October 4, 2011

Dora And William Donner Were Busy People

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Dramatis Personae

Dora and William Donner did many things in their lives. Perhaps there were not an inordinate number, but some of what they did caused many men with brilliant minds to write legal opinions which have maintained lasting value. Most of those men ended their lives without trauma, but one’s life ended tragically. What follows is a short summary of Dora’s and William’s lives and the men who used some of what they did during those lives to manufacture lasting presence of trust law.

Dora Browning came from an established and prominent family, living in Philadelphia, Pa. She was a member of the National Society of Magna Charta Dames and Barons.\(^1\) Since her great, great, great grandfather was a Minuteman in the American Revolution she was listed in the Lineage Book of the National Society of the Daughters of the American Revolution.\(^2\) She and her husband, William H. Donner, and their children, having moved to Buffalo, N.Y., she lived there until 1944, when she became a resident of Palm Beach, Florida, where she lived until her death on November 20, 1952.

William H. Donner’s family, while not having the historical background of the Browning family were comfortable, financially. While still in his twenties he took control of a family-owned grain mill and soon increased its profit margins considerably. Shortly thereafter he realized that the newly found natural gas deposits in Indiana would result in an increase of the value of Indiana real estate. He invested heavily in natural gas and Indiana land. The money earned from his real estate investments allowed him to construct plants in Indiana and Pennsylvania for the manufacture of tin plate, for which he obtained a patent for an innovation in the rolling of tin plate, from the United States Patent & Trademark Office. He then moved to the Monongahela valley in southwest Pennsylvania with his National Tin Plate Company. He sold that company and using some of his own funds and financial support from the Mellon brothers and Henry Clay Frick\(^3\) he organized the Union Steel Company.\(^4\) After selling that company Donner became President of Cambria Steel Company, and Chairman of the Board of the Pennsylvania Steel Company, which led to his formation of the Donner Steel Co. in Buffalo, N.Y., where he and his family lived\(^5\) Mr. Donner sold that company in 1929, and three years later\(^6\) he established The International Cancer Research Foundation as a memorial to his son, Joseph Donner, who died that year of cancer. In 1945 he incorporated the Donner Foundation, Incorporated, which took over the assets of the International Cancer Research oundation. The Donner Foundation’s name was later changed to The Independence Foundation. After Mr. Dinner’s death the William H. Donner Foundation, Inc. was formed.\(^7\) The foundation’s headquarters, which still exist, are located in Manhattan, between Madison and Park Avenues. In October, 1950 Mr. Donner organized a Canadian corporation, known as the Donner Canadian Foundation, Endowed by a grant from Independence

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\(^1\) [www.magnacharta.org/Decd99/decddcd.htm](http://www.magnacharta.org/Decd99/decddcd.htm)

\(^2\) Page 109 of the book reveals that her ancestor, Nicholas Sooy, (1747-1822) was a member of the Gloucester County, N.J. Militia. See google.com/books?id=rXtGHmx4wcC.


\(^4\) That company later became known as the American Steel and Wire Company

\(^5\) See people/donner/whdonner.htm and http:www.donner.org/aboutwilliam.html

\(^6\) April 27, 1932.

\(^7\) In 1961.
Foundation of $420,000.\textsuperscript{8} The Canadian Foundation is located in Montreal, where he died in 1953, a year after the death of his wife, Dora.

Dora Browning and William H. Donner, were married, and by 1920 they had five children, Robert, Joseph, William H., Jr., Elizabeth, and Dora.\textsuperscript{9} They adopted daughters Dorothy who became known as Dorothy Stewart, and Katherine who became known as Katherine N. R. Denckla.

On November 11, 1920 William created a trust with The Wilmington Trust Co. as trustee. This was the trust which was considered in the epic case, \textit{Wilmington Trust Co. v. Wilmington Trust Co.}.\textsuperscript{10} In 1935 Dora created a trust with Wilmington Trust Co. as trustee. This was the trust, which was considered in the epic case, \textit{Hanson v. Denckla} before the U.S. Supreme Court.\textsuperscript{11}

Josiah Oliver Wolcott wrote the fist two Opinions in cases involving a trust created by William Donner. Born in Dover, Delaware, he obtained his college degree from Wesleyan University in Middletown, Connecticut. Not being required to obtain a degree from a Law School in those days, he was admitted to the Delaware Bar in 1904. In 1909 he became Deputy Attorney General of the state and was elected its Attorney General in 1913, serving until 1917. The prior year he, a member of the Democrat Party, defeated incumbent, Republican Senator Henry A. du Pont, serving from March 4, 1917 until July 2, 1921, when he resigned from the Senate to accept a surprise appointment to Delaware’s Court of Chancery. Delaware has retained a separate court to hear equity cases.\textsuperscript{12} Wolcott, working in a small office, without a secretary, and writing all of his Opinions in longhand was the primary cause of Delaware’s Court of Chancery gaining the acclaim of judges and lawyers, across the nation. His father, James Wolcott, was Chancellor of the Delaware Court of Chancery from May 5, 1892 until September 5, 1895. He died on November 11, 1938.

Wolcott was succeeded by a lower court judge, 64 year old William Watson Harrington, who took the oath of office as Chancellor on Dec. 7, 1938 and wrote the third Opinion of the William Donner’s trust cases. Realizing that the volume of work of the Chancery required another person, he obtained authority for the appointment of a Vice Chancellor on May 12, 1939.

Chief Justice Daniel J. Layton of the Delaware Supreme Court wrote the Opinion of the fourth, and final, case decided in William Donner’s trust cases. He was a graduate of the University of Pennsylvania School of Law, who was appointed Chief Justice in 1933, having written 49 of the 106 Supreme Court Opinions during his term. The Governor of the state failed to reappoint him in 1945, Chief Justices serving on a rotating basis, probably because though considered a brilliant jurist he aggressively dominated oral argument.

Curtis Eugene Chillingworth was the Florida Circuit Judge who, as Chancellor of a court of equity in a Florida case in West Palm Beach, concerning Dora’s trust, was a graduate of the University of Florida School of Law. After graduation, that same year,
1917, he was admitted to the Florida Bar and due to World War I attended the U.S. Naval Academy, receiving a commission as an Ensign. After the war he returned to West Palm Beach, practiced law with his father, and married a Cornell University student, Marjorie M. McKinley, a lovely girl and avid Garden Clubber. In 1921, at the age of 24 he began his career as a County Judge. In 1923 he became an elected Circuit Judge. In those years Circuit Judges in Florida served as “judges” in “at law” cases, and as Chancellors in Equity cases. Having remained in the Naval Reserves he was recalled to active duty, during World War II, where he participated in the invasion of Europe. Upon discharge from war service he returned to his duties as Circuit Judge. Judge Chillingworth was highly regarded, not only in Palm Beach County, Florida, but throughout the state.

Joseph Alexander Peel, Jr., who ordered the murder of Judge Chillingworth, was a good looking young lawyer, born in West Palm Beach, Florida, who upon graduating from Stetson Law School, when it was located at Deland, Florida, in 1949 worked for one of the most prominent lawyers in Palm Beach County, Phillip D. O’Connell. Before long he was named as the only Municipal Judge in West Palm Beach. Married, with two children he was extremely popular, and talked about as one day becoming Governor of Florida.

The man who actually killed Judge Chillingworth, Floyd Albert “Lucky” Holzapfel was a World War II hero, turned criminal. A paratrooper, with the 101st Airborne Division, he won a Purple Heart for being wounded at Bastogne, Belgium, during the “Battle of the Bulge.” After the war he led a “checkered” life, from serving as a fingerprint technician for the Oklahoma City Police Department, and one of the organizers of a Young Republican Club, and an Asst. Scout Master in West Palm Beach to serving time for bookmaking, armed robbery, and attempted rape.

The man who helped kill Judge Chillingworth, George “Bobby,” Lincoln was a drifter. His main source of income was the operation of various poolrooms, and wherever he could earn a quick buck.

The man who wrote the first Opinion in Dora’s trust cases, Daniel L. Herrmann, a graduate of Georgetown Law School, was one of Delaware’s outstanding attorneys, at the time of his appointment to Delaware’s Superior Court, from which he resigned in 1958 to continuing practicing law. During this period, due to the court’s heavy work load he was appointed Acting Vice Chancellor of the Court of Chancery. It was while holding that position that he wrote the first Opinion of Dora’s trust cases. About ten years later, in 1965, he was appointed a Justice of the Delaware Supreme Court, in 1973 being elevated to the position of Chief Justice. He retired on September 30, 1985, and died in June, 1991.

The man who wrote the Opinion in the second of Dora’s trust cases, T. Frank Hobson was a Justice of the Florida Supreme Court from 1948 until 1962. On September, 19, 1956, he wrote the Opinion of the case which was over-turned by the U.S. Supreme Court.  

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13 Peel was a “big man” on campus at Stetson, and a “hit” with the female students. See Bruce R. Jacobs, Memories and Reflections About Gideon v. Wainright, 33 Stetler 181, 216, n.191.
14 The Battle of the Bulge (Dec. 14, 1944 to Jan. 25, 1945), was Nazi Germany’s last major, but unsuccessful, plunge to drive the Allies back to the English Channel, from which they invaded Europe and were heading for demolishment of the Third Reich.
The man who wrote the Opinion in the third of Dora’s trust cases, Daniel F. Olcott, the grandson of Chancery Court Chancellor James Wolcott and the son of Chancellor Josiah Wolcott succeeded Chancellor Harrington on Delaware’s Chancery Court. He was appointed in 1950, but served only a year as he was appointed to the state’s Supreme Court in 1951, where on January 14, 1957 he wrote the third Opinion of Dora’s trust cases. In 1964 he was appointed Chief Justice of the Court which he served until his demise in 1973.

The man who wrote the Opinion in the fourth and last Opinion in Dora’s trust cases, Earl Warren, born in California on March 19, 1891, was the son of a Norwegian immigrant father and a Swedish immigrant mother. He served as Attorney General of California and was elected, Governor, as a Republican in 1942. He was reelected in 1946. In 1950 he became the first person to have been elected to a third term as Governor of the state, having received the nomination of the Democratic, Progressive and Republican parties. Appointed Chief Justice of the U.S. Supreme Court by President Eisenhower, he took the oath of office on October 5, 1953. During his administration he toiled successfully to have the Court render a unanimous decision in Brown v. Board of Education\(^\text{15}\) which overruled the aberrant Plessy v. Ferguson\(^\text{16}\) and wrote the Opinion of the Court in that case. Chief Justice Warren wrote the Opinion of the Court in Dora’s fourth trust case. He resigned from the Court on June 23, 1969 in order to head the Commission which investigated the assassination of President John F. Kennedy. Chief Justice Warren died on July 9, 1974.

The William H. Donner Trust

On November 20, 1920 William, (at times hereinafter referred to as “the donor”), while living in Buffalo, executed a Deed of [intervivos] Trust in New York State,\(^\text{17}\) conveying shares of stock\(^\text{18}\) to his wife, Dora, as Trustee for her benefit, as well as that of the five children, who had been born to them at that time (at times, hereinafter referred to as the 1920 trust”). The First paragraph of the trust provided that the trustee was to collect the income from the corpus of the trust and to pay the same as follows: \(\frac{1}{4}\) to the donor’s wife, Dora, for life, and the remaining \(\frac{3}{4}\) thereof during Dora’s life (and the whole thereof after her death), to his five named children, and any after-born of his children, share and share alike.\(^\text{19}\) In the second paragraph of the trust the donor gave each beneficiary the power to appoint family members or “other persons.”\(^\text{20}\) The Tenth Paragraph of the trust contained, inter alia, a provision contemplating a possible change of the trustee, from Dora to another suitable person, if Dora and the adult beneficiaries of the trust agreed and such change was consented to by the settler. William’s reason for so providing was that he intended to increase the size of the trust corpus, and at that time Dora might conceivably be “wholly incapable” of administering a large trust.\(^\text{21}\) The

\(^{15}\) 347 U.S. 485 (1954).

\(^{16}\) 163 U.S. 537 (1896).

\(^{17}\) Wilmington Trust Co. v. Wilmington Trust Co., 15 A. 2d 153, 160 (Del. Ch. 1940).

\(^{18}\) There were 250 shares of Pennsylvania Pitt Coal & Coke Co. See Wilmington Trust Co., 15 A. 2d at 155.

\(^{19}\) Wilmington Trust Co. v. Wilmington Trust Co., 180 A. 597, 598 (Del. Ch. 1935); Wilmington Trust Co., v. Wilmington Trust Co., 15 A.2d 153, 155 (Del Ch. 1940).

\(^{20}\) Wilmington Trust Co., 180 A. at 598, 599.

\(^{21}\) Wilmington Trust Co., 15 A. 2d at 163.
fifteenth article provided that the income should be paid to the beneficiaries for life, to
them and them only, that they should not sell or assign the same, nor dispose of it by
anticipation or otherwise, and that the income should not be liable for any debts or
engagements of the life beneficiaries, nor be subject to attachment, levy, sequestration, or
execution of any kind.\textsuperscript{22}

About three and one half years later, Dora and their two adult children, Robert N.
and Joseph W., on January 24, 1924, appointed Wilmington Trust Co. as successor
Trustee, and a month after that\textsuperscript{23} delivered to that company the trust corpus. That change
was approved by the settler.\textsuperscript{24}

On February 4, 1927 son Joseph W., a resident of Buffalo, N.Y. executed a Will
in which he devised the residue of his estate to Marine Trust Co. of Buffalo, in trust for
his wife, Carroll, for her life, and upon her death to their children then living and the
issue of any child not living, \textit{per stirpes}.\textsuperscript{25} He made no mention of the power of appointment
which he acquired from his father, the settler of the November 11, 1920 trust\textsuperscript{26}

Not long after the corpus of the William H. (1920) trust was received by the
successor trustee\textsuperscript{27} both William and Dora contributed substantial cash and stock
contributions to the trust. On May 9, 1927 Dora sent 10,000 shares of preferred stock.\textsuperscript{28}
On July 2, 1928 William sent additional certificates of stock.\textsuperscript{29} On September 17, 1929
William sent Dora’s check for $420,700 to Wilmington Trust.\textsuperscript{30} William and Dora and
their adult sons, Robert, and Joseph, made like contributions to it.\textsuperscript{31}

On October 9, 1929, Joseph W, executed a deed of appointment, by which he
expressly attempted to exercise the power of appointment which he gave to himself in his
trust.\textsuperscript{32} The terms of the exercise were as follows: each child was to receive income of the
trust for life, and upon his or her death the trust, as to that child’s interest, would cease
and the property being held in trust for that child would “be transferred and delivered as
such child should have devised or designated, or in default thereof to his or her lineal
descendants, if any.” If no legatee or devisee existed, the property being held in trust for
that deceased child was to remain in trust for the survivor of the children; and if there be
no survivor, the property was to remain in trust for all of the beneficiaries of the original
trust.\textsuperscript{33}

Exactly one month after attempting to exercise his power of appointment, Joseph
W. died, - on November 9, 1929,\textsuperscript{34} leaving as his survivors his wife, Carroll,\textsuperscript{35} and their
two children, Joseph, Jr. and Carroll, Jr.

\textsuperscript{22} \textit{Wilmington Trust C.o.}, 180 A. at 603
\textsuperscript{23} Specifically February 16, 1924.
\textsuperscript{24} \textit{Wilmington Trust Co.}, 15 A. 2d at 164.
\textsuperscript{25} Id. at 165.
\textsuperscript{26} Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309, 311 (Del. 1942).
\textsuperscript{27} On February 16, 1924.
\textsuperscript{28} \textit{Wilmington Trust Co.}, 15 A2d at 157.
\textsuperscript{29} Id. at 158.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 156, 157.
\textsuperscript{32} See supra, text accompanying notes 25, 26.
\textsuperscript{33} \textit{Wilmington Trust Co.}, 15 A. 2d at 158.
\textsuperscript{34} Joseph died of lung cancer, a disease that doctors knew very little about at that time. His father William
H. Donner sold his interest in Donner Steel Co. of Buffalo, his final business undertaking, and invested $ 2
March 25, 1935 - Dora Browning Donner Executes a Trust Agreement

On March 25, 1935, Dora, while still a resident of Pennsylvania, created a trust, with the Wilmington Trust Co. as trustee. The trustee was required to pay the net income of the trust to Dora, for her natural life. Upon her death the trustee was to “assign, transfer, convey and deliver” the trust fund (i.e. the principal and any undistributed income) free from the trust, unto “such person or persons, and in such manner and amounts and upon such trusts, terms and conditions as” Dora shall have appointed by last instrument, in writing, which she, Dora, shall have executed and delivered to the trustee. If she did not execute such instrument, then by her last Will. If she did not exercise any such Power of Appointment, [either by written instrument or last Will], then to her “living issue . . . per stirpes, and not per capita.”

Dora named her husband, William, or such other persons as trustor may nominate in writing given to trustee during her lifetime, as an “Advisor,” with a right of a replacement in the event of such person’s incapacity to serve. As a matter of fact Dora appointed three such advisors during her life. The trustee must be governed by directions of the Advisor, specifically with regard to any sale or exchange of trust property, any proceeds of such sale, or of other available money, and any participation in plans of reorganization, merger, and the like of any company in which the trustee holds securities.


August 8, 1935 – Chancellor Olcott writes the first Opinion in William’s trust case

This was the first case concerning the trusts to be decided in the busy life of William H. Donner. It was filed in the Delaware Court of Chancery. The plaintiff was the Wilmington Trust Co., as guardian of Joseph Jr. and Carroll, Jr. and Marine Trust, as executor of the estate of Joseph, Sr. The defendant was The Wilmington Trust Co., as the successor trustee of the 1920 trust of William H. The title of the case is Wilmington Trust Co. v. Wilmington Trust Co.

million in charities, particularly cancer research. In 1932 Mr. Donner founded the International Research Foundation to honor Joseph. See http://www.donner.org/aboutwilliam.html. 

35 After the death of Joseph, Carroll became Lady Carroll Tennyson. See Headnote to 15 A.2d 153 (Del. Ch. 1940). Extensive research has not revealed anything about Lord Tennyson, including, but not limited to, his relationship, if any, to Britain’s Nineteenth Century renowned poet, Alfred Lord Tennyson. 

36 Hanson v. Denkla, 100 So.2d. 378, 380 (Fla. 1956)

37 Id. at 383.

38 At times referred to by the courts as “Trust Advisor.”

39 Lewis v. Hanson, 128 A.2d.819, 829 (Del. 1957).

40 Hanson v. Wilmington Trust Co., 119 A. 2d 901, 909 (Del. Ch. 1955).

41 See Hanson 100 So.2d at 380.

42 This was the date on which she executed her Will.

43 See Hanson, 100 So.2d at 380.

44 180 A. 597 (Del. Ch. 1935).
The Bill filed by the guardian asked:⁴⁵ (1) that a decree be entered declaring whether the October 9, 1929 instrument executed by Joseph, Sr. sufficiently complied with the terms of his father’s trust; (2) that if the Chancellor finds that the October 9 instrument complied with his father’s trust, (a) he declare it void as having violated the New York Rule Against Perpetuities,⁴⁶ (b) he declare that the life estates attempted to be created by the Oct. 9th instrument coalesced with the absolute remainders in their father’s Will; (3) that the Chancellor declare that Joseph, Jr. and Donner, Jr. are absolute owners, (not beneficiaries of a trust) of a portion of their grandfather’s 1920 trust., and (4) that the successor trustee account to the guardians of Joseph, Jr. and Carroll, Jr., who would be holding the subject property until they become absolute owners.

It can be seen that the guardian wanted the attempted exercise of the Power of Appointment to fail, so that Joseph, Jr. and Donner, Jr. would come into full ownership of the money upon their father’s death, albeit temporarily in the hands of their guardian, rather than being held in trust, by the successor trustee. While the Executors agreed with the Guardian that the October 9th attempted exercise was invalid, they took the position that the Power was effectively exercised by the Residuary clause of Joseph, Sr.’s Will, so it would remain in trust. Both the guardian and the successor trustee contested that view, the guardian believing that the father’s trust ceased upon his death, and the money went outright to his children, and the successor trustee believing that the trust continued for Joseph’s children.⁴⁷

The Chancellor said that it was contended that the question of whether the Power was exercised by the Will was to be determined by New York law.⁴⁸ He did not clearly indicate which law he used, but in the following case, however, he admitted that he referred to Delaware law in making his determination in the first case.⁴⁹ Upon examining both the 1920 trust and the 1929 Will, the Chancellor concluded that the settler of the 1920 trust permitted the power to be exercised by Will or “by another instrument.”⁵⁰ As the Power of Appointment was properly exercised “by another instrument” Chancellor Olcott dismissed the Bill, and the portion of the 1920 trust involved remained in trust for the benefit of Joseph, Jr. and Donner, Jr.⁵¹ In sum, no conflict of laws was involved in Olcott’s decision. He simply ruled that under Delaware law the deed of appointment to Joseph’s two children was permitted by the trust, but under New York’s rule against perpetuities the limitation of the remainders to the children’s appointees, and in default of appointment to their lineal descendents, was invalid.⁵²

May 22, 1936 – Chancellor Olcott writes the second Opinion in William’s trust case

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⁴⁵ See Wilmington Trust Co., 180 A. at 600.
⁴⁶ § 11 of the New York Personal Property Law limits the period of suspension of the absolute ownership of personal property not longer than two lives in being at the date of the instrument creating the limitation. Wilmington Trust Co. v. Wilmington Trust Co.,186 A. 903, 907 (Del. Ch. 1936).
⁴⁷ Wilmington Trust Co., 180 A. at 600. He did not identify the person so contending. It was probably Marine Trust of Buffalo, N.Y.
⁴⁸ Id.
⁴⁹ Wilmington Trust Co., 186 A. at 906. His admission was rather indirect – in the second case he clearly switched to New York law, that being the choice of the settler, instead of Delaware, the locale of the successor trustee.
⁵⁰ Wilmington Trust Co., 180 A. at 601.
⁵¹ Id. at 603.
⁵² Wilmington Trust Co. v. Wilmington Trust Co., 24 A. 2d 309, 312 (Del. 1942).
This, *Wilmington Trust Co v. Wilmington Trust Co.*,\(^53\) was the second trust case to be decided in the busy life of William Donner. Chancellor Wolcott clearly made it known that the primary issue to be decided in this, what was initially a motion for re-argument, but became a motion for re-hearing\(^54\) was whether the validity of the exercise of the Power was to be judged by New York law, rather than Delaware law, as had previously occurred.\(^55\)

In confirming that New York law was to be used\(^56\) Chancellor Wolcott lost no time in decrying the importance of the domicile of the new trustee (Wilmington Trust), now being Delaware. He did so with eight pronouncements. First “[i]n an agreement *intervivos* the element of domicile lacks the importance which practical considerations have accorded it in the law of Wills,”\(^57\) As he stated “[t]here is more room for the play of intent,”\(^58\) referring to the intent of the donor.\(^59\) Second, that intent may be discerned from specific language used in the instrument creating the Power; but it may also be discerned from “facts and circumstances.”\(^60\) In this case those facts and circumstances were (a) the donor was domiciled in New York when his 1920 trust and power were created;\(^61\) (b) the original trustee [Dora Donner] was domiciled there;\(^62\) (c) all of the beneficiaries were domiciled there;\(^63\) (d) the securities [corpus of the trust] were located in New York; and (e) the delivery of the securities was effected in New York.\(^64\) Third, since all of the facts and circumstances were in New York “the donor, at that time, must have regarded the rules of New York were applicable to the trust he had created.”\(^65\) An argument was made that when the new trustee was appointed, there occurred a change in the application of rule. That, however, was incorrect. That rule did not apply even to donations made to the new trustee, because at the time the trust was created its provisions were “uniform” as to all property constituting its corpus, at that time, and thereafter. There is no indication in the facts and circumstances of this case that support a claim that that uniformity should be broken.\(^66\) Fourth, the Chancellor next proclaimed that if applicable law of the trust was to change with a change of the identity of the trustee, such would create a state of imbalance.\(^67\) Fifth, while the trust instrument gave the donor the power to modify the trust by enlarging or restricting its size, it did not give him the power to modify the rights and privileges of his children; moreover, he never attempted to exercise such power of modification, except his enlarging the size of the trust.\(^68\) Sixth, the Chancellor next

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\(^{53}\) *Wilmington Trust Co.*, 186 A. 903 (Del. Ch. 1936).

\(^{54}\) See id. at 905.

\(^{55}\) Id. at 906, 907.

\(^{56}\) Id. at 905.

\(^{57}\) Id. at 907.

\(^{58}\) Id.

\(^{59}\) Id. at 908.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Id. at 909.

\(^{68}\) Id.
considered wording of the trust dealing with a potential change of trustees. The Chancellor wrote

The provision in the trust instrument that ‘the successor trustee shall hold the said trust estate subject to all the conditions herein, to the same effect as though named herein,’ does not alter my view of the significance of the clause providing for a further possible trustee in another state. The italicized phrase is referable to the conditions as stated and existing at the time the trust was created.  

Seventh, if the beneficiaries could, after the donor’s death, modify the trust’s applicable law, by simply changing trustees, they would have the power to “alter the terms of the trust in substantial respects.” Eighth, the donor’s consent to the change of trustee “was designed solely in the interest of administration and was in no wise intended as a means of selecting what body of law should govern the trust in its substantial and essential terms,” in the opinion of the Chancellor, since the meaning and validity of a trust may be judged by one jurisdiction, and its administration judged by another.

Since Joseph’s attempted exercise of the Power of Appointment given him by the 1920 trust was invalid, under New York’s perpetuities law, the property which Joseph enjoyed for life under his father’s trust goes to Joseph, Jr. and Donner, Jr., at Joseph, Sr.’s death, unless the position advanced by Marine Trust, the executor of Joseph’s estate, is correct. That position was, in essence, that Joseph’s Will exercised the Power, and the property remains in trust. That issue, also, must be determined by New York law.

Before the Chancellor arrived at a decision as to the issue of whether Joseph’s residuary clause exercised the Power of Appointment given him by his father’s trust, the Chancellor divided his analysis into two sections – the ¼ of the trust and the ¾ of the trust. With regard to the smaller portion of the trust, with which Joseph, Sr. enjoyed income for life, under New York law the 1920 trust gave Joseph power broad enough to dispose all of his interest in that ¼ portion. Such being the case, his disposition of that property was not converted into a Power of Appointment, but went through the Residuary Clause of his Will. With regard to the ¾ portion of the property Joseph Sr’s. Power of Appointment was restricted as to the persons to whom he could appoint. That attempted appointment was void under New York’s law against perpetuities, and could not be revived by the Residuary Clause. Joseph, Jr. and Donner, Jr. were entitled to the property absolutely, subject, of course to its being held temporarily by a guardian until each child reached his or her majority, their father having failed to make an appointment as to that property.

69 Id.
70 Id. at 910.
71 Id.
72 Id.
73 Id.
74 See supra text accompanying notes 17 – 19.
75 Wilmington Trust Co., 186 A, at 911,
76 Id. at 912.
77 Id. at 911.
78 Id. at 912.
August 6, 1940 – Chancellor Harrington writes the third Opinion in William’s trust case

After Chancellor Wolcott wrote his Opinion in the second Donner hearing to be held before him,\(^{79}\) he died before he signed a decree in that case.\(^{80}\) and was replaced as Chancellor by attorney, William Watson Harrington.\(^{81}\) The third Opinion in the William Donner cases, \textit{Wilmington Trust Co. v. Wilmington Trust Co.}\(^{82}\) which was composed by Chancellor Harrington, was not written after a third hearing, but one which, in fact, altered that second Opinion, written by Chancellor Wolcott, which had followed a hearing. Chancellor Harrison’s Opinion appears\(^{83}\) after a lengthy recitation of the facts of the case.\(^{84}\) The Delaware Supreme Court, which reviewed his Opinion, specifically affirmed his conclusion that when Joseph Donner, Sr. availed himself of the Power of Appointment given him by his father, William H. Donner the “home” of the trust was in Delaware, and hence “the validity and effect of the deed of appointment and the rights and interests of the appointees thereunder are to be adjudged and determined by the law of Delaware.”\(^{85}\) As to the “other conclusions” reached by Harrington and the reasons for them they were “approved;” and the decree of his court was affirmed.\(^{86}\) Since the holdings of Chancellor Harrington became virtually those of Delaware’s highest court,\(^{87}\) they must be examined.

Chancellor Harrington lost little time before getting to that wording in paragraph 10, dealing with the functions of a successor trustee of the 1920 trust, as prescribed by that trust – “the successor trustee shall hold the said trust estate subject to all the conditions herein, \textit{to the same effect as though named herein.}”\(^{88}\) Although Chancellor Wolcott held that: “[a] change of domicile by the trustee which is accompanied by a change of the location of the trust property itself does not change the status of the trust”\(^{89}\) Chancellor Harrington observed that while there may be some cases so holding, “the facts of this case would seem to indicate that something more than mere administrative action was intended by the provisions of the ‘Tenth’ paragraph of the trust deed.”\(^{90}\)

Chancellor Harrington made several pronouncements concerning trusts: (1) in testamentary trusts it is usually the law of the domicile of the settler which applies as to the validity of the trust and the interpretation of its provisions. In a cited decision, however, the Chancellor stated that the holding of the court was to the effect that “the law of the domicile of the grantor was not necessarily controlling.” (2) the validity and interpretation of deeds of trust concerning land is usually the location of the land; (3) some cases use the law of the place of administration; (4) still others use the law of the place of the donor’s intention.\(^{91}\) The later rule is particularly applicable in the case of

\(^{79}\) Wilmington Trust Co. v. Wilmington Trust Co., 186 A. 903 (Del. Ch. May 22, 1936)
\(^{80}\) Nov. 11, 1938
\(^{81}\) Harrison’s appointment occurred on Dec. 7, 1938.
\(^{82}\) 15 A. 2d 154 (Del. Ch. 1940).
\(^{83}\) \textit{Id.} at 159.
\(^{84}\) Possibly prepared and inserted by the Clerk of the Court.
\(^{85}\) Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309, 314 (Del. 1942).
\(^{86}\) \textit{Id.}
\(^{87}\) \textit{Id.}
\(^{88}\) Wilmington Trust Co., 15 A. 2d at 161.
\(^{89}\) Wilmington Trust Co., 186 A. 2d at 909.
\(^{90}\) Wilmington Trust Co. 15 A. 2d at 161.
\(^{91}\) \textit{Id.}
living trusts. That “intent” is usually determined by the “facts and circumstances,” which indicate “a real connection” with the state whose law is chosen as governing. The “intent” rule is certainly applicable to Joseph, Sr.’s attempted exercise of the Power of Appointment on October 9, 1929. The words used in the instrument creating the trust are not the only words to be considered. Oral pronouncements of the donor may also be evaluated. In this case Mr. Donner’s deposition established that at the very inception of the trust he considered ultimately moving it to Delaware, unless such change be adverse to the trust, tax-wise, and that prior to the execution of the trust deed, he had discussed the possible change of location with the adult beneficiaries, and secured their approval. The following facts, though highly significant, had not been strongly stressed by the Chancellor, cellor Wolcott (1) ¶ 10 of the trust provided that if the adult beneficiaries and the trustee wished to change the trustee, at that time the settler would possibly approve, (2) because his wife, Dora, would be “wholly incapable” of managing a trust of substantial proportions. (3) That paragraph [¶ 10] should be acted upon. (4) by ¶ 7 of the trust, concerning additions to its corpus not only did Mr. Donner give liberal authority to himself and the beneficiaries, under the original trust instrument, but by not changing those provisions, he transferred those rights to the same people under the transferred instrument.

The Chancellor then considered the fact that the beneficiaries, including Joseph Donner, Sr. made contributions of assets to the trust after it was being administered by the successor trustee. At least some of those contributions went to a separate trust for Joseph; Sr., but the additional cash and securities contributed in New York did not create separate trusts, although the trust, when it was created, and being administered in New York, authorized such action. Dora Donner’s books contained notations of such additions.

The Chancellor next held that the attempted execution of the Power of Appointment could not be considered an exercise of that power by the residuary clause of

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92 Id. at 161, 162.
93 Id. at 162.
94 Id. at 163.
95 Id.
96 Id.
97 Id.
98 Id. at 164.
99 Id. According to the Chancellor, Wilmington Trust Company’s attorney stressed that fact when sent $420,700 to the new trustee, William’s letter of transmittal (see supra text accompanying note 30) Dora’s ¼ percent of the entire trust was increased by that sum, even though it could have been placed in a separate trust; but that his conclusions as to the effect of ¶ 10, there was no need to consider that point. Id. at 164.
the Will, because the Will did not take effect until the death of Joseph, Sr. in November, 1929, a month after the October 9, 1929 deed.\textsuperscript{100}

The next question to be answered was whether the portion of the 1920 trust in favor of William H. Donner, Jr., would go to the children of Joseph Donner, Sr.. Chancellor Harrington answered that question in the negative; the part or share of the trust enjoyed by William, Jr. during his lifetime remained in trust “for the use and benefit of my [the donor’s] surviving children or child.”\textsuperscript{101} William, Jr. died on or about January 23, 1931, a minor, without issue and without having attempted to exercise the Power of Appointment having been given him by his father, William H. Sr. The reason for the negative answer was that none of the provisions of the deed of 1920’s ¶ 2 were present at the death of William, Jr. Those provisions were that “if there be no surviving lawful child or children, or other lawful lineal descendants of the deceased child, and no appointment or designation by will or otherwise, the trust as to said share, or in case of a devise of only a portion, then as to any portion thereof not devised, shall remain and continue in force for the use and benefit of my surviving children or child.”\textsuperscript{102} William, Jr., did not survive William, Sr.

\textbf{January 20, 1942 - Justice Layton Writes the Fourth Opinion in William’s Trust Case}

Chief Justice Daniel John Layton wrote the fourth, and last, Opinion of the decisions involving William Donner’s trust., i.e. \textit{Wilmington Trust Co. v. Wilmington Trust Co}\textsuperscript{103}. In this decision the Delaware Supreme Court affirmed all of Chancellor Harrington’s work - settling the issue that the law of Delaware, rather than New York governed the validity and construction of the trust of 1920, as well as other issues ruled upon by the Chancellor.\textsuperscript{104} The court, after reviewing the history of the case,\textsuperscript{105} stated that it agreed with both Chancellors Olcott and Harrington, to the effect that the settlor’s intent determined the jurisdiction under which the validity of a trust, \textit{intervivos}, is to be determined. The court agreed with this conclusion, provided that the “intended selection is substantially linked to the trust.”\textsuperscript{106} The court next considered the phasing of ¶ 10 of the 1920 trust to the effect that a successor trustee will serve “to the same effect as though now named herein.”\textsuperscript{107} While the original Chancellor (Wolcott) gave that phrase little weight, the second Chancellor (Harrington) thought that that phrase established that the donor had in mind that if the trustee were to be changed in identity, such change would effect a “re-creation of the trust under the laws of a jurisdiction to be selected.”\textsuperscript{108} Justice Layton wrote that “[w]e, after careful consideration, are of the opinion that the narrow interpretation put upon the italicized phrase by the late Chancellor [Wolcott] was unjustified.”\textsuperscript{109} The court’s primary attention was directed in proof of that conclusion.

\textsuperscript{100} \textit{Wilmington Trust Co.} 15 .A. 2d at 164, 165.
\textsuperscript{101} \textit{Id}. at 168.
\textsuperscript{102} \textit{Id}.
\textsuperscript{103} \textit{Wilmington Trust Co. v. Wilmington Trust Co.}, 24 A. 2d 309 (Del. 1942)
\textsuperscript{104} \textit{Id}. at 314.
\textsuperscript{105} At id.310 the court misspelled Dora’s maiden name as “Browning,” rather than “Browning.”
\textsuperscript{106} \textit{Wilmington Trust Co.}, 24 A.2d at 313.
\textsuperscript{107} \textit{Id}.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}.
Justice Layton opined that no word or phrase must not be rejected, or treated as superfluous, redundant, or meaningless if to it a meaning can be given, which is reasonable, and consistent with the object and purpose of the writing, considered as a whole.\textsuperscript{110} As to the significance of ¶ 10, the Chief Justice wrote that “[i]n an era of economic uncertainty, with vanishing returns from investments and with tax laws approaching confiscation, such a provision would seem to amount to no more than common foresight and prudence.”\textsuperscript{111} With regard to the balance of Chancellor Harrington’s Opinion, Chief Justice Layton said: “Other conclusions reached by the Chancellor and the reasons for them are given at length in his opinion. They are approved; and the decree entered in the Court below is in all respects affirmed.”\textsuperscript{112}

\textit{January 15, 1944 - Dora Browning Donner became a domiciliary of Palm Beach, Florida}

1948 – \textit{Elizabet Hanson creates two trusts with Delaware Trust Co. of $200,000 for the benefit of her two children, (Dora’s grandchildren), Donner Hanson, and Joseph Donner Winsor,}

\textit{December 3, 1949 - Dora Donner executes her Last Will in Palm Beach, Florida}

The Residuary Clause of Dora Donner’s last Will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denckla, an adopted daughter; and the other part to be transferred to Elizabeth Donner Hanson, a blood-related daughter, in trust for Dorothy B. R. Stewart, another adopted daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denckla.\textsuperscript{113}

At the same time, by a non-executory instrument she exercised a Power of Appointment, revoking prior Powers of Appointment and appointing $10,000 to the Bryn Mawr Hospital in Pennsylvania and $7,000 to family retainers,\textsuperscript{114} $200,000 to the Delaware Trust Co., in trust for grandson Joseph Donner Winsor and $200,000 to the Delaware Trust Co. for granddaughter Donner Hanson.\textsuperscript{115}

\textit{November 20, 1952 - Dora Browning Donner died in Palm Beach, Florida}

At the time of her death the corpus of her trust held by Wilmington Trust Co. was in excess of $1,490,000.\textsuperscript{116}

\begin{footnotes}
\item[110] Id.
\item[111] Id. at 314. It should be observed that those words were uttered in 1942.
\item[112] Id.
\item[113] Lewis v. Hanson, 128 A. 2d 819, 824 (Del. 1957).
\item[114] Neither the hospital, nor the retainers were named as parties pro forma in the Florida action. Lewis, 128 A. 2d at 831, n.8.
\item[115] Lewis at 824. On July 7, 1950 she exercised another Power of Appointment.
\item[116] Id.
\end{footnotes}
1953 - William H. Donner died in Montreal, Canada, where he had established a foundation for the counteraction of cancer.

January, 1954 – Katherine Denckla & Dorothy Stewart sue Elizabeth Hanson in Florida

In January 1954, two of Dora’s adopted daughters, Katherine Denckla, and Dorothy Stewart, residuary beneficiaries of Dora’s Will, sued Dora’s blood related daughter, Elizabeth Hanson, individually and as the Executrix of Dora’s estate, being probated in Palm Beach County, Florida. Some of the other possible claimants to the assets passing under the residuary clause of Dora’s Will were named as party defendants. The plaintiffs sought a Declaratory Decree to the effect that Dora’s Dec. 3, 1949, inter vivos Powers of Appointment of $200,000 to each of two trusts which Elizabeth had created in 1948 with the Delaware Trust Co. for the benefit of her two children, (Dora’s grandchildren), Donner Hanson, and Joseph Donner Winsor, were invalid. The plaintiffs, being residuary legatees of Dora’s Will each has already received in excess of $500,000 at the time of their filing, but they wanted the aforementioned $400,000 to go through probate, instead of being siphoned off in trust for Elizabeth’s children. The case was assigned to Circuit Judge Curtis Eugene Chillingworth.

Personal jurisdiction was obtained over Elizabeth, her children, Donner Hanson and Joseph Donner Winsor, and another of Elizabeth’s children William Donner Roosevelt, a potential beneficiary. There were numerous party defendants who were not residents of Florida and could not be personally served. These included, inter alia, The Wilmington Trust Co., The Delaware Trust Co., certain individuals who were potential successors-in-interest to the complainants, Denckla and Stewart, but none of the other appointees of the appointment in question. The non-resident defendants were served constructively under Florida law. None of the non-residents of Florida made any appearance in the Florida proceeding, except two individuals whose interests coincided with the plaintiffs, Denckla and Stewart.

118 Katherine Denckla appeared in her own person. Dorothy R. Rodgers Stewart, being an incompetent, her position was represented by Palm Beach attorney, Elwyn L. Middleton, Guardian of her property. Lewis 128 A2d at 825 n.3. (Del. 1957).
119 In the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida
120 That was the same day that she executed her Will in Florida.
121 That Power of Appointment was given to her by her inter vivos trust of Mar. 25, 1935, with Wilmington Trust Co., as trustee.
122 In addition to the appointment of the $400,000 Dora made some modest appointments to a hospital and some family retainers. See supra, text accompanying note 114.
123 At the time Florida procedure provided that cases sounding “in equity,” filed in Circuit Courts were assigned to the Chancery division of the Circuit Court, and the Judge was henceforth called the “Chancellor” of the cause, rather than the “Judge” the title addressed in cases “at law.” It was not until Jan 1, 1967 that Florida’s Rule of Civil Procedure 1.040,(as in Federal Rule 2), merged procedurally (but not substantively) law and equity.
124 Another of Elizabeth’s children, Curtin Winsor, Jr., also a potential beneficiary, was not made a party defendant.
125 The trustee of Dora’s trust established Mar. 25, 1935, which transferred the $400,000 to the Delaware Trust Co., the trustee of Elizabeth’s trust of 1948.
126 The trustee of Elizabeth’s 1948 trust, which received the $400,000 shortly after Dora’s death.
The defendants, Elizabeth and her sons moved to dismiss the Complaint on the ground that proceeding without jurisdiction over the Delaware trustees, indispensable parties, would offend § 1 of the Fourteenth Amendment. Chancellor Chillingworth made two rulings. First, as to the parties before the court he ruled that the attempted appointment was testamentary in character, hence it was invalid as not being witnessed by two persons, required by Florida law. The attempted appointment, being invalid, according to Judge Chillingworth, the $400,000 must be passed through the residuary clause of Dora’s Will. Second, he dismissed the Complaint against the non-resident defendants, who had received only constructive service, which included the Delaware trustees.

July 1954 – Elizabeth Hanson files an action against Wilmington Trust Co. in Delaware

In July, 1954 Elizabeth Donner Hanson filed an action in the Delaware Court of Chancery, seeking a Declaratory Decree to determine the persons entitled to assets valued at $417,000, held at the time of Dora’s death by the defendant Wilmington Trust Company under Dora’s Mar. 25, 1935 trust. The parties were substantially the same as those in the Florida litigation. Elizabeth was joined by a Guardian Ad Litem for her children, Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, Dora’s grandchildren. Both the Wilmington Trust Co and the Delaware Trust Co. were made defendants, as were several appointees. The non-residents of Delaware were notified by registered mail. All of the trust companies, beneficiaries, and legatees appeared and participated in the litigation, except, for some unexplained reason, Katherine N.R. Denckla.

The defendants’ Answer contained two prayers for relief. The first prayer asked that the Delaware Trust Co. as trustee of Elizabeth’s trust for her two children, be ordered to account for the $400,000 received by it from Wilmington Trust Co. as trustee of Dora’s trust and that the Delaware Trust Co. be directed to transfer the $400,000 to Elizabeth Hanson, as Dora’s Executrix. The second prayer for relief was that in the event that the Delaware Trust Co. as trustee, not be ordered to account, a money judgment be entered against Wilmington Trust Co. as trustee of Dora’s trust for the full $417,000.

The defendants, Dora Stewart Lewis, Mary Washington Stewart Borie, and Paula Browning Denkla other adoptive grandchildren of Dora, filed a Cross Motion For Summary Judgment based upon the reasoning that either by res judicata, collateral estoppel, or by reason of “applicable law,” what Dora executed in 1935 was an agency agreement, and not a trust agreement. Hence the instruments of 1949 and 1950 were invalid testamentary acts, and hence should have been distributed under Dora’s Will.

Chancellor Chillingworth in the Florida case, about the time of this case’s inception, enjoined Elizabeth from prosecuting this action. Consequently since that time

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128 Most of the operative facts of the West Palm Beach case involving Dora was obtained from Hanson, 357 U.S. at 238-242.
129 The aforementioned two $200,000 gifts, the $10,000 gift to the hospital, and the $7,000 gift to the family retainers.
130 Hanson, 357 U.S. at 242.
131 See Lewis v. Hanson, 128 A. 2d 819, 831 (Del. 1957).
132 See supra text accompanying notes 129-131 and infra 133-134.
neither Elizabeth nor her counsel took any part in this case.\textsuperscript{133} Elizabeth’s children, however, pursued their own interests.\textsuperscript{134}

\textit{January 14, 1955 Chancellor Chillingworth rules in Dora’s Florida case}

On Jan. 14, 1955 Chancellor Chillingworth entered two rulings:

1. No present interest passed to any beneficiary, other than Dora, under her 1935 trust. Nothing passed under the 1949 instrument because it was invalid, being testamentary in nature it\textsuperscript{135} lacked the second witness, as required by Florida law. The assets held by Wilmington Trust not having passed under the attempted exercise of the Powers of Appointment, Wilmington Trust was to distribute them under the residuary clause of Dora’s Will.

2. The Florida court lacked jurisdiction over the Wilmington Trust Co. and the assets that the trust company was holding in Delaware, as well as all of the other non-residents of Florida who were not before the Florida court; and the Complaint against them was dismissed without prejudice.\textsuperscript{136}

\textit{June 14, 1955 - Judge and Mrs. Chillingworth are murdered}

On the evening of Tuesday, June 14, 1955 Judge and Mrs. Chillingworth attended a dinner party at the home of friends in West Palm Beach, Florida. They left rather early, about 10:00 P.M., because they had an 8:00 A.M. appointment the next morning with a carpenter who was going to discuss with them the building of a playground for their grandchildren. When the carpenter arrived at their home, he found the front door unlocked with the appearance of no one being in the house, directly on the ocean at Manalapan, Florida, about ten miles south of Palm Beach. Upon the arrival of the police they confirmed that the house was empty, and the only suspicious evidence were one spool of adhesive tape in the sand between the house and the ocean, and one in the house, which had a shattered porch light, and drops of blood on the steps leading down to the beach. Accidental drowning was ruled out, the Chillingworths both being experienced swimmers. Robbery was ruled out, cash being found in Mrs. Chillingworth’s pocketbook. The case was assumed to be a murder, but several suspects, including a man tried for murder before Judge Chillingworth were cleared of suspicion. It became an unsolved murder in the County of Palm Beach; The Chillingworths were not declared legally dead until 1947.

About four years after the disappearance of the Chillingworths, Floyd Albert “lucky” Holzapfel bragged to an acquaintance of his that he knew who killed the judge and his wife. The acquaintance and a retired police officer in September, 1960 lured Holzapfel to a hotel in Melbourne, Fla., where after becoming completely intoxicated he confessed to murdering the couple, not knowing that in an adjoining room a Deputy Sheriff was taping the entire conversation.\textsuperscript{137} The law authorities lost little time in

\textsuperscript{133} \textit{Lewis}, 128 A. 2d at 822 n.1
\textsuperscript{134} Hanson v. Denckla, 357 U.S. 235, 242 (1958).
\textsuperscript{135} Hanson v. Denckla, 100 So. 2d 378, 381 (Fla. 1956).
\textsuperscript{136} Id. at 385.
\textsuperscript{137} The confession was ruled inadmissible in court, albeit of inestimable value in attaining Holzapfel’s confession in court.
arresting Holzapfel, and on Dec. 12, 1960 after being arrested, he confessed to both murders.

At trial details of the murder were established. Holzapfel and an accomplice, George “Bobby” Lincoln, neither of whom had ever met the Chillingworths, took a skiff in the ocean to the front of the judge’s home in Manalapan at about 1:00 A.M. on June 14. Holzapfel knocked on the door while Lincoln hid behind a bush. When the judge opened the door, dressed in his pajamas, Holzapfel initially told him he was having motor trouble in his boat, but quickly pulled a pistol from his pants and after applying adhesive tape to the judge and his wife, Holzapfel and Lincoln forced them to enter their skiff, and motored out almost to the Gulf Stream. Holzapfel after applying weights to their legs threw Mrs. Chillingworth overboard, smilingly saying “ladies first.” The Chillingworths were a devoted couple; their last words were expressions of love for each other. The judge, not waiting to be thrown overboard, and possibly hoping to help his wife, jumped into the ocean, and was apparently navigating fairly well, when Lincoln slammed him on the head with a rifle, with such force that the barrel of the weapon broke. Holzapfel was given a death sentence, which was later commuted to life in prison, where, still incarcerated, he died in 1996. Bobby Lincoln, having turned state’s evidence was sentenced to only two years. He was discharged in 1962, changed his name, converted to Islam, settled in Riviera Beach, Fla. and died in 2004.

Why would two men who had never met the judge or his wife kill them? Holzapfel testified that the reason was one Joseph Alexander Peel. Peel worked for one of the most prominent lawyers in Florida, at the time, Phillip D. O’Connell, and was elected as the youngest Municipal Judge to serve that post in Florida, but was completely dishonest. He would find out when the police were going to raid a gambling joint, tip the joints’ proprietors off and receive $500 per tip-off. He and Holzapfel would split about $3,000 per week from these ill-gotten gains.\(^{138}\) In addition he represented both a husband and wife in a divorce case, but failed to complete the case. After the wife remarried, thinking her divorce had been granted she gave birth to a child. It was not until then that she realized that she could be charged as a bigamist. Judge Chillingworth, as his superior, warned Peel that his next infraction of the law would result in his dismissal from public service and disbarment. Peel became so infuriated at the judge, tense about his relationship with Chillingworth, and convinced that the judge must be liquidated, he hired Holzapfel for $2,000 to kill the judge and his wife too, if she witnessed the murder. Holzapfel hired Lincoln to help him. The $2,000 was never paid. Peel was arrested as being an accessory before the fact in November 1960.

After the Chillingworths’ murders, but before being charged, Holzapfel and Peel had their problems with the law. Holzapfel was charged with the attempted murder of Peel’s law partner one Harold Gray, on Dec.12, 1956 and Peel was charged with being an accessory to the attempted murder because he was present as it was being administered by a severe beating of the man, from which he miraculously survived. At trial it was proved that Gray had a $100,000 life insurance policy with Peel as beneficiary.\(^{139}\) Holzapfel pled self defense; the jury exonerated him. Peel asked the court to dismiss the case against him since one cannot be an incarcerated accessory to a killing in self defense. When the trial judge agreed with Peel the state appealed. The Florida Second

\(^{138}\) National Affairs, Newsweek 26, 27 (Mar. 20, 1961).

\(^{139}\) Time Magazine, Nov. 14, 1960.
Court of Appeal reversed on the ground that it was not certain that the defense of self defense was the jury’s reason for its return of not guilty.\textsuperscript{140} Hence the case was remanded for a new trial, which did not occur since Peel agreed to voluntarily seek termination from his membership in the Florida Bar. He did so and his membership was terminated May 1, 1959.\textsuperscript{141} On Nov. 3, 1958 a small time bootlegger, Lew Gene Harvey, left his home accompanied by a man ostensibly named the same as an alias used by Holzapfel. Three days later Harvey’s body was found in a West Palm Beach canal, wrapped in chains, with a bullet hole in his head. Holzapfel was indicted by the Grand Jury for the murder of Harvey, but never arraigned.\textsuperscript{142} Holzapfel was accused of breaking and entering a living quarters in Miami, Fla. on May 4, 1959 for the purpose of stealing small arms. Having been found guilty Holzapfel appealed to the Florida Third District Court of Appeal, on several grounds. The most persuasive ground compelling a new trial was that there was no proof that the stolen property was that of the building’s owner or tenant. Rather it appeared that the pistols were owned by a Latin American revolutionary organization. This was sufficient ground upon which to grant a new trail.\textsuperscript{143} There is no record of Holzapfel being tried again for breaking and entering. The state had more important business with him. Just about five months after the appellate court ordered a new trial\textsuperscript{144} Holzapfel was arrested\textsuperscript{145} for the murder of the two Chillingworths, and shortly thereafter,\textsuperscript{146} he pled guilty to the charge. Soon after his arrest, Holzapfel turned state’s evidence against Peel. Shortly after he was imprisoned, he slashed his wrists and nearly died. Peel was arrested for the attempted murder of Holzapfel. He jumped bail, however, and fled to Chatanooga, where police found him hiding in a hotel. Subsequently Peel was arrested again; this time for being an accessory before the fact of murdering the Chillingworths, and indicted on Nov. 23, 1960.\textsuperscript{147} His trial began on Nov. 27, 1961.\textsuperscript{148} As the jury was undergoing \textit{voir dire} examination (on Nov. 29, 1961) Peel changed his plea from Not Guilty to \textit{Nolo Contendere}, with the agreement of the state that he would obtain a life sentence, rather than death, if found guilty.\textsuperscript{149} He was found guilty.

Not long after Peel was imprisoned he met a fellow prisoner, Clarence Earl Gideon, who had been charged with breaking and entering a poolroom with intent to commit a misdemeanor – a felony in Florida. The trial judge refused to appoint counsel for him even though he was indigent and had no counsel representing him. The judge’s ruling was based on a decision of the U.S. Supreme Court in \textit{Betts v. Brady}.\textsuperscript{150} That case held that appointment of counsel is not a “fundamental” right in the U. S. even where a defendant is charged with the commission of a felony. Gideon conducted his own defense and was found guilty. Peel offered to help him file a Petition for Certiorari, actually

\begin{footnotes}
\footnote{140} State v. Peel, 111 So.2d 728 (Fla. 2d DCA Apr. 29, 1959).
\footnote{141} Application of Peel, 111 So.2d 452 (Fla. May 1, 1959).
\footnote{142} Peel v. State, 154 So. 2d 910, 914 (Fla. 2d DCA 1963).
\footnote{143} Holzapfel v. State, 120 So.2d 195, 197 (Fla. 3d DCA 1960).
\footnote{144} April 21, 1960.
\footnote{145} On Oct. 1, 1960.
\footnote{146} On Dec.12, 1960.
\footnote{147} Peel v. State, 210 So. 2d 15 (Fla. 2d DCA 1968).
\footnote{148} Peel v. State, 150 So. 2d. 281, 296. (Fla. 2d DCA 1963).
\footnote{149} Peel, 210 So. 2d. at 15.
\footnote{150} 316 U.S. 455 (1942).
\end{footnotes}
standing over him as Gideon wrote the Petition\textsuperscript{151} in pencil, with many typographical errors. It is believed that Peel authorized this makeshift form of Petition on the ground that the Supreme Court Justices’ pity would be aroused more than if the Petition had been typed in a more formal manner. The Supreme Court granted the Petition, and in the famous decision of \textit{Gideon v. Wainwright}\textsuperscript{152} reversed Betts, and held that when an indigent, without counsel, appears in court to defend against a felony charge, that defendant is entitled to an appointment of counsel.\textsuperscript{153}

In addition to helping out Clarence Gideon, Peel filed three appeals while he was in prison, in none of which was he successful.\textsuperscript{154} In the first two appeals his first employer, after he became a lawyer, Phillip D. O’Connell, at the time the State’s Attorney, represented the State of Florida in prosecuting him. Though he was serving a life sentence, Peel was released from prison in 1982 because he had contracted terminal cancer. He died nine days later. He took with him a brilliant, but twisted brain. A man who had “the world in his hands” in early life ended that life a pitiful, disgraced convict.

Because he was a “model prisoner” in 1966 “Lucky” Holzapfel’s death sentence was commuted to life in prison. He died there thirty years later, in 1996. If ever there was a misnomer for one’s nickname it was Mr. Holzapfel’s. He wasn’t very lucky. He was a man of extremes. From a paratrooper wounded by the Nazis, while fighting for his country he returned to that country, the United States, and while living a partially normal life, because of a malfunction of his brain, he could not refrain from stealing things and killing people.

“Bobby” Lincoln, changed his name, converted to Islam, moved to Riviera Beach, Florida, and died in May, 2004, apparently a remorseful man.

Both Dora and William Donner would have been, and their families must have been, saddened and distressed at the news of a well respected judge who ruled on one of their trust cases, and his wife, being killed in such a horrifying and archaic manner. Marjorie Chilligworth, having been killed because her only offense to her murderers was that she witnessed their killing of her husband.

\textit{Dec. 28, 1955 – Chancellor Herrmann writes the first Opinion in Dora’s trust case}

As afore stated\textsuperscript{155} in July, 1954 Elizabeth Donner Hanson filed an action in the Delaware Court of Chancery, seeking a Declaratory Decree to determine the persons entitled to assets valued at $417,000, held at the time of Dora’s death by the defendant Wilmington Trust Company under Dora’s Mar. 25, 1935 trust. That action culminated in \textit{Hanson v. Wilmington Trust Co.}\textsuperscript{156} Elizabeth was joined by a Guardian Ad Litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, Dora’s minor

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\textsuperscript{151} It was filed with the Supreme Court on Nov. 21, 1962.
\textsuperscript{152} 372 U.S. 335 (1963)
\textsuperscript{153} \textit{BRUCE R. JACOBS, MEMORIES OF AND REFLECTIONS ABOUT GIDEON V. WAINRIGHT}, 33 STETLR181, 214-217. (Fall, 2003).
\textsuperscript{154} \textit{Peel}, 150 So.2d at 281; \textit{Peel v. State}, 154 So.2d 910 (Fla. 2d DCA 1963); and \textit{Peel v. State}, 229 So. 2d 892 (Fla. 2d DCA 1970).
\textsuperscript{155} \textit{See supra} text accompanying notes 129-134.
\textsuperscript{156} 119 A. 2d 901 (Del.Ch. 1955)
grandchildren. The defendants, were Dora Stewart Lewis, Mary Washington Stewart Borie, and Paula Browning Denckla adoptive grandchildren of Dora; Guardians Ad Litem for Dorothy R.B. Stewart, an incompetent adopted daughter of Dora, and William Donner Denckla, a minor were also made defendants. Katherine N.R. Denckla, did not participate in this appeal since, for some unexplained reason, she neither appeared nor participated in the Delaware chancery proceeding commenced by Elizabeth Hanson. Dora’s adoptive granddaughter, and supposedly Katherine Denckla’s daughter, Dora Stewart Lewis, a fellow-provocateur of Katherine Denckla, took her place as the leading party defendant opposing Elizabeth.

The defendants filed an Answer, seeking two forms of relief. The first prayer was that the Delaware Trust Co. be ordered to account for the $400,000 received by it from the trustee (The Wilmington Trust Co.) and be directed to transfer it to the Executrix of Dora’s estate, i.e. Elizabeth Hanson for distribution pursuant to Dora’s Will. The second prayer for relief was that in the event Delaware Trust Co. be not ordered to account, that a money judgment in favor of the defendants be entered against WilmingtonTrust Co. in the amount of $417,000 together with interest.

Elizabeth filed a Motion for Summary Judgment. A Cross Motion For Summary Judgment was filed by the majority of the defendants. Defendants’ motion was based upon the reasoning that either by res judicata, collateral estoppel, or by reason of “applicable law,” what Dora executed in 1935 was an agency agreement, and not a trust. Hence the instruments of 1949 and 1950 were invalid testamentary acts, and therefore should have been distributed under Dora’s Will, not by the attempted exercise of the Powers of Appointment. The Guardian Ad Litem for Dorothy R.B. Stewart, and the minor, William Donner Denckla, supported this position.

To reiterate, the facts of the case were as follows: Dora Donner, while a resident of Pennsylvania on Mar. 25, 1935, executed a trust agreement with Wilmington Trust Co. of Delaware, in which she gave herself Powers of Appointment. On Dec. 3, 1949 and July 7, 1950 after she had become a resident of Florida, Dora exercised the Powers of Appointment given to herself in her 1935 trust, as to $417,000. After Dora’s death Wilmington Trust distributed the $417,000 to the persons named in the aforementioned Power of Appointment.

Herrmann divided his Opinion into several compartments. He first rejected the defendants’ argument that res judicata required him to follow the Florida Supreme Court’s ruling. He then considered the defendants’ argument that his court was bound to follow Florida’s court based on the doctrine of collateral estoppel. He rejected the second argument as well as the first.

Third, he said that Chancellor Chillingworth made some findings that he had no jurisdiction to make. First, that Dora’s 1935 purported trust was invalid as a trust, and

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158 Lewis v. Hanson, 129 A. 2d 819, 831 (Del. 1957).
159 Id.
160 While the Chancellor did not elucidate, his conclusion was probably based on the fact that the Florida decision of Judge Chillingworth involved whether Dora’s Dec. 3, 1949 exercise of her Power of Appointment giving each of her two grandchildren $200,000 was invalid (See text accompanying note 135), whereas the object of the Delaware action was to determine whether the $417,000 disbursed by Willington trust was proper, or whether that money should have been disbursed through the Residuary Clause of Dora’s Will. Close, but conceivably different.
consequently her purported exercise of a Power of Appointment was not a Power of Appointment, but rather a testamentary instrument, which was invalid, in having insufficient witnesses. 161 Second, he said that the Florida court had no jurisdiction to rule on the validity of the 1935 trust. It was created in Delaware, all of the assets were in Delaware, and the trustee is a Delaware corporation, and that trustee was not before the court. 162 Hence collateral estoppel would not be applicable. Third he said that compelling Delaware courts to honor a judgment of another state which lacked the jurisdiction to enter the judgment would violate Delaware’s public policy. 163 Fourth, he said that applying collateral estoppel to the Florida decree would result in “chaos and injustice” because one set of parties who were before the Florida court would be bound by one judicial determination, whereas another set of parties who were not before the Florida court, but rather were before the Delaware court would be bound by an opposite judicial determination. 164

After reviewing in depth the terms of Dora’s 1935 trust 165 the Chancellor specifically noted that the reservation of a life interest, the reservation of the right to revoke an inter vivos trust, and the reservation of the settler to change the trustee, do not affect the validity of the trust. 166

Since the defendants heavily attacked Dora’s appointment of an Investment advisor in her 1935 trust 167 the Chancellor next considered that fact. He concluded that as the settler may “personally direct or veto” investments by the trustee without impairing the validity of an inter vivos trust, the settler may assign that authority to a third party. 168

Chancellor Herrmann next touched upon a subject to which William’s trust was considered – whether it was the intent of the settler to create a trust, or merely an agency agreement. He found that Dora did not reserve to herself “control over the details of the administration of the trust, as would constitute the trustee an Agent.” 169 The Defendants argued that the record reflects that the trustee permitted the Adviser to “usurp all of its powers and functions as to the details of the administration, and that, in reality, the trustee was nothing more than a custodian of the securities.” 170 To this contention the Chancellor responded that “the modus operandi adopted by the trustee and the Advisor is immaterial “to the question of whether a trust was created.” 171 The Chancellor stressed the fact that there was no evidence that Dona knew of the situation to which the defendants refer, and he ended his ruling on that point with the following words: “[a] trustor, intending to create an inter vivos trust, may not be thwarted by an ex parte act or failure to act on the part of the trustee.” 172

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161 Hanson, 119 A. 2d at 906, n.2.
162 Hanson, at 906.
163 Id. at 907.
164 Id.
165 Id. at 908.
166 Id. at 909. The Chancellor furnished authority for all three propositions, offering the Delaware Supreme Court decision in William’s trust case, Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309 (Del. 1942) as authority for the third point.
167 See supra text accompanying notes 37—40.
168 Hanson, 119 A. 2d at 909.
169 Id. at 910.
170 Id.
171 Id.
172 Id.
The defendants placed considerable emphasis on § 56 of the Restatement of Trusts to the effect that if no interest passes to the beneficiaries of a trust before the death of the settler, the intended trust is testamentary. The Chancellor held that that principle is not applicable to the present case because the exercise of the Powers of Appointment in 1949 and 1950 were “created when the Agreement and exercises thereunder were executed.”\(^\text{173}\) even though the created interests could not fall into possession until after Dora’s death and they might be rescinded by revocation or further exercise of the Power.\(^\text{174}\)

Lastly the court announced that the plaintiffs’ motion for summary judgment was granted and the defendants’ motion was denied.\(^\text{175}\)

Jan. 20, 1956 - Defendants Filed a Motion For a New Trial in Delaware’s Chancery Court Raising Full Faith and Credit For the First Time in the Delaware court

Sept. 19, 1956 - Justice Hobson writes the second Opinion in the Dora Donner Trust Cases

The plaintiffs led by Elizabeth Donner Hanson. appealed Chancellor Chillingworth’s holding that the 1935 trust and Appointments of Power made under it were invalid in *Hanson v. Denckla*.\(^\text{176}\) The defendants, led by Katherine N.R. Denckla, cross-appealed the Chancellor’s ruling that he had no jurisdiction as to the non-resident defendants.

Justice T. Frank Hobson wrote the unanimous Opinion for the Florida Supreme Court, affirming in part and reversing in part the judgment entered by Chancellor Chillingworth in the Circuit Court of the Fifteenth Circuit in and for Palm Beach, Florida.

After a brief review of the facts Justice Hobson considered whether Chancellor Chillingworth’s court had jurisdiction to pass on the validity of the 1935 trust and the attempted exercise of Powers of Appointment under it. He made it clear that the court had substantive jurisdiction, because the Will of Dora, a Florida resident, had been probated there. This is a different situation than that which existed in the case of William Donner,\(^\text{177}\) where the administration or validity of an *intervivos* trust existed without any connection to a Will.\(^\text{178}\) The court ruled that jurisdiction to construe the Will carried with it “substantive” jurisdiction\(^\text{179}\) “over the persons of the absent defendants” even though the trust assets were not “physically in this state.”\(^\text{180}\)

The next question considered by the court was what law must be applied to the issue of validity of the instrument. Florida law was chosen despite the fact that the trust was created in Pennsylvania, and the first two Powers were exercised there.\(^\text{181}\) It was

\(^\text{173}\) *Id.* It may be that the Chancellor intended not to include the words “and exercises thereunder.”

\(^\text{174}\) *Id.*

\(^\text{175}\) *Id.* at 911.

\(^\text{176}\) 100 So. 2d 378 (Fla. 1956).

\(^\text{177}\) *See* Wilmington Trust Co. v. Wilmington Trust Co., 24 A. 2d 309 (Del. 1942).

\(^\text{178}\) *Hanson*, 100 So. 2d at 381.

\(^\text{179}\) *Id.*

\(^\text{180}\) *Id.* at 385. It must be noted that the U.S. Supreme Court thought that these two last statements of the Florida Supreme Court left “open to doubt” whether they meant jurisdiction over the person of the defendants or jurisdiction over the trust assets.” *See* Hansno v. Denckla., 357 U.S. 235, 243. (1958).

\(^\text{181}\) *Hanson*, 100 So. 2d at 382.
apparent to the court that in the early days of the trust’s existence Dora had made no final disposition of her property.182 It was not until after Dora settled in Florida that she made an “integrated pattern of arrangements for the disposition of her property.”183 When she executed her new Will in Florida, after she had settled there she had it contain provisions which would complete her thoughts about the gifts she had made by the Powers of Appointment, in the event they were to be declared invalid.184

Having decided that Florida law applied to the validity of the trust, Justice Hobson next considered whether it was valid or invalid under Florida law. He concluded that the reservation of powers by Dora, standing alone “might not have been enough to render the trust invalid,”185 but “the cumulative effect of the reservations was such that the relationship established diversted [sic] the settler of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory.”186 He repeated this observation in altered words later in his Opinion.187 Hence Chancellor Chillingworth was affirmed in that part of the case.188

The court reversed Chancellor Chillingworth in his ruling to the effect that he lacked jurisdiction over the non-Florida-residents. The court relied on a prior Florida Supreme Court decision which held that though a trust’s “res” consisted entirely of intangible property located in New York state, being administered by a New York trustee the Florida court had jurisdiction of the trust, even where Florida had no claim to the subject matter of the trust, other than the construction of a Will of the settler.189

The court’s final ruling was to deny the plaintiffs’190 motion to remand the case, with instructions that the Florida case (then pending on appeal), be dismissed because the movant would be bound by the Delaware decree.191 The reason for the denial was that, since the Florida Supreme Court, under Florida law, has jurisdiction of the matter presented and “Florida law is exclusively applicable thereto.”192

Nov. 28, 1956 - The Florida Supreme Court Denies Beneficiaries’ and Appointees’ Motion for Rehearing Based on Full Faith and Credit, Without Opinion

January 14, 1957 – Justice Olcott writes the Third Opinion in Dora Donner’s Trust Case

Delaware Supreme Court Justice Daniel Fooks Olcott, the grandson of Chancellor James Wolcott, and the son of Chancellor Josiah Olcott who wrote the first two Opinions in William’s trust cases,193 wrote the Opinion of the Delaware Supreme Court in Lewis v. Hanson.194

Justice Olcott divided the parties into two contesting groups, as follows:

182 Id. at 382, 383.
183 Id. at 383.
184 Id.
185 Id.
186 Id. at 383, 384.
187 See Id. at 385.
188 Id.
189 Id. at 385.
190 The motion was actually filed by Elizabeth Hanson. See Hanson, 357 U.S. at 242.
191 See id. at 242. Up to that point full faith and credit had not been raised. Id.
192 Hanson v. Denckla, 100 So. 2d 378, 385 (Fla. 1956).
193 See supra text accompanying notes 44—78.
194 128 A. 2d 819 (Del. 1957)
The Lewis Group takes the position that:

the exercise of the power of appointment was testamentary in character and as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust corpus comprises part of the Florida estate of the settlor and passes under her will.

The Hanson group takes the position that:

the trust agreement is valid and that, accordingly, the transfer of $417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other

Justice Olcott’s first attention was to answer two questions heavily argued by the Lewis group, to wit: what law was to be used in determining “the basic validity” of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. After reference to some basic facts concerning the trust, Justice Olcott summarily discounted the settlor’s domicile when dealing with inter vivos trusts, and, having previously, established that the most important factor in connection with that enquiry is the settlor’s intent. He relied substantially on the fact that the instrument was signed and the securities delivered to a trustee doing business in a specific state. Such determination applies not only to the validity of a trust, but also to the exercise of a Power of Appointment reserved in such a trust. The court thereupon formally held that the validity of the trust of 1935 and the subject Power of Appointment were to be determined by the law of Delaware, having been established by the settlor’s intent.

The next matter to be taken up by the court was whether the trust and Power of Appointment were valid under Delaware law. The position asserted by the Lewis group, on that position was buttressed by the argument that the 1935 trust created no interest, vested or contingent, in any one place prior to Dora’s death. And therefore that the 1935 instrument was not a trust, but a testamentary disposition, invalid under Florida law because of the absence of a second witness. While recognizing such rule, the court thought it did not apply to the 1935 trust, because a vested interest in remainder was “lodged” in Dora’s issue. By the same token, Dora’s next of kin had an interest in the

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195 The Lewis group is so named because Dora Stewart Lewis, one of Dora’s adoptive granddaughters, was the leading party defendant in the trial court and appellant in the Supreme Court.
196 Lewis, 128 A. 2d at 823.
197 The Hanson group were the plaintiffs in the lower court, being led by Elizabeth Donner Hanson.
198 Lewis, 128 A. 2d at 823.
199 Id. at 825.
200 He said that domicile is “at most a minor factor to be considered in determining the situs of an inter vivos trust” Lewis, 128 A. 2d at 830.
201 Id. at 826.
202 Id.
203 Id.
204 Id.
remainder conditioned only upon Dora dying without leaving surviving issue, and further conditioned only that they survive her. Whether these two remainder interests were vested or contingent, they were subject to defeasance by the exercise of the reserved Power of Appointment, but defeasance of interests does not mean that they had not been created. Neither the Rule Against Perpetuities nor the Restatement of future interests in property alter this Rule.

The next argument of the Lewis group considered by Justice Olcott was that the considerable number of powers which Dora reserved to herself make her purported trust “testamentary in character.” Despite such rule being generally accepted, in Delaware authority has established that, which appeared to be the majority rule, the reservation of a life interest in trust income coupled with a power to revoke and to dispose of the trust corpus by testamentary appointment will not make the trust testamentary in character. Chancellor Herrmann had established that the reservation of a life interest, the reservation of the right to revoke an inter vivos trust, and the reservation of the settler to change the trustee, do not affect the validity of a trust. Then the court made short shrift of the “main thrust” of that argument of retention of powers, i.e. the appointment of a “trust advisor.” The “trust advisor” in the opinion of the court was only a continuation of the settler, or of a “co-trustee.” Dora, according to the court had not reserved to herself control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee, and change the advisor to the trustee.

As to the next point of the Lewis group, i.e. that the record established that the Trust Advisor, in fact, ran the trust, and the trustee was nothing more that a custodian of the trust property, the court opined that “[s]uch extrinsic evidence is material only in the event of ambiguity in the trust instrument itself.”

The following point was, in the opinion of the court, “unnecessary” to consider, but due to insistence of counsel, the court consented to consider it. The fact that a trustee accedes to the thoughts of another person, rather than making its own decisions “may be a ground at the insistence of a beneficiary to remove the trustee, but, certainly, it cannot change the relationship intended to be created by the trustor.” The facts establish that Dora “knew nothing” of the manner in which the trust was being administered.

The court turned briefly to the Opinion of the Florida Supreme Court judgment. As the court read the Opinion it appeared to adopt a theory that each exercise of a Power of Appointment constituted an “amendment or republication” of the 1935 trust agreement. And since no present remainder interest was created either by the agreement or the exercise of the Power, until Dora’s death in Florida the validity of those remainder

205 Id.
206 Id. at 827.
207 Id.
208 Id.
209 See supra text accompanying notes 159, 160.
210 Lewis, 128 A. 2d at 828.
211 Id.
212 Id. at 829.
213 Id.
214 Id.
215 Id.
interests was to be tested by the law of the place of her demise – in this case, Florida. Olcott went on to state that while such might be the law of Florida, it certainly was not the law of Delaware. Under Delaware law the exercise of a Power of Appointment creates immediate interests, just as though they had been written into the purported trust agreement. The fact that those immediate interests might be later defeased does not establish that they were never created. The Florida court’s position, moreover, had overlooked, presumably inadvertently: “the gift in remainder to Mrs. Donner’s living issue, or next of kin in default of the exercise of the power.”

As indicated above, the Trust Advisor was not subject to the “dictates of Mrs. Donner.”

The court next took up what it considered “[t]he second fundamental question,” i.e. to what effect, if any, is Delaware bound by the Florida Supreme Court’s affirmance of Chancellor Chillingworth’s holding that the 1935 trust and exercise of Powers of Appointment under it, were invalid under Florida law? The court noted that the Lewis defendants were invoking for the first time in the Delaware court, the full faith and credit clause of the Fourth Amendment of the federal Constitution. This was made clear by their second prayer for relief contained in their answer filed in the court below. This is made clear by Ms. Lewis and her co-defendants seeking a judgment in personam against Wilmington Trust and a judgment in rem “dispositive of the entire trust corpus,” as is demonstrated by their second prayer for relief. The Florida judgment, however, cannot be recognized because, under the facts, no in personam judgment has been obtained against the Wilmington Trust Co. The same fate befell the attempt of the Lewis group to establish the Florida judgment as one in rem. The res over which the parties claimed responsibility consists of corporate securities; and those have at all times herein germane, had been located in Delaware. Though the court did not specifically say so, the ruling of Chancellor Chillingworth on this point was correct and that of the Florida Supreme Court was wrong. Another error of the Florida Supreme Court was its finding that its trial court had jurisdiction over the non-resident defendants by reason of Dora’s domicile in Florida, and the probate of her Will. The execution of the Power of Appointment in Florida during the year 1949 does not have the same effect as had the execution of the trust agreement been made in Florida in 1949, at least under the law of Delaware and “the recent trend of well-considered decisions in other states.”

The court then considered the argument that under the full faith and credit position the Florida judgment precludes relitigation of the question of essential validity of the 1935 trust as a matter of res judicata or of collateral estoppel. Res judicata was

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216 Id. at 830.
217 Id.
218 Id.
219 See supra, text accompanying notes 167, 168.
220 Lewis, 128 A. 2d at 830.
221 Id. at 831.
222 See supra text accompanying note 159.
223 Lewis, 128 A.2d at 831.
224 Id.
225 Id. at 832.
226 Id.
227 Id.
quickly ruled out because of lack of identity of the parties or of subject matter in both cases. In Florida the issue was what assets passed under Dora’s Will. The Florida ruling that the Power of Appointment, executed in Florida, was invalid was only “incidental” to the main issue raised in the Florida court.\footnote{228}

As to collateral estoppel, even though it might apply to a peripheral matter decided in a case in which the court has jurisdiction\footnote{229} the doctrine is not applicable to this case for two reasons. First there is an exception to the doctrine where the court, even though its jurisdiction is beyond question, decides a point which is only “incidental” to the main issue in the case.\footnote{230} Second, based upon the consideration that the proper administration of justice will be served best by limiting parties to one trial on one issue, the principle has evolved that the doctrine of collateral estoppel will be applied “only when the same parties in the second action have had their day in court in the first action on the issue in question.”\footnote{231} What the Lewis and Hanson groups were arguing in the Delaware court is not what they were arguing in the Florida action.\footnote{232}

The Lewis group argued that since the non-residents received actual notice of the Florida action they could have made an appearance there, had they wanted to. Justice Olcott agreed that the non-residents could have voluntarily appeared in the Florida action; but they chose not to, since there was no \textit{res} before the Florida court which might have furnished plausible reason for them to do so. To hold that the non-residents were obliged to appear even in the absence of the \textit{res} would be a violation of the due process clause of the 14th Amendment.\footnote{233}

The Lewis group next argued that it is the law that a \textit{cestui que trust} is bound by a judgment against its trustee, and the reverse should apply, i.e. in this case the trustees should be bound by a judgment against their \textit{cestui que trusts} because the trustees were not necessary parties, but were mere stakeholders.\footnote{234} The court answered that position by stating that the converse of the one rule is not the law particularly when the adjudication affects the existence of the trust itself.\footnote{235} Not only could none of the parties, nor the court, find authority for the Lewis position, but the court thought it would be bad law if some authority did exist to that effect. Beneficiaries could by “shopping around” against the manifest intent of the trustor, and even though it is a trustee’s duty to defend the existence of his trust, its existence could perish by the intentional ignoring of the trustee.\footnote{236}

Lastly, the court thought that requiring one state to be required to accede to the ruling of another state’s court with only a “shadowy pretense of jurisdiction” would violate the second court’s public policy.\footnote{237}
June 17, 1957 - The U.S. Supreme Court, in Hanson v. Denckla postposes Consideration of its Jurisdiction of the Florida Appeal until Consideration of the merits of Both Cases, and grants Petition of Certiorari Have Been Issued to the Supreme Court of Delaware in Lewis v. Hanson.

June 23, 1958 - Chief Justice Warren Writes the Fourth Opinion in Dora Donner’s Trust Case

Justice Olcott of the Delaware Supreme Court prophetically said that the battle between the Elizabeth Hanson litigants and the Katherine N.R. Denckla and Dora Stewart Lewis litigants had become a “headlong jurisdictional collision between states.” It was inevitable that they would meet in the U.S. Supreme Court to resolve the clash between Florida and Delaware, to say nothing of the clash between the Hansons and the Dencklas-Lewises. That battle-royal, familial civil war, took place in the U.S. Supreme Court under the title of Hanson v. Denckla, the Opinion of the Court being authored by its Chief Justice, Earl Warren.

Since Elizabeth Donner Hanson, lost in the Florida Supreme Court she, individually, and as Executrix of the Will of her mother, Dora Donner, and beneficiaries of Dora’s trust, appealed the Florida Supreme Court’s ruling. The U.S. Supreme Court determined that it was without jurisdiction of that appeal, and dismissed it because the appeal was predicated upon the contention that the Florida statute providing for constructive service violated the federal constitution, but in the Florida state court the Appellants (beneficiaries), did not object that the statute as applied was invalid, rather they argued that the state court’s exercise of jurisdiction in the circumstances of the case deprived them of federal constitutional rights. Hence the Court was without jurisdiction to hear the appeal, and dismissed it. Though treating the appellate papers as constituting a Petition for a Writ of Certiorari, granted the Petition.

Since Dora Stewart Lewis, an adoptive granddaughter of Dora Donner lost in the Delaware court, her fellow-provocateur, Katherine N.R. Denckla, an adopted daughter of Dora Donner filed a Petition for Writ of Certiorari in the U.S. Supreme Court for herself, Katherine Denckla, and two other adoptive granddaughters of Dora Donner, to wit Mary Washington Stewart Borie and Paula Browning Denckla, against daughter Elizabeth Donner Hanson and the beneficiaries of Dora’s trust. Chief Justice Warren began his Opinion with a detailed recitation of the facts. Being of a staunch Scandinavian background, he couldn’t resist observing that even though Katherine Denckla and Dorothy Stewart, had received half a million dollars each

\[\text{239} \] 354 U.S. 919 (1957)
\[\text{240} \] 354 U.S. 920 (1957).
\[\text{241} \] See Lewis, 128 A.2d at 825.
\[\text{242} \] 357 U.S. 235 (1958). It was argued before the Court on March 10th and 11th, 1958.
\[\text{245} \] Hanson, 357 U.S. at 244-246. Technically, therefore, perhaps the title of the case should have been Denckla v. Hanson, rather than the reverse, as it is known.
\[\text{246} \] Id. 238-244. He made one mistake. He said that the Delaware’s Chancellor made his ruling on Jan. 13, 1956, whereas in fact that ruling was made on Dec. 28, 1955.
from the residue of Dora’s estate, they still sought to split $400,000 from the same source.\footnote{247}

The issues before this Court were stated as follows:\footnote{248}

\begin{itemize}
  \item [W]hether Florida erred in holding that it had jurisdiction over non-resident defendants.\footnote{249}
  \item [W]hether Delaware erred in refusing full faith and credit to the Florida decree.\footnote{250}
\end{itemize}

The following matter to which the Chief Justice devoted his attention was the reason for dismissing the appeal by Elizabeth Hanson from the Florida court, which he entitled “The Florida Appeal.”\footnote{251}

The appeal\footnote{252} was predicated upon the contention that the Florida statute providing for constructive service violated the federal constitution, but in the Florida state court the Appellants (beneficiaries),\footnote{253} did not object that the statute as applied was invalid, rather they argued that the state court’s exercise of jurisdiction in the circumstances of the case deprived them of federal constitutional rights. Hence the Court was without jurisdiction to hear the appeal, and dismissed it.\footnote{254} The Appellants complain that Florida judgment is offensive to the due process Clause of the Fourteenth Amendment because the court lacked jurisdiction. The Appellants did not complain about a lack of notice to the absent parties, and the court apparently the Court did not believe that this was the problem with the lower court’s judgment. The defect with the Florida court’s ruling was the lack of “AFFILIATING CIRCUMSTANCES WITHOUT [sic]\footnote{255} which the courts of a state MAY NOT [sic]\footnote{256} enter a judgment imposing obligations on persons (jurisdiction \textit{in personam}) or affecting interests in property (jurisdiction \textit{in rem} or \textit{quasi in rem}).”\footnote{257} Unfortunately the Chief Justice did not elucidate on that explanation, and his only citation of authority was a description of \textit{in personam}, \textit{in rem}, and \textit{quasi in rem} judgments.\footnote{258}

With the appeal from the Florida court now a certiorari proceeding, the Chief Justice, dealt with what he viewed as the first issue, i.e. whether the Florida court had jurisdiction over the non-resident defendants, and a sub-issue - could it have prevailed by

\begin{itemize}
  \item \footnote{247} Hanson, 357 U.S. at 240.
  \item \footnote{248} \textit{Id.} at 243. The Court stated that it was not required to consider whether Florida was bound to give full faith and credit to the decree of the Delaware Chancellor, since the question was not seasonably presented to the Florida court. \textit{Id} at 243, 244.
  \item \footnote{249} This issue was, no doubt, raised by the Hanson Certiorari section of the case.
  \item \footnote{250} This issue was, no doubt, raised by the Denckla Certiorari section of the case.
  \item \footnote{251} Hanson, 357 U.S. at 244-246.
  \item \footnote{252} As stated above (see supra text between 242, and 243) the appeal was now considered Petition for Certuoari).
  \item \footnote{253} Now technically “Petitioners.”\footnote{254} \textit{See supra} text between notes 242 and 243.
  \item \footnote{255} Hanson, 357 U.S. at 246. Another error appears at page 242 where the date of a decree of the Delaware Chancellor (Herrmann) was referred to as Jan. 13, 1956, whereas the actual date was Dec. 28, 1955.
  \item \footnote{256} \textit{Id.}
  \item \footnote{257} \textit{Id.} at 245, 246.
  \item \footnote{258} \textit{Id.} at 246, n. 12.
concluding that it had *in rem* jurisdiction over the trust? The Florida Supreme Court thought that its trial court need not have the presence of subject property before it in order to have jurisdiction to construe the trust. Authority over the probate and construction of the Will, and of the trust’s settler, was assumed to be sufficient to give the trial court the power to construe the settlor’s trust. Chief Justice Warren countered this position with the following words:

Whatever the efficacy of a so-called ‘in rem’ jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. . . . The maxim is no less suspect when the domicile is that of a decedent.259

Warren concluded his attention to *in rem* judgments with giving credence to *Pennoyer v. Neff*260 and then stating:

Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction. . . Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained.261

Still addressing the Florida “Appeal,” the Court next considered the Appellee Denckla’s stronger argument for upholding the Florida judgment – *in personam* jurisdiction.

Warren again returned to *Pennoyer v. Neff*.262 He observed that “progress in communications and transportation has made the defense in a foreign tribunal less burdensome.263 Modern adjustment have lessened, to some extent the strength of *Pennoyer*, “[b]ut it is a mistake to assume that this trends heralds the eventual demise of all restrictions on personal jurisdiction in state courts.”264 He then examined the lack of contacts which Florida had with the subject trust.265

The exercise of the Powers of Appointment in Florida does not remedy the

259 *Id.* at 248, 249.
260 95 U.S. 714 (1877).
261 *Hanson*, 357 U.S. at 250.
262 See *supra*, text accompanying note 260.
263 *Hanson*, 357 U.S. at 251.
264 *Id.*
265 *Id* at 252, 253.
defects present in this case, because “it is the validity of the trust, not the appointment with which we are concerned.” The contact with Florida in this case might have some weight were this a “choice-of-law” case, but it is not.

Warren then referred to purposeful availment, of which there was none on the part of the settler of the trust. He said that the argument of the Denckla people that the domicile of the settler and most of the appointees and beneficiaries being in Florida, gives the courts of that state the right to exercise personal jurisdiction over non-resident trustees is a “nonsequitur.”

Chief Justice Warren concluded his refutation of the Dencklas’ position to the effect that the Florida court could proceed without jurisdiction over the trust’s trustee, with the following words:

Because it sustained jurisdiction over the nonresident trustees, the Florida Supreme Court found it unnecessary to determine whether Florida law made those defendants indispensable parties in the circumstances of this case. Our conclusion that Florida was without jurisdiction over the Delaware trustee, or over the trust corpus held in that State, requires that we make that determination in the first instance. As we have noted earlier, the Florida Supreme Court has repeatedly held that a trustee is an indispensable party without whom a Florida court has no power to adjudicate controversies affecting the validity of a trust. For that reason the Florida judgment must be reversed not only as to the nonresident trustees but also as to appellants, over whom the Florida court admittedly had jurisdiction.

Chief Justice Warren did not give as much attention to “The Delaware Certiorari” as he did to “The Florida Appeal.” Under the later category he alluded to the fact that “Delaware is under no obligation to give full faith and credit to a Florida judgment invalid in Florida because offensive to the Due Process Clause of the Fourteenth Amendment.” As to why adjudication of the case should not be deferred until the Florida court had an opportunity to determine whether a trustee is an indispensable party in the instant circumstances, as was appropriate in a prior decision of this Court, he said that there was no need to do so, as Florida courts had already announced its position in that regard. It is, moreover, the function of the U.S. Supreme Court to determine whether judgments are consistent with the Federal Constitution. Were the Court to withhold affirmance of a correct Delaware judgment until Florida has time to...

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266 Id. at 253.
267 Id.
268 Id.
269 Id. at 254.
270 Id. at 254, 255.
271 Pages 255, 256.
272 Pages 244-255.
273 Hanson, 357 U.S. at 255.
274 Id. at 255, 256.
rule on “another question” would be “participating in litigation instead of adjudicating its outcome.”

The Court affirmed the Delaware judgment and reversed the Florida judgment, remanding it for proceedings not inconsistent with the Court’s Opinion.

Justice Hugo L. Black wrote a dissenting Opinion which was joined in by Justices Harold H. Burton and William J. Brennan, Jr. He stressed Dora’s strong contacts with Florida, and that she, in fact, administered the trust; stating that the Adviser was “little more than a custodian.” He saw no signs that the Due Process Clause had been violated - not only did the settler live in Florida, but also so did the major beneficiaries.

While the issue of whether the law of one state may be used by another, and the question of whether one state’s jurisdiction to enter a judgment which affects another are different, the two “are often closely related.” It is incorrect to say that it would be more convenient to try the issues in this case in a Delaware court than in a Florida court, when none of the beneficiaries or legatees has ever resided in Delaware. Construction of a Will and construction of a trust are similar procedures. The strictures of Pennoyer v. Neff which might have required personal service upon the trustees, have been constantly relaxed, with the “increasing ease and rapidity of communication.” Mullane v. Central Hanover Bank & Trust Co., a case usually cited for Justice Jackson’s description of notice, was cited by Justice Black, because a judgment in personam was entered in favor of a trustee against non-resident beneficiaries, who had not been served with process in that state. Before lending his support to the requested decision to defer ruling on this case until Florida courts had a chance to decide whether the trustee is an indispensable party under the facts of this case, he acknowledged that this was not a case in rem, because the litigation concerned the personal liability of the trustee and not the trust property. He was, however, in favor of deferring ruling.

Justice William O. Douglas, in dissent made four points. First he took the position that the Power of Appointment, under this trust, being integrated so much with Dora’s Will, that its construction and interpretation was virtually identical to the construction and interpretation of the Will, itself. Dora, a domiciliary of

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275 Id. at 256.
276 Id.
277 See supra text accompanying notes 37-40.
278 Hanson, 357 U.S. at 257.
279 Id. at 258.
280 Id.
281 Id. at 259 n.3.
282 Id. at 259.
283 See supra note 260.
284 Hanson, 357 U.S. at 260.
286 It would seem that the reverse of that case had been sufficiently discussed by the court in this case, to emphasize the difference
287 Hanson, 357 U.S. at 261, 262.
288 Id. at 261, n.5.
289 Id. 261, 262.
290 Id. at 262.
Florida, really administered the trust – the trustee was “simply a stakeholder.” He cautioned that we must remember that this suit was not one attempting to impose liability on a non-resident defendant. Douglas’ final point being that Dora and her trustee worked so closely together, and were in such privity with each other that a judgment affecting Dora was no different than a judgment against the trustee.

Oct. 13, 1958 - The U.S. Supreme Court denies the Petition for Rehearing. See Hanson v Denckla.

Nov. 21, 1958 The Florida Supreme Court awards court costs in favor of Hanson. The amount was $1,243.92. See Hanson v. Denckla.

Au Revoir

Au revoir, Dora and William. You were good people. You gave birth to five children – Robert, Joseph, William, Jr., Elizabeth and Dora. Two of them, Joseph and William, Jr., died at an early age; and you adopted two girls – Katherine and Dorothy. You treated all of your children lovingly, and provided for their well being. William, you created foundations for the prevention of the spread of cancer, when son Joseph died of that disease. Dora you kept in tack you family, still of five members. Your daughter, Elizabeth, helped you in that noble endeavor. For the benefit of your family members you and William established trusts. Due to controversy concerning those two trusts, unintentional on the part of either of you, the courts of this country have produced two of the most authoritative, and lasting bodies of trust law in the jurisprudence of this country --- Wilmington Trust Co. v. Wilmington Trust Co. and Hanson v Denckla. Wherever you are, may you rest in peace. We will remember you.

An Epilogue

In 1945, William Donner formed the Donner Foundation, Incorporated, to continue the research of cancer, in memory of his son, Joseph, who died of cancer on Nov. 9, 1929. On October 27, 1961, after William’s death the name of that foundation was changed to the Independence Foundation. Disagreements between the Donner family and others arose after Mr. Donner’s death as to the operation of the Independence Foundation. An agreement was reached between the two factions (including Meses. Denckla and Stewart, - though not in writing as to them), to the effect that the best method of avoiding the arguments would be to establish a new foundation, to be operated

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291 Id. at 263.
292 Id.
293 Id. at 264.
295 106 So. 2d 549 (Fla. 1958).
296 See supra text accompanying notes 3--8 concerning Mr. Donner’s efforts in that field.
297 Even though a Foundation with that name exists today, it is not the same entity as the above referred to.
by the Donners, separately. In 1961 one was formed, and named the William H. Donner Foundation, Inc. On October 16, 1961 The Board of Directors of Independence Foundation approved of a grant of 55% of the assets of Independence Foundation, amounting to $25,000,000 for the purpose of funding the new entity. Katherine N.R. Denckla, and her sister, Dorothy Stewart, members of Independence Foundation, filed Denckla v. Independence Corporation, an action in the Chancery Court of Delaware for the purpose of preventing the grant from being put into effect.

May 22, 1962 - Vice Chancellor Short Wrote the First Opinion in Ms. Denckla’s Case

The Denckla-Stewart case, Denckla v. Independence Foundation, was assigned to Vice Chancellor Isaac D. (“Ike”) Short. Independence was named as a party, and though two officers/directors were also named, neither was served with process. On Nov. 17, 1961 Ms. Denckla and Ms. Stewart obtained from the Chancellor of the court, an order, enjoining the defendant Independence from taking any action in pursuit of the Board of Directors’ action. On Dec. 1, 1961 Independence filed a motion to dismiss the Complaint, ruling on which was deferred. On Dec. 13, 1961 by stipulation, approved by the court, certain members of Independence, who were also organizers of the William H. Donner Foundation, Inc. were permitted to intervene. The intervenors petitioned to vacate the Restraining Order, which also was not ruled upon immediately.

Chancellor Short, after going into the history of the foundations, considered whether Independence had the power to make the grant. Short alluded to the fact that the object of the grantor and the grantee were virtually identical. The plaintiffs, no doubt due to their experience with trusts, argued that the powers and limitation of charitable foundations were analogous to those of the trustees of charitable trusts. Vice Chancellor Short refused to consider that argument, observing “there is doubt” as to its authority. Even though Meses. Denckla and Stewart characterized Independence as an “almoner of funds”, the court disagreed and defined it as “an endowed foundation charged by the mandate of its charter with using and applying its funds exclusively in charitable activities for the welfare of mankind.” The court found that in addition to its general powers, Independence was granted certain specific non-conflicting powers. The court countered the plaintiffs’ argument to the effect that by Independence making this grant it had “abdicated” its power to make grants, with a revisit to the point that the purpose of

299 Id.
300 181 A. 2d 78 (Del. Ch. 1962).
301 Perhaps because the foundation was incorporated in that state. Dorothy Stewart does not appear to have participated in this action. See Denckla v. Maes, 313 F. Supp 515, 519 (E.D. Pa. 1970). Perhaps this inaction was due to her “incompetency,” - of undiscovered disability. See Hanson v. Wilmington Trust, 119 A.2d 901, 904, (Del. Ch. 1955), requiring a Guardian of her property. Id. at 905 and Lewis v. Hanson, 128 A.2d 819 Del. 1957).
302 181 A.2d 78 (Del. Ch. 1962).
303 Needless to say the officers and directors took no action in the litigation.
304 The intervenors were Robert Donner, Sr., Robert Donner, Jr., Margaret Donner Spencer, Joseph W. Donner, Carroll Donner Annan, William Donner Roosevelt, and Curtin Winsor, Jr. They were all family members of William and Dora Donner. See Denckla v. Independence Foundation, 193 A.2d at 540, 541.
305 Denckla, 181 A. 2d at 81.
306 Id. at 83.
307 An almoner of funds is a person who distributes alms to people in need, such as a social worker.
308 Denckla, 181 A.2d at 83.
309 Id. at 84.
the grant by Independence to The William H. Donner Foundation, Inc. was simply to carry on the same objectives.\textsuperscript{310} The court held that by its documents of powers and limitations Independence’s Board of Directors had the power to make the grant without membership approval.\textsuperscript{311} The court’s last function was to dissolve and vacate the November 17, 1961 order enjoining the completion of the grant.\textsuperscript{312}

While the Vice Chancellor does not mention it, we are informed by Justice Wolcott in the Delaware Supreme Court’s review, in *Denckla v. Independence Foundation*\textsuperscript{313} of the Vice Chancellor’s decision, of an attempt to amend her Complaint by Ms. Denckla, without her co-plaintiff joining her.\textsuperscript{314} In an extended recitation of the Complaint the proposed Amended Complaint alleged that defendants, officers of Independence, Maes and Barbieri, entered into a scheme to take over Independence Foundation, and also that the alleged “grant” was not a grant, but a settlement between the Donner family group and the non-family group in order to prevent the commencement of litigation by the Donner family.\textsuperscript{315} In addition Katherine Denckla alleged that she personally suffered a “substantial loss” by the machinations of Maes and Barbieri.\textsuperscript{316} Vice Chancellor Short denied the motion to file the Amended Complaint, on the ground, *inter alia*, it was an attempt to charge two defendants who had never been served with process nor made an appearance in the case.\textsuperscript{317}

*July 30, 1963 – Justice Wolcott wrote the Second Opinion in Ms. Denckla’s Cases*

Justice Daniel Fooks Wolcott, who wrote the Opinion of the Delaware Supreme Court in *Lewis v. Hanson*\textsuperscript{318} wrote the Opinion of the same Supreme Court in *Denckla v. Independence Foundation*\textsuperscript{319} which reviewed the Opinion of Vice Chancellor Short in the Court of Chancery. Katherine Denckla took this appeal without the joinder of Dorothy Stewart.\textsuperscript{320} Reference to a few additional facts were made by Justice Wolcott, such as one faction of the disputants of the Independent’s group consisted largely of the two adopted daughters (Denckla and Stewart), while the other faction consisted largely of lineal descendants of William H. Donner.\textsuperscript{321} During the time that the controversy existed between the family members of Mr. Donner and the non-family members, the Board of Directors of Independence and some of its members by a By-Laws amendment made Meses Denckla and Stewart and their lineal descendents, upon coming of age, members of Independence.\textsuperscript{322} Katherine Denckla claimed that as a result of By-Laws changes non-family members of Independence are in control, despite what Mr. Donner would have wanted. Justice Wolcott observed, cogently, that despite such protestation of Ms. Denckla

\textsuperscript{310} *Id.* at 85.

\textsuperscript{311} *Id.*

\textsuperscript{312} *Id.* at 86.

\textsuperscript{313} 193 A. 2d 538 (Del. 1963).

\textsuperscript{314} See *Id.* at 544.

\textsuperscript{315} *Id.* at 541.

\textsuperscript{316} *Id.* at 544.

\textsuperscript{317} *Id.* at 544, 545.

\textsuperscript{318} See supra text accompanying notes 194--238.

\textsuperscript{319} *Denckla*, 193 A. 2d at 538.

\textsuperscript{320} *Id.* at 539.

\textsuperscript{321} *Id.* at 540.

\textsuperscript{322} *Id.*
she “sided with the so-called non-family faction against the family faction.”323 Upon the funding of the William H. Donner Foundation the Donner family members of Independence resigned their membership and became members of, and in control of, the new Foundation. Ms. Denckla complained that such move left her and her sister in a minority position in Independence, with no right of control.324

The court responded to the Denckla claim that a charitable foundation must be judged by charitable trust law. He acknowledged that while “in a loose sense” the assets of a foundation are trust funds, the “extent and measure” of that trust with respect to assets given “outright” to it are not governed by general trust law, but by the terms of the Certificate of Incorporation and By-Laws of the foundation,325 as per the Delaware General Corporation law.326 A review of the Certificate of Incorporation of Independence revealed that the “purpose of [the foundation] is to achieve its broad object of promoting the well-being of mankind and the alleviating of human suffering.”327 The By-Laws gives the members of Independence only certain restricted powers – to elect new members and to expel present members.328 Independence is far from an “almonger of funds.”329 As to the size of the grant, the judge opined that such is “at most” a question to be left to the judgment of Independence’s Board of Directors.330

As to the Vice Chancellor’s denial of permission to Denckla to file an Amended Complaint, Justice Wolcott gave five technical, procedural, reasons for his affirmance.331

May 21, 1970 – Judge Troutman wrote the Third Opinion in Katherine Denckla’s Case

The third, and apparently last, attempt of Katherine N.R. Denckla to obtain some money from the Donner family was a derivative action which, in 1970, she filed in the U.S. District Court in and for the Eastern District of Pennsylvania, against Independence Foundation and some of its officers, and Directors, and/or members, Robert Maes, Frederick H. Donner, Edgar Scott, and Viola MacInnis, resulting in Denckla v. Maes.332 After a recitation of the facts333 the first matter considered by Judge Troutman was the defendants’ claim that res judicata of the Delaware proceeding prevented the U.S. court in Pennsylvania from further reference to this action. He observed that “[t]he doctrine of res judicata rests on public policy to put an end to litigation and to eliminate the resulting hardship to individuals should they be vexed twice for the same cause,”334 The court next considered the requirement that there be identity of parties in the two actions. Troutman said that the same individuals need not be involved. It is sufficient if the parties in the first action be in privity with the parties on the same side of the second action.335 He found that the subject matter in both actions was control of

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323 Id.
324 Id.
325 Id. at 541.
326 Id. at 542.
327 Id. at 543.
328 Id.
329 Id. at 544.
330 Id.
331 Id. at 545.
333 Id. 517-520.
334 Id. at 520.
335 Id. at 520, 521.
Independence Foundation. He next touched upon Ms. Denckla’s argument that it is not solely the subject-matter which must be identical, but the causes of action. With regard to causes of action what must be considered is a comparison of “the ultimate and controlling issues” which were before the first court and which are being considered in this action. The court repeated that “[t]he gist of both the Delaware action and this second action is control of this Foundation.”

It is not only the issues actually adjudicated in the Delaware action which must be considered, but also those which “might have been raised and passed on.” The acts which the plaintiff contends were taken in the first action, might have been different from the acts which the plaintiff contends were taken in this case. That does not matter. Adjudication of the first set of acts bars adjudication of the second set of acts as long as the subject matter of the two actions are identical. Of course the plaintiff may have interjected some acts in the second action that were not considered in the first action, but again, as long as the subject matter of both actions are identical, the splitting of details does not differentiate the actions. The plaintiff may not try to split her cause of action, by trying one phase of her action in one court, and later try another phase in another court.

With regard to defendants’ motion for summary judgment Judge Troutman said that the plaintiff, was given an opportunity to refute, by affidavit, factual matter raised in detail by the Defendants, but has refused to do so. Such would have raised issues which might defeat a motion for summary judgment had she attacked those allegations of the opposing party. Instead she has asked the court to speculate and, without any proof, draw unfavorable inferences to the defendants’ motives of acquiring control of Independence. He wrote, in summary of his position, the following:

‘unresolved issues of fact’ may not be created or manufactured by drawing inferences from general conclusions which are not factually supported. To do so would render all cases unsuitable for summary judgment, and for all practical purposes, nullify the effect of Rule 56.

Au Revoir

Au revoir, Katherine and Dorothy. We didn’t know that you were adopted daughters of the wonderful Donner family until that was revealed in Denckla v. Independence Foundation, and Denckla v. Maes. We hope that you both appreciated the Donners’ generosity to you. though your avarice would not be proof of that conclusion. Dorothy, your having backed off in the Independence Foundation and Maes cases, was commendable. The law denied Katherine’s several attempts to gain more money from your adopted parents’ family. Those were good decisions. They published a lot of good law concerning charitable

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336 Id. 521, 522.
337 Id. at 522.
338 Id.
339 Id. at 522, 523.
340 Id. at 523.
341 Id. at 524.
342 See Denckla, 193 A. 2d at 539, 540.
343 See Denckla, 313 F. Supp at 517-519.
grants, *res judicata*, and motions for summary judgment. We have no idea of where either of you two are now, but you have our sincere hope that you have enough money with which to be comfortable.