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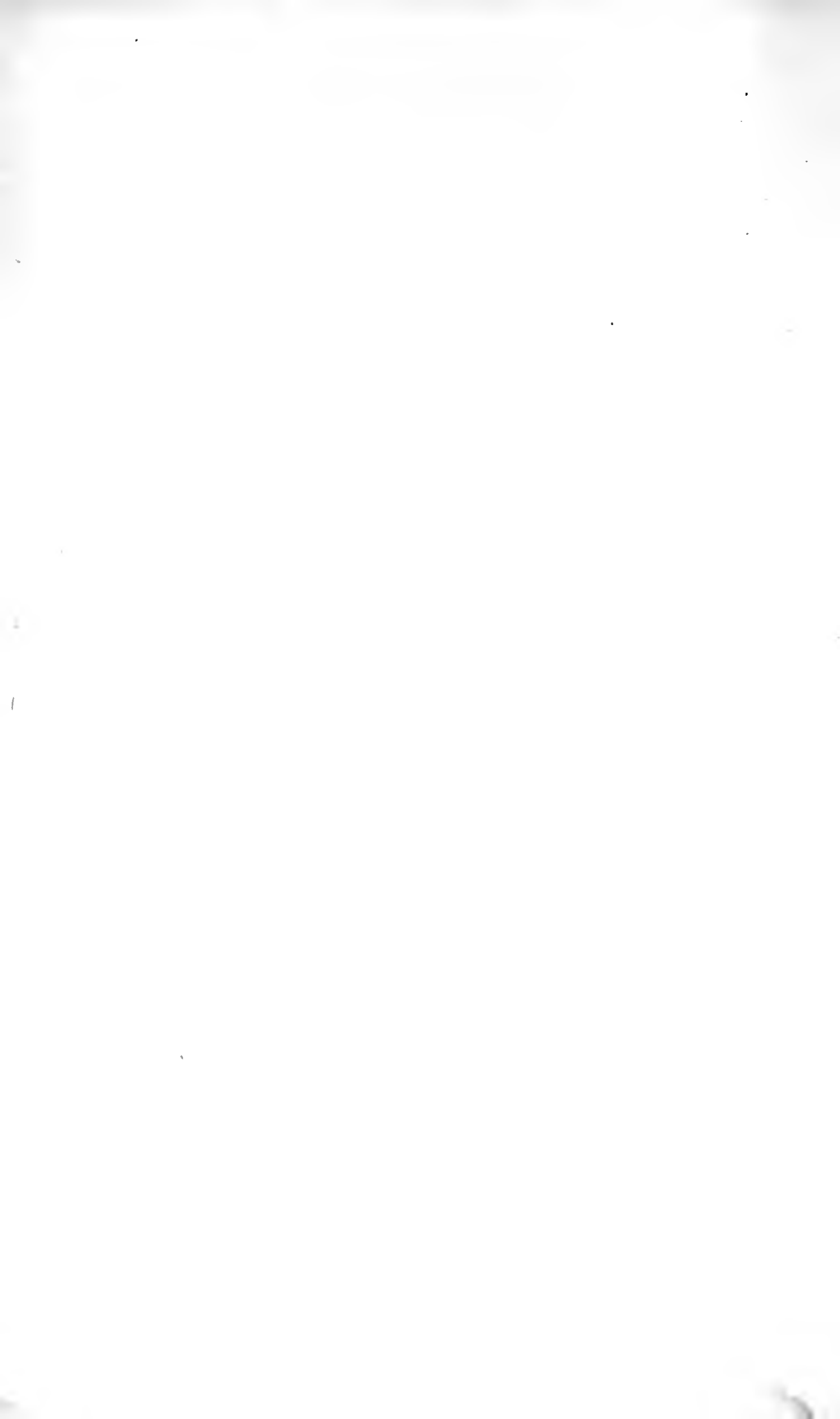

California. Reports. Superior Court (San Francisco)

REPORTS

OF

DECISIONS IN PROBATE

BY

JAMES V. COFFEY,
JUDGE OF THE SUPERIOR COURT,

IN AND FOR THE

CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

REPORTED AND ANNOTATED BY

PETER V. ROSS AND JEREMIAH V. COFFEY,
Of the San Francisco Bar.

VOLUME ONE.

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BY

JEREMIAH VINCENT COFFEY.

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PREFACE.

Probate law, under the ancient English practice, was administered in three different tribunals, some matters being cognizable by the common-law courts, some by the ecclesiastical courts, and still others by the chancery courts. This obviously awkward system never obtained in all its fullness in America, for the ecclesiastical courts did not secure a foothold on our soil. But courts of equity, in the early history of American jurisprudence, assumed to exercise probate powers to a very considerable extent, and in many states of the Union they still appear to retain some vestige of this authority. The general tendency, however, has been to concentrate all probate powers in a single, common-law tribunal, saving to equity only a revisory function to grant relief from orders and decrees in probate in case of fraud, mistake, or other ground of equitable intervention; and this system, whereby one court has exclusive original jurisdiction in all matters touching the administration of estates of deceased and incompetent persons, and also the guardianship of minors and incompetents, now generally prevails in the western commonwealths.

The California constitution of 1849 clothed the county judge in each county with probate powers, and from time to time thereafter the legislature enacted statutes regulating the practice in probate. By an amendment to the constitution in 1862, and an enactment of the legislature the year following, a separate probate court was created in San Francisco, which superseded the jurisdiction of the county judge in probate proceedings in that city and county. With this single exception the county judges throughout the state continued to exercise probate functions until the constitution of 1879 went into operation.

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By the constitution of 1879, the probate and county courts were abolished, and jurisdiction of all probate matters was vested in the superior courts throughout the state. This constitution went into effect on the first day of January, 1880. In San Francisco it provided for twelve judges and twelve departments of the superior court; and the original apportionment of judicial business among these departments was as follows: To departments one to eight were assigned ordinary civil causes; to department nine, probate matters; to department ten, insolvency and special proceedings; and to departments eleven and twelve, criminal cases. This apportionment has been modified more or less from time to time; but not so far as to encroach upon department nine as a probate forum. While a considerable amount of probate business, especially in recent years, has been assigned to other departments, practically no business other than probate has ever been assigned to department nine. Therefore this department has now for nearly thirty years been distinctly the probate court in the city and county of San Francisco.

In the formative period of this department it was argued, and with no little plausibility, that a judge of the superior court sitting in probate could wield the powers of a court of general jurisdiction; that he could, for example, try disputed titles to property, and administer general equitable remedies. But it has long since become settled doctrine that the probate jurisdiction of the superior court is a jurisdiction separate and distinct from its jurisdiction in ordinary civil actions. Hence, in an action of ejectment by an administrator, the superior court has no power to set aside the land in controversy as a probate homestead; this can be done only by the superior court while sitting as a court of probate. On the other hand, when acting as a probate court, the superior court ordinarily cannot determine disputes involving the title to real estate. True, a superior judge, while sitting in probate, may properly inquire into the real ownership of property under some circumstances, as when it is necessary to determine whether it shall be inventoried as part of an estate in process of administration; but the inquiry is not pursued

for the purpose finally to determine title. And he may exercise equity powers incidentally necessary to a complete administration of the estate, but he does not, when so doing, exercise the general jurisdiction of a court of chancery. Hence the superior court, on its probate side, is, in a sense, a court of limited jurisdiction, somewhat the same as was the probate court which it has superseded. But of matters properly cognizable in the probate forum it has exclusive original jurisdiction. It shares none of this jurisdiction with any other tribunal as does the probate court of some states, and even as formerly did the probate court of California; but administers, in the first instance, all matters touching the administration of the estates of deceased persons, and all matters pertaining to the guardianship of the estates and persons of minors and incompetents. Moreover, the procedure on the probate side of the superior court, except so far as expressly declared otherwise by statute, is essentially the same as that of the superior court in trying ordinary civil actions; and the orders and decrees of the superior court, while sitting in probate, are entitled to the same favorable intendments and presumptions commonly accorded the orders and decrees of courts of general jurisdiction. It is therefore apparent that the probate court in California is not a court of limited jurisdiction, in the proper sense of that term, notwithstanding it is often so styled. Neither is it a statutory tribunal. It derives its authority from the constitution. The proceedings in probate, however, are purely statutory; and the rule of the statutes, in so far as they furnish any, must be followed before resorting for guidance to the principles of the common law.

After the probate court of San Francisco came into existence in 1863, as indicated in preceding paragraphs, Hon. Maurice C. Blake became the first probate judge, acting as such from January 1, 1864, to December 31, 1867. Hon. Selden S. Wright succeeded him, holding the office until December 31, 1871. From January 1, 1872, until December 31, 1879, Hon. Milton H. Myrick presided over the court.

When the superior court was created by the constitution of 1879, the Hon. John F. Finn was the first judge to preside in department nine, the probate department. This he

did from January 1, 1880, to September 1, 1883, when he exchanged departments with the Hon. James V. Coffey (then presiding in department three), and the latter has presided continuously in department nine to the present time. Judge Coffey has therefore presided over the probate department of the superior court in San Francisco for over a quarter of a century.

Naturally Judge Coffey's decisions have been eagerly sought by members of the bar, and consequently many of them have, in one form or another, been published from time to time. But nothing like a complete publication of his works has been attempted until now, when his opinions are sufficient in number to fill not less than five volumes, they will be given to the world in full.

It has been thought that the practical utility of these reports would be increased by a system of annotation. Therefore the editor has appended notes, some of them of quite an extended character, to many of the decisions. It will of course be understood that Judge Coffey is in no wise responsible for any statement in these annotations, and that they have not the authority of judicial pronouncement.

P. V. ROSS.

San Francisco, December, 1908.

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COFFEY'S

PROBATE DECISIONS.

Estate of N. W. CHITTENDEN, Deceased.

[No. 4,783; decided February 24, 1887.]

Executors—Right to Counsel Fees.—The trust imposed upon an executor makes the probate of the will a part of his duty, for which he may employ attorneys and charge their fees against the estate.

Executors.—The Fees of Attorneys Employed by an Executor in probating the will, being a charge against the testator's estate, can be fixed only by the probate court.

Executors—Right to Counsel Fees in Procuring Letters.—Counsel fees incurred by an executor in applying for letters are a proper charge against the estate, notwithstanding he renounces his trust before letters are issued.

Executors.—There is a Distinction Between Executors and Administrators. ·An executor is appointed by the will to carry out its provisions and the wishes of the testator, who burdens the executor with the trusts created by the will and charges his estate with the expenses necessary to carry out his views as expressed in his will; but an administrator has no trust imposed upon him by the decedent, and he looks solely to the statute for his duties, authority, and compensation.

Application for an allowance to petitioners for services performed as attorneys for an executor, in filing a petition for the probate of the will, and proceedings in connection therewith and with the probate of the instrument. The executor did not qualify for his trust, but renounced his right to letters upon or before the hearing of the petition; and this was a direct application to the court by the attorneys so employed by him. The administrator with the will annexed de-

murred to the application, and the following decision was given on the demurrer.

M. S. Eisner, for the demurrer.

John M. Burnett, for the application.

COFFEY, J. This is an application on behalf of William and George Leviston for counsel fees for services rendered in probating the will of the testator.

The demurrer should be overruled. This case is to be distinguished from the Estate of Simmons (43 Cal. 548), decided in April, 1872, which applies only to an application for letters of administration, and refers to a class of cases where one is seeking for his own gain to exercise a privilege.

There is a distinction between executors and administrators. The executor is appointed by the will to carry out its provisions, under the supervision of the court, and the trust is conferred on him by that instrument. It is the duty of an executor to protect the beneficiaries named in the will, and this he can do in no other way than by offering it for probate. If he do not renounce the trust he is bound to prove the will, and is not called upon to do it at his own expense. To do so properly he is necessarily obliged to employ counsel, and a counsel fee in that behalf is a proper charge against the estate.

The probate of the will by the executor is the performance of a duty and the fulfillment of a trust, and the payment of attorney's fees just as necessary as that of clerk's fees.

This being a charge against the estate, the judge sitting in this department alone has power to fix the fees: Gurnee v. Maloney, 38 Cal. 87, 99 Am. Dec. 352; Estate of Page, 57 Cal. 241.

The executor is entitled to attorney's fees on probate of will or on contest of same: Abila v. Burnett, 33 Cal. 659; Estate of Miner, 46 Cal. 564.

The executor only carries out the wish and will of the testator, who has the absolute power to make a will and to dispose of his property as he may choose. The testator, by

the exercise of that power, burdens the executor with the trusts created, and impliedly charges his own estate with all the costs and expenses necessary to carry out his views as exposed in his last will and testament. To hold otherwise would practically nullify the statute of wills, and prevent the testator from disposing of his property as he may elect, or from appointing a disinterested trustee to carry out his views.

Certain legatees and devisees might wish the will enforced, but conflicting interests and contentions might render the assumption of the trust too burdensome.

No one will ever assume the arduous labors and responsibilities of the office of executor, when he himself must pay from his own means for having his muniment of title assured, when nothing of benefit can accrue to him, even in case of success.

The privilege of administration is different; there the intestate creates no trust to be enforced, and burdens his estate with no conditions; he expresses no wish in favor of particular objects, but the party who assumes the privilege is any one of a large number, and is directly interested, outside of his commissions, in taking charge of the estate; the estate is to be divided, and he is a party receiving a share. Further, his duties are not as onerous; he has no document limiting his powers and authority; he has no trust imposed upon him by the will of the intestate; he looks solely to the statute. The duties of an executor are regulated not only by the law but by the will also; he, as executor, has no interest, beyond his commissions, to stimulate his exertions; as executor, he can claim none of the estate, it belongs to others. The compensation of an executor is the same as that of an administrator, but the expenses of the former are necessarily more, and his labors may be harder. He cannot probate the will himself, he must employ counsel. No such charge is imposed upon the administrator. There seems, therefore, to be a clear distinction between the two cases.

Demurrer overruled; ten days to answer.

The Rule that an Estate cannot be charged with the fees of an attorney for procuring letters of administration, which is announced in Estate of Simmons, 43 Cal. 543, has been followed in Bowman v. Bowman, 27 Nev. 413, 76 Pac. 634; Wilbur v. Wilbur, 17 Wash. 683, 50 Pac. 589. One appointed as administrator, and successfully contesting an appeal from the order appointing him, was denied an allowance for attorney fees and costs in Estate of Barton, 55 Cal. 87.

GUARDIANSHIP OF LAURA DANNEKER, A MINOR.

[No. 4,344; decided March 29, 1887.]

Guardianship—Custody and Welfare of Child.—In appointing a guardian and awarding the custody of a child, the court is bound to do what in its judgment appears to be for the best interest of the child in respect to its temporal, its mental and moral welfare.

Guardianship.—The Affection of a Child for the Person seeking its custody as guardian is always given consideration by the court.

Guardianship—Social and Private Life of Guardian.—It is the duty of the court to inquire into the social relations and private life of a person seeking to be appointed guardian of a child, so far as they may affect the child's welfare.

Evidence—Inference from Failure to Produce.—The failure of a party to produce evidence within his power to produce is a circumstance to be taken against him.

Record.—Matters Prejudicial to the Character of any person will be excluded from the record when not essential to a proper decision.

Henry Vrooman and W. H. Jordan, for the motion.

A. H. Loughborough, contra.

COFFEY, J. This is a motion for a new trial in the matter of Laura Danneker, a minor, wherein, upon the petition of one Teresa Magee, letters were granted to her as guardian of the person of the said minor. Upon the hearing of that petition Jacob Michaelson appeared and opposed the issue of such letters, but the court, upon the conclusion of the testimony, granted the prayer of the petitioner, Teresa Magee. The court is now asked to grant the motion of the respondent to set aside the decision, the findings and the judgment therein, and for a new trial. This motion has

been prosecuted with great earnestness and evident conviction on the part of counsel that the court erred in its original conclusion, and counsel, Mr. Jordan, in presenting his argument, said that such was the gravity of the case to the respondent and to the ward, and so deep the interest felt in its final determination, that he invoked the exercise of some patience on the part of the court in reviewing the evidence in extenso produced at the trial, and in presenting fairly and logically the reasons which, in his judgment, actuated the respondent in making the motion. The counsel arguing the motion for new trial were not the counsel engaged at the time of the hearing of the application, and on that account, as well as out of consideration for their request, I gave them more than the usual time to prepare their statement on motion for new trial and argument; and, notwithstanding the pressure of other matters before the court, have bestowed great care upon the re-examination of the evidence and the written argument of the counsel. In this connection, I may say that this is the uniform habit of this court in all cases of this class. The court endeavors to try these cases with strict reference to the interest of the child. In awarding the custody of a minor, or in appointing a guardian, the court is bound to do what, in its judgment, appears to be for the best interest of the child in respect to its temporal, its mental and moral welfare.

The counsel, at the argument, dwelt with great emphasis upon expressions found in the oral opinion of the court, which he construed favorably to the respondent, and which he says may be presumed to reflect the impressions made upon the mind of the court by the evidence touching the character and fitness of the respondent. Such remarks were inspired by the reluctance of the court to fasten upon the record matter prejudicial to the character of any person, when such matter seems to be not essential to the conclusion. The court does not wish, unnecessarily, to affix a stigma to the character of any person, and would rather suffer injustice itself than perpetrate it, and it was with this view that the court, at the original hearing (when the counsel now appearing for respondent was not present, and had not the op-

portunity of observing all that occurred in court), made a statement which it will now repeat, which statement was predicated upon some injurious publications with regard to the case which were in their nature sensational and outside of the record, and calculated to obstruct the current of justice. The court then said in a kindly manner, as it supposed, that with reference to the respondent the court was not willing that he should be prejudiced by any statement not in the record.

Some statements obtained admission to the newspapers pending the trial of the case, which the court regretted to see, and remarked: "I have no control over newspapers in any way, and, consequently, I cannot control their publications. I do not wish anybody that comes into this courtroom to be prejudiced by circumstances or testimony of any kind that is not relevant to the issue. One of the statements that appeared in one of the papers was that Mr. Michaelson is a gambler. There is not any evidence to support that. It was the statement that was alleged to have been made by the son of the lady who kept the school in Oakland, which was denied by her." The same care which the court exercised in purifying the record from any unnecessary reflection upon the character of the respondent, it tried to maintain in other respects in commenting upon the evidence that was before the court; and, believing it had sufficient ground upon which to found its judgment without reflecting upon the personal character of the respondent, it excluded from view, as far as possible, allusion to anything that may have been testified to or suggested by the evidence derogatory to his reputation with respect to his relations to the opposite sex, or as to the character of some of that sex with whom this child may have been, or was liable to be, brought into contact.

As the result of my re-examination of the evidence and consideration of the argument of the counsel, and of the imputed errors of the court committed during the trial and in the decision, I am constrained to say that I discover no reason why I should change my original conclusion. I may repeat, that, while I have had a great deal of sympathy for the respondent in this case on account of the affection which

the child has shown for him, and the emotion exhibited by the respondent, which state of the mind of the child is always considered by the court in deciding these cases, I cannot see wherein he has established any right to the legal custody of the minor, and that I think that that custody should be in the hands of those from whom it was taken at the time Mrs. Trendal received it. In my opinion, the evidence shows that the minor, Laura Danneker, was at the time of the application a resident of the city and county of San Francisco; that it was and is expedient, and was and is for the interest of the said minor, that a guardian of her person be appointed; that the petitioner, Teresa Magee, was and is a suitable and competent person to be appointed such guardian. The residence of the child was the residence it had at the time it was given to the Sisters, and at the time it was placed in charge of Mrs. Trendal. The obligation which Mrs. Trendal contracted when she received the child from the Sisters was violated when she gave that child to the respondent. Of that fact I can have no doubt. In order to understand this case fully, the whole of the evidence must be considered, and I am of opinion that, taken altogether, the evidence justifies the conclusion of the court.

One point I desire to allude to as considerately as possible, and that is the social relations of respondent during the time that the child was in his custody. The child was received by him without the knowledge, consent or connivance of the Sisters, and in violation of the agreement between them and Mrs. Trendal. At the time the respondent received the child he was not a married man, and his social relations, as the evidence discloses, were not such as are ordained by the sanction of the law. Pending the trial, however, he became a married man. To repeat the language of my former opinion: "Have the changed relations of the respondent altered the law or the duty of the court?" It is no business of the court, so far as he is personally concerned, to deal with his relations to society prior to that time; but it is part of the duty of the court to consider his social relations as they may have affected the child's welfare, and while upon him, as he stands isolated from his child, the court is not called upon

to pronounce judgment, it has a right, in awarding the custody of a child, to inquire into his private life. The child was at the time of the application nine years of age. She was brought into contact, into association, with persons whose habits of life, as developed by the evidence, were such as if not to contaminate her mind or morals, at least to not elevate them, and she certainly should not have been brought into such company. There was another circumstance here, one which necessarily impressed the court very strongly. That is the fact that Mrs. Wasserman, after process was served upon her, and after the testimony had shown that she had sustained some friendly relations with respondent, had absconded. She was a witness for the applicant, Teresa Magee, and summoned here in her behalf. So far as the court could see she left here after she was served with subpoena, and after she had some consultation with respondent. He saw her. It did not transpire what conversation he had with her, but he did see her. The law says that whenever it is in the power of a party to produce evidence, that is a circumstance which shall be taken against him whose fault it is that the evidence is not forthcoming. I could not ignore this fact, since the evidence which she might have given was of importance in this case. It was argued earnestly, and impressed me strongly at the time, that the fact that for so long a period the child was allowed to remain in the custody of the respondent, should be taken against the applicant, Teresa Magee. It was claimed that the Sisters lacked diligence in reclaiming the child. This was explained by the testimony on behalf of the applicant, that the Sisters did not discover where the child was, and that when they did make the discovery they took these proceedings and in good faith prosecuted them to a conclusion.

I have no time to analyze all the evidence, but I am satisfied that from the whole record the conclusion of the court in granting the application of Teresa Magee was correct, and that the motion for a new trial should be denied. If I have erred in this conclusion, as is argued by the counsel for the respondent, I trust he will have ample opportunity of making that error manifest in the appellate tribunal.

In Appointing a Guardian, the court is guided primarily by what appears to be for the best interests of the child, and may award its custody to a person other than the parent if its well-being demands such a course. The wishes of the child, when of sufficient age to form an intelligent preference, although not conclusive on the court, will always be given due consideration; and it is not necessary, in order for the child to enjoy this privilege, that it should have reached the age of fourteen: 2 Ross on Probate Law and Practice, 950-952, citing In re Lundberg, 143 Cal. 402, 77 Pac. 156; Estate of Dellow, 1 Cal. App. 529, 82 Pac. 558; Andrino v. Yates, 12 Idaho, 618, 87 Pac. 787; Russner v. McMillan, 37 Wash. 416, 79 Pac. 988; Willet v. Warren, 34 Wash. 647, 76 Pac. 273; Stapleton v. Poynter, 111 Ky. 264, 98 Am. St. Rep. 411, 62 S. W. 730, 53 L. R. A. 784.

ESTATE OF ALMIRA GIBSON, DECEASED.

[No. 3,211; decided November 2, 1885.]

Charitable Bequest—Necessity of Naming Corporation.—A charitable institution which is made a residuary legatee need not be designated in the will by its corporate name.

Charitable Bequest—Evidence to Identify Beneficiary.—If either from the will itself or from extrinsic evidence the object of a charitable bequest can be ascertained, the court will not invalidate the gift or defeat the donor's intention.

Charitable Bequest—Ascertainment of Beneficiary.—A residuary bequest to "The Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital," is held to have been intended for the "Sisters of Mercy," a corporation embracing, as part of its charitable design, the "Old Ladies' Home."

Executor—Compensation Fixed by Will.—When an estate is solvent, the compensation of the executor, fixed by the will in lieu of statutory commissions, should be paid as "expenses of administration."

Charitable Bequests, so Far as They Exceed One-third the distributable estate, are void.

John M. Burnett, for the applicant.

W. S. Goodfellow, for the opposing heirs.

Selden S. Wright, for absent heirs.

COFFEY, J. The provision of the will under discussion here is in these terms:

"Twelfth.—I give and devise the remainder of all my estate, after the above legacies have been paid, to the Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital."

The "Sisters of Mercy" claims this bequest, alleging that it is an incorporation incorporated March 7, 1868, under the laws of California, and that it has since continued to exist under the laws then in force, having its principal place of business in San Francisco; that among its objects is the care of sick, unprotected and needy persons, and that to carry out said object the corporation, prior to January 1, 1878, organized and instituted the Old Ladies' Home, mentioned and described in the provision herein quoted from the will of Almira Gibson; that the said Old Ladies' Home is and has been conducted by the Sisters of Mercy, corporation, as part of its work, and as one of the means to carry out its object, and that it is carried on and conducted in the building belonging to said corporation; and that the bequest in said will to the "Old Ladies' Home" was intended to go to the corporation for the benefit of said part of its work, namely, the Old Ladies' Home. To this claim the heirs at law respond that the legatee has no legal capacity to take, and that they are entitled to the residue of the estate. The heirs contend that the bequest is direct, not in trust nor for the use of anybody, but it is a direct bequest to an institution, the "Old Ladies' Home," having no capacity to take, nor being a corporation or society, but simply an institution under the charge of the Sisters of Mercy, the petitioners, who are not named in the will.

The will is olographic, and is a careful composition, leaving little or no need of interpretation or construction apart from the provision under review. It remains to be seen whether that provision inadequately describes the object of testator's bounty, or is so expressed as to bar the petitioner corporation from claiming it as the proper channel of bestowing the benefaction on "The Old Ladies' Home." The bequest is in accord with and to carry out the objects of the corporation petitioning here, which had the capacity to take under the law: Estate of Eastman, 60 Cal. 310. So long

as the testator sufficiently indicates the institution or individual intended, that intention should be executed: Jackson v. Phillips, 14 Allen, 539. A charitable institution need not be named by its corporate name: Power v. Cassidy, 79 N. Y. 610, 35 Am. Rep. 550; St. Luke's Home v. Association etc., 52 N. Y. 191, 11 Am. Rep. 897; 2 Redfield on Wills *515, *516.

The intent and purpose of the donor should be accomplished. Of the intention of the testator to make the claimant the object of her bounty, and to contribute of her substance to the charity administered by said "Sisters of Mercy" corporation, there can be no doubt upon the evidence. If either from the will itself or from extrinsic evidence the object of her bounty can be ascertained, the court will not invalidate the provision or defeat the intention of the testatrix. The institution here was described with entire accuracy, and the evidence is conclusive that the testatrix knew that the only conduit of her charity was the corporation claimant. In the N. Y. Inst. for the Blind v. How's Exrs., Denio, J., expressed himself substantially to this effect, remarking also that he did not think it necessary to go over the cases to show how considerable an error might be overlooked or reconciled: "There is much solemn trifling in the old books upon this question": 10 N. Y. 88. I think the case of Lefevre v. Lefevre, 59 N. Y. 434, sustains this view, and I do not consider the Missionary Soc. v. Chapman, 128 Mass. 265, as authority against the petitioner, since it is shown here that the "Old Ladies' Home" is an existing institution forming part of the work of the "Sisters of Mercy" corporation, and one of the means of carrying out its charitable designs, conducted in the building designated in the will, which is part of the premises belonging to petitioner, and that the testatrix intended her bequest to go to said corporation for the benefit of said part of its work, namely, the "Old Ladies' Home."

The conclusion reached as to this point is that the petition of the "Sisters of Mercy" corporation be granted.

2. As to executors' compensation. When the estate is solvent, as in this case, the compensation fixed by the will,

in lieu of statutory commissions, should be paid as "expenses of administration."

3. So far as the charitable bequests exceed one-third of the distributable estate, they must be adjudged void; the bequests in items "Fourth" and "Twelfth" are in favor of charitable institutions.

Subject to the views hereinabove expressed the petition for distribution is granted.

The Principal Case was Affirmed by the supreme court of California in 75 Cal. 329, 17 Pac. 438. For a discussion of the certainty and unity required in the creation of charitable trusts, see the note in 64 Am. St. Rep. 756-772. It is well-understood that a degree of vagueness is allowable in charitable bequests: Snider v. Snider, 70 S. C. 555, 106 Am. St. Rep. 754, 50 S. E. 504; Kemmerer v. Kemmerer, 233 Ill. 627, 121 Am. St. Rep. 600, 84 N. E. 256. A consideration of what are charitable uses or trusts will be found in the note in 63 Am. St. Rep. 248.

ESTATE OF DANIEL T. MURPHY, DECEASED.

[No. 4,313; decided October 23, 1886.]

Account of Executor—Objections to Expense of Lease.—Upon the settlement of the account of an executor containing items of expenditures in executing a lease under authority of the will, which items the heirs contest on the ground of the invalidity of the lease, the court will not consider the lease invalid.

Executor—Renunciation of Compensation.—The fact that an executor at one time entertained and expressed an intention to renounce his commissions does not bar his right to claim them if he has made no renunciation in writing nor made any agreement prior to appointment to waive compensation.

Executor—Liability for Interest on Funds.—An executor who withdraws funds from the capital account of a firm of which the testator was a member, and permits them to lie idle in a bank, is chargeable with interest thereon.

Account of Executor—Expense of Repairs.—Where an executor, as an inducement to the heirs to join with him in the execution of a lease, represents to them that the expense of alterations and fitting up for the tenant will not exceed a certain sum, he cannot be allowed for expenditures beyond that sum.

Account of Executor.—Expenditures that do not Add to the Rental Value of premises to be leased, and injudiciously made, should be disallowed.

Fixtures.—The Question as to What are or are not "Fixtures" depends for its determination upon the circumstances of the construction and intended use of the articles.

Daniel T. Murphy died on June 3, 1885, in the city of New York, of which place he was a resident at the time of his death, leaving an estate in San Francisco, California. He left a will, bearing date May 15, 1883, and two codicils, dated respectively May 18, 1885, and May 23, 1885.

On the eighth day of June, 1885, the will and codicils were filed, together with a petition for their probate, and for the appointment of John T. Doyle and Adam Grant, two of the nominees of the testator, as executors. The applications were granted on June 19, 1885, and the executors named duly qualified.

On November 6, 1885, John T. Doyle tendered his resignation as one of the executors, and, after the settlement of his account, he was discharged; Adam Grant continuing as sole executor.

During his lifetime Mr. Murphy began the erection of a building of great value on the corner of McAllister, Jones and Market streets in San Francisco, the lower floors of which it was intended should be occupied by the firm of Murphy, Grant & Co., a wholesale house of which he was a member, as a retail store. Shortly before Mr. Murphy's death, however, one of the members of the firm mentioned died, and Mr. Murphy being seriously ill in May, 1885, and this building being then still unfinished, and the purpose of the firm to occupy it having been abandoned, the decedent executed the codicil of May 18, 1885, in which he gave his executors the power to complete the building, and to modify the original plans, if necessary, and also to lease it for the term of five years.

Mr. Grant, as sole remaining executor, leased the lower portion of the building, first the western, and then also the eastern part, to the firm of J. J. O'Brien & Co., for five years, and covenanted for the fitting up of the premises to

suit the purposes of the business of the tenants. Upon the representations of the executors as to the advantages to be derived from the lease, the devisees of the property joined in it for a further period of five years. The executor also represented to the heirs that the expense of altering the premises for the use of J. J. O'Brien & Co. would not exceed $12,000 (instead of that it amounted to over $20,000) and that the expense of fitting up a "parlor" would not exceed more than $4,000.

Previous to the execution of this lease negotiations were pending with other persons for the leasing of the premises upon terms which some of the heirs thought more advantageous, but acting upon the representations, among others, of the executor (who was a member of decedent's firm, which firm was in the same line of business at wholesale as that of J. J. O'Brien & Co. at retail), that the firm, in which the estate had an interest, would profit thereby, the lessors closed the transaction with Mr. O'Brien.

The executor, thereafter finding that his position as such conflicted with his interest as a surviving partner in the firm of Murphy, Grant & Co., filed his account and tendered his resignation.

During the negotiations for the O'Brien lease Mr. Grant intimated to the heirs that he would charge no commissions as executor.

The heirs contested the items of his account relating to the fitting up of the leased premises, claiming that the lease was invalid, on the grounds that better terms could have been obtained from other parties, and that the executor was bound to the highest degree of care, diligence and prudence; also, that the expenses of fitting up the premises for the occupation of J. J. O'Brien & Co. were too high, and the improvements made for their benefit unusual on the part of a landlord, and not "fixtures"; that the expenses were much greater than the executor had represented to the heirs that they would be, and that he misrepresented certain facts to them; further, that as a member of the firm of Murphy, Grant & Co., the executor was interested in giving Mr. O'Brien the

preference, and that as remaining executor he had no power to execute the first five years lease alone.

It was also claimed that he had waived his commissions as executor, which he asked to be allowed him in his account, which waiver was one of the inducements to the heirs for entering into the lease.

It also appeared that the executor had withdrawn the sum of $100,000 from the capital account of Murphy, Grant & Co., and out of the same had paid a debt of the estate of some fifty-odd thousand dollars owing to Donohue, Kelly & Co., and had deposited the balance with these bankers, where it was lying idle, and the heirs sought to charge him with interest on this balance.

Jarboe, Harrison & Goodfellow, for executor.

McAllister & Bergin, for contesting heirs.

COFFEY, J. On the 26th of March, 1886, Adam Grant, desiring to retire from his office as executor, filed his report and account; on the 10th of April, 1886, Anna L. Murphy, widow, and Helen and Fannie Murphy, daughters of decedent, filed exceptions to said account, and on the 17th of April, 1886, they filed a supplemental and additional objection. Isabella Murphy, another daughter of decedent, on the said last-mentioned dates, filed in her own behalf separate exceptions and supplemental exceptions to said account. The matter came up for hearing on the 17th of April, 1886, and occupied, from time to time, until August 28, 1886, when, after argument, it was submitted for the consideration and decision of the court. The testimony is comprised in a volume of six hundred and six typewritten pages, which the court has considered.

I cannot undertake to do more than to state the results of my reflection upon the evidence and arguments.

The objections and exceptions to the account as a whole are overruled and denied.

Whatever may have been the inducements which caused the contestants to execute the ten years lease, this court cannot here treat that instrument as invalid.

While the executor admits that at one time he entertained and expressed the intention to renounce his commissions or to make no claim therefor, he insists that he changed his mind, and now demands as his due the statutory allowance.

I do not perceive any way in which, under the circumstances of this case, the court can deny to the executor what the statute allows him. I find no case sustaining counsel's view—the Estate of Davis, 65 Cal. 309, 4 Pac. 22, 3 W. C. R. 61, was a case where the renunciation was made in consideration of the appointment—a promise made before the appointment that the appointee would not charge. Schouler says: "If one has been appointed on a distinct understanding with those interested to serve as executor or administrator without recompense . . . . he must abide by his engagement": Schouler on Executors, sec. 545.

That is not this case. Adam Grant made no stipulation or agreement prior to his appointment, nor has he renounced in writing (section 1616, Code Civ. Proc.) his claim to compensation; but he insists that, notwithstanding his declared intention at one time, he has now a strictly legal right to commissions. The statute says (section 1618, Code Civ. Proc.) he must be allowed commissions upon the amount of the estate accounted for by him.

The court finds that the executor has not waived or renounced his commissions, and that he is entitled to them—the amount to be ascertained hereafter.

The executor is chargeable with interest on the balance of the money withdrawn from the capital account of Murphy, Grant & Co., which has been lying idle on deposit in the bank of Donohoe, Kelly & Co. This balance is the difference between the amount necessary to discharge the Donohoe debt and the amount drawn out of the capital account.

It is clear to the court that all expenditures in fitting up the store for the occupancy of O'Brien & Co. in excess of twelve thousand dollars, and all outlay in and about the "parlor" beyond the sum of four thousand dollars, should be disallowed.

The lowering of the skylight was not indispensable to the enjoyment of the premises by the tenants of the first floor,

as sufficient light might have been had by placing a glass roof over that part of the store now covered by the skylight, so the architect, Percy, testifies. I do not think, from my own observation when in company with the counsel for the respective parties, that the lowering of the skylight was judicious. It certainly has not added to the rental value of the second floor. It should be disallowed.

With reference to the mirrors and stools, while ordinarily they might not be regarded as "fixtures," I think that under the evidence in this case they must be so considered. For the purposes of the business to which the premises are devoted, the stools are about as necessary as the counters, and the testimony is that the space occupied by the mirrors had to be filled, and the cost would have been no less if paneling had been inserted.

All items not mentioned in this memorandum are allowed.

An Executor or Administrator, like any other trustee, may waive or renounce his right to compensation for performing the duties of his trust: Noble v. Whitten, 38 Wash. 262, 80 Pac. 451; Estate of Field, 33 Wash. 63, 73 Pac. 768; and a promise by him to the person primarily entitled to the administration of the estate, before his appointment, that he will not charge for his services, is equivalent to a renunciation of his claim: Estate of Davis, 65 Cal. 309, 4 Pac. 22. A waiver of commissions in a petition for letters of administration does not deprive the administratrix of the right to commissions, where the waiver was without objection, and by leave of court withdrawn before she was appointed: Estate of Carver, 123 Cal. 102, 55 Pac. 770.

Executors, having Improperly Withdrawn Money from the estate to pay a bookkeeper, were held liable for interest thereon at the legal rate until it was repaid to the estate, in Estate of Scott, 1 Cal. App. 740, 83 Pac. 85. For a further consideration of the liability of executors and administrators for interest on funds belonging to the estate, see Ross on Probate Law and Practice, 702-704.

ESTATE OF LENA FLEISHMAN.

[No. 11,697; decided January 13, 1892.]

Will—Attestation in Presence of Testator.—There must be two attesting witnesses to a will, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence. In the presence of the testator means that he must not only be present corporally, but mentally as well, capable of understanding the acts which are taking place before him.

A Will is not Attested in the Presenec of the Testatrix when the witnesses subscribe their names in an apartment adjoining the room in which she is lying ill, where it is impossible for her to see them, she having previously signed her name while reclining on her bed, not being able to rise therefrom.

Lena Fleishman died on November 16, 1891, leaving a husband and two brothers. On December 5, 1891, a petition was filed by the husband for the probate of a will dated November 15, 1891. On December 23, 1891, the brothers filed written grounds of opposition to the probate of the will. The grounds of contest appear from the opinion of the court.

Sullivan & Sullivan, for contestants.

Craig & Meredith, for proponent.

COFFEY, J. The question here is whether the instrument propounded for probate as the will of Lena Fleishman, deceased, was signed by the persons whose names are appended thereto as subscribing witnesses in the presence of the testatrix.

Section 1276 of the Civil Code of California provides, in the matter of an attested will, subdivision 4, that there must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request and in his presence.

In presence of the testator means that the testator must not only be present corporally, but mentally as well, capable of understanding the acts which are taking place before him.

In this case the instrument was signed by the subscribing witnesses in an apartment adjoining the room in which

the testatrix was lying ill upon her bed. Between the bed, and opposite where her head lay, there was a partition wall, an absolutely opaque substance, dividing the two apartments, and on the other side of that wall, at a table near the window, without the sight or hearing of the testatrix, the two witnesses subscribed their names, the testatrix having previously signed her name while reclining on her bed, not being able to rise therefrom. It was impossible for her to see what was transpiring on the other side of the wall by natural vision.

These are the facts in evidence. Subjoined is a review of the cases cited by proponent in support of the proposition that there was a valid execution of the paper proffered.

In Hogan v. Grosvenor, 10 Met. 56, 43 Am. Dec. 414, the attesting witnesses signed in the presence of the testator.

In Ambre v. Weishaar, 74 Ill. 110, "the testatrix could have seen the witnesses in the dining-room at the table, while they were signing the will."

Redfield on Wills declares the rule as follows: "The rule requires that the witnesses should be actually within the range of the organs of sight of the devisor, and where the devisor cannot by any possibility see the act, that is out of his presence": Redfield on Wills, 247 (star * page).

In Shires v. Glasscock, 2 Salk. 688, the court decided "that it is enough if the testator might see—it is not necessary that he should actually see—them (the attesting witnesses)."

In Dary v. Smith, 3 Salk. 395, the court sustained the will, saying, "it was a sufficient subscribing within the meaning of the statute, because it was possible that the testator might see them (the attesting witnesses) subscribe their names."

In Todd v. Winchelsea, 2 Car. & P. there was a question as to whether the will was attested in the room where the will was executed, or whether in a part of the adjoining room where the testator "might have seen" the witnesses attest the will. The court in that case, instructing the jury, said: "You will therefore have to say whether the will was attested in the bedroom; if so, there is no doubt. But, if

you think it was attested in the other room, whether it was attested in such part of that room that the testator might have seen the witnesses attest it. In either of those cases plaintiffs are entitled to a verdict; but if you think otherwise, I am of the opinion that, in point of law, you ought to find a verdict for the defendants."

In Hill v. Barge, 12 Ala. 695, 696, we find: "The design of the statute in requiring the attestation to be made in the presence of the testator was to prevent the substitution of a surreptitious will. In the presence of the testator, therefore, is within his view. He must be able to see the witnesses attest the will, or, to speak with more precision, their relative position to him, at the time they are subscribing their names as witnesses, must be such that he may see them if he thinks proper."

In Nock v. Nock, 10 Gratt. 106, the witness signed at a bureau in an adjoining room, sixteen or seventeen feet from the bed where the testator was lying with his head raised up, and from which he could, through an open door, plainly see the witnesses, excepting their forearms and hands, while writing.

In Lamb v. Girtman, 26 Ga. 629, it was held that the lower court erred because it refused to charge that, if the testator might have seen the attestation, it is sufficient.

In Wright v. Lewis, 5 Rich. 212, 216, 55 Am. Dec. 714, the testator stepped into and remained in the adjoining room, from which he might have seen the witnesses subscribe their names.

In Watson v. Pipes, 32 Miss. 468, the court say: "It is settled by all the authorities that it is not absolutely essential that the testator should actually see, but if the witnesses be shown to have been within the scope of the testator's view from his actual position, it will be sufficient."

In McElfresh v. Guard, 32 Ind. 412, the trial court instructed the jury that "the law requires attestation in the presence of the testator to prevent obtaining another will in place of the true one. It is therefore enough that the testator might see," etc. The instruction was sustained.

Contestants refer to the following cases as instances of what has been deemed not a sufficient signing in the testator's presence:

In Edelston v. Spake, Holt, 222, 223, Mod. 259, Comb. 156, the witnesses subscribed their names in a hall adjoining the room where the testator lay, but in such a place that he could not see them.

In Machell v. Temple, 2 Show. 288, the witnesses withdrew out of sight into another room, at the request of the testator, because the noise in his sick room disturbed him.

In Broderick v. Broderick, 1 P. Wms. 239, 4 Vin. Abr. 534, the witnesses, for the ease of the testator, went downstairs into another room, to attest his will. See, also, Onions v. Tyrer, Id. 343.

In Clark v. Ward, 1 Bro. P. C. 137, the witnesses subscribed at a window, in a passageway, where they could see but part of the bed, and the testator, lying thereon, could not see them.

In Tribe v. Tribe, 13 Jur. 793, 1 Rob. 775, the testatrix lay in bed with the curtains drawn, and her back turned toward the witnesses, who were signing at a table in the same room.

In Wright v. Manifold, 1 M. & S. 294, the testator could not, from his room, have seen into the room where the witnesses signed, without putting his head out into a passageway which connected the two rooms, although, as the witnesses were retiring from his room, he called upon his attendant to assist him in rising.

In Ellis' Case, 2 Curt. 395, the witnesses were in an adjoining room, where they could neither see the testator nor be seen by him, although they were so near that they could hear him breathe.

In Colman's Case, 3 Curt. 118, folding doors between the two rooms were open, being tied back, but the table on which the witnesses wrote was so situated that the testator could not possibly have seen it.

In Norton v. Bazett, Dea & S. (5 Am. Law Reg. 52), the witnesses were clerks of the testator, and called by him from an outer office into his own, where he was sitting with his

back toward the door. The will was written on two separate sheets, the second (see Bond v. Sewell, 3 Burr. 1773; Gass v. Gass, 3 Humph. 278; Horsford's Case, L. R. 3 Prob. 211) of which he signed, and they (his table being full of papers) took it into their room for attestation. When they returned he was standing up, but otherwise relatively in the same position as before, and from which it was impossible for him to have seen them while signing.

In Killick's Case, 3 Sw. & Tr. 578, the deceased could, by changing her position in bed, have seen the witnesses sign her will in another room, but the proof was that she did not do so.

In Violette v. Therriau, 1 Pug. & Bus. (N. B.) 389, the testator had been paralyzed and was, when his will was executed, unable to rise from his bed without assistance. A small table stood at the foot of his bed, and was concealed therefrom by the footboard of the bed rising above it, so that, although he could see the persons of the witnesses, their arms and hands and the paper on which they wrote on the table were invisible.

In Robinson v. King, 6 Ga. 539, the testator signed his will in bed, and was not able to get up without assistance. The witnesses wrote their names thereto on a piazza adjoining his room, about ten feet from him. There was a door communicating with the room, but their relative positions were such that they could not see each other.

In Brooks v. Duffell, 23 Ga. 441, a will was executed by the testator in bed, toward evening, and, for the sake of seeing better, the witnesses stepped to a door, which, when open swung against the side of his bed, so that, without changing his position, it would have been impossible to see them, and he was too weak to notice anything that was going on.

In Reed v. Roberts, 26 Ga. 294, 71 Am. Dec. 210, the testator, in extremis, was lying in a bed with four high posts, having a counterpane stretched across those at the head to protect him from the air. After he had signed, the will was taken behind the head of the bed, to a chest against the wall some seven or eight feet distant and attested. The

proof showed that he was too feeble to change his position without help.

In Graham v. Graham, 10 Ired. 219, the witnesses went into another room to sign at a chest standing against the partition, two or three feet from the open door. The bed in which the testator lay stood also against the partition, with its head nearly opposite to the chest, so that the testator could, by turning his head, see the backs of the witnesses as they sat at the chest writing, but he could not see their faces, arms or hands, nor the paper on which they were writing.

In Lamb v. Girtman, infra, the testator signed his will at a small table in a hallway, and then, being in feeble health, withdrew to his room adjoining, accompanied by a witness, who returned to the others, and then they all signed. The testator, when afterward noticed by them, was lying in the ordinary attitude on his bed, and in that position could not have seen the witnesses when signing.

In Reynolds v. Reynolds, 1 Spears, 253, 40 Am. Dec. 599, the testator, after being raised to sign his will, sank back in his bed, and the witnesses went to a table in a hall and signed their names. The testator could not see them as he lay, and, although he had strength to rise sufficiently to see them, yet he did not rise.

In Jones v. Tuck, 3 Jones, 202, the testator could not see the witnesses while signing his will in another room, without raising himself up on his elbow, but this the witnesses thought him capable of doing, because they saw him turn several times in his bed.

In Orndorff v. Hummer, 12 B. Mon. 619, the table on which the witnesses wrote stood just behind the head of the lounge on which the testator lay, and four or five feet therefrom. He could not, from his position, have seen the witnesses at all, and it seemed doubtful whether he could, without assistance, have changed his posture.

In Neil v. Neil, 1 Leigh, 6, the testator, when two of the witnesses signed at a table by his bed, lay with his back to them, and his sight was poor, and the light in the room dim; he could not rise alone.

In Boldry v. Parris, 2 Cush. 433, the testatrix and one witness signed in her room, and then that witness took the will into an adjoining room, where it was signed by the other two witnesses, out of the testatrix's sight altogether.

In Edelen v. Hardy, 7 Har. & J. 61, 16 Am. Dec. 292, the testator, after signing, requested the witnesses to retire and they went into an adjoining room, separated from the other by a plank partition; there was no direct communication between the rooms, nor could testator have possibly seen them: See Russell v. Falls, 3 Har. & McH. 457, 1 Am. Dec. 380. See, also, Redfield on Wills, sec. 245, et seq; Jarman on Wills, 5th ed. (Bigelow), star * p. 87, et seq., and notes; also section 1276, Civil Code.

In conclusion, the court may refer to the record in the matter of the estate of J. B. Firnkas, deceased, No. 2774, of this court, decided August 19, 1884.

In that case the attesting witnesses signed the alleged will of the deceased, not in the actual presence of the testator, but in an adjoining room where they could not be seen by him at the time they signed their names as witnesses to the will.

This court held that the instrument was not attested in the manner required by law, and denied probate thereof.

The facts in the Firnkas will case and in the case at bar are curiously coincidental, and the judgment here should correspond.

Judgment for contestants.

ATTESTATION AND WITNESSING OF WILLS.

Object and Purpose of Attestation.—In Appeal of Canada, 47 Conn. 450, the court declares that the primary reason for the presence of a witness to a will is not that he has known the testator long or intimately; not that he is required to use or have any skill in detecting the presence of insanity or other forms of mental disease or weakness; not that he is to have any opportunity for discovering the fraudulent scheme which may have culminated in the act of the testator. If the presence of one or three witnesses provides any degree of security against the procurement of a will from a competent testator by fraud, or against the procurement of one from a testator without mental capacity, it is an incidental benefit; it was not in the mind of the law. That only intended that the witness should be able, with

a great degree of certainty at all times, possibly at great length of time after his attestation, to testify that the testator put his name upon the identical piece of paper upon which he placed his own. Similarly, in Pollock v. Glassel, 2 Gratt. 439, the court holds that the object of witnessing a will is "not to obtain from the witnesses a certificate of the essential facts of the transaction, but to provide the means of proving them by persons entitled to confidence and selected for the purpose. The subscription of their names by the witnesses denotes that they were present at, and prepared to prove, the due execution of the instrument so attested, and nothing more"; See, also, Huff v. Huff, 41 Ga. 696. Some authorities, however, take a broader view of the purposes of attestation and witnessing. Thus, in Re Pope's Will, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235, the court holds: "One principal purpose in requiring the attestation of wills is to surround the testator with witnesses who are charged with the present duty of noting his condition and mental capacity. Another is to insure the identity of the instrument and to prevent the fraudulent substitution of another document at the time of its execution." To the same effect are Odenwaelder v. Schorr, 8 Mo. App. 458; Cornelius v. Cornelius, 52 N. C. 593. This latter view is also sustained by other decisions set forth in the discussion of the particular requisites of attestation and witnessing below.

Attestation vs. Subscription.—In some earlier decisions, attestation is distinguished from subscription. It is said: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, and the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will is only to write on the same paper the name of the witness for the sole purpose of identification"; Swift v. Wiley, 1 B. Mon. 114; Upchurch v. Upchurch, 16 B. Mon. 102; In re Downie's Will, 42 Wis. 66. In later decisions, however, this distinction is abandoned. In Skinner v. American Bible Soc., 92 Wis. 209, 65 N. W. 1037, the court says: "It would be difficult, no doubt, to satisfactorily define that element in the attestation of a will which is not also present in the mere subscription to a will. No physical act is required in the one which is not also required in the other, and it is not clear what mental act or fact appropriate to the one is absent from the other": To the same effect, Luper v. Werts, 19 Or. 122, 23 Pac. 850. Similarly, in Drury v. Connell, 177 Ill. 43, 52 N. E. 368, Sloan v. Sloan, 184 Ill. 579, 56 N. E. 952, and Calkins v. Calkins, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393, the court holds that a requirement of statutory law that a will shall be "attested" renders essential the "subscriptions" thereof by the attesting witness, that act being in-

volved in attestation. And lest the idea of attestation be confused with the mere physical act of subscription, the court in Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951, holds: "The attestation .... is not a matter of mere formality in affixing one's name to the will as a witness. There must be an active mentality connected with it."

Necessity Witnesses.—It is prerequisite to the validity of a will that it be attested and witnessed in conformity with statute: Orth v. Orth, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 32 L. R. A. 298; Clark v. Miller, 65 Kan. 726, 68 Pac. 1071; Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599; Davis v. Davis, 6 Lea, 543; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62; Pollock v. Glassel, 2 Gratt. 439; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682. This rule also applies in cases of interlineations, corrections, and alterations to wills: Eschbach v. Collins, 61 Md. 478, 48 Am. Rep. 123; Gardiner v. Gardiner, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383; Jackson v. Holloway, 7 Johns. 304. See, also, In re Penniman, 20 Minn. 245 (Gil. 220), 18 Am. Rep. 368, holding that after alterations and interlineations have been made in a will, it must not only be resubscribed by the witnesses, but also again signed by the testator. The provision often found in the statutes of wills, that the witness to a will must be "credible" means that they must be "competent," the words "credible" and "competent" being synonymous when used in this connection: Sloan v. Sloan, 184 Ill. 579, 56 N. E. 952; Standley v. Moss, 114 Ill. App. 612; Rucker v. Lambdin, 12 Smedes & M. 230; Fowler v. Stagner, 55 Tex. 393. The requirements of attestation and witnessing generally apply to wills of personalty as well as of realty (Hooks v. Stamper, 18 Ga. 471; Lewis v. Maris, 1 Dall. 278; Town of Pawtucket v. Ballou, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43; Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97; Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62), though formerly they were not prescribed in cases of personalty: Davis v. Davis, 6 Lea, 543; Moore v. Moore's Exr., 8 Gratt. 307 (before the statute of 1835). In the absence of statutory requirement, a will is valid without witnessing or attestation: In re High, 2 Doug. 515. Moreover, the requirements of attestation and witnessing, as set forth in this article, do not apply to nuncupative wills, nor in jurisdictions where they are recognized to olographic wills.

Number of Witnesses.—Under the law prevailing in most jurisdictions, two competent witnesses to a will are sufficient: In re Walker 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L. R. A. 460; Clark v. Miller, 65 Kan. 726, 68 Pac. 1071; Griffith's Exr. v. Griffith, 5 B. Mon. 511; Odenwaelder v. Schorr, 8 Mo. App. 458; Williams v. Miles, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W.

151; In re Look's Will, 5 N. Y. Supp. 50; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed, 64 Hun, 636, 19 N. Y. Supp. 613; In re Nevin's Will, 4 Misc. Rep. 22, 24 N. Y. Supp. 838; Luper v. Werts, 19 Or. 122, 23 Pac. 850; In re Irvine's Estate, 206 Pa. 1, 55 Atl. 795; Davis v. Davis, 6 Lea, 543; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Pollock v. Glassel, 2 Gratt. 439; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97; Skinner v. American Bible Soc., 92 Wis. 209, 65 N. W. 1037. Likewise under the custom prevailing in California before the formation of the state government, two witnesses were sufficient: Adams v. Norris, 64 U. S. 353, 16 L. Ed. 539, 1 Fed. Cas. No. 51; McAll. 253. In other jurisdictions, however, the old English rule requiring three or four competent witnesses still prevails: Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Fleming v. Morrison, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499; Gardiner v. Gardiner, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383; Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599; Dean v. Heirs of Dean, 27 Vt. 746; Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62. In Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599, the reason for requiring three or four witnesses is said to be to protect men against fraudulent wills, for confederates in fraud usually conspire in pairs and can seldom trust with safety any third person.

A will executed with only one witness is invalid (Potts v. Felton, 70 Ind. 166), and where three witnesses are requisite, a will executed with only two is void as a muniment of title; a judgment admitting it to probate is a nullity, and cannot be validated by lapse of time: Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694.

Sufficiency of Substantial Conformity with Law.—Only a substantial compliance with the requirements of the law in the attestation and witnessing of wills is requisite, and formalities are not required which the legislature has not plainly prescribed: Montgomery v. Perkin, 2 Met. (Ky.) 448, 74 Am. Dec. 419; Savage v. Bulger, 76 S. W. 361, 25 Ky. Law Rep. 763; Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17; Hoystradt v. Kingman, 22 N. Y. 372; Gilbert v. Knox, 52 N. Y. 125; Lane v. Lane, 95 N. Y. 494; In re Jones' Will, 85 N. Y. Supp. 294; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun, 636, 19 N. Y. Supp. 613; In re Voorhis' Will, 125 N. Y. 765, 26 N. E. 935, 54 Hun, 637, 7 N. Y. Supp. 596; In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729. "It is not necessary that any particular form be followed, or that any rigid rule of construction of the statute be imposed. Any other interpretation would be to confine the execution of testamentary documents within a narrow compass, and would in many instances defeat the expressed intentions of a person": In re Menge's Will, 13 Misc. Rep. 553, 35 N. Y. Supp. 493. Yet, in construing the statutes of wills, it is the intention of the legislature that must be kept in mind, and not that

of the testator: In re Blair's Will, 84 Hun, 581, 32 N. Y. Supp. 845; In re Fish's Will, 88 Hun, 56, 34 N. Y. Supp. 536. And in Savage v. Bowen, 103 Va. 540, 49 S. E. 668, it is said that courts should strictly follow the requirements of the law in the execution of wills, but should not supplement those requirements with others.

Subscription or Acknowledgment by Testator.—It is provided by the various statutes of wills in effect in the several states that a will must be signed or subscribed (as differently provided) by the testator with his name or mark, or, as permitted in some states, may be signed or subscribed at the direction of the testator by another in his stead.

Necessity of Its Being Before or to Witnesses.—In order to validate a will, either this act of signing or subscribing must be done in the presence of the witnesses to the will, or in lieu thereof the testator must acknowledge the instrument or signature to the witnesses: Yoe v. McCord, 74 Ill. 33; Webster v. Yorty, 194 Ill. 408, 62 N. E. 907; Reed v. Watson, 27 Ind. 443; In re Convey's Will, 52 Iowa, 197, 2 N. W. 1084; Denton v. Franklin, 9 B. Mon. 28; Etchison v. Etchison, 53 Md. 348; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Dewey v. Dewey, 1 Met. (Mass.) 349, 35 Am. Dec. 367; Hogan v. Grosvenor, 10 Met. (Mass.) 54, 43 Am. Dec. 414; Nickerson v. Buck, 12 Cush. 332; Ela v. Edwards, 16 Gray, 91; Mundy v. Mundy, 15 N. J. Eq. 290 (so holding under the law of 1851, but under the statute of wills of 1741 an acknowledgment was not sufficient); Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225; Baskin v. Baskin, 36 N. Y. 416; In re Look's Will, 5 N. Y. Supp. 50; In re Look, 54 Hun, 635, 7 N. Y. Supp. 298, judgment affirmed, 125 N. Y. 762, 27 N. E. 408; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed, 64 Hun, 636, 19 N. Y. Supp. 613; In re Carll's Will, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; Eelbeck's Devisees v. Granberry, 3 N. C. 232; Raudebaugh v. Shelley, 6 Ohio St. 307; In re Irvine's Estate, 206 Pa. 1, 55 Atl. 795 (such is the law in case of wills disposing of property to charitable or religious uses); Roberts v. Welch, 46 Vt. 164; In re Claflin's Will, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97. Where a testator makes his mark to his will in the presence of the witnesses, no acknowledgment is necessary (Savage v. Bulger, 25 Ky. Law Rep. 763, 76 S. W. 361), and where the testator makes such acknowledgment to the witnesses, they need not see him sign it (Yoe v. McCord, 74 Ill. 33; Webster v. Yorty, 194 Ill. 408, 62 N. E. 907; Etchison v. Etchison, 53 Md. 348; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Nickerson v. Buck, 12 Cush. 332; Cravens v. Faulconer, 28 Mo. 19; Sisters of Charity v. Kelly, 67 N. Y. 409, reversing 7 Hun, 290; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Roberts v. Welch, 46 Vt. 164; Skinner v. American Bible Soc., 92 Wis. 209, 65 N. W. 1037), although he signed his mark only: In re Kane's Will, 20 N. Y. Supp. 123.

The acknowledgment need not be made to both nor to all witnesses at the same time: Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687; In re Diefenthaler's Will, 39 Misc. Rep. 765, 80 N. Y. Supp. 1121. Moreover, where the witnesses are in the presence of the testator while he signs the will, it is immaterial that the witnesses do not actually see him sign: Etchison v. Etchison, 53 Md. 348; In re Bedell's Will, 2 Conn. Sur. 328, 12 N. Y. Supp. 96; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. But if the witnesses are not present at the time of the signing of the testator's will, and there is no subsequent acknowledgment sufficient to fulfill the requirements of the law, the will is not executed at all: Sisters of Charity v. Kelly, 67 N. Y. 409; Luper v. Werts, 19 Or. 122, 23 Pac. 850; Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; Roberts v. Welch, 46 Vt. 164.

Object of Requirement.—The object of the foregoing requirement in the execution of will is to identify and authenticate the instrument as one actually subscribed by the testator: Baskin v. Baskin, 36 N. Y. 416.

Sufficiency of Acknowledgment.—There is a diversity of decision as to the sufficiency of an acknowledgment to the witnesses, depending upon the terms of the statutes of wills in the respective jurisdictions, some of them providing that the testator must acknowledge the will to be his act and deed, and others providing that he must acknowledge his signature to the will to be his act and deed. In Hobart v. Hobart, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581, affirming 53 Ill. App. 133, the court points out and comments on this distinction, saying in substance: In England and in New York, and perhaps some other of the states, the statute requires that there must be an acknowledgment of the signature. Decisions based on this provision of law hold in substance that there is not a sufficient acknowledgment of the signature by the testator when he produces a will and requests the witnesses to sign it, unless his signature is visibly apparent on the face of the paper, and is seen, or can be seen, by the witnesses, especially if he does not explain the instrument to them. These decisions are not, however, applicable where the statute merely requires that the testator acknowledge the will or codicil to be his act and deed, and does not specially and in terms require the signature to be acknowledged. A man may acknowledge an entire written instrument to be his act and deed without necessarily calling the attention of those before whom he produces it to any particular part of the instrument. But if he is required to make acknowledgment of a specified part of it, it may be requisite that attention should be directed to that part.

Thus where the law is that the will must be acknowledged, it is not necessary that the witnesses see the signature of the testator to the will, or that the testator acknowledge his signature, or that the witnesses know that the instrument is a will, but where the

testator acknowledges to the witnesses the execution of the instrument by himself the requirement of the law is satisfied: Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536; In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97. Thus a declaration by the testator to the witnesses that the instrument is his last will (Dewey v. Dewey, 1 Met. (Mass.) 349, 35 Am. Dec. 367; Nickerson v. Buck, 12 Cush. 332), or that it is his act and deed (In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97), or a request by the testator to the witnesses to attest his last will, he producing it for their signature (Tudor v. Tudor, 17 B. Mon. 383; Dewey v. Dewey, 1 Met. (Mass.) 349, 35 Am. Dec. 367; Nickerson v. Buck, 12 Cush. 332; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280), is sufficient. Moreover, the declaration or request need not be spoken by the testator himself, but may be made by another in his presence, he himself remaining silent, where it appears from the surrounding circumstances that the other was acting for the testator at his instance: Denton v. Franklin, 9 B. Mon. 28. See, also, to same effect, In re Kane's Will, 20 N. Y. Supp. 123. Furthermore, this acknowledgment need not be made in language at all, but any act, sign, or gesture of the testator which indicates an acknowledgment of the will with unmistakable certainty, will suffice: Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536; In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Ela v. Edwards, 16 Gray, 91; Ludlow v. Ludlow, 36 N. J. Eq. 597. Thus where the testator, having heard read the attesting clause of his will reciting that he had executed the instrument as his will, handed the subscribing witnesses the pen and saw them sign it, but uttered not a word, he acknowledged it as satisfactorily as though he had said, "I, ———, do acknowledge this instrument to be my last will and testament": Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237.

Where, however, the law is that the signature to the will must be acknowledged, it is requisite that the testator's signature affixed to the will be shown to the witnesses and identified and recognized by the testator, and in some apt and proper manner acknowledged by him to be his signature: Lewis v. Lewis, 11 N. Y. 220, affirming 13 Barb. 17; Baskin v. Baskin, 36 N. Y. 416; In re Mackey's Will, 110 N. Y. 611, 6 Am. St. Rep. 409, 18 N. E. 433, 1 L. R. A. 491; In re Eakin's Estate, 13 Misc. Rep. 557, 35 N. Y. Supp. 489; Raudebaugh v. Shelley, 6 Ohio St. 307. Thus where at the time a witness subscribed a will she had just entered the house where the testator was, and as she entered said to the testator, "Are you making your will?" to which he responded, "Yes," and added that he wanted her to put her name to the paper he had in his hand at the place he pointed out, which she did, there is no sufficient acknowledgment

of his signature to the will: In re Simmons' Will, 56 Hun, 642, 9 N. Y. Supp. 352, affirmed without opinion, 124 N. Y. 663, 27 N. E. 413. The exhibition, however, of a will and of the testator's signature attached thereto, made by the testator to a witness, and his declaration to the witness that it was his last will and testament and his request to the witness to attest the same, constitute together a sufficient acknowledgment by the testator of the signature to the will: Baskin v. Baskin, 36 N. Y. 416, 48 Barb. 200 (Parker and Grover, JJ., dissenting); Willis v. Mott, 36 N. Y. 486; Sisters of Charity v. Kelly, 67 N. Y. 409; In re Phillips, 98 N. Y. 267; In re Lang's Will, 9 Misc. Rep. 521, 30 N. Y. Supp. 388; In re Aker's Will, 74 App. Div. 461, 77 N. Y. Supp. 643.

Request to Witnesses to Sign.—In some states there must be a request from the testator to the witnesses to sign his will: Mundy v. Mundy, 15 N. J. Eq. 290; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun, 636, 19 N. Y. Supp. 613; Vogel v. Lehritter, 139 N. Y. 223, 34 N. E. 914. "The object of the statute is that an officious signing by the witnesses, without any privity with the testator, should not be recognized as sufficient": Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220, affirming 38 Barb. 77. The manner and form in which the request must be made, and the evidence by which it must be proved, are not, however, prescribed, and no precise form of words addressed to each of the witnesses at the very time of attestation is required; but any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is sufficient. So where one of the subscribing witnesses, in the presence of the other, asked the testator if he wished him to sign or witness the paper as his will, and the testator answered in the affirmative, and both thereupon subscribed the will, the publication is sufficient: Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235. See, also, In re Kane's Will, 20 N. Y. Supp. 123. Likewise where, before the witnesses signed a will, the draftsman said to the testator, "Here are M. and H.; do you wish them to act as witnesses to this, your will?" to which he replied, "Yes, I do," and then subscribed himself, after which the witnesses did, the request is sufficient: In re Menge's Will, 13 Misc. Rep. 553, 35 N. Y. Supp. 493. Moreover, where the words of request are made in the presence of the testator, they may proceed from another than the testator, and will be regarded as those of the testator, although the testator said not one word and did not indicate his acquiescence by act or motion, provided that the circumstances show that he adopted them and that the party speaking them was acting for him with his assent: Bundy v. McKnight, 48 Ind. 502; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; In re Murphy's Will, 15 Misc. Rep. 208, 37 N. Y. Supp. 223; Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650. So where the person who had drawn up a will for a testator and was attending

to his execution fôr him, they both being in a bank, called up three persons who were in their hearing to witness the will, which they did, the subscribing by them was done at the testator's request: Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220, 38 Barb. 77. Likewise, where counsel who drew a will for a testator and acted as witness with the consent of the testator requested his stenographer to attest as a witness, such request being made in an adjoining room out of the hearing of the testator, after which the witness entered the room where the testator was and signed her name in the testator's presence, nothing further being said to her and no objection being made by the testator, the request to the witness is sufficient: Ames v. Ames, 40 Or. 495, 67 Pac. 737.

In other states, the statutes of wills there prevailing do not require that a testator should ask the witnesses to his will to attest it; his assent, either express or implied, is sufficient; yet the act must be done with his knowledge, and not in a clandestine or fraudulent manner: Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Etchison v. Etchison, 53 Md. 348; In re Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591.

In yet other states, it is immaterial whether or not the witnesses to a will attested it at the request of the testator: Sandley v. Moss, 114 Ill. App. 612; Dyer v. Dyer, 87 Ind. 13; In re Allen, 25 Minn. 39; Savage v. Bowen, 103 Va. 540, 49 S. E. 668. See, also, Huff v. Huff, 41 Ga. 696, where the court held that the law implies a request from the testator to the witnesses to attest his will from their consummation of the act, that no special request by the testator is necessary to constitute the attesting witnesses competent, that if he does not object his assent is equivalent to a request and satisfies the requirements of the law, and that an instruction that if the jury believed from the evidence that one of the witnesses was suggested to the testator as a witness to his will, and the testator assented to such suggestion, such assent was, in law, a request, or equivalent to a request, is not erroneous.

Publication, or Declaration of Character of Instrument.—In some states it is prerequisite to the execution of a will that there be some declaration by the testator to the witnesses that the instrument attested by them is his last will and testament: Cravens v. Faulconer, 28 Mo. 19; Mundy v. Mundy, 15 N. J. Eq. 290; Ludlow v. Ludlow, 36 N. J. Eq. 597; Clark v. Clark, 64 N. J. Eq. 361, 52 Atl. 225; Remsen v. Brinckerhoff, 26 Wend. 325, 37 Am. Dec. 251, affirming Brinckerhoff v. Remsen, 8 Paige, 488; Seymour v. Van Wyck, 6 N. Y. 120; Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17; Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Baskin v. Baskin, 36 N. Y. 416; Gilbert v. Knox, 52 N. Y. 125; In re Look's Will, 5 N. Y. Supp. 50; In re Look, 54 Hun, 635, 7 N. Y. Supp. 298, judgment affirmed, 125 N. Y. 762, 27 N. E. 408; In re Dale's Will, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun, 636,

19 N. Y. Supp. 613; Vogel v. Lehritter, 135 N. Y. 223, 34 N. E. 914; In re Carll's Will, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729 (requisite in case of olographic wills). Such declaration is what is known in technical language as a publication of a will (Remsen v. Brinckerhoff, 26 Wend. 325, 37 Am. Dec. 251), and without it the will is invalid: Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220, affirming 38 Barb. 77. Publication "is important, first, in denoting that the testator knows the nature of the instrument he is executing, and to check any deception upon him. In the second place, and also in order that there may be no imposition perpetrated, it is important that the subscribing witnesses understand that they are attesting the signature to the will of the person at whose request they severally subscribe their names. They realize, if the document is a will, that they are expected to remember what occurred at its execution and be ready to vouch for its validity in court. The declaration of the testator that the instrument is his will is not solely, therefore, for the purpose of showing that he knew that he was executing his will": In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729. See, also, Baskin v. Baskin, 36 N. Y. 416; Gilbert v. Knox, 52 N. Y. 125.

A substantial compliance with the requirement of publication is not only requisite but sufficient: In re Beckett, 103 N. Y. 167, 8 N. E. 506; In re Dale's Will, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649. "It is a substantial compliance with the statute, if in some way or mode the testator indicates that the instrument that the witnesses are requested to subscribe as such is intended or understood by him to be his executed will. . . . . The legislature only meant that there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will, and that any communication of this idea or to this effect will meet the object of the statute; that it is enough if in some way or mode the testator indicates that the instrument the witnesses are requested to subscribe as such is intended or understood by him to be his will. The word 'declare' is said to signify 'to make known, to assert to others, to show forth'; and this in any manner, either by words or acts, writing or in signs; in fine, that to declare to a witness that the instrument subscribed was the testator's will must mean to make it distinctly known to him by some assertion or by clear assent in words or signs": In re Kane's Will, 20 N. Y. Supp. 123. See, also, Cravens v. Faulconer, 28 Mo. 19; Remsen v. Brinckerhoff, 26 Wend. 325, 37 Am. Dec. 251; In re Murphy's Will, 15 Misc. Rep. 208, 37 N. Y. Supp. 223; In re Carll's Will, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729. In Re Beckett, 103 N. Y. 167, 8 N. E. 506, the court further says: "Where the testator cannot speak at all, or only with difficulty, he

may communicate his knowledge by signs or by words to some listeners unintelligible. He must communicate it, however; but if he does that in a manner capable of conveying to the minds of the witnesses his own present consciousness that the paper being executed is a will, that must necessarily be sufficient.'' Likewise in Mundy v. Mundy, 15 N. J. Eq. 290, the court holds that the provision of the New Jersey statute of wills of 1851 that the writing must be declared by the testator to be his last will and testament requires no more formality than the act of 1741 which provided that the will must be published. So where one of the subscribing witnesses in the presence of the other asked the testator if he wished him to sign or witness the paper as his will, and the testator answered in the affirmative, the publication was sufficient as to both witnesses: Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235. Or, where the draftsman of a will asked the testatrix ''if she wanted B and him to witness the will,'' which then lay before them with the subscription of the testatrix upon it, and she answered in the affirmative, the publication is sufficient: In re Menge's Will, 13 Misc. Rep. 553, 35 N. Y. Supp. 493. To the same effect, In re Murphy's Will, 15 Misc. Rep. 208, 37 N. Y. Supp. 223. And where it was understood by the witnesses to a codicil when they were sent for that it was to witness a codicil, the statement of the testator upon their arrival, ''It lays there on the desk; I have signed it, and there are only two lines left; you sign it on one, and Frank on the other,'' constitutes a sufficient publication: In re Carll's Will, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036. Likewise where the testator knew and the witnesses understood from his acts and conduct, as he intended they should, that the instrument then executed was his will, there is a sufficient publication: Lane v. Lane, 95 N. Y. 494. Moreover, the fact that the testatrix's act of declaration of an instrument as her will included a reference to a previous conversation between her and the attesting witnesses, which reference was of such a character that without it there would be no publication of the will, does not render the publication insufficient: In re Beckett, 103 N. Y. 167, 8 N. E. 506. On the other hand, where the messenger who called a witness told him that he was wanted to subscribe a will, but while he was in the room subscribing it nothing was said to him of the nature of the paper, there is no sufficient declaration that the paper was a will: In re Nevin's Will, 4 Misc. Rep. 22, 24 N. Y. Supp. 838.

Again, it is not necessary that the testator should, by his own words or acts, publish the will, for this in some cases might be impossible through sickness or bodily infirmity, but it may be done by another in his presence and hearing, acting for him with his assent, he being able to dissent but not dissenting: Mundy v. Mundy, 15 N. J. Eq. 290; Ludlow v. Ludlow, 36 N. J. Eq. 597; Gilbert v. Knox, 52 N. Y. 125.

The act of publication is not complete until the witnesses understand from the testator that the instrument they attest is a will: In

re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729. And "it will not suffice that the witnesses have elsewhere and from some other sources learned that the document which they are called to attest is a will, or that they suspect or infer from the circumstances and occasion that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him, and that he understands it, and, at the time of its execution, which includes publication, designs to give effect to it as his will": Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17. To the same effect, see Gilbert v. Knox, 52 N. Y. 125.

While olographic wills are not recognized in New York as such, yet where a will is wholly in the testatrix's own handwriting, "criticism of the terms and manner of what is claimed to have been a sufficient publication need not be so close or severe as where the question whether the testatrix knew that she was executing a will depends solely upon the fact of publication": In re Beckett, 103 N. Y. 167, 8 N. E. 506. To the same effect, In re Aker's Will, 74 App. Div. 461, 77 N. Y. Supp. 643; In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729.

In other states no declaration to the witnesses or otherwise of the nature of the document the witnesses are called upon to and actually do witness is requisite, and the fact that its nature and character is unknown to either or all of them does not impair its validity: Appeal of Canada, 47 Conn. 450, holding it error to instruct the jury that it was necessary that the subscribing witness of a will should know that the instrument which he subscribed was a will: Dickie v. Carter, 42 Ill. 376; In re Storey's Will, 20 Ill. App. 183; Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; Webster v. Yorty, 194 Ill. 408, 62 N. E. 907; In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Brown v. McAlister, 34 Ind. 375; Turner v. Cook, 36 Ind. 129; In re Hulse's Will, 52 Iowa, 662, 3 N. W. 734, holding that a statutory requirement that a will be "witnessed" does not require its publication; Ray v. Walton, 2 A. K. Marsh. 71; Flood v. Pragoff, 79 Ky. 607, relating to a codicil; Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155, holding that while it was to some extent the usage of courts of probate to inquire of the witnesses to a will whether the testator had declared the instrument to be his will, and while such declaration frequently makes a part of the attestation clause of wills, it is unnecessary; Ela v. Edwards, 16 Gray, 91; Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687; Watson v. Pipes, 32 Miss. 451; Luper v. Werts, 19 Or. 122, 23 Pac. 850; Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; Loy v. Kennedy, 1 Watts & S. 396; Appeal of Linton, 104 Pa. 228, in case of wills of married women; Dean v. Heirs of Dean, 27 Vt. 746; In re Claflin's Will, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261. Compare, however, In re Claflin's Will, 73 Vt. 129, 87 Am. St. Rep.

693, 50 Atl. 815; Beane v. Yerby, 12 Gratt. 239; Allen v. Griffin, 69 Wis. 529, 35 N. W. 21; overruling In re Downie's Will, 42 Wis. 66. In a few decisions the superfluousness of a declaration of the character of the instrument is explained or excused on the ground that the writing out and signing of the will on paper by the testator constitutes a sufficient publication thereof: Ray v. Walton, 2 A. K. Marsh. 71; Watson v. Pipes, 32 Miss. 451; Dean v. Heirs of Dean, 27 Vt. 746. And in Loy v. Kennedy, 1 Watts & S. 396, the court says: "To require more [in the execution of a will] would frequently do mischief, as a testator is frequently disposed to conceal the fact that the instrument executed is a will."

Where, however, after subscription of a will by a subscribing witness, the testator declares to the witness that it was "a fake will, made for a purpose," his attestation and subscription of the will is invalid: Fleming v. Morrison, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499.

Necessity of Signing and Attestation by Witnesses.—In most states it is necessary that the witnesses to a will subscribe and attest the same: See the statutes of the various states. And in Iowa, under a statute requiring a will to be in writing and "witnessed" by two witnesses, the court has held it necessary to the validity of a will that the witnesses should "subscribe" the will. For, as there said by the court, "to say that a writing is witnessed includes, as it seems to us, almost necessarily, the idea that it is witnessed in writing, and to exclude the conclusion that it is witnessed in any other manner. .... This is sustained by the thought that the witnesses to a will become such from the time they thus sign it. They testify from that moment, and hence, though they should die before the testator or before the probate of the will, it is still good. .... If without anything more than mere memory to identify the instrument, disregarding the consideration that the testator deliberately and formally made his will, desiring and wishing particular persons to attest it in writing, these most solemn of all writings may be established by the recollection of witnesses months and years afterward, immeasurable would be the temptations to frauds and perjuries": In re Boyens' Will, 23 Iowa, 354. In Pennsylvania, however, where the statute of wills requires the signature of the testator to be proved by at least two competent witnesses, neither subscribing nor attesting witnesses are necessary to give validity to a will: Hight v. Wilson, 1 Dall. 94, 1 L. Ed. 51; In re Irvine's Estate, 206 Pa. 1, 55 Atl. 795. And under the custom prevailing in California, before the formation of the state government, to validate a will it was only necessary that the testator and the witnesses should alike hear and understand the testament, and that under such conditions its publication as the will of the testator should be made. It might be drawn in another language from that understood by the testator and witnesses, the notary drawing it understanding both, and the witnesses understanding the language of the

testator: Adams v. Norris, 64 U. S. 353, 16 L. Ed. 539; affirming same case under name of Adams v. De Cook, 1 Fed. Cas. No. 51, McAll. 253.

Mode of Subscription.—A witness to a will may sufficiently subscribe a will by making his mark thereon: In re Pope's Will, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235; Ford v. Ford, 7 Humph. 92. Moreover, a witness' name may be written thereon by another at his instance and direction, and in his presence: Upchurch v. Upchurch, 16 B. Mon. 102; In re Pope's Will, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. For such subscription by another "furnishes as much assurance of identity as the making of a mark. . . . . A literal adherence to the words of the statute would operate harshly, and exclude all persons unable to write their names, as witnesses to wills, however, worthy of credence. A more liberal construction will as effectually accomplish the ends of the statute, and not violate its language": Upchurch v. Upchurch, 16 B. Mon. 102. In North Carolina, it is held that the fact that the witness himself is able to write does not impair the validity of such signature by another (In re Pope's Will, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235); but in Tennessee, it is held that where the witness' name is written by another, the witness himself must countersign it with his mark or other identifying sign, and further, that a competent witness cannot effectively procure his signature to be made thereon by one incompetent to have himself been a witness to a will, for "to permit the devisee to write the name of the subscribing witness would expose the will to little less danger of wrongful alteration and substitution than would exist if the devisee himself were allowed to become the witness; the same evil consequences would follow in the one case as in the other. If he may sign the name of one subscribing witness, he may sign the name of both, and in that way become a more potent factor in the execution and probate of the will than if he were allowed to become a subscribing witness himself. He may not lawfully take the matter so largely into his own hands. A proper construction of the statute excludes the devisee from the doing of any act, even for the subscribing witness, which is essential to a valid subscription": Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

In Re Walker, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L. R. A. 460 (McFarland, Garoutte, and Van Fleet, JJ., dissenting), the court held that a witness could sign only in one way, viz., by affixing his name; and, accordingly, that where a witness, inadvertently signed his name as "C. G. Walker," instead of "C. G. Warren," the will was invalidated.

Place on Will of Subscription.—In the absence of an express statutory requirement that the witnesses attach their signatures at the foot or end of the will, it is immaterial upon what part of a will the attesting witnesses sign their names; all that is necessary is

that the witnesses sign their names upon the paper upon which the will is written. So the fact that two provisions of a will were written after the attestation clause and signatures of the witnesses does not impair its validity: Kolowski v. Fausz, 103 Ill. App. 528; Fowler v. Stagner, 55 Tex. 393, where the clause appointing executors was appended after the place left for the signatures of the subscribing witnesses, and they signed after the writing of the whole and with the intention of attesting the whole will, the part after their signatures as well as that before. Likewise it is of no importance that the witnesses sign their names in the attestation clause of the will, and not after: Franks v. Chapman, 64 Tex. 159. And where, at the conclusion of a will, after the testator's signature, was written a statement by the testator's wife, in substance that she was satisfied with it, and agreed to its provisions, and a subscribing witness to the will signed his name after the above addendum, instead of after the will itself, that fact does not invalidate the will: Potts v. Felton, 70 Ind. 166. Also where one of the witnesses to a will signed a sworn certificate on the back thereof, stating in substance that on the date of the will the testator signed, sealed and delivered it for the consideration and purposes stated therein, as his own proper act and deed, the attestation of such witness is sufficient: Murray v. Murphy, 39 Miss. 214.

In states, however, where it is requisite that the witnesses sign the will at the foot or end thereof, or that they "subscribe" it, a more rigid rule is applicable. Where a will occupied the first and part of the second page of a four-page sheet of paper, and, after being signed, was folded with the fourth page outside and sealed, and was later presented by the testator to three persons to be by them witnessed as his will, there is no sufficient subscribing of the will by the witnesses: Soward v. Soward, 1 Duvall, 126. For "between the paper as subscribed by Soward [the testator], and the names of the witnesses, there is an intervening space of nearly two blank pages. So far from subscribing their names to the will, it may be said, with much more propriety and accuracy of speech, that they merely indorsed the paper enclosing and enveloping the will, without any accompanying writing or memorandum to indicate the purpose of the indorsement or showing any connection whatever between the indorsement and the will. If the paper had been inclosed in a sealed envelope, and the witnesses had written their names on the envelope, it would have been quite as near an approximation to the requirements of the statute. There would also have been just as little room to doubt the identity of the paper in the one case as in the other. And whilst it is true that one of the chief objects of requiring the subscription of the names of the witnesses is to insure identity, it is equally true that another object is to prevent fraudulent additions to or alterations of the instrument to be subscribed. But the mode in which these objects are to be attained is definitely and certainly prescribed by the law, and it admits the substitution of no other mode."

Moreover, where, after a testator's will was written, he caused another paragraph to be written at the end, which clause was of a testamentary character; and he signed both at the end of the original will, and after the new paragraph, but the witnesses signed only at the end of the original will, they failed to subscribe the will, and the will is invalid: In re Blair's Will, 84 Hun, 581, 32 N. Y. Supp. 845. And where a will was written on the first and third pages of a double sheet of paper, and at the foot of the first page were the words "continued on the next page," followed by an attestation clause and the signatures of the testator and three subscribing witnesses, and it further appeared from the terms of the will that the matter on the third page was surplusage, yet the will, not being signed by the witnesses at the end of the whole writing, is invalid. The testator intended the clauses on the third page to be part of his will, and it was not completed to his satisfaction until they were added. What shall form part of the instrument which the testator intends as his will must be determined by him: In re Albert's Will, 38 Misc. Rep. 61, 76 N. Y. Supp. 965.

Time of Subscription and Attestation.—It is not necessary, in most states, that both or all the witnesses to a will should subscribe it at the same time, but a will attested by a sufficient number of witnesses, who at different times subscribe their names as witnesses, is well executed: Johnson v. Johnson, 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201; Grubbs v. Marshall (Ky.), 13 S. W. 447; Dewey v. Dewey, 1 Met. 349, 35 Am. Dec. 367; Cravens v. Faulconer, 28 Mo. 19; Eelbeck's Devisees v. Granberry, 3 N. C. 232. In Virginia, however, the witnesses to a will must attest at the same time, for otherwise "the testator might be capable of making a will at the time of one of the attestations, and incapable at the time of the other, and only one attesting witness could prove the important fact of mental capacity at either time": Parramore v. Taylor, 11 Gratt. 220.

Presence of Testator—Necessity and Purpose.—It is prerequisite to the validity of a will that both or all the witnesses thereto subscribe and attest the same in the presence of the testator: Standley v. Moss, 114 Ill. App. 612; Calkins v. Calkins, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 293; Cravens v. Faulconer, 28 Mo. 19; In re Beggans' Will, 68 N. J. Eq. 572, 59 Atl. 874; Eelbeck's Devisees v. Granberry, 3 N. C. 232; In re Pope's Will, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235; Town of Pawtucket v. Ballou, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43. An instruction that a will to be valid must be attested in the "personal and actual" presence of the testator, is not objectionable, although the adjectives are unnecessary, as, if attested in his presence, it cannot otherwise than in his "personal and actual" presence: Greene v. Greene, 145 Ill. 264, 33 N. E. 941.

"The object of the statute in requiring that a will should be 'attested by the witnesses in the presence of the testator,' so far as the

form of the attestation is concerned, was to identify the instrument as that signed and published by the testator, and to prevent fraud and imposition in establishing spurious wills, and, at the same time, to show the person by whom the facts necessary to establish the will could be proved, when it should be produced for probate'': Fatheree v. Lawrence, 33 Misc. Rep. 585. To the same effect, see Robinson v. King, 6 Ga. 639; Calkins v. Calkins, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393; Arndorff v. Hummer, 12 B. Mon. 619; Watson v. Pipes, 32 Miss. 451; Crovens v. Faulconer, 28 Mo. 19; Mandeville v. Parker, 31 N. J. Eq. 242. A further object it said to be that the testator may know that the instrument has been witnessed by the persons whom he has chosen for that purpose: Orndorff v. Hummer, 12 B. Mon. 619.

Presence Mentally.—From the standpoint of a testator as a rational being, the performance of the act of subscription and attestation in his presence necessarily involves his full consciousness at the time of such performance of the nature and quality of the act: Watson v. Pipes, 32 Miss. 451; Nock v. Nock's Exrs., 10 Gratt. 106. For "when the condition of the testator is such that immediately after the acknowledgment and before the subscription of the will, from sleep or other cause, he becomes insensible to what is passing around him, and unconscious of the act of subscribing, which he has a right to supervise, and thus in fact is unable to determine whether he will or will not supervise it, the subscription thus made is not in the sense or within the objects of the statute made in his presence. . . . . Although, as far as mere space were concerned, the subscription was in his presence, we are satisfied that the same reasons which require that he should have been physically capable by his own exertion or by the aid of others to see what was going on if he chose to do so, operate even more powerfully to require that he should have been conscious of it, and that he should have had the will or mental power to determine whether he would or would not see it. If this be not requisite, the subscription by the witnesses would be sufficient, though made after the death of the testator, or after he had relapsed into perfect delirium, or had become wholly insensible to external objects from the near approach of death. And if this were sufficient, the objects of the statute would be as fully accomplished if the will were subscribed a year from the testator's death, or at any distance from his presence during his life'': Orndorff v. Hummer, 12 B. Mon. 619. So where at the time of subscription the testator was in bed and did not speak to the witness while he was in the room, nor did the witness see him, and while both before and after the subscription the testator was able to converse and walk about, but it did not appear that he was sensible or awake at the time thereof, the subscription is insufficient: Griffith's Exr. v. Griffith, 5 B. Mon. 511. Where the feebleness of mind and body of a testator at the time of attestation of his will was so great that there was a total prostra-

tion of bodily and mental powers, the will is void: Spoonemore v. Cables, 66 Mo. 579. And where a testator declared an instrument to be his will and requested the witnesses to sign, but before the second witness had signed died, and he afterward subscribed, the will is invalid: In re Fish's Will, 88 Hun, 56, 34 N. Y. Supp. 536. In McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682, the court in substance says: If before the attestation of a will, and while it is being done, the testator, by reason either of unconsciousness or physical inability, was unable to dissent from the attestation and to arrest or prevent the same by indicating his dissent or disapproval, if he had desired to do so, the will is not valid. It is not necessary that the testator shall actually assent to the attestation, but when the attestation is made he must be in a mental and physicial condition which will enable him to dissent from the attestation if he desires; and if his condition is such that he could give such dissent or disapproval, if he chose to do so, but does not, his assent will be implied.

In Ambre v. Weishaar, 74 Ill. 109, it has further been held that an attestation, even in the same room with the testator, if done in a clandestine and fraudulent manner, will not be regarded as done in his presence.

Presence Physically.—From the standpoint of the testator as a sentient creature, there must be such contiguity between the testator and the witnesses at the time of their attestation as in fact or in the common experience of men will bring the act of the witnesses in subscribing and attesting to the perception of the testator's senses. In Healey v. Bartlett, 73 N. H. 110, 59 Atl. 617, the court says: "When a testator is not prevented by physical infirmities from seeing and hearing what goes on around him, it is the general, if not the universal, rule, that his will is attested in his presence if he understands and is conscious of what the witnesses are doing when they write their names, and can, if he is so disposed, readily change his position so that he can see and hear what they do and say. . . . . In other words, if he had knowledge of their presence, and can, if he is so disposed, readily see them write their names, the will is attested in his presence, even if he does not see them do it, and could not without some slight physical exertion. It is not necessary that he should actually see the witnesses for them to be in his presence. They are in his presence whenever they are so near him that he is conscious of where they are, and of what they are doing, through any of his senses, and are where he can readily see them if he is so disposed. The test, therefore, to determine whether the will of a person who has the use of all his faculties is attested in his presence, is to inquire whether he understood what the witnesses were doing when they affixed their names to his will, and could, if he had been so disposed, readily have seen them do it."

In view of the tendency, observable in the foregoing and many other decisions, to confuse presence with eyesight, the court, in May-

nard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401, says: "Courts have held that where the testator is a blind person, still the witnesses must subscribe in such position and proximity that, had the testator been possessed of eyesight, he would have seen them; thus making the test of sight the limit of personal presence. If this is the correct criterion, then the rule, instead of being uniform, would be subject to great fluctuations, according to the degree of eyesight a person has. What would be in the presence of a far-sighted person would be in the absence of a near-sighted one; and what would be a valid execution of a will for one would be wholly worthless for another with equal mental capacity; and a person wearing his eyeglasses or spectacles would have a larger presence than when he laid them aside. Under such a rule, the oculist would appear to be the most important witness to establish or destroy the legal attestation and execution of a will. . . . . I confess I do not see why the word 'presence' should not be held to convey the idea attached to its ordinary signification in the ordinary use of language. It is not a technical term or scientific word. Why should such a meaning be put upon this word 'presence' that implies that every person who is called upon to witness the execution of a will is presumed to be willing and anxious to foist upon the testator a spurious document, and hence required to write his name under the eye (if he has one) of the testator."

Other decisions, while recognizing that an attestation may be good although the testator is blind or does not choose to look at the act of attesting, yet hold that to be in the testator's presence the act of attesting must be in the line of the testator's vision if he could or cared to look. In Calkins v. Calkins, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393, the court says: "In the case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses. . . . . On the other hand, no mere contiguity of the witnesses will constitute presence if the position of the testator is such that he cannot possibly see them. An attestation is not in the presence of the testator, although the witnesses are in the same room and close to him, if some material obstacle prevents him from knowing of his own knowledge or perceiving by his senses the act of attestation. To the same effect, In re Tobin, 196 Ill. 484, 63 N. E. 1021; Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464; Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599. The necessity, in case of a blind testator, that the act of attesting should be within the perception of his remaining senses does not appear to be appreciated in the remarks in Healey v. Bartlett, 73 N. H. 110, 59 Atl. 617, in respect to the wills of blind testators. In Ray v. Hill, 3 Strob. 297, 49 Am. Dec. 647, the will of a blind man was sustained, the will having been within two feet of the testator at the time the witnesses subscribed their names, and the court said: "In the case of a blind man, the

superintending control which in other cases is exercised by sight must be transferred to the other senses; and if they are, or may, at his discretion, be made sensible that the witnesses are subscribing the same will that he had signed, I should think it ought to suffice.''

Presence in Case of Clear Vision.—Where a testator is so situated with respect to the witnesses to his will that by a mere movement of his head, which he had the physical ability to make if he chose, they would be in his unobstructed sight during the act of attestation, they are sufficiently in his presence, though he fails to overlook their act of attestation: Robinson v. King, 6 Ga. 539; Ambre v. Weishaar, 74 Ill. 109; In re Storey's Will, 20 Ill. App. 183, 200; McElfresh v. Guard, 32 Ind. 408; Turner v. Cook, 36 Ind. 129; Orndorff v. Hummer, 12 B. Mon. 619; Edelen v. Hardley's Lessee, 7 Har. & J. 61, 16 Am. Dec. 292; Dewey v. Dewey, 1 Met. (Mass.) 349, 35 Am. Dec. 367; Hogan v. Grosvenor, 10 Met. (Mass.) 54, 43 Am. Dec. 414; In re Allen, 25 Minn. 39; Watson v. Pipes, 32 Miss. 451; Walker v. Walker, 67 Miss. 529, 7 South. 491; Spoonemore v. Cables, 66 Mo. 579; Cornelius v. Cornelius, 52 N. C. 593; Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62; Ray v. Hill, 3 Strob. 297, 49 Am. Dec. 647. This rule applies equally where the witnesses were not in the same room with the testator: Orndorff v. Hummer, 12 B. Mon. 619; Bynum v. Bynum, 33 N. C. 632; In re Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591. If actual sight were necessary, it would vitiate a will if the testator did but turn his back or look off, though literally present by being at the spot where the thing was done: Bynum v. Bynum, 33 N. C. 632.

Presence in Case of Obstructed Vision.—Where, however, the testator and witnesses are in the same apartment and fairly contiguous, but some physical object obstructing the sight lies between them during the act of subscribing, the witnesses are not in the testator's presence, and the attestation is insufficient, although the testator was physically capable of changing his position or removing the obstruction had he chose to do so: Robinson v. King, 6 Ga. 539; Brooks v. Duffell, 23 Ga. 441; Reed v. Roberts, 26 Ga. 294, 71 Am. Dec. 210; Calkins v. Calkins, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 293; Ray v. Hill, 3 Strob. 297, 49 Am. Dec. 647. Yet in Michigan, where the sight was interrupted by the fact that the first witness stood between the testator and the second witness while the second was subscribing, the attestation was not thereby invalidated: Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401. And the fact that, while subscribing, a witness is so placed with respect to the testator that the witness' body cuts off the testator's view of the will, the hand of the witness with which he was subscribing, and the act of subscription, does not render the attestation any the less in the presence of the testator: In re Tobin, 196 Ill. 484, 63 N. E. 1021; Nock v. Nock's Exrs., 10 Gratt. 106; Baldwin v. Baldwin's Exr., 81 Va. 405, 59 Am. Rep. 669.

Presence in Case of Inability to Look in Direction.—In some decisions it is held that where the testator's ability actually to see the witnesses to his will subscribe the same is dependent upon his ability to turn himself, and his ailment so operates as to prevent him from making this movement, the will is not witnessed in his presence: Aikin v. Weckerly, 19 Mich. 482; Watson v. Pipes, 32 Miss. 451; Walker v. Walker, 67 Miss. 529, 7 South. 491; Neil v. Neil, 1 Leigh, 6, the court being equally divided. But in Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464, the court held that where a will was attested nine feet from a testator's bed in an adjoining room, and in the unobstructed line of vision from his bed, but because of injuries he was unable to turn his head or to look in any direction except upward, it is attested in his presence, for sight is not the only test of presence. "A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence."

Position in Same or Another Room—Presumption Therefrom.—In order that the attestation may be in the presence of the witnesses, it is not indispensable that the witnesses should, at the time of their subscription, be in the same room or even in the same house as the testator: Robinson v. King, 6 Ga. 539; Ambre v. Weishaar, 74 Ill. 109; McElfresh v. Guard, 32 Ind. 408; Watson v. Pipes, 32 Miss. 451. Yet where the witnesses subscribe in a different room from that in which the testator is and out of the line of his vision, they are not in his presence: Robinson v. King, 6 Ga. 539, where the witnesses went onto the piazza to subscribe; Edelen v. Hardley's Lessee, 7 Har. & J. 61, 16 Am. Dec. 292; Boldry v. Parris, 2 Cush. 433; Mandeville v. Parker, 31 N. J. Eq. 242, where the will was on a table, behind the partition of the adjoining room, although the backs of the witnesses sitting at the table and subscribing their names might have been visible from the position of the testator; Graham v. Graham, 32 N. C. 219, under same circumstances; Jones v. Tuck, 48 N. C. 202; Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599, where a testator in bed could have seen, by raising himself on his elbow, which he had the strength to do, but did not. In Wright v. Lewis, 5 Rich. 1, 212, 55 Am. Dec. 714, where a testator, being in ordinary health, walked on to a piazza to subscribe his will and sat down at a table and did it, and then rose and let the witnesses sit there to sign, meanwhile walking into the room off the piazza from parts of which he could see the witnesses sign, and after the attestation was done was found by the witnesses sitting in a place in the room from which he could not have seen the witnesses when subscribing, the court held the attestation sufficiently in the testator's presence, and distinguished the case from the others on the ground that in them the will

was taken from the actual presence of the testator to be attested, while here the will remained exactly where the testator signed it, and he left the witnesses when he knew they were attesting it.

Moreover, in a number of decisions it is held that where the witnesses are in the same room with the testator at the time of the act of subscribing, they are prima facie in his presence, and the burden is on a contestant of the will to rebut that presumption, while if they are not all in the same room at that time, they are prima facie out of the presence of the testator, and the burden is on the proponent of the will to establish their mutual presence: Orndorff v. Hummer, 12 B. Mon. 619; Watson v. Pipes, 32 Miss. 451; Mandeville v. Parker, 31 N. J. Eq. 242; In re Beggan's Will, 68 N. J. Eq. 572, 59 Atl. 874; Bynum v. Bynum, 33 N. C. 632; Jones v. Turk, 48 N. C. 202.

Acknowledgment of Signature as Equivalent to Presence.—In some states, where the witnesses to a will subscribed the same out of the presence of the testator, their subsequent acknowledgment of the signatures to the testator, although done as part of the same transaction, the signatures being exhibited to the testator, does not amount to subscription in the testator's presence and is insufficient to validate the will: Calkins v. Calkins, 216 Ill. 458, 108 Am. St. Rep. 223, 75 N. E. 182, 1 L. R. A.. N. S., 393; Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687; Town of Pawtucket v. Ballou, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43; In re Downie's Will, 42 Wis. 66. In other states, however, the subscription and attestation is in such case, under the circumstances mentioned, sufficiently done in the testator's presence: Cook v. Winchester, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822; Moore v. Moore's Exr., 8 Gratt. 307, the court being equally divided; Sturdivant v. Birchett, 10 Gratt. 67 (Daniel and Allen, JJ., dissenting).

Mutual Presence of Witnesses.—In most states, it is not requisite that the witnesses to a will sign or attest the same in the presence of each other or of one another, but it is sufficient that they do so separately: Moore v. Spier, 80 Ala. 129; Appeal of Gaylord, 43 Conn. 82; Flinn v. Owen, 58 Ill. 111; In re Hull's Will, 177 Iowa, 738, 89 N. W. 979; Hogan v. Grosvenor, 10 Met. (Mass.) 54, 43 Am. Dec. 414; Ela v. Edwards, 16 Gray, 91; Cravens v. Faulconer, 28 Mo. 19; Hoysradt v. Kingman, 22 N. Y. 372; In re Potter's Will, 12 N. Y. Supp. 105; In re Diefenthaler's Will, 39 Misc. Rep. 765, 80 N. Y. Supp. 1121; Raudebaugh v. Shelley, 6 Ohio St. 307; Logue v. Stanton, 5 Sneed, 97; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Parramore v. Taylor, 11 Gratt. 220; Beane v. Yerby, 12 Gratt. 239; Green v. Crain, 12 Gratt. 252 (Allen, P., and Daniel, J., dissenting, by reason of peculiar statutory language); In re Smith's Will, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665. "A requisition that the witnesses shall subscribe in the presence of each other would be a fruitful source of litigation, would

defeat many fair wills, and would, I think, be productive of no corresponding good. It would very much clog the exercise of the testamentary power, without throwing around it, so far as I can perceive, a single additional safeguard. It would render it necessary to inquire in every case whether the witnesses, when they subscribed the will, were not only in the presence of the testator or in the range of his vision, but also in the presence of each other or in the range of each other's vision. It would be questionable whether range of the vision would be sufficient in regard to the witnesses inter se, and whether actual sight would not be necessary'': Paramore v. Taylor, 11 Gratt. 220.

In a few states, however, the witnesses must be together in each other's or one another's presence at the time of their subscription and attestation of the will, to validate the same: Ludlow v. Ludlow, 36 N. J. Eq. 597; Roberts v. Welch, 46 Vt. 164. In these latter states, where all the witnesses to a will were so situated that they might have seen one another sign, it is not material whether they did in fact or not: Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62; In re Claflin's Will, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815. But to constitute presence, it is not sufficient that the witnesses merely were in the same room with the testator. The room might have been so large; but the witnesses must have been together in the presence of one another in such a way and in such a sense that they could see one another sign; whether they actually looked and saw or not, they must have been right where they could have seen one another sign: In re Claflin's Will, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261.

Knowledge of Contents by Witnesses.—It is not essential to the validity of a will that it should be read over to the witnesses thereto, nor that they should know its contents: Dickie v. Carter, 42 Ill. 376; Brown v. McAlister, 34 Ind. 375; In re Higdon's Will, 6 J. J. Marsh, 444, 22 Am. Dec. 84; Flood v. Pragoff, 79 Ky. 607; Hogan v. Grosvenor, 10 Met. (Mass.) 64, 43 Am. Dec. 414; Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Raudebaugh v. Shelley, 6 Ohio St. 307; Luper v. Werts, 19 Or. 122, 23 Pac. 850; Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; Appeal of Linton, 104 Pa. 228, relating to a will of a married woman; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

In order to validate his attestation to a will, a witness thereto need not know the testamentary capacity of the testator: Huff v. Huff, 41 Ga. 696. It is error to instruct the jury that prior to the signing of a will by the witnesses thereto, each of the witnesses must know that the other was to be an attesting witness, and each must know that the other had been requested to act in that capacity: Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

It is not requisite to the validity of a will that the witnesses thereto attest to exactly the same act or declaration on the part of

the testator, indicating his acknowledgment of the instrument: In re Hull's Will, 117 Iowa, 738, 89 N. W. 979.

Attestation Clause.—Where it is customary to place at the end of a will, before the signatures of the witnesses thereto, an attestation clause setting forth with more or less completeness the performance of the statutory requisites to its due execution and witnessing, yet the total absence of such clause, or of any word of attestation, does not invalidate the will: Calkins v. Calkins, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393; In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Barricklow v. Stewart, 163 Ind. 438, 72 N. E. 128; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Ela v. Edwards, 16 Gray, 91; Berberet v. Berberet, 131 Mo. 399, 52 Am. St. Rep. 634, 33 S. W. 61; Williams v. Miles, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151; In re Look, 54 Hun, 635, 7 N. W. Supp. 298; affirmed without opinion, 125 N. Y. 762, 27 N. E. 408; In re Aker's Will, 74 App. Div. 461, 77 N. Y. Supp. 643; In re Cornell's Will, 89 App. Div. 412, 85 N. Y. Supp. 920; Webb v. Dye, 18 W. Va. 376. Where such a clause is used, the particular form of completeness thereof is immaterial to the validity of the will: Keely v. Moore, 196 U. S. 38, 25 Sup. Ct. 169, 49 L. Ed. 376, affirming 22 App. Dist. Col. 9; Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 638; Barricklow v. Stewart, 163 Ind. 438, 72 N. E. 128; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Chase v. Kittredge, 11 Allen, 49, 89 Am. Dec. 687; Fatheree v. Lawrence, 33 Miss. 585, Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225; Jackson v. Jackson, 39 N. Y. 163; Franks v. Chapman, 64 Tex. 159. The same rules hold true with respect to an attestation clause to a codicil: In re Crane, 68 App. Div. 355, 74 N. Y. Supp. 88.

So where the attestation clause of a will consisted merely of the word "witness" (Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Chase v. Kittredge, 11 Allen, 49, 87 App. Div. 687; In re Aker's Will, 74 App. Div. 461, 77 N. Y. Supp. 643), or "attest" (Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683), or "test" (Fatheree v. Lawrence, 33 Miss. 585), written before the names of the witnesses, it is sufficient. Where at the end of a will, below the testator's subscription were subscribed the phrases "Written by S. S. Ashton," and "Witness Anna R. Ashton," and it appeared that the first witness was the draftsman of the will and wrote the words "Written by S. S. Ashton for" on the will, intending to add the testatrix's name in case she was unable to write her own, but the testatrix, being able to write it, scratched out the word "for" and left the remainder as a subscription and attestation of the will, it is sufficient: Pollock v. Glassel, 2 Gratt. 439. An attestation clause in the form of a formal certificate of acknowledgment of the testator's signature, the witness being one authorized to take acknowledgments, has also been sustained: In re Hull's Will, 117 Iowa, 738,

89 N. W. 979; Franks v. Chapman, 64 Tex. 159. Likewise an attestation clause stating in substance that on the date of the will the testator signed, sealed and delivered it for the consideration and purposes stated therein as his own proper act and deed does not invalidate the attestation, as such superfluous language cannot invalidate the witness' signature thereto: Murray v. Murphy, 39 Miss. 214. Furthermore, the use of one clause in one form signed by two witnesses, and of another clause in another form signed by the third, does not (three witnesses being necessary) render the attestation of the will insufficient: Keeley v. Moore, 196 U. S. 38, 25 Sup. Ct. 169, 49 L. Ed. 376, affirming 22 App. Dist. Col. 9.

But in the early case of Withinton v. Withinton, 7 Mo. 589, where a paper offered as a will was in form a deed to take effect at the grantor's death, and had attached to it a certificate of a notary, wherein the notary acknowledged his signature and his act, and that he did it for the purposes in the writing set forth, which certificate was signed by the notary, the court held that the notary's signature cannot, for the purpose of sustaining the writing as a will, be considered the signature of an attesting witness, since the function of a witness to a will is not only to prove that the instrument was executed, but that the testator was of sound and disposing mind, while here the notary certified merely to the due execution and not to the mental capacity of the grantor.

Order of Execution by Testator and by Witness.—While the general and regular course in the attestation of a will is for the testator first to execute the will on his part and then call on the witnesses to attest the execution by subscribing their names (O'Brien v. Gallagher, 25 Conn. 229), yet in some states the fact that one or more of the witnesses subscribe their names before the testator signs or acknowledges the will does not, where the testator afterward, as part of the same transaction and in the continued presence of the witnesses, himself signs or acknowledges it, invalidate the will: O'Brien v. Gallagher, 25 Conn. 229; Swift v. Wiley, 1 B. Mon. 114; Sechrest v. Edwards, 4 Met. (Ky.) 163; Cutler v. Cutler, 130 N. C. 1, 89 Am. St. Rep. 854, 40 S. E. 689, 57 L. R. A. 209; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97; Parramore v. Taylor, 11 Gratt. 220; Beane v. Yerby, 12 Gratt. 239. Compare, however, Chisholm's Heirs v. Ben, 7 B. Mon. 408. In Swift v. Wiley, 1 B. Mon. 114, the court said: "As all three of the subscribing witnesses were present at the final publication of the will, attested the fact of signing and publishing by the testator, and either then subscribed or acknowledged the subscription of their respective names, on the same paper, so as to insure the identification of the will as then published and attested, every purpose of the statute has been fulfilled, and not even a letter of it violated or disregarded. To resubscribe the names . . . . would have been a superfluous and puerile act of mechanical repetition, not necessary for identification; because they had once sub-

scribed the same paper in the presence and at the request of the testator, and which fact was recognized by him, as well as by themselves, after his own name had been subscribed, and when the document, thus recognized and identified, was finally and conclusively published as his will; nor can we perceive any other end of either utility or security that could have been promoted by again subscribing names already sufficiently subscribed.''

Moreover, in Grigg v. Williams, 51 N. C. 518, the court held that where after one of the witnesses to a will had subscribed his name the testator inserted the name of an additional executor as part of the same transaction, the attestation by such witness was good.

In other states, however, where one or more of the necessary witnesses to a will subscribes it before the testator subscribes or acknowledges the same to the witnesses, the attestation of the will is insufficient, although the testator afterward, as part of the same transaction, signs or acknowledges the will: Duffie v. Corridon, 40 Ga. 122, where the testator signed the next day in the presence of the witness who had signed the previous day; Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160; Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687, where one of the witness signed in the absence of and before the testator, and the witness afterward acknowledged his signature to the testator after the testator had signed in his presence; Lacey v. Dobbs, 63 N. J. Eq. 325, 92 Am. St. Rep. 667, 50 Atl. 497, 55 L. R. A. 580, overruling Mundy v. Mundy, 15 N. J. Eq. 290, to the contrary; Baskin v. Baskin, 36 N. Y. 416; Jackson v. Jackson, 39 N. Y. 153; Sisters of Charity v. Kelly, 67 N. Y. 409; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed, 64 Hun, 636, 19 N. Y. Supp. 613; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. See, also, In re Irvine's Estate, 206 Pa. 1, 55 Atl. 795, holding that the Pennsylvania statute of 1855 governing the execution of a will disposing of property to charitable or religious uses, presupposes the existence of a writing signed by the testator at the time of attestation. In support of this doctrine, the court in Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160, declared that the signature of the testator is the principal, if not the only, matter to which the attestation applies, and such being the case, the attestation is insufficient if made a moment before the signing by the testator, as well as though made a day before. ''To witness a future event is equally impossible, whether it occur the next moment or the next week.'' And in Jackson v. Jackson, 39 N. Y. 153, the courts says: ''Their signatures do not attest the signing by the testator, if they are placed there before the will is signed by him. For some period, longer or shorter, as the case may be, those signatures attest no execution—they certify what is not true. . . . . Execution and the attestation thereof bear a plain relation to each other in point of time, in the good sense and common apprehension of everyone, and the statute prescribing the requisite formalities to a valid execution and authen-

tication plainly contemplates that the acts of the witnesses shall attest the signing and declaration of the testator as a fact accomplished.''

Similarly in Reed v. Watson, 27 Ind. 443, where a testator procured the signature of a witness to his will before he signed it, and then took the will away with him and afterward attached his own signature without the knowledge of such witness, the court held the attestation insufficient.

In Re Phillips, 98 N. Y. 267, the court, however, held that the statute of wills is complied with, if the declaration that the instrument is a will and the acknowledgment of the testator's signature are simultaneous with the signature of the subscribing witness, especially if these acts are done before the witness has completed his signature and all on the same occasion.

Order of Publication and Other Requisites.—It is sufficient in those states where publication is essential to the validity of a will that it be done as part of the transaction of witnessing the will, whether before or after the signing or acknowledgment of the will by the testator to the witnesses: In re Johnson's Estate, 57 Cal. 529, where the publication was made immediately after a witness finished subscribing; Jackson v. Jackson, 39 N. Y. 153, where publication was made immediately before the subscription of the will by the testator; In re Look's Will, 5 N. Y. Supp. 50; In re Look, 54 Hun, 635, 7 N. Y. Supp. 298, judgment affirmed, 125 N. Y. 762, 27 N. E. 408, holding that publication must be made at the time of subscription or acknowledgment by the testator; In re Dale's Will, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed, 64 Hun, 636, 19 N. Y. Supp. 613, where publication was made immediately before subscription by the testator; In re Carll's Will, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036. It is, however, insufficient to publish the will to one of the witnesses thereto several weeks after the attestation by the witness: In re Dale's Will, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649.

Order of Request to Witnesses and Other Requisites.—The fact that a testatrix requested the witnesses to her will to subscribe as such before she subscribed it does not impair its validity, where they did not actually subscribe until after the testatrix: In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun, 636, 19 N. Y. Supp. 613.

Mode of Attestation.—''The code provides no special formalities about the witnesses to a will. It is sufficient if they attest and subscribe the will in the presence of the testator'': Huff v. Huff, 41 Ga. 696. The law looks to the substance of the transaction, and requires only evidence that all the safeguards against improvidence

and fraud, prescribed by statute, have been substantially observed: Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17.

Mode of Request to Witnesses and Publication.—It is proper and sufficient for a testator to publish his will and to request the witnesses thereto to attest, in the same sentence, or by the same acts, or in response to one question by one of the witnesses. "These acts are distinct in their nature or quality, but the performance may be joint or connected": Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235; In re Kane's Will, 20 N. Y. Supp. 123; In re Menge's Will, 13 Misc. Rep. 553, 35 N. Y. Supp. 493; In re Murphy's Will, 15 Misc. Rep. 208, 37 N. Y. Supp. 223.

The Testimony of the Attesting Witnesses.—Where a will is regular on its face, its due execution may ordinarily be proved by the uncontroverted testimony of one of the witnesses thereto: Griffith's Exr. v. Griffith, 5 B. Mon. 511; Hight v. Wilson, 1 Dall. 94, 1 L. Ed. 51; Dean v. Heirs of Dean, 27 Vt. 746. In Illinois, however, it is requisite that the testimony of all the witnesses shall be taken to the point that the testator was of sound mind and memory at the time of the execution of the will: Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237.

Right to Put in Evidence Outside Testimony of Witnesses.—Before any evidence other than the testimony of the witnesses to a will may be produced to prove its due execution, all the witnesses must first be examined, or else their absence accounted for and their signatures proved: Tudor v. Tudor, 17 B. Mon. 383, relating to a codicil; In re Moore's Will, 109 App. Div. 762, N. Y. Supp. 729; Alexander v. Beadle, 7 Colo. 126. No controlling force, however, is to be given to the testimony of the witnesses, and it is liable to be rebutted by other evidence, either direct or circumstantial; yet their direct participation in the transaction gives great weight to their testimony: Orser v. Orser, 24 N. Y. 51; Webb v. Dye, 18 W. Va. 376. Thus where the testimony of one or even all of the witnesses to a will is adverse to its valid execution, it may be sustained by other evidence adequate to show its due execution: Griffith's Exr. v. Griffith, 5 B. Mon. 511; Jauncey v. Thorne, 2 Barb. Ch. 40; In re Carll's Will, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729; Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; Hight v. Wilson, 1 Dall. 94, 1 L. Ed. 51; Rose v. Allen, 1 Colo. 23; Alexander v. Beadle, 7 Colo. 126; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Dean v. Heirs of Dean, 27 Vt. 746; In re Claflin's Will, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; Webb v. Dye, 18 W. Va. 376; In re Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591. So where a witness to a will testifies that his signature thereto is not genuine, and that he knew nothing of its execution, proof of his handwriting is admissible to controvert his testimony: Jones v. Arterburn, 11 Humph. 97. Thus a will may be proved by other witnesses than the sub-

scribing witnesses, notwithstanding one of them gives testimony that the testator was unconscious at the time of attestation: Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650. Likewise where the witnesses to a will disagree as to the material facts in its execution, that fact alone is not enough to defeat the will: In re Bedell's Will, 2 Conn. Sur. 328, 12 N. Y. Supp. 96; In re Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591. And where the witnesses to a will were unable to write, and their hands having been guided by the draftsman of the will while writing their respective signatures, were unable to identify them, and expressed the opinion on hearing the will read that certain of its provisions had been changed since it was read to them at the time of its execution, the testimony of the draftsman of the will is properly admitted to sustain it: Montgomery v. Perkins, 2 Met. (Ky.) 448, 74 Am. Dec. 419. Furthermore, where the witnesses to a will when called as witnesses cannot remember the facts respecting the execution of the will, it may nevertheless be supported by other evidence, including the presumptions of law properly applicable: Hobart v. Hobart, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Jauncey v. Thorne, 2 Barb. Ch. 40, 59; Orser v. Orser, 24 N. Y. 51; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220, 38 Barb. 77; Rugg v. Rugg, 83 N. Y. 592; In re Kane's Will, 20 N. Y. Supp. 123; Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

In Illinois, however, where a petition for probate of a will is first heard in a probate court, the evidence in that court is properly confined to that of the attesting witnesses, but if the probate is there denied and the matter goes to the circuit court, on the hearing in the circuit court the proponent of the will is not limited to nor bound by the testimony of the witnesses to the will, but may rightfully resort to any relevant and competent evidence to sustain the will: Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536; Webster v. Yorty, 194 Ill. 408, 62 N. E. 907; In re Tobin, 196 Ill. 484, 63 N. E. 1021; In re Barry's Will, 219 Ill. 391, 76 N. E. 577.

Opinion of Witness as Evidence.—"The opinions of subscribing witnesses as to the condition of the testator's mind, at the time of the execution of the will, may be received in evidence, when the facts are stated on which such opinions are founded, though such witnesses do not fall within the class known to the law as experts. In such cases, however, the evidence on which most reliance should be placed are the facts proved, rather than the opinions expressed by the witnesses": Cilley v. Cilley, 34 Me. 162. Also Stirling v. Stirling, 64 Md. 138, 21 Atl. 273. In Illinois such opinion must, however, be taken in every case of probate: Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237. Where a witness to a will expresses an opinion adverse to the testamentary capacity of the testator, that fact is not necessarily fatal to the will, but as the witness prima facie attests the testamentary capacity of the testator by becoming a witness, his adverse testimony will be received with suspicion:

Odenwaelder v. Schorr, 8 Mo. App. 458; Mays v. Mays, 114 Mo. 536, 21 S. W. 921.

Declarations of Witness as Evidence.—Where the variant statements of a witness to a will are put in evidence to impeach him, they cannot be used as substantive evidence of the facts stated: Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729; In re Claflin's Will, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261.

The Attestation Clause as Evidence.—Where, on a proceeding wherein the validity of a will is at issue, the witnesses thereto are produced, the attestation clause may be used as a means of refreshing the memories of the attesting witnesses in respect to the formalities actually observed in the execution of the will to which it is attached: In re Look, 54 Hun, 635, 7 N. Y. Supp. 298, affirmed without opinion, 125 N. Y. 762, 27 N. E. 408. Moreover, where there is a dispute as to what occurred at the time of the execution of a will, and the will is on its face in due form, the recitals of the attestation clause must be given some weight in determining the dispute: In re Menge's Will, 13 Misc. Rep. 553, 35 N. Y. Supp. 493.

Where, by reason of the failure of the memories of the subscribing witness to a will, their insanity, death, or absence beyond the reach of process, their testimony cannot be obtained, proof of their signatures subscribed to the attestation clause renders the recitals of that clause prima facie evidence of the observance in the execution of such will of all the formalities set forth in such clause. It is not, however, conclusive evidence of the due execution of the will, but is subject to be rebutted by evidence showing that the actual execution was insufficient: In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Mundy v. Mundy, 15 N. J. Eq. 290; Tappen v. Davidson, 27 N. J. Eq. 459; Allaire v. Allaire, 37 N. J. L. 312, 39 N. J. L. 113; Mandeville v. Parker, 31 N. J. Eq. 242; Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225; In re Kane's Will, 20 N. Y. Supp. 123; In re Jones' Will, 85 N. Y. Supp. 294, holding that this presumption arises even though the will was of recent date; Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; Appeal of Linton, 104 Pa. 228; In re Claflin's Will, 73 Vt. 129, 87 Am. St. Rep. 639, 50 Atl. 815; In re Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591, holding that want of recollection on the part of the witnesses to a will would not defeat it, especially where there was a complete attestation clause. Because of its effect as evidence, an attestation clause to a will, comprising a statement of all that is necessary to the execution of the instrument as a will, is therefore in the highest degree useful: Allaire v. Allaire, 37 N. J. L. 312, 39 N. J. L. 113. For the purpose of rebutting the presumption thus arising from the attestation clause, oral evidence is admissible: Fleming v. Morrison, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499; Pollock v. Glassel, 2 Gratt. 439.

In Pennsylvania it has been held that where it is shown on the probate of a will that one of the witnesses thereto is dead and that his signature to the will is genuine, that proof is equivalent to positive proof by one witness of every fact stated in the attesting clause: Appeal of Linton, 104 Pa. 228. In New York, however, it has been held that it is clear that the attesting clause is not equivalent to the testimony of a living witness, and cannot stand as against the positive testimony of a witness to the contrary. "If equivalent, it should have equal weight as against conflicting testimony, a force which cannot reasonably be attributed to it. The statute makes it evidence; but it is evidence of a secondary and inferior nature, which is received from the nature of the case": Orser v. Orser, 24 N. Y. 51; Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17.

Where a will has no attestation clause, or if the attestation clause does not recite the performance of all the requisites to the making of a valid will, and the testimony of the witnesses to the will cannot be obtained, in some states the burden is on the proponent of the will to show, by the circumstances of the case or other proof if necessary, the observance of all the requisites to the valid execution of a will or of those the performance of which is not recited in the attestation clause, as the case may be: Ela v. Edwards, 16 Gray, 91; Mundy v. Mundy, 15 N. J. Eq. 290; Allaire v. Allaire, 37 N. J. L. 312, 39 N. J. L. 113; Ludlow v. Ludlow, 36 N. J. Eq. 597; In re Breining's Estate, 68 N. J. Eq. 553, 59 Atl. 561; In re Beggans' Will, 68 N. J. Eq. 572, 59 Atl. 874; Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225. In other states, however, where a will is regular on its face, the performance of the necessary requisites to its due execution will, in the absence of an attestation clause, be implied from proof of the signatures of the witnesses thereto: Fatheree v. Lawrence, 33 Miss. 585; Nock v. Nock's Exrs., 10 Gratt. 106. See, also, Webb v. Dye, 18 W. Va. 376, 388.

IN THE MATTER OF THE ESTATE OF JOHN S. DOE.

[No. 14,365; decided November 27, 1905.]

Wills—Construction as to Intestacy.—Of the two modes of interpreting a will, that is to be preferred which will prevent a total intestacy; but if the legal effect of the expressed intent of a testator is intestacy, it will be presumed that he designed that result.

Construction of Statute Adopted from Another State.—The rule that a statute adopted from another state will be given the construction placed upon it by the courts of that state prior to its adoption, is not absolute, especially where there has been a single

decision which has since been questioned or repudiated in the foreign state.

Trusts—Construction as to Duration.—In determining the duration of a trust term, the inherent character of the trust and its essential limitations may form an element in the construction to be given to the language creating it.

Trusts—On Whose Lives Term may be Limited.—A trust created under subdivision 3 of section 857 of the Code of Civil Procedure, to receive the rents and profits of real property, and apply them to the use of designated beneficiaries, may be limited on lives of persons other than the beneficiaries.

Trusts—Duration Limited by Purposes.—A trust in real property to pay the rents and profits thereof to designated beneficiaries cannot endure longer than the lives of the beneficiaries, where, upon the assumption that they will outlive the trusts, the lives of the latter are made the measure of the trust.

Trusts—Whether Bare and Void.—A devise "in trust" for others is not invalid as a bare trust, when it imposes on the trustee the duty of paying the rents and profits of the property to the beneficiaries.

Trusts—Effect of Partial Invalidity.—An invalid provision in a trust, which is not an integral or essential part of the trust scheme, will not necessarily vitiate the other provisions.

Trusts—Unlawful Accumulations.—A direction to trustees to pay taxes, street assessments, and other charges and expenses incurred in improvements, out of the income of the trust estate, does not provide for an unlawful accumulation.

Trusts—Unlawful Accumulations.—A provision in a trust for retaining the income of the estate and paying it over to the beneficiaries annually is not void.

Wills—Devise on Termination of Trust.—A devise to the widow and daughter of the testator, one-half to the daughter absolutely and the other half to the widow for life with remainder to the daughter, is valid, regardless of the validity of a devise in trust of an intermediate or precedent estate.

Wills—Creation of Vested Remainder.—The devise in this case to the widow and daughter of the testator upon the "termination of the trust" is held to be a devise of a vested remainder, postponed in possession merely.

Trusts—Purpose and Validity.—If a testator, after making specific gifts, devises the residue of his estate to trustees "for" certain beneficiaries, and elsewhere in the will provides that the executors, who are also named as trustees of the trust, shall pay to the persons designated as those "for" whom the property is held, a specified sum per month, the payment of that sum constitutes a trust pur-

pose of the trust of the residuum, and the latter is not void as a naked trust.

Wills—Acceleration of Devise When Trust Invalid.—If a devise is limited to take effect upon the termination of a trust and the trust proves invalid, the devisees come immediately into their own.

Trusts—Liberal Interpretation of Statutes.—Provisions of the codes in respect to testamentary trusts should be construed liberally.

Application for final distribution.

Garret W. McEnerney and Heller & Powers, for the surviving executor and trustee, Bartlett Doe, and for other contingent devisees, applicants.

The trust of specific property is not created to endure for an illegal period. If the wife and daughter predecease the trustees, the trust terminates on the death of the beneficiaries: Civ. Code, secs. 871, 2279; Crooke v. County of Kings, 97 N. Y. 421. Even if a trust were dependent upon the lives of the trustees, the trust would be valid: Bailey v. Bailey, 97 N. Y. 467; Crooke v. County of Kings, 97 N. Y. 421, both cases overruling Downing v. Marshall, 23 N. Y. 366, 377, 80 Am. Dec. 290. The construction given a statute at the time of its adoption from a foreign state will not be followed where that construction has afterward been held erroneous: Goble v. Simeral, 67 Neb. 276, 93 N. W. 236; Whitney v. Fox, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145; Iron Works v. White, 31 Colo. 82, 71 Pac. 384. The case is distinguishable from that of Wittfield v. Forster (124 Cal. 418, 57 Pac. 219), since trust purposes are here declared. If there be directions for an unlawful accumulation of income, this does not invalidate the trust of specific property: Civ. Code, sec. 733. A provision for the annual payment of income is not void as an unlawful accumulation: Estate of Steele, 124 Cal. 533, 541, 57 Pac. 564; In re Howell's Estate, 180 Pa. 515, 520, 37 Atl. 181; Livingstone v. Tucker, 107 N. Y. 549, 552, 14 N. E. 443. Thus annuities are valid under the New York law corresponding to our code section: Alvord v. Sherwood, 21 Misc. Rep. 354, 47 N. Y. Supp. 749; Garvey v. Trust Co., 29 App. Div. 513, 52 N. Y. Supp. 260; Nichols v. Nichols, 42 Misc. Rep. 381, 86 N. Y.

Supp. 719; In re Tracy, 87 App. Div. 215, 83 N. Y. Supp. 1049; Provost v. Provost, 70 N. Y. 144; Townshend v. Frommer, 125 N. Y. 446, 26 N. E. 805; In re Foster's Estate, 37 Misc. Rep. 581, 75 N. Y. Supp. 1067; Stewart v. Phelps, 71 App. Div. 91, 75 N. Y. Supp. 526; Salisbury v. Slade, 160 N. Y. 278, 54 N. E. 741; Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971; Hooker v. Hooker, 41 App. 235, 58 N. Y. Supp. 536; Horsfield v. Black, 40 App. Div. 264, 57 N. Y. Supp. 1006; Vernon v. Vernon, 53 N. Y. 351. The trust of specific property is not invalid under the doctrine of Carpenter v. Cook (132 Cal. 621, 84 Am. St. Rep. 118, 64 Pac. 997), as, unlike that case, the trust here does not make the payment of the expenses which are claimed to be accumulations a trust purpose. Even if the trust of specific property were invalid, the devise in remainder would be unaffected: Civ. Code, secs. 741, 742, 767. The estate of the mother and daughter in the property covered by the specific trust is a vested and not a contingent remainder: Civ. Code, secs. 689, 690, 693-695. Even if the trust of the specific property were void, the remainder of mother and daughter would be accelerated merely and not defeated: Underhill on Wills, sec. 878; 24 Am. & Eng. Ency. of Law, 2d ed., 418; Hamlin v. Mansfield, 88 Me. 131, 137, 138, 33 Atl. 788; Marvin v. Ledwith, 111 Ill. 151; Fox v. Rumery, 68 Me. 121; Jull v. Jacobs, L. R. 3 Ch. D. 703, 710; Everett v. Croskey, 92 Iowa, 333, 335, 336, 60 N. W. 732; Key v. Weathersbee, 43 S. C. 414, 49 Am. St. Rep. 846, 21 S. E. 324; Norris v. Beyea, 13 N. Y. 273. Even if the doctrine of acceleration were not applicable, and if the trust of specific property were void, the estate devised would fall into the trust of the residuum: Civ. Code, sec. 1332; Estate of Upham, 127 Cal. 90, 92, 59 Pac. 315; Matter of Benson, 96 N. Y. 499, 509, 48 Am. Rep. 646. If the doctrine of acceleration were not applicable, and the trusts, both of the specific property and of the residuum, were invalid, the testator would be held merely to have died intestate as to the intermediate estate, but not as to the estate in remainder to the mother and daughter.

The trust of the residuum is valid. The payment of one thousand dollars per month provided for in the eighth para-

graph of the codicil gives the trust an active purpose: Teel v. Hilton, 21 R. I. 227, 42 Atl. 1111; Matter of Dewey, 153 N. Y. 63, 46 N. E. 1039; In re Schneider, 71 Hun, 62, 24 N. Y. Supp. 540; United States Trust Co. v. Maresi, 33 Misc. Rep. 539, 68 N. Y. Supp. 918. The trust is valid and covers all of the property, even though the estate covered by it be more than sufficient to pay the thousand dollars per month: Estate of Pichoir, 139 Cal. 682, 688, 73 Pac. 606; Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971. Even if the trust of the residuum were invalid, the testator did not die intestate as to the property embraced within it. Either the remainders to mother and daughter would be accelerated, or the testator would die intestate as to the intermediate estate only, which intermediate estate terminates upon the arrival of the daughter at the age of eighteen years.

Charles S. Wheeler and J. F. Bowie, for Eleanor H. Stetson, respondent and counter-applicant.

In construing the will the court must arrive at the intention of the testator without reference to the validity of such intention. The rule that testacy is preferred to intestacy has reference only to cases of ambiguity: Civ. Code, secs. 1317, 1318, 1326; Estate of Young, 123 Cal. 343, 55 Pac. 1011; Cunliffe v. Brancker, L. R. 3 Ch. D. 399; Speakman v. Speakman, 8 Hare, 185; Schouler, on Wills, sec. 470; 3 Jarman on Wills, 5th Am. ed., 706; Gray's Rule Against Perpetuities, sec. 629. The direction for payment of the income annually by the trustees to the executors is not a trust purpose, but a mere power: Estate of Sanford, 136 Cal. 97, 68 Pac. 494. That the testator misapprehended the legal effect of his language is immaterial: Estate of Young, 123 Cal. 343, 55 Pac. 1011; Estate of Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; Estate of Fair, 132 Cal. 546, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; Hunter v. Attorney General, [1899] App. Cas. The direction for the payment of one thousand dollars does not furnish a trust purpose for the attempted trust of the residuum: Civ. Code, sec. 1322. One of the purposes of the trust of the specifically devised property being void, as providing for

an unlawful accumulation, the entire trust is void: Estate of Fair, 132 Cal. 523, 540, 541, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; Estate of Dixon, 143 Cal. 511, 77 Pac. 412; Estate of Sanford, 136 Cal. 97, 68 Pac. 494. The trust to pay rents and profits to the executors, to be paid to the beneficiaries, is not valid under subdivision 3 of section 857 of the Civil Code: "Field Code" of New York, sec. 285, subd. 3, and annotations. A trust under this section and subdivision must be made dependent on the lives of the beneficiaries: Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290. In adopting the statute from New York, we adopted the construction which Downing v. Marshall, supra, placed upon it: Henrietta Min. Co. v. Gardner, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. Ed. 637; Sanger v. Flow, 48 Fed. 152; Coulter v. Stafford, 48 Fed. 266, 270; Tucker v. Oxley, 5 Cranch, 34, 42, 3 L. Ed. 1018; Culam v. Doull, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596; Kennedy's Heirs v. Kennedy's Heirs, 2 Ala. 571; Armstrong's Ex. v. Armstrong's Heirs, 29 Ala. 538; Bailey's Heirs v. Bailey's Ex., 35 Ala. 687; Tyler v. Tyler, 19 Ill. 151; Duval v. Hunt, 34 Fla. 85, 15 South. 876; Freese v. Trip, 70 Ill. 496; Bemis v. Becker, 1 Kan. 86; Commonwealth v. Hartnett, 69 Mass. 450; State v. Macon Co., 41 Mo. 453; Coffield v. State, 44 Neb. 417, 62 N. W. 875; Everding v. McGinn, 23 Or. 15, 35 Pac. 178; Pomeroy v. Pomeroy, 93 Wis. 262, 67 N. W. 430. The cases of Crooke v. County of Kings, 97 N. Y. 421, and Bailey v. Bailey, 97 N. Y. 460, are not here applicable or competent to change the construction placed upon the statute in Downing v. Marshall: Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522. The trust created by the second paragraph of the codicil provides for unlawful accumulations in directing payment of (1) mortgages (Hascall v. King, 162 N. Y. 134, 143, 76 Am. St. Rep. 302, 56 N. E. 515); (2) charges on the property (Hascall v. King, 162 N. Y. 134, 76 Am. St. Rep. 302, 56 N. E. 515; Matter of Hoyt, 71 Hun, 13, 24 N. Y. Supp. 577; Wells v. Wells, 30 Abb. N. C. 225, 24 N. Y. Supp. 874; In re Fisher, 4 Misc. Rep. 46, 25 N. Y. Supp. 79); (3) street assessments (Mat-

ter of Rogers, supra; Hascall v. King, supra; Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Peek v. Sherwood, 56 N. Y. 615; Thomas v. Evans, 105 N. Y. 601, 612, 59 Am. Rep. 519, 12 N. E. 571; Cromwell v. Kirk, 1 Dem. 599, 603; Stilwell v. Doughty, 2 Bradf. 311, 317); (4) expenses incurred in making improvements on the property (Drake v. Trafusio, L. R. 10 Ch. App. 364, 366; Stevens v. Melcher, 80 Hun, 514, 525, 30 N. Y. Supp. 625). The trust being created to pay over only such rents and profits as may remain after the payment of these items which amount to accumulations, the trust is void: Carpenter v. Cook, 132 Cal. 625, 84 Am. St. Rep. 118, 64 Pac. 997; Limbrey v. Gurr, 6 Madd. 151. Section 733 of the Civil Code does not save the trust.

The trust of the residuum is a trust to distribute, and therefore void: Estate of Fair, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; Hofsas v. Cummings, 141 Cal. 25, 75 Pac. 110. A trust cannot be created to hold property, receive the rents and profits, and pay them over as annuities. The only trust in real property for the payment of annuities permissible in this state is that provided by subdivision 2 of section 857 of the Civil Code, which is not a trust to "hold," but a trust to lease, which involves an alienation and not a holding: Hascall v. King, 162 N. Y. 149, 76 Am. St. Rep. 302, 56 N. E. 515; Hawley v. James, 16 Wend. 62. The devise in remainder after the expiration of the trust of the specific property falls with the invalidity of the trust: Moneypenny v. Dering, 2 De Gex, M. & G. 180; Cowen v. Rinaldo, 82 Hun, 479, 31 N. Y. Supp. 554; Carpenter v. Cook, 132 Cal. 621, 84 Am. St. Rep. 118, 64 Pac. 997.

COFFEY, J. John S. Doe died January 21, 1894, leaving a widow and child, two brothers, two sisters, several nephews and nieces, and other collateral kindred. He had made a will, dated January 26, 1892, and a codicil dated November 21, 1893, which were admitted to probate February 9, 1894. The entire estate was the separate property of decedent, and was appraised in 1894 at $1,383,184, and in the final account set down at $1,954,317.

The executors named in the will, his brothers, Bartlett Doe and Charles F. Doe, immediately qualified and acted jointly until January 16, 1904, when Charles died, and thereafter Bartlett acted alone until March 16, 1905, when he filed his final account and petition for final distribution to the persons entitled thereto.

To this petition the former widow, now remarried, made response, claiming that decedent died intestate as to all the property which he owned except what was disposed of by the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of his will, and she asked, therefore, that there be distributed to her in fee simple absolute one-half of all his estate not included in the clauses enumerated.

The codicil confirms the will down to the twelfth paragraph, which it revokes, substituting therefor other provisions.

The paragraphs necessary to consider are here inserted.

The will contained the following provisions:

"Twelfth—The rest and residue of my estate, real, personal and mixed, of every nature and kind whatsoever of which I may die seized or possessed, I give, devise and bequeath to my brothers Bartlett Doe and Charles F. Doe, hereinafter named as the Executors of this my last Will, in trust nevertheless, to be held by them until my daughter Mary Marguerite now One year old, shall have reached the age of Eighteen years, when the same shall be distributed as follows, to-wit:

"To my said daughter, Mary Marguerite one-half thereof, and to my wife Eleanor Doe, the other half for her life, with remainder to my said daughter Mary Marguerite. Should my said wife Eleanor die before my daughter arrives at the age of Eighteen years, then the interest hereby devised and bequeathed to my said wife, to go to my said daughter.

"Thirteenth.—Should my said daughter Mary Marguerite die before she arrives at the age of Eighteen years then the interest hereby devised to my said brothers Bartlett and Charles F. Doe, in trust for my said daughter, to go to my heirs, who may be living at the time of her death, and to be by my said

brothers distributed to my said heirs, according to the Statutes in such cases made and provided.

"Fourteenth.—I hereby nominate and appoint my brothers Bartlett Doe and Charles F. Doe, the Executors of this my last Will, hereby expressly waiving the giving of any bond or bonds, for the discharge of their duties as such Executors.

"Fifteenth—I give and grant to my said Executors and Trustees full power and authority to sell and convey all or any part or portion of my said Estate, as in their judgment they shall think best, and to re-invest the proceeds from time to time to the best interest of those concerned.

"And I hereby direct my said Executors to pay over to my said wife monthly, until my said daughter arrives at the age of Eighteen years, the sum of One Thousand Dollars for the following purpose, to-wit: Five Hundred Dollars for the support of my said wife, and Five Hundred Dollars for the support and maintenance of my said daughter."

In the codicil to the will it is provided:

"First—I hereby re-publish and affirm all that is contained in said Will down to the 12th paragraph thereof, and I hereby revoke and annul all the rest and remainder thereof, to-wit: all that is contained in said Will beginning with said 12th paragraph and down to the end thereof, and in lieu of the said part and portion so annulled and revoked do make, publish and declare this Codicil to my said Will in manner following:

"Second—I give and devise to my brothers Bartlett Doe and Charles F. Doe hereinafter named as the Executors of this my last Will and Testament all my right, title and interest in and to all the certain lots, pieces and parcels of land situate, lying and being in the City and County of San Francisco State of California, and described as follows:

[Here follow the descriptions of a number of pieces of improved and unimproved real property in San Francisco.]

"In trust nevertheless for my wife Eleanor Doe and my daughter Mary Marguerite Doe. Said trust to continue during the life time of my said trustees, and upon the death of

either of said trustees the trust to continue and to be carried out and into effect by the survivor, and to terminate only on his death.

"Giving and granting unto my said trustees and to the survivor upon the death of either of them full power and authority to take possession of, improve, mortgage and convey my said interest in the said pieces and parcels of land or either of them as they may deem most beneficial to the interest of all concerned, and to invest and reinvest the proceeds received from the sale of the same from time to time as in their judgment shall be for the best interest of the beneficiaries under this trust, and annually to pay over and deliver to the Executors of this my last Will, the rents, issues and profits thereof that may remain after paying all taxes, street assessments and other charges upon the same, and costs and expenses incurred in making improvements thereon, which rents, issues and profits my said Executors are hereby required and directed to pay over as they may be received to my said wife Eleanor Doe and my said daughter Mary Marguerite Doe.

"And upon the death of the survivor or last of my said trustees and the termination of the trust thereby created, I give, devise and bequeath to my said wife Eleanor and to my said daughter Mary Marguerite all my right, title and interest in and to said pieces and parcels of property hereinbefore described, and such portion of the rents, issues and profits thereof as may remain in the hands of my said trustees, or the survivor of them undisposed of at the termination of this trust, and also my right, title and interest in and to any and all other pieces and parcels of property that my said trustees may purchase and acquire from the proceeds of the sale of any part or portion of said real estate that they may sell during the continuance of this trust, it being my will, wish and purpose that on the death of the last of my said trustees and the termination of said trust that all my right, title and interest in said trust estate shall be paid over and delivered to my said wife Eleanor and my said daughter Mary Marguerite, provided, however, that the interest hereby devised to my said wife Eleanor to be for and continue during

her lifetime, and upon her death to go to my said daughter Mary Marguerite.

"Third—The rest and residue of my estate, real, personal and mixed of every nature and kind whatsoever of which I may die seized or possessed, I give, devise and bequeath to my brothers Bartlett Doe and Charles F. Doe, hereinafter named as the Executors of this my last Will, in trust nevertheless to be held by them until my daughter Mary Marguerite shall have reached the age of Eighteen years, when the same shall be distributed as follows, to-wit:

"To my said daughter Mary Marguerite one-half thereof and to my wife Eleanor Doe the other half for her life with remainder to my said daughter Mary Marguerite. Should my said wife Eleanor die before my daughter arrives of the age of Eighteen years then the interest hereby devised and bequeathed to my said wife to go to my said daughter.

"Fourth—Should my said daughter Mary Marguerite die before she arrives at the age of Eighteen years, then the interest hereby devised to my said brothers Bartlett and Charles F. Doe in trust for my said daughter to go to my heirs, who may be living at the time of her death, and to be by my said brothers distributed to my said heirs according to the statutes in such cases made and provided.

"Fifth—My said brothers Bartlett Doe and Charles F. Doe are interested in said pieces and parcels of land mentioned and referred to in paragraph 2 hereof, and are owners thereof with me as tenants in common, our interests therein being in common and undivided, and it being the wish, purpose and intent of the several owners of said pieces and parcels of land to keep our interests therein intact and undivided during the lifetime of all and each of us, I have made the provision herein contained to accomplish that purpose, and my said brothers being like-minded have made their Wills with like provisions to effectuate the said object. Said Wills having been made upon a mutual understanding between us to the above effect.

"Sixth—I hereby nominate and appoint my said brothers Bartlett Doe and Charles F. Doe, the Executors of this, my last Will and Testament without bonds, hereby waiving the

giving of any bond or other undertaking for the faithful discharge of their duties under this Will and as Executors and Trustees hereunder.

"Eighth—I hereby direct my said Executors to pay over to my said wife monthly until my said daughter arrives at the age of Eighteen years, the sum of One thousand Dollars for the following purpose, to-wit: Five hundred Dollars for the support of my said wife, and Five hundred Dollars for the support and maintenance of my said daughter."

The purpose of testator is patent. Whether or not he has legally accomplished that purpose, is the question. For ten years the trust remained unassailed, but now it is challenged as invalid because it is contrary to the code, as (1) the term is not properly constituted, (2) the devise to the trustees "for" the widow and daughter is void, (3) the direction to the trustees to pay taxes, street assessments and other charges out of the income is a direction for an unlawful accumulation, (4) the gift of income annually is a gift of an unlawfully accumulated fund and is void, (5) the direction to the trustees to pay over the residue of the income after deducting moneys expended for purposes shown to be unlawful is void, (6) if the mode in which the testator has framed his gift fails for illegality, the court cannot provide a valid mode in order to effectuate his intent; (7) the trust to pay the residue of the income to the executor, followed by the direction to the executor to pay it to the widow and daughter, is void; (8) the subsequent limitations of the trust property fall with the illegal trust, for where valid and invalid provisions are so blended that it is impossible to separate them and give effect to the one without doing violence to the intention of the trustor, the whole trust must fall; (9) there is no devise over of the trust property in the event of the failure of the trust; (10) the gift is contingent "upon the termination of the trust"; the court cannot transmute it into a vested remainder; (11) the intended mode of passing the property has failed for illegality, and the court cannot supply a valid mode; (12) the property embraced in the void trust does not pass under the third paragraph of the codicil; (13) the trust which the testator has attempted to create in

the third and fourth paragraphs to the codicil is void (14) the trust to distribute is unauthorized by section 857, Civil Code.

We are reminded in undertaking to construe this instrument of the duty of the court to disregard the design of the testator unless it comports with the rules of law. The function of the court is to determine the intention of the testator and then to apply the canons of construction, and not to constitute a valid for an invalid devise. We are told that the best method to be pursued in such case is that in Cunliffe v. Brancker (L. R. 3 Ch. D. 399), where Sir Geo. Jessel said: "All we have to do is to construe the instrument fairly, find out what it means, and then to apply the established rules of law to the instrument, and see what the effect will be.

"How far judges may be, or ought to be, able to defeat a rule of law of which they disapprove I cannot say. It is the duty of a judge not to allow himself to be so influenced, but to construe the instrument in a proper way, to arrive at its meaning independently of the results, and then apply the law. This has been laid down over and over again with regard to another rule of law—the rule against remoteness or perpetuity—but I do not see that, because in the opinion of the judge the one rule of law is reasonable and the other unreasonable, the rules of construction are to be altered."

Of two modes of interpreting a will, says the code, that is to be preferred which will prevent a total intestacy; but the supreme court has said that if the legal effect of the expressed intent of testator is intestacy, it will be presumed that he designed that result. If a fair interpretation of the will results in total or partial intestacy because of rules prohibiting the devises attempted, the court may not alter the construction to avoid or evade that consequence.

The first point made by respondent is that the trust is necessarily void for the reason that its term is not properly constituted, as the trust attempted to be created is measured by the lives of two persons—the two trustees—and by the life of the survivor of them, and neither of said persons had any beneficial interest in the trust whatever. It was not to cease

with the death of the widow or the daughter, but was intended to continue during the lives of the trustees, whether the daughter should die or whether the widow should die, or whether they both should die during the lifetime of these trustees. Upon this point it is argued that the meaning of the testator is manifest. The authority for this proposition is Downing v. Marshall, 23 N. Y. 377, but it seems that that decision has been discredited in later cases and declared dictum. At the time, however, that the California codifiers copied from the New York law the present code provision, that case was supposed to be sound, and, it is asserted, should be received as controlling in this court, for it is a general canon of construction that if statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state, but this rule has not always been followed, and has been modified in cases, as, for example, where the courts of the state from which the statute had been taken have since altered their opinion as to its construction. The rule is not an absolute one, especially where there is but a single decision, and that subsequently discarded as authority in the same state. When, therefore, it is argued that at the time we took our statute of uses and trusts from New York, we accepted the construction given in Downing v. Marshal, the answer is acute that, as the appellate tribunal of that state has renounced that case as authority, it has no force here, and it being the sole support of respondent on this point, his contention is without basis.

It is not the wish of this court to lengthen its opinion by extracts from cases, but, so far as petitioner relies upon Downing v. Marshal, it would seem that the views of that case cannot govern here: Crooke v. County of Kings, 97 N. Y. 421; Bailey v. Bailey, 97 N. Y. 467.

These cases are substantially identical, and in the latter one, as counsel for respondent says on page 63 of brief, the judge writing the opinion saw fit "to criticise in a hostile manner the decision of Downing v. Marshall and implies that the opinion in that case relating to the lives measuring the trust was dictum."

It is worth while, perhaps, to make this criticism clear in connection with the case at bar, to quote from the opinion, which was concurred in by all the judges:

"We do not concur in the view expressed by the learned judge (in Downing v. Marshall) as to the construction of the statute cited, and upon a careful examination of the same we are of the opinion that the limitation provided is a limitation of time and not a personal one. We think that a correct interpretation of the same authorizes the naming of the lives of strangers as well as beneficiaries as the limitation of the devise. No reason exists why the lives named in a devise of this character should be confined to those who are interested in the estate, and it was the evident purpose of the statutes to confer upon the testator the power to fix such lives as he chose to designate within its terms. This is very manifest upon examination of the various provisions relating to the subject. Under the statute relating to uses and trusts, an express trust may be created 'to receive the rents and profits of land and apply them to the use of any person during the life of such person or for a shorter term, subject to the rules prescribed in the first article of this title': 1 Rev. Stats. 728, sec. 55, subd. 3. Among the rules referred to is that contained in a previous provision of the statute. (1 Rev. Stats. 723, sec. 15) which declares that 'the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate.' These two statutes must be considered and read in connection with each other in giving an interpretation to their meaning. The first (section 55) provides for a trust for the use of a person during the life of such person or a less period, and the second (section 15) limits the time during which the trust may be held. In the former nothing is said about beneficiaries, and, standing alone, it is not apparent that the limitation is confined to their lives. The latter section alone contains the limitation, and it is not restricted to any class of lives and embraces any lives upon which the trust created is limited. To bring a case within the rule provided for, it is not required, we think, that the lives during which the power

of alienation is suspended should be those of beneficiaries, and if the estate may be alienated absolutely at the expiration of any two lives in being at the time of its creation, the provision is complied with. To illustrate: if a trust is created to receive rents and profits and apply them to the use of four joint lives, upon the death of either, then to the use of the survivors and so on until the death of the last survivor, the trust in the case of each beneficiary is simply during his life, or for a shorter period—that is, as to the share to which he is entitled at the outset it is during his life. If he survives either of the other beneficiaries, then he has an additional portion during the remainder of his life. But the trust would be void as it would suspend the power of alienation for more than two lives. If, however, a condition be added to the trust that in any event it shall terminate upon the death of two persons who are strangers to the trust, then the rule referred to is complied with. In that case in no event can the power of alienation be suspended beyond these two specified lives. Upon the death of the survivor of the two strangers named, although all the beneficiaries be living, the trust estate terminates. The trust, then, while it can only exist during the lives of the two strangers, is also for the life of each beneficiary subject to be terminated by the death of the lives named during his or her life. Its continuance is not dependent upon the lives of the beneficiaries, but upon the lives of strangers. When they are ended, the two lives named have passed away and the limitation ceases. The fact that a number of persons are to be benefited under the trust during the lives of the strangers named does not create a trust beyond two lives in being contrary to the statute. It follows that the limitation contained in the sixth clause of the testator's will was not a violation of the statute, and that the provisions therein were valid, and the same should be upheld.

"Since the foregoing was written, the cases of Crooke v. County of Kings and Crooke v. Prince, which were first argued before this court in the month of June, 1883, have been heard upon a reargument. These cases involved the construction of the provisions of a will where a trust was created which depended upon the life of a stranger named therein.

No question was made on the argument that the provision referred to was invalid upon the ground that the trust created depended upon the life of a person who was not a beneficiary, and a reargument was ordered upon another and a different question. Upon the last argument, however, the question now considered, which was previously overlooked, was fully presented and the court arrived at the conclusion that a trust, of the character referred to, was valid, and not in violation of the statute. The subject is fully considered in the opinion of the court by Finch, J., and it disposes of the question presented in the case at bar. As that authority is directly in point, it is decisive in this case": Bailey v. Bailey, 97 N. Y. 467.

Counsel for respondent rely absolutely upon Downing v. Marshall, and quote this passage to illustrate this point:

"But, although trusts to receive and apply rents and profits may be created under the statute of uses and trusts,, the one in question is not constituted in the manner which that statute prescribes. The application of rents and profits must be 'to the use of any person during the life of such person, or for any shorter term': 1 Rev. Stats., p. 728, sec. 55, subd. 3. The trust must, therefore, be made dependent on the life of the beneficiary. In this case the beneficiaries are associations, incorporated or unincorporated; while the lives on which the trust depends are those of two natural persons having no interest in its performance. Such a limitation is plainly unsupported by any construction which we can give to the language of the statute": Downing v. Marshall, 23 N. Y. 377, 80 Am. Dec. 290.

Counsel contend that section 857, subdivision 3, of the California Civil Code is even more explicit in this connection than is the section of the New York Revised Statutes cited in the foregoing extract. Subdivision 3 of section 857 of our code is identical with subdivision 3 of section 285 of the proposed Civil Code of New York, the so-called "Field Code," printed 1865, which had been revised in view of Downing v. Marshall, and counsel insist that thereby our code must be construed in the light of that decision; but we have seen that this rule is not uniform, and that our code provision,

though taken from New York, receiving there the construction claimed before its adoption here, such decision does not necessarily control; it may be persuasive, but not conclusive.

Depending upon that decision, respondent asserts that the trust here is void, for it does not rest on the lives of the beneficiaries; the widow and daughter may both die; the executors, to whom the payment of income is to be made in the first instance, may change from time to time and die, but the trust is to terminate only upon the death of the surviving trustee; but this view does not accord with the accredited authorities cited, which declare that the inherent character of the trust and its essential limitations may form an element in the construction to be given to the language creating it. As said in Crooke v. County of Kings, "that character and those limitations are such that the trust cannot exceed in duration the lives of the beneficiaries, because upon their death its purpose is accomplished, and a trust supposes a beneficiary, and so its very creation implies necessarily, without express words, a termination at such period. If, then, in creating the trust, one or two lives of persons not beneficiaries are designated as its measure of duration, it follows that such designation can never be intended to lengthen the trust beyond its possibility of existence, and that the language which confines its benefits to persons who are or may be living, sufficiently indicates an intention to end it at their deaths, unless it is earlier terminated by the close of the selected life, or lives. And when, in the present case, the vesting of the fee was fixed at the death of the trustee, the close of the selected life, that must be read and construed in connection with the other necessary limit indicated by the language declaring the purpose of the trust, and held to mean that the vesting is to take place at the end of the designated life, or at the period less than that marked by the earlier death of all the beneficiaries. We are not to gather, from the language of the will, the absurd and destructive intention to continue a trust beyond the limit implied by its own nature and inherent character, unless compelled to it by the language which will admit of no other interpretation."

The language of the trust does not necessarily bear the meaning attributed to it by respondent. We should not destroy the trust, unless there is no other recourse in interpreting the words of testator. If the words of this will can be construed to preserve its purpose, the court should not be swift to subvert it.

The intention of the testator was not to create a trust to continue beyond the life of his wife and child. Such a construction does not seem to this court reasonable. The assumption appears to have been that they would survive the trustees. Certainly the duration of the trust cannot be assumed to be beyond the lives of the beneficiaries, for it was possible that they might predecease the trustees, in which case the trust would terminate.

Upon this point, the court cannot sustain the contention of respondent.

What was the object of this trust? To pay over the rents and profits to the surviving wife and daughter. When they die, it ceases, because the object is accomplished. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases: Civ. Code, sec. 871. The measure of the estate of the trustees is the necessity of the trust, and in making the provision for the payment of the income it is certain that only the mother and daughter were intended as recipients, and, therefore, the trust term could not extend beyond their existence.

Is the devise of the trustees "for" the widow and daughter void? Respondent relies upon the case of Wittfield v. Forster 124 Cal. 418, 57 Pac. 219, but after a careful reading of that case this court fails to see its application. The syllabus shows with sufficient clearness that the case cited is not analogous to the one at bar. "A conveyance of all the real and personal property of the grantor to a trustee in trust for an unincorporated association named, to have and to hold to the trustee named, 'his successors and assigns, forever,' without further specification as to the purpose of the trust, or as to the duration of the estate, or as to the nature and quantity of interest of the beneficiaries, or as to the manner in which the trust is to be performed does not create a valid trust as to the real property, within any of

the provisions of section 857 of the Civil Code, and under section 2221 of that code, the whole trust, both as to the real and personal property, is void for uncertainty.'' In the case here there seems to be a substantial difference. In that case there was a devise ''in trust for'' another. There were no trust purposes specified and no other duties imposed upon the trustee. It was a bare trust for another. In this case, while the language is ''in trust for'' others, the trust purposes are specified and trust duties are imposed.

Is the direction to the trustees to pay taxes, street assessments and other charges, and expenses incurred in improvements out of the income a direction for an unlawful accumulation? This point has been presented with fullness and force by counsel for respondent, who, while admitting that, generally speaking, it is undoubtedly the rule that a direction for an invalid accumulation is void only pro tanto, and passes over the income to the owners of the next eventual estate, insist that the peculiar effect of the void provision here is to render void the entire instrument. Great stress is laid upon this provision, and it is argued that assuming the power to be susceptible of being construed as a trust purpose, the trust is annually to pay over and deliver to the executors the rents, issues and profits of the trust property that may remain after paying all taxes, street assessments or other charges upon the same and expenses incurred in making improvements thereon. This is not a trust to pay over rents and profits, but only to pay over what may be left of the rents and profits after the same have been applied to the payment of the items mentioned.

Each case of this class must be considered according to its own circumstances, and the expressions of the testator should not be interpreted in a manner subversive of his intention unless that be plainly contrary to law. As was said in a case recently decided by our supreme court, Matter of Heywood, ''in construing testamentary dispositions of property, it is a cardinal rule, that a liberal construction should be given to them, and all reasonable intendments indulged in, with a view of sustaining the purpose which it is disclosed the testator had in view. No particular form of expression is necessary to constitute a valid trust. It is sufficient that,

from the language used, the intention of the testator is apparent, and that the disposition in trust which he endeavors to make of his estate is consistent with the rules of law. The intent of the testator is the matter for primary consideration, and it is immaterial what method of expression is employed as long as that intention can be ascertained."

In Hill on Trustees, 101, it is remarked that it is one of the fixed rules of equitable construction that there is no magic in particular words, and our appellate court has declared that it is, of course, "a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction, and that it will not be held to contain a void trust unless the invalidity of the trust is beyond question . . . . and cannot be reasonably construed otherwise": Estate of Dunphy, 147 Cal. 95, 81 Pac. 315.

It is insisted in the case at bar that the trusts are void, being for purposes not specified in section 857 of the Civil Code, and as they are inextricably interwoven with the trust to pay the remainder of the rents, that trust falls with them.

If we are to be guided by the explicit indication of the purpose of the testator, it would be doing violence to his intention so to construe the terms of the will in the trust under consideration. He devised the specifically described properties to trustees for the benefit of two beneficiaries, his wife and daughter. The provisions clearly indicate that it was the intention of the testator that they should receive the income from the trust property.

What were these trustees to do in the management of this trust? It clearly appears that the motive was the maintenance of the minor and her mother. They were to receive the rents, issues and profits after the discharge of incidental expenses, such as are set forth. They alone are entitled to the income from the trust property, and they are entitled in due season to the corpus of the trust estate. It is argued that the direction of the will to discharge out of the income the costs and expenses incurred and incident to the administration of the trust is void, and that no matter how clearly a testator may have expressed himself in this regard, his intent cannot prevail; in other words, the essential purpose

of the trust is to be sacrificed to the incidental necessities of its fulfillment. It is the duty of the trustees to hold the property and administer it; subject to the trust, the estate is vested in them. How can they discharge their duty if they are restricted to the extent contended for by counsel? Even if this part of the clause were invalid, it is not so inextricably interwoven or so essentially a part of the trust scheme that all the other trust provisions would fall if it could not be sustained. In any event the entire income would go to mother and daughter. That is the express direction of the testator. If he authorized an invalid accumulation of a portion of that income, that provision failing the amount would necessarily be payable to them. The invalid clause is not an integral part of the scheme; it is a provision entirely separable from it: it is plain that the primary trust would be unaffected and the primary purpose of the testator fulfilled, even if this direction should be held void; but for the reasons suggested, it seems to this court, that, in the circumstances of this case, the direction is not unlawful.

It is contended that the provision for retaining the income and paying it over annually is void; but this is a mere matter of management, and it seems to this court that to accept this argument would be to carry the doctrine invoked to an extreme. Where the entire net income is distributed annually, the courts have held that there is no accumulation. The purpose of the statute is to prevent permanent accumulations, not to interfere with judicious management. The cases are numerous on this point and citations need not be multiplied.

Counsel are insistent upon the proposition that the testator did not give to his widow and his child the whole income of his estate, but only the residue after certain charges were to be paid, and that, therefore, the direction to the trustees to pay over the residue of the income after deducting moneys expended for purposes shown to be unlawful is void; and, hence, if the mode prescribed is illegal, the court cannot substitute a valid mode, no matter how obvious his intent; and, that the trust to pay the residue of the income to the executors by them to be paid to the widow, is

void; and that the subsequent limitations of the trust property fall with the illegal trust, for the reason that they are inseparably blended. These points might be judicially treated at greater length, but it would serve no purpose, since their substance has been discussed in the preceding pages. This court does not agree with counsel for the widow in the conclusions they deduce and apply from the abstract rules of law. As counsel say, the scheme of the will is perfectly clear; but they claim that the testator would not, if properly advised, have made the disposition that he did, for they believe that he would not have liked the idea that at the age of eighteen years this child would have come into the whole of this vast estate, for he manifested regard for and confidence in his widow, and it seems likely, if they could indulge in speculation, that he would have preferred in such circumstances that the mother of his child, her natural protector, should have one-half of his property. But this is speculation on the part of counsel. What testator meant is to be tested by what he said.

In the paragraph of the codicil which creates the trust embracing specific property, it is provided that, "upon the death of the survivor or last of my said trustees, and the termination of the trust hereby created, I give, devise and bequeath to my said wife Eleanor and to my said daughter Marguerite" all the property embraced in the trust, "provided, however, that the interest hereby devised to my said wife Eleanor to be for and continue during her lifetime, and upon her death to go to my said daughter Mary Marguerite."

It will be observed, therefore, that, subject to the devise of the trustees, all of the property embraced within the trust was devised to the widow and daughter, one-half to the daughter absolutely and the other half to her, but subject to a life estate in her mother. Such a devise is perfectly valid.

"A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time": Civ. Code, sec. 767.

Nor would the estate devised to the wife and daughter of the testator be defeated by the invalidity of the devise in trust of the intermediate estate. The rule that a future estate is not affected by the destruction of a precedent estate is recognized in the following provisions of the Civil Code:

"No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof": Civ. Code, sec. 741.

"No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterward happen, the future interest takes effect in the same manner, and to the same extent, as if the precedent interest had continued to the same period": Civ. Code, sec. 742.

Counsel for the widow argue that there is no devise over of the trust property in the event of the failure of the trust, and that the gift is contingent "upon the termination of the trust" and that the court cannot transmute it into a vested remainder, but this argument seems to be answered by saying that the testator did not contemplate a contingency such as is suggested; he must have assumed the validity of the trust and that it would terminate upon the death of his brothers, naturally anticipating that the widow and child would survive them. The event upon which the estate of the beneficiaries is limited is certain, the death of the trustees; the time is uncertain. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain: Civ. Code, sec. 695.

In this case neither the persons to whom the future estate is limited nor the event are uncertain. The sections of the Civil Code controlling this point may here be inserted.

A present interest entitles the owner to the immediate possession of the property: Section 689.

A future interest entitles the owner to the possession of the property only at a future period: Section 690.

A future interest is either: 1. Vested; or 2. Contingent: Section 693.

A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest: Section 694.

Section 695 as above quoted.

The argument against the widow that the estate devised to the beneficiaries is a vested remainder—one vested in interest, but postponed in possession, seems to be supported by these sections.

If this be so, it follows that the surviving wife and daughter take a vested remainder in the specifically described properties.

Counsel for the widow contend that the trust declared in clauses 3 and 4 of the codicil is void, and say that these paragraphs contain the entire provisions of the trust. These paragraphs are identical with 12 and 13 of the original will, but paragraph 5 of the codicil is new. Paragraph 6 appoints Bartlett and Charles F. Doe without bonds as executors and trustees, and 7 requests to employ Daniel Titus as their attorney. Paragraph 8 follows and that is practically the final clause, and provides that the executors pay to his wife monthly, until his daughter arrives at the age of eighteen years, the sum of one thousand dollars for the following purpose to wit: Five hundred dollars for the support of his said wife, and five hundred dollars for the support and maintenance of his said daughter. Counsel argue that the relative position of these clauses raises the strongest kind of a presumption against any connection between them, and that the only rational construction of paragraph 8 is that it is an attempt by the testator to prescribe the amount of family allowance which should be paid. If, however, the provision for maintenance is to be executed, it must be out of the residuum. There is no other way of carrying out the purpose of the testator. This duty was imposed upon them as executors. It was an active duty and such as usually

pertains to the office of trustees, and such they must be deemed to be for the performance of these duties. This seems to be the essence of the authorities on this point. It does not seem to this court that the position of the clauses in the will shows that in the mind of the testator they had no connection. He certainly designed that his wife and daughter should be supported out of the estate, and recourse to the residuum was the only means by which that object could be accomplished. That was his evident purpose, and a strained construction should not be resorted to to defeat his design.

It is contended with confidence that the trust herein is to distribute and is, consequently, void, but this court cannot accept this contention for reasons already advanced. Even if this residuary trust were invalid, the effect would not be fatal to the devise to the mother and daughter. It would simply shorten the period of possession; to translate the technical terms of the law, they would arrive earlier at their enjoyment of the estate; the intermediate estate being out of the way by reason of the assumed intestacy as to that, the beneficiaries would come immediately into their own; that is to say, the daughter would have her half at once in fee, and the mother hers for life with remainder to her child.

It is said sometimes that the trust statutes should be construed rigorously, and that the law does not favor trusts of this character; but this is not the general rule of construction established by the codes. On the contrary, the rule of the code is that its provisions should be liberally construed. The interpretation of the instrument should be benignant and conservative, not destructive. Having ascertained the intent of the testator, and here it is obvious, we should not be too industrious in seeking reasons for its nullification.

This court is of opinion that the trusts created in and by this instrument are valid, and that the distribution should be decreed in conformity with the terms of the will.

The Rule Against Perpetuities is the subject of a note in 49 Am. St. Rep. 117-138.

And the Severability of Perpetuities and Forbidden Trusts is the subject of a note in 64 Am. St. Rep. 634-646.

ESTATE OF CHARLES McLAUGHLIN, DECEASED.

[No. 3,061; decided June 16, 1885.]

Probate of Will—Setting for Hearing, Evidence of.—When it is claimed that the clerk did not set a petition for probate for hearing, a notice in fact issued by him and fixing the day is the best evidence that the law has been complied with.

Probate of Will—Setting for Hearing.—Any Omission in matters of form in fixing the date for hearing a petition to probate a will may be disregarded by the court or ordered supplied when the proper fact is made satisfactorily to appear.

Probate of Will.—The Publication of the Notice fixing the day for hearing the probate of a will, when made in a weekly paper, must appear on at least three different days of publication, but not necessarily in three consecutive weekly issues.

Probate of Will.—A Creditor cannot Petition for a Revocation of the probate of a will.

The Probate of a Will and the Appointment of an Executor are distinct emanations from the will of the court, usually, though not necessarily embodied in one order, but determined upon entirely different sets of facts.

Application by creditor to revoke the probate of a will.

A. B. Hotchkiss, for petitioning creditors.

L. D. McKisick, for executrix.

T. H. REARDEN, J. (in vacation sittings of Department 9, Probate).—This is an application, by petition, by Emile Erlanger and others, setting forth that they are residents of the city of Paris, and are creditors of the decedent, who died in 1883, leaving a will, and being at his death a resident of this state.

That decedent's will is on file in this court; that it appears by the records that proceedings were had for the probate of the will; that witnesses touching its execution were examined, and their testimony reduced to writing, on June 16, 1884; and that the court ordered letters testamentary to be issued to Kate McLaughlin, the executrix named in the will.

That the will was filed January 9, 1884, together with a petition for letters testamentary.

That it appears from an inspection of the record that the clerk did not set the petition for hearing; nor did the court set it for hearing; that proper notice of said hearing has not been given; that no proof was made at the hearing that notice was given; that a notice was published in the "Daily Alta California," a daily newspaper, but such notice was not published as required by law; that no order of any court or judge was made directing the manner, or number of times, of said publication; that the only proof of publication was an affidavit filed February 5, 1884, which affidavit is insufficient to give the court jurisdiction, as it does not show the year of publication, or that said notice was published as often during the period of publication as the paper was regularly issued.

Petitioners therefore pray that the probate be revoked, and for such other order as may be proper.

This petition is demurred to by the executrix. On the hearing upon demurrer, the petitioners claimed that the clerk should have made an order fixing the day of hearing, and that no such order was in existence. It appeared, however, as a fact before the court, that the clerk had entered the day of hearing in a calendar kept by him. This entry was not transferred to the register, but there would seem to be no reason why, if such entry had been made in rough minutes, it could not be put into the more formal register, either by the clerk himself or by the court, when attention had been directed thereto. But the best evidence in the matter of the fixing of the day for probate is the notice issued by the clerk, which is complete in that regard. Any omission in matters of form should either be disregarded by the court, or the omission should, by direction, be supplied, when the proper fact is made satisfactorily to appear. Section 1704, Code of Civil Procedure, provides only that orders of the court or judge must be entered at length on the minute-book of the court.

The next objection to the proceedings for probate lies in the number of times the notice was published. The affidavit of proof of publications shows that a notice fixing Tuesday, February 5, 1884, at 10 o'clock A. M., which notice is dated January 9, 1884 (the date of filing petition for

probate), was published in the "Daily Alta California" five times, to-wit: January 10, 15, 24, and 31, and February 5, 1884, which last day was the day set for hearing. The notice was directed by the clerk to be published Thursdays and Tuesdays till date (of hearing). It is probable that the notice was published oftener as there were more Tuesdays and Thursdays than are indicated.

The provisions of the code in that behalf are:

"Notice of the hearing shall be given by the clerk by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices posted at three of the most public places in the county.

"If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included": Code Civ. Proc. 1303.

The petitioners claim that section 1705 should be made to supplement section 1303, in that it provides that "when any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title." The court or judge thereof may, however, order a less number of publications during the period.

Counsel for executrix claim that it is "otherwise provided" in section 1303.

It will be seen that even in the case of a weekly newspaper, section 1303 does not provide that the publications shall be made in three consecutive weekly issues, but merely "on at least three different days of publication."

Also, if the court or judge can order a less number of publications, "unless otherwise provided" by section 1303, the order might be for less than three publications in a weekly paper, and only one in a daily paper (should the judge have discretion in the premises, which section 1303 germane to the notice of probate, would clearly negative): McCrea v. Haraszthy, 51 Cal. 149, does not aid us. In that

case the court held that the statute supplemented the judge's order, when the latter was silent; and that if the notice was published for the statutory time, it was good. Here the question is, whether the publication is for the statutory number of times.

At the same time, the general impression has prevailed that a notice of probate in a daily paper should be published daily, as often as the paper is issued. I would be loath to run counter to so general an opinion in any event; and, therefore, decline at this point, in the absence of the usual judge of this department, to pass absolutely upon the sufficiency of the notice. If such notice is bad, it behooves the learned counsel for the executrix to discover and remedy the error at the earliest possible moment, and to vacate the proceedings in the matter of the estate, and commence de novo from the notice by the clerk.

But the petition of these creditors is, as I regard it, fatally defective in its point of attack. It seeks, as its declared object, to avoid the will as probated; it does not strike at the only point where a creditor can be interested in an estate—the executorship or the competency of the executrix (counsel for petitioners admitted, at the hearing, that his clients had no quarrel with her, or her appointment, but only denied the regularity of the probate). A creditor cannot be affected injuriously by any testamentary dispositions of his debtor. The debtor cannot posthumously hinder, delay or defraud his creditor. An executor, once inducted into his trust, must quoad the creditors, proceed on precisely the same lines as an administrator. He must publish notice to creditors, file exhibits, render accounts, allow or reject claims, pay all dues to strangers to the estate, as rigidly as if he were an officer of the court, appointed independently of the decedent's wish. If he be distrusted by the creditor, application will be entertained to put him under bonds; if he be incompetent, the creditor may demand his removal. The creditor may come in when the executor is to be qualified, and object. But the creditor has nothing to do with the will. The will attaches only to the decedent's net estate, after all debts and expenses of administration have been liquidated: See Estate of Hinckley, 58 Cal.

516. As to the will, the creditor is a stranger. It is no affair of his: See, also, Civ. Code, sec. 1270.

The probate of a will and the appointment of an executor are distinct emanations from the will of the court—usually, but not necessarily, embodied in the one order, but determined upon entirely different sets of facts.

Can the present petition be used to initiate an attack upon the executrix, so as to nullify any notice to creditors given by her whereby these particular creditors are barred of their claims? The petition does not disclose the fact or motive of the creditors, but it was hinted at upon the hearing.

If the present proceedings are nugatory, then the only way whereby the court can acquire properly jurisdiction is by a petition for probate, or some application of that kind, wherein sufficient facts are set forth to put the machinery of the court—its ordinary procedure—in motion.

The present petition is insufficient. By itself, it would not warrant the court's proceeding anew to reappoint the present executrix, or an administrator in her stead. Demurrer is therefore sustained, with leave to petitioners to amend.

Where a Notice of the Hearing of a Petition for the Probate of a will is published only twice in a weekly newspaper, when the statute requires at least three times, an order admitting the will to probate and appointing an administrator with the will annexed is void: Estate of Charleblis, 6 Mont. 373, 12 Pac. 775. But a notice is sufficiently proved to have been published in a daily paper for the requisite period by an affidavit showing that it was published in a paper purporting by its name to be a daily paper, for eleven days: Crew v. Pratt, 119 Cal. 139, 51 Pac. 38. And if a decree recites due service of notice by publication or posting, the recital is sufficient to prove the same as against a collateral attack: Crew v. Pratt, 119 Cal. 139, 51 Pac. 38.

ESTATE OF JACOB SOLOMON, DECEASED.

[No. 3,881; decided July 22, 1886.]

Will Contest—Burden of Proof.—One who contests the probate of a will has the burden of proof to establish the ground of contest.

Insane Delusion—Wrong Conclusions as Evidence.—If any fact exists as a foundation for a testator's belief that a child borne by his wife is not his, he cannot be said to be the victim of an insane delusion, however mistaken he may be in his conclusion.

Insane Delusion.—A Person may Act on Weak Testimony, yet be under no delusion.

This was a contest filed to an application for the probate of a document, presented as the last will of Jacob Solomon, deceased. The will and a petition for the admission to probate were filed on January 6, 1885, by Lazarus Solomon, named in the instrument as executor. On the eleventh day of February, 1885, there was filed the written contest (as amended) of Jennie Asch, the person referred to by testator in the seventh clause of his will, hereinafter given.

Six grounds of contest were specified by contestant, but the only ground covered by the opinion of the court below is the "second" one, stated in the contest as follows: "That at the time of signing of the said alleged will, the said Jacob Solomon was laboring under and controlled by the insane delusion that this contestant was not the child of said deceased."

This ground of contest is aimed at the seventh clause of the will, which is in the following language: "I hereby declare that, prior to my coming to California, I was married to a woman named Hannah—whose other name I have forgotten; she was divorced from me by a decree of the Twelfth District Court of the State of California, on the 11th day of August, 1860; during our marriage a child was born of her; this child was not begotten by me, and was not my child; she is now living in this city; her present name is, I believe, Mrs. Jennie Von Stratton; I do not make in this my will, and do not intend to make, any provisions for said child."

The important fact in the case turned out to be the date of the marriage of the testator with the contestant's mother, as upon this hinged the testator's belief with respect to contestant's birth. The exact date of the marriage could not be shown, and it was capable of being fixed only by reference to certain events. The court found that the marriage took place at the time of the Jewish feast of "Hanucah," which was shown to have fallen during the Christian year 1854, in the tenth month of the Jewish calendar—the last half of the month of December, 1854, and the first half of the month of January, 1855. The birth of the child took place on the following first day of July, 1855, about six and one-half months after the marriage. It also appeared that about two months previous to the birth of contestant, the testator being away from home on business, had sent money to his wife, but that when he was informed afterwards of the date of the child's birth, he declared that the child was not his; that subsequently he came to California, his wife afterward following and obtaining here a divorce against him by default, the complaint for divorce fixing the date of marriage as "—— day of August, 1854," and alleging the birth and existence of the child.

Geo. Flournoy and J. B. Mhoon, for contestant.

R. C. Harrison (Jarboe & Harrison), for proponent.

COFFEY, J. The burden of proof is on contestant to establish ground of contest. After a re-examination of the evidence, I am of the opinion that the contestant's case is not supported by the preponderance of proof. Whether the statement of the testator was well or ill based, there was in the order of nature, according to the testimony in this contest, some reason for his belief. He knew when he was married; he knew when his daughter was born; hence he could have inferred the fact he alleges in the paper propounded. However much he might have been mistaken in the conclusion at which he arrived, if any fact existed as a foundation therefor, he was not the victim of insane delusion. A person may act upon weak testimony, yet be under no delusion (Myr. 15), and there does not appear to me to be sufficient evidence in support of the statement that Jacob and Han-

nah were married in "the latter part of November," 1854, and even then it would be a very close call for the child; the probable time, I am constrained to conclude, was near the feast of "Hanucah," which began about the middle of December, 1854, and lasted until January 1, 1855; this was in or about the month of "Tebet," the tenth month of the Jewish calendar, corresponding to the English calendar months of December-January—two weeks of each. If it be true, as I take it from the testimony, that Jacob and Hannah were united in marriage at that time, in December, 1854, the birth of a child July 1, 1855, was sufficient premise for the conclusion announced in the seventh clause of the will—the subject matter of this contest.

Let an order be drawn admitting the will to probate.

A Delusion Which will Destroy Testamentary Capacity must spring up spontaneously in the mind, without extrinsic evidence of any kind to support it. If it has any foundation in fact, if it has any evidence, however slight, as its basis, it is not an insane delusion. One cannot be said to be under such a delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from the facts which are shown to exist: Estate of Scott, 128 Cal. 57, 60 Pac. 527; In re Cline's Will, 24 Or. 175, 41 Am. St. Rep. 851, 33 Pac. 542; Skinner v. Lewis, 40 Or. 571, 67 Pac. 951.

False logic or faulty ratiocination is far from the manifestation of insanity, so long as the process is formally correct, not incoherent or inconsequential. Hence if a wife has evidence, however slight, on which to base a suspicion of her husband's unfaithfulness, and has no settled conviction on the subject, her suspicion does not amount to an insane delusion: Estate of Scott, post, p. 271. But where a man wills his entire estate to his children of a former marriage because he believes that his present wife is unfaithful and his children by her illegitimate, which belief has no evidence to support it, the will may be avoided as the product of an insane delusion: Johnson v. Johnson, 105 Md. 81, 121 Am. St. Rep. 570, 65 Atl. 918.

ESTATE OF JOHN LANE, DECEASED.

[No. 3,490; decided August 7, 1884.]

Letters of Administration.—The Order in Which Letters of administration are granted is a matter of statutory regulation, and to the statute the court must resort for decision.

Succession—Vesting of Estate in Heirs.—Heirs succeed to the property of their intestate immediately upon his death; then their interest becomes vested, subject only to the lien of the administrator for the payment of the debts of the decedent and the expenses of administration.

Succession.—The Next of Kin Entitled to Share in the Distribution of the estate of an intestate are such only as are next of kin at the time of his death.

Letters of Administration —Next of Kin.—Where a man dies intestate, and subsequently his widow dies before letters are taken out on his estate, her niece is not entitled to administer his estate as next of kin, for she was not such when he died.

Charles F. Hanlon, for Miss Margaret Murray.

Geo. D. Shadburne and Mr. W. A. Plunkett, associate, for absent heirs.

T. E. K. Cormac, for Public Administrator Roach.

J. M. Burnett, amicus curiae.

COFFEY, J. John Lane died intestate, leaving solely surviving him his widow Ellen, who, shortly after his death and before letters were taken out on his estate, died, leaving no issue nor parents. Now comes Margaret Murray, spinster, niece of Ellen Lane, and claiming to be her heir at law, and files a petition for letters of administration on the estate of the first aforesaid John Lane, which petition is contested by the public administrator, who claims that he is entitled, under the statute (Code Civ. Proc., sec. 1365). The question before the court is: To which of these antagonistic applicants should letters issue?

The order in which letters of administration are granted is a matter of statutory regulation, and to the statute we must resort for the rule of decision. This principle should

be borne in mind when examining the authorities cited from other states, for unless they interpret statutes similar to our own they carry no weight. Section 1365 of the California Code of Civil Procedure provides that relatives of the deceased shall be entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and the section then fixes the order in which letters shall be granted, the seventh subdivision being "the next of kin entitled to share in the distribution of the estate." It has been held from the earliest history of our jurisprudence that the heirs succeed to the property of the intestate immediately upon his death; then their interest becomes vested, subject only to the lien of the administrator for the payment of the debts of the intestate and charges and expenses of administration. It follows from this independent of the statute, that "the next of kin entitled to share in the distribution of the estate" must be the persons who are "next of kin" at the death of the intestate. Miss Margaret Murray was not next of kin to John Lane when he died: how can she become so after his death? The first part of section 1365, Code of Civil Procedure, provides that the relatives of the deceased (not the relatives of a deceased heir of the deceased) shall be entitled to administer only when they are entitled to succeed to his personal estate. Miss Murray was not a relative of the deceased John Lane; she was not an heir at law; if her aunt Ellen had died before John Lane, Margaret would come in for nothing. Miss Murray will ultimately obtain a portion of the estate, but only as an heir at law or "next of kin" of her aunt Ellen, if it be established in that estate that she is so related. Her interest comes and is worked out through that estate and in no other way. There is no descent cast by right of representation in this case; the law provides for such only where the common relative dies before the intestate. It would seem, then, that as Miss Margaret Murray was not a relative of the decedent, John Lane, and can claim only through the estate of her deceased aunt, Ellen Lane, she does not come within the statute, and hence her application must be denied.

In Estate of Wakefield, 136 Cal. 110, 68 Pac. 499, a mother and daughter perished in a wreck, the daughter dying first. The daughter died intestate, leaving her mother sole heir. Her mother left a last will bequeathing her property to her two sons. It was held that the sons were not entitled to administration on the estate of the daughter, under section 1365, California Code of Civil Procedure, as they became possessed of her estate, not as her heirs, but by reason of being devisees under their mother's will.

ESTATE OF CHARLES SEALY, DECEASED.

[No. 3,186; decided July 5, 1884.]

Jurisdiction—Residence of Deceased.—The Issuance of Special Letters of administration to the public administrator in one county is not a final determination of his right to general letters of administration as against the public administrator of another county.

Jurisdiction—Residence of Deceased.—The Issuance of Special Letters of administration leaves the jurisdictional facts still to be ascertained prior to the issuance of general letters.

Jurisdiction—Residence of Deceased—Conclusiveness of Determination.—Where the public administrators of two counties each file an application for letters of administration, there being a doubt as to which county the decedent was a resident of, and one applicant contests the application of the other, the adjudication of the court that it has jurisdiction is a bar to the contestant's own application in the other county.

John A. Wright, for San Francisco public administrator.

E. C. Robinson and W. R. Davis, for Alameda public administrator.

J. M. Seawell, for Robert Sealy, brother.

W. A. Plunkett, for absent heirs.

Barrows & Dare, for "somebody in shadow."

COFFEY, J. Charles Sealy died in San Francisco on February 22, 1880, he having moved over to Oakland, Alameda county, about four months before his death, intending to take up his residence there, in order to avoid jury duty

in San Francisco, declaring that he would never live in San Francisco again.

On February 23, 1884, Philip A. Roach, public administrator, filed in the superior court of the city and county of San Francisco his petition for special letters of administration upon the estate of Charles Sealy, and he was appointed special administrator on February 25th. At about the same time, Louis Gottshall, public administrator of Alameda county, was ordered by the superior court of that county to take charge of the estate therein, Charles Sealy having resided in Alameda county. At the same time Mr. Gottshall filed his petition in the Alameda superior court for general letters of administration. Subsequently he filed a petition in the superior court of San Francisco to set aside and revoke the special letters of Mr. Roach, which petition was denied. On February 28th Mr. Roach filed in Alameda county his written objections to the application of Mr. Gottshall for letters of administration, and upon the issues of fact raised by the objection the case was heard and tried before that court. On March 31st the Alameda superior court, Noble Hamilton, judge, rendered a decision in favor of public administrator Gottshall, but, disregarding this decision, public administrator Roach insisted on the hearing of his petition in the San Francisco court for general letters. When the matter came up for hearing the attorney for the Alameda administrator filed objections to the application of the San Francisco administrator, and pleaded in bar, as a final adjudication upon the question of residence, the decision of the Alameda court. The points of the argument were, whether the Alameda adjudication could be pleaded in bar, and, if so pleaded, what would be its effect.

Messrs. Robinson and Davis, for Alameda administrator, filed herein a brief of forty-three pages; Mr. Seawell, for Robert Sealy, one of twenty pages; and Messrs. Wright and Cormac, for San Francisco administrator, one of twelve pages. If attorneys expect their learned and long essays and reviews to be well considered, their citations verified, and their conclusions cogitated and considered by the court, they

must be content to wait awhile for a decision. Hence the delay in deciding this controversy.

The issue of special letters to the public administrator of San Francisco was not a final determination of the rights of the parties herein. His function is "to collect and take charge of the estate of the decedent," and to preserve the same, pending proceedings for the appointment of a general administrator: Code Civ. Proc., sec. 1411.

The jurisdictional facts were still to be ascertained, prior to the issue of general letters. The first inquiry upon such an application was had in Alameda county. To the court in that county went the San Francisco public administrator, and, opposing the application of the Alameda administrator, controverted the latter's right to letters, and in that controversy was worsted. He must abide the event of a controversy to which he was a voluntary party. There was an issue to which the parties here were parties; they had their day in court; the facts were investigated and found in favor of that jurisdiction; and the judgment is here regularly and properly pleadable, and pleaded in bar of this court's action. Let an order be drawn accordingly.

Under Some Circumstances, Two or More Courts may have Jurisdiction to entertain an application for letters testamentary or of administration. When such is the case, and one of the courts receives an application and assumes jurisdiction, that jurisdiction is exclusive, for there cannot be two valid administrations of an estate at the same time. The court first applied to for letters has exclusive authority to determine whether or not it has jurisdiction, subject to review upon appeal, and the other courts must abide by its determination of the question. The statutes of many states provide that in certain cases the courts in which application is first made has exclusive jurisdiction of the settlement of the estate, and under this rule, the first filing of a petition for letters constitutes the "first application" for them. The appointment of an administrator in one county is without validity while a prior appointment in another county is in effect. And a decree escheating property to the state is ineffectual when the court of another county has already granted letters of administration: 1 Ross on Probate Law and Practice, 226, citing Dungan v. Superior Court, 149 Cal. 98, 84 Pac. 767; Estate of Davis, 149 Cal. 485, 87 Pac. 17; Estate of Griffith, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; Oh Chow v. Brockway, 21 Or. 440, 28 Pac. 384; Territory v. Klee, 1 Wash. 183, 23 Pac. 417.

ESTATE OF MICHAEL PICKETT, DECEASED.

[No. 4,371; decided November 7, 1885.]

Words and Phrases.—The Terms "Surviving Wife" and "Widow" are synonymous.

Appointment of Administratrix.—When a Widow Marries, she ceases to be the widow of her first husband; and then being a married woman, she loses her right to administer his estate, or to nominate an administrator.

This was a contest between two applicants for letters of administration, one being the nominee of the decedent's widow, who had remarried, and the other the public administrator of San Francisco, Philip A. Roach.

Wright & Cormac, for Public Administrator Roach.

Burnett & Bartlett, for O'Connell, nominee of former widow.

Geo. D. Shadburne, for absent heirs.

COFFEY, J. When Mrs. Pickett married Minihan, she ceased to the widow of the decedent and lost her right to administer. Being a married woman she had no right herself, and had nothing to confer upon her nominee, O'Connell. The terms "surviving wife" and "widow" are synonymous, and are so treated in the statute and in the decisions, the supreme court commonly employing the term "widow" in the same signification as "surviving wife." I have carefully conned and considered the brief of counsel for Mrs. Minihan's nominee, and have examined all the authorities accessible with a view to discerning the distinction drawn by them between the principles involved in the authorities cited by counsel for absent heirs, and the point raised here; but my conclusion is that the sense of the statute, and the result of the decisions of the supreme court, is to exclude the widow upon her second marriage from the right of nomination. The Estate of Cotter does, as counsel contend, settle the point that a nonresident widow is entitled to nominate although disqualified from serving, because, as the court

said, the right to nominate "does not depend upon the matter of residence," but it does depend upon the status of the nominator. The court there refers to "the widow of the deceased," "the right of the widow to nominate" (54 Cal. 217), thus treating "surviving wife" and "widow" as convertible terms. Mrs. Minihan is a married woman, and, as such, could neither administer nor nominate; being a married woman, how can she be accounted the "widow" of her predeceased husband?

I have searched the dictionaries and the decisions in vain for relief in this extremity. In the circumstances, her nomination is "of no legal consequence whatever": Estate of Morgan, 53 Cal. 243.

Counsel for the nominee express their assurance that before the court will refuse this claim of right in Mrs. Minihan, it will be fully statisfied that its decision expresses the intention of the legislature, and that the court will resolve its doubts, if any there be, in favor of a class whose rights it is especially organized to defend and protect.

In the Estate of Flaherty, decided February 11, 1884, this court, in the conclusion it reached, justified the assurance here avouched by counsel. That case was elaborately argued by John A. Wright, Esq., for the public administrator, and Messrs. Jarrett and C. W. Bryant for one claiming to be a nonresident widow, although in marital relations with another man, to whom she was ceremonially united during the lifetime of Flaherty (being under the impression that he was dead), and with whom she continued to cohabit after she learned that Flaherty was still in existence, and until his death and up to the time of making her nomination, and thereafter, and bearing the name of the second supposed spouse; but this court held that the second marriage was void, as she was then the lawful wife of Flaherty, and at his death as "surviving wife" or "widow" entitled to nominate. Conversely, it should seem, if she was, as counsel there contended, under the law of New York, the wife of another at the time of application, she would be disentitled to nominate. After full consideration I cannot discover any doubt of the intention of the legislature. If hardship result, the legis-

lature is responsible, not the court. As was said in the Estate of Boland, 43 Cal. 643 (in which estate one of the counsel here, W. C. Burnett, Esq., was concerned), "whatever right she (the quondam widow) may once have had . . . . she lost when she lost the status upon which the right depended."

Disregarding the demurrer, the petition of Mrs. Minihan's nominee, Patrick O'Connell, should be and is denied.

The Statute of California, upon which the decision in the principal case is based, has been amended. As the law now stands in that state, and in many other states, the marriage of a woman seems to have nothing to do with her competency as an executrix, as manifestly it should not. She is entitled to administer on the estate of her deceased husband, though married to another man: Estate of Dow, 132 Cal. 309, 64 Pac. 402.

ESTATE OF AUGUSTA R. NEUSTADT, DECEASED

[No. 6,608; decided August 16, 1884.]

Administrator's Sale—Release of Bidder.—If a bidder at a private sale by an administrator states that she has not had time to examine the title because of the shortness of the notice, and does not wish to be bound unless the title is good, to which the administrator assents, she should be released from her bid when her counsel advises against the title, whether or not his view of the law is correct.

This was an application by the administrator to confirm a private sale of realty returned by him. The application was opposed by the purchaser.

Wm. H. Sharp, for administrator.

Gunnison & Booth, for purchaser, opposing.

COFFEY, J. As suggested at the hearing, the only ground which the court deems it necessary to consider is: Whether the purchaser, who now seeks to be excused, was misled, inadvertently or otherwise, into making her bid. She

sets up in her opposition "that at the time of the delivery of said bid to said administrator she stated that by reason of the short time of said notice she had not time to examine the title to said property, and for that reason did not wish to be bound by the bid if the title thereto was not good," to which proposition she avers the administrator assented; the administrator joins issue upon this allegation.

If the bidder had been granted sufficient time, or if she had not been induced to make the bid by reason of the promise of the administrator that she would have ample time to examine title, she would not have made the offer, acting upon her attorney's advice as to condition of title.

It is immaterial, in my judgment, to consider the soundness of this advice, unnecessary for me to adjudicate upon the attorney's accuracy of judgment; enough to know the purchaser's conduct would have been influenced thereby. Did the administrator mislead her? Not intentionally, perhaps, but the evidence seems to show that the required opportunity of examination was not accorded to her; if it had been she would have acted differently from what she did, so she testifies; and whether her counsel's view of the law be sound or unsound, it was the motive to her act, and excuses her from the performance of a purchase predicated upon a promise that she should have time for full examination.

Upon the evidence as to this point, and upon no other ground, is the opposition sustained.

Purchasers at an Administrator's Sale are usually subject to the maxim of caveat emptor, and the deed can contain no warranty of title: Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Miller v. Gray, 136 Cal. 261, 68 Pac. 770.

ESTATE OF CAROLINE H. FISHER, DECEASED.

[No. 3,000; decided December 23, 1884; January 8, 1886.]

Executors—Duty to Collect Assets.—It is not only the duty of an executor to seek to recover assets of the estate, but should he forbear the endeavor he would be liable as for malfeasance or nonfeasance.

Executors—Good Faith in Bringing Action.—Where a suit brought by an executor presented issues of a "serious" and "difficult" character, and occupied many days in trial, a nonsuit being refused, it must have afforded grounds to the executor's judgment in its institution and prosecution.

Executors—Right to Counsel.—An executor, acting in good faith, is entitled to aid of counsel in all litgation concerning the estate.

Executors—Allowance for Counsel Fees.—It being an executor's duty to defend or prosecute for the estate in all matters where in good faith he believes it necessary, he should be reimbursed though the suit be lost.

An "Exhibit and Account" Presented by an Executor does not Operate as an Estoppel upon the hearing and settlement of a subsequent account by him; the items of the first account are impeachable, and the settlement of such account does not impart a dignity not inherently belonging to the account.

Accounts.—Where an "Exhibit" and "Account" Presented by an Executor was merely "experimental," to raise certain questions as to previous acts of the administration, the executor will, under instructions as to his rights, be ordered to render another account, which shall have the quality of finality.

Counsel Fees.—There is no Authority in the Probate Court to allow an attorney appointed by the court under section 1718, Code of Civil Procedure, compensation for services performed in a suit brought by the executor. The attorney's remuneration must be restricted to proceedings before the court of administration.

This was an application for the settlement of an account filed by executor, Selden S. Wright. A contest was filed on the part of Estelle L. Dudley, a daughter of testatrix, and also a grantee under a certain deed made by testatrix shortly before her death, which deed was the subject matter of the suit brought by the executor, referred to in the opinion of the court. The contest was raised respecting the expenses of this suit, and presented the question of the executor's duty to bring the suit, and his good faith in the matter.

Under the first opinion of the court (December 23, 1884), a new accounting by the executor was directed, and, upon the presentation of this second account, the questions discussed in the first opinion were again raised and reargued; and the question as to the right of an attorney appointed by the court in a probate proceeding to have compensation for services in connection with matters not taking place in and before the court of administration was more particularly presented. The second opinion of the court (of January 8, 1886), rendered upon this new accounting, reconsidered all the questions raised on the first account, and reiterated the former decision; therefore, only that part of the second opinion is given which especially considers the question of the right of compensation of the attorney appointed by the court. The suit referred to in the opinion of the court was a civil action begun and tried in department No. 5 of the same court.

M. G. Cobb and Geo. T. Wright, for the executor.

E. J. McCutchen, for minor heir.

Daniel Titus and James C. Cary, for contestant.

COFFEY, J. Counsel must be content with a summary of conclusions of the court, as I have no leisure to extend the reasoning, although I have well considered the case and the arguments.

1. The duty of the executor:

It was not only the duty of the executor to seek to recover assets of the estate, but had he forborne such endeavor, he would have been liable as for malfeasance or nonfeasance: Code Civ. Proc., title 11 (of part 3), c. 8, Powers and Duties of Executors, etc.; secs. 1581 et seq.; c. 10, Accounts, etc.; art. 1, secs. 1616 et seq.

The discussion as to the bona fides of the suit against the Dudleys seems to be concluded by the opinion or "decision" of Judge Hunt in Wright v. Dudley, which says: "While the proceedings in this case were hastily commenced, yet I am not prepared, from all the evidence in the case, to say that they were instituted in bad faith"; also, the "decision"

says that "the questions of law presented on the trial were difficult, and in some respects serious, and their solution by no means an easy matter." A case presenting issues of a "serious" and "difficult" character, and occupying many days in trial, in which a nonsuit was refused, must have afforded some grounds to the judgment of the executor for its institution and prosecution. If the prosecution were without merit, it would seem inequitable to cast the defense in any costs; but Judge Hunt decided, for the reasons suggested, to wit, the difficulty and seriousness of the questions, to apportion the costs of that action.

The questions here argued with great elaboration by counsel for contestants seem to me disposed of by the department presided over by Judge Hunt, in which the suit of Wright v. Dudley was determined.

As to the haste with which the suit was brought: It was the duty of the executor to proceed with diligence, as delay might have incurred the loss of property by enabling the grantee to part with it to a purchaser who could not be pursued.

The court considers that the action of Wright v. Dudley was begun and carried on by the plaintiff executor as a duty, and that the expenses incurred and obligations assumed were contracted in good faith. An executor acting in good faith is entitled to the aid of counsel in all litigation concerning the estate: Code Civ. Proc., sec. 1616.

It being the duty of a representative to defend the estate against claims, or to prosecute suits upon claims, which he believes should be defended or prosecuted, in the exercise of his honest judgment, he should be reimbursed, even though the suit be lost: Re Miller, 4 Redf. 304.

Mr. McCutchen having appeared in the litigation at the instance of the executor, and having rendered service, is entitled to be considered in this connection: Estate of Simmons, 43 Cal. 543.

The second objection and exception is overruled and denied.

2. "The Exhibit and Account" of May 3, 1884:

The paper indorsed "Exhibit and Account of Executors," filed May 3, 1884, does not operate an estoppel upon the executor, nor does the "Order Settling Exhibit and Account," filed May 16, 1884, give a dignity to that paper to which it is not inherently entitled. The items thereof may now be impeached. If counsel deem it necessary, let the order settling it be set aside.

3. "The Exhibit and Account of Executor," filed August 19, 1884:

I understood from his remarks upon the hearing that the presentation of this paper by the executor was "experimental," merely to raise the points as to whether he had any claims to include in an account. Let him now, therefore, under the instruction of this opinion as to his powers, duties and rights, prepare and file an account of his administration from the beginning, and, when such account is presented and filed, a day will be set for the hearing, or the account sent to a referee, as to the respective counsel may seem expedient.

The prayer of the "Petition and Report accompanying Exhibit and Account" should be formally denied, with leave to the executor to file a first and final account, as indicated in the foregoing opinion.

OPINION ON SECOND APPLICATION.

The argument of the counsel, Mr. Titus, in regard to the compensation of the attorney for the minor heir in the trial of Wright v. Dudley, has convinced this court that it is not competent to consider such claim under section 1718, Code of Civil Procedure, and that the attorney's remuneration must be restricted to probate proceedings. As attorney for minor heirs, there is no authority in the court to allow him for services rendered in the action of Wright v. Dudley; and for the services he did render, he must look to the executor. However harsh this may seem, I am satisfied, upon reargument and reflection, that it is the law.

ESTATE OF CYNTHIA HOFF SHILLABER, DECEASED.

[No. 4,015; decided January 7, 1886.]

Special Administrator.—It is the Duty of a Special Administrator to Collect and preserve, for the executor or administrator, all personalty and choses of every kind belonging to the decedent and his estate; also to take the charge of, enter upon and preserve from damages, waste and injury the realty.

Special Administrator—Actions by and Against.—For all purposes of the performance of the duty of a special administrator to collect and preserve the assets, real and personal, of the decedent, and for all necessary purposes, he may commence and maintain or defend suits and other legal proceedings, as in the case of a general administrator.

Special Administrator—Accounts.—The Accuracy of a special administrator's account will be tested by strictly legal methods, under the rule of section 1415, Code of Civil Procedure, and his duty as therein found, and as defined in the first and second headnotes above.

Special Administrator—Allowance for Clerical Assistance.—In this case the court allowed the special administrator for clerical help in collection of rents, and keeping the accounts, four per cent upon the collections; but reserved the right in other cases to deal differently with a similar item.

Special Administrator.—An Item of Expense for Detective Service, claimed to be incurred for the estate's interest, was in this case disallowed by the court.

Special Administrator—Expenditure on Personalty.—Until distribution, an article of personalty specifically bequeathed by decedent must be treated as part of the estate, and not allowed to deteriorate. Hence, where the special administrator has made an expenditure upon such article to prevent its deterioration, the item should be allowed in his account.

An Executor is Entitled to the Assistance of Counsel, Even When He is Himself an Attorney; and he will be granted an allowance for counsel employed by him; but in dealing with the question, the court will be mindful of the fact that the executor is an attorney of ability.

The Administrator was Allowed Counsel Fees, Although His Counsel was His Law Partner, in the case at bar, it being proved that in this service such counsel was not the business partner of the administrator.

Special Administrator—Expenditures for Business Trip.—Where a special administrator has in good faith journeyed to a distant state upon business of the estate, an allowance will be made to him therefor;

but he will be entitled to no greater remuneration than, in the court's opinion, would be proper for the dispatch of the business of such journey.

Special Administrator.—For the Compensation of a Special Administrator, the court can accept no other standard than that furnished by section 1618, Code of Civil Procedure (for general administration). Commissions are here allowed on the amount accounted for, including an additional sum of one-half of such commissions for extra service, as permitted under such section.

Devisee—Right to Possession.—A Tenant of Realty, specifically devised to her for life, is not entitled to possession on testator's death. But as she will be entitled to the rents, issues and profits upon distribution of the estate, her intermediate occupancy might not ordinarily challenge criticism; yet aliter, if objection made.

Administrator—Liability for Rents When He Places Devisee in Possession.—In the face of objection an administrator will be held accountable for the rental value of realty specifically devised by his testator, which he has placed in the possession of the devisee. But where the premises contained certain articles of personalty, which the testator directed to have left there and which the administrator claimed should be cared for, the court will take into account the care bestowed upon the property by the devisee.

This was a contest to the settlement of the account of the special administrator. Mr. Carroll Cook, the special administrator of the estate (also the nominated executor of decedent's will), filed his first and final account as special administrator upon the twenty-fourth day of September, 1885; and on October 5, 1885, written objections thereto were filed by Frances H. Lowndes (a sister of testatrix) in her own right as heir of testatrix, and as guardian of the person and estate of Theodora Lowndes, a minor, interested in the estate. The objections were exhaustive, but only those are here (and in the decision) explained which involved some principle or question of law; those not explained being the subject only of some controverted question of fact.

As to the first objection, it appears that the administrator had made an expense of $320 for gardening, etc., with respect to the premises referred to by the court in the consideration of the tenth objection. The objection to this item, so far as it involved a question of law, was that the administrator was blowing hot and cold; claiming that the realty upon which the expense was alleged to have been

made had been specifically devised by testatrix, and therefore the title had vested in the devisee, and the premises constituted no part of the estate; while, on the other hand, contending that the property belonged to the estate for the purpose of its care and preservation during the administration. The court having subsequently, under the tenth objection, held that the premises were part of the estate, and the administrator accountable for their rental value, in accordance with the reason of that ruling, allowed this item as proper from a legal point of view, the property of the expense having been first determined by the court.

The fifth objection was to an item in the account for services of a detective employed by the administrator and claimed to be in the interest of the estate and the administration. The sixth objection was to an item of $60, for repairs to an organ removed by the administrator from the place of its situs at testatrix's death, on account of its constant deterioration from want of care, climatic influence, etc. The objection was on the ground that the article had been specifically bequeathed, and the legatee could only claim the gift in the condition in which it was left by the testatrix, and that it was not the function of the administrator to keep property for legatees in any particular state of preservation.

The seventh objection was to an item of $500, charged as fees of the attorney for the administrator. The objection was on the ground that the attorney was a brother and law partner of the administrator; furthermore, that the administrator was himself an attorney, and hence there was no necessity for getting the usual professional assistance, and that even here much of the work of the administration was done by the administrator and not by the attorney.

The tenth objection was to an item of $2,500, placed at the end of the credit side of the administrator's account as a charge by him as administrator to cover all his services in the special administration of the estate, and to include all his expenses in making a journey to New York (referred to in the opinion) to attend to certain litigation and interests there in behalf of the estate, and also including com-

pensation for time and labor with respect to certain suits to which the estate was a party.

Wm. Hoff Cook, for special administrator.

Carroll Cook, special administrator, in pro. per.

W. S. Wood and B. Noyes, for objectors.

COFFEY, J. It is the duty of the special administrator to collect and preserve for the executor or administrator all the goods, chattels, debts and effects of the decedent, all incomes, rents, issues and profits, claims and demands of the estate; he must take the charge and management of, enter upon and preserve from damage, waste and injury the real estate, and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator: Code Civ. Proc., sec. 1415

The account here under examination runs from and including February 26, 1885, to and including September 1, 1885—say six months. Its accuracy must be tested by strictly legal methods, under the rule of the foregoing cited section of the code.

First Objection: Payler payments, numbers 7, 30, 46, 64, 78, 92, 99: disallowed, i. e., objection overruled: Estate of Miner, 46 Cal. 572.

Second Objection: As to voucher 5: objection overruled; item allowed. As to vouchers 23, 26, 28, 45, 56, 71, 91 and 96: When in the care and management of a large estate, it is shown to be impracticable to do without clerical assistance to collect rents and keep accounts, the court usually makes some allowance, but the exercise of this discretion should be guarded. The executor is expected to perform some labor, and to use the utmost economy consistent with the protection of the estate intrusted to his custody and care. I have never made such allowances without rigorous proof of necessity, even when no objection was interposed but such allowances have been made in probate courts repeatedly and in such circumstances as are suggested in this case. Even if proper, however, the charge is out of proportion to the result. I shall allow at the rate of four per cent upon the collections; reserving to myself the right in other accounts to deal otherwise with any similar item, and

acting now upon the evidence before me and my present view of the duty.

Third Objection: Overruled under the evidence.

Fourth Objection: Overruled under the evidence.

Fifth Objection: Sustained. The court cannot understand the reason or necessity in such a case for such a charge.

Sixth Objection: Until distribution the organ must be treated as part of the estate, and not allowed to deteriorate. Objection disallowed and overruled.

Seventh Objection: Attorney's fee, $500. The executor is entitled to such assistance, even when he is himself an attorney, and he needs other counsel. In this case, while he has been actively participant in all the proceedings, yet the counsel claiming the allowance has done, before the court, work entitling him to consideration, and his evidence is that in this service he is not a business partner of the executor. The executor, however, is a lawyer of competency and experience; that he must expect, hereafter, that the court will consider this fact in dealing with his accounts. In this instance I think the item should be allowed.

Eighth Objection: Overruled.

Ninth Objection: Overruled.

Tenth Objection: With reference to this objection the court has given careful attention to the brief presented by the special administrator, and is disposed to consider this claim in the most liberal spirit consistent with its view of the law. The special administrator undoubtedly acted in good faith in journeying to New York in response to the telegram from Buffalo; but he should have consumed no more time than was actually necessary in the discharge of his business, and he is entitled to no more remuneration than, in the opinion of the court, would be proper for the dispatch of his errand to the east. The court regulates his charges in this manner:

21 days necessarily consumed; loss of time, at $20....	$420 00
7 days in New York, at $5 per day; board, etc.	35 00
	$455 00

For his compensation as special administrator the court can, in the due exercise of its discretion, accept no other standard than that furnished by section 1618, Code of Civil Procedure, and allow accordingly:

Commissions on amount accounted for, $10,394 14.		
First $1,000 00..	$ 70 00	
9,000 00.......	450 00	
394 14.......	15 77	
	$535 77	
Extra comp., one-half rates......	267 88	
		$803 65
		$1,258 65

Tenth objection: While the tenant of the life estate is not entitled to immediate possession, she will be entitled on distribution to the rents, issues and profits; and, ordinarily, her intermediate occupancy might not seem to challenge criticism; but in the face of objection, the court cannot disregard the strictly legal aspect of the case; and must, therefore, hold the administrator accountable for the rental value of the premises; being disposed, however, to take into account the care bestowed upon the property by the temporary tenant or custodian. In allowing for the first (Payler) items objected to, the court has bestowed some consideration upon this point. The court will hold the administrator for the ascertained rental value of the premises on Sixteenth Street. Let the account of the special administrator be restated or amended in accordance with this opinion.

An Administrator is Entitled to an Allowance for necessary expenses incurred in traveling on business connected with the preservation of the estate: Estate of Byrne, 122 Cal. 260, 54 Pac. 957; Estate of Rose, 80 Cal. 166, 22 Pac. 86; Rice v. Tilton, 14 Wyo. 101,

82 Pac. 577. Traveling expenses connected with the administration of foreign assets should be allowed out of those assets: Estate of Ortiz, 86 Cal. 316, 21 Am. St. Rep. 44, 24 Pac. 1034. An administratrix is not entitled to expenses incurred in traveling when taking steps to apply for letters of administration, or in attending the hearing of a contest over letters of administration: Estate of Byrne, 122 Cal. 260, 54 Pac. 957.

An Administrator may, Under Some Circumstances, be Allowed in his accounts for the services of a bookkeeper: Estate of Moore, 72 Cal. 335; 13 Pac. 880; or of an expert accountant: Estate of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479. As a rule, the question whether an administrator is entitled to employ a bookkeeper depends on the circumstances of the estate; and should be left to the discretion of the court: Estate of More, 121 Cal. 609, 54 Pac. 97. He cannot charge the estate with the expense of hiring assistance in keeping his ordinary accounts: Lucich v. Medin, 3 Nev. 93, 93 Am. Dec. 376; Steel v. Holladay, 20 Or. 462, 20 Pac. 562.

In Case an Executor or Administrator is Himself an attorney, he cannot charge the estate with the expense of another attorney to assist him in conducting the ordinary administration, unattended with any legal or other complications: Noble v. Whitten, 38 Wash. 262, 80 Pac. 451; Estate of Young, 4 Wash. 534, 30 Pac. 643; Estate of Coursen (Cal.), 65 Pac. 965.

GUARDIANSHIP OF ANNIE MURPHY, MINOR.

[No. 4,385; decided September 4, 1885.]

Guardianship.—The Probate Court has no Jurisdiction to appoint a guardian for a child who has been awarded to a parent in divorce proceedings, while the divorce court retains the right to control the custody of the child.

This was an application by the father of Annie Murphy, a minor, to be appointed her guardian. Mary Murphy, the mother of the child, contested the application.

It appeared that in an action for divorce, pending between the petitioner and contestant, in department 8 of the superior court of San Francisco, the custody of the child had been awarded to the contestant.

Counsel for contestant claimed that the court granting the divorce, and awarding the custody of the child to one of the

parties, retained full and exclusive control over the subject matter, and, besides citing numerous authorities, quoted section 138 of the Civil Code of California, which is as follows:

"In an action for a divorce, the court may, before or after judgment, give such directions for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same."

Petitioner's counsel proceeded under sections 1747 et seq., Code of Civil Procedure, relating to the subject of guardian and ward.

They maintained that the action of the court in the divorce proceeding is merely ancillary to the main purpose of the suit—the procurement of a divorce; and that the point in controversy in that proceeding was not as to who should have the custody of the minor—that she was not a party thereto—but merely as to whether one of the spouses was entitled to a divorce, and that therefore the order of department 8 was not conclusive as to the custody of the child, and does not debar the court having the control of minors from exercising its jurisdiction. It may be added that, by rule of the superior court of San Francisco (consisting of twelve departments), all probate matters and those relating to the guardianship of minors are assigned to department No. 9, which hears only probate and guardianship proceedings.

Taylor & Craig, for petitioner.

Leonard S. Clark, for contestant.

COFFEY, J. This court cannot entertain jurisdiction while the divorce court still retains the right to control the custody of the minor: Anthony v. Dunlap, 8 Cal. 26.

Application denied.

ESTATE OF DAVID McDOUGAL, DECEASED.

[No. 2,278; decided Sept. 12, 1884.]

Administrator.—A Surviving Wife has the Right to Nominate an administrator of her husband's estate, although she has been removed from her position as executrix of his will because of her permanent removal from the state.

David McDougal died on August 7, 1882, in San Francisco, a resident thereof, leaving a last will wherein his wife, Caroline M. McDougal, was named as executrix.

On May 25, 1883, letters testamentary were issued to her; and on October 1, 1883, she left this state for Washington, D. C.

Thereafter proceedings were instituted under Sections 1436 et seq., Code of Civil Procedure, for the revocation of her letters, on the ground that she had permanently removed from this state, and on July 16, 1884, an order was made removing her from her position as executrix.

A request in writing by her, for the appointment of W. K. Van Alen as administrator with the will annexed, was subsequently filed, with a petition for his appointment.

A counter-application was filed, but was denied. The grounds of contest of this application appear from the facts above recited and the opinion.

P. J. Van Loben Sels, for Mrs. K. C. McDougal.

J. B. Reinstein, for nominee of surviving wife.

COFFEY, J. I have read carefully the briefs of respective counsel in these applications, but do not consider it necessary to express any opinion as to the correctness of the conclusions of either; since section 1426 of the Code of Civil Procedure (to which they did not refer in their briefs, but which was discussed orally in open court) disposes of the matter. As the court said at the hearing, it can only exercise its discretion under the limitations of the statute, and section 1426 brings this case within the conditions of section 1365, Code of Civil Procedure. The conduct of the executrix and the cause of her removal do not affect her right of nomination, since the statute does not so declare.

It does not appear that Van Alen is incompetent under the statute; and this being so, he is entitled as of right, as the nominee of the surviving wife, to letters of administration with the will annexed: Code Civ. Proc., secs. 1365, 1426.

A Surviving Spouse, though incompetent to act as administrator because of nonresidence, is entitled to nominate some competent person for the position: Estate of Dorris, 93 Cal. 611, 29 Pac. 244; Estate of Healey, 122 Cal. 162, 54 Pac. 736.

ESTATE OF THOMAS H. BLYTHE, DECEASED.

[No. 2,401; decided February 12, 1885.]

Counsel Fees.—The Difficulty and Delicacy of the Court's Duty, in adjusting applications of attorneys for allowance of fees, expressed.

Attorneys—Duty to Submit to Court.—Among the duties of an attorney is that of submission to the court in the exercise of a discretion not abused, without demur or murmur. He is to advise and counsel simply, leaving the court, in its own way, to come to a conclusion.

Counsel Fees.—In the Consideration of Applications for Fees by attorneys appointed by the court, the appointee and applicant should be especially indulgent to the court which has chosen him in its endeavor to properly adjust the rights of the applicant. The duty of submission to the court, stated in the second headnote above, is especially applicable to these attorneys.

Counsel Fees.—Whether an Estate in Probate is Large or Small, whether it may escheat or not, or go to claimants then unknown, the principles of law governing the compensation of an attorney are the same, and should be applied rigorously by the court.

Counsel Fees.—In Fixing Attorneys' Fees There are no Established Rules; the character and circumstances of every case, founded upon general principles of justice, and the reasonable value of a capable attorney's services, must furnish the rule.

Counsel Fees.—In Determining the Compensation of an Attorney it has been the practice, and has become the rule of the court, that expert testimony as to the value of the services will not be considered. The judge will determine the matter for himself.

Administration—Extravagant Costs.—The Impression, Widely Prevalent, of the extravagant cost of administering estates, referred to and the court's position stated.

Attorneys.—The Probate Judge is the Guardian of all Decedents' Estates; but the law contemplates an aid in the selection of a competent attorney to protect the court against spurious claimants, or fraudulent devices or practices of any sort.

Attorneys.—It is the Duty of an Attorney Appointed by the Court in the administration of a decedent's estate, as the legal representative of the heirs, to discover and demonstrate to the court the true heir, and to expose and denounce all pretenders.

This was an application by John C. Burch, who was the appointee of the court to represent absent and other heirs, for an allowance of $1,750 on account of services performed under his appointment. After overruling a demurrer to the petition, the matter was sent to a referee for adjustment, and was reported back for allowance. The referee's ruling was excepted to, and the opinion below was rendered on a review of the report of the referee, Mr. A. H. Loughborough.

John A. Wright, for administrator.

T. I. Bergin, W. H. H. Hart and David McClure (appointee of court), for Florence Blythe.

John C. Burch, in pro. per.

COFFEY, J. The adjustment of attorneys' accounts and applications for compensation is one of the most delicate and difficult incidents of the office of judge, particularly in the probate department, where so many such applications are made. The attorney is naturally anxious for a fee, which is sometimes resisted with vigor, and sometimes there is no one to resist, save the court, in the exercise of what it conceives to be the interest of the estate. In discharging this duty the court is constantly withstood by practitioners who seem to forget, in the pursuit of their private gain, the higher obligations they are under to the law which permits them to practice, and to the court whose officers they are; occasionally an attorney appears who considers (or seems to consider) the court as a convenience for him, and who resents the court's regulation of his fees as an exercise of arbitrary authority. Such attorneys mistake their vocation or its duties; they have rights which the court is always careful to regard; but they have also duties which are the source of those rights,

and which duties the court will endeavor to see are faithfully performed.

Among these duties is that of submitting to the court in the exercise of its discretion, when it is not abused, without demur or murmur; but instead of doing so, they undertake to direct the court, instead of simply advising and counseling it, and then leaving the court, in its own way, without molestation or undue urging, to its time for reflection or deliberation, so that it may come to a correct conclusion free from obstruction or irritation produced by importunity or intercession out of court.

These remarks are peculiarly applicable to petitions for fees by appointed attorneys, who should be especially indulgent to the court which has chosen them to perform important duties; and the remarks are made now and here, because this is an estate of magnitude and many complications, in which the court is apt to be called upon, and has been called upon, to act on applications for large allowances. Whether the estate be large or small, however; whether it may ultimately escheat to the state, or go to some of the present claimants, or to others not yet before the court, the principles of law are the same, and should be applied rigorously by the court. In fixing fees there are no established rules; every case, in its character and circumstances, must furnish its own rule, founded upon general principles of justice and the reasonable value of a capable attorney's services. In arriving at such a rule, experience has taught and courts have declared—this particular probate department repeatedly—that so-called expert testimony is unreliable; and the judge should trust to his own knowledge, experience and judgment in establishing the value of services. The judge here presiding has not (except in two or three earlier instances) called upon experts in such cases, and where in some instances the applicant called in other attorneys to testify, the court has discarded their testimony and substituted its own judgment. It is not necessary to discuss further the reason of this practice; the supreme court has declared it to be correct, and that is the end of the controversy. But the court has so serious a responsibility, that it is bound to de-

cide these questions (as all other questions arising) with the utmost care and deliberation; and even then it is not free from liability to error.

Estates, large or small, complex or simple, should be administered with efficiency and economy; and the impression, too widely prevalent, of the extravagant expenses of administering estates should not be countenanced by the court, nor in any wise encouraged by its conduct. Some of the applications are extraordinary in their amount, and, even when largely reduced by the court, seem excessive; but the court does its utmost to keep the cost of administration within bounds, to do justice to worthy and capable attorneys, and to save all that can be saved to the widows and orphans and absent persons who rely upon the protection afforded to them by the law and the courts. Unpleasant as it may be to contend with counsel in this regard, this court intends to be firm and inflexible in the application of the principles herein suggested.

Now, as to this particular application: The attorney applicant is a practitioner of large experience, of high repute for integrity, and possessing the confidence of the court with regard to his capacity (as is amply evidenced by his selection by the court), and entitled to adequate compensation for his services; but what "adequate" compensation is may constitute matter of difference between him and the court, without reflection upon him. The claim he made here for compensation was referred, with other matters, to the referee, who is also a lawyer of ability, approved integrity and large experience, just and fair in his reasonings and conclusions, and moderate in his estimate of the value of services; and he has undertaken to make, and has made, a thorough examination of the claim, and as a conclusion therein recommended its allowance, approval and payment.

In his report the referee says, that at first it seemed to him that the compensation sought seemed very large, but after mature reflection and careful consideration of all the circumstances, he concludes that it was well earned; the referee further says, in alluding to the appropriateness of the appointment, that this is an extraordinary case; a very large

estate is waiting for the legal heirs, the decedent left no will, his domestic relations are involved in doubt; apart from his vast property he was an obscure man, it is not even known with certainty where he was born, or under what name; his family source is difficult to discover, and of the numerous and conflicting claimants who have appeared and asserted rights to the inheritance, not one is an admitted heir, and the pretensions of each must be scrutinized. As the referee remarks, the judge is the guardian of this estate, but the code contemplates that he shall be aided by a competent attorney to protect the court against spurious claimants or fraudulent devices or practices of any sort, such as are, in every court and in every country, constantly attempted and occasionally consummated. It is the duty of such attorney to expose and denounce the pretender claimant and to discover and demonstrate the true heir. The referee finds that the attorney appointed has discharged his duty, so far, diligently and efficiently, and has rendered all the services mentioned in his petition, and that he is, therefore, entitled to the amount claimed as the reasonable value of his services.

Now, expressly reserving the question of the attorney's right to pay for services rendered in the litigation in another department, and also expressly declaring that any future application for compensation shall not be predicated upon the allowance here made, the court considers that the judgment of the referee, based upon a complete examination of the evidence, and fortified by his own matured experience, ripened knowledge and discriminating intellect, should be respected, and at the same time the court desires counsel distinctly to understand that all applications of this nature will be subjected to rigid scrutiny, and that expert evidence will not be invited, for reasons already set forth with sufficient succinctness. Report confirmed.

ESTATE OF THOMAS H. BLYTHE, DECEASED (No. 2).

[No. 2,401; decided January 6, 1885.]

Attorney for Absent Heirs—Power to Appoint.—Under section 1718, Code of Civil Procedure, the probate court has power to appoint an attorney for absent or unrepresented heirs of a decedent.

Attorney for Absent Heirs—Discretion in Appointing.—Although the probate court has power to appoint an attorney for unrepresented heirs of a decedent, the power should be prudently and discreetly exercised, in the interests of the estate and of all concerned. The rule is, never to make such an appointment unless the necessity is manifest.

Attorney for Absent Heirs When no Known Heirs.—The probate court generally refrains from appointing an attorney for unrepresented parties when there are no known heirs; not doubting its power, but questioning the expediency of its exercise in such cases.

Attorney for Absent Heirs—Compensation.—An attorney appointed to represent heirs is entitled to an allowance at any time after services rendered, and during the administration. An application for such an allowance before final settlement of the estate is not premature.

Attorney for Absent Heirs.—The Compensation of an Attorney appointed by the court to represent heirs must be paid out of the estate, as necessary expenses of administration. Upon distribution of the estate the attorney's fee may be charged against the party represented by him.

This was a demurrer to an application by Jno. C. Burch, appointed by the court to represent absent and unrepresented heirs, for an allowance of $1,750, on account of services performed by him under the appointment. It was claimed that such an allowance could not be granted during the administration—not until distribution of the estate; hence the demurrer.

T. I. Bergin, W. H. H. Hart, and D. McClure, for demurrant.

Jno. C. Burch, for claimant, in pro. per.

COFFEY, J. This court was rather reluctant to make any appointment in the first instance, but upon motion of one of the many attorneys for the numerous claimants, none of the other attorneys dissenting audibly, or objecting other-

wise until now, the appointment was made of a competent and reputable practitioner at this bar. This court never makes such appointments unless the necessity is manifest.

The court has the power to make such appointment under section 1718, Code of Civil Procedure, although it is a power that should be prudently and discreetly exercised, with a view to the conservation of the estate and of the interests of all concerned in it; and this court trusts it has so exercised the power conferred upon it by the code in this as in other instances. The court has in most cases refrained from appointing attorneys where there were no known heirs, not doubting its power, but questioning the expediency of its exercise in such cases; but in some other cases the result of the appointment was the discovery of true heirs, who, except for the action of the court, might have lost their inheritance. That the power resides in the court to make such appointment is hardly dubitable: Stuart v. Allen, 16 Cal. 504, 76 Am. Dec. 551; Estate of Gasq. 42 Cal. 288; Estate of Simmons, 43 Cal. 547; Gurnee v. Maloney, 38 Cal. 87, 99 Am. Dec. 352.

This application is not premature. The attorney is entitled to an allowance at any time after services rendered: Estate of Simmons, 43 Cal. 543.

The attorney may receive a fee, to be fixed by the court, for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney: Code Civ. Proc., sec. 1718.

The fee may be "paid" at any time prior to the "distribution," and then "charged" to the party represented: Estate of Garraud, 36 Cal. 278.

Mr. Burch was appointed according to law; has rendered services to the estate in pursuance of such appointment, and is entitled to compensation therefor; the measure of which compensation was referred to the referee, from whom it was temporarily taken by the order of suspension of his proceedings, and to whom it should now be restored. Let it be restored; and the referee is ordered to take testimony in this regard and report thereupon at his convenience.

ESTATE OF ANN FITZPATRICK, DECEASED.

[No. 2,623; decided May 19, 1885.]

Funeral Expenses.—The Surviving Husband is Liable for the funeral expenses of his wife, where he has resources sufficient to respond.

Ann Fitzpatrick, a married woman, died intestate, on May 27, 1883, in San Francisco, a resident thereof, leaving separate estate therein.

She left a surviving husband, Patrick D. Fitzpatrick, and also a sister named Bridget Curley, as her heirs.

Letters of administration were duly issued to the surviving husband on July 19, 1883.

On March 26, 1885, the administrator filed his final account, which contained an item of $284 for the funeral expenses of his deceased wife. The sister of the decedent objected to this item, on the ground that the surviving husband is liable therefor, he having the pecuniary ability to pay, and it being averred that he had such ability. The objection was sustained, and the item disallowed.

Matt. I. Sullivan and J. E. Abbott, for administrator.

E. N. Deuprey and J. M. Burnett, for contestant.

COFFEY, J. I am unable to find any authority anywhere exempting the surviving husband from liability for the funeral expenses of the deceased wife, where he has resources sufficient to respond; and the court is destitute of discretion in such case: Garvey v. McCue, 3 Redf. 315.

Services Rendered by Physicians and Undertakers to a married woman should be paid by her husband, if he is able to pay them, rather than out of her estate: Estate of Weringer, 100 Cal. 345, 34 Pac. 825; note in 98 Am. St. Rep. 647; Constantinides v. Walsh, 146 Mass. 281, 4 Am. St. Rep. 311, 15 N. E. 631; Gallaway v. Estate of McPherson, 67 Mich. 546, 11 Am. St. Rep. 596, 35 N. W. 114.

ESTATE OF WM. H. WALLACE, DECEASED.

[No. 1,198; decided January 28, 1884.]

A Distribution of a Partnership Interest, owned by the estate, may be ordered without a previous accounting by the surviving partners to the administratrix.

Distribution Disposes of the Subject Matter, and Nothing Remains within the jurisdiction of the court, except to compel obedience to its decree, when necessary.

An Administratrix must be Held to have Concurred, as such, in a request made by her in her own behalf as widow and as guardian of a minor heir.

An Administratrix, as Such, is Estopped from Attacking a Decree Made upon Her Request, as widow and as guardian of a minor heir, and concurred in by her as administratrix.

Wm. H. Wallace died intestate in San Francisco, on October 2, 1881. On October 24, 1881, letters of administration were duly issued to his widow, Emeline Wallace.

He left him surviving, as his heirs, his widow and two children, Cora A. and Wm. H. Wallace, Jr., the latter a minor.

Mrs. Wallace was also appointed guardian of her minor son.

The estate was the owner of a one-third interest in the firm of Sisson, Wallace & Co., composed at the time of decedent's death of A. W. Sisson, C. W. Crocker and said Wm. H. Wallace.

An inventory and appraisement, in which the interest of the estate in this firm was set out, was duly filed.

The administratrix entered into negotiations with the surviving partners for the sale to them of the interest of the estate in said partnership.

The result of these negotiations was that on May 2, 1882, the widow, for herself, and as guardian of her minor son and also the daughter of the decedent, filed a petition for the distribution to them, of the interest of the decedent in said partnership, in the proportions to which they were respectively entitled.

The parties all appeared before the Judge then presiding in Department No. 9 (the Hon. Jno. F. Finn), in his cham-

bers, and explained to him the purpose of the application for distribution, namely, to sell to the surviving partners the interest of the estate in said firm, and the same met with his approval.

Thereupon, on May 15, 1882, the court rendered its decree, distributing said interest to said heirs as prayed for.

The administratrix delivered to the distributees their several shares, according to said decree, and on June 2, 1882, the widow and her daughter conveyed all their right, title and interest in said firm to said surviving partners.

The widow, also, as guardian of her minor son, obtained an order of court authorizing her, as such guardian, to sell said son's interest in said firm under the decree of distribution, and accordingly did so, which sale was thereafter duly confirmed.

Thereafter the administratrix became dissatisfied with the sale, claiming that certain matters were misrepresented to her, and also that she was compelled to submit to the terms of the surviving partners, and on October 26, 1883, she obtained an order for them to show cause why they should not render to her an account of the business, property and affairs of the said copartnership.

The application for the order was based upon section 1585, Code of Civil Procedure.

Counsel for the administratrix claimed that the decree of distribution above mentioned was prematurely made, and without authority of law, and void, and also that the court had no jurisdiction to distribute until a partnership accounting had been rendered, and that until then there were no assets in the hands of the administratrix.

A. N. Drown, for administratrix, petitioner.

Mastick, Belcher & Mastick, for respondents.

COFFEY, J. 1. The court is of opinion that the decree of distribution of May 15, 1882, was properly made, and was within the jurisdiction of this court. I cannot assent to the view of the counsel for the petitioner upon this point.

2. Having by that decree disposed of the subject matter, nothing remains within the jurisdiction of this court, except

to compel obedience to the decree, in case it should have been disobeyed, which is not the case.

3. The petitioner is estopped, as administratrix, by that decree, from complaining of the exercise of a power possessed by the court and invoked upon her own request in behalf of herself as widow, and as guardian of the minor, and by the adult child, and in which, as administratrix, she must be held to have concurred.

No other result can be reached by the court consistently with my opinion of the law or of the principles of equity. Order discharged.

ESTATE OF CYNTHIA HOFF SHILLABER, DECEASED (NO. 2).

[No. 4,015; decided July 14, 1887.]

Administrator—Allowance for Traveling Expenses.—Where an administrator has, in good faith, journeyed to a distant state upon business of the estate, and has incurred an attorney's charge in connection therewith, an allowance will be made to him therefor; and this whether or not he misconceived his legal duty.

Executor—Insurance—Proof of Loss.—It is an executor's duty to prepare proofs of loss in case of a destruction of insured property and hence he will not be allowed a charge incurred for having such proofs prepared.

Executor—Costs of Copying Papers.—All proceedings necessary to be taken by the executor in the administration of the estate are part of his duty, and any papers drawn in connection therewith are covered by the statutory compensation provided for his services; and the costs of engrossing or copying the same are not taxable against the estate.

Executor—Allowance for Clerical Help.—When, in a large estate, the impracticability is shown of doing without clerical assistance to collect rents and keep accounts, the court usually makes some allowance therefor; but guardedly, and never without rigorous proof of necessity, although no objection be interposed.

The Administrator may be Allowed a Charge for Costs Paid in Serving Notices required by law to oust a defaulting tenant, and although paid to an agent of the estate, receiving a compensation for collection of the rents.

An Item in an Account for "Executor's Loss of Time" will be stricken out.

Appraisers.—Where Compensation of Appraisers has been Fixed after Notice to all parties interested, the question will be thereafter treated as res judicata.

Appraisers.—It is the Duty of Appraisers, in all cases where their labor extends over a number of days, to preserve a minute account of their services.

An Executor is Entitled to the Assistance of Counsel, even When He is Himself an Attorney; but in dealing with the question the court will be mindful of the fact that the executor is an attorney of ability. So, in this case, conforming to this rule and qualification, the court reduced the attorney's charge by one-third.

Executor—Allowance for Counsel Fees.—In the case at bar the executor was allowed an item for counsel fees, although his counsel was his law partner, it being proved that in this service such counsel was not the business partner of the executor.

Executor.—An Item for Commissions of an Executor, found in an annual account by him, will be disallowed. Allowance of an executor's statutory commissions is authorized only upon settlement of his final account in the administration.

There was a contest arising upon objections to the settlement of the first annual account of the executor. Mr. Carroll Cook, as executor, filed his first annual account on September 13, 1886, and upon the twenty-seventh day of September, 1886, written objections were filed by Frances H. Lowndes (a sister of the above-named testatrix) in her own right as an heir, and also as guardian of the person and estate of Theodora Lowndes, a minor, a party interested in the estate of said decedent. After sustaining, as to one point, a demurrer to the objections (on October 8, 1886), the hearing was had, extending over a considerable period of time; final argument being heard on March 24, 1887. Such statement of the objections and items of the account referred to in the opinion is here made, as is considered to be helpful to a more complete understanding of the judge's decision.

As to the first objections considered, respecting certain telegrams, it appeared that the executor was absent from San Francisco, and telegraphed certain instructions respecting affairs of the estate. As to the amount paid Josiah Cook, an attorney at Buffalo, it appeared that at the time of dece-

dent's death a certain suit began in New York state was pending against her, and, in answer to a telegram from relatives of decedent's family, the executor went on to New York in the belief that some immediate necessity existed for the sending of the telegram, which called for his prompt appearance in New York. For the contestants to the account, it was urged that no necessity of attention could arise with respect to that suit or matters involved in it, because the suit suspended by decedent's death, and could only be revived by instituting an administrator in New York, and having him substituted in the suit; furthermore, the whole matter of the suit was beyond the jurisdiction of this court, and the forum of this administration, and so no part of the executor's duty. The court took the view, however, that the executor should be protected in his action, it having been taken in good faith, although under an erroneous impression of the law.

The items of moneys paid O'Beirne and Jewett, and disallowed by the judge, deserve attention, as they involve an erroneous impression on the part of the executor, not so uncommon, perhaps, in probate proceedings, as might be wished on the part of the court, who is often left to pick out objectionable items of a like character without any help from observing counsel in opposing interests.

The item of $2 paid O'Beirne was for making a "fair copy" of the executor's account; the item of $5.50 for copying the executor's amendments to a certain statement on appeal; and the item of $16, for copying the inventory filed in the estate and a brief presented to the judge. The item of $34 paid Jewett was for making a copy of all proceedings and papers of record in the administration, which copy the executor wanted for his convenience.

The rejection of these items was, as stated in the headnote, on the ground that the subject matter was within the line of the executor's duty, and so was covered by the compensation and commissions provided by law. If, e. g., it was part of the executor's duty to file an account, he could not make a charge for moneys paid in engrossing that; neither could he ask the estate to pay for any copy thereof he should

desire to keep; all these items disallowed are upon this legal ground.

The facts as to all other items objected to are sufficiently stated in the opinion of the court.

The legal propositions contained in the second, fifth, sixth, eleventh and twelfth headnotes were previously announced January 7, 1886, in a decision delivered in the same estate, upon the settlement of the executor's final account in the special administration, reported ante as Estate of Shillaber (No. 1).

William Hoff Cook, for executor.

Carroll Cook, executor, in pro. per.

W. S. Wood, for objections.

B. Noyes, also for objections.

COFFEY, J. Objections sustained to items for telegrams July 6th, $1.30; July 6th, 50c.; July 6th, 75c.; July 6th, 50c.; July 7th, 85c.; July 9th, 35c.; July 9th, 25c.

Fifteen per cent should be taken from all premiums of insurance, it appearing from the testimony that Mr. Gunther was agent for the estate, and that he received, or is about to receive, not less than that amount of premiums as commissions for procuring the insurance.

As to the $100 paid to Josiah Cook, an attorney at Buffalo, the court repeats what it said with reference to the special administrator in a similar connection, that, having acted in good faith in journeying to New York, in response to the telegram from Buffalo, he should be allowed whatever proper expense was incurred in that regard; and, whether or not he was mistaken in his view of the law, the court esteems it just to allow this item.

Item, August 31st, E. W. Gunther $50, for preparing proofs of loss. I do not think this is a proper charge against the estate, for the reason that, if I correctly understand it, it is the duty of the executor to make and prepare such proofs.

Items for September 25th, J. F. O'Beirne, $2; September 30th, J. F. O'Beirne, $5.50; October 3d, George Jewett, $34; December 14th, J. F. O'Beirne, $16 should be disallowed.

With references to the charges of commissions paid E. W. Gunther for collecting rents, as well as the three items of cash paid Mr. Gunther on May 25th, June 5th and 12th for serving notices, the court will repeat what it said upon the settlement of the account of the special administrator: "When in the care and management of a large estate it is shown to be impracticable to do without clerical assistance to collect rents and keep accounts, the court usually makes some allowance, but the exercise of this discretion should be guarded.

"The executor is expected to perform some labor and to use the utmost economy consistent with the protection of the estate entrusted to his custody and care. I have never made such allowances without rigorous proof of necessity, even when no objection was interposed; but such allowances have been made in probate courts repeatedly under such circumstances as are suggested in this case.

"Even if proper, however, the charge is out of proportion to the result. I shall allow at the rate of four per cent upon collections; reserving to myself the right in other accounts to deal otherwise with any similar item, and acting now upon the evidence before me and my present view of duty."

I am inclined to think that under all the circumstances of this estate it is reasonable to allow something for such service, but, taking into consideration the relation of the recipient of this commission to the executor, three per cent seems to be sufficient. The item is reduced to that amount. The charges for serving notices are allowed.

With reference to the items embraced under objection 4, so much of the charge as is for executor's loss of time should be struck out; and as for other expenses, for the trip to Los Angeles, while I consider that executors should be more frugal in disbursing the moneys of estates, yet in this case it may be that the expenditures were justified by the circumstances, so I shall disallow objections as to all but what I have herein indicated.

As to the charges of the appraisers, I am of opinion that that matter was adjudicated by the order allowing the amount, after notice given, and that, apart from that, while the appraisers should have preserved a minute account of

their services, day by day, in this as in all other cases, the court would feel compelled from the evidence, if it considered the matter open for inquiry at this stage, to allow the items.

As to the ninth objection: "August 25th, William Hoff Cook, services $1,500," the court repeats the language of its opinion in the matter of the account of the special administrator. "The executor is entitled to such assistance, even when he himself is an attorney and he needs other counsel. In this case, while he has been actively participant in all the proceedings, yet the counsel claiming the allowance has done, before the court, work entitling him to consideration, and his evidence is that in this service he is not a business partner of the executor. The executor, however, is a lawyer of competency and experience; and he must expect, hereafter, that the court will consider this fact in dealing with his accounts."

So considering in the present instance, the court reduces this item by one-third, making it $1,000.

With regard to objection 10, commissions of executor. This item is unauthorized by law.

"An administrator's commissions should not be allowed him in the settlement of his annual account, but when he has rendered his final account": Estate of Minor, 46 Cal. 564.

All objections and exceptions not herein specifically dealt with are overruled and denied.

For Authorities upon the questions involved in the principal case, see Estate of Shillaber, ante, p. 120, and note. That an administrator may charge the estate with the traveling expenses of his attorney incurred in preserving the assets of the estate, see Estate of Moore, 72 Cal. 335, 13 Pac. 880; Estate of Byrne, 122 Cal. 260, 54 Pac. 957.

ESTATE OF RICHARD T. MAXWELL, DECEASED.

[No. 2,625; decided March 10, 1884.]

Homestead.—The Probate Court must, upon proper application, set apart to the widow a homestead, if none has been selected during the lifetime of the decedent. It has no discretion in the premises.

Homestead.—It does not Impair or Diminish the Right of the Widow to have a homestead set apart that there are no minor children.

Homestead.—Even if the Testator Devises His Entire Estate, which was separate property, his widow will still be entitled to a homestead.

Homestead.—If a Homestead is Selected from the Separate Property of the decedent, the court can set it apart only for a limited period, to be designated in the order.

The above-named decedent left certain real property in Napa county.

Two days before his death he entered into what he supposed to be a valid marriage with a woman who called herself Miss Elena Donnelly.

After his death a sister of the deceased claimed that Miss Donnelly had a husband living at the time she entered into the pretended marriage with decedent, and that in consequence such marriage was void. This marriage, however, is immaterial here, as this fact, if it existed, had not been discovered at the time of the application for a homestead.

On October 30, 1883, Mrs. Elena Maxwell, alleging herself to be the widow of the decedent, filed an application that a homestead be set apart to her out of this Napa property.

Appraisers were appointed to select the homestead, which they did, appraising it at $5,000.

Previous to this alleged marriage with the applicant, the decedent had been married and divorced. In the matter of this divorce the parties settled their property rights, which settlement was made a part of the divorce decree.

By the terms of this settlement Mrs. M. W. Maxwell, the divorced wife, released all claim to the testator's property, and he agreed to pay her $125 per month during her life. and as security for such payment executed a mortgage upon his Napa property.

The testator left a will, in which it was provided that the monthly income from the property, after payment of this charge of $125 per month upon it, should be equally divided between Miss Donnelly and one Miss Margaret McKenzie.

On January 28, 1884, Miss McKenzie filed a contest to the application for a homestead, alleging the above facts in regard to the charge of $125 per month upon the property, and that she was a legatee, and further that there was no issue of the marriage of Miss Donnelly with the testator, and that the Napa property was his separate estate, that the applicant and decedent never lived upon the land or occupied it as a homestead, and that it was of greater value than $5,000; that the portion selected as a homestead was the most valuable portion of the property, and that the income from the remainder was insufficient to pay the monthly allowance to Mrs. M. W. Maxwell.

On January 19, 1884, the executors also filed objections to the application, alleging that it was the desire of the decedent that the lands should not be sold.

On March 14, 1884, the court made an order setting apart a homestead to the applicant during her widowhood.

T. I. Bergin, for applicant, Mrs. Elena Maxwell.

Daniel Rogers, for executors, in opposition.

A. F. Morrison, for Miss Margaret McKenzie, legatee, also in opposition.

COFFEY, J. There is a proper petition before the court. If there were a defect of signature, it was cured under the Code (Code Civ. Proc., sec. 473.) by leave of the court.

The evidence of Appraiser Cornwell, a highly respectable citizen and property owner of Napa county, entirely disinterested and perfectly conversant with the circumstances of the Maxwell Ranch, is clear that the land selected can be segregated without detriment to the rest of the ranch, or impairment of any right in others than the applicant here.

This court must, upon proper application, set apart to the widow a homestead, if none has been selected in lifetime of decedent. The court has no discretion to deny the

application: Estate of Ballentine, 45 Cal. 699; Estate of McCauley, 50 Cal. 546; Mawson v. Mawson, 50 Cal. 539.

It does not impair or diminish the right of the widow that there be no minor children. The homestead is to be set apart to the survivor. It is immaterial that the petition be on behalf of the widow alone. It could not here be otherwise. Her status is that of the "surviving wife" (Code Civ. Proc., sec. 1465). If a testator devised his entire estate —his separate property—his widow would still be entitled to a homestead: Estate of Moore, 57 Cal. 443.

If the property set apart be selected from the separate property of the decedent, the court can only set it apart for a limited period, to be designated in the order: Code Civ. Proc., sec. 1468; Estate of Lord, 2 West Coast Rep. 131; Lord v. Lord; 65 Cal. 84, 3 Pac. 96.

It is suggested that there is a crop of wheat sown on the land. The crop should be reserved.

Application granted.

The Principal Case is followed in Estate of Tate, post, p. 217.

ESTATE AND GUARDIANSHIP OF WM. A. WHITE, MINOR.

[No. 3,411; decided September 3, 1884.]

Marital Obligation—Filial Devotion.—A husband should not allow the duty he owes to his wife to be overcome by his love for his parents. Where one's marital obligation comes into conflict with his filial devotion, the latter should give way to the former.

Guardianship.—Assuming that a Father's Right to the Custody of his child revives upon the death of the mother, who had been awarded the custody under a divorce decree, yet it must be shown that the minor's interest will be conserved by recognizing the father's right.

Guardianship.—Where a Husband Deserts His Wife, who is left to care and provide for their infant child, this will be considered as an abandonment of the child, upon the father's application for guardianship after the mother's death.

Guardianship.—Reluctant as the Court Always is to Interfere with a Father's natural right to his child's custody, it will do so where the child's interest demands.

Guardianship.—In the Case at Bar the Court Refused Guardianship of a minor of divorced parents to its father, applying after the death of the mother, and granted letters to the maternal grandmother of the minor, for the following reasons: The child had been awarded to the mother by a divorce decree against the father; the father never provided for the child, except when compelled by judicial process; he never showed any interest in the child from the time of his desertion of the mother, and by his continued course of conduct manifested a lack of paternal instinct; the maternal grandmother had received the mother and child when deserted by the father, and had ever afterward given them shelter and assistance, and she was the nominee of the mother, by the latter's dying request.

H. C. Firebaugh, for first application.

K. M. Smith, for second application.

COFFEY, J. We have here two applications for letters of guardianship of the person of Wm. C. A. White, a minor. The first application was filed on behalf of Mrs. Ellen Doran, the maternal grandmother of the minor; the second by Wm. F. White, the father of the minor, who was married to the minor's mother April 13, 1879, separated from her July, 1880, four months after the birth of the child, which occurred April 2, 1880; subsequent to the separation, a divorce was obtained by the mother of the minor on the ground of the father's desertion of her; child awarded to mother. The mother died May 22, 1884, prior to which time the father married again.

The father of the minor appears to be a respectable young man, engaged in a responsible position for many years, earning for about six years of that time $100 per month, a salary sufficient for the maintenance of his small family in comfort. Between the time of the separation, July, 1880, and October, 1882, and while Mr. White was in possession of abundant means, he contributed nothing to the support of his child, and then (October 9, 1882) only under judicial process and constraint of court. It appears in evidence that, when Mr. White married, he took his wife to his mother's house, and owing to inability to live amicably with her mother in law, the wife left there and went with her child of four months to her own mother's home, where she remained until the moment of her death, May 22, 1884.

The minor's mother supported herself and child by prosecuting the vocation of bookbinder, and was expert and industrious always, except when her health compelled her to suspend work, and sometimes even when in ill health. According to all accounts in evidence, she was a most exemplary woman, a good wife, a dutiful daughter and an affectionate mother. She offered to live with her husband and to provide for her mother in law, but her husband "wouldn't have it." The husband seemed to care more for his mother than for his wife.

While his filial devotion is not to be censured in itself, when it came into conflict with his marital duty he should have observed the canonical command and the Scriptural injunction, and, if the occasion demanded, to leave his father and mother, and all the rest of his kin, and to "cleave unto his wife": Eph. v., 31. His regard for his mother should not have overcome his obligation to his wife. He allowed his wife to go away elsewhere for shelter with a four months' old infant, and then for over two years, in more or less infirm health, to labor arduously at a binding business, only yielding pecuniary aid when he was coerced to comply with the order of the court (awarding to her the custody of the child, and $15 per month alimony), under the fear of punishment for contempt of court. Whatever the extraneous influence operating upon his mind, he showed no interest in nor affection for his wife and child, from the time of separation, until after the death of his wife; and then he claims custody of the child as the father, and, therefore, naturally entitled to possession. By decree of court he had been deprived of that possession; he claims the death of the mother revived his right. Assuming the accuracy of his attitude, it should be shown that the interest of the minor will be conserved by the recognition of the right of the father. In this case it appears that the child is in the same custody that he was placed in by the mother at the age of four months; that the child has been tenderly nurtured, and is and has been treated with the most affectionate care by the petitioner, Mrs. Ellen Doran, the maternal grandmother, a widow with a family of grown children, all of whom

appear to be respectable persons in comfortable circumstances, and greatly devoted to the child; that when the mother died, and while realizing her approaching end, she manifested solicitude as to care of child, and expressed a desire that her mother (Mrs. Ellen Doran) should retain the child; that practically her mother has cared for the child for years, nursed him and his mother, the deceased Mrs. White, when both were ill, and when the child's life was in danger, procured competent medical attendance, during which time the father, W. F. White, although cognizant of the situation, never went to see the mother or the minor, and made use of expressions indicating (to employ mild terms) an absence of sensibility and sympathy in his relations to the mother and their child. Practically, when Mr. White allowed his wife to go forth from his protection, in delicate health, with her infant, also in delicate health, and to seek her mother's care, which was granted to her, he abandoned his child (as the court had decreed he deserted his wife), and the grandmother, Mrs. Ellen Doran, gave the child a good home, and has ever since that time treated the infant as if she were the mother. The father's natural right must bend to the interest of the child, as the court discerns that interest. Reluctant, as the court always is, to interfere with such natural right, the law and the evidence make clear the duty in this interest. The original award of the custody of the child to the mother; the dying request of that mother in favor of Mrs. Doran; the long-continued indifference of the father, and his contumacy in complying with the orders of the divorce court; his expressions before the death and during the illness of the wife (before and after divorce); his continued course of conduct manifesting a lack of the paternal instinct—all of these established circumstances warrant the court in granting the prayer of the maternal grandmother, Mrs. Ellen Doran, subject to such limitations in favor of the father's visiting the child as may be consistent with its secure custody and welfare.

While Parents are Presumed Competent to have Charge of Their Child, and the parental right will not lightly be disregarded, nevertheless the court, in appointing a guardian, is guided primarily by

what appears to be for the best interests of the child, and may award it to a third person whenever its well-being demands such a course: See 2 Ross on Probate Law and Practice, 950; Guardianship of Danneker, ante, p. 3, and note.

ESTATE OF NICHOLAS TREWEEK, DECEASED.

[No. 2,159; decided November 11, 1885.]

Executor—Failure to Comply with Decree of Distribution—An executor who refuses to make payment to distributees in accordance with the decree of distribution is punishable for contempt, and he cannot plead inability to pay, when his account on file shows the contrary.

Nicholas Treweek died in San Francisco on December 30, 1882, leaving an olographic will dated April 2, 1882, in which he made his brothers, Francis, John and George Treweek, and his sisters, Jane Treweek and Elizabeth West, his legatees and devisees. The same persons were his heirs.

To his brother Francis he left the sum of $5,000, and to each of his other brothers and sisters $2,500, making in all $15,000. He also made all his brothers and sisters his residuary legatees and devisees, share and share alike.

In this will the testator also named Arthur W. Bowman executor.

On January 6, 1883, Mr. Bowman filed the will, together with a petition for its probate, and for letters testamentary.

The petitioner stated the probable value and character of the property of the estate to be about the sum of $15,000 in money in his hands, and certain stocks and real property.

On January 24, 1883, the will was duly admitted to probate, and the petitioner appointed executor, and letters were issued to him on the 29th of the same month.

An inventory and appraisement was filed in the estate on September 4, 1883, in which the executor stated that part of the estate consisted of about the sum of $16,775.23 in money in his hands.

On January 3, 1884, the executor filed his final account, and a petition for final distribution in accordance with the will.

In this account he stated the balance of moneys in his hands to be $15,000.

The account was settled, and decree of distribution made as prayed for on January 15, 1884.

On June 15, 1885, Lovell Squire, Jr., filed a verified petition reciting the facts above stated, and also alleging that he was the attorney in fact of the distributees; that he had, as such, made demand upon the executor for the sum of $15,000, in accordance with the decree of distribution, and that he had refused to pay, giving as his only ground of refusal that he did not have the money; Mr. Squire therefore prayed that an order be made requiring the executor to show cause why he should not pay the money, or be punished for contempt for his failure to do so.

The order to show cause was made, and citation issued thereon.

On July 22, 1885, the executor filed his answer to this petition. He stated in his answer that at the time of the testator's death he, Bowman, owed the sum of $15,000 to the testator for moneys loaned; that in his petition for probate he alluded to said moneys as moneys in his hands, but as a matter of fact there were no moneys of the estate in his hands, although he was at that time amply able to pay the debt; that after his appointment as executor, the matter remained in precisely the same condition, to-wit: as a debt, he having made no segregation of his moneys, or set any apart to the estate in payment of the debt; that at the time of the distribution the distributees were absent from the state of California, and respondent did not know that they had an agent in this state, and if they had been here he would have paid them out of his general resources; that on October 27, 1884, a petition was filed in the superior court of Alameda county by certain of his creditors, to have him declared an insolvent, and that on November 10, 1884, he was adjudicated an insolvent, and one Wm. Thomas was appointed his assignee; that his estate was worth at least

$100,000, and the insolvency proceedings were still pending; and since the filing of the petition in insolvency he had no moneys in his hands, and that his whole estate was in the hands of his assignee; that it was impossible for him, respondent, to comply with the decree of distribution, and that this impossibility was the only reason for his failure to comply, and he intended no contempt of or disrespect to the court.

To this answer a general demurrer was filed by the petitioner, which was sustained on November 11, 1885, with leave to respondent to amend within ten days thereafter.

Respondent having declined and failed to amend, he was committed for contempt on November 30, 1885.

Columbus Bartlett, with whom was W. E. Lindenberger, for demurrant.

E. W. McGraw, for respondent.

COFFEY, J. The executor is an officer of the court, and as such responsible to the court for failure to comply with the terms of the decree of distribution, which was final and conclusive. It was his duty to make payment as therein directed: Code Civ. Proc. 1209, 1666, 1721, 1962; Estate of Taylor, Myr. 160; Estate of Smith, 53 Cal. 208; Estate of Cohn, 55 Cal. 193; Estate of Lacoste, Myr. 68.

The other authorities cited and considered do not affect the adjudications in this court and state, which seem to me conclusive against respondent. Demurrer sustained, ten days to amend.

When a Decree of Distribution is Made, it becomes the duty of the executor or administrator to deliver the estate to the parties designated by the court: McCabe v. Healy, 138 Cal. 81, 90, 70 Pac. 1008. No special or express order to that effect is authorized or required. Upon the entry of the decree, the law fixes this duty on him. He still remains an officer of the court, subject to its jurisdiction, until his final discharge; and hence the court has authority, if necessary, to compel him, by punishment as for a contempt, to make a delivery to the distributees of their respective shares: Ex parte Smith, 53 Cal. 204; Wheeler v. Bolton, 54 Cal. 302; Estate of Kennedy, 129 Cal. 384, 62 Pac. 64; Estate of Cohn, 55 Cal. 193; McLaughlin v. Barnes, 12 Wash. 373, 41 Pac. 62. And he can take no appeal from an order adjudging him in contempt, and committing him to jail until he complies with the decree: Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393.

ESTATE OF RICHARD T. MAXWELL, DECEASED (No. 2).

[No. 2,625; decided December 1, 1884. Affirmed, 74 Cal. 384, 16 Pac. 206.]

Probate Court—Jurisdiction.—The Superior Court, sitting in probate, has no greater jurisdiction than the probate court which it succeeds.

Probate Court—Jurisdiction.—The Superior Court, while engaged in the exercise of probate jurisdiction, cannot entertain a cause of action to obtain relief upon the ground of fraud, such as a petition to disregard and declare void a devise alleged to have been procured through fraud, and to make distribution to the heirs.

Richard Tybout Maxwell died in San Francisco on June 29, 1883.

He left an olographic will, bearing date July 23, 1882. Daniel Rogers and Charles Ashton were therein named as executors, and upon petition filed on July 5, 1883, and due proceedings had, the will was admitted to probate and the executors named appointed, and letters testamentary issued to them on July 17, 1883.

In the petition for probate the executors stated that on June 27, 1883, the testator intermarried with Miss Nellie Donnelly, who was the principal devisee in the will.

On November 5, 1884, the executors filed their final account and a petition for distribution, in accordance with the terms of the will.

On November 13, 1884, Mrs. Elizabeth C. Tybout, sister of deceased, filed certain exceptions to the petition of the executors for distribution, and asked that distribution be made to her as sole heir at law.

She alleged that all provisions in the will in favor of Miss Donnelly were made by the testator upon Miss Donnelly's false and fraudulent representations, knowingly made to the testator, that she was an unmarried woman and capable of entering into a valid contract of marriage with him, and in view of such marriage being entered into.

That as a matter of fact, however, the so-called Miss Donnelly was, on August 31, 1880, married in Alameda county to one Charles H. Keane, and is still his lawful wife.

That the testator never knew this, and, believing the so-called Miss Donnelly's false and fraudulent representations, made the provisions in her favor; and that on June 27, 1883, she entered into a pretended marriage with the testator, but that she was then the wife of Charles H. Keane, and well knew it, and that her said pretended marriage with testator was void.

That up to the time of his death the testator did not know of the fraud that had been practiced upon him, and believed Miss Donnelly to be his wife, and that neither Mrs. Tybout nor the executors had any knowledge or information of the marriage of the so-called Miss Donnelly to Keane, nor of the fraudulent representations, prior to September 8, 1884, more than a year after the probate of the will.

That the marriage with Miss Donnelly was the testator's sole motive in making her his devisee.

Mrs. Tybout therefore asked that the devise to Miss Donnelly be declared void, and that she, Mrs. Tybout, have distribution as sole heir at law of decedent.

To these exceptions and petition Miss Donnelly filed a demurrer on November 26, 1884.

The principal grounds of demurrer were, that more than one year had elapsed since the probate of the will, and that the time for attacking such probate and said will on any ground had long since elapsed; also that the will cannot be set aside in the mode attempted; further, that the facts stated are insufficient to authorize the court, under any circumstances, to disregard or refuse to the terms of the will, or to the order admitting it to probate, full force and effect, and that they are no longer open to attack in any proceeding.

This demurrer was sustained on December 1, 1884.

McAllister & Bergin, for the demurrant, M. E. Donnelly

Joseph R. Brandon, opposed, for Mrs. Elizabeth C. Tybout.

COFFEY, J. Counsel for the petitioners, excepting to the application for distribution in this estate, claims that the "exceptions" constituting a cause of action or pro-

ceeding under section 338, Code of Civil Procedure, to obtain relief on the ground of fraud or mistake, and not a proceeding collaterally or directly to assail the probate of the will, are at this time and in this manner cognizable by this court; and he asks this court, while engaged in exercising probate jurisdiction, to declare a trust in Miss Donnelly for the benefit of the Tybout heirs, under section 2224 of the Civil Code, and under the general jurisdiction vested in the superior court by the constitution and codes.

The superior court, sitting in probate matters, has no greater jurisdiction than the probate court which it succeeds: Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, 63 Cal. 473.

It follows that the subject matter of the "exceptions" and petition of the Tybout heirs is not entertainable by this court while it is engaged in the exercise of probate jurisdiction; it does not constitute a cause of action that can here and in the manner presented be tried by the court which can only consider the probate law and practice. "Cases in equity," "cases at law," "matters of probate," are all separately described in the constitution (article 6, section 5), and while the court is engaged in the consideration of a case belonging to one of these classes it cannot, in the same matter, hear and determine what is essentially a case of another class mentioned in the constitution. The supreme court seems to have so settled the law; and it is the duty of this court to decide accordingly.

MATTER OF MRS. HANNAH W. INGRAM.

[Decided December 1, 1884.]

Insanity.—In Order to Commit a Person to an Asylum for the insane, the court must be satisfied, upon examination, pursuant to section 258, Civil Code, that such person is of unsound mind, and unfit to be at large. The provisions of the codes as to such examination summarized.

Insanity.—There are no "Commissioners of Insanity." Physicians are merely summoned to hear the testimony, and to make a personal

examination of the alleged insane person; and, if they believe him to be dangerously insane, they make a certificate of certain facts, whereupon it is reserved to the judge, upon whom rests the responsibility, to adjudicate upon the charge.

Insanity.—Although a Person is Subject to Certain Delusions, where the court is not satisfied that he is "so far disordered in mind as to endanger health, person or property," or "unfit to be at large," it is bound to give him the benefit of such reasonable doubt as it entertains upon the whole charge.

Application to confine Mrs. Hannah W. Ingram, an alleged insane person, in the insane asylum.

COFFEY, J. Before the court can order the commitment of any person to an asylum for the insane it must be satisfied, upon examination in open court, and in the presence of such person, from the testimony of two reputable physicians, that such person is of unsound mind, and unfit to be at large: Civ. Code, sec. 258.

Whenever it appears by affidavit, to the satisfaction of a magistrate of the county, that any person within the county is so far disordered in his mind as to endanger health, person or property, he must issue and deliver to some peace officer for service a warrant, directing that such person be arrested and taken before any judge of a court of record within the county for examination.

Subpœnas must issue thereupon to two or more witnesses best acquainted with such person to appear and testify before the judge at such examination; the judge must also subpœna at least two graduates of medicine to appear and attend such examination; and all such persons so subpoenaed must appear and answer all pertinent questions; the physicians so called in by process of subpoena must hear such testimony and must make a personal examination of the alleged insane person, and must make a certificate of their conclusions; and then the judge, after such examination and certificate made, if he believes the person accused to be so far disordered in mind as to endanger health, person or property, must make an order that such person be confined in the asylum. A record of all such proceedings must be kept by the county clerk. The physicians attend-

ing the examination of "an insane person" are allowed a fee, to be paid by the county.

The foregoing is a summary of all the pertinent provisions of the codes, with reference to this character of cases: Pol. Code, 2210-2222.

An impression seems to prevail that there are certain "Commissioners of Insanity" who pass upon these cases. An examination of the codes will make manifest the error of this impression. The so-called "commissioners" are simply physicians, "graduates of medicine," in good standing, who are summoned in the same manner as other witnesses to attend the hearing; but it is reserved to the judge of the court to find the fact and to adjudicate thereupon. Upon the judge or the court the law casts the responsibility, and to discharge it faithfully is not always a light duty; in this case it has been more than ordinarily onerous, from the peculiar circumstances, the character of the evidence, and the conduct pending the examination and in view of the court of the parties immediately connected with the subject matter of the investigation.

As a result of the examination, and the subsequent reflections thereupon, the court is convinced that Mrs. Ingram is the victim of a delusion as to the relations of Miss Pratt with her husband, and has, while possessed of that delusion, subjected that lady and her family to great annoyance and indignity; but the court is in doubt as to the dangerous nature of the delusion, is not fully persuaded that the accused person is "so far disordered in mind as to endanger health, person or property," or is "unfit to be at large," and the court is bound to give the accused person the benefit of such reasonable doubt as it entertains upon the whole charge. This is the conclusion from a full investigation and mature deliberation; and, accordingly, the proceeding against Mrs. Hannah W. Ingram is dismissed.

ESTATE OF ELLEN LYNCH, DECEASED.

[No. 3,079; decided June 30, 1884.]

Partial Distribution—Time for Making.—An application for partial distribution of a decedent's estate in course of administration may be made at any time after the period of administration mentioned in the statute, upon allegations showing the existence of the conditions and circumstances required by the statute.

Partial Distribution—Time for Making.—The rule prescribed by the statute, as to whom and under what circumstances a partial distribution of a decedent's estate may be had, is the same whether the decedent left a will, or died intestate. And a petition for the partial distribution of a testate's estate is not premature merely because the year given by the statute, within which a contest to the probate of the decedent's will may be filed, has not elapsed.

The opinion of the court in this case was rendered upon objections made to two separate petitions for distribution after the lapse of four months of administration—"partial distribution," as usually designated. The first filed petition was that of Margaret Daly, presented June 6, 1884, showing that petitioner was a legatee under decedent's will, which had been duly proved, to the extent of $1,000, and certain specified household furniture; that four months had elapsed since the issuance of letters testamentary to John D. Coughlin and Daniel J. Coughlin, the executors named in the will, who qualified May 24, 1884, and prayed for distribution of the legacies upon giving the bond required by the statute. The second petition was filed June 7, 1884, on behalf of and subscribed by (1) Catherine Riley, (2) Margaret Ware, (3) Margaret Weston, (4) Hannah Sullivan, (5) Adina Gertrude Ware, (6) Frances Ellen Ware, (7) Henry Ware (8) Mary Cunningham, (9) Miss Lizzie Armor, Superioress of the Convent of the Holy Family, and (10) Daniel J. Coughlin; and set forth the same facts respecting the administration as in the petition of Margaret Daly, first above mentioned. No attorney's name appeared upon either of the petitions, but it is recited by the record that Selden S. Wright, as the appointee of the court, appeared for them.

The two petitions came on regularly for hearing on the twentieth day of June, 1884, and a decree of "partial

distribution" was made according to the prayers of the petitioners, under date of June 20, 1884, and was filed on the twenty-fourth day of June, 1884.

The record shows that Selden S. Wright, was appointed by order of June 6, 1884, as attorney to represent in the administration all unrepresented heirs and legatees, naming the parties interested, so far as known, to be Mary Riley, Ellen Riley, Anastasia Riley, Johanna Riley, David Riley, Henry Riley, Michael Riley and Patrick Riley. All of these parties named were legatees and also nephews and nieces respectively, and heirs of deceased; and resided at St. Peters, Cape Breton, Nova Scotia. None of them were petitioners for or participants in the "partial distribution."

Selden S. Wright, for petitioners.

E. E. Haft, contra, for executors.

COFFEY, J. It is suggested, on behalf of executors that the petition for partial distribution is premature; that a year (the time to contest the validity of the will) should elapse before the application.

Under the authority of the Estate of Pritchett, 51 Cal. 568, the petition is not prematurely preferred, the essential facts and the principle of this matter corresponding to the facts and principle in that case. Petition granted.

The Rule that the Final Distribution of an estate may be had upon the settlement of the final account of the executor, or at any subsequent time (Estate of Thayer, 1 Cal. App. 104, 81 Pac. 658; McAdoo v. Sayre, 145 Cal. 344, 78 Pac. 874), was invoked in Re Pritchett, 51 Cal. 568, 52 Cal. 94, although the time for contesting the will had not yet expired.

ESTATE AND GUARDIANSHIP OF SUSANNA ZIMMER, MINOR.

[No. 2,860; decided December 22, 1883.]

Guardian—Nomination by Minor.—A minor, aged sixteen years, who is intelligent and of fair education, is legally competent to nominate her own guardian, subject to the court's approval.

Guardian—Nomination by Minor.—Although an intelligent minor over fourteen years of age is competent to nominate its own guardian, and its intelligent preference for a guardian must be considered, yet the court must be guided in its determination by what appears to be for the child's best interests, as to its temporal, mental and moral welfare.

Guardian.—The Nomination and Preference of the Minor in this case of her aunt for guardian as against the child's mother, who had remarried after divorce from the child's father to one who was the object of the child's aversion—discussed, but not decided.

Guardian—Nomination by Minor.—In this case it was held that an application for guardianship by the minor's nominee should be denied, although the applicant and minor were closely related and affectionately disposed toward each other, having lived and loved as if mother and child for years; it appearing that, from the circumstances of the applicant, a grant of guardianship would not be for the best interests of the child as to its temporal welfare.

Guardian—Nomination by Minor—Nonresidence.—Where an applicant for guardianship of a minor, claiming as the minor's nominee, is a nonresident of the state, and only awaits the determination of the application to return home, the court will not be justified in confirming the minor's choice, even if legally permitted to do so.

Guardian—Nomination by Minor.—In this case the court, in determining an application for guardianship upon the nomination of the minor over fourteen years of age—involving the minor's competency and the applicant's rights, with the court's duty in the premises—considered and construed sections 1748, 1749, Code of Civil Procedure, and section 246, 253 (subdivision 6), Civil Code.

In this case the record shows the filing of two separate petitions for the guardianship of the above-named minor, Susanna Zimmer. The first application was filed by Mrs. Susanna Smith on October 12, 1883. It is alleged that the minor was a resident of the city and county of San Francisco; that the minor was and had been for ten years last past in the exclusive custody of the petitioner, and had been by petitioner maintained and educated; that the minor

was aged sixteen (16) years and four (4) months, and that her mother was married to the stepfather of the minor. Annexed to the petition was a written request and nomination of the minor, dated October 9, 1883, in favor of the petitioner. The second application for guardianship of the minor was made and filed by Julia Krone, and alleged that the applicant was the mother of the minor, the minor being a resident of the city and county of San Francisco; that the applicant was by a decree of the "fifteenth district court" granted a divorce from Ernst Zimmer, the father of the minor, on the ground of adultery on the part of said father, and that by the same decree the custody of said minor was awarded to her (the applicant). Neither of the applicants filed any answer to the petition of the other, so far as the record in the guardianship shows; and the opinion of the court expressly states that it was delivered only with respect to the application of Mrs. Susanna Smith, without decisively passing upon the merits or legal standing of the mother's petition. As to the decision of the court being based upon the nonresidence of the applicant, it should be noticed that both of the applicants carefully alleged the residence of the minor as hereinabove stated.

Matt. I Sullivan, for Susanna Smith.

E. J. Linforth, for Julia Krone.

COFFEY, J. Application of Susanna Smith for letters of guardianship of the person of Susanna Zimmer, a minor, The minor is an intelligent girl of about the age of sixteen years, of fair education, and legally competent to nominate her own guardian, subject to the approval of the court: Code Civ. Proc., secs. 1748, 1749. She is capable of expressing an intelligent preference, and the court should consider that preference in determining the question: Civ. Code, sec. 246. But the court must be guided in so determining by what appears to be for the best interest of the child, in respect to its temporal and its mental and moral welfare: Civ. Code, sec. 246. The nominee of the minor is doubtless a worthy woman, and affectionately disposed toward the child, with whom she has been familiarly associated for many years.

The minor has been treated by this lady, who is her aunt, as if she were her own child; has lived in her family with the consent of her own parents for several years; and has been educated largely through the kindness, affection and liberality of the applicant and her husband. All of this the minor acknowledges and appreciates; and she desires to remain in the relation she has sustained for so long a period. She manifests no want of affection towards her mother, who is a counter-applicant here, but has an aversion toward her stepfather, her own father being legally separated from her mother, who is married a second time, to the object of this minor's aversion.

Without considering now the counter-application of the mother, it is sufficient to say that the court considers that with reference to the competency of the nominee of the minor, it does not appear from the evidence to be for the best interest of the child, in respect to its temporal welfare (Civil Code, section 246) to commit her to such custody; and it further appearing from the evidence that the nominee of the minor is a resident of the state of Nevada, having her home for many years in that state, and only awaiting the determination of this application to return thither, the court would not be justified in confirming, even if legally permitted to confirm, the choice of the minor: See Civ. Code, sec. 253, subd. 6. Application denied.

The Wishes or Judgment of a Child of sufficient maturity to realize in a measure his situation cannot, independent of or despite other circumstances, control the court in the determination of his custody: Stapleton v. Poynter, 111 Ky. 264, 98 Am. St. Rep. 411, 62 S. W. 730, 53 L. R. A. 784.

ESTATE OF RICHARD T. MAXWELL, DECEASED (No. 3).

[No. 2,625; decided January 27, 1885.]

Will—Supplying Defects by Implication.—When, from the whole will, the court can determine that the testator necessarily intended an interest to be given, which is not bequeathed by express and formal words, the court should supply the defect by implication, and so mold the testator's language as to carry into effect, as far as possible, the intention which he has in the whole will sufficiently declared.

Will—Construction Avoiding Partial Intestacy.—The law prefers a construction of a will which will prevent a partial intestacy, to one which will permit such a result, unless a construction involving partial intestacy is absolutely forced upon the court, for the fact of making a will raises a very strong presumption against any expectation or desire, on the part of the testator, of leaving any portion of his estate beyond the operation of his will.

Wills—Construing Parts in Relation to Each Other.—All the parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole.

Will—Contradictory Clauses.—Where several parts of a will are absolutely irreconcilable, the latter part must prevail; but the former of several contradictory clauses is never sacrificed except on the failure of every attempt to give all such a construction as will render every part effective.

Will.—When the Meaning of Any Part of a Will is Ambiguous or doubtful, it may be explained by any reference thereto or recital thereof in another part of the will.

Will.—The Words of a Will are to be Taken in Their Ordinary and Grammatical Sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

Will.—The Words of a Will are to Receive an Interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

Will.—Where a Testator Gives to B a Specific Fund or property at the death of A, and in a subsequent clause disposes of all his property, the combined effect of the several clauses, as to such fund or property, is to vest it in A for life, and after his decease in B.

Will.—A Will Consisting of Several Parts, separately executed by the testator, must be considered as a single instrument completed in all its parts at one time.

Daniel Rogers, for applicants, the executors.

Thos. I. Bergin, for Miss Elena Donnelly.

A. F. Morrison, for Miss Margaret McKenzie.

J. R. Brandon, for the Tybout heirs.

COFFEY, J. This is an application on the part of Daniel Rogers and Charles Ashton, executors of the last will and testament of Richard Tybout Maxwell, deceased, for distribution, according to "the provisions of said will"; and the application involves a construction of the terms of said instrument, which (as usually occurs in cases where a man draws his own will) has been variously interpreted according to the desire of the interested interpreter. The views of the court as to the correct construction are appended.

Where it is possible for the court, upon a reading of the whole will, to arrive at a conclusion that the testator necessarily intended an interest to be given, which is not bequeathed by express and formal words, the court should supply the defect by implication, and so mold the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared: Metcalf v. Framingham Parish, 128 Mass. 370. See opinion of Mr. Chief Justice Gray, p. 374.

The law prefers a construction of a will which will prevent a partial intestacy to one which will permit such result (Vernon v. Vernon, 53 N. Y. 361, opinion by Mr. Justice Andrews), unless such construction involving partial intestacy is absolutely forced upon the court, which rule of preference has been adopted partly from considerations of policy, but mainly because it is calculated to carry into effect the presumed intention of the testator; for the fact of making a will raises a very strong presumption against any expectation or desire, on the part of the testator, of leaving any portion of his estate beyond the operation of his will: 2 Redfield on Wills, 3d ed., *116, and see note thereunder 32.

All the parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole, but where several parts are absolutely irreconcilable,

the latter must prevail: Civ. Code, sec. 1321. Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will: Civ. Code, sec. 1323. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained: Civ. Code, sec. 1324. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative: Civ. Code, sec. 1325. The rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective. Where a testator gives to B a specific fund or property at the death of A, and in a subsequent clause disposes of the whole of his property, the combined effect of the several clauses as to such fund or property is to vest it in A for life, and after his decease in B: 2 Jarman on Wills, 49, 5th Am. ed., *476.

In applying these principles of construction to the instrument before me (a copy of which is hereunder inserted):

"San Francisco, July 23, 1882.

"Fully aware of the uncertainty of life, and being of sound mind and memory, I declare this to be my last will and testament, hereby revoking all wills and codicils to wills by me heretofore made.

"The dilatory habits of my counsel employed in the divorce suit, recently decided in my favor in the Superior Court, having left thus far the matter incomplete in this, that the quit-claim deed from the former Mrs. M. W. Maxwell has not yet been signed and returned by her, nor has the mortgage in her favor upon my land in Napa County, securing to her the sum of one hundred and twenty-five dollars per month, been submitted to me for signature, I desire that my executors may at once, if it is possible, have this matter settled on this basis. Should this be impossible, she is of course entitled to her half of the property I leave behind me, which is all community property. Should it, under these circumstances, be necessary to sell in order to divide, it is

my desire that my executors shall, after paying all my debts, be appointed trustees by the Court, and that they shall receive as my bequest in trust the balance of the estate which I desire shall (if the property has been necessarily in their judgment sold to effect a division) be invested in first mortgages on real estate of unquestionable title, and the monthly income derived therefrom be equally divided between Miss Nellie Donnelly, residing at 2103 Jones street, with her parents, and Miss Margaret McKenzie, living at the northwest corner of Folsom and Second streets, that I may, so far as is in my power, prove my appreciation of their kindness and my sincere friendship for them both, trusting that I may lessen the burden of life to each of them. In case of the death of either of them, I wish the whole income paid to the survivor, and after her death the whole amount or then value of the property to be equally divided between the living children of my sister, Mrs. Elizabeth C. Tybout, living in New Castle County, Delaware.

"I hereby appoint Daniel Rogers, Esq., and Mr. Charles Ashton my executors, and direct that no bonds shall be required. RICHARD TYBOUT MAXWELL.

"It is my earnest desire that if possible the real estate in Napa County shall not be sold, but held for some years, and rented on shares or otherwise by some competent person, and that it shall, after the lien upon it in the shape of the mortgage given or to be given to Mrs. Maxwell (formerly) shall have been removed by her death, be still so managed by my executors, or rather as they will then be the trustees for the heirs, and that Miss Margaret McKenzie shall, under these circumstances, receive during her life an income of one hundred dollars per month, if this does not exceed one-half of the income from the property, and the estate be in that case conveyed entire to Miss E. Donnelly, to whom I hope to be married, should my life be spared, in a few months. All of this expression of my desires as to settlement of my property is in consequence of my knowledge of the dangers attendant upon a surgical operation, to which I expect to be subjected in a short time.

"RICHARD TYBOUT MAXWELL."

I must consider it as one single instrument, completed in all its parts at one time, and, as such it was probated. From this instrument it appears that the testator had in view three objects: (1) the satisfaction of the lien upon the estate in favor of his former wife; (2) the provision of an income for Miss Donnelly and Miss McKenzie, that he might "lessen the burden of life to each of them," in recognition of their kindness to him and his friendship for them; and (3) the division of the proceeds of his property after the death of the others named to the children of his sister, Mrs. Tybout. The latter part of this instrument is to be reconciled, if possible, to the foregoing provisions: Civ. Code, sec. 1325; 2 Jarman on Wills, 49, *476.

This latter portion, which is claimed to operate as a revocation, should not be so construed, unless it is absolutely irreconcilable with the rest. It evidently was designed by the testator that the Tybouts should have the benefits of his bounty, after his other assumed obligations had been discharged by the death of the beneficiaries, and the latter part of the will may be reconciled with this intention by considering the contingency, and providing for it, of the death of the former Mrs. Maxwell, and in that event a larger amount coming into the hands of the trustees, in which case a fixed certain sum might be paid to Miss McKenzie, thus dispensing with the necessity of trustees to divide the estate, and enabling them to convey it entire to Miss Donnelly; that is to say (by way of interpretation), the estate held by the trustees is to be conveyed to Miss Donnelly to enjoy during her life, subject to the payment of $100 per month to Miss McKenzie. This seems to me to be the combined effect of the several clauses of the will (Jarman on Wills, 476), and I conceive it to be the correct construction of this instrument.

Throughout the paper the testator's intention seems to be to make life provision for Miss Donnelly and Miss McKenzie, to "lessen the burden of life to each of them," as he expresses it; and his intention is quite manifest to provide for his sister's children, after provision for Miss Donnelly and Miss McKenzie should be no longer necessary; to secure these two named ladies against want was his clear

design, by imposing a life lien upon his estate, and after that to give the remainder to the children of his sister. If this be not the true interpretation of his intention, he has certainly chosen his words cleverly to conceal his meaning; but I think that, upon a study of the whole instrument, I have arrived at the correct conclusion.

Daniel Rogers renounces his trust as trustee under the will, and his coexecutor, Charles Ashton, accepts the trust devolved upon him by the testator, and the estate should be distributed to him for the purposes named in said will, according to the provisions thereof as construed by the court in the foregoing opinion.

Application granted.

All the Various Parts of a Will are Construed in relation to each other, so as to form, if possible, one consistent whole; but if different parts are irreconcilable, the latter prevails: Cal. Civ. Code, 1321; Mont. Civ. Code, 1773; N. D. Rev. Code, 5133; Okl. Rev. Stats. 6841; S. D. Civ. Code, 1040; Utah Rev. Stats. 2771.

The Making of a Will Raises a Presumption that the testator intended to dispose of all his property. And constructions which lead to intestacy, total or partial, are not favored. Therefore such an interpretation should, when reasonably possible, be placed upon the provisions of a testamentary instrument as will prevent that result. These principles have been made a part of the statutory law. Of course, if the expressed intent of a testator is intestacy, he must be presumed to have intended that result: 1 Ross on Probate Law and Practice, 78.

ESTATE OF BRIDGET McGOVERN, DECEASED.

[No. 2,643; decided October 23, 1883.]

A Cost Bill is not Filed, if not delivered to the clerk nor received by him.

Filing a Paper Consists in Presenting It at the Proper Office and leaving it there, deposited with the papers in such office.

Filing Papers.—Section 1030 of the Political Code Defines and Fixes the hours during which public offices shall be kept open; and a paper which is left in a public office one hour after the time fixed by law for its closing, is left there when the office is legally closed.

Where a Cost Bill is Left in the Clerk's Office About One Hour After the Time specified by law for the closing of the office, there being no person present authorized to receive and file it, the paper is not filed; and if the date of the alleged filing is the last day allowed by the statute for filing the bill, a motion to strike it out should be granted.

The opinion of the court in this case was rendered upon a notice of motion to strike out cost bill filed August 28, 1883. The notice was given by M. Cooney, the attorney theretofore appointed by the court to appear "for Ellen McPartry, of Ireland, John Simpson, of Philadelphia, Ann Halligan, of Philadelphia, Rose Kenney, Boston, to represent them upon the contest and application for the probate of the alleged will on file herein, and upon all subsequent proceedings in the estate; such persons being heirs of deceased (Bridget McGovern)."

The notice of motion was directed to a cost bill claimed to have been filed August 23, 1883, but which appears by the record to have not been actually filed till January 12, 1884; this cost bill was presented by John McQueeny and Edward McFernan, proponents and executors of the last will of the deceased, and purported to be a memorandum of costs incurred on the contest to the probate of the will; the contest having been made by the heirs named aforesaid, represented by M. Cooney. The ground specified in the notice of motion to strike out was, among other grounds, first, that the cost bill "was not filed or served within five days after the decision and judgment of the court was made, and the order admitting the will to probate was made and entered." The opinion of the court is directed solely to this first ground. and the facts supporting that ground are fully set out in the opinion.

M. Cooney, for the motion.

C. F. Hanlon, contra.

COFFEY, J. The cost bill in this matter was not delivered to the clerk, nor received by him. "Filing a paper consists in presenting it at the proper office, and leaving it there deposited with the papers in such office." According

to the evidence, the office was legally closed when the paper was left there: Pol. Code, sec. 1030. No person authorized to receive it and file it was present—it being about one hour after the closing of the office (Pol. Code, sec. 1030), and there was no person present to whom it could be "presented," nor does it appear it was "deposited with the papers" in the office. This paper never was filed, in the sense of the statute.

Motion to strike out granted.

ESTATE OF WILLIAM LUND, DECEASED.

[No. 351; decided October 20, 1884.]

Attorney.—An Administratrix has Power to Employ an Attorney to institute proceedings to recover damages for the death of her intestate.

Attorney—Compensation.—An Attorney Who Renders Services for the Benefit of an estate, at the request of the administratrix thereof is entitled to reasonable compensation therefor. The probate department is the proper forum in which to present his claim for such services; they are "expenses of administration," and the probate department has exclusive jurisdiction to adjust and enforce such demands.

Attorney—Contingent Fee.—An Administratrix has no Power to Make a Contract with an Attorney for the payment of a contingent fee to him out of the assets of the estate. But the employment of an attorney to perform services, and a promise to pay him a contingent fee for such services, are separable. The retainer of the attorney, and rendering of services by him in pursuance of such retainer, may be considered by the court apart from the promise to pay a contingent fee, and the compensation will be adjudged according to the proof of the reasonable value of the services. An attorney accepting employment and rendering services, under such circumstances, must rely upon the subsequent action of the court in adjudging proper compensation, and consents to perform his duty without other compensation than may so be allowed.

William Lund died intestate in San Francisco, a resident thereof, and leaving estate therein, on the sixth day of April, 1880.

He left a surviving wife, Catherine Lund, who, upon petition filed on June 16, 1880, was appointed administratrix

of his estate on June 28, 1880, and letters of administration were issued to her on July 6, 1880.

The petition for probate stated that the estate of the decedent consisted of certain personal property, and a claim for damages against the Spring Valley Water Works, arising by reason of negligence of that corporation, which caused the death of Mr. Lund.

On July 21, 1884, P. B. Nagle filed a petition in the matter of the estate, in which he alleged that the administratrix, as such, employed him to institute and prosecute an action against the Spring Valley Water Works, on the above-mentioned claim; that the administratrix agreed to pay all the costs and expenses of the action, and to pay the petitioner one-half of all that was recovered therein, as compensation for his services.

That accordingly petitioner commenced said action on her behalf, on the twenty-eighth day of February, 1881, and that he diligently prosecuted the same; that the action was tried before a jury, but that the jury failed to agree; that thereafter petitioner was ready and willing to enter upon a second trial of said action, provided the administratrix paid the costs and expenses of such trial, but that she refused to do so, and on July 13, 1882, discharged the petitioner as her attorney in said action, and employed P. F. Dunne in his place and stead, who was regularly substituted therein; that on February 15, 1883, the administratrix recovered judgment against the Spring Valley Water Works in said action for the sum of $4,000 and costs, which judgment was paid in March, 1884; that the reasonable value of the services of petitioner in said action up to the time of his discharge was $500, and that the administratrix refused to pay the same, hence he asked that said sum be allowed him, and that the administratrix be ordered to pay it.

To this petition the administratrix filed a demurrer on July 28, 1884, specifying as grounds therefor that it appeared from the petition that P. F. Dunne, and not the petitioner, performed the services which resulted in the recovery of the judgment, and that under petitioner's contract, as alleged by him, his compensation was dependent upon a

recovery by him, and, further, that it appeared that the contract was illegal and void.

James L. Nagle, for petitioner.

R. H. Taylor, for administratrix.

COFFEY, J. This department is the proper forum in which to present the claim of petitioner: Gurnee v. Maloney, 38 Cal. 87, 99 Am. Dec. 352.

Services rendered at the request of an administratrix, for the benefit of an estate, are "expenses of administration," and the probate department has exclusive original jurisdiction to adjust and enforce such demands: Ibid.

If it shall appear that the petitioner performed any service for the advantage of the estate at the instance and request of the administratrix, the court will award such compensation as, in its opinion, such service may be reasonably worth.

The administratrix had the power to employ counsel for the purpose indicated in the petition, although not to make a contract for the payment of a contingent fee out of the assets of the estate. These two things are to be separately considered; they are separable. The retainer of an attorney, and the rendering of service by him in pursuance of such retainer, is what the court may consider; and, according to the proof, his compensation will be adjudged by the court: Estate of Page, 57 Cal. 238.

An attorney accepting employment and rendering services under such circumstances, must rely upon the subsequent action of the court in ascertaining and adjudging proper compensation. In accepting the employment he consented to perform his duty without other compensation than such as might be allowed by the court: Cole v. Superior Court, 10 Pac. C. L. J. 732 (S. C., 63 Cal. 86, 49 Am. Rep. 78).

I understand the claim of petitioner to be on the score of services rendered for the benefit of the estate, and at the request of administratrix; and he should be allowed to prove whether he rendered any such services at any such request, and their value.

Demurrer overruled; fifteen days to answer.

An Executor or Administrator is Entitled to an Allowance for Legal Services rendered him both in conducting the ordinary probate proceedings and in conducting necessary litigation. In fact, he is entitled to reasonable attorney fees in any matter, arising in the administration of the estate, which calls for legal advice or counsel: Elizadale v. Murphy, 4 Cal. App. 114, 87 Pac. 245; Estate of Miner, 46 Cal. 564; Estate of Simmons, 43 Cal. 543; Hicox v. Graham, 6 Cal. 167; Steel v. Holladay, 20 Or. 462, 26 Pac. 562; Nash v. Wakefield, 30 Wash. 556, 71 Pac. 35; Estate of Davis, 33 Mont. 539, 88 Pac. 957.

ESTATE OF A. A. JENNINGS, DECEASED.

[No. 8,962, former Probate Court; decided Nov. 22, 1883.]

Administrator's Sale—Advance Bids and Resale.—When, upon the hearing of a return of an administrator's sale of personal property, the purchaser increases his bid from $3,000 to $5,000, it is manifest that the price obtained is greatly disproportionate to the value of the property; and in such case the court will refuse confirmation of the sale, and will order a new sale to be had under circumstances calculated to bring the utmost value of the property.

In this case, on the nineteenth day of July, 1882, Barbara Jennings, the administratrix with the will annexed, filed a petition praying for an order of sale of certain personal property, being the only property of the estate, and designated, "Assessments and contracts for street work done in said city and county (of San Francisco) by said deceased." And in the petition particularly described there were four contracts set out, upon which there were due the following amounts, to-wit: Upon the first, $12,576.88; upon the second, $590.52; upon the third, $12,887.56; and upon the fourth, $10,077.34. After five days' notice given by posting, the court (by Hon. Jno. F. Finn, Judge) on July 25, 1882, made an order of sale of the property described in the petition aforesaid, and directed that the administratrix sell the same "by public auction, and after public notice given for at least two days by publication in the 'Daily Chronicle,' a newspaper published in said city and county (of San Francisco)." A verified return and account of the sale of the property under the aforesaid order was made by the

administratrix and filed August 9, 1882, and showed that all of the property was sold to one C. J. Shipman, for $500. On October 2, 1882, Mr. C. H. Parker, as attorney for certain creditors of the estate, filed written objections to a confirmation of the sale returned, detailing a great many exceptions to the proceedings taken in the premises. Upon the eleventh day of May, 1883, the hearing of the said return coming on "after due continuances and upon due notice," and the court (Finn, Judge) finding that the price obtained was disproportionate to the value of the property, and that upon a resale at least $1,000 would be obtained, made an order that the sale be not confirmed, but that it be set aside, and that the administratrix resell the property under the original order of sale.

Upon August 30, 1883, the administratrix filed a return and account of sales made under the order of resale of May 11, 1883, showing that the property was sold at public auction in several parcels as follows: Lot No. 1, to C. G. Shipman for $100; lot No. 2, to C. G. Shipman, for $10; lot No. 3 to J. C. Fruchey for $3,000; and lot No. 4, to C. G. Shipman for $100. On the fourteenth day of September, 1883, Mr. C. H. Parker, as attorney for certain creditors, objected to the confirmation of the sale of the property sold to Fruchey for $3,000. There were thirteen written exceptions and objections to this sale, detailed at great length, and included all the technical points made in the objections filed by said attorney to the previous sale of the property; but these grounds and technicalities are not stated here, as the only matter considered by the court was the objections taken by the twelfth and thirteenth grounds, viz.: (1) that the amount bid was disproportionate to the value of the property; (2) that a sum exceeding ten per cent, exclusive of expenses of new sale, could be obtained if a new sale were ordered.

On September 21, 1883, C. H. Parker filed a written bid for the property sold Fruchey, of $4,000, and expenses of readvertising, and stipulating to pay $5,000 if the property were sold in a particular manner (that is to say, the property sold was a contract and assessment for grading a certain

block of land; and it was claimed that the property should be so sold as to give each property owner in the block, against whom there was an assessment, an opportunity to bid upon it).

Upon September 25, 1883, J. C. Fruchey, the purchaser aforesaid, made and filed an advance bid of $5,000, and authorized the return of sale to be amended by inserting the said amount in place of the sum of $3,000, bid by him at the auction. On November 23, 1883, the court ordered another resale of the entire four parcels of property in conformity with the opinion of his honor, Judge Coffey, below, and at such resale it appears that the property before sold to Fruchey was sold to Chipman for $6,500.

C. H. Parker, attorney in support of objections.

J. M. Wood, for the administratrix, contra.

COFFEY, J. It is manifest from the offer of Mr. Fruchey's attorney to increase his bid of $3,000 to $5,000, that the price obtained at the sale was greatly disproportionate to the value of the articles sold. I have fully considered all the points made by counsel on both sides, in oral argument and in briefs, and, while conceding the cogency of Mr. Wood's presentation of views, cannot consider it conclusive. I adhere to the view intimated by me at the hearing, as the correct conclusion—the sale cannot be confirmed; and a new sale should take place under circumstances calculated to bring the utmost value of the property.

ESTATE OF MARGARET ARMSTRONG, DECEASED.

[No. 2,054; decided December 12, 1883.]

Trustee—Use and Management of Funds.—An agent or trustee has no right to use the funds intrusted to him as his own, nor to mingle them with his own funds, without clear authorization; it is his duty to keep the funds separate and intact, and free from any liability such as he incurs in the use of his own moneys.

Trustee—Management of Funds.—An agent or trustee must pursue with exactitude the instructions given as to funds intrusted

with him, or show that his particular act was ratified with full knowledge on his principal's part as to the nature of the act.

Trustee—Loaning Funds.—Where an agent or trustee is instructed to "loan out" funds held by him, it means that he is to invest them for his principal's account, and to make an accounting to the principal of such investment. He is not authorized to borrow the funds for his own purposes.

Trustee—Investment of Funds.—Where confidence is reposed in a trustee to judiciously invest the funds in his hands, this confidence is abused when he places himself in the position of a debtor to the principal, without fully advising the latter of the risk he runs, and giving him an opportunity of knowing the hazard that the funds are subjected to.

Where a Trustee to Invest has Made Himself a Debtor to His Principal, and thereby subjected the funds to a risk and hazard, he must show that he fully advised his principal in the premises, in order to avoid responsibility for the loss his conduct may cause.

Trust—Limitation of Actions.—Where one occupies a fiduciary relation, the statute of limitations cannot avail as a defense. Lapse of time is no bar to a subsisting trust, clearly established.

Trust—Limitation of Actions.—Where one has occupied a fiduciary relation, the statute of limitations cannot be availed of, unless and until a demand on the part of the principal, and a refusal by the trustee, are shown.

Trust.—The Following Language in a Letter Written by One Who has Collected and holds moneys for another, establishes a trust: "It leaves a balance in your favor of $15,000, besides what has accumulated since the estate was fixed up, which I will loan out [at] about nine per cent, being the best I can do at present."

Where It Appeared that a Special Administrator had been a Trustee for the decedent in her lifetime, and there was a large balance at the time of decedent's death, for which he should be held accountable, and he has made no statement of his indebtedness or trust in his account rendered as special administrator, he should be charged with the amount of such indebtedness upon the settlement of his account.

In this case the record shows that Robert Stevenson filed an application for letters of special administration upon the twenty-first day of November, 1882, the petition alleging: That decedent, Margaret Armstrong, died at Foxlake, Dodge county, Wisconsin, on October 3, 1882, being then and there resident, and leaving estate in the city and county of San Francisco, within the jurisdiction of the court, consisting

of an undivided one-eighth (1/8) interest in the lot of land (and the improvements thereon) situated on the southwest corner of California and Montgomery streets, in the aforesaid city and county, and known as "Stevenson Block"; that the rents and profits of decedent's interest in said realty amounted to $150 a month; that petitioner was a brother of the decedent, and also agent for all the owners of said "Stevenson Block"; and that decedent left no will. Upon the filing of said petition and showing made, and in accordance with the prayer of the petition, the said Robert Stevenson was appointed special administrator, and upon the same day, to-wit: November 21, 1882, letters of special administration were issued to him by the clerk.

Thereafter, Maurice B. Blake filed a petition in the matter of the estate, to have a will of decedent admitted to probate, upon a copy of said will and of the probate thereof by a Wisconsin court (all duly authenticated); and after due proceedings the same was so admitted to probate upon June 5, 1883, and said M. B. Blake was appointed administrator with the will annexed of the estate of said decedent, and thereupon qualified on June 9, 1883. On July 17, 1883, the said administrator, Blake, filed a petition praying that a citation issue against the aforesaid Robert Stevenson, directing him to render an account of his special administration of said estate. Upon this petition citation was issued against Stevenson, returnable on July 26, 1887; citation was served, and on the return day the prayer for an account was granted.

On August 3, 1883, an "Account of Robert Stevenson, Special Administrator," was filed, showing that he received the sum of $385 rents from James W. Hart, collector for the "Stevenson Block," and that he paid out $133.45, leaving a balance amounting to $251.55; and with this account was filed a detailed account by the aforesaid James W. Hart, the agent and collector of all the rents for the owners of the said "Stevenson Block." On August 7, 1883, there were filed by the administrator, Blake, "Exceptions to Account of Special Administrator," contesting the said account filed August 3, 1883, on the grounds, first, that Stevenson has not charged himself with all the property of the estate coming

to his hands, for that on or about August 15, 1877, in decedent's lifetime, he collected, as her agent, a large sum of money and also other personal property, and an interest (undivided) in a parcel of real property, distributed to her as heir of one Andrew J. Stevenson, deceased; that large sums were afterward received as her agent in her lifetime, for rents of realty and interest and dividends on moneys and stocks; that said Stevenson never fully accounted to her for any of such property so received by him as aforesaid; that the amount of Stevenson's indebtedness cannot be stated, but is believed to exceed $20,000, and he has not accounted for any of it; second, the item for attorney fees of special administration is excessive; and prayed that the account presented be not allowed, but that said Stevenson be compelled to charge himself with the amount of his indebtedness and with all property that should be in his hands, or the proceeds of the same.

The facts proved before the court, and which led to the opinion in the case, can be best given as they were presented in the "Findings and Decision on Account of Special Administrator," drawn in conformity with the opinion and filed January 17, 1884, viz.: 1. That about August 15, 1877, said Robert Stevenson, as agent of said Margaret Armstrong, the decedent, took possession of the sum of $24,618.80 one-eighth interest in the lands and premises known as "Stevenson Block," and certain mining stocks, jewelry and furniture, distributed to her as one of the heirs of the late Andrew J. Stevenson, deceased. 2. That none of the said property so received by him is accounted for in his account as special administrator; but that the jewelry had been given to said Stevenson by the decedent; that the mining stocks had been, after rendition of the account, delivered to the administrator, Blake, and since the latter's qualification he has been in possession of the interest in the realty and of the household furniture. 3. That on August 15, 1877, there remained in Stevenson's hands, out of said amount of $24,618.80, the sum of $15,000 ($9,618.80 having been previously disbursed to his principal); and that said money was held and retained by him in a fiduciary capacity, upon the understanding that

he should loan out the same upon interest for the benefit of his principal, the aforesaid decedent, and account to her therefor. 4. That, without notice to his principal, and in violation of his duties as agent, he mingled the said sum of $15,000 with his own funds, and never kept them separate therefrom; that he did not loan out the money for her to others, but used it in all respects as his own, employing it in hazardous mining and stock speculations in his own behalf, by which means it was ultimately lost. 5. That he never paid to his principal any part of said $15,000, or the interest thereon, except the interest to October 1, 1878. 6. That no demand for an accounting of said moneys was ever made upon him by his principal, or refused by him; that he never informed her of the mingling and using of said moneys with his own, and such intermingling and use were never ratified by her, the said principal. 7. That from the fifteenth day of August, 1877, aforesaid, up to the date of his principal's death, viz.: October 4, 1882, he held and managed the property collected and received as aforesaid, as her agent, together with the rents, income and dividends thereof; and that he has not entered any of the said rents or dividends, or the disbursements connected therewith, in his account aforesaid, but has specified them in an exhibit filed in the estate September 21, 1883. 8. That for a considerable period the rents and dividends received by him were not paid over to his principal, but allowed to accumulate, and on January 1, 1881, there had so accumulated and remained unpaid net rents and dividends amounting in all to the sum of $11,727.67, with interest; that thereafter he paid over the current rents and dividends up to May 1, 1882, but subsequently there accumulated and remained unpaid in his hands, from net rents and dividends, the sum of $1,004.75. 9. That the same facts existed as to the rents and dividends, so received by him as aforesaid, as existed with reference to the principal and original moneys and property which came into his possession, as found in and by the third and fourth findings above. 10. That his principal died, and he, after petitioning therefor, was appointed the special administrator of her estate and duly qualified, and at and after such qualification he was

possessed of sufficient property to have realized and taken into his possession, as such special administrator, at least the sum of $1,004.75, aforesaid. 11. That after his qualification as special administrator he received and disbursed the moneys set forth in his account filed herein, and afterward paid over the balance therein stated to the administrator of the estate, M. B. Blake.

And, as conclusions of law, the court found: 1. That the indebtedness of said Stevenson to said decedent was not, nor any part of it, barred by section 339, Code of Civil Procedure, or the statute of limitations; 2. That the account should not be settled as rendered, but the said Robert Stevenson, as such special administrator, should be charged with the various sums of money and accumulations received by him, as set out in the findings of fact, with interest; and that a decree should be entered against him settling his account at a total balance of $37,218.74, due the estate of Margaret Armstrong, deceased, from him as special administrator thereof.

Alfred Wheeler, attorney for special administrator (Stevenson); afterward E. D. Sawyer, on the "Exceptions" to the account.

J. M. Allen, attorney for Frederick James Armstrong, an heir at law.

M. C. Blake, attorney for Maurice B. Blake, the administrator with the will annexed, for the "Exceptions."

COFFEY, J. In the matter of the application for the settlement of the account of Robert Stevenson, as special administrator of the estate of Margaret Armstrong, deceased, the special administrator had no right to use the funds of the decedent as his own, nor to mingle them with his own funds, without clear authorization from her. It was his duty to keep them separate and intact and free from any liability such as he incurred in the use of his own moneys. He should have pursued with exactitude the instructions given as to them, or show that his act was ratified, with full knowledge on the part of the decedent of the nature of that act.

The evidence shows that the authority was to "loan out" the money, which seems to me to mean that he was to invest for her and to account therefor, and not to borrow it for his own purposes. Mrs. Armstrong reposed confidence in him to judiciously invest her funds, and this confidence was abused when he placed himself in the position of a debtor to her, without fully advising her of the risk she ran, and affording her an opportunity of knowing that he was subjecting her funds to hazard, and depriving her of the means of averting catastrophe to her fortune. He should show that he did so, in order to avoid responsibility for the loss his conduct caused to her. Occupying a fiduciary relation, the statute of limitations cannot avail as a defense; at least, not unless or until a demand and refusal are shown.

Lapse of time is no bar to a trust clearly established. Prevost v. Gratz, 6 Wheat. 481, 5 L. Ed. 311. Is this trust clearly established? I think so. See extract from letter, page 48, transcript:

"It leaves a balance in your favor of $15,000, besides what has accumulated since the estate was fixed up, which I will loan out at about 9 per cent, being the best I can do at present."

Clearly, the ordinary meaning of language will not bear the strain that "loan out" means he will borrow for himself, appropriate to his own use, treat as a personal account. It must be interpreted that he will invest it for her account. He was to "loan out," not to borrow. He had no other instructions. He did not advise her of the risk to which he was subjecting her funds, nor of his mingling the funds with his own indiscriminately: See vol. 2, Trans., p. 70. Mrs. McLean testifies that her sister, Margaret, wanted her brother, Robert, to "lay out" the money. She reposed in him great trust and confidence, which he was bound to use with the utmost discretion. He did not advise her of the hazardous nature of his use of the money, nor of his own failing condition (vol. 2, Trans., pp. 62, 69-70, 77, 78, 80, 85, 86). The evidence is by no means clear, is very vague and unsatisfactory, as to the extent of Mr. Hunter's or of Mrs. Armstrong's knowledge of the facts in time to retrieve conse-

quences of Robert's conduct (vol. 2, Trans., 89, 87½, 103, 104). Altogether, he failed in his duty to protect her interest.

Robert Stevenson was the trustee of Margaret Armstrong; his trusteeship has never been revoked; and the statute of limitations cannot operate in his favor. He is clearly liable for loss. His account should not be allowed as rendered, except the item for attorney's fee, a charge properly and necessarily incurred. Let findings be prepared in conformity with the text of this opinion.

The Decision in the Principal Case was affirmed by the supreme court of California in 69 Cal. 239, 10 Pac. 335, where it is held that a special administrator, who is individually indebted to the decedent, must charge himself in his account with the amount of such indebtedness.

ESTATE OF ELIZABETH D. TRAYLOR, DECEASED.

[No. 4,705; decided January 11, 1887.]

Claim for Counsel Fees—Jury Trial.—A claim of an attorney for fees for services rendered an estate is an expense of administration, and is not a proper matter for trial by jury. But the claim of an attorney for fees for services rendered to a decedent during his lifetime differs materially from a claim for services rendered to the estate.

Claim.—The Allowance of a Claim Against Decedent prima facie establishes its correctness and validity, and shifts the onus of proving its incorrectness or invalidity upon the party contesting the same.

Claim—Jury Trial.—The Allowance of a Claim does not interfere with the question of the right to a trial by jury.

Account—Jury Trial.—An Account, as Such, is a Matter to be Settled by the Court without a jury.

A Claim Arising During the Lifetime of the Decedent is a matter which may be segregated from the account of the executors.

Claim.—The Parties are Entitled to a Jury on the Trial of a contest which arose during the lifetime of the deceased, and at the trial the claim alone should be submitted, and not as part of an account in which it is set forth.

Elizabeth D. Traylor died in San Francisco, a resident thereof and leaving estate therein, on the twenty-first day of October, 1885.

She left a last will and testament bearing date July 20, 1885, and a codicil thereto dated September 30, 1885.

George W. Prescott, P. N. Lilienthal and Robert Harrison were named therein as executors.

Upon petition filed on October 28, 1885, the will and codicil were admitted to probate, and the persons named appointed executors thereof, and letters testamentary issued to them on November 10, 1885.

On November 20, 1885, George W. Prescott resigned his trust as executor, and the two remaining executors continued to act as such.

Robert Harrison, one of the executors, presented to Hon. J. V. Coffey, judge of the probate department of the superior court, in the first instance pursuant to section 1510, Code of Civil Procedure, for allowance, a claim against the estate for the sum of $8,250, for professional services rendered decedent in her lifetime, which claim was allowed by the judge on March 5, 1886, for $7,250. The claim was also presented to the other executor and the Judge, under section 1496, Code of Civil Procedure, and by them allowed and approved for said sum on said day.

On May 14, 1886, the executors filed an exhibit, pursuant to section 1622, Code of Civil Procedure. The exhibit contained a statement of the expenses of administration, in which was an item "Retaining fee of Swift and Harrison, as counsel for estate and executors, $1,000." It further contained a statement of claims presented against the estate and allowed, among which was the "claim of Robert Harrison, for professional services as attorney and counselor, rendered Elizabeth D. Traylor, in her lifetime, allowed for $7,250."

On May 18, 1886, Elizabeth H. Siddall, claiming to be sole heir of decedent, filed a contest, on various grounds, to various items in the exhibit, among them the two above mentioned, and, as to those two, separately demanded a jury trial to determine the merits of the claims: and, as to the latter, also asked that proper pleadings be framed for that purpose by the respective parties.

On September 29, 1886, the executors filed their first annual account, which contained the above-mentioned items.

By subsequent amendment, however, the names of Swift and Harrison were stricken out from the first item, and that of John F. Swift inserted in place thereof.

On October 8, 1886, said Elizabeth H. Siddal filed her contest to the same items in said account, and also made a similar demand for jury trials.

The motions for jury trials were argued and submitted to the court on November 10, 1886, and on January 11, 1887, the motion as to the claim of John F. Swift was denied, and the one as to the claim of Robert Harrison granted. Subsequently, the latter claim was transferred to department No. 1 for trial.

D. W. Douthitt, for motions; also, with him, J. C. Bates.

W. W. Cope, opposed, for executors.

Robert Harrison, also opposed, for executors.

Selden S. Wright, also opposed, for certain heirs.

COFFEY, J. With reference to the motion to refer claims to jury: I have come to the conclusion in regard to the claims of John F. Swift, for counsel fees, for services rendered to the estate, being a claim for legal services incurred during the administration, which is an expense of administration, it is not a proper matter for trial by jury. Motion denied. As to the claim of Robert Harrison, for legal services rendered in the lifetime of deceased: This differs materially from Mr. Swift's claim. It is a matter which may be segregated from the account, so if it be submitted to a jury it should be submitted alone and not as part of the account. The account is a matter to be settled by the court without a jury, that is, the account as an account. This claim of Mr. Harrison, although it is allowed by the court and prima facie established by reason of the approval of the court, that is only a shifting of the onus, that does not interfere with the question of the right to a trial by jury.

The decision of the court is, that the motion for a jury trial as to that claim be and it is granted. Exception.

ESTATE OF GEORGIANA ROTHSCHILD, DECEASED.

[No. 3,944; decided May 25, 1885.]

Letters of Administration—Revocation in Favor of Person having Prior Right.—Where letters of administration have been granted to a person who is not entitled to them in his own right, and who was not nominated by the person entitled, they will be revoked upon the application of the person entitled to letters.

Georgiana Rothschild died in La Porte county, Indiana, a resident thereof, and leaving personal estate in San Francisco, on April 1, 1883.

On February 3, 1885, Asher Frank filed a petition for letters of administration upon the estate of the decedent in San Francisco, in which he alleged the foregoing facts, and also that John and Rosalie Summerfield were the grandparents of the decedent, and her heirs and next of kin, and resided in Indiana, and that petitioner was the great-uncle of the decedent, and that the heirs had authorized him to make this application.

No written request of the heirs for the appointment of petitioner was filed, but he held a power of attorney from the grandparents dated January 23, 1885, authorizing him to act in any manner that he saw fit, to collect their inheritance from the decedent for them. This power of attorney was filed April 10, 1885.

The estate in San Francisco consisted of $2,000, in the hands of Joseph Rothschild. On February 17, 1885, the application of Asher Frank was granted, and he was appointed administrator, and on the following day letters of administration were issued to him.

On March 30, 1885, Henry Rothschild filed a petition for the revocation of such letters. He alleged that decedent was the infant daughter of George and Bertha Rothschild, both deceased; that petitioner and Mrs. Nathan Meyer, residents of San Francisco, were heirs of decedent; that petitioner was decedent's uncle and a brother of her father, and Mrs. Nathan Meyer was an aunt of decedent, and a sister of her father and of petitioner; that Asher Frank was a resident of Oakland; that decedent was a minor under the

age of eighteen years, and unmarried at the time of her death, and that the money left by her was inherited from her father, who had previously died in San Francisco; that no notice of the application of Asher Frank had been given to petitioner, or to Mrs. Nathan Meyer, and the first knowledge he had of it was when he was informed by Joseph Rothschild that Asher Frank had been appointed administrator.

An order to show cause was issued on this petition, returnable on April 10, 1885.

On that day the administrator filed his answer, in which he denied that petitioner, Henry Rothschild, and Mrs. Nathan Frank were heirs of decedent, or entitled to a distributive share of her estate, and alleged that the decedent was an actual resident of the state of Indiana at the time of her death; that her death was known to petitioner immediately after it occurred, and petitioner took no steps for the issuance of letters; further, that John and Rosalie Summerfield were the grandparents of decedent, and next of kin under the laws of Indiana.

It was contended, on behalf of the administrator, that letters were properly granted to him, under section 1377, Code of Civil Procedure, which provides that "letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuance of letters to themselves"; and that the letters should not be revoked. Counsel cited sections 1383 and 1386, Code of Civil Procedure, the first of which provides in substance that when letters have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them who is competent may obtain the revocation of the letters and be entitled to the administration; and the latter of which provides that "the surviving husband or wife, when letters have been granted to a child, father, brother or sister of the intestate, or any of such relatives, when letters have been granted to any other of them, may assert his prior right and obtain letters of administration, and have the letters before granted revoked," and claimed

that when letters are once granted only the persons above named could apply for their revocation.

On behalf of the petition for revocation, section 1365, Code of Civil Procedure, was cited, to the effect that letters could only be granted to some one or more of the persons mentioned in that section, and that relatives of the deceased are "entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof"; and that the administrator did not come within subdivision 7 of that section, giving the right to administer to "the next of kin entitled to share in the distribution of the estate," petitioner and his sister being the only heirs of decedent. Counsel further contended that under section 1379, Code of Civil Procedure, the administrator, not being entitled to letters in his own right, could only have been appointed "at the written request of the person entitled, filed in the court," and that no such written request had been filed.

Joseph Rothschild, for petitioner.

William H. Sharp, opposed, for administrator.

COFFEY, J. Upon the facts presented to the court, the petition for revocation should be granted, and it is so ordered.

On the Revocation of Letters of Administration on the application of the person primarily entitled to letters, see 1 Ross on Probate Law and Practice, 379-386.

ESTATE AND GUARDIANSHIP OF GERTRUDE A. SMITH, MINOR.

[No. 3,697; decided February 24, 1885.]

Guardianship—Welfare of Child.—The First Point to be Considered, in adjudging the custody or guardianship of a minor, is the best interests of the child with respect to its temporal, mental and moral welfare.

Guardianship—Preference of Minor.—In determining what is for the best interests of a child, in adjudging its custody or guardianship, the court may consider the child's preference, if it is of sufficient age to form an intelligent preference.

Guardianship—Welfare of Child.—In guardianship matters the court acts for and on behalf of the child, and must regard, as the paramount consideration, the interest and welfare of the child. To this every other consideration must yield.

Guardianship.—The Father is Prima Facie Entitled to the Custody of His Child. But this is not an absolute right; it may be controlled by other considerations; and, if the father is unable or unfit to take charge of the child and educate it suitably, the court will not interfere to take the child from those who are fit and able to so maintain and educate it.

Guardianship—Father's Right to Child's Custody.—As a general rule, courts assent to the proposition that natural right and public policy, as well as the safety of the social structure, require that the father should have the custody of his child. But this is not imperative upon the court; it bends to the interests of the child.

Guardianship—Considerations in Awarding Custody of Child.—It is within the court's sound discretion whether the custody of a child will be given to the father. The court should consider not only the father's fitness, but the condition of the child with its present custodians, its relation to them, the present and prospective provision for its support and welfare; the facts as to its present home—its duration, and whether with the father's consent, and upon understanding of permanency; the strength of the ties formed, and the child's wishes if it is of an age of discretion.

Guardianship.—Where the Best Interests of a Child require that it should remain in the home where it has been fostered from infancy, that consideration will be deemed paramount to the father's natural right, although the father is in every way competent and suitable.

Guardianship.—The Custody of Minors is Always Within the Discretion of the court; and this discretion is to be exercised in the light of the particular and peculiar circumstances of each case. The court is not bound to deliver the custody to any particular person, not even the father.

Guardianship—Election and Nomination by Child.—It has become the rule, in awarding the custody of a minor, to give the child, if of proper age, the right of election in the matter. In California, fourteen years is the age fixed, when the minor has a right of nomination, subject to the court's approval; and the law also permits a minor, "if of sufficient age to form an intelligent preference," to express such preference, which may be considered by the court.

Guardianship—Child's Choice of Custodian.—Mere mental precocity is not the test of a child's capacity to express a choice of custodian; acuteness of apprehension, sharpness of intellect on the part of the child, will not alone be sufficient for the judge. The minor must be capable of exercising a discretion in the premises;

its mere impulses will not weigh. In this case, a child thirteen years and eight months old was held "of a sufficient age to form an intelligent preference," within the meaning and intent of section 246, Civil Code, relating to the custody and guardianship of minors.

Guardianship.—The Welfare of a Minor Means Its Permanent, not temporary, welfare. The court is governed by that which, looking to the previous condition, and the future continued residence of the child, will contribute to its permanent happiness and welfare.

Guardianship—Examination of Minor.—In this case, in accordance with the practice of the court in matters of guardianship, the minor was examined, separate and apart, at length, first by the respective counsel and the judge, with the official reporter; then by the judge alone, counsel being absent; and finally was requested to express her own wishes in writing, she being alone and without any influence whatever. Her written views, with her transcribed testimony, were then filed as part of the record.

Guardianship.—One of the Objects of the Court's Private Examination of the Minor, in guardianship matters, is to discover the child's capacity; its appreciation of the object of the proceedings; the strength of the natural affections, and its idea of filial duty and parental right; and the child's freedom of expression, that is, absence of influence or teachings adverse to parents. The court looks with distrust upon any choice of the minor contrary to the natural affections in favor of a parent.

Guardianship Awarded to Aunt Rather than to Father.—In this case an application for guardianship of a minor was filed by its aunt, and a counter-application and opposition presented by its father, the mother being deceased. The minor was aged thirteen years and eight months, and held to have proven herself fully capable of expressing an "intelligent preference" in the matter, which she did in favor of her aunt, after undergoing a thorough examination. The child was born in the dwelling of her aunt while her parents were members of the aunt's domestic circle; and the mother and child ever afterward continued to live with the aunt until the mother's decease, when these proceedings were instituted. The child's mother had, some years before her death, obtained a divorce from the father, by default, and with it the custody of the child; and it was her last wish that her child should remain with the aunt.

Guardianship Awarded to Aunt—Right of Father to Visit Ward.—In this case the court found that the best interests of the child required that it should remain with the aunt, with the right of the father to visit and enjoy the society of the child at all reasonable times; and, in awarding the minor's custody to the aunt, the court said that the parties ought to reach an amicable understanding whereby the child should spend part of her time with her father,

and so allow opportunities for mutual affections and interests to grow up between her and her paternal relatives.

In the above matter, Caroline A. Taber filed a petition on October 16, 1884, praying to be appointed guardian of the person and estate of the minor, Gertrude A. Smith; setting forth, among other things, that the minor had no guardian appointed by will; that its mother was deceased; that the mother in her lifetime had been divorced from the father of the child, and had been awarded the custody of the minor; and that the only relatives of the minor were the petitioner, who was the aunt of the minor, petitioner's husband, and the children of petitioner. Upon the twenty-second day of October, 1884, Henry L. Smith filed a petition for the guardianship of the person and estate of the minor, alleging that he was the child's father and entitled to be appointed the guardian, and giving the names of the child's relatives as they were set out in the aunt's petition aforesaid.

On November 19, 1884, Smith filed objections to the granting of Mrs. Taber's petition, alleging; first, that he was the father of the minor, and entitled to guardianship in preference to Mrs. Taber, the child's mother being deceased; second, that Mrs. Taber was unsuitable to be guardian; third, that it was for the best interests of the minor, and most conducive to its temporal, mental and moral welfare, that he (Smith) should be appointed guardian; and fourth, that it was not the minor's best interests, etc., that Mrs. Taber be made guardian. Upon September 8, 1885, the court, in conformity with the opinion below, made an order and decree appointing Mrs. Taber guardian; and in the decree further ordered that: "Henry L. Smith, father of minor, be and he is hereby allowed to visit and enjoy the society of the said minor, at all reasonable hours, and to take her to fit and proper places with him at reasonable times."

Letters of guardianship were issued to Mrs. Taber October 10, 1885.

A. N. Drown, attorney for father, H. L. Smith.

J. E. McElrath, attorney for aunt, Mrs. C. A. Taber.

COFFEY, J. Gertrude A. Smith, the minor here, was born March 19, 1871, in this city, in the dwelling-house of

Jacob S. Taber, the father and mother of the minor being inmates of the domestic circle, the mother a sister of Mrs. Caroline A. Taber, one of the petitioners here, and the wife of Jacob S. Taber. At the time of the birth of Gertrude the family consisted of Mr. and Mrs. Taber, Mr. and Mrs. Smith, and the only child of the Tabers; subsequently, another child was born, and while the two families remained together there were three children and the grown persons, all living in comfort and in harmony. Subsequently, in about two years thereafter, the family moved to Oakland, and there resided for several years, until at the desire of the ladies, Mr. Taber decided to break up housekeeping, and removed to the Palace Hotel in San Francisco. Mr. Smith strenuously objected to this course, as he was averse to hotel life, but his wife persisting in her purpose, he permitted her to take up her abode with her child in the family of Mr. Taber, at the hotel, he remaining, as he has since remained, in Oakland, and living with his mother, an aged and estimable lady. Mr. Smith frequently visited his wife and child in San Francisco, and treated them with respect and consideration; but after a while his wife instituted a suit for divorce on the ground of failure to provide, which he did not resist, and the divorce was granted, and the custody of the child awarded to the mother. There is reason, from the evidence, to believe that the result of this suit was reached by mutual understanding; but however this may have been, the record must speak for itself. The parties to the suit continued friendly, and, indeed, throughout, Mr. Smith's conduct was amiable and conciliatory. The main burden of the support of wife and child was borne by Mr. Taber, although many items for tuition, clothing, etc., were paid by Mr. Smith. In August, 1884, while Mrs. Smith, Mrs. Taber and the children were in the country, the mother of the minor died at a place called Wawona, a station coming out of the Yosemite Valley. After this event Mr. Smith desired to obtain the custody of his child, and negotiations between himself and the aunt-applicant were carried on for a long time; but failing of amicable arrangement culminated in these proceedings. All the parties seem to be of good social standing, and, as the matter is before the court,

they are all entitled to respect. Mr. Smith occupies a station of trust, secretary of the board of trade, with good salary and fair prospects. Mr. Taber, the husband of the other applicant, is president of the same board, and is in constant business relations with the father of the minor and on friendly terms with him. It should seem that, under such circumstances, this controversy should have been settled out of court, and without recourse to the harsh and costly procedure of the law; but it is reserved now for the court to pass upon the facts and apply the law. In doing so, I may say in the language of Brewer, J., in Chapsky v. Wood (26 Kan. 651, 40 Am. Rep. 321, and note), a petition of a father for the possession of his minor child, that: "Counsel have in their arguments expressed very feelingly and truthfully the embarrassments and difficulties which surround the decision of a case like this."

And further to quote from the same learned judge , I may apply his description of the minor in that case to the one at bar: "The burden of the case is that the decision is one which involves the future welfare of a little girl; and I think no man can look upon the face of a bright and happy little girl, like the one before us, and come to the decision of a question which may make or mar her future life, without hesitation and feeling; certainly we are not so insensible as to be able to do it" (page 652).

Gertrude Smith is certainly entitled to the description here quoted. She is more than ordinarily intelligent and advanced in study; she has a happy temperament, a cheerful temper, a firm yet entirely reasonable disposition, and a full appreciation of the position which she is placed in by these proceedings. She was examined for hours, first by the respective counsel themselves, and the judge with the official reporter being alone; then by the judge without the intervention of counsel, they being absent; finally she was asked to remain entirely by herself, and without any influence whatever, to write her own views and indicate her own choice of custodian, which she did in plain and concise terms, as hereinafter transcribed. The first point to be considered by the court is, according to section 246 of the Civil Code of California, "the best interest of the child in respect to

its temporal, and its mental and moral welfare''; and ''if the child be of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question.''

This court acts for and on behalf of the child, and must regard as the paramount consideration the interests and welfare of the child. To this every other consideration must yield. There is no doubt, as was said by the eminent Chief Justice Shaw, of Massachusetts, in Pool v. Gott et ux. (August 20, 1851, at Chambers; 14 Monthly Law Reporter (Vol. 4, New Series), p. 269; not elsewhere reported), that the father is prima facie entitled to the custody of the child. This is the law of California (Code Civ. Proc., sec. 1751; Civ. Code, sec. 197); but this is not an absolute right; it may be controlled by other considerations; if unable or unfit to take charge of the child and educate it in a suitable manner, the court will not interfere to take the child from the care of persons who are fit and able to maintain and educate it properly; but it may be said in this case, as Chief Justice Shaw said in the one before him, this is an exception which need not here be considered, for the evidence shows in this case that the father of Gertrude is in a good situation, pecuniary, domestic and social, and of a character and reputation against which no objection can be made.

On the other hand, the aunt-applicant and her husband are persons of respectability, in sufficient pecuniary circumstances, and have so far mainly educated and guarantee hereafter to educate the child in a proper manner. In their family the child has been reared from her birth, and, as she says, she ''has known no other home.'' To them the child is devotedly attached, as appears by her private examination, conducted with great care and thoroughness, and with an earnest endeavor on the part of the examiners to elicit the exact truth; and I am satisfied, as Judge Shaw said in that case, ''that a termination of this relation would be, for a long time at least, the cause of great suffering to her and them'' (14 Law Rep. 269, 270, 271). But the counsel for the father-applicant contends for the natural right to the custody of the child, as expressed in the Code of Civil Procedure (section 1751) and the Civil Code (section 197); and

the learned counsel argues strenuously that his client has done nothing to impair that right, and that the court is bound now to respect the assertion of the father's right and to respond to his demand by delivering to him the minor. Both natural right and public policy, says counsel, as well as the safety of the social structure, require that the father should have the custody of the child (Schouler, Dom. Rel., cited). As a general rule courts assent to such demands, but they are not imperative upon the court. As was said by Judge Finn, in the matter of the Piercy minor, the custody is always within the discretion of the court—a discretion to be exercised in the light of the particular and peculiar circumstances of each case. The court is not bound to deliver the infant over to any particular person, for it is not a matter of right which even the father himself can claim at the hands of the court as against the interest of the child. In the case of Irma Linden, Judge Myrick [the predecessor of Judges Finn and Coffey in the probate forum, San Francisco] decided that where the father had intrusted his infant daughter to the custody of an aunt, at the request of his dying wife, that when the child had been a member of the aunt's family for six years, the custody would not be changed even in favor of the father, who appeared to the court to be entirely competent to support and educate his child. Judge Myrick's decision was placed on the ground that the best interests of the child required that she should remain in the home where she had remained from infancy, and that consideration was deemed by the court paramount to the father's natural right.

This decision is in accord with the best American authorities, and Judge Finn [the predecessor, in the probate department of Judge Coffey] thought it correctly stated the law. The cardinal principle relative to these matters is to regard the benefit of the infant; to make the welfare of the child paramount to the claims of either parent (Schouler, Dom. Rel., 248), and the primary object of the American decisions is to secure the welfare of the child and not the special claims of the parent (Schouler, Dom. Rel., sec. 248). It is sometimes a question (says Schouler, Dom. Rel., sec.

250), in proceedings relative to the custody of minors, how far the child's own wishes should be consulted. Where the object is simply that of custody, the rule, though not arbitrary, rests manifestly upon a principle elsewhere often applied, namely: That after a child has attained to years of discretion she may have, in case of controversy, a voice in the selection of her own custodian; the practice is to give the child the right to elect where she will go, if she be of proper age. What is proper age? Fourteen years is the age indicated by the code (Code Civ. Proc., sec. 1748) at which the minor has the right of nomination, subject to the court's approval. The Civil Code (section 246) allows the minor, "if of sufficient age to form an intelligent preference," to express such preference, which expression may be considered by the court in determining the question of custody. Let us inquire, now, what is meant by "intelligent preference." Mere mental precocity, as was observed by Lord Chief Justice Cockburn in Ex parte Barford (8 Cox C. C. 405, 408, 9 Week. Rep. 99, 3 L. T., N. S., 467), is not the test of the capacity of the child to express effectually a choice of custodian. If the child have arrived at an age to exercise a discretion in the premises, her wish may be consulted; but acuteness of apprehension, sharpness of intellect alone, is not sufficient to justify the judge in confirming her choice The action of the court will not be controlled by the mere impulses of a child of tender years. The welfare of the child means the permanent and not the temporary welfare. It is not what will please or gratify the child for a day or an hour which is to govern the court, but that which, looking to its previous condition and to its future continued residence, will contribute to its permanent happiness and welfare. Thorndike v. Rice, Supreme Court Massachusetts, 14 Law Rep., N. S., 19; opinion by Mr. Justice Bigelow. One of the objects of the private examination is to discover how far the child is capable; her appreciation of the situation in which she is placed; the strength of her natural affections; her idea of filial duty and of parental right; her freedom of expression, i. e., freedom from influence adverse to her father which might have taught her to determine in

favor of another. The court is concerned to ascertain her real desire; her free, voluntary choice of custodian; and so natural is the tendency of a child, normally constituted, to seek the protection of the author of its being, that the court looks with distrust upon any choice to the contrary.

Frequently courts have conformed to the wishes of minors under the age of fourteen, as in the case of Rex v. Smith, 2 Strange, 982, cited in the Matter of the McDowles, 8 Johns. 328, 331, where a boy under fourteen was brought up on habeas corpus, sued out by his father against his aunt, but the court merely left the boy at liberty to go where he pleased, and the boy chose to stay with his aunt.

In the Matter of the McDowles the infants were respectively eleven and eight years of age, and yet the court declared they were at liberty to go where they pleased, and the chief justice, asking the infants where they chose to go, they answered that they wished to return to their masters; afterward, upon the suggestion of the counsel for the father, that improper means and constraint had been used to influence their election, and that the answers were not freely given by them to the court, three counselors were appointed to examine the boys and discover their real desire; thereafter the examiners reported to the court that the boys, after being carefully informed of the purpose of the inquiry, expressed a decided and unequivocal desire to return to their masters, and a strong and unaccountable repugnance to go back to their father, and the court so ordered (8 Johns. 332).

In the State v. Libbey, 44 N. H. 321, 82 Am. Dec. 223, it was held to be within the sound discretion of the court, whether the custody of the child will be given to the father, and in determining the question the court should consider not only the fitness of the father for the trust, but the condition of the child with the person from whose custody it is sought to be taken, its relation to them, the present and prospective provision for its support and welfare; the length of its residence there, and whether with the consent of its father, and the understanding, tacit or otherwise, that it should be permanent; the strength of the ties that have been formed between them, and, if the child has come to years

of discretion, her wishes in the matter. This is a clear enunciation of the law, and commends itself to one's sense of justice (In re Scarritt, 76 Mo. 593, 43 Am. Rep. 768), and it has been recognized as correct doctrine in every well-considered American case.

Gertrude Smith is of sufficient age to form an intelligent preference; she is within a short interval of the time when she will have the right of nomination; her preference has been expressed, and the transcript of her testimony occupies one hundred and five pages of legal cap paper, and has been examined carefully by this court. In the private examination the judge strenuously endeavored to impress upon the mind and heart of this child her filial obligation, her duty to her surviving parent, the strength of his affection for her, his kindness to her, and his natural right to her custody, and his ability and willingness to provide for her in every way (see page 73 and following pages of the Reporter's Transcript of Testimony); but, while professing respect for her father, she resolutely refused to elect him as her guardian, declaring that in no wise was her refusal inspired by any influence, save her own judgment of what was best for her interests. In order to illustrate her determination, I will quote from her testimony (Trans., pp. 90-93):

The Court (questioning)—"It is a very serious matter for me to decide these questions. I don't want to decide so that hereafter you will say that my decision was unjust or unfair to you, or inconsistent with your happiness; nor do I want your father to say, if I should decide against him, that my decision was not right, and not based on sufficient grounds. Do you understand that?" Ans.—"Yes, sir." The Court—"You understand, also, that the law allows you to say something about what you prefer?" Ans.—"Yes, sir." . . . . The Court—"You have reasoned over this matter, you say?" Ans.—"I have thought a good deal, and have come to a conclusion which I think I can never change, am certain of that. That conclusion is that I want to live with my aunt, and don't want to go to my father." (Page 94, this testimony I here condense, preserving the language, avoiding repetitions.) In answer to the Court—"If you should decide to

give me to my father, I don't think I will be reconciled to it in a few months, nor say that you were right, and understood better than I. I should be very unhappy at such a decision. Indeed, I would feel very bad about it." The Court (page 96)—"Don't you think your father has some feelings, too? Didn't you ever consider that?" . . . . Ans.—"I feel this way: I am sure he would not feel any the worse for seeing me regularly, as he has always done, and maybe stay with him a week or two, and something like that, and then stay sometime with auntie, and then go back with him; and I know that she would be willing; but of course it must be different the other way." The Court—"You made me an answer, a while ago, that when you should be fourteen years of age you would be entitled to name your own guardian. How do you know that?" Ans.—"Mamma told me. . . . . She said to me she would be very happy when I was fourteen, and I asked why, and she said if anything I would be able to choose my own guardian." (Rptrs. Trs. Testy., p. 98.)

All through her examination the minor adhered to her desire to remain with those with whom she has been domiciled since her birth, and stated that her mother so desired in her last hours: "She wanted me to remain with auntie because aunt had been so good to her" (Reptrs. Trs., pp. 67, 68), etc.

Finally, at the instance of the court, the minor while alone wrote freely her desire, in these words:

"San Francisco, December 3, 1884.

"Judge Coffey:—My desire is to live with my aunt, Mrs. C. A. Taber, and hope you will consent to it. I am thirteen years and eight months. I am now going to the Denman School and getting along in my studies very well, being now number one of my room. We now live on 737 Ellis street, between Larkin and Polk. Hoping you will be of the same opinion as I am, in regard to living with my aunt, I remain,

"Yours respectfully,

"GERTRUDE A. SMITH."

It will be seen from the foregoing that the court has done everything in its power to ascertain what is for the best interests of this child, feeling an extreme reluctance to sepa-

rate that interest from the father's right, and paying great heed to the argument of his counsel. The right of the father has been considered fairly and fully; and the court very much regrets that its views of the minor's interests, and her own earnest entreaty, compel it to deny his petition. As was said in the case of Pool v. Gott, supra, this is eminently a case for amicable arrangement between the parties. Some agreement might have been made, might still be made, by which the child should spend part of her time with her father, to allow opportunities for mutual affections and interests to grow up between herself and her paternal relations; but it is not in the power of the court in this proceeding to decree any arrangement, except to permit the father freely to visit his child, at such times and places as may be suitable; and his counsel will propose such restrictions which, if agreed upon, will be accepted by the court; and, if not agreed upon, the court will settle the terms of the restrictions, subject to which the prayer of Mrs. Taber is granted.

The Father or Mother of the Minor if found by the court competent to discharge the duties of guardianship, ordinarily is entitled to be appointed guardian, in preference to any other person: Cal. Code Civ. Proc. 1751. This right of the parent may be lost by abandoning the child, or by such a course of conduct as makes him or her unfit to have its care and custody. The rigid rule of the common law which gave the father the right to the custody and services of his child, superior to that of the mother and all others, has been decidedly relaxed in modern times, and it is now universally conceded that the parental right must yield and be subordinated to the best interests of the child, even to the extent of its being placed in the hands of strangers. Indeed, neither parent has any right that can be made to conflict with the welfare of the child: In re Lundberg, 143 Cal. 402, 7 Pac. 156; In re Van Loan, 142 Cal. 423, 76 Pac. 37; Ex parte Becknell, 119 Cal. 496, 51 Pac. 692; Ex parte Miller, 109 Cal. 643, 42 Pac. 428; In re Vance, 92 Cal. 195, 28 Pac. 229; In re Galleher, 2 Cal. App. 365, 84 Pac. 352; Jones v. Bowman, 13 Wyo. 79, 77 Pac. 439, 67 L. R. A. 860; Rusner v. McMillan, 37 Wash. 416, 79 Pac. 988; Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23, 20 L. R. A. 199.

The Wishes of a Child, if he is of a sufficient age to form an intelligent preference, although not conclusive on the court, will always be given due consideration in determining who shall be named

guardian: Stapleton v. Poynter, 111 Ky. 264, 98 Am. St. Rep. 411, 62 S. W. 730. It is not necessary, in order for a child to enjoy this privilege, that he has reached the age of fourteen: Willet v. Warren, 34 Wash. 647, 76 Pac. 273.

GUARDIANSHIP OF THEODORA F. HANSEN, MINOR.

[No. 4,243; decided January 26, 1886.]

Guardian—Eligibility of Nonresident.—Where the mother of a minor is a nonresident, she is legally incapable of obtaining letters of guardianship over the child in this state.

Guardian—Eligibility of Married Woman.—Where the mother of a minor is a married woman, she is ineligible to become guardian.

Guardian—Choice of Child.—A child ten years of age who has been educated carefully and is a bright girl may be capable of expressing "an intelligent preference" for a guardian, which the court will consider.

Guardian—Best Interests of Ward.—In awarding the custody of a minor, or appointing a general guardian, the court is guided by what appears to be for the child's best interests as to its temporal, mental and moral welfare.

Guardian.—Where Application is Made for Guardianship of a Minor, if there is no person before the court who is legally entitled to the guardianship, it must be shown, to justify a resistance of the application, even by the nonresident mother, that no guardian is needed for the child, or that the applicant is an unfit person.

Guardian—Stranger Preferred to Mother.—Where a mother, after desertion by her husband, committed her child to the care of the petitioner, agreeing that he should adopt it (which he never legally did), and afterward, under judgment in an action for divorce by the mother, the child was awarded to petitioner; and the petitioner kept the child for nearly six years, until the mother wanted to get the child again, when he applied for guardianship of her, the mother opposing it, and the divorce decree being modified pending the guardianship proceedings, so as to remit the question of custody to the guardianship department; and during all the period aforesaid petitioner and his wife treated and educated the child as if she were their own; and the mother is legally incapable and ineligible to become guardian, being a nonresident and married; and the child has expressed a preference for petitioner, and it would not be for the child's best interests to place her anywhere but with petitioner, guardianship should be granted to petitioner; but so restricted that the mother may communicate with and visit the child.

Guardianship—Interest of State.—In the matter of the guardianship of minors, the state is interested in having beneficial influences surround and impress its future citizens.

In the matter of the guardianship of the above minor, it appears that letters of guardianship were granted to J. W. Baldwin, on May 13, 1885, after the usual notices required by the statute to relatives within the state (the mother, it would seem, being absent therefrom). Immediately after the granting of these letters, and on May 15, 1885, affidavits and a petition, on behalf of the child's mother (Frances E. Fairbanks), were filed, for a revocation of the letters to Baldwin; and on May 18, 1885, an order to show cause was made, and a citation issued against said Baldwin. Thereafter, it would seem, from the record in the case, that proceedings were taken before Judge Coffey, as if there had never been a grant of guardianship to Baldwin; this course no doubt having been deemed necessary or advisable, in view of the claim of the child's mother, appearing of record, that the divorce court, referred to in Judge Coffey's opinion, had never surrendered or lost jurisdiction over the minor; and in furtherance of the modification (subsequently had) of the decree of the divorce court, remitting the question of the child's custody to the determination of the probate department of the court. Two written requests of the child, both in favor of Baldwin, appear of record, filed on June 6th and December 24, 1885. Each of them is entirely in the child's handwriting, addressed to the judge, giving the name and residence of the child, and expressing its wish to stay with "Papa Baldwin."

M. A. Dorn and P. B. Nagle, for applicant Baldwin.

Thos. P. Ryan, for the mother, Mrs. Fairbanks.

COFFEY, J. This application has been a long time before the court, but the delay in deciding it is not due to the court, except so far as the disposition to come to a correct conclusion has induced deliberation; and in that regard the court has not gone beyond the constitutional limitations.

The facts are, as adduced in evidence: The minor was born July 5, 1875, the parents being Theodore E. Hansen and

Frances E. Hansen, who had contracted marital relations in September, 1874; the parents did not live happily together, and after a while parted, the husband deserting the wife, as she alleges, leaving with her two children, one of them, the minor, Theodora, aged at that time four years, September, 1879; the mother being in poor circumstances, under the advice of a friend, gave the custody of the child to J. W. Baldwin, the applicant here, and agreed that he should adopt the child; but he did not do so according to law, and subsequently the mother claims that she repented her agreement, and desired to regain the custody of the child; but upon this point there is a conflict of evidence, as Baldwin denies that the mother ever expressed to him a change of mind, but, on the contrary, he swears she always caused him to believe, until the year 1885, that he could have the sole custody of said minor, and that the child has been reared and educated by himself and wife for six years, and that she has received the constant care and attention of his wife, whose sole companion she has been during such period; that they have no child of their own, and that they have become greatly attached to said minor, who reciprocates their attachment; and that in sickness and in health they have treated the minor as if she were their natural born child. The uncontroverted fact is that the applicant, Baldwin, received the child from her mother, and has retained the custody up to this time. On the 11th of March, 1885, the minor's mother commenced an action for divorce in this county against the minor's father, Theodore E. Hansen, and on the 10th of April, 1885, the superior court, department one, Wilson, Judge, rendered a decree of divorce, and awarded the custody of said child to said Baldwin until the further order of the court; subsequently the lady was married to Mr. Fairbanks, a respectable gentleman, residing and doing business in the state of Nevada, where she has since continued to reside. The decree of the court in the divorce suit was modified pending these proceedings, with respect to the custody of the child, by remitting to this department that question.

There was but one application for guardianship—that preferred by Baldwin; the mother of the minor is a nonresident,

and incapable under the code by reason of such nonresidence; and, moreover, ineligible, because she is a married woman: Code Civ. Proc., sec. 1751. She is here, however, simply resisting the application of Baldwin, in whose custody the child is in the first place by her own act, and afterward by the order of the court in the action for divorce.

The child is now ten years of age, and has been examined by the court in the manner customary in such cases, and has orally and in writing twice expressed her preference as to custodians—June 6, 1885, and on December 24, 1885—each time declaring her desire to remain with Mr. Baldwin; these written requests or expressions of preference are filed among the papers in the case, as is usual in such matters.

For six years the child has lived in that family, and has been treated tenderly and educated carefully. She is a bright girl, and capable of expressing "an intelligent preference," in the sense of the statute (Civ. Code, sec. 246), which preference the court may consider.

In awarding the custody of a minor, or in appointing a general guardian, the court is to be guided, as a paramount consideration, by what appears to be for the best interests of the child, in respect to its temporal and its mental and moral welfare. The mother is a nonresident and a married woman, and is beyond the jurisdiction of this court in this proceeding, and if there were no other consideration, she could not be considered as an applicant; and, in order to justify her resistance to this application, it should be shown that no guardian is needed, or that the applicant, Baldwin, is an unfit person to be appointed guardian.

It appears from the evidence that the Baldwins, to whose custody this child was primarily committed by the mother, and subsequently confirmed by the divorce court, have a comfortable home; they have had Theodora for six years continuously; she is attached to them and they to her; she knows no home but theirs; their care and management of her have been unexceptionable; if she were to leave them she could gain no better home temporarily, mentally or morally, while great risks would be run by a change; she would have to part from her present friends and find new associations; to be summarily wrested from the only home life she

has ever known, and separated from influences that have been beneficial; and the state is interested in having such influences surround and impress its future citizens.

This is substantially the sentiment and language employed by my predecessor on this bench in the Guardianship of Irma Linden (Myrick's Reports, p. 221), which only follows the current of decisions in similar cases, such as Cozine v. Horn, 1 Bradf. 143, Foster v. Mott, 3 Bradf. 409, Holley v. Chamberlain, 1 Redf. 333, Burmester v. Orth, 5 Redf. 259, and Macready v. Wilcox, 33 Conn. 321. These and numerous other cases that might be cited to the same purport leave no room for doubt as to the law.

However hard the conclusion may seem to the mother, the Court must find from the evidence that it is necessary a guardian should be appointed, and that the gentleman to whose care she six years ago consigned the child, and in whose custody the judge who decided the divorce suit ordered the child should remain, and with whom such child desires to remain, should be appointed the guardian; and it is so ordered.

Let a decree be prepared according to the conclusion herein reached, with the restriction that the mother shall from time to time communicate with and be permitted to visit the child, and the bond of guardian is fixed at one thousand dollars.

For Authorities bearing upon the decision in the principal case, see Guardianship of Smith, ante, p. 169, and note.

ESTATE OF PETER DONAHUE, DECEASED.

[No. 4,796; decided May 10, 1887.]

Partial Distribution—Petition by Widow.—Where one petitions for partial distribution of an estate, and alleges that she is the widow of deceased, and is desirous of having her share of the community property therein described assigned and distributed to her, it sufficiently appears that the petitioner is an heir. As widow she is included in the statutory term "heir."

Partial Distribution—Sufficiency of Petition as Showing Title and Seisin.—Where the widow of a decedent petitions to have her share of the community property assigned to her, by way of partial dis-

tribution, alleging that certain property described in the inventory of the estate, and then particularly describing it, was conveyed to decedent by a particular person named, and on a particular date mentioned, such averments of title in the decedent and seisin at the time of his death are sufficient.

Partial Distribution—Sufficiency of Petition as Showing Community Property.—An allegation in the petition of a widow to have her share of the community property assigned to her by way of partial distribution, that the property (describing it) "was acquired by the said deceased after his marriage with your petitioner, to wit" on a day named, "and was not acquired by gift, bequest, devise or descent; but, on the contrary, by purchase for a valuable consideration, and as she is advised and insists was, and is the community property," is sufficient, as a statement of the character of the property. It is sufficient treating the petition as a pleading; but especially so as an application for partial distribution.

Partial Distribution—Informality of Petition.—A petition for partial distribution of a decedent's estate should not be treated as severely as a common-law pleading. All that it need show is that the person applying has the status of an applicant as described in the statute, and that the administration of the estate is in a sufficient state of forwardness to authorize a distribution.

Partial Distribution.—Whenever the Administration of an Estate has Advanced so far as to be in a sufficient state of forwardness to authorize distribution, it is the duty of the court, upon petition of any party interested, to proceed to a partial distribution, and for that purpose to make the necessary investigation of facts.

Partial Distribution—Petition by Executrix.—A party is not incapacitated to apply for partial distribution of a decedent's estate because she is an executrix of his will.

Partial Distribution.—Assuming that the Question of Giving a Bond upon partial distribution can be considered upon demurrer to an application for partial distribution, and the objection taken that the party to give the bond is both distributee and executrix—obligor and obligee; the answer is that the law is so written.

Partial Distribution—Petition by Administrator.—The Practice of the Court since its institution, in recognizing the right of an heir or devisee, although he is also the representative of the estate, to apply for and have partial distribution, referred to and cases cited.

Partial Distribution—Petition.—Various Grounds of Special Demurrers for ambiguity, presented to a petition for partial distribution of a decedent's estate, are overruled in this case.

Decedent's Widow Applied for Partial Distribution of the Estate, alleging that "a portion" of it was separate property, and "the other portion" community property, particularly describing and claiming the portion alleged to be community. Demurrer, on the

ground that it appeared from the petition to be necessary to ascertain and determine the title to the property asked to be distributed, and that title could only be determined upon final distribution, or under section 1664, Code of Civil Procedure, overruled. (See Estate of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, affirming Coffey, J.)

The opinion of the court in this matter was rendered upon two demurrers (considered together) to an amended petition for a partial distribution of the estate. The petition was presented by the widow of the decedent, asking to have her community rights in the property assigned and distributed to her by way of partial distribution. The following quotations are made from the petition in order to give the exact language of certain important allegations referred to in the opinion of the court: 1. As to the motive and object of the petition—"That she (petitioner) is desirous of having her share or portion of the community property of herself and the said Peter Donahue assigned and distributed to her (page 2, of petition)"; and your petitioner declines to release, relinquish or assign any claim or interest in common or community property; but, on the contrary, claims her share thereof. Wherefore, your petitioner prays that the said J. Mervyn Donahue and Mary E. Von Schroeder (coexecutors) may be required to answer this petition, and that partial distribution of said estate may be made by order of this court, and that one-half of all of the property hereinabove described and claimed as community property, exclusive of such household furniture as may be set apart to her, be distributed and assigned to her as her share thereof, and that she may have such further and other relief in the premises as may be just and proper (Id., p. 35). 2. As to the relationship and heirship of the petitioner—her status —"The amended petition of Annie Donahue, widow of Peter Donahue, deceased, respectfully shows (page 1 of petition); That your petitioner was married to the said Peter Donahue in the state of California, of which they were both residents, on the sixth day of August, 1864; and since which time they resided in said state continuously until the death of said Peter Donahue (Id., p. 2)"; signed, "Annie Donahue" (also by her attorneys) (Id., p. 35); and verified by

her (Id., p. 36). 3. As to the character and quality of the property the title and seisin of the decedent and his estate, etc.—"That the estate of the said deceased has been appraised in the aggregate at the sum of 3,778,312 dollars, whereof a portion is separate property of the said deceased, and (the) other portion is community property of the deceased and your petitioner (page 1 of petition), as to how much and what particular parts of the said estate are community property, she alleges that the parcel of land in the city and county of San Francisco, described in the inventory of the estate of the said deceased as follows, viz.: 1, (describing it) . . . . conveyed by Edward Martin to said Peter Donahue January 25, 1879; recorded in Liber X of Deeds, page 10, was acquired by the said Peter Donahue, deceased, after his said marriage with your petitioner, to wit: on or about the twenty-fifth day of January, 1879, and was not acquired by gift, bequest, devise or decedent; but, on the contrary, by purchase for a valuable consideration, and, as she is advised and insists, was and is community property (pages 2 and 3 of petition)"; then follow the descriptions of twenty-nine other parcels of realty, with averments in the same language as above, as to the inclusion of each in the inventory of the estate, the date and record of the conveyance of each to the decedent, and the character and nature of the acquisition (Id., pp. 3-26); then follows a particular and detailed description of "notes, accounts, stocks, bonds, choses in action, and other personal property embraced in the inventory of said estate and therein described (Id., pp. 26-33)," with the allegation that "all thereof were acquired by the said Peter Donahue in his lifetime, and after his marriage with your petitioner, and was not, nor was any, or either, or any part thereof, acquired by gift, bequest, devise or descent; but, on the contrary, by purchase for a valuable consideration, and, as she is advised and insists, the same, and each and every thereof, were and are community property (Id., pp. 33, 34)": then follow similar averments respecting an additional chose in action, separately specified on page 34 of the petition. Following these allegations and specifications of the property of deceased is the averment: "Your petitioner further shows that

she has reason to believe, and does believe, that there are other assets and property of the said Peter Donahue, the particulars of which are at present unknown to her, some or all of which are community property; and she prays leave whenever the same, or any part thereof, may be discovered, to have the same, so far as may be necessary, included herein by proper amendment (page 34 of petition)."

There were ten (10) grounds of demurrer taken, seven of the grounds being by way of special demurrer for ambiguity. All of these grounds are fully and separately set out, and enumerated in their order, in the opinion of the court. The opinion also analyzes the various grounds of the demurrers and makes them more clear by stating their "objective points." After an oral argument upon the demurrers, a printed brief was prepared and submitted on behalf of the demurrants, and a reply to this was presented (March 11, 1887) on behalf of Mrs. Donahue. In this printed brief but two points were urged upon the court, viz.: (1) The averment that the property was purchased after marriage for a valuable consideration is ambiguous and uncertain, in not showing and virtually tracing the source of the consideration; and so vulnerable to special demurrer.

"Such valuable consideration may or may not constitute the property, separate property. If the funds constituting the valuable consideration were funds of the community, then of course the property would be community property. While if, on the contrary, such funds constituted the funds of the separate estate of either of the spouses, then the property would not be common property, but would give the separate estate of the spouse out of whose separate funds such consideration proceeded."

(2) That the statute which gives an heir a right to have partial distribution of the succession is conditioned upon giving a bond for the payment of his proportion of the debts; that this bond must run to the executor or administrator for the creditor's benefit; that where an heir is also the representative of the estate, he cannot give the bond required by the statute (which must be presumed to be the ordinary legal bond), for he would be both obligor and obligee, and thus rob the bond of its usual—and, it must be

held, indispensable—attributes; therefore, the statute must be construed as excepting from its provisions an heir or legatee who is at the same time the legal representative of the estate—such heir is under a disability, has a want of capacity, to apply for a partial distribution.

Inasmuch as all the ten grounds of demurrer are enumerated in the opinion of the court, and apparently considered advisable to be passed upon, it may be of value to notice the positions taken on the oral argument by the demurrants, which were seemingly abandoned or tacitly consented to be put aside, by their printed brief aforesaid. As the petitioner's counsel in their "reply" to this printed brief claimed every advantage that could be considered gained from this apparent waiver of original positions, it has been deemed best to state these positions in the language of such reply brief; especially as there is also given, in a succinct form, the answer of petitioner to each of these positions, as advanced upon the oral argument. We quote from pages 2, 3 and 4 of "Reply to Points on Demurrer" (presented by Mrs. Donahue's counsel, Messrs. Galpin, Scripture and Loughborough), viz.:

"The paper (demurrants' brief) is as remarkable for what it omits, as for its contents. It practically abandons numerous points urged with great apparent earnestness on the oral arguments. Respondents had claimed: 1. That their general demurrer, 'that the petition stated no cause of action,' was good, upon the authority of Dye v. Dye; to which we replied, that Dye v. Dye had been overruled by Gimmy v. Doane, 22 Cal. 637-639; and that the petition stated a cause of action within the latter case. 2. They argued, also, 'that the petition did not allege that Peter Donahue was seised at his death of the various pieces of property described in the petition.' We replied, that the petition did allege 'the date of each conveyance to Peter Donahue as being subsequent to his marriage, and that said property was now in the inventory as part of his estate.' 3. They argued that the petition did not allege 'that the grantor of Peter Donahue was ever seised in fee of the premises described.' We replied, that 'we were not declaring in ejectment, but petitioning for distribution of com-

munity property; and that the widow was entitled to her share of all property in possession, whether held by titles good, bad, indifferent or worthless.' 4. They argued that 'the petition should state the probative facts required by the statute, as was decided in Dye v. Dye, and also it should not state probative but ultimate facts, as was decided in authorities read from eastern states.' We replied that the argument defeated itself, for both propositions contended for could not be true; and, further, that we did plead the probative facts of marriage, subsequent acquisition of property, etc., and that we also did plead the ultimate fact, that the property specified was community property, that is, property of the community; and that ownership, like seisin, was the ultimate fact. 5. They argued that although 'we had alleged that the property was purchased for a valuable consideration after marriage, we should also have alleged that said property was not purchased with the separate estate of Peter Donahue.' We replied that, as a general rule, the pleader was not required to plead negative matter, because he was not required to prove it; and that this case came within no exception to that rule. 6. They argued on the next day, shifting their point from negative to affirmative, that we 'must prove and allege that the property was purchased with community funds.' We replied, that we were compelled to plead such affirmative matter only as we were required to prove; that because of the legal presumption that the purchase was made with community funds, we were not compelled to plead as claimed; on the contrary, that respondents should allege and prove that said property was separate estate, in order to raise and try that issue. . . . . The points now presented in support of the demurrer are, by the printed argument, reduced to two. The others, discussed at such length orally, we may deem abandoned."

Finally, attention is directed to the fact that section 1664, Code of Civil Procedure, referred to in the final (tenth) ground of demurrer, is the new section added to the probate law, approved March 18, 1885 (Stats. 1885, pp. 208-210). The section provides for a proceeding, in the nature of a civil

action, to determine heirship and the status of all claimants to any estate of a decedent in course of administration, being intended to meet such cases as the Blythe estate, for which litigation it was avowedly devised. In the language of the section, "at any time after the expiration of one year from the issuing of letters testamentary or of administration upon a decedent's estate, any person claiming to be heir, or to be entitled to distribution of any part of the estate, may 'file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and of all interests therein, and to whom distribution thereof should be made' ": whereupon, the elaborate proceedings mentioned in the section for bringing in all claimants, and determining the respective interests of each, shall be taken.

A. H. Loughborough, P. G. Galpin, John T. Doyle, H. D. Scripture, for petitioner, Mrs. Donahue, widow and executrix.

R. H. Lloyd, for J. Mervyn Donahue, executor.

O. P. Evans, for Mrs. Von Schroeder, executrix.

T. I. Bergin, of counsel (against the petition).

COFFEY, J. Annie Donahue, widow of Peter Donahue, deceased, on the fifth day of February, 1887, filed her amended petition in this court, praying for a partial distribution to her of one-half of all of certain property described in said petition claimed by her to be community property. To this petition, on the eleventh day of February, were interposed two separate demurrers on behalf severally of J. Mervyn Donahue, and Mrs. Mary Ellen Von Schroeder, devisees named in the last will of said Peter Donahue, deceased.

GROUNDS OF THE DEMURRERS.

The points of both demurrers are the same: 1. The insufficiency of the statement of facts. 2. The lack of legal capacity in the petitioner. 3. The petition is ambiguous, uncertain and unintelligible in this: That it is uncertain therefrom whether or not said Peter Donahue left any com-

munity or other property, and there is no direct averment in the petition that he left common or any property; and the fact, if such be the fact, that he did leave common property, appears from said petition only by recital and inference, and not by any direct or positive averment on that behalf. 4. Also, that the petition does not distinctly allege that there was any community property; but alleges merely conveyance of certain parcels of land to the said Peter Donahue, at the dates in the petition specified, with the averment that the same was acquired by said Peter Donahue, deceased, after the said marriage with petitioner, and was not acquired by gift, bequest, devise or descent; but, on the contrary by purchase for a valuable consideration, and without stating or alleging whether or not the consideration for each and every of the respective purchases in said petition mentioned was or was not funds of the community; or that the persons, or any of them, so conveying, had any title to be conveyed, or that by force of such conveyance said deceased became the owner of the property so conveyed; also, that it is uncertain and not alleged that the consideration for each of said purchases in said petition mentioned was not part of the separate property and separate funds of said Peter Donahue, and not any portion of the community property or funds of the community. 5. Also, that the petition does not allege that the lands in said petition described, or any part of the same, were or was the property or estate of said Peter Donahue, deceased, at the time of his death; or that the same, or part of the same, is now any part or portion of the property or estate of said deceased, or that said Peter Donahue continued to own such several parcels of land from the time of the alleged purchase of the same, as in said petition mentioned, up to the time of his death, or that such lands are of the character as to entitle the petitioner to partial distribution of the same, or part of the same; and the mere fact that said lands, or any part of said lands, may be found in the inventory or described in the inventory of the estate of said Peter Donahue, deceased, does not prove title in said Peter Donahue, deceased, at the time of his death, or upon petition for distribution thereof, at the time of said appli-

cation. 6. Also, that it is uncertain in this: that the averment therein contained in respect to the several parcels of property therein mentioned and described—that the same were severally acquired at the dates therein alleged, and the same were acquired subsequent to the marriage therein alleged, and that the same were not acquired by gift, bequest, devise or descent; but, on the contrary, by purchase for a valuable consideration, and, as the petitioner is advised and insists, was and is community property—is not an averment that the same or any part of the same is community property, and no allegation that the petitioner is informed and verily believes that the same or any part of the same is community property; that, while said petitioner may be advised and may insist that the same is community property, such advice and insistence constitute no averment of any issue of material fact, and the same is not the equivalent of the apt averment that said petition should in this behalf contain. 7. And that the petition is uncertain in this: that in and from said petition it is uncertain whether the same be merely designed to definitely ascertain what is or what is not common property of said estate, or whether the same is designed for partial distribution of the property of the community heretofore existing between said Annie Donahue and said petitioner, or for partial distribution of said estate. 8. And that the same does not definitely describe the particular property whereof partial distribution is therein and thereby asked. 9. And that it is not certain therefrom whether the proceedings therein and thereby contemplated are the proceedings provided for in and by sections 1658 to 1662, inclusive, of the Code of Civil Procedure, or of the proceedings authorized and provided for in and by section 1664 of said Code of Civil Procedure. 10. And, as a final ground of demurrer, it is claimed that it appears, from the face of said petition, that it is necessary to ascertain and determine the title to the particular property, whereof said petitioner prays partial distribution, and such title can only be determined either upon final distribution of said estate, or under the provisions of section 1664 of said Code of Civil Procedure, and not under said provi-

sions of said code relating to partial distribution of the estate of said deceased.

THE ALLEGATIONS OF THE PETITION.

The petition itself sets forth that Peter Donahue died November 26, 1885, leaving a last will and testament, which has been admitted to probate in this court, whereby, among other things, he nominated the petitioner, Annie Donahue, and James Mervyn Donahue, his son, and Mary Ellen Von Schroeder, executors thereof, all of whom have qualified and are acting as such; that the estate of said deceased has been appraised in the aggregate at the sum of $3,778,312, whereof a portion is separate property of the said deceased, and the other portion is community property of the deceased and the petitioner; that the executors have caused notice to be published as required by sections 1490, 1491, Code of Civil Procedure, and that the time limited for the presentation of claims against the said decedent has expired; that all the claims against the said deceased that have been presented, allowed and approved have been paid, and that the claims which are disputed are few in number and insignificant in amount, in view of the magnitude of the estate; that more than ten months have elapsed since said will was proved and letters testamentary issued; that the petitioner was married to the said Peter Donahue in the state of California, of which they were both residents, on the 6th of August, 1864, and since which time they resided in said state continuously until the death of said Peter Donahue; that she is desirous of having her share or portion of the community property of herself and the said Peter Donahue assigned and distributed to her; and as to how much and what particular parts of the said estate are community property, she alleges that certain pieces of property described in her petition were acquired by said Peter Donahue after his said marriage with the petitioner, and were not acquired by gift, bequest, devise or descent; but, on the contrary, by purchase for a valuable consideration, and that such pieces of property were and are, as she is advised and insists, community property. The petitioner in her petition declines to release or relinquish or assign any claim or interest

in common or community property, but, on the contrary, claims her share thereof.

OBJECTIVE POINTS OF THE DEMURRERS.

As stated in argument by the counsel for the demurrants, the objective points of the demurrers are: (1) It does not allege title in the decedent; (2) there is no averment that decedent continued to own the property, or that it constitutes any part of the estate; (3) that it does not state the source of the title of the community; that it should state the facts; that the averments of community property are insufficient; (4) that the petitioner is incapacitated to make this application by reason of the fact that she is petitioner for partial distribution and executrix at the one time; therefore, practically, plaintiff and defendant in the same suit.

THE STATUTE UNDER WHICH PETITION PRESENTED.

This is a petition presented under chapter 11, article 1, part 3, title 11, the pertinent sections of which read as follows:

Section 1658. "At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate."

Section 1659. "Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator."

Section 1660. "The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application; or any heir, devisee or legatee may make a similar application for himself."

Section 1661. "If, at the hearing, it appear that the estate is but little indebted, and that the share of the party

applying may be allowed without loss to the creditors of the estate, the Court must make an order in conformity with the prayer of the applicant, requiring:

"1. Each heir, legatee, or devisee obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled;

"2. The executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or, if there be more than one, shall be partitioned equally amongst them."

Under section 1662 of the same code provision is made as to the use of this bond and the manner in which it is to be enforced.

It appears from this petition that the petitioner is an heir. She is the widow, and in the sense of the statute is included under the term heir: Estate of Ricaud, Myr. 158.

The averments of title in the decedent and of his seisin at the time of his death are sufficient.

For the purposes of this petition the statement of the character of the property is sufficient: Meyer v. Kinzer and Wife, 12 Cal. 252, 253, 73 Am. Dec. 538; Smith v. Smith, 12 Cal. 224, 73 Am. Dec. 533; Payne and Dewey v. Treadwell, 16 Cal. 243; Rough v. Simmons, 65 Cal. 227, 3 Pac. 804.

Treating this petition as a pleading, it is sufficient. But it is not necessary to treat a petition for partial distribution with the same severity that one would treat a common-law pleading. All that such a petition need show is that the person applying has the status of an applicant, and that the administration is in a sufficient state of forwardness to au-

thorize distribution. Whenever the administration has advanced so far, it is the duty of the court, on petition of any party interested, to proceed to partial distribution, and for that purpose to make the necessary investigation of facts. But it is contended that the petitioner is incapacitated to make this application, by reason of the fact that she is petitioner for partial distribution and executrix at the one time, therefore, practically, plaintiff and defendant in the same suit.

The demurrants argue that she cannot act in the dual capacity of executrix and petitioner for partial distribution; that she cannot be virtually plaintiff and defendant in the same suit; and support this proposition by an abundance of citations, which it is claimed establish the principle that the applicant is not in a position to seek this remedy; that her attitudes as executrix and as an applicant for partial distribution are irreconcilable; that she labors under a disability which should determine the application against her; and that, therefore, in form and substance this application is obnoxious to the demurrer. All the cases in support of this proposition have been examined and considered by the court, but it has been unable to reconcile them with the circumstances of this case.

If the position of the demurrants be true, this court has been proceeding against its institution upon an erroneous theory, for numerous applications of precisely similar character have been made and granted; one of the latest of which I find in the matter of the Estate of Daniel T. Murphy, deceased, where Anna L. Murphy, the widow of Daniel T. Murphy, deceased, and Samuel J. Murphy and others, the children of the deceased, filed their petition and application for partial distribution of the estate of said deceased, which petition and application was granted upon the execution and delivery to Anna L. Murphy, as executrix, of a bond, with proper sureties, from Anna L. Murphy, as widow, and the others as children and heirs and devisees of the deceased. The attorneys for the applicant, Anna L. Murphy, in that case appearing individually and as the sole executrix of the last will of David T. Murphy, deceased, were Messrs. McAl-

lister & Bergin; Estate of Daniel T. Murphy, Deceased, No. 4,313. Decree of Partial Distribution. Filed March 4, 1887. See, also, Estate of Silas W. Sanderson, Deceased (No. 5,464).

Assuming, then, that the question of the giving of a bond is in order at this stage of the proceedings, the answer to the objection of the demurrants is that the law is so written, and that as written it has been uniformly applied in cases differing in no essential particular from the one now before the court.

The demurrer overruled. Ten days to answer.

An Heir, Devisee or Legatee may, at any time after the lapse of four months from the issuance of letters testamentary or of administration, present a petition for the share of the estate to which he is entitled, or any portion thereof, to be given him upon his furnishing security for the payment of his proportion of the debts of the estate: Cal. Code Civ. Proc. 1658. No one but an heir, devisee or legatee (Estate of Foley, 24 Nev. 197, 51 Pac. 834, 52 Pac. 649), or his assignee or grantee (Estate of Straus, 144 Cal. 553, 77 Pac. 1122) can petition for a partial distribution. An executor or administrator, as such, has no authority to file a petition: Alcorn v. Buschke, 133 Cal. 655, 66 Pac. 15; In re Letellier, 74 Cal. 312, 15 Pac. 847.

The Codes Make no Attempt to Prescribe the Form and Contents of petitions for partial distribution, and clearly do not contemplate or require elaborate pleadings in such proceedings: Estate of Murphy, 145 Cal. 464, 78 Pac. 960. For forms of petitions, see Estate of Levison, 98 Cal. 654, 33 Pac. 726; Estate of Crocker, 105 Cal. 368, 38 Pac. 954.

GUARDIANSHIP OF THE PERSON OF WILLIE McGARRITY, MINOR.

[No. 3,386; decided June 4, 1884.]

Guardianship—Wishes of Deceased Mother.—In the appointment of a guardian for a minor, the court must regard the dying declaration of the mother as to her wishes in the premises, when not inconsistent with the welfare of the child.

Guardianship—Religious Instruction of Ward.—Where a child is baptized in a particular faith to which its mother belonged, the guardian of the child should secure to her instruction in the faith of the mother, until the child arrives at an age when she is presumptively competent to determine her own doctrine of religion.

On May 27, 1884, Mary L. Graves filed a petition to be appointed guardian of the person of Willie McGarrity.

The petitioner averred that the minor is a resident of San Francisco; that both her parents are dead; that petitioner is the sister of the deceased mother of the minor; that Sarah C. Bachelder is also a sister of the deceased mother, and Thos. F. Conklin a brother. The petition also contained the further necessary averments.

A citation was issued to the aunt not petitioning and the uncle, returnable on June 3, 1884, at which time the application was heard; the facts proved on the hearing appear from the opinion of the court.

John M. Burnett, for petitioner.

COFFEY, J. In this matter it appears from the evidence of Mrs. Graves, the applicant, and of her brother, Thomas F. Conklin, and Mrs. Cathcart, a friend of the family, that the mother of the minor upon her deathbed desired her sister, the petitioner here, to take care of "Willie," the minor. She desired her brother (Mr. Conklin) and her sister (Mrs. Graves) to take care of the child. There is no formal opposition to the application, but the minor appears in court accompanied by her aunt, Mrs. Bachelder, sister of decedent and of applicant; and Mrs. Bachelder testifies that the child was committed to her care and custody by the mother during the latter's illness and pending an operation upon her, and the child has remained there ever since, and desires to remain there.

All the parties are respectable and harmonious in their mutual relations, and there is no individual incapacity in either case. This being the fact, the court must regard the proved dying declaration of the mother, when it is not inconsistent with the welfare of the child. While the child manifests a tender devotion to Mrs. Bachelder, she evinces no aversion toward Mrs. Graves, her mother's particular and final choice, and the latter is amply competent, pecuniarily and otherwise, to maintain the child. The child's true name is Lucy; she was baptized in the Catholic Church, to which her mother belonged (according to the child's statement to

the court), and the guardian must be required to secure the minor instructions in the faith of the mother until the child arrives at an age when she shall be presumptively competent to determine her own doctrine of religion. The minor is a very intelligent girl between ten and eleven years of age, with strong sentiments of affection toward her aunt, Mrs. Bachelder, who must be allowed to see her as frequently as practicable; and also Mr. Conklin will have the same privilege guaranteed in the order of the court. The custody of the child is awarded to Mrs. Graves, under the intimated restrictions, and with bond fixed at $500.

ESTATE OF JEREMIAH WHALEN, DECEASED.

[No. 2,328; decided February 11, 1885.]

Unsolemnized Marriage—Evidence to Establish.—Where it appears that parties, without the sanction of any ecclesiastical ceremony, agreed between themselves to live together as man and wife, and did live as such in one place of domicile for years, and in other places, and so held themselves out to others moving in the same limited social sphere; and it further appears that each of the parties testified in a legal controversy, wherein they were both called as witnesses, to being, respectively, married persons, and stated their respective places of habitation to be where in fact they lived together at the time, their marriage is proved.

Unsolemnized Marriage—Evidence to Establish.—Where persons called to prove that a man and woman lived as husband and wife and held themselves out as such to others living in the same social sphere, are credible witnesses, no matter how circumscribed is their social environment, their testimony is sufficient to establish repute.

Unsolemnized Marriage—Declarations to Support.—Where it appears that an alleged spouse of an unsolemnized marriage has testified as a witness, subsequently to the alleged marriage, that he was a married man, such declaration is the most important evidence that can be offered in support of such a marriage.

Marriage.—**Where the Relation of Husband and Wife is Once Established,** no subsequent conduct of either spouse, which does not culminate in a legal dissolution, can affect the judicial determination of the question of their status.

Letters of administration were granted herein to Philip A. Roach, as public administrator, on March 20, 1883. Subsequently Henrietta C. Whalen gave and filed notice of her appearance in the administration, as the surviving wife of the decedent; and thereafter, at the proper stage of the administration, on November 19, 1883, filed her application for a distribution of the estate, claiming a share thereof as the widow of the deceased. This application was opposed by Joseph L. Whalen, a brother, and Jane E. Gregory, a niece of the decedent, upon the ground that the petitioner was not the surviving wife of the decedent, as claimed by her. The opinion of the court below was rendered after consideration of the testimony produced in support of the issue tendered by the opposition; and, in accordance with the decision of the court, distribution of the estate was thereafter ordered, on February 11, 1885.

M. S. Eisner, for the petitioner, Henrietta C. Whalen.

M. Lynch, contra, for decedent's brother and niece.

COFFEY, J. In this matter all the propositions of law are undisputed; the only question is as to two or three matters of fact. The applicant, Henrietta C. Whalen, claims that she entered upon the marriage state with the decedent in the city and county of San Francisco after a brief acquaintance—a year or more—without the sanction of any ecclesiastical ceremony, but after an agreement between them to live together as man and wife, followed by an immediate assumption of marital relations; and they continued to cohabit for several years, except at intervals when she went to the country on account of her health, being troubled with a neuralgic affection which was aggravated at seasons by the climate of San Francisco, according to her testimony. For years these two lived together in the northeast corner of Kearny and Jackson streets, and in other places, as man and wife, and held themselves out as such to others moving in the same limited social sphere; this is proved by the evidence of Mr. Thurston, Mr. Findley and Mrs. Taylor (or McCarthy as she is now) and her daughters and son. They are credible witnesses, and no matter how circumscribed their

social environment it is sufficient to establish repute. Mrs. Whalen herself testified that she was not in the habit of making acquaintances, but "was a great hand to stay at home," and that neither before nor after marriage did she visit families, except those in the house wherein she was domiciled.

There is one fact in evidence which is more important than any other—the pivotal fact of this case, namely, the oath-bound declaration of Jeremiah Whalen, the decedent, made at a time while he and Henrietta were living on the northeast corner of Kearny and Jackson streets, which shows not only that they had a habitation there, but that they held to each other the relation of husband and wife. This is more important, I say, in support of applicant's case than any other fact in evidence, because you cannot take a man's declaration in a more solemn way than when on the witness-stand under the sanction of an oath, and examined under the forms of law and with a knowledge of the pains and penalties of perjury, and the consequences of his declaration with regard to his family circumstances and the influence of his statement upon his private fortune. Under such circumstances in the case of Wight v. Wight, before Court Commissioner Robert C. Rogers, in 1866, Jeremiah Whalen, the decedent, swore that he was a married man and lived in this house, northeast corner Kearny and Jackson streets.

The applicant here was examined in the same controversy before Commissioner Rogers, and testified that she was a married woman living with her husband, and that her name was Henrietta C. Whalen, and that she lived in that house at the time of her testimony. She signed her name "Henrietta C. Whalen." It should seem that these two persons were no other than the decedent and the applicant; and by their own statements contemporaneously made, and in the same proceedings under judicial oath, they sustained to each other the relation of husband and wife. These declarations seem to me to be sufficient corroboration of applicant's testimony as to the contraction and consummation of the marriage and the subsequent continuous cohabitation for years. In addition, while she was absent from the city Mr. Whalen

constantly corresponded with her, although, except in one instance, he did not address her as "my dear wife," or subscribe himself as husband, yet he superscribed his letters to her by his own surname, "Mrs. Henrietta C. Whalen." That is a public recognition, which was fortified by declarations made more than once to persons who addressed him; Mr. John H. Harney, for one, a fellow-clerk in a public office, when the latter found on Mr. Whalen's desk a letter so superscribed; also at another time to Mons. Perrier, the restaurateur. These declarations were made at a very late date long after the informal nuptials. Mrs. Whalen, for reasons already suggested by her, left this city and went into the interior and to the mountains, and pursued an irregular life for years; but, as I have had occasion to say in another case, "once establish the relation of husband and wife between these parties and the subsequent conduct of either of them, which does not culminate in a legal dissolution, cannot affect the judicial determination of the question of their status." She may have misconducted herself, may have been a bigamist, subsequently, still her legal rights were vested by the law, which courts sit to administer, not to set aside; the judge's personal views as to such marriages or such misconduct should not affect the court's administration or application of the law. The court finds the fact and applies the law; it finds the facts proved as alleged, and that the applicant is the surviving wife of the decedent intestate, Jeremiah Whalen. His own conduct inconsistent with his relation to Henrietta—the fact that he led Mrs. Stees, a witness in this proceeding, to believe that he was unmarried, does not detract from the strength of what has been said. Mrs. Stees' testimony may be taken as true, and, so far as this discussion is concerned, there is no necessity of imputing inveracity to any witness in this proceeding; Mrs. Stees' statement need not be challenged—her own eccentricity of matrimonial conduct has no bearing upon her credit as a witness; and accepting her testimony as truthful, it would appear that Jeremiah Whalen, for the purpose of deceiving her and contracting an alliance with her, discarded his first spouse and led the witness to believe that he was a free man. Cases

of that kind are so numerous that it is not necessary to dilate thereupon.

So far as such a marriage can or need be established, it has been established in this case. The prayer of the petitioner is granted. Let the appropriate decree be framed and submitted to the court.

ESTATE OF JEANNETTE HELD, DECEASED.

[No. 3,025; decided June 30, 1884.]

Special Administrator—Person Entitled to Letters.—In making the appointment of a special administrator, the court must give preference to the person entitled to letters testamentary or of administration, unless he is shown incompetent for the position. The court has no discretion.

Special Administrator—Want of Integrity and Improvidence.—The evidence in this case is held insufficient to establish improvidence or want of integrity on the part of the applicant for special letters of administration.

On June 9, 1884, John E. Hammersmith filed his petition for special letters upon the estate of the above-named decedent. He alleged that she died in San Francisco, a resident thereof and leaving estate therein, on December 9, 1883; that she left a last will and testament dated July 2, 1883, wherein he, petitioner, was named as executor; that he was a son of decedent; that on December 19, 1883, he filed the will together with a petition for its probate and for his appointment as executor thereof, but that the probate of such will was being contested and a special administrator was necessary. Petitioner based his application on sections 1411, 1412 and 1413, Code of Civil Procedure, and the petition contained the further usual averments.

This application was opposed by Amelia Haxe, a daughter of deceased, who asked that special letters be issued to the public administrator.

It was asserted that the applicant claimed certain property to be his own, which was alleged to be a part of the estate

of the decedent, and that he claimed interests adverse to said estate; also that he had without right or authority assumed to take charge of the estate of decedent since her death, and had improvidently managed the same; as to the claim of the applicant to certain property alleged to belong to the estate, it was shown that shortly before her death the decedent had executed a deed to him of certain real estate, under which he asserted title in his own right, which deed was claimed to be void on various grounds; and the invalidity of this deed was set up as a circumstance to prove the lack of integrity of the applicant; as to his improvidence, it was claimed that while he had assumed control of the estate, he had permitted certain premises belonging to it to remain idle for some time, and that this was "improvidence" within the meaning of the code; the applicant had also expended $1,000 of the moneys of the estate as a retainer to his attorneys, on the contest of the will, and it was claimed that he had no right to pay attorneys' fees out of the estate until he should be appointed executor, and that this was also "improvidence."

Thos. I. Bergin, for John E. Hammersmith, applicant.

Geo. Flournoy, for Mrs. Amelia Haxe, opposed.

Thos. V. O'Brien, for Gustave Held, absent heir.

Thos. F. Barry, for Haxe minors.

H. E. Highton, for Russ minors.

COFFEY, J. Applicant is the son of decedent and named in the will offered for probate as executor. He is of legal age and prima facie competent and eligible under the statute: Code Civ. Proc., sec. 1413.

It is suggested that he is not a proper person to take letters by reason of lack of integrity and also "improvidence" (Code Civ. Proc., sec. 1369, subd. 4); but this is not established; it is "not proven"; and, in view of that, the court has no discretion to deny this application.

Granted.

In Appointing a Special Administrator, the court must give preference to the person entitled to letters testamentary or of admin-

istration (Cal. Code Civ. Proc. 1413; Ariz. Rev. Stats. 1689; Ida. Rev. Stats. 5392; Mont. Code Civ. Proc. 2502; Nev. Comp. Laws, 2857; Okl. Rev. Stats. 1573; S. D. Pro. Code, 121; Utah Rev. Stats. 3823; Wyo. Rev. Stats. 4641); but no appeal lies from the order of appointment: Estate of Carpenter, 73 Cal. 202, 14 Pac. 677; Estate of Ohm, 82 Cal. 160, 22 Pac. 927.

The Courts have no Authority to Add to the Disqualifications of Administrators which have been prescribed by the legislature, nor to decline to issue letters to one who possesses the statutory right to them: Estate of Muersing, 103 Cal. 585, 37 Pac. 520; Estate of Brundage, 141 Cal. 538, 75 Pac. 175; Estate of Carmody, 88 Cal. 616, 26 Pac. 373. As to what improvidence or lack of integrity will disqualify a person to act as administrator, see Estate of Carmody, 88 Cal. 616, 26 Pac. 373; Estate of Newman, 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780; Root v. Davis, 10 Mont. 228, 25 Pac. 105; Estate of Courtney, 31 Mont. 625, 79 Pac. 317.

ESTATE OF PETER G. PARTRIDGE, DECEASED.

[No. 3,308; decided August 26, 1886.]

Inventory.—An Administrator must Make a True Inventory and appraisement of all estate of the decedent coming to his possession or knowledge; and he is accountable with respect to this duty.

Inventory—Adverse Claim Against Property.—If any portion of a decedent's estate is the subject of an adverse claim, it is prudent on the part of the administrator to add a memorandum to the inventory, stating the asserted claim. But the property must be inventoried; the administrator cannot stand neutral because the decedent's title is disputed.

Inventory—Property Claimed Adversely to Estate.—An administrator cannot omit to inventory property said to belong to his intestate which is the subject of an adverse claim, on the pretense that he wants to stand neutral between the estate and the adverse claimant, leaving the merits of the controversy to the court's determination. The administrator cannot assume an attitude of neutrality; the statute points out his duty; and for the court to pass upon the merits of the adverse claim would be to assume a jurisdiction which, in probate, it cannot exercise.

Inventory—Disputed Title.—The Probate Court ought not, it seems, to reject an inventory of a decedent's estate, or order it modified, because it contains property, the title to which is disputed.

Inventory—Trying Questions of Title.—Where part of an inventoried estate of a decedent is in dispute, the adjudication of the title belongs to common-law tribunals; a probate court cannot conclude the question.

On September 28, 1885, Annie E. Partridge filed an affidavit and petition, the statements in each being the same, viz.: That she was interested in the estate as one of the distributees thereof; that decedent at time of his death owned and possessed certain bonds of the city of Sacramento, of the face value of $25,300 (with interest), and of the actual value of over fifty cents on the dollar; that upon information and belief, the said bonds have, since decedent's death, been in possession or under control of John Partridge, the agent of the administrator in the matters of the estate; that on September 14, 1885, she made demand on the administrator (Antoine Borel) to inventory said bonds as a part of said estate, "and the said Borel informed affiant that he would take no action, either for or against said estate, in the matter of said demand." That said bonds are not mentioned or included in the inventory of said estate on file. In response to a citation issued, the administrator made answer on October 6, 1885, setting forth substantially that the decedent left a will, which was duly admitted to probate, in and by which decedent's brother, Patrick M. Partridge, was made the sole legatee and devisee; that decedent left him surviving a son, Louis G. Partridge, of the age of majority, who was the husband of petitioner, Annie E. Partridge; that by reason of a claim of the invalidity of the will set up by the son, negotiations were entered into between the said son and the aforesaid devisee, which resulted in an agreement whereby the son withdrew his opposition to the will and consented to its probate, in consideration that the devisee should assign the son one-half of the decedent's estate; that the John Partridge mentioned in Annie E. Partridge's petition is the son of the devisee, Patrick M., and for many years prior to decedent's death was employed by him in his business matters; that in course of the negotiations between the said Louis G. and Patrick M., it became known that said John was in possession of the bonds referred to in Annie E. Partridge's petition,

and that he claimed to be the owner of them; also that he had a large claim against decedent for services performed; that therefore, to effect a settlement of all matters of controversy, it was agreed between John and Louis G. that upon the admission of the decedent's will to probate John should receive $1,500 from Louis G., and the latter should consent that the said bonds were and should be considered as the property of John and not of decedent's estate, and John should waive all claims against the decedent's estate, and against Louis G.

On October 17, 1885, the said administrator, Borel, filed an amended answer to the aforesaid petition of Annie E. Partridge, in which he set forth that the inventory of the decedent's estate returned and filed by him contained all the property of the estate coming to his knowledge or possession; that there was no other property except that returned in the inventory; a denial that decedent owned the bonds mentioned in the petition; or that the bonds had ever been in his (Borel's) possession, or under his control; or that John Partridge had been his agent as administrator or otherwise. Alleged, upon information and belief, that the bonds were never the property of decedent, and never formed part of his estate. The opinion below was delivered upon the hearing of the order to show cause made upon the petition, and the answers of the administrator.

T. Z. Blakeman, for applicant, A. E. Partridge.

E. S. Pillsbury, for John Partridge, claimant.

S. V. Smith, for A. Borel, administrator.

COFFEY, J. This is an application to compel the administrator to include in his inventory certain bonds—"Sacramento County Bonds"—alleged to belong to the estate of Peter G. Partridge, deceased. The administrator makes response that the reason of his omission was and is that John Partridge, nephew of deceased testator and son of Patrick M. Partridge, the sole devisee and legatee under the will of Peter G., asserted title to the lands, which title was recognized by the disinherited only son of deceased testator, Louis

Partridge, now deceased, whose surviving widow is the moving party in this proceeding. The agreement between Louis and John was in writing. There were only two persons interested in the subject matter at that time, Louis, the disinherited child, and Patrick M., resident in Canada, who was the universal devisee and legatee. Between these two a settlement was made outside of court, and without opposition the will was admitted to probate. Thereafter the controversy between Louis and John about the ownership of the bonds was apparently adjusted. In this hearing the administrator stood aside, as a "neutral" spectator, professing willingness to submit to any order the court might make, after taking testimony, as to the transaction between Louis and John. John Partridge then came in, represented by special counsel, and has undertaken to show that, inasmuch as he owned and owns the bonds in question, the administrator cannot be obliged to include them in the inventory. The administrator cannot assume an attitude of neutrality. He must, under the statute (Code Civ. Proc., sec. 1443 et seq.), make a true inventory and appraisement of all the estate which has come to his possession or knowledge, and he is accountable therefor. If any portion of the estate is claimed by others, it seems prudent to include this item in the list, with words or a memorandum stating the asserted claim: Schouler's Executors and Administrators, sec. 233.

Without reference in any manner to the character of the transaction between John Partridge and the deceased Louis, it is clear that the administrator should have included the disputed item in his inventory. The only reason why the decision has been deferred is that the court was desirous of placing the parties upon an equal footing in any litigation as to the title in another tribunal. After a full and anxious consideration of the whole matter, a consideration of the arguments and briefs and review of the testimony, I am convinced that the correct conclusion is that the administrator should inventory these bonds. Any other conclusion would, in my judgment, be equivalent to assuming a jurisdiction which this court sitting in probate may not exercise.

A court of probate ought not, it would appear, to reject an inventory, or order it modified, because it contains property, the title to which is disputed: for to common-law tribunals belongs the adjudication of the title, and the probate court cannot conclude the question: Schouler's Executors and Administrators, sec. 236; Gold's Case, Kirby (Conn.), 100 (see opinion on page 103).

Application granted.

When Doubt Arises as to Whether any Particular Piece or Article of Property should be inventoried as a part of the estate of a decedent, the court may institute an inquiry, and hear evidence to ascertain the ownership of such property; not for the purpose finally to determine the title, for that would exceed the jurisdiction of the probate court, but to determine, prima facie, whether the property belongs to the estate and should be inventoried. The investigation involves the bona fides of the claimants and the faithfulness to his trust of the executor or administrator; and the determination of these questions may serve as a basis for compelling him to inventory the property, or for removing him from office. But the adjudication of the court, or the recitals of the inventory, are not conclusive in another forum of the decedent's ownership, either as against third persons or against the executor or administrator: Estate of Rathgeb, 125 Cal. 302, 57 Pac. 1010; Lamme v. Dodson, 4 Mont. 560, 2 Pac. 298; Estate of Bolander, 38 Or. 493, 63 Pac. 689; Estate of Belt, 29 Wash. 535, 70 Pac. 74. The valuations given in the inventory are not conclusive for any purpose: Estate of Hinckley, 58 Cal. 457, 516; Estate of Simmons, 43 Cal. 543.

ESTATE OF JEAN PIERRE RICAUD, DECEASED.

[No. 7,754, former Probate Court; decided November 7, 1883.]

A Legatee of a Specific Bequest can Take Only Such Interest in the property bequeathed as the testator had a right or power to dispose of by will.

Where Property Specifically Bequeathed is Sold Under Order of Court, the legatee is not entitled to the proceeds before distribution, but the same must be held subject to administration.

An Executor can be Allowed Commissions only upon the amount the estate accounted for by him; and he cannot be said to have accounted for property as part of the estate of his testator, to which it has judicially been determined that the estate has no title.

Jean Pierre Ricaud died April 1, 1877, in San Francisco, a resident thereof, and leaving estate therein.

He left a last will and testament, dated March 26, 1877, in which Francois Larroche and Leon Auradou were named as executors. Upon petition filed by them on April 6, 1877, the will was admitted to probate, and they were appointed executors thereof on April 26, 1877, and letters testamentary were issued to them on April 28, 1877.

A part of the estate consisted of a saloon, which the decedent bequeathed to his brother, Michael Ricaud.

On May 2, 1877, the executors, at the request of this legatee, filed a petition praying for an order of sale of this saloon, on the ground that its chief value consisted in its goodwill, and that unless it could be kept open it would depreciate in value and become worthless, and that its stock of wines and liquors was diminishing by daily sales, and that they did not feel authorized to expend the money of the estate in replenishing it. An order of sale was accordingly made on said day, and the saloon was thereafter sold, with the assent of the legatee, for $2,000, and the sale confirmed by the court.

On August 30, 1878, the executors filed their first account, from which it appeared that the saloon had been sold under the order of court for $2,000, and the proceeds paid to the legatee by the executors.

On September 13, 1878, Maria Ricaud, the widow of the decedent, filed exceptions to this account, and contested this payment to the legatee, on the ground that the same was unauthorized and illegal, but the question was reserved by the court for future consideration, and the account, with the exception of this item, settled.

On August 13, 1883, the executors filed their second account, to which exception was again taken by the widow, on the same ground.

The contestant also excepted to the amount claimed by the executors as commissions, the facts in relation to which matter are as follows: There was included in the inventory and appraisement filed in the matter of the estate certain real property valued at $7,500, and commissions were claimed on this amount as part of the estate accounted for.

From the account and report of the executors, it appeared that a suit in ejectment had been commenced against the decedent for this property in his lifetime, and that after trial and appeal to the supreme court, subsequently to the death of the testator, the litigation terminated in a final judgment against the estate, and the property was surrendered to the successful parties.

The account was settled in accordance with the principles laid down in the following opinion:

Jarboe & Harrison, attorneys for executors.

H. A. Powell and A. P. Needles, attorneys for widow.

COFFEY, J. 1. The claimant of the specific legacy (the saloon) can take only such interest in the property as the testator had a right or power to dispose of by will. It follows, therefore, that the proceeds of the sale of the saloon, to-wit, $2,000, should be retired from the account and held subject to distribution, to be disposed of by the court according to the circumstances at such time existing.

2. Commissions can only be allowed, according to the statute, "upon the amount of estate accounted for" by the executor. He cannot be said, in the sense of the statute, to have accounted for estate to which it has been determined the estate had no title, which it appears never belonged to the estate, and is not returned or accounted for in this account.

The Principal Case was Affirmed by the supreme court of California in Estate of Ricaud, 70 Cal. 69, 11 Pac. 471, holding that an executor cannot claim commissions on real estate involved in litigation that ultimately results in a decision adverse to the estate. To the same effect is Estate of Delaney, 110 Cal. 563, 42 Pac. 981. Commissions are allowable, as a rule, upon all the property which comes into the possession of the executor or administrator and for which he is accountable, but upon no other: Estate of Simmons, 43 Cal. 543; Estate of Isaacs, 30 Cal. 106; Blackenburg v. Jordan, 86 Cal. 171, 24 Pac. 1061.

ESTATE OF JAMES L. RIDDLE, DECEASED.

[No. 1,209; decided April 27, 1885.]

Letters of Administration—Who may Apply for.—The person to whom letters of administration are issued must apply by his own petition, signed by himself or his counsel; a petition by an heir for the appointment of another person is insufficient, and an order appointing an administrator on such petition must fall. Such petition is in effect no petition, and is not subject to amendment.

Administrator's Sale.—The Court Should Require an Additional Bond from the administrator upon ordering the sale of any real property belonging to the estate.

James L. Riddle died in Santa Clara county, in this state, but being a resident of San Francisco, and leaving estate therein, on October 8, 1881.

He left a will, bearing date February 2, 1881, in which Channing G. Fenner was named as executor.

On petition filed by Mr. Fenner, on October 13, 1881, the will was admitted to probate, he appointed executor thereof, and letters testamentary thereon issued to him, on October 28, 1881.

The executor died on April 22, 1883, while still acting as such.

On May 26, 1883, Grace L. Riddle, a daughter of the testator, filed a petition signed by Samuel H. Dwinelle, as her attorney, and verified by her, setting forth the facts, and praying for the appointment of David McClure as administrator of the estate with the will annexed.

On June 8, 1883, an order was made as prayed for by the petitioner appointing Mr. McClure, and on August 13, 1883, letters of administration with the will annexed were issued to him.

On December 17, 1884, Mr. McClure filed a petition for an order to sell certain real property belonging to the estate, and on January 28, 1885, an order of sale was made accordingly.

A sale was had pursuant to such order, and on April 8, 1885, Mr. McClure filed his return and account of sales, together with a petition for the confirmation thereof.

On April 23, 1885, a purchaser (J. C. Johnson) filed written objections to such confirmation, on the ground that the sale was not legally made, in this:

1. That no petition in writing had ever been filed by David McClure, signed by him or by his counsel, for his appointment as administrator.

2. That there was no administrator of the estate, and that the sale was without authority.

3. That no bond was required in the order of sale, or ever given by Mr. McClure upon the sale, and that his original bond was only $3,500, while the amount bid for the property was $32.500.

The facts were correctly stated in the grounds of contest. Proceedings de novo were accordingly commenced, and new letters issued to David McClure May 29, 1885.

F. J. French, attorney for objecting purchaser.

S. H. Dwinelle, for administrator cum test. ann.

COFFEY, J. 1. There is no petition on file here signed by David McClure or by his counsel. Grace Riddle's application that David McClure be appointed is not sufficient, as the person to whom letters are issued must apply by his own petition, signed by himself or his counsel: Code Civ. Proc., secs. 1371, 1374.

The order of June 8, 1883, had no proper basis as required by the foregoing cited sections, and it must fall.

2. An additional bond should have been provided for in the order of sale of the real estate: Code Civ. Proc., sec. 1389.

The objections to the confirmation of the sale are sustained; they cannot now be cured by amendment; there being no petition, there is nothing to amend.

ESTATE OF ROBERT N. TATE, DECEASED.

[No. 5,084; decided February 24, 1887.]

Homestead.—A Widow Without Minor Children is Entitled to have a homestead selected and set apart by the court out of decedent's separate estate, there being no community property.

Homestead.—The Court must Set Apart a Homestead upon the application of a widow, if none has been selected in the lifetime of the deceased spouse. There is no discretion in the matter.

The Right of the Surviving Spouse to a Homestead in separate estate of the decedent is limited to an estate for years, for life, or until the happening of some event, as the marriage of the survivor, as may be decreed by the court. But the exercise of the court's power is limited by a sound discretion acting upon the circumstances of the particular case; if the survivor is young and likely to remarry, a limitation for life might be indiscreet, otherwise where she is of an advanced age.

Homestead.—The Purpose of the Statute in Giving a Homestead right to the surviving spouse out of the decedent's separate estate is to provide a home for the survivor, which no one can touch; merely depriving the survivor of the power of alienation.

J. A. Hosmer, for applicant, Margaret E. Tate.

W. C. Burnett, opposed.

COFFEY, J. This is an application by Margaret E. Tate, surviving widow of Robert N. Tate, deceased, for an order of court setting apart to her absolutely, as and for a homestead, a certain piece of real property mentioned in the estate of said deceased, situated on Post street, between Broderick and Baker, particularly described in her petition, with the dwelling and improvements thereon. This property is appraised at the aggregate value of $4,550. The petitioner claims the same as community property, and by virtue of having a homestead declared thereon in the lifetime of said Robert N. Tate, which declaration of homestead complying substantially with the provisions of the Civil Code of this state, was recorded on the first day of May, 1883, in the recorder's office of the city and county of San Francisco. The application is contested by a daughter of said deceased, on the ground that it was not community property, but the

separate property of the deceased, Robert N. Tate, and on the further ground that being separate property the widow, having no children by the deceased, is not entitled to a homestead out of his separate estate.

After a patient hearing of the case in open court, and a careful reading and examination of the able briefs presented by the respective counsel, and of the documentary evidence of a very voluminous character which was submitted to the court, I am unable to come to the conclusion that it was community property. Upon the whole, after a complete survey of the situation of the parties, and of the history of the accumulations of the deceased, I am of the opinion that the property was his separate estate. This being the court's deduction from the facts as presented by the evidence, the remaining question is, whether a widow without minor children is entitled to have a homestead set apart to her out of the separate estate of her deceased husband.

This question has been decided in this court in the Estate of Richard T. Maxwell, Deceased, No. 2,625 [ante, p. 126], in an application in a proceeding wherein Elena Maxwell, the widow, applied for an order setting aside a homestead out of the separate estate, the fact being that there were no minor children. The counsel who participated in the argument of that case were T. I. Bergin, Esq., for the applicant; Daniel Rogers, Esq., for the executors in opposition; and A. F. Morrison, Esq., for a legatee, also in opposition. Each and all of these counsel argued the point involved in the application elaborately, and thoroughly covering the entire ground, so that the court has, in addition to the advantage of the argument in this present proceeding, the benefit of former argument and of its own examination, and the court has seen no reason to recede from its ruling in that case.

This court must, upon proper application, set apart to the widow a homestead, if none has been selected in the lifetime of the deceased. The court has no discretion to deny the application: Estate of Ballentine, 45 Cal. 699; Estate of McCauley, 50 Cal. 546; Mawson v. Mawson, 50 Cal. 539.

In the present case the application is founded upon a statutory declaration of homestead, which, operating upon

(separate) property appraised at not more than $5,000, should be the subject matter of the court's decree. The power of the court is limited by a sound discretion acting upon the circumstances of the particular case. The fee passes to the heirs, in this case the petitioner and the applicant, in equal shares, with a limited estate as a homestead in the surviving widow, which would be for years, for life, or until the happening of some event, as the marriage of the widow. As the counsel for the applicant says, the purpose of the statute undoubtedly is to provide a home for the widow which no one can touch, depriving her of the power of alienation merely.

It does not impair or diminish the right of the widow that there be no minor childen. The homestead is to be set apart to the survivor. It is immaterial that the petition be on behalf of the widow alone. It could not here be otherwise. Her status is that of the "surviving widow": Sec. 1465 (Amdt. 1881); Estate of Lord, 2 W. C. R. 131 (Lord v. Lord, 65 Cal. 84, 3 Pac. 96).

If the petitioner were young, and likely to remarry and obtain a home and support by that act, a limitation for life might be indiscreet, but considering her age—she is now sixty-two—her domestic condition, and the probability that the condition will not be modified by marriage, the court is of opinion that she is entitled to have a homestead set apart for life, and it is so ordered. Let an order be drawn accordingly.

The Principal Case affirms the decision in Estate of Maxwell, ante, p. 126. The duty of the court to set apart a probate homestead when a proper application therefor is made is imperative. It has no discretion to refuse the application, but must grant it, for the words "may set apart," as employed in the statute, are construed "must set apart": Demartin v. Demartin, 85 Cal. 71, 24 Pac. 594; Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116; Estate of Burton, 63 Cal. 36; Ballentine's Estate, 45 Cal. 696; Estate of Walley, 11 Nev. 260; Estate of Syndegaard, 31 Utah, 490, 88 Pac. 616. In case there are no children the surviving spouse, nevertheless, has a right to a homestead: Estate of Armstrong, 80 Cal. 71, 22 Pac. 79; Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769.

When a Probate Homestead is Selected from the separate estate of the decedent, the court can set it apart for a limited period only. The remainder in fee vests in the heirs, even to the exclusion of devisees named in the will. They take a vested estate, which may be aliened by them voluntarily or by judicial sale. Only the homestead is exempt; their interest in the property is subject to the claims of creditors of the decedent, and may be ordered sold to pay a family allowance made to the widow: Estate of Tittel, 139 Cal. 149, 72 Pac. 909; McHarry v. Stewart (Cal.), 35 Pac. 141; Lord v. Lord, 65 Cal. 84, 3 Pac. 96; Estate of Schmidt, 94 Cal. 334, 29 Pac. 714.

ESTATE OF JEAN PIERRE RICAUD, DECEASED (NO. 2).

[No. 7,754 former Probate Court; decided February 5, 1887.]

The Widow can Claim to Own an Undivided Half Only of Such Property as is distributed in kind. If she receive one-half of the community property, her right as survivor is satisfied.

Executors are Entitled to have the Costs of an Appeal Allowed them in their account, the prosecution of which is necessary to obtain a final determination of their rights in relation to commissions.

On October 20, 1885, Maria Ricaud, widow of the above-named decedent, died intestate, and A. P. Needles was thereafter appointed administrator of her estate.

On August 2, 1886, the administrator filed a petition for distribution herein.

Decedent herein, by his will, left the sum of $5,000 to his widow, and the sum of $2,000 to her daughter by a previous marriage.

Before distribution herein this daughter also died, and Selden S. Wright was appointed administrator of her estate.

On September 8, 1886, the executors filed a supplemental account, containing a charge of $45.10 for costs expended on appeal (affirmed against them, 70 Cal. 69, 11 Pac. 471) from an order made by the court, refusing to allow them commissions on property inventoried as part of the estate, but afterward judicially determined not to belong to it (see Estate of Ricaud, ante, p. 212).

This item was objected to by the administrator of the widow, as arising out of an appeal taken by the executors for their exclusive benefit.

The estate left by decedent was community property. The executors had, under order of court, sold a saloon for $2,000, which had been specifically bequeathed by the testator to his brother, Michael Ricaud, and the executors had paid said legatee the full proceeds.

The administrator of the widow now claimed that as this saloon was community property the testator could only bequeath one-half of it, and that the legatee was only entitled to one-half the proceeds.

The contention of the executors was that the widow had already received more than one-half of the estate in money on partial distribution, and that the bequest by the husband of a specific piece of his estate does not make the legatee a cotenant with the widow; that "the widow has the right to claim any other portion equal in value to that which the husband has given, but has not the right to claim the half of the specific piece, so long as she receives the half of the entire estate."

They further maintained that even if, as claimed by counsel for contestants, the widow is entitled to an undivided one-half of all the community property, this is only the rule when the property is distributed in kind, and that it cannot be the rule when the property, or the bulk thereof, is converted into money, and the widow receives, in money, one-half of the whole estate as its money value.

"If the entire estate is converted into money, all that the widow can receive is one-half of the money. She cannot, after having received that one-half, claim that she is entitled to a portion of the very estate or its proceeds, out of which the money received by her was realized."

Jarboe & Harrison, for executors.

H. A. Powell and A. P. Needles, for administrator of widow.

Selden S. and Geo. T. Wright, for administrator of widow's daughter.

COFFEY, J. The final brief in this matter was filed November 29, 1886, which should be considered the date of actual submission of the controversy.

1. The theory of the contestants' counsel does not fit the facts in this case. If I correctly apprehend the respective arguments of counsel, the position assumed by the executors is the true legal one. "The widow can claim to own an undivided half only of such property as is distributed in kind, and then only after distribution." If she have received one-half of the community property her right as survivor is satisfied.

Exception and objection denied and overruled.

2. The prosecution of the appeal seems to have been necessary to obtain a final judicial determination of the rights and duties of the executors.

Exception and objection denied and overruled. Account allowed.

ESTATE OF HANNAH G. INGRAM, DECEASED.

[No. 4,993; decided December 13, 1886.]

Will.—Every Person Over the Age of Eighteen Years, of Sound Mind, may, by last will, dispose of all his estate remaining after payment of his debts.

Will.—A Person is of Sound and Disposing Mind who is in the possession of all the natural mental faculties of man, free from delusion, and capable of rationally thinking, reasoning, acting and determining for himself. A sound mind is one wholly free from delusion. Weak minds differ from strong minds only in the extent and power of their faculties; unless they betray symptoms of delusion their soundness cannot be questioned.

Will—Delusion.—It is not the Strength of a Mind which determines its freedom from delusion; it is its soundness.

Will—Delusion of Mind is a Species of Insanity.—The main character of insanity, in a legal view, is the existence of a delusion.

Will.—A Person is the Victim of Delusion when he pertinaciously believes something to exist which does not. Belief of things which are entirely without foundation in fact is insane delusion; that is, where things exist only in the imagination of a person, and the non-

existence of which neither argument nor proof can establish in his mind.

Will.—If a Person is Under a Delusion, though there is but Partial Insanity, yet if it is in relation to the act in question, it will defeat a will which is the direct offspring of that partial insanity.

Will.—Belief Based on Evidence, However Slight, is not Delusion; delusion rests upon no evidence whatever; it is based on mere surmise. The burden of proof is upon the party alleging insanity or insane delusion.

Will.—A Will Produced by Undue Influence cannot stand.

Will.—Undue Influence is any Kind of Influence, either through fear, coercion, or importunity, by which the testator is prevented from expressing his true mind. It must be an influence adequate to control the free agency of the testator. If a weak-minded person is importuned to such an extent that he has not sufficient strength of mind to determine for himself, so that the proposed script expresses the views and wishes of the person importuning, rather than his own, and is not his free and unconstrained act, it is not his will. Undue influence, or supremacy of one mind over another, is such as prevents that other from acting according to his own wish or judgment.

Will—Undue Influence.—Neither Advice, Argument, nor Persuasion will vitiate a will made freely and from conviction, though such will might not have been made but for such advice and persuasion. Neither does undue influence arise from the influence of gratitude, affection or esteem.

Will.—If the Testator has Sufficient Memory and Intelligence fairly and rationally to comprehend the effect of what he is doing, to appreciate his relations to the natural objects of his bounty, and understand the character and effect of the provisions of his will; if he has a reasonable understanding of the nature of the property he wishes to dispose of, and of the persons to whom and the manner in which he wishes to distribute it, and so express himself, his will is good. It is not necessary that he should act without prompting.

Will.—Undue Influence may be Defined as that which compels the testator to do that which is against his will, through fear or a desire of peace, or some feeling which he is unable to resist, and but for which the will would not be made as it is, although the testator may know what he is about when he makes the will, and may have sufficient capacity to make it.

Will.—What would be an Undue Influence on One Man might be no influence at all on another. This depends upon the capacity, in other respects, of the testator.

Will.—Undue Influence must be an Influence Exercised in Relation to the will itself, and not in relation to other matters or transactions.

But it need not be shown to have been actually exercised at the point of time that the will was executed.

Will.—Undue Influence cannot be Presumed, but must be Proved, and the burden of proving it lies on the party alleging it. Such evidence must often be indirect and circumstantial, for undue influence can rarely be proved by direct and positive testimony. The circumstances to be considered, stated.

Will—Insane Delusion—Undue Influence.—The Evidence in this Case reviewed at length and the conclusion reached, that the testatrix was the victim of an insane delusion, of which the instrument propounded was the offspring, and that the testatrix was unduly influenced to make the will in favor of proponent.

Geo. H. Perry and W. W. Bishop, for contestant, John W. Ingram, husband of testatrix.

J. M. Seawell, for contestants, Samuel F. Clough and others, nephews and nieces of testatrix.

Selden S. Wright and R. Thompson, for proponent, Junius L. Hatch.

COFFEY, J. On February 6, 1886, a petition was filed by Junius L. Hatch in this court, praying for the admission to probate of a certain document purporting to be the will of Hannah G. Ingram, deceased, which petition set forth that Hannah G. Ingram died on the 1st of February, 1886, in this city and county, where she was at that date a resident, leaving a last will and testament in the possession of Junius L. Hatch, who was named therein as executor and principal devisee and legatee, the others being Samuel F. Clough, James A. Clough, Olympia Wilson, Lillie D. Hatch and John W. Ingram. That the next of kin of the testatrix and heirs at law were said John W. Ingram, the husband of decedent, residing at San Francisco, Samuel F. Clough, James A. Clough, nephews, all residing in this state.

That at the time said will was executed, February 13, 1885, the testatrix was of the age of fifty-two, and otherwise competent to make a will. The will is in the handwriting of the proponent, signed by the testatrix, and attested by the subscribing witnesses, according to the statute in such case made and provided, and the petitioner further prays that letters testamentary be issued to him.

The will provides (1) that all the just debts and funeral expenses be paid; (2) the testatrix gives to her husband. John W. Ingram, the sum of $5; (3) to her nephew, Samuel F. Clough, $5; (4) to her nephew, James A. Clough, $5; (5) to Mrs. Olympia Wilson, of Farback, Germany, formerly France, the sum of $10 per month, to be paid monthly out of her estate by her executor during the legatee's natural life; (6) she gives to Lillie D. Hatch, the daughter of said J. L. Hatch, executor, all her personal property, consisting of clothing, books, pictures, jewelry, etc.; (7) she directs that an appropriate monument be erected by her executor to her first husband John Dominic Wilson, and herself, in her lot in the Odd Fellows' Cemetery, of such cost and character as her executor may approve, to be paid for out of her estate; (8) she gives, devises and bequeathes to Junius L. Hatch, journalist, now of San Francisco, her house and lot No. 1724 Hyde street, including the cottage in the rear, No. 1235 Vallejo street, and she also makes the said Junius L. Hatch her residuary legatee, and finally nominates the said Junius L. Hatch the executor of her will without bonds.

The will purports to have been executed on the 13th of February, 1885, in the presence of Amanda Arnold and Algernon Hopkins.

On February 16, 1886, J. W. Ingram filed an opposition to the admission of this instrument to probate, on the grounds, first, that he was the husband of the deceased at the time of her death, having been married to her on the thirtieth day of July, 1884; that at the time of her death she possessed real estate and personal property of about $15,000 in value, and that at the time the said Hannah G. Ingram executed the said will she was not of sound and disposing mind, and was not competent to execute the said will by reason of her unsoundness of mind, and that, at that time, her signature was obtained by means of threats made by one Hatch, the person named in said instrument as the residuary legatee; further, that in order to obtain said signature, said Hatch falsely and fraudulently, and with intent to deceive said Hannah G. Ingram, and to prejudice and defraud the opponent, represented to said Hannah G.

Ingram that he, the opponent and husband of decedent, was unfaithful to his marriage vows, and that he was an idle and dissolute person; and the petitioner further alleged that the said Hannah G. Ingram believed the said false and fraudulent representations of said Hatch to be true; and further, the opponent alleged that from the date of the execution of the said purported will up to the time of the death of the said Hannah G. Ingram, the said Hatch falsely and fraudulently and with intent to unduly influence the mind of said Hannah G. Ingram, and with intent to weaken and destroy the love and affection borne by the said Hannah G. Ingram toward the opponent, her husband, continued to represent and declare that the opponent was associating with lewd women and was unfaithful and untrustworthy, and was not a fit and proper person to associate and live with said decedent, and was not a fit and proper person to whom the property and estate of said decedent should be bequeathed; and further, opponent alleged that said deceased was influenced by false and fraudulent representations of said Hatch, and, believing them to be true, forced the opponent, her husband, to leave said deceased, and the said Hatch caused said deceased to remain away from opponent, her husband, and to conceal her whereabouts from opponent, her husband, and at the time of the death of the said Hannah G. Ingram, and for a long time prior thereto, the whereabouts of said deceased were unknown to opponent, her husband, and said deceased so conducted herself, owing to the representations and influence of said Hatch, as hereinbefore set forth. The opponent therefore prayed that the probate of the purported will be denied, and that he be appointed administrator of the estate of said Hannah G. Ingram.

On February 25, 1886, Samuel F. Clough, James A. Clough, Lulu B. Clough and Albatena M. Weaver filed an opposition on their own behalf, alleging that they are the next of kin and heirs at law of Hannah G. Ingram, deceased, being her nephews and nieces, and alleging as grounds of opposition all of the statutory causes, the issue of undue influence being tendered in these words:

"That said alleged will and testament was procured to be made by said Junius L. Hatch by undue influence exerted

by him upon said Hannah G. Ingram, as follows, to wit: 'That said Hannah G. Ingram, prior to and at the time of making said alleged will and testament, was of unsound mind; that prior to and at the time of the making of said alleged will and testament, the said Junius L. Hatch, with the sole intent and design of procuring said Hannah G. Ingram to make said alleged will and testament, had professed great friendship for said Hannah G. Ingram, and by divers acts and practices unknown to these contestants acquired an ascendency, influence and control over said Hannah G. Ingram, and over her mind and will; that prior to and at the time of making said alleged will and testament, said Junius L. Hatch importuned her to make and execute the same, and himself wrote the same and presented the same to her and urged and importuned her to sign the same; and that owing to her said condition of mind and the influence and control which he, said Junius L. Hatch, had over her, she, the said Hannah G. Ingram, was unable to resist the said importunity of said Junius L. Hatch, and signed said alleged will and instrument.' "

To both and to each of these contests or oppositions answer was made by Junius L. Hatch, the proponent of the will, specifically denying all the allegations of the respective oppositions or contests, and the issues thus joined came up for trial before the court, a jury having been expressly waived in open court, on September 29, 1886, and it was consented in open court that the two contests be consolidated for the purposes of the trial.

The issues to which response must be made are reduced by the evidence to two: insanity and undue influence.

(1) Was the testatrix the victim of an insane delusion, and was this will the product of that delusion?

(2) Was the testatrix unduly influenced by Dr. Hatch to make this will?

As to the first of these questions—Was there an insane delusion, and was this will the product of that delusion?—we must first settle what constitutes an insane delusion according to the law, and the decisions of the courts declaring the law; and this is included within the general question as to mental competency.

The law of our state provides that every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, chargeable, however, with the payment of all his debts: Civ. Code, sec. 1270.

A person is of sound and disposing mind who is in the possession of all the natural mental faculties of man, free from delusion, and capable of rationally thinking, reasoning, acting and determining for himself. A sound mind is one wholly free from delusion. Weak minds differ from strong minds only in the extent and power of their faculties; unless they betray symptoms of delusion their soundness cannot be questioned. It is not the strength of a mind which determines its freedom from delusion, it is its soundness. Thus, it is often said that such or such a distinguished man has a sound mind; yet a man in the plainer walks of life, of faculties of less extent or power, may be equally sound. The latter is of sound mind equally with the former, if free from delusions. Delusion of mind is to an extent insanity The main character of insanity, in a legal view, is said to be the existence of a delusion, that is, that a person should pertinaciously believe something to exist which does not exist, and that he should act upon that belief. Belief of things which are entirely without foundation in fact, and which no sane person would believe, is insane delusion; that is, when a person believes things to exist only, or at least in that degree only, in his own imagination, and of the nonexistence of which neither argument nor proof can convince him, that person is of unsound mind. If he be under a delusion, though there be but partial insanity, yet if it be in relation to the act in question, it will defeat a will which is the direct offspring of that partial insanity. Thus, in one case, where the testator conceived the groundless delusion that his nephew had conspired to effect his death, the will was set aside. On the other hand, in Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681, it was held that the will could not be rejected on the ground that the testator entertained the idea that one of his daughters was illegitimate, if this belief was not founded on insane delusion, but upon slight and insufficient evidence acting upon a jealous and suspicious mind. Belief based on evidence, however

slight, is not delusion. One person, from extreme caution or from a naturally doubtful frame of mind, will require proof before acting, amounting, perhaps, to demonstration; while another, of different faculties but of equally sound mind, will act upon very slight evidence. Delusion rests upon no evidence whatever; it is based on mere surmise: Estate of Tittel, Myr. 12; Estate of Black, Myr. 24.

To apply these general principles to the case in hand: If Mrs. Ingram believed that her husband, John W. Ingram, was unfaithful to her, and if the belief of his infidelity was entirely without foundation in fact; if the belief was the product of her own imagination; and if the paper here propounded as her will was made under such belief; and if she was influenced and controlled by such belief in making it, then she was not of sound mind, but was under a delusion, and the paper, so far, is not her will.

Did any fact exist which could cause a sane mind to believe that such was the case? If any fact did so exist, she was not laboring under a delusion regarding the same. If any fact existed, and was known to her, upon which she could base such a suspicion of her husband's fidelity, she was not laboring under a delusion respecting the same. A person may act upon weak testimony, yet be under no delusion. If the court finds that no fact existed upon which a sane mind would form such a belief as is imputed to the testatrix, then she was under an insane delusion, and the court is bound to find that this is not a valid will.

John W. Ingram, one of the contestants, when about twenty-six years of age, intermarried with the widow Wilson, July 30, 1884, she being about forty years his senior, or say sixty-five years of age. He had been brought up from about his tenth year by herself and her former husband, John D. Wilson, who had practically, but not statutorily, adopted him as their son. She had a considerable property, and it is in testimony that one reason why she married her adopted son was to secure to him firmly his rights of property. She appears to have had more than a mother's fondness for him, since it appears in evidence she was intensely jealous of him, a jealousy apparently more conjugal than maternal. Why she should have been ap-

prehensive that he would attract more than ordinary interest, or inspire unusual affection in the heart of other women, is not clear to the mind of the court, which must depend upon normal conditions for its conclusions. Prior to Ingram's marriage to the deceased, it appears he had suffered a brief experience of like character with a lady, from whom, after six weeks of cohabitation, he had been divorced upon his own application upon the ground of extreme cruelty.

Ingram was a plumber by trade, and seems to have pursued his calling with reasonable diligence; in his work it appears he was often embarrassed by the attentions of his wife, the testatrix, who followed him about, and by her unusual conduct annoyed his fellow-workmen; one of his employers testified that he was a nice, quiet man, but the employer was compelled to discharge him several times, because Mrs. Ingram was in the habit of coming around and bothering her husband on account of a "Spanish woman," whom she imagined to be after him. Upon this subject of this "Spanish woman" the case as to insane delusion rests. All the witnesses testify that, while upon the other subjects she acted in a fairly rational manner, she labored under hallucinations, fixed false ideas (testimony of Hollwege and others) as to the "Spanish woman"; she never tired of this topic; and the almost uniform testimony is that she was not in her right mind on the question of the "Spanish woman."

See testimony of P. R. O'Brien, James Watson, Andrew T. Field, J. H. Williams, Thomas O'Brien, Mrs. Stangenberger, Lottie M. Golden, Mrs. Letitia Ralph, Patrick Lee, Charles C. Levy, W. H. Allen, George Dixon, Joseph Buckley, Andrew McKinnon, Officer T. A. McKinnon, E. M. Gallagher, William G. Thomas, John Evans, Benjamin Davis, Guillaume Abadie, Mrs. Ida Carpenter, John W. Shields, George H. Perry, Dr. S. S. Stambaugh, Miss Frances Pratt (the "Spanish woman"), and her mother, Mrs. Josephine Pratt.

The burden of proof is upon the party alleging insanity or insane delusion. The reports have rarely furnished a case in which the weight of evidence is stronger in favor

of such an allegation than the one here presented. That the testatrix was under an insane delusion with regard to the "Spanish woman," which delusion controlled her in disposing of her property, and that that delusion was fostered by Dr. Hatch, I have no manner of doubt. It seems to me impossible to go through the evidence, upon a re-examination, without reaffirming the conviction that I suggested when the case was submitted, that the testatrix was the victim of an insane delusion, of which the instrument here propounded was the offspring. There is not an atom of evidence that her husband was unfaithful, not an iota of testimony that the young woman, Miss Pratt, the "Spanish woman," was the cause of the jealousy of the decedent, and, as all the counsel conceded at the trial, there is the highest degree of improbability that she should have been the active cause of provoking the jealousy with regard to Ingram; moreover it does appear, without contradiction, that she was a total stranger to all the parties concerned, and an innocent victim of a most extraordinary persecution. The deceased testatrix had absolutely nothing upon which to base her suspicion of the infidelity of her husband, and of the complicity of Miss Pratt, and the testimony of Mrs. Humphreys weighs not even a feather in the scale against the overwhelming evidence to the contrary; there is not, as counsel for proponent insists, in favor of this theory, even one of those

> "Trifles light as air, which
> Are, to the jealous, confirmation strong
> As proofs of holy writ."
>
> —OTHELLO, Act III, Scene 3.

There was every reason, in the natural order, why Ingram should have been the object of her bounty. The testimony of most of the witnesses, disinterested and unimpeached, was to the effect that she had contracted this otherwise incongruous and unnatural alliance in order to secure to her and her deceased husband's adopted child "his rights of property." (See testimony, uncontradicted, of witnesses for contestant.) Amid all her vagaries and eccentricities there stood out, in clear lines, affection for this young man; nothing but the wholly imaginary "Span-

ish woman" interfered with her intention to make him the beneficiary of her bounty, and it would be a "judicial outrage," as intimated by one of the counsel, to defeat that marital purpose. The "Spanish woman" was a myth, a sheer delusion, a creature of diseased imagination, now, in the light of legal evidence, entirely dissipated.

2. Was the testatrix unduly influenced to make this will?

A will produced by undue influence cannot stand. Undue influence is any kind of influence, either through fear. coercion or importunity, by which the testator is prevented from expressing his true mind. A question of this kind is not likely to arise, except in regard to persons of naturally weak mind or facile disposition, or where such has become their condition, either from age or disease. It must, of course, be an influence adequate to control the free agency of a testator. It is very properly said: "A testator should enjoy full liberty and freedom in making his will, and possess the power to withstand all contradiction and control. That degree, therefore, of importunity or undue influence which deprives the testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it."

I have a legal right to ask of a person making his will, that he direct his property to go in any given channel, I may even urge and importune him, and if he has sufficient strength of mind to determine for himself the will is good, even though he adopt my suggestion; but if I ask or importune a weak mind, one exhausted by disease or otherwise. to such an extent that he do not have sufficient strength of mind to determine for himself, so that the proposed script expresses my views and wishes rather than his own, it is not his will. If the testatrix had sufficient memory and intelligence to fairly and rationally comprehend the effect of what she was doing, to appreciate her relations to the natural objects of her bounty, and understand the character and effect of the provisions of the will; if she had a reasonable understanding of the nature of the property she wished to dispose of, and of the persons to whom, and the manner in which she wished to distribute it, and did so express her-

self, it is good. It is not necessary that she should have acted without prompting. Importunity or influence, to have the effect of invalidating a will, must be in such a degree as to take away her free agency.

The question here is, whether at the time of executing this will Hannah G. Ingram was free to do as she pleased, or whether she was then so far under the influence of Junius L. Hatch that the will is not the act and will of Hannah G. Ingram, but is the will of Junius L. Hatch.

Undue influence has been defined by our code (Civ. Code, 1575) to consist:

1. In the use, by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

2. In taking an unfair advantage of another's weakness of mind; or,

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

On this point evidence must often be indirect and circumstantial. Naturally, persons who intend to control the actions of another, especially in the matter of the execution of wills, do not proclaim that intent. Very seldom does it occur that a direct act of influence is patent. The existence of influence must generally be gathered from circumstances, such as whether the testatrix had formerly intended a different disposition of her property; whether she was surrounded by those having an object to accomplish to the exclusion of others; whether she was of such weak mind as to be subject to influence; whether the paper offered as a will is such a paper as would probably be urged upon her by the persons surrounding her; whether they are benefited thereby to the exclusion of formerly intended beneficiaries.

Undue influence can rarely be proved by direct and positive testimony. It may be inferred from the nature of the transaction, from the true state of the affections of the testatrix, from groundless suspicions against members of her family, if any such have been proved, and from all the surrounding circumstances.

Undue influence may be defined to be that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment. A testator should enjoy full liberty and freedom in making his will and possess the power to withstand all contradiction and control.

That degree, therefore, of importunity or influence which deprives the testator of his free agency, which is such as he is too weak to resist, and which renders the instrument not his free and unrestrained act, is sufficient to invalidate it.

It is only that degree of influence which deprives the testator of his free agency, and makes the will more the act of others than of himself, which will avoid it.

Neither advice, nor argument, nor persuasion would vitiate a will made freely and from conviction, though such will might not have been made but for such advice and persuasion.

Undue influence must not be such as arises from the influence of gratitude, affection or esteem; but it must be the control of another will over that of the testator, whose faculties have been so impaired as to submit to that control, so that he has ceased to be a free agent, and has quite succumbed to the power of the controlling will.

Pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment, is a species of constraint under which no valid will could be made.

Undue influence may also be defined as that which compels the testator to do that which is against his will through fear or a desire of peace, or some feeling which he is unable to resist, and but for which the will would not have been made as it was.

The testator may have known what he was about when he made the will, and may have had sufficient capacity to make it; this may be true, and still, if his mind were not free to act, if it was constrained to act, or if it had become submissive to the will of another who then exercised the commanding control over the testator, by reason of which freedom of thought and action in making the will was

suppressed, under such circumstances the will should be declared invalid.

Considering together the two issues of mental soundness, and unsoundness and undue influence, it must be noted that although mere weakness of intellect does not prove undue influence, yet it may be that, in that feeble state, the testator more readily and easily becomes the victim of the improper influences of unprincipled and designing persons who see fit to practice upon him.

It may be necessary to consider what degree of influence will vitiate a will, and this depends upon the capacity, in other respects, of the testator. What would be an undue influence on one man would be no influence at all on another. A man of strong will, whose mind is in its wonted vigor, could not be shown to have been influenced by what might be such influence as to wholly invalidate the will of one whose mind has been weakened by sickness, dissipation, or age.

But as well in the case of the sick, dissipated, or aged, as in that of one in health and vigor; in the case of him whose intellect is weak, as of him whose mind is strong, that influence which will be sufficient to invalidate a will must be such as, in some degree or to some extent, to deprive the party affected thereby of his free agency, and to make the will not the product of his own untrammeled thoughts: Comstock v. Hadylone etc. Society, 8 Conn. 254, 20 Am. Dec. 100.

In all cases of this kind the validity of the will depends more upon the abuse of a controlling influence than upon the fact of its existence; more upon the fact that the testator was not fairly dealt with, and not left free to pursue his own natural and healthful instincts and reasonable desires, than that the person benefited by the will had the power to control such will.

It need not be proved that there was actual exercise of influence at the point of time the will was executed.

Influence at any time, the effect of which was to produce the will without the fair concurrence of the mind of the testator, is sufficient to void the will.

But the exercise of undue influence must be upon the very act of making the will; and must be proved, and cannot be inferred from opportunity and interest.

Undue influence must be an influence exercised in relation to the will itself, not in relation to other matters or transactions. But this principle must not be carried too far. When it is seen that, at and near the time when the will sought to be impeached was executed, the alleged testatrix was, in other important transactions, so under the influence of the persons benefited by the will, that as to them she was not a free agent, but was acting under undue control, the circumstances may be such as to fairly warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to the will also the same influence was exercised.

We should be satisfied by a comparison of the will in all its provisions, and under all the exterior influences which were brought to bear upon its execution, with the maker of it as she then was, that such a will could not be the result of the free and uncontrolled action of such a person so operated upon, before it can be declared invalid.

All influence is not undue influence. The procuring a will to be made, unless by foul means, is nothing against its validity. A man may by fair argument and persuasion, or even by flattery, induce another to make a will, and even to make it in his favor.

If the testator act upon the suggestion of others, this will not invalidate the will, if there be no evidence of improper dealing or undue influence.

On this subject no distinct or precise line can be drawn. It is enough to say, that the influence exercised must be an unlawful importunity on account of the manner or mode of its exertion, and by reason of which the testatrix's mind was so embarrassed and restrained in its operation that she was not mistress of her own opinions in respect to the disposition of her estate. The only inquiry for the court is, was the testatrix, from infirmity or age, or other cause, constrained to act against her will, to do that which she was unable to refuse by importunity or threats, or any other way, by which

one acquires dominion and control over another? If so, validity of the will may be impeached.

It is not possible to define or describe with exactness what influence amounts to undue influence in the sense of the law; this can only be done in general and approximate terms. In each case the decision must be arrived at by application of these general principles to the special facts and surroundings in the case.

No influence can be considered as undue influence which does not overpower the inclinations and judgment of the testatrix, and induce a disposition of her property contrary to her own wishes and desires.

Undue influence cannot be presumed, but must be proved in each case; and the burden of proving it lies on the party alleging it.

Undue influence is not a presumption, but a conclusion from the facts and circumstances proved.

In Children's Aid Society v. Loveridge (70 N. Y. 387), Miller, J., said:

"The position of the contestant is that the execution of the will was procured by the exercise of undue influence on the part of those who were the beneficiaries, and who, at the very time of the making of the same, were possessed of her confidence and surrounded her.

"In order to avoid a will upon any such ground, it must be shown that the influence exercised amounted to a moral coercion which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testatrix to do that which was against her will, but which she was unable to refuse or too weak to resist.

"It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercise over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear."

To sum up the elements which go to constitute undue influence, the facts proved must be such as:

1. To destroy the freedom of the will of testatrix, and thus render her act obviously more the offspring of the will of others than of her own.

2. That it must be an undue influence specially directed toward the object of procuring a will in favor of the particular parties.

3. If any degree of free agency or capacity remained in the testatrix, so that when left to herself she was capable of making a valid will, then the influence which so controls her as to render her making a will of no effect, must be such as was intended to mislead her to the extent of making a will essentially contrary to her duty; and it must have proved successful to some extent, certainly: 1 Redfield on Wills, 523, 524; 1 Jarman on Wills; Reynolds v. Root, 62 Barb. 250; 2 Phill. 449-451; Gardiner v. Gardiner, 34 N. Y. 155; Saunders' Appeal, 54 Conn. 108, 6 Atl. 185; Disbrow's Estate, 58 Mich. 96, 24 N. W. 624 (see notes to this case, p. 629); Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 27, 26 N. W. 401; Estate of Tittel, Myr. 16; Estate of Black, Myr. 31; Waterman v. Whitney, 11 N. Y. 165, 62 Am. Dec. 71.

Having stated these legal propositions, their application to the facts in controversy remains to be seen. Had Mrs. Ingram, at the time this instrument was executed, sufficient memory to fairly and rationally comprehend the effect of what she was doing? Did she understand and appreciate her relations to her husband and her relatives? And did she understand the character and effect of the provisions of the will? Did she have a reasonable understanding of the nature of the property to be disposed of, and of the persons to whom she wished to distribute it? Did she exercise her own choice and did she express her own wishes? If she did have such understanding, she had the legal right to make any disposition of her property that she pleased.

If she acted freely and with proper understanding, she had a legal right to ignore her husband and all her kin —"to cut them off with a shilling"—and send her property to strangers. Neither courts nor juries can say whether

this legacy or that is a prudent or wise one to make: by attempting to do so we should attempt to make our will take the place of that of the testatrix. Such an instrument should not be lightly set aside. It is only when the court is brought irresistibly to the conclusion, from the evidence, that the will proffered for probate was procured by the application of a dominant and controlling intelligence to an inferior understanding or a feebler will in an improper manner, that the instrument will be declared void.

The proponent of this instrument, Junius L. Hatch, is a keen, shrewd, cool man of a large and varied experience and extensive worldly knowledge, a fair judge of human nature, with quick perceptions of the weak points of his fellow-mortals; ready to seize advantages, and steadfast in holding on; in address plausible, in deportment perfect, in manner insinuating, in aspect benevolent; in all exterior attributes calculated to secure the trust of a woman whose mind was weakened by the natural advance of senility and tainted by the disease of jealousy.

Take such a man, as his counsel describes him, with his manner and demeanor, and everything bearing the impress of truth; his actions invested with the appearance of honesty, his utterance sympathetic and apparently sincere; an outward seeming of candor, calmness and consistency; qualities which indicated a man of humane heart, kindly nature and disinterested disposition. It was natural he should have made a deep impression upon the morbid mind of this aged woman. Once he discovered the vulnerable point in her character, he operated adroitly and persistently. As against the clever intrigues of such a man, the imperfect intellect and infirm purpose of the youthful husband of this old lady had no prospect of success. From the moment Junius L. Hatch first met Hannah G. Ingram, the young husband was deposed, his authority was gone, and to it succeeded the paramount influence of a will strong and resolute, an intelligence always alert and vigilant in the prosecution of the design to gain the confidence and to control the fortune of Hannah G. Ingram. Between these two men there is the strongest contrast of character and culture. The career of Hatch was

that of a man of great adaptability to changing circumstances. At this time, in his sixty-second year, he has been actively employed in the ministry of the gospel, in the civil service of the government, in the profession of a school teacher, also as a journalist, being both an editorial writer and a newspaper reporter. The title of "doctor," by which he is often described, he disclaims. He was regularly ordained at Gloucester, Massachusetts, and for several years had charge of a Congregational church. Changing his religious views, he became a Unitarian minister, and accepted a settlement over a Unitarian church in Massachusetts and in New Hampshire, which he retained for about ten years. The last charge he undertook was in San Jose in 1882, which charge he voluntarily relinquished, because of inadequacy of remuneration. Subsequently he taught in the public schools, and privately, for a number of years. Thereafter he became a clerk in the custom-house of this port, and finally engaged in journalism, which is his present occupation.

It was while plying his vocation as a journalist, acting as a reporter for the "Morning Call" newspaper, that he first encountered Mrs. Ingram, pending an inquiry into her sanity in this court and department. He was sent by his employer to interview her, to ascertain if, according to his opinion, she was insane. Upon that occasion he had an hour's interview with her. He called again the next day, and after that saw her every day or two for several weeks. These visits were made, according to his story, at her special instance and request. Complying with her desire, he wrote articles to correct public opinion as to her case, which articles he caused to be inserted in various newspapers. His visits were continued by her wish, because she felt she needed a friend for counsel and advice, and she had confidence in Dr. Hatch. Their relations became very friendly and confidential. She visited his family sometimes, and occasionally his daughter visited her, and she expressed herself as grateful for the kindness of his daughter in sending her delicacies during her illness.

Dr. Hatch was assiduous in his attentions to Mrs. Ingram being sometimes as frequent in his visitations as three or

four times a day, and the result of his visits seems to have been a fastening of the delusion in her mind that her husband was unfaithful to her, principally with the "Spanish woman," otherwise Miss Pratt.

It is in evidence that Dr. Hatch himself said that he had no doubt that there was truth in the "Spanish woman's" story; that he had followed it up and found some basis for it; and he also declared to one of the witnesses (see evidence of George H. Perry) that Ingram was a lazy, shiftless fellow, and that he had abused his wife.

While he denies that he ever said or did anything to encourage her in her impressions about her husband, it is difficult to reconcile this statement with the declarations just adverted to, made to witness Perry, and with the strain and tenor of the letter from him, dated San Francisco, January 28, 1886, to Ingram.

(See Exhibit "F," a printed copy of which is here inserted, as well as the letter to which it is an answer.)

EXHIBIT "D."

The first letter from Ingram to Rev. Dr. Hatch reads:

"San Francisco, Jan. 22d, 1886.

"Mr. Hatch:—The snake in the grass, you are a lier, a villian and a coward of the deepest die. You put a piece in the papers about me, and you lied when you did it. You have been trying to seperate me and my wife by lieing to her about the spanish woman, you are a dam lier of the worst kind. I defy you or anyone to prove that I know that spanish woman or had anything to do with her you are trying to separate my wife and me so you can get hold of her proporate. I tell you, you shall not get hold of her proporate as long as I live. I am not afraid of you or your kind in Court or out. I will make your grey hairs stand on ends when I get you in Court. You dare not tell me to my face what you are and have been telling in this city about me. they know you are after my wife properately and lieing about me and now do your damist you are a black villian and a coward and a pretendend friend. you mean low life scoundle you can fine me at 754 Folsom st at night or at Scott and Clay st in the

day time. I defy you to face me like a man and tell to my face the lies you are telling I will handle you Hatch in a differend way that I did Abbott which will be in Court I will fight you face to face in any proceeding that you wish to take I am working steady and am not a loafer as you say I am. You mean low life villian you will have to prove all those things if you do not think I can put you behind with your grey hairs behind the bars as people has been trying to do with me. I defy you to starte in.

"From JOHN W. INGRAM,
"754 Folsom st."

EXHIBIT "F."

The answer of Rev. Dr. Hatch to Ingram's epistle reads:

"San Francisco, January 28, 1896.

"John W. Ingram:—Your very abusive and insulting letter is really unworthy of notice or reply, but I have concluded to answer it so far as to remind you that you have never received anything but kindness from me, and to say that your language to me is, therefore, particularly discreditable to you. 'Ingratitude is a monster,' and you are certainly monstrously ungrateful for the many favors I have done you, from the day I first saw you behind the bars in the city prison, to the last time, when I gave you money to pay for food and lodging.

"Have you forgotten who it was that exerted himself to assist your wife's heroic efforts to save you from a felon's cell at San Quentin, where, but for us, you would probably at this time be wearing motley prison garb and serving out a sentence of fourteen years? Have you forgotten that when there was a possibility that you might be let off with a fine of $500—I say, have you forgotten who it was stood ready with his $500 to pay that fine? And when you had to go to jail, instead, have you no recollection who bought a bed and other things to make you comfortable? And, when Mrs. Ingram could not be admitted after hours, who used his privilege as a reporter to carry you in food, fruit, etc.?

"Is it possible, Ingram, that your memory is so treacherous and that you have really forgotten also the many

favors I have done you since your discharge, taking your property out of pawn repeatedly; letting you have money as you needed, and, when you had no work, going round to one shop after another to get it for you? Or is it possible that, with all these favors in your mind, as you have repeatedly acknowledged them to me in the strongest terms, declaring that you would never, never forget my kindness, would return it whenever you could, and be my friend for life, you turn on me in this abusive way? You remind me of the venomous reptile the farmer found almost dead with cold in the field. Moved with compassion, he carried it home and warmed it at his hearth, when it turned its fangs on its benefactor and stung him for his pains.

"But why should I expect you to be grateful to me when you have been ungrateful to your generous and long-suffering wife? Why kind to me when you have been so cruel to her, who has done so much more for you than I? You falsely charge me with having tried to separate you and her. On the contrary, I have always tried, when you had estranged her from you by your bad conduct and your exasperating taunts about being 'crazy,' etc.; I have tried, I say, to smooth over matters and keep you together. You pretend to think me actuated by mercenary and selfish motives—judging me by yourself, probably, for you have thrown off the mask now completely, and in the letter you wrote me, as well as in the letter you wrote her, you show clearly that your great anxiety is to get hold in some way of her property, which she is determined you shall never do, after treating her as you have, and I cannot blame her for it.

"Instead of going to work and keeping to work and repaying her, as you promised, a part at least of the expense you had been to her, you have not earned your board since you got out of jail, but have been an additional expense and burden to her.

"I did not call you a 'loafer,' but I did say you seemed to prefer to live on your wife's slender income without work rather than to work and earn your own living, and I say so still.

"The proposition you have repeatedly made to her that you would go to work and give her your wages if she would deed the property to you, or have the deed made out in your names together, shows your disposition plainly enough. If you had not been so greedy and avaricious, you would have fared much better, probably. With regard to what you say of the woman Pratt, Mrs. Ingram showed me a note, written by you while you were in jail, acknowledging that what she (Mrs. Ingram) had said about the woman and of your relations with her (Pratt) was all true, and at her request I carried an item to that effect to the paper. She has that note in her possession still, and the handwriting is unmistakably yours. You have made the last year and more of your wife's life very unhappy, and the disease under which she is now suffering severely, and which may terminate fatally, I have every reason to believe was brought on by mental worry on your account. I have done all I could for her comfort and relief, and shall continue to do as long as she lives. I have never given her an unkind word or worried her by an unkind act. It were well for your peace of mind, methinks, if you could say the same. She does not wish to see you at present, and has enjoined me not to inform you where she is, lest you should trouble and annoy her, as you did the last time she saw you. When she wishes to see you I will notify you, and she can tell you, if she has not already told you, that I have never sought to influence her against you, or with regard to the disposition of her property.

"I hold a note signed jointly by you and her for one hundred and some odd dollars, on which she has paid me sixty dollars. The remainder you promised to pay from your earnings, with other moneys advanced since you were living with her on O'Farrell and Polk streets. You kept an account of this, I believe, and, if I am not mistaken, it amounts to about thirty dollars. You owe me five dollars more on your watch chain, which I took out of pawn for the third time, and which I hold as security for the debt. If you mean to be honest with me you will pay me out of your wages as soon as you can. I will charge you no interest if you do that, and will hold the chain for you.

"I am glad you are at work, as you say your are, and hope you will keep at it, and show by your future conduct that you are determined to redeem your character, and live so that you will have no occasion to be ashamed of yourself in the future. If any person, man or woman, advises you to any other course, and tries to induce you to attempt to get possession of your wife's property, by force or by fraud, or in any way except with her free will and consent, on the ground of affection and regard, such person is a poor counselor, and your enemy instead of your friend. J. L. HATCH.

"P. S.—At Mrs. Ingram's request, I read the letter you sent me, and also the one you sent her, to her, and I have also read to her this reply. She says I have spoken the truth, but have put it more mildly than she would have done if writing to you. You have my permission to read this letter to Mrs. Fitzgerald and her niece, or any others.

"J. L. H."

The association between Dr. Hatch and Mrs. Ingram, under the circumstances, was extraordinarily confidential In all his intercourse with her he appears to have been her business adviser, and to have been substituted in her confidence, if not in her affections, for her husband. He controlled her movements; when her husband was in jail she communicated with him through Hatch; when she was finally taken sick—so sick that she had to be carried to the German Hospital—Dr. Hatch was still sedulous in his attentions to her, and in his supervision over her affairs. It was he who took her to the hospital, where, it appears, she never saw her husband. There she lay prostrated by distressing corporal maladies; she had liver trouble, liver obstruction, and jaundice, to which diseases she succumbed on the 1st of February, 1886. From the day he became acquainted with her, in December, 1884, to the day of her death, Dr. Hatch never lost sight or control of Mrs. Ingram. This is the tenor of the testimony. In all her various lodging places he was her most frequent visitor; his interviews were commonly out of the presence of her husband; even when Ingram was in the house, his wife and Hatch would

have their interview without his presence (testimony of Mrs. Golden); and it is in evidence that whereas, before Dr. Hatch's visit, she would be very friendly with her husband, or "Johnnie," as she was accustomed to call him, after Hatch's departure her manner toward "Johnnie" would change (testimony of Mrs. Carpenter). Her talk about the imaginary "Spanish woman" became, also, more pronounced at these times; "she said if her husband had not run with the 'Spanish woman,' she would leave it all (her property) to him."

That Dr. Hatch did not discourage her in the entertainment of this delusion as to the "Spanish woman" is shown by the letter to Ingram, Exhibit "F," hereinbefore inserted. In this most extraordinary effusion, in reply to Ingram's accusation (Exhibit "D") that he (Hatch) had been trying to separate Ingram and wife by lying to her about the "Spanish woman," so he (Hatch) could get hold of the property, Hatch says: "With regard to what you say of the woman Pratt, Mrs. Ingram showed me a note written by you while you were in jail, acknowledging that what she (Mrs. Ingram) had said about the woman and of your relations with her (Pratt) was all true, and at her request I carried an item to that effect to the paper. She has that note in her possession still, and the handwriting is unmistakably yours." This note, the authorship of which is here imputed to Ingram, but which is denied by him, was not produced on the trial. It was not found among her papers, and its nonproduction is significant. In the same connection the postscript to this letter from Hatch is noteworthy. "P. S.—At Mrs. Ingram's request, I read the letter you sent me, and also the one you sent her, to her; and I have also read to her this reply. She says I have spoken the truth, but have put it more mildly than she would have done if writing to you."

Whatever may be said of Dr. Hatch's letter, Exhibit "F," it can hardly be accused of drawing it mild. This letter certainly speaks for itself, and it is of great consequence in showing the closeness of his relation to and the strength of his influence over the wife of Ingram. What was the object of his frequent visits to Mrs. Ingram? It

was all business. Although, by virtue of his sacerdotal calling, he might have administered to her spiritual consolation, no hint of such ministration is shown by the evidence; no such suggestion is contained in the letter to Ingram (Exhibit "F"); nowhere does it appear that in Dr. Hatch's mind was there aught but business; "property" is his overmastering idea, his ruling thought in all his intercourse and correspondence with the Ingrams. In his letter to Ingram (Exhibit "F") he says: "If any person, man or woman, advises you to any other course, and tries to induce you to get possession of your wife's property, by force or by fraud, or in any way except with her free will and consent, on the ground of affection and regard, such person is a poor counselor, and your enemy instead of your friend." In this curious contribution to the literature of will contests, it is difficult to discern the spiritual element. It is of the earth, earthy.

But how came the will into existence? One day, about the middle of February, 1885, according to Dr. Hatch's testimony, he called upon Mrs. Ingram; she gave him some "specifications" from which he was to draw up the form; he did so, he did not write the specifications. Who did? His son, William K. Hatch, a young man of twenty-one years of age, who never thitherto had drawn a will—a baggage and brakeman on the railroad—it was this inexperienced youth who was selected to take down the "memoranda" from which the will was elaborated. He purchased the blank form, and from the "specifications" or "memoranda" the will was drawn by Junius L. Hatch, the proponent, the principal beneficiary, residuary legatee, and executor. Where are the "specifications" or "memoranda"? Their nonproduction must be regarded as important. Who so much interested in their preservation and production as the proponent? It was in his power to preserve this paper; it was his interest to produce it; and the circumstance that it is not preserved and produced must tell against him. The will itself is filled out in a printed form, the filling being in his handwriting, and the inspection of the paper shows that it was carefully drawn in his interest. If drawn from the "specifications" dictated by her to a youth

who had no experience in drawing wills, presumably unfamiliar with technical legal terms, it is strange that such exactitude of legal expression should obtain, as is particularly shown in the paragraph "Eighthly," in words as follows: "I hereby give, devise and bequeath to Junius L. Hatch, journalist, now of the City and County of San Francisco, my house and lot, No. 1724 Hyde street, including the cottage in the rear, now numbered 1235 Vallejo street; *and I do also hereby make the said Junius L. Hatch my residuary legatee.*" It is hard to believe that this residuary clause came from the lips of the decedent, and was set down in such terms by the inexperienced hand of the young man who had never before drawn a will; and the appearance of the script adds to the improbability of such fact, and strengthens the impression that it was the inspiration and the act of the proponent of this instrument. While he disclaims having anything to do with the dictating of the terms of that instrument, his own son testifies that he (the son) went to Mrs. Ingram at the request of his father, and then from her instructions prepared the "memoranda" for the will. The proponent testifies that before Mrs. Ingram went to Paso Robles Springs, she told him what she had determined to do about her property, because of her husband's infidelity and his ill-treatment of her; she also spoke of the Cloughs, her nephews, and their conduct.

To corroborate his statements that he had nothing to do with the disposition of the property, he introduces a witness, Dr. Thomas Grant, who testified that he knew Mrs. Ingram, and also Dr. Hatch, the latter of whom lived in the same house for awhile with them. Grant saw Mrs. Ingram on Polk street before she went to Paso Robles Springs, and she said she had everything all fixed in case she did not come back; she left everything to Dr. Hatch, he and his family had been kind to her; only $5 to her husband; he had been unkind to her; all he wanted was her property; he had tried to get her in the asylum; she left $5 each to her nephews; they had been unkind; this was about the sum and substance of what she said to the witness Grant, according to his testimony. She asked him to remember what she told him in case she didn't come back from the springs. Upon the

cross-examination of this witness it appeared that his relations with Dr. Hatch were quite friendly, and that he went to see Mrs. Ingram at the instance of and in company with him. What was the purpose of this joint visit? Although this witness, according to his statement, had been at one time a regular physician, it is many years since he pursued that calling as a profession, and not at all in this city, his nearest connection with the practice being that he deals in medicines in a small way, being occupied at other times in the building of houses, and his medical attentions to Mrs. Ingram were of the slenderest character.

The conclusion that the court drew from his testimony was that the real object and purpose of his visit to Mrs. Ingram was to substantiate the premeditated plan of the proponent of this will: that Mrs. Ingram was acting of her own volition without restraint exercised by Dr. Hatch or any one else, and upon rational premises as against her husband and her nephews. If the deliberate design of Dr. Hatch were to prepare his proofs in advance for the establishment of this paper as a valid will, he could not have acted with greater care, the vice of his process being the excess of precaution in laying his foundations in some particulars; as, for example, in the case of the witness Grant, and the endeavor to materialize the mythical "Spanish woman"; and for other instances, see his own testimony and that of his son, and the testimony throughout.

In the infrequent intervals afforded by the other occupations of this department, and in the face of interruptions necessarily suffered by and in the discharge of other duties, I have endeavored to make a careful examination and collation of the legal principles applicable to the issues in this case, and a fair statement of the facts adduced in evidence. If there is any omission to comment upon any particular statements of witnesses, it is because I have attached more importance to what I have set down than to what I have passed by lightly or omitted to enlarge upon; but upon the whole case, as presented, I do not see how the conclusions can be escaped: (1) That at the time of making this will the testatrix was laboring under an insane delusion, and that this will was the product of that delusion; and (2)

that she was unduly influenced to make this will in favor of the proponent, Junius L. Hatch, and that, consequently, the instrument here propounded should be and it is refused admission to probate. Let judgment be entered accordingly.

"**An Insane Delusion** is the spontaneous production of a diseased mind, leading to the belief in the existence of something which either does not exist or does not exist in the manner believed—a belief which a rational mind would not entertain, yet which is so firmly fixed that neither argument nor evidence can convince to the contrary": Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Potter v. Jones, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161; note to People v. Hubert, 63 Am. St. Rep. 30, on insane delusions. A delusion which will destroy testamentary capacity must spring up spontaneously in the mind, without extrinsic evidence of any kind to support it. If it has any foundation in fact, if it has any evidence, however slight, as its basis, it is not an insane delusion. One cannot be said to be under such a delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from the facts which are shown to exist: Estate of Scott, 128 Cal. 57, 60 Pac. 527; In re Cline's Will, 24 Or. 175, 41 Am. St. Rep. 851, 33 Pac. 542; Skinner v. Lewis, 40 Or. 571, 67 Pac. 951, 62 Pac. 523. Moreover, the belief must be real, not simulated; and it must be persistent, not a "fleeting vagary" or a temporary hallucination: Estate of Redfield, 116 Cal. 637, 48 Pac. 794; Estate of Caleb, 139 Cal. 673, 73 Pac. 539. And furthermore, a delusion, to be fatal to the validity of a will, must be operative in the testamentary act: Estate of Redfield, 116 Cal. 637, 48 Pac. 794; Estate of Dolbeer, 149 Cal. 227, 86 Pac. 695. It is not enough that a delusion may exist; its connection with the will must be made manifest, and shown to have influenced its provisions: Potter v. Jones, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161.

"In ordinary language, a person is said to be under delusion who entertains a false belief or opinion which he has been led to form by reason of some deception or fraud, but it is not every false or unfounded opinion which is in legal phraseology a delusion, nor is every delusion an insane delusion. If the belief or opinion has no basis in reason or probability, and is without any evidence in its support, but exists without any process of reasoning, or is the spontaneous offspring of a perverted imagination, and it is adhered to against all evidence and argument, the delusion may be truly called insane; but if there is any evidence, however slight or inconclusive, which might have a tendency to create the belief, such belief is not a delusion. One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however

irrational or unfounded, drawn from facts which are shown to exist'': Estate of Scott, 128 Cal. 57, 60 Pac. 527.

The Undue Influence Which Invalidates a Will must be such as relates to the will itself, and operates upon the testator at the time of his making the will: Estate of Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 191; Estate of Flint, 100 Cal. 391, 34 Pac. 863; Estate of Shell, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413, 53 L. R. A. 387; Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295; Estate of Holman, 42 Or. 345, 70 Pac. 908. General influence, not directly brought to bear upon the testamentary act, though strong and controlling, is not enough: Estate of McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Black, 132 Cal. 392, 64 Pac. 695; Estate of Donovan, 140 Cal. 390, 73 Pac. 1081; In re Darst's Will, 34 Or. 58, 54 Pac. 947. The influence must be used directly to procure the will, and must amount to coercion destroying the free agency of the testator at the time of the execution of the instrument: Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Keegan, 139 Cal. 123, 72 Pac. 828; Goodwin v. Goodwin, 59 Cal. 561; Hurley v. O'Brien, 34 Or. 58, 54 Pac. 947; Estate of Holman, 42 Or. 345, 70 Pac. 908; Waddington v. Busby, 45 N. J. Eq. 173, 14 Am. St. Rep. 706, 16 Atl. 690.

When a Will is Contested on the Ground of Undue Influence, the burden of proof is generally on the contestant: Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; Dausman v. Rankin, 189 Mo. 677, 107 Am. St. Rep. 391, 88 S. W. 696; note to Richmond's Appeal, 21 Am. St. Rep. 94-104. See, however, Estate of Holman, 42 Or. 345, 70 Pac. 908. Such influence cannot be inferred merely from opportunity and motive: Herwick v. Langford, 108 Cal. 608, 41 Pac. 701; Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Black, 132 Cal. 392, 64 Pac. 695; Estate of Donovan, 140 Cal. 390, 73 Pac. 1081; Estate of Shell, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413, 53 L. R. A. 387; Hubbard v. Hubbard, 7 Or. 42. But while undue influence is not presumed, still, like fraud, it rarely is susceptible of proof by direct and positive evidence. Hence it is that courts are liberal in allowing a wide range of investigation, and permitting the introduction in evidence of all facts and circumstances, even though of slight significance in themselves, which tend to throw light upon the issue: Clough v. Clough, 10 Colo. App. 433, 51 Pac. 513; Blackman v. Edsall, 17 Colo. App. 429, 68 Pac. 790; Estate of Shell, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413, 53 L. R. A. 387; Dausman v. Rankin, 189 Mo. 677, 107 Am. St. Rep. 391, 88 S. W. 696. However, although circumstantial evidence may be sufficient, it must amount to proof; and it has the force of proof only when circumstances are proved which are inconsistent with the claim that the will was the spontaneous act of the testator: Estate of McDevitt,

95 Cal. 17, 30 Pac. 101; Estate of Calkins, 112 Cal. 296, 44 Pac. 577.

"The question of undue influence is one of peculiar character; it does not arise until after the death of the one who alone fully knows the influences which have produced the instrument; it does not touch the outward act, the form of the instrument, the signature, the acknowledgment; it enters the shadowy land of the mind in search of its condition and processes. . . . This opens a broad field of inquiry and gives to such a contest over a will a wider scope of investigation than exists in ordinary litigation": Mooney v. Olsen, 22 Kan. 69, approved in Estate of Miller (Utah), 88 Pac. 338. For cases considering the sufficiency of the evidence to establish undue influence, see Estate of Welch, 6 Cal. App. 44, 91 Pac. 336; Estate of Carriger, 104 Cal. 81, 37 Pac. 785; Estate of Silvany, 127 Cal. 226, 59 Pac. 571; Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Estate of Tibbetts, 137 Cal. 123, 69 Pac. 978; Estate of Calef, 139 Cal. 676, 73 Pac. 539; Estate of Morey, 147 Cal. 495, 82 Pac. 57; Ames v. Ames, 40 Or. 495, 67 Pac. 737; Estate of Abel (Nev.), 93 Pac. 227.

ESTATE OF ELIZABETH D. TRAYLOR, DECEASED (No. 2).

[No. 4,705; decided April 18, 1887.]

Will.—A Bequest of "Ornaments" is in this case construed to embrace jewelry and "jewels in general."

Will.—A Bequest of "Her Wardrobe" by the testatrix is held in this case not to include her "ornaments."

J. F. Swift, for executors.

Wm. Thomas, for Louise E. Matthews, legatee.

Selden S. Wright, for certain absent devisees and legatees.

D. Wm. Douthitt, for heirs at law.

J. C. Bates, of counsel with Douthitt, for heirs.

COFFEY, J. Elizabeth D. Traylor died, leaving a will, duly admitted to probate in this court, November 10, 1885, in which (inter alia) she made a bequest in terms as follows:

"To my niece, Louise E. Matthews, of this city, I give ten thousand dollars, my piano, sewing machine, finger rings (save the diamond ring I habitually wear), and so many of

my books, pictures and ornaments (not otherwise bequeathed specifically) as she shall choose to take. I also charge my executors, hereinafter named, to purchase, or otherwise provide for said Louise E. Matthews, a house, such as in their judgment shall best befit her condition in life, and to permit her to furnish the same from the furniture of my home."

In a codicil admitted to probate at the same time, she provides that:

"Mrs. Margaret A. Wilson shall have so much and so many articles of my wardrobe as she shall care to take."

The question presented is, What passes to the legatees under the terms "ornaments" and "wardrobe"?

1. What are "ornaments"?

"The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained": Civ. Code, sec. 1324.

"In case of uncertainty arising upon the face of a will, ... the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of oral declarations": Civ. Code, sec. 1318.

We must, in such case, take the will, holding it "by the four corners," and read it in the light of the circumstances surrounding its execution.

The word "ornaments" is of Latin derivation, and, going to the source for a definition, we find in Andrews' Latin-English Lexicon:

"ORNAMENTUM, *n.* (1) Apparatus, accoutrement, equipment, furniture, trappings, etc.; *ceterae copiae, ornamenta, praesidia,* Cic. Cat. 2, 11, etc. (2) An ornamental equipment, ornament, decoration, embellishment, *jewel,* trinket; *pecuniam, omniaque ornamenta ex fano herculis in oppidum cartulit,* JEWELS, Caes. B. C. 2, 18; *quae (urbs, praesidio et ornamento est civitati,* Caes. B. C. 7, 15; *ipse ornamenta a chorago haec sumpsit, i. e.,* a dress, costume, Plant, Trin. 4, 2, 16, etc.; *ornamenta triumphalia consularia,* the insignia of triumphing generals, etc."

Worcester defines:

"ORNAMENT. (1) Embellishment; decoration; that which adorns or beautifies.

"*Illustration*: I hold every man a debtor to his profession, from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and *ornament* thereunto. —*Bacon.*

"(2) [Fine Arts.] Any accessory part of a work which has the merit of adding to its beauty or effect.

"*Illustration*: Pedestals, pediments, draperies, fringes, garlands, vases, cameos, utensils of elegant and picturesque form, are the usual subject of ornament in painting. —*Fairholt.*"

Webster's definition is:

"That which embellishes; that which adds grace or beauty; embellishment; decoration.

"The ornament of a meek and quiet spirit, which is in the sight of God of great price. —*1 Peter, iii, 4.*

"Is it for that such outward *ornament*
Was lavished on their sex? —*Milton.*

"ORNAMENTAL, *a.* [Lat. as if *ornamentalis* from *ornamentum.*] Serving to ornament; giving additional beauty; embellishing.

"Some think it most *ornamental* to wear their bracelets on their wrists; others about their ankles. —*Browne.*"

There are many terms of frequent occurrence in legacies, in regard to which there have been almost an indefinite number of decisions; but cases generally depend so much upon their peculiar circumstances, and the accompanying context, that one can afford very slight aid toward the determination of another not precisely similar. Thus, the word "jewels" is often brought under discussion, as in Attorney General v. Harley, 5 Russ. 173, where the testatrix directed all her jewels to be sold, except certain rings, and her necklaces of every description, pearls, garnets, carnelians and watches, which she gave specifically; and it was held that a diamond necklace and cross came under the direction for

sale, and the pearl necklace passed under the specific bequest: 2 Redfield on Wills, *123, *124, sec. 13.

Webster defines:

"JEWEL, *n.* 1. An ornament of dress in which the precious stones form a principal part.

"Plate of rare device,
And *jewels* of rich and exquisite form. —*Shakespeare.*

"Sweet are the uses of adversity,
Which, like the toad, ugly and venomous,
Wears yet a precious *jewel* in his head. —*Ibidem.*

"2. A precious stone; a gem."

From a careful study of the will and codicil, and from an elaborate examination of the authorities cited by counsel, I have come to the conclusion that the contention of the attorney for the heirs at law (that the word "ornaments" in the bequest "does not apply to jewelry," and is not used in that sense) is not sustainable; and that, applying the canons of construction to this instrument, the court must, and it does, conclude that jewelry, "jewels in general," are within the meaning of the clause "ornament (not otherwise bequeathed specifically) as she shall choose to take."

2. The second point presented for construction is: What is included in the word "wardrobe," in the bequest to Mrs. Margaret A. Wilson?

Counsel for this legatee argues strenuously that "wardrobe" is a general term and includes "ornaments." Among the authorities relied upon by the ingenious and able counsel was Thomas Carlyle, not generally recognized in controversies of this character, but entitled to respect for his skill and exactitude in the use of words. The counsel cited Carlyle's Sartor Resartus, and I find on pages 25-27 (of the People's Edition, London, Chapman & Hall, see in the [San Francisco] Law Library) reference to Herr Teufelsdroch's dissertation on "Clothes," beginning with the remark:

"The first purpose of clothes was not warmth or decency, but *ornament.*"

Webster defines wardrobe to be:

"1. A room or apartment where clothes are kept, or wearing apparel is stored; a portable closet for hanging up clothes.

"2. Wearing apparel in general; articles of dress or decoration."

In Gooch v. Gooch, 33 Me. 535, it was decided that a watch, which the testator had been in the habit of carrying with his person, did not pass by a bequest of his wearing apparel. We see that, according to Webster, "wardrobe" is "wearing apparel in general," so that the Maine case is in point. As the reasoning of the court in Gooch v. Gooch is applicable, we shall appropriate it to the present purpose. The judge, in delivering his decision, said that if the watch belonged to the plaintiff it must have been given by being included in the words "wearing apparel." It appears that the testator purchased the watch a few years before his death, and generally used it by carrying it upon his person. Words used in wills are to be taken in their common and ordinary sense. The ordinary meaning of wearing apparel is vesture, garments, dress; that which is worn by or appropriated to the person. Ornaments may be so connected and used with the wearing apparel as to belong to it. There are implements, such as pencils and penknives, carried about the person but not connected with the wearing apparel. These are not to be considered as clothing. To which class does a watch belong? It may not properly be called an implement, for it is used merely to look at. Neither is it used as clothing or vesture (wearing apparel or "wardrobe"). The judge deduced the conclusion that the watch did not pass under the phrase "wearing apparel."

If the context of the will of Mrs. Traylor did not show clearly that she intended a limitation or restriction of her bequest to articles of bodily vesture, the authorities cited would render the conclusion inevitable, but the terms of the will, in this instance at least, are plain enough to exclude "ornaments" from the bequest of the "wardrobe."

The Principal Case was Affirmed by the supreme court in 75 Cal. 189, 16 Pac. 774.

ESTATE OF CHARLES McLAUGHLIN, DECEASED (NO. 2).

[No. 3,061; decided April 5, 1887.]

Probate Court—Jurisdiction.—The Superior Court, sitting in probate, cannot exercise other than purely probate jurisdiction; its jurisdiction, as succeeding the powers of the former probate court, is not enlarged.

Revocation of Probate Because Obtained by Fraud.—The superior court, sitting in probate, has no jurisdiction to revoke the probate of a will because procured by fraud or artifice; the remedy of the party aggrieved is by independent suit in equity.

Charles McLaughlin died in San Francisco, on December 13, 1883, leaving a will, bearing date February 8, 1866, with a codicil executed December 22, 1869.

The operative portions of the will and codicil made Kate D. McLaughlin, wife of the testator, his sole devisee, legatee and executrix.

The heirs of the decedent were his widow, above named; a brother, named Michael McLaughlin; a niece, named Mary Grace McLaughlin, and two sisters, named respectively Ellen J. Hogan and Arabella Hinkle.

On January 9, 1884, the will was filed, together with a petition for its probate and the appointment of Mrs. Kate D. McLaughlin as executrix. Within due time, the above-named heirs (with the exception of the widow, the petitioner) filed written grounds of opposition to the will and codicil, and to their probate, contesting the same.

Thereafter, and before the sixteenth day of June, 1884, the opposition on the part of said heirs, was withdrawn by them, and their contest dismissed; and on the last-named day the will and codicil were admitted to probate, and the petitioning widow appointed executrix.

On June 15, 1885, two of the heirs, Arabella Hinkle and Ellen J. Hogan filed a petition for the revocation of the probate.

On March 16, 1886, the executrix filed her answer thereto, and on September 18, 1886, the matter came on for hearing.

It was continued from time to time until October 6, 1886, when the executrix moved for judgment on the pleadings. This motion was met by a counter-motion on the part of the contesting heirs, for leave to file an amended petition. The latter motion was granted and the former denied, and on said day the amended petition was filed.

On October 26, 1886, the executrix filed her notice of motion to strike out certain portions of the amended petition, specified in the opinion of the court below. The motion was thereafter argued and submitted to the court, and granted on April 6. 1887.

The matter sought to be stricken out, and stricken out—was in substance to the following effect:

It was alleged that the contestants and the other heirs (excepting the widow) had filed their contest to the will and codicil, and to their probate, in due time, as hereinabove stated.

That the executrix filed her answer to the contest, and a trial by jury had been demanded, and the widow had been appointed special administratrix until the petition for probate should be determined.

That certain real estate, of the value of about $200,000, owned by the decedent, was, at the time of his death, held in secret trust by Tully R. Wise, his attorney and the attorney for the executrix; and that at said time certain personal property of the decedent, of the value of about $800,000, was held in trust by his widow, and that this personal property, as also all books of account, stocks, bonds, etc., of the decedent, passed into the possession of the widow at the time of decedent's death, and remained in her exclusive control until the filing of the inventory on May 11, 1885.

That the petition for probate alleged the value of the estate to be $1,000,000, while the widow knew it to be of far greater value; and that she has continuously and persistently concealed its true value from the contestants and the court, and that contestants have had no knowledge or means of knowledge as to its value, except such as the executrix furnished them.

That while the contest was pending, the executrix made overtures to contestants and set on foot negotiations to purchase and secure their rights and interests in the estate, as the heirs of deceased.

That while such negotiations were pending, and for the purpose of acquiring accurate information as to the value of the estate, so as to make a just and intelligible sale of their interests, contestants requested the executrix to furnish them with a statement in writing of the assets and liabilities of the estate.

That she furnished them a statement showing the value of the estate, over its liabilities, to be about $240,000, a copy of which is attached to the amended petition and made part thereof, marked Exhibit "A."

That the executrix represented this to be a true and correct exhibit of the actual condition of the estate, and that she further caused it to be represented to contestants that the estate is not large, and is involved in litigation, and that the litigation would consume nearly the whole estate, and in the end it would be worth little or nothing, and that $23,000 was the fair and reasonable value of the interest of each of the contestants as such heirs.

That the contestant, Ellen J. Hogan, at that time resided in Illinois and was never in California, and was sixty-three years of age; had no business experience, and was ignorant and illiterate, being unable to read or write, and that contestants were wholly unacquainted with the character or value or extent of the estate.

That they relied upon the information given them by the executrix, and so relying and supposing that she had made a full and perfect disclosure of the property of the estate, and had concealed nothing, and induced thereto by her statements and representations, contestants consented to sell the whole of their interest in the estate to the widow for $23,000 each, and to withdraw and dismiss their contests to the probate of the will and that without reliance upon such statements they would not have done so; and that accordingly they executed a conveyance of their interests and dismissed their contests.

That thereafter, the executrix returned her inventory, and procured the court, by some means, to appoint as two of the appraisers two persons who were in her employ.

That on the eleventh day of May, 1885, the inventory and appraisement was filed; that the estate was appraised at $2,476,162.72 by said appraisers.

That the newspapers of this city and county published the appraised value of the estate, and therefrom contestants for the first time learned that the estate was worth more than $2,000,000 over and above what the executrix had represented its value to be.

That upon examination of the inventory, contestants learned for the first time of the large and valuable portions of the estate held in trust by said Tully R. Wise and by said widow, and that said two appraisers were her employees.

That the inventory does not contain all the property of the estate, and the appraisement is far below its actual value, and that its real value is upward of $4,000,000.

The last paragraph sought to be stricken out concludes: "By reason of the foregoing facts, it is manifest that the foregoing conveyances from these petitioners to Kate D. McLaughlin, wherein and whereby they conveyed to said Kate D. McLaughlin their interests in the estate of said Charles McLaughlin, were all procured by the fraud, imposition and deceit of said Kate D. McLaughlin, and that by reason thereof said conveyances are, as to these petitioners, in equity, null and void."

S. M. Wilson, L. D. McKisick, for motion.

D. M. Delmas, J. B. Mhoon and Flournoy & Mhoon, contra.

COFFEY, J. This is a motion to strike out certain portions of the amended petition of Arabella Hinkle and Ellen J. Hogan to revoke the probate of the will of Charles McLaughlin, deceased. The parts of the petition which it is proposed to strike out are all of paragraphs 6, 7, 8, 9, except lines 20 to 27 inclusive, on the seventh page of the petition, and all of paragraphs 10 and 11, also all of the paper

marked Exhibit "A," and annexed to said amended petition and made a part thereof.

If this motion should prevail, the petition will then contain allegations (1) of the time and place of the death of Charles McLaughlin; (2) of his residence at the time of his death; (3) the persons interested in his estate; (4) the value of the property left by him; (5) the filing of the paper purporting to be a will with codicil, and of a petition for the probate thereof, and for the appointmnet of the proponent as executrix; (6) the admission of said paper to probate, and the appointment of the proponent as executrix, her qualification as such executrix, and that she continues acting as such executrix; (7) allegations (paragraph 12 of amended petition) that said will so probated was not executed, attested and published as required by law; that it was not an olographic will, and was not subscribed at the end thereof by said McLaughlin in the presence of both the attesting witnesses thereto; that the signature of the said McLaughlin was not acknowledged to said witnesses to have been made by him or by his authority; that the attesting witnesses did not sign their names at the end of said paper at the request of said McLaughlin, or in his presence, or in the presence of each other, or at all; that said will is not the last will of said Charles McLaughlin; that said will was by him in his lifetime revoked; that said will was by said McLaughlin, in his lifetime, torn, canceled, obliterated and destroyed, with the intent and for the purpose of revoking the same; that said will was never published by said McLaughlin as his will; that said will so filed for probate on the 9th of January, 1884, is not the last will of said McLaughlin; but that he, many years subsequent to the date of said paper, to wit, on the 12th of October, 1878, made, executed and published another and different will, whereby the said McLaughlin revoked and annulled the said paper presented and filed on the 9th of January, 1884, by said Kate D. McLaughlin.

The grounds of the motion are that each of the first above enumerated portions of the amended petition are irrelevant and redundant within the meaning of section 453 of the Code of Civil Procedure of the state of California;

and on the further ground, that said portions of said amended petition are wholly immaterial and irrelevant to the proceedings provided for in sections 1327 and 1328 of the Code of Civil Procedure of this state, and contrary to the same, and are not matters of probate, or within the jurisdiction of this court sitting as a court of probate.

Section 1327, Code of Civil Procedure, reads: "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing containing his allegations against the validity of the will, or against the sufficiency of the proof, and praying that the probate may be revoked."

For the purpose of such application he need only put in issue (1) the competency of the decedent to make a last will and testament; (2) the freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence; (3) the due execution and attestation of the will by the decedent, or subscribing witnesses; (4) any other question substantially affecting the validity of the will.

This court sitting in probate may consider only the will and the sufficiency of the proofs upon its probate. It cannot exercise other than purely probate jurisdiction. If the judgment or order was obtained by the employment of frauds or artifices such as would justify a court of equity in annulling it, the remedy of the party aggrieved is by independent action in equity. The matter has passed beyond the jurisdiction of the superior court as a court of probate: Dean v. Superior Court, 63 Cal. 477.

The jurisdiction of the superior court, as succeeding to the powers of the probate court, is not enlarged. In such cases courts of equity have jurisdiction to afford proper relief; and, if it be true that the probate court was imposed upon, and induced to make a decree which it would not otherwise have done, resort must be had to a court of equity for relief: Estate of Hudson, 63 Cal. 454.

This is a statutory proceeding for a specific purpose; it has its scope and limitations, and can go no further. The

jurisdiction of the probate judge, relating to revocation of probate, is wholly statutory. In exercising the power, he can in no way alter or disregard the provisions of the statute: Pryer v. Clapp, 1 Dem. (N. Y.) 390.

It follows, therefore, that all the parts of the petition assailed by this motion should be struck out as not within the jurisdiction of this court sitting in probate. Motion granted.

The Conclusiveness of the Probate of a Will, when attacked on the ground of fraud, is a question that recently has been before the supreme court of California in Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711; Tracy v. Muir, 151 Cal. 363, 121 Am. St. Rep. 117, 90 Pac. 832.

RELIEF IN EQUITY FROM THE ORDERS AND DECREES OF PROBATE COURTS.

The Power of Courts of Equity to Grant Relief from the orders and decrees of probate courts, in case of fraud or other ground of equitable jurisdiction, has often been recognized, so that it may safely be affirmed that the orders and decrees of courts of probate may, as a rule, be relieved from by independent suits in equity under the same circumstances, to the same extent, and subject to the same limitations as relief may be had from other judicial determinations: Shegogg v. Perkins, 34 Ark. 117; Silva v. Santos, 138 Cal. 536, 94 Am. St. Rep. 45, 71 Pac. 703; Gafford v. Dickinson, 37 Kan. 287, 15 Pac. 175; Grady v. Hughes, 80 Mich. 184, 44 N. W. 1050; Searles v. Scott, 14 Smedes & M. 94; Foute v. McDonald, 27 Miss. 610; Froebrich v. Lane, 45 Or. 634, 106 Am. St. Rep. 634, 76 Pac. 351. Thus equity has jurisdiction to set aside orders in probate procured by the fraudulent suppression of the decedent's will: Ewing v. Lamphere, 147 Mich. 659, 118 Am. St. Rep. 563, 111 N. W. 187.

Decrees Settling Accounts.—The most familiar application of the rule just stated relates to orders and decrees settling the accounts of administrators, executors, and guardians, and of trustees performing analogous duties. These settlements, when once made and approved by courts of competent jurisdiction, have the force of res judicata both at law and in equity, and will not be vacated or annulled by courts of equity, except upon the establishment of some well-recognized ground for equitable relief: Alexander v. Alexander, 70 Ala. 357. The temptation to fraud is, however, not less in these cases than in others coming before courts, and the opportunity for exercising it is much greater than in litigation where all of the parties are generally well informed both respecting the facts of the controversy and the legal rights attending them, and furthermore, are rep-

resented by counsel attentive in safeguarding their interests. So, though there is no fraud, there may be accident or mistake such as authorize the granting of relief from other judicial determinations. "The courts of chancery have no power to take such cases out of probate courts, for the purpose of proceeding with the administration. But their powers and functions to relieve against fraud, accident, mistake, or impending irremediable mischief is universal, extending over suitors in all of the courts and over the decrees in those courts obtained by fraud, or rendered under circumstances which render it inequitable that they should be enforced. Hence, any fraud in the settlements of administrators or executors may be corrected": Reinhardt v. Gartrell, 33 Ark. 727; Shegogg v. Perkins, 34 Ark. 117; Jones v. Graham, 36 Ark. 383; Green v. Creighton, 10 Smedes & M. 159, 48 Am. Dec. 742; Oldham v. Trimble, 15 Mo. 225; Dingle v. Pollick, 49 Mo. App. 479; Froebrich v. Lane, 45 Or. 13, 106 Am. St. Rep. 634, 76 Pac. 351; Bertha Z. & M. Co. v. Vaughan, 88 Fed. 566. If trustees under a will, with intent to defraud the person benefited, present a false account and secure its settlement by the court, they are guilty of fraud upon the court extrinsic to the case, as well as upon the beneficiary, and if he has no knowledge of the fraud until after the expiration of the time for moving to vacate the order of settlement or for appealing therefrom, he may maintain a suit in equity to compel the trustees to pay the amount of which he has been defrauded by the settlement: Aldrich v. Barton, 138 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169. The same principles apply to a decree settling the account of the guardian of an infant or incompetent person, who, through fraud or mistake has failed to account for the funds or assets of his ward: Nelson v. Cowling, 77 Ark. 351, 113 Am. St. Rep. 155, 91 S. W. 773; Willis v. Rice, 141 Ala. 168, 109 Am. St. Rep. 26, 37 South. 507; Silva v. Santos, 138 Cal. 536, 94 Am. St. Rep. 45, 71 Pac. 703; Anderson v. Anderson, 178 Ill. 160, 52 N. E. 1038; Neylans v. Burge, 14 Smedes & M. 201. This rule is not abrogated by statutes purporting to make decrees and orders of courts of probate conclusive. Such statutes merely place the determination of those courts on the same footing as the determinations of other judicial tribunals without interfering with the power of equity, in proper cases, to relieve from them: Black v. Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423.

In some of the states statutes have been enacted under which the authority of equity is clearly expressed and which remove any doubts that otherwise might exist upon this subject. Thus, in Iowa, a section of the code provides that mistakes in the final settlement of accounts may be corrected after the settlement "by equitable proceedings and showing such grounds as would justify the interference of the court": Tucker v. Stewart, 113 Iowa, 449, 86 N. W. 371. These statutes authorize relief to be granted against an order settling an account, and so does a statute authorizing judgments to be va-

cated for fraud practiced by the successful parties in obtaining them: Roll v. Stum, 20 Ky. Law Rep. 661, 46 S. W. 223. But these statutes are not essential to the jurisdiction of the court. Thus, where, as in California, in which state no special statute existed upon the subject and where its courts of probate were of exclusive jurisdiction, a bill was filed to compel an accounting for certain property, notwithstanding its omission from the accounts of an administrator, which had been settled by the court. The supreme court of the United States, reversing the judgment of the trial court, said: "It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such cases, open its decrees and administer upon the property omitted. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity": Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934.

Orders Directing the Sale of the Property of a decedent or incompetent, and confirming such sales when made, are, not less than those of other judicial tribunals, subject to attack in courts of equity, not, indeed, for the purpose of showing them to be erroneus or irregular, but of proving that they were obtained under such circumstances that relief ought to be granted against them to the extent of setting aside the sales, or requiring persons acquiring title under them to hold it as trustees, or to otherwise so act that equity shall not be offended: Van Horn v. Ford, 16 Iowa, 578; Grant v. Lloyd, 12 Smedes & M. 191; Hull v. Voorhis, 45 Mo. 555; Lander v. Abrahamson, 34 Neb. 553, 52 N. W. 571. Where suit was commenced by creditors of a decedent to set aside for fraud a sale of his property authorized and confirmed by a probate court of Louisiana, the supreme court of the United States said: "The administration of General Morgan's succession undoubtedly belonged to the probate court of the parish of Carroll, and, in a general sense, it is true that the decisions of that court in the matter of the succession are conclusive and binding, especially upon those who were parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud, whether committed in pais or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors in proceedings in another court; but it

will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it'': Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619, 27 L. Ed. 547.

Decrees of Distribution.—In many of the states, courts whose orders and decrees we are here considering are authorized and required, after the settlement of the estate of a decedent, to make, a decree distributing the property remaining undisposed of among the heirs, devisees, and other parties entitled thereto, and the statutes conferring this authority impart conclusive effect to the action of the court, to the end that thereafter there shall be no question remaining respecting the persons entitled to such property. As in every other judicial proceeding, fraud may be employed, mistakes may occur, or accidents may prevent the due presentation of the claims of the persons entitled, and an adjudication may result which equity will not allow to be enforced. It may declare that the person in whose favor a decree of distribution is, or his successor in title with notice, holds the property in trust for an heir or other person to whom it should have been distributed (Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; Maney v. Casserly, 134 Mich. 252, 96 N. W. 478), or in some jurisdictions the decree of distribution may be set aside so far as inequitable: Benson v. Anderson, 10 Utah, 135, 37 Pac. 256; Beem v. Kimberly, 72 Wis. 343, 39 N. W. 542.

Orders Granting Probate of Wills and Letters of Administration.—There is no doubt that courts of equity have always disclaimed jurisdiction over the probate of wills and have refused to cancel or set aside such probate, though assailed on the ground that the wills in question were forgeries, and their admission to probate had been procured by fraud and perjury: Watson v. Bothwell, 11 Ala. 650; Ewell v. Tidwell, 20 Ark. 136; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814; Sharp v. Sharp, 213 Ill. 332, 72 N. E. 1058; Hughey v. Sidwell's Heirs, 18 B. Mon. 259; Lyne v. Marcus, 1 Mo. 410, 13 Am. Dec. 509; Graland v. Smith, 127 Mo. 583, 28 S. W. 195, 29 S. W. 836; Loosemore v. Smith, 12 Neb. 343, 11 N. W. 493; Post v. Mason, 91 N. Y. 539, 43 Am. Rep. 689; McDowall v. Peyton, 2 Desaus. 313; Archer v. Meadows, 33 Wis. 166; Traver v. Traver, 9 Pet. 174, 9 L. Ed. 91; Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006; In re Broderick's Will, 21 Wall. 504, 22 L. Ed. 599; Allen v. McPherson, 1 H. L. Cas. 191; Kerrick v. Bransby, 1 Brown P. C. 588; and the same rule has been applied to grants of letters of administration: Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054.

Such proceedings as will contests cannot be inaugurated in courts of equity; the jurisdiction of probate courts is exclusive in such

matters: Curtis v. Schell, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951; Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; Froebrich v. Lane, 45 Or. 13, 106 Am. St. Rep. 634, 76 Pac. 351; Benson v. Anderson, 10 Utah, 135, 37 Pac. 256; Carrau v. O'Calligan, 125 Fed. 657, 60 C. C. A. 347.

There is doubtless much in the opinions in these cases from which the inference might be supported that, under no circumstances, can any relief be had in equity from an order admitting a will to probate. It must be remembered, however, that every ground upon which relief in equity might be urged is also available in the probate court in opposition to the probate of a will, and that in most, if not all, of the states a considerable period of time is allowed after such probate in which applications for its revocation may be made. In nearly, if not in all, of the cases cited, the persons seeking relief were guilty of laches in long delaying their application for such relief, or in failing without adequate excuse in the court having jurisdiction of the probate of the will to take advantage of the remedies there available to them. Hence, we think none of these cases warrants the broad proposition that in no event can relief in equity be obtained against the probate of a will. Of course, it may be conceded that, unless specially authorized by statutes, a court of equity cannot directly cancel or set aside such probate. This, however, is by no means conclusive of the question. It was, and perhaps still is, the rule that a court of equity could not and would not attempt to set aside a judgment at law. This, however did not prevent it from granting effective relief in personam. Relief of this character would, doubtless, in many instances practically annul the probate of a will, or, at least, prevent its inequitable operation. The right to proceed in equity against the probate of wills has been given by various American statutes which we shall not here undertake to summarize: Sharp v. Sharo, 213 Ill. 332, 72 N. E. 1058; Bartlett v. Manor, 146 Ind. 621, 45 N. E. 1060; Pryer v. Howe, 40 Hun, 383; Ocobock v. Eells, 37 N. Y. App. Div. 114, 55 N. Y. Supp. 1118; Dillard v. Dillard, 78 Va. 208; Couch v. Eastham, 27 W. Va. 796, 55 Am. Rep. 346. Where, upon the trial of an issue devisavit vel non, a will was set aside, it was held that relief might be granted in equity and the probate of a will reinstated upon proof of fraudulent combinations between the proponents and the contestants: Smith v. Harrison, 2 Heisk. 230.

The question remains whether, though the probate of a will cannot be set aside in equity, some other adequate relief may not be there obtained, as by declaring the party receiving the benefit of the will to be a trustee holding in trust for those who have been defrauded by its probate. That this may be accomplished has been intimated in certain English and American cases: Barnesly v. Powell, 1 Ves. Sr. 284; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98,

67 Pac. 282; and necessarily determined in Smith v. Boyd, 127 Mich. 417, 86 N. W. 953. The bill in this case was to set aside certain codicils to a will on the ground of fraud, and for an accounting. A demurrer to the complaint was overruled, and the defendants appealed. The bill stated that the complainant was a grandchild of W. M., deceased, and that the defendants were his children and grandchildren, and they, with the complainant, constituted his heirs at law; that complainant's mother died when he was about eight months old, and that at the age of seven he went to live with his grandfather, with whom he remained until the death of the latter; that the grandfather, when complainant was five years of age, made a will, and that several years later, and when the grandfather was in feeble health and of unsound mind, he was, by undue influence, fraud, and deceit, induced to change his will to the prejudice of the complainant; that in July, 1889, the grandfather died, and the will and codicils were admitted to probate on the petition of one of the defendants; that the complainant had no general guardian; that his father was absent from the state; that no guardian ad litem was appointed, and that complainant had no knowledge of the proceedings in the probate court. The defendants, in support of their demurrer, insisted that the proceeding in the probate court was substantially in rem, and that the remedy was by appeal. The supreme court affirmed the judgment overruling the demurrer to the bill apparently on the ground that the complainant was without any remedy in the probate court, and that his case was to be treated substantially as if it were one to set aside the settlement of an account in the probate court when obtained by fraud. So far as the opinion of the court shows, there was no consideration by it of the English and American authorities with which its conclusions seemed to conflict.

The Limitations upon the Right to Obtain Relief in Equity from orders and decrees of probate courts and other tribunals exercising a like jurisdiction is the same as when relief is sought from judgments at law. Equity will not assert a mere revisory jurisdiction by attempting to correct or relieve from mere errors or irregularities, there being otherwise no sufficient ground for the interposition of equity: Seals v. Weldon, 121 Ala. 319, 25 South. 1021; Greely Burnham G. Co. v. Graves, 43 Ark. 171; Daly v. Pennie, 86 Cal. 552, 21 Am. St. Rep. 61, 25 Pac. 67; Ratliff v. Magee, 165 Mo. 461, 65 S. W. 713; Froebrich v. Lane, 45 Or. 13, 106 Am. St. Rep. 634, 76 Pac. 351; Gee v. Humphries, 28 S. C. 606, 5 S. E. 615; Central Nat. Bank v. Fitzgerald, 94 Fed. 16. Nor will it act where the complainant still has an adequate remedy in the courts having jurisdiction of the estate: Hankins v. Layne, 48 Ark. 544, 3 S. W. 821; Ladd v. Nystol, 63 Kan. 23, 64 Pac. 985; nor where he has been guilty of laches, either in not presenting his claims and not pursuing his remedy in that court, or in not seeking his remedy in equity within a

reasonable time after having notice of his rights and of the wrongs of which he complains. In other words, he must always aver and prove facts which excuse his not appearing and protecting his interests in the court of probate: Moore v. Lesueur, 33 Ala. 237; Lyne's Admr. v. Wann, 72 Ala. 43; Boswell v. Townsend, 57 Ala. 308; Tynan v. Kerns, 119 Cal. 447, 51 Pac. 693; Froebrich v. Lane, 45 Or. 15, 106 Am. St. Rep. 634, 76 Pac. 351; and where sufficient cause exists for resorting to equity, he must proceed with reasonable diligence; otherwise relief will be denied him because of his laches: Hankins v. Layne, 48 Ark. 544, 3 S. W. 821; Tucker v. Stewart (Iowa), 86 N. W. 371; Duryea v. Granger's Estate, 66 Mich. 593, 33 N. W. 730; Williams v. Petticrew, 62 Mo. 460; Slaughter v. Cannon, 94 N. C. 189; Handley v. Snodgrass, 9 Leigh, 484; Hays v. Freshwater, 47 W. Va. 217, 34 S. E. 831; Eames v. Manly, 54 C. C. A. 561, 117 Fed. 387. Furthermore, if fraud is relied upon, it must be extrinsic or collateral to the questions examined and determined in the adjudication complained of: Gruwell v. Seyboldt, 82 Cal. 10, 22 Pac. 938; In re Griffith, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282. The strict application of this rule must prevent the award of all relief in equity, for such relief is never granted, unless the adjudication complained of is unjust, and the only method by which its unjustness can be established is by re-examination of the issues involved. Thus, where an executor or administrator presents and obtains an allowance of his accounts, and relief in equity is sought therefrom, it must always be alleged and proved that the account as presented and allowed is unjust, as well as that there was some fraud, accident, or mistake to which the allowance was due, and yet all the cases cited in the second paragraph of this note show that, in a proper case, relief may be obtained, though it must necessarily involve a re-examination of the question. The same may truly be said where relief is sought and obtained from a decree of distribution or an order directing the sale of property of a minor or decedent.

In no part of the proceedings in probate is there more temptation to fraud or more opportunity to successfully employ it than in proceedings to set aside to the widow property to which she claims to be entitled, either because it was a homestead of the decedent selected by him in his lifetime, or ought to be selected as her homestead, because he had never made any selection. There are several cases denying relief from orders setting aside a homestead on the ground that the fraud complained of was not extrinsic, and that the court hence could not proceed without the re-examination of issues already tried and determined: Fealey v. Fealey, 104 Cal. 355, 43 Am. St. Rep. 111, 38 Pac. 49; Wickersham v. Comerford, 104 Cal. 494, 38 Pac. 101; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736. The case last cited is an extreme one, and, if carried to its logical

result, should prevent relief being granted in nearly, if not in all, cases where fraud is practiced in probate proceedings. The action was brought to set aside a decree in the administration of the estate of Patrick Hanley, deceased, by which certain property was set aside to his widow as a homestead; and the complaint, among other things, alleged that the premises were the separate property of the deceased, that his widow willfully, falsely, and fraudulently represented to the court, and testified, that they were community property; and also falsely represented to it that a certain declaration of homestead had been filed on the premises while she and her deceased husband were actually residing thereon; and it was further contended that the complainants had no notice of the proceeding to set aside the homestead. A demurrer to the complaint was sustained, on the ground that the proceeding, being in rem, all parties interested were bound by it without personal notice, and that the fraud alleged was not extrinsic or collateral to the matter which was tried and determined by the court. As the question was presented upon demurrer, there was no suggestion that the widow testified as she did through any mistake; on the contrary, the demurrer necessarily admitted that she acted willfully, fraudulently, and falsely. Proceedings of this character are ordinarily ex parte, and we do not think that the rule to which we refer should be applied to them where such is the case. As those who are adversely interested are not present in court and usually have no actual knowledge of the proceeding, it ought to be regarded as a fraud, entitling them to relief when one, taking advantage of their absence, willfully misrepresents facts to the court, though the facts so represented involve the merits and go to the very foundation of the proceedings. The case of Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282, though it does not profess to overrule any of the decisions referred to, seems to be necessarily in conflict with them, unless it can be said that the principles applicable to decrees of distribution differ from those applicable to orders setting apart homesteads. In the case last cited relief was obtained from a decree of distribution, on the ground that a widow conspired with her son, who was not the son of the decedent, to procure for him a share of the latter's property as one of his children, filed a petition naming him as such, and obtained a decree in accordance therewith. The court proceeded, however, partly upon the ground that the widow, being the executrix of the decedent, was the trustee of all the heirs and of other parties in interest, was the mother and natural guardian of such heirs, and was obligated to protect their legal rights and see that the legal claims to the estate were properly presented to the probate court.

ESTATE OF ANGELIA R. SCOTT, DECEASED.

[No. 19,473; decided August 29, 1898.]

Insanity of Testator—Evidence and Burden of Proof.—The legal presumption is in favor of the sanity of a testator, and the burden of proof is on the contestant of his will to demonstrate the contrary; and if the contestant prevails, in a case of doubt, it must be by a preponderance of proof, and the number, character and intelligence of witnesses, and their opportunity for observation, should be taken into account.

Witnesses—Credibility as Affected by Station in Life.—Persons employed in domestic service and other categories of honest labor are entitled, as witnesses, to credence equally with those who plume themselves on their higher level, affecting to look down on those who work for wages as inferior. Before the law there is no such distinction, and in courts of justice all must be co-ordinated, irrespective of the accidents of artificial and conventional social relations.

Witnesses—Manner of Testing Credibility.—Each witness is a man or woman to be treated as an individual, a moral unit, tested for integrity and veracity on his merits or her title to credit by the inherent and extrinsic elements of belief, or the circumstantial criteria of credibility. These are the only considerations for the court in weighing evidence.

Insane Delusions—Business Capacity.—Business capacity may coexist with monomania or insane delusions.

Insane Delusions—Vulgarity of Testatrix.—Where the vulgarity in behavior and speech of a testatrix is relied upon to establish the presence of insane delusions, her whole conduct, at home and aboard, should be considered, and not merely her conduct within her own house, the alleged acts of immodesty in this case being confined to the home premises of the testatrix, while her behavior abroad was not subject to adverse criticism.

Insane Delusions—Eccentricities not Suddenly Acquired.—Eccentric habits of speech, if not suddenly acquired, are not evidence of insanity.

Expert Evidence—Its Nature and Value.—Expert evidence is really an argument of the expert to the court, and is valuable only with regard to the proof of the facts and the validity of the reasons advanced for the conclusions.

Insane Delusions—Suspicions as to Husband's Constancy.—Where there was at least one instance in the conduct of a husband which might arouse in the mind of the wife a suspicion as to his constancy, the fact that her suspicions may have been unjust and her

inferences too general, is merely an error of logic, and not an evidence of insanity or of an insane delusion. She has a right to infer, however erroneously, or from inadequate premises, to a universal conclusion.

Insanity—Faulty Logic.—False logic or faulty ratiocination is far from the manifestation of insanity, so long as the process is formally correct, not incoherent or inconsequential.

Insane Delusions—Fear of Poisoning.—A fear of poisoning on the part of a testatrix, even though a delusion, must, in order to invalidate her testamentary act, be continuous, persistent, and operative upon her volitional capacity.

Insane Delusions—Fear of Poisoning.—The mistaken belief of a testatrix, when suffering with chronic stomach trouble, that her food has been tampered with, does not, as a matter of law, amount to an insane delusion.

Insanity—Unreasonable Suspicions.—Unfounded and unreasonable suspicions are not insanity.

Insanity—Insomnia.—The mind of a testatrix is not necessarily diseased because she is at times troubled with insomnia while afflicted with an intestinal ailment.

Insane Delusions—Unfounded Suspicions.—The sanity of the testatrix in this case being questioned because she suspected that her husband was unfaithful to her, and that he was attempting to poison her and to send her to an insane asylum, the court observed: There is a very large class of people whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who upon the most trivial, even whimsical, grounds wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons confessedly sane are to a greater or less degree afflicted with it, to justify us in saying that because the deceased was so afflicted she was insane, or the victim of an insane delusion.

Insane Delusions—Suspicions—Evidence and Burden of Proof.—The line between unfounded and unreasonable suspicions of a sane mind and insane delusions is sometimes quite indistinct and difficult to define. However, the legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way.

Insane Delusions—Suspicions—Tests of Insanity.—Suspicion is the imagination of the existence of something, especially something wrong, without proof, or with but slight proof; it is an impression in the mind which has not resulted in a conviction. It is synonymous

with doubt, distrust, or mistrust—the mind is in an unsettled condition. Suspicion existing, slight evidence might produce a rational conviction or conclusion; this without evidence, however slight, would be a delusion. Is there evidence, however slight? This is the test. The suspicion may be illogical or preposterous, but it is not, therefore, evidence of insanity.

Insane Delusions—Suspicions as to Husband's Constancy.—If a wife has evidence, though slight, on which to base a suspicion of her husband's unfaithfulness, and has no settled conviction on the subject, her suspicion does not amount to an insane delusion.

Insane Delusion—Conspiracy to Confine Wife in Asylum.—The contention in this case that the testatrix was afflicted with an insane delusion in that she believed her husband conspired to confine her in an insane asylum, was found by the court to be unsupported by the evidence, especially in view of the fact that the husband had twitted her of being crazy and threatened to break her will.

Insane Delusions—Testimony of Business Men.—The value of the testimony of business men and acquaintances, acquired in commercial dealings with a person alleged to be the victim of insane delusions, is favorably regarded by the courts, on the issue of insanity.

Testamentary Capacity—Inquisition Before Execution of Will.—The examination by medical experts of a testatrix prior to her execution of her will, for the purpose of determining her testamentary capacity, is discussed by the court, both as a suggestion of insanity, and as a wise precaution.

Testamentary Capacity—Will as Evidence.—A will may be considered in proof of its own validity and of the sanity of its maker.

Testamentary Capacity—Suspicion of Husband.—If there are causes sufficient to induce a sane woman to ignore her husband in her will, or reduce what otherwise would have been a just allowance, the fact that she entertains an unjust or an unfounded suspicion in regard to his treatment of her, or an unjust prejudice against him, does not affect the will nor demonstrate that she is necessarily of unsound mind.

Testamentary Capacity—Test for Determining.—The tests of testamentary capacity are: (1) Understanding of what the testatrix is doing; (2) how she is doing it; (3) knowledge of her property; (4) how she wishes to dispose of it; (5) and who are entitled to her bounty.

Testamentary Capacity—Testimony of Attesting Witnesses.—The testimony of the attesting witnesses, and, next to them, the testimony of those present at the execution of the will, are most to be relied upon in determining the question of testamentary capacity.

Testamentary Capacity—Insane Delusions.—In this case the husband of the testatrix contests her will on the ground that she was

of unsound mind by reason of being the victim of insane delusions that her husband was unfaithful, that he was trying to poison her, and that he was conspiring to confine her in an insane asylum, but the court finds against the contestant and sustains the will.

Morris M. Estee, A. Everett Ball, and Charles A. Shurtleff, for contestant, Emerson W. Scott.

A. E. Bolton, C. S. Peery, J. H. Henderson, J. B. Gartland, R. E. Houghton, P. G. Galpin, H. M. Owens, and Guy C. Earl, for proponents and respondents.

E. D. Sawyer, for persons otherwise unrepresented.

COFFEY, J. This is a contest instituted by E. W. Scott to the probate of certain papers filed herein on December 22, 1897, purporting to be the last will and codicils of Angelia R. Scott, deceased, the proponents being the executors named therein, C. S. Tilton, Frank Garcia, Junior, and C. M. Gerrish, who simultaneously present a petition for admission to probate and the issue of letters testamentary to them thereon and thereunder.

The petition for probate sets forth that decedent died on December 16, 1897, in San Francisco, of which city and county she was a resident and left estate therein and also in the counties of Santa Clara and Tulare, consisting of real and personal property not exceeding $450,000 in aggregate value, all of which was her separate estate; that she left a will and codicils, copies of which are hereinafter inserted in this opinion; that the petitioners named as executors consent to act; the names of the devisees and next of kin are given; and it is alleged that decedent had no other devisees or heirs at law; it is further alleged that decedent left a husband, E. W. Scott, but no children, and that her father and mother had predeceased her; it is finally alleged, in proper phrase and form, that she was of sound mind at the time of executing the papers propounded and that in all respects and circumstances her testamentary acts were free from legal fault or blemish, and, therefore, should be consummated through the court.

The will and codicils are as follows:

"IN THE NAME OF GOD, AMEN. I, Angelia R. Scott, of the City and County of San Francisco, State of California, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament.

"I. I give, devise and bequeath to the officers of Apollo Lodge of the Independent Order of Odd Fellows in the City and County of San Francisco, and their successors in office, the sum of Two Thousand (2,000) Dollars, to be by them invested and the proceeds thereof to be used in the preservation and care of the cemetery lots in the Odd Fellows Cemetery in the City and County of San Francisco, in which my late husband, Salvin P. Collins, and my nephew, John Quincy Wormell, are buried.

"II. I give, devise, and bequeath to Horatio Stebbins the sum of Three Thousand (3,000) Dollars, to be used by him at his discretion to advance the interests of the First Unitarian Church in this City and County.

"III. I give, devise, and bequeath to Carl Anderson, my coachman, who has served me faithfully for five years, Five Hundred (500) Dollars.

"IV. I give, devise, and bequeath my diamond earrings, one bar pin with one diamond, one finger ring set with three large diamonds, my chain and charms to my niece, Helen Garish, and my watch to my niece, Ella Perkins.

"V. I give, devise, and bequeath my cluster diamond ring and one small solitaire diamond finger ring, the gift of my late husband, S. P. Collins, to his sister, Mrs. Rachel Johonnot.

"VI. I give, devise, and bequeath one diamond solitaire finger ring to Mrs. Frank Garcia, wife of my nephew, Frank Garcia.

"VII. I give, devise, and bequeath all the rest and residue of my property as follows: One fiftieth thereof to each of the following persons, children of my late brother, Amos P. Wormell, namely: One-fiftieth to Andrew Wormell of Dover, New Hampshire: one-fiftieth to Charles Wormell, of Sunbury, Ohio; one-fiftieth to William Wormell of the same place; one fiftieth to Eugene Wormell of Livermore, Maine: one-fiftieth to Lettie Wormell of Colorado; one-fiftieth to Salvin Ulysses Wormell of Phillips, Maine;

two-fiftieths thereof to Louisa E. Roe, daughter of my late brother, Amos P. Wormell, of Island Pond, Vermont; six-fiftieths thereof to my sister Mary A. Cowan and her daughter Amanda Meily, share and share alike; six-fiftieths thereof to M. S. Chamberlain, nephew of my late husband, S. P. Collins, now residing at Concord, New Hampshire; one-fiftieth thereof to Mrs. Rachel Johonnot, sister of my late husband, residing at Montpelier, Vermont; one-fiftieth thereof to Florence Swall, wife of George Swall of Mountain View, California, niece of S. P. Collins, deceased; one-fiftieth thereof to Eugene Wormell, son of my brother Nathaniel Wormell, now residing at Seattle, Washington; one-eighth to my nephew Frank Garcia; one-eighth to my niece Helen Gerrish, wife of Charles Gerrish of Port Townsend, Washington; one-eighth thereof to Mrs. Ella Perkins, of Santa Clara County, California, wife of Caleb F. Perkins; one-tenth thereof to Mrs. Louisa Garcia, my sister; one fortieth thereof to Chester and Nellie Swall, son and daughter of George and Florence Swall of Mountain View, California, share and share alike, two-fiftieths thereof to my husband, E. W. Scott.

"In case any of my legatees contest the probate of this will, I, hereby revoke the legacy of such contestant, and direct that such legacy become a part of my estate.

"VIII. I nominate and appoint Charles S. Tilton, Caleb F. Perkins, and Frank Garcia, Jr., as executors of this my last Will and Testament without bonds.

"In Testimony Whereof, I have made, published and declared the foregoing as my last Will and Testament.

"ANGELIA R. SCOTT. (Seal.)

"Signed, sealed, published and declared to be her last Will and Testament by the aforesaid Angelia R. Scott, in our presence, who in her presence and in the presence of each of us, and at her request have hereto set our hands and seals, as witness this seventh day of November, A. D. 1891.

"JACOB C. JOHNSON, 1519 Van Ness Ave.
"EDWARD H. HORTON, 30 Post Street.

"Whereas, I Angelia R. Scott, by my will subscribed on the 7th day of November, 1891, appointed Caleb F. Perkins

together with Charles S. Tilton and Frank Garcia, Jr., to be executors of my last Will and Testament.

"Now, then, I hereby revoke the nomination and appointment of said Perkins as one of my said executors, and it is my desire that this Codicil be annexed to and made a part of my last Will and Testament as aforesaid to all intents and purposes. ANGELIA R. SCOTT.

"Signed, sealed, published and declared to be and as and for a codicil to her last Will and Testament by Angelia R. Scott, in our presence, who in her presence, and in the presence of each of us and at her request have hereto set our hand and seals as witnesses this 25th day of February, A. D. 1892. J. C. JOHNSON.
"E. H. HORTON.

"Whereas, I, Angelia R. Scott, of the City and County of San Francisco, have made my last Will and Testament in writing, bearing date the seventh day of November, in the year of our Lord, one thousand, eight hundred and ninety-one, and in and by which I give and bequeath to my sister, Mary A. Cowan and her daughter, Amanda Meily, six-fiftieths of the residue of my estate (after providing for certain legacies) to be divided share and share alike between them, and whereas, since then said Mary A. Cowan has died, and I desire to revoke so much of said Will as devises six-fiftieths to her and her daughter Amanda Meily.

"And Whereas, by the same instrument, I have devised one-fiftieth of said residue to Florence Swall, wife of George Swall of Mountain View, and since that time said Florence has died, leaving three children; and whereas I also devised to Eugene Wormell, son of my brother, Nathaniel Wormell, residing at Seattle, Washington, one-fiftieth part of said residue, and since then he has died, and whereas, I also desire to change the devise to Frank Garcia, of one-eighth of my estate, and to decrease the amount thereof and whereas I did devise one-eighth of my said estate to Helen Garish, wife of Charles Garish; and I desire to increase the amount devised to her; and whereas, I did devise one-eighth of the residue of my said estate to my niece Ella Perkins, I now desire to devise something to her four children; and whereas, I

now desire to make a bequest to the Old People's Home of San Francisco, and to the three children of my present husband, E. W. Scott; and whereas, I desire to revoke the gift of two thousand dollars to the Apollo Lodge of the Independent Order of Odd Fellows, and desiring to preserve the general features of my former will making new distributions when necessary by deaths which have happened since the making of that will, I prefer to do this by way of another codicil to my former Will instead of executing a new Will; but in any respect in which this codicil shall conflict with the provisions of my former Will, I fully intend that this codicil shall control the provisions of the former Will and that otherwise the former Will and the codicil thereof shall stand unaffected by it.

"I revoke the bequest I made in my said Will of Two Thousand Dollars to the Apollo Lodge of the Independent Order of Odd Fellows, and I give, devise and bequeath Two Thousand Dollars to the Apollo Lodge of the Independent Order of Odd Fellows in the City and County of San Francisco, and I request them to take care of my cemetery lot in the Odd Fellows Cemetery in this city and County of San Francisco.

"I give, devise and bequeath the sum of One Dollar to each of the following persons: To Mrs. Amanda Miley, daughter of Mary A. Cowan; to Mrs. Nellie Swall, wife of George Swall; to Mrs. Eliza Paisley, wife of Donald Paisley, sister of my late husband.

"I give, devise and bequeath to my maid, Estella Burnham, Five Hundred Dollars if she is in my employment down to the time of my decease.

"I give, devise and bequeath my emerald finger ring set with diamonds, and also my large solitaire diamond finger ring to Mrs. Helen Garish.

"I give, devise and bequeath all the rest and residue of my estate subject to all unrevoked legacies and bequests of my Will, and subject to those herein contained as follows:

"Of such residue, two-fiftieths thereof to my nephew, Andrew Wormell of Dover, New Hampshire.

"Two-fiftieths thereof to Charles Wormell, of Sunbury, Ohio.

"Two-fiftieths thereof to my nephew, William Wormell of the same place.

"Two-fiftieths thereof to my nephew, Salvin Ulysses Wormell, of Phillips, Maine.

"Three-fiftieths thereof to my niece, Louisa E. Roe, of Island Pond, Vermont, daughter of my brother, Amos P. Wormell.

"One-fiftieth thereof to Lulu Wormell, of Oakland, daughter of my nephew Eugene Wormell, now deceased.

"Six-fiftieths thereof to Mortimer S. Chamberlain, residing at Concord, New Hampshire, nephew of my late husband, S. P. Collins.

"Three-fiftieths thereof to Mrs. Rachael Johonnet, sister of my late husband, S. P. Collins.

"Three-fiftieths thereof to Ella Perkins, of Santa Clara County, wife of C. F. Perkins.

"Three-fiftieths thereof to be divided share and share alike between the four children of said Ella Perkins, or the survivors of them at my decease.

"Seven-fiftieths thereof to Helen Garish, my niece, wife of Charles Garish of Port Townsend, Washington.

"Four-fiftieths thereof to my sister, Mrs. Garcia, wife of Frank Garcia, (senior).

"Three-fiftieths thereof to be divided share and share alike between the children, now living or the survivor of them, at my death, of Florence Swall, and George Swall, of Mountain View, California, said Florence Swall being a niece of my late husband, S. P. Collins.

"Four-fiftieths thereof to Frank Garcia, Jr. son of Frank Garcia.

"Two-fiftieths thereof to my husband, E. W. Scott.

"One fiftieth thereof to Lloyd N. Scott, for himself, for his brother, Wesley B. Scott, and his sister, Laura May Scott, share and share alike; but he is to receive and hold in trust the shares of Wesley B. Scott and Laura B. Scott, invest the same, and use the income or principal, if necessary, for their education and support until both beneficiaries shall die or become of age; and in case of death of either beneficiary the share of such decedent shall be divided equally between the survivors, unless decedent leaves

issue him or her surviving, and in that event the share of said decedent shall go to said issue.

"One-fiftieth thereof to the Old People's Home of San Francisco.

"One-fiftieth thereof to the San Francisco Protestant Orphan Asylum.

"And in case any of my devisees or legatees shall contest the probate of this Will the bequest or devise to them is hereby revoked, and the amount bequeathed or divised to such contestant shall go back and become a part of my estate, and be divided pro rata among the residuary devisees.

"I also nominate and appoint Charles Garish to be another executor of my estate.

"I also revoke the bequest of my one large solitaire diamond finger ring to Mrs. Frank Garcia, formerly wife of, Frank Garcia, Jr., and I give, devise and bequeath the same to Helen Garish.

"(Seal) ANGELIA R. SCOTT.

"Signed, sealed and published and declared to be and as for a codicil to her last Will and Testament by Angelia R. Scott in our presence, who in her presence and in the presence, of each of us and at her request, have hereto set our hands and seals as witnesses this 22nd day of October, A. D. 1897.

"JACOB C. JOHNSON, 1519 Van Ness Ave.
"EDWARD H. HORTON, 2110 Devisadero St.
"PHILIP G. GALPIN, 1738 Broadway."

The contestant alleges that he is the surviving husband of deceased, of the age of sixty-one years, and as such survivor is an heir at law of said deceased and interested in the estate, and is a legatee under the instrument propounded to the extent of two-fiftieths of said estate. He denies each and all the matters set forth in the petition for probate except the death, age and the residence of decedent. He then sets up two grounds of opposition and contest: (1) Unsoundness of mind; (2) Undue influence exercised by Louisa Garcia, a sister, Helen Gerrish, a niece, and Frank Garcia, a nephew of said decedent, the undue influence consisting in falsely representing to decedent that her husband was un-

true to her for the purpose of misleading, deceiving, and prejudicing her against him and controlling her in making her Will and inducing her to neglect to provide suitably for him, the natural object of her bounty, and that such false representations had the purposed effect. The contestant further alleges that at the time of the alleged testamentary acts the testatrix was laboring under certain insane delusions, (a) that her husband was untrue to her, (b) that he was trying to poison her, and (c) that he was engaged in a conspiracy with others to commit her to an insane asylum, and that the said Louisa Garcia, Helen Gerrish, and Frank Garcia in furtherance of their purpose fostered and encouraged these insane delusions. All of these allegations are traversed in due form by proponents and respondents.

Contestant claims a right to institute and prosecute a contest under section 1307, Code of Civil Procedure, as a person interested, as one who would take under the statute of succession if decedent had died intestate.

Issue having been joined, this contest came on for trial before the court, a jury being waived, on Tuesday, the twenty-second day of March, 1898, and continued with intermissions until Thursday, the nineteenth day of May, 1898, when after ample argument extending over four days, the issues were submitted for deliberation and decision.

The entire time of trial, including the taking of testimony and the audition of argument, was eighty-one hours and forty-five minutes; divided as follows:

Examination of witnesses: Sixty-six hours.

Arguments of counsel: Fifteen hours and forty-five minutes.

There were forty-two witnesses for contestants, thirty-six for respondents, seventy-eight in all.

These minutiae are material only as intimating the importance imputed to the issues by counsel and their clients and suggesting the magnitude of the interests involved employing the energies and abilities of lawyers, of experience and eminence, whose intellectual resources and professional skill seemed to be taxed to the utmost in honorable endeavor to achieve success for what each in good faith from his point of view conceived to be the right.

It may be that, in these cases, the right might be developed and determined in a shorter space, but those whose fortunes are at stake in such a struggle and who bear the brunt of its expense of time and treasure are more immediately concerned in the calculation of cost than the critics to whom the result is indifferent, except that it affords a theme for censorious comment upon the tedious process of eliciting evidence and the unrestricted scope accorded to advocates in their examinations and arguments. Reform in this particular may be necessary, but it must not be so sharp or sudden as to collide with justice to individual suitors who demand thoroughness of treatment.

The issues raised by the pleadings are reduced in proof, as stated by counsel for contestant in final argument, to the following:

That the testatrix was of unsound mind by reason of certain delusions, to wit: 1. That her husband was unfaithful; 2. That he was trying to poison her; 3. That he was conspiring to confine her in an insane asylum.

If it has been established that any one of these delusions infected her mind and operated upon the testamentary act, the will should be set aside.

Added to these delusions were certain peculiarities which served to aggravate the cardinal crotchets of her cerebral constitution, to magnify her malady, and to intensify her insanity, which are thus summed up by counsel in his closing condensation of the case: (a) She was profane and vulgar in her language; (b) She danced perfectly nude before mirrors; (c) She imagined that she saw visions; (d) She heard noises in the hall at night; (e) She asked many of her associates if they thought she was insane; (f) She thus evidenced her own belief that she was insane; (g) She sought to be examined by experts before she made her will; (h) She was inordinately suspicious; (i) She was troubled with insomnia; and (j) She was insanely jealous;—all of which symptoms indicate a mind diseased.

The pith of contestant's contention may be stated in his counsel's words: That the testamentary acts were the product of a mind diseased by delusion caused by morbid jealousy.

This, then, is what we have to consider in this case: Is it established by the evidence that the mind of decedent was so far diseased by delusion on the dates of the documents in dispute as to destroy her testamentary capacity? The dates to which this question is addressed are: November 7, 1891, date of the original will; February 25, 1892, date of the first codicil; October 22, 1897, date of the second and final codicil.

The legal presumption is in favor of sanity, and therefore, as is conceded by contestant, the burden of proof is upon him to demonstrate the contrary, he occupies the affirmative of the issue in this case, and it is incumbent upon him to establish the proposition that the testatrix was of unsound mind by reason of certain delusions, and he claims to have discharged this obligation by abundant evidence of numerous witnesses.

If contestant prevail, in case of doubt, it must be by a preponderance of proof; and the number, character, and intelligence of witnesses, and their opportunity for observation, should be taken into the account: Will of Cole, 49 Wis. 181, 5 N. W. 346; Lee v. Lee, 4 McCord (S. C.), 183, 17 Am. Dec. 722.

Criticism was made upon some of the witnesses because they were assumed to be subordinate socially to others supposed to belong to a superior caste, but we have no such Hindoo scale in our American tribunals, and persons employed in domestic service and other categories of honest labor are entitled to credence equally with those who plume themselves on their higher level affecting to look down on those who work for wages as inferior; but before the law, human and divine, there is no such distinction, and in courts of justice all must be co-ordinated irrespective of the accidents of artificial and conventional social relations.

Each witness is a man or woman to be treated as an individual, a moral unit, tested for integrity and veracity on his merits or her title to credit by the inherent and intrinsic elements of belief, or the circumstantial criteria of credibility. These are the only considerations for the court in weighing evidence.

It is claimed by counsel for contestant that at the time of the date of the original will, November 7, 1891, testatrix was laboring under well-defined delusions, in relation to her husband and affecting her testamentary capacity. These delusions had their origin prior to that date, as is sought to be shown by the testimony of witnesses for contestant, and covered the years 1889, 1890, and 1891, forming a complete chain showing their continuation and persistence; they had their inception in unjust and unfounded suspicions and grew to such an extent and proportion as to render her irrational and insane, a victim of insane delusion, which, as said by the expert witness Dr. F. W. Hatch, often arises from misinterpreted suspicions, the gradual building up of which finally results in a fixed delusion, a condition that is not amenable to argument nor mutable by reason; and it is further claimed by counsel that the proof for proponents supports the theory of contestant as to the existence and effect of these delusions and is, in the main, corroborative of his contention.

Angelia R. Scott died on December 16, 1897, rising sixty-five years of age, having been born July 14, 1833, in Strongville, Maine; she was over fifty-eight years when she made the original will, over fifty-nine years when she made the first codicil, and over sixty-four years when the final paper was executed, October 22, 1897. She was the widow of Salvin P. Collins, when on March 6, 1889, at the age of fifty-five years, she married Emerson W. Scott, a widower, fifty-two years old, several years her junior. Each had passed the period of probation in the spousal relation; they were no longer young; both were mature and experienced in married life, with knowledge of the weakness as well as the worth of the opposite sex, with no general illusions of the perfectness of the individual man or woman; what faults they had were carefully concealed, and each was concerned to appear to best advantage in the presence of the other, as persons seeking each other's society in the way of sparking usually exhibit only the favorable aspects of their character, and are adroit in avoiding the exposure of the shady and the seamy sides of selfishness and coarseness in the grain of the garb of human

nature; such is life in love previous to marriage which is, as we are advised by one of the counsel, "a leap in the dark," which young men and maidens should not venture upon too rashly, but these parties had each survived their first venture and hesitated not to embark upon another. She had been well reared, her parents were persons of respectability and refinement and afforded her the means and opportunity of education suited to her situation and sex; she had come to California at an early date, in the primitive and pioneer period of American settlement and domination, and had married her first husband, Mr. Collins, a well-known restaurateur and wine merchant, who founded an establishment which still bears his name and continues flourishing and perpetuating the goodwill and good cheer that brought him local fame and the considerable fortune that made his wife a wealthy widow, and which was at the time of her second marriage some compensation for the impairment of those graces of person which caused her to be envied of her own sex and the admired of the other, for she is described as having been endowed with physical form and symmetrical proportions, with stately presence and dignified carriage, conscious of her charms, proud and vain of her beauty, alive to and avaricious of admiration and jealous of attentions bestowed by her husband upon others of her sex, of whom she was not fond, having little confidence in the virtue of women and less faith in the honor of men.

This woman, who in her youth possessed such a striking personality as to command attention from the passing throng, believed in her advancing years that she still retained the fatal gift which might claim no worse a husband than the best of men, and at the age of fifty "and upward" she met and married Scott. She was now neither fresh, nor fair, nor perfect in health, whatever might be her conceit that age had not withered nor custom staled her. He had passed the meridian of life, but was tall, shapely, broad-shouldered, a fine figure of a man, somewhat soldierly in bearing, distinguished in appearance, amiable and suave in manner, rather soft and subdued of speech, "genteel in personage, conduct and equipage," in deportment dignified, always cour-

teous, especially to women, all of whom as witnesses speak favorably of his conduct, to them he seemed to be the pink of perfection and propriety, calculated to please their eye and attract their admiration, conscious of his natural physical gifts, not averse to feminine regard,—altogether the style of man to captivate the still ardent imagination and to arouse the flickering embers in the heart of this ancient dame, for she realized what was said by an author, that so long as the hearts of women preserve the feeblest spark of life, they preserve also shivering near that pale ember, a longing for appreciation and affection; and although she was aged, if we may believe one of the witnesses, the heyday in her blood was neither tame, nor humble, nor did it always wait upon the judgment, but it was sometimes as riotous in her veins as in younger days. She had been a widow for five years, childless and alone, and she yearned for love and companionship; she had abundance of material means but the heart hunger was unappeased; she craved for something more than money, and she met Scott and surrendered at discretion to his smooth speech and subduing tongue.

She was a childless widow of fifty-six years; he was a widower of uncertain age, for in this contest he sets himself at sixty-one years, in the marriage license with this decedent in 1889 at fifty, and in the petition for letters of administration upon the estate of his first wife in 1881 his age was stated at forty years, but whichsoever of these ages and dates is correct, whether it be 1841, 1839, or 1837, he was much younger than his second wife, who was born in 1833; she was wealthy, he had no assessable property in his own right and derived no independent fortune through the will of his former wife, who had left her estate, which was separate property, to her three children, to be held in trust by three trustees, Scott being one. The youngest child, a daughter, was in the Atlantic states at the time of his second marriage, and the two boys, aged eleven and thirteen years respectively, he took to his new home, the palatial mansion erected as a homestead by Mr. Collins, and left by him to his widow, who occupied it as her abode until her death. To the new community Mr. Scott added nothing but his portly presence

and his two sons, and they made this house thenceforward their home, contributing nothing substantial to its maintenance, although their father as their guardian had a considerable allowance for their support from the estate of their mother. He himself had been unfortunate in business and at the time he married it does not seem that he possessed any tangible property, although there appears somewhat obliquely, if not obscurely, in the evidence that there was always speculation in his eye and that he had a number of good things in sight, but on his own personal account he had nothing in hand. He had passed through insolvency, into which he had been driven by the conduct of a partner, and came out in his own personal reputation legally unscathed, but had not retrieved his fortunes up to the time when he assumed, through his marriage with the widow Collins, charge and control of her property and affairs. It is said by his intimate friend of twenty-eight years' standing, who has also been his attorney, Mr. Ball, that he was at one time in large business as an importer and commission merchant and was worth considerable money, but he failed through no fault of his own and subsequently engaged in various ventures and enterprises of great pith and moment, and with no notable success, until the opportunity presented by his union with the rich relict of the deceased wine merchant Collins. Mr. Ball, recalling and recounting the business career of his friend and office associate for many years, says that after Scott's mining operations and other various speculations he was "dealing in real estate and mines and such like" up to the time of his marriage to Mrs. Collins, "after that he was a good deal occupied with her affairs." The first essay in that occupation was a journey to New York to dispose of a stock of wines, with which transaction she was not satisfied, although Mr. Scott considered it a success and claims to be the author of the achievement. He says that he shipped three thousand barrels of wine to himself in New York City and went there to sell it, and did so, at thirteen and one-eighth cents net; this was in 1889; he sold a part of it himself personally and then his new wife telegraphed him to come home and he came, leaving the remainder with a firm of

brokers there who completed the transaction, which he initiated, on the lines laid out by him. It seemed, however, that she was dissatisfied and disposed to be querulous about the matter then and ever after. She advanced him a large amount of money for expenses which he claimed to have appropriated to that end, and the money was so charged in her books, but the returns and account sales seem to show that the expenses were included in the transaction of sale. She complained to several persons, so Scott says, that he squandered her money, "it was all over town," and this like others of her petulant plaints was born of mental disease and delusion, but, however this may be, it is plain that immediately after the marriage Scott assumed dominion over his wife's affairs and estate. Without a dollar in his own name prior thereto, the nominal ownership is at once vested in him, and E. W. Scott's name is even engraven over the portal of the new wine-house in Santa Clara county. This transmutation of title was hot on the heels of the marriage.

Subsequently his wife has his name excised and her own inserted in its lieu, and she resumes the reins which upon her marriage she had relinquished to him, asserting that her only safety lay in dispossessing him of control, and expressing her grievous disappointment in having married a man who was not capable of acting as an auxiliary in the management of her extensive interests much less of exercising absolute dominion thereover.

Whether this was a just accusation or not, it must be concluded as to her own commercial capacity, executive energy, and administrative ability that her general prosperity throve apace and that her fortune flourished where others faded and failed, albeit they were sane and sagacious men of affairs and she a woman tormented with chronic disease and delusions. Some instances are cited to show that she held out against the market and special circumstances are adduced to suggest a lack of business shrewdness, which simply serve to evidence her stubborn confidence in her own estimate of values and the conditions of their creation, but even occasional error in judgment only signifies a tangent here and there in the consecutive course of her commercial career. By the death

of her first husband she acquired a large estate, $334,000—less $25,000, special bequests and expenses of administration. In all the vicissitudes of viticulture and other branches of trade and industry, from that day until the date of her own decease, from the zenith to the nadir, she managed so wisely as to preserve the fortune left to her by Collins with slight diminution in value; the property devised to her by her first husband is still there in kind and quantity and much improved in quality, and is now the bone of contention in this contest; but assuming all this as in proof, is it inconsistent with contestant's claim that she was insane or a monomaniac, since business capacity may coexist with monomania or delusions such as are alleged in this case?

What manner of woman have we here who, with unbalanced mind, held against the elements of adversity an estate of such magnitude virtually unimpaired as she received it from him who with her conjointly created it, when men of perfect poise and unchallenged equity of intellect went to the wall in the time of trial during the decade preceding her death?

One of the counsel, occupying a position in the controversy somewhat separated from partisan bias (former Judge E. D. Sawyer), ultimates his analysis of her character in this wise: A woman of passion, uncontrollable temper, suspicious, jealous, gross in manners, coarse in conduct, vulgar and obscene, and yet a good business woman, penurious, exacting especially in household affairs: altogether an unlovely creature is present in this sketch of the testatrix.

Mr. Bolton, of counsel for proponents, describes her as a woman of naturally strong mind, of resolute purpose, great determination, and indomitable will power; and Mr. Estee, in his written comment on ex-Judge Sawyer's observations, characterizes her as a "most aggressive person, sane or insane; as aggressive as any person whose life was ever brought to the attention of a court of justice." Mr. Scott's own testimony shows that she was a woman of great clearness and strength of mind, possessing a power of reasoning and logical faculty.

We have here, then, a case where the possession of general vigor of mind and intellectual capacity is conceded, but it

is insisted that in respect to the contestant the decedent, was under such an insane delusion that she could not act sensibly in disposing of her property by will: Will of White, 121 N. Y. 412, 24 N. E. 935.

Mr. Shurtleff, in the course of his able argument, undertakes to demonstrate a progressive insanity as manifested by a change of temperament, and supports this theory by citing her early education and rearing and the subsequent lapse into habits of low language and indecorous conduct; he claims that a comparison of her early life with her later years exhibits a marked change in temperament which is an evidence of insanity.

Mrs. Helen L. Gerrish says her aunt was well reared and particular as to dress, and the evidence generally as to her early career proves that she was a lady in appearance and action. The change came later betokening the development of insanity; the precise point of time at which the change of temperament was made manifest is not so easy to ascertain. Such a change is usually so gradual in the system that the terms of the transition are almost imperceptible until the revolution is complete and we become all at once conscious of the progress from normal to abnormal, and recall stages and phases in personal history unnoted at the time of original observation. Such, it is argued, was the case here.

The testimony as to the acts of immodesty in speech and behavior must be considered as produced to establish the theory of general insanity; otherwise it is not of paramount importance, since this case has been reduced to delusion, and fixed or habitual general insanity can no longer be maintained against this testatrix; but her personal history is important, and if there be such a transition in it, as is claimed by Mr. Shurtleff, it is worth while to note it as a circumstance or link in the entire chain of proof. She was undoubtedly coarse and vulgar in her home, where she talked and acted differently from what she was accustomed to on the promenade or in her shopping expeditions about the town, when she affected the airs of an aristocrat and the demeanor and deportment of a duchess, but the pomp of parade was discarded when she reached the cover of her own roof and

appeared among the people of her own selection and hiring, or a few intimates, before whom she threw off her affectation of reserve and reticence and assumed an abandon of act and expression that would put Billingsgate to the blush and cause its fishmongers to hide their diminished heads in shame.

More than a passing allusion to these features of foulness is necessary only because of their being indicated as idiosyncrasies symptomatic of insanity and denoting a radical revolution in her normal nature; but if it appear that these peculiarities were of long duration and had attained gradual growth or been in process of development for many years antecedent to her second marriage, the effect of the argument of counsel for contestant will necessarily suffer eclipse, partial or total, as related to the question of insane delusion.

We find in the revelation of the secrets of her home life an account from the lips of servants and other inmates of her household establishment, stories of speeches, profane and vulgar, obscene eccentricities of allusion, departures from modesty in dress, some sportive gambolings before her mirrors in nature's simplicity of vesture, accompanied by remarks of an original and unique, but morally uncouth, if not grossly indecent, construction. All these exhibitions were in the freedom of her own home, where she might do as she pleased, where there was no one her right to dispute; her conduct and conversation in such circumstances may be criticised, even censured, but predicating insanity thereon is another matter. Sanity and insanity are to be determined by other criteria than these occurrences in such premises. We must take a more comprehensive survey of the situation of sanity, a broader and longer view, than is afforded by the circumscribed boundaries and narrow precincts of the inclosed house and home. We must take the whole life of the subject of inquiry in every observable manner and from every possible point of view to acquire a just judgment.

It is claimed against the contention of contestant that decedent's conduct after her second marriage was similar to what it was prior thereto and while she was the wife of Mr. Collins and during widowhood: the proponents have both by the cross-examination of contestant's witnesses and the direct

examination of their own attempted to show that while she was a widow and also before the decease of her first husband she was profane and obscene in her language, had had trouble with her servants, had broken dishes and smashed furniture, and had suspected that Mr. Collins was unfaithful to her.

This was testified to by Mrs. Meily, a witness for contestant, who knew Mrs. Scott for twenty-seven years, was her niece, her sister's child, now over fifty years of age, and who said that decedent would indulge in the most dreadful oaths and obscenities of speech, and was always addicted to this mode of expression from the time she first saw her when she visited her at her home in Columbus, Ohio, in 1871. Mrs. Meily did not know Mrs. Scott in her early years, but the first time she saw decedent the latter used profane language and the habit continued strong upon her always. Her violence of temper was not exhibited at that time and Mrs. Meily first became conscious of decedent's infirmity in that particular when the former came to California, twenty-four years ago; then she saw her aunt Angelia in those spells of sulkiness and anger in which she gave scope to her destructive propensities. She was always having trouble with her servants and became angry with them without cause. This was before the death of Mr. Collins and also after. Decedent was a woman of very suspicious disposition and distrusted her best friends; she was very irritable and petulant; she drank every day and was in the habit of imbibing intoxicants daily as long as Mrs. Meily knew her; drank whisky three or four times every day. This habit she had during the lifetime of Mr. Collins. She used to pretend to size or measure it in a tablespoon. Mrs. Meily saw decedent several times when she thought she was under the influence of liquor, but this was not during the lifetime of Mr. Collins. Her habit of drinking grew gradually. In the latter years of her life decedent drank harder than before. She was suspicious of the fidelity of Mr. Collins and told witness so many times; all the same with Mr. Scott. Decedent was a woman of striking appearance at the time witness first met her and always dressed very neatly, taking a great deal of pains with her attire. She was proud of her personal beauty, fond of money,

avaricious. Witness knew that decedent smashed dishes and furniture in the lifetime of Collins. Decedent was insanely jealous of her second husband and accused witness of intimacy with him, which accusation was utterly false, and there was no reason for any such imputation. Witness denied ever having been alone with Mr. Scott. Mrs. Meily is a member of St. Peter's Episcopal Church, and when the decedent, her aunt, learned that she had joined the church she cursed and swore violently; this was at Easter time in 1896. Decedent spoke to witness of her suspicion of Scott's intimacy with the domestics and told her that she had employed detectives to track him, and that she herself, in company with her sister, Mrs. Garcia, went in her carriage to three different houses to inquire if there was a woman kept there by Mr. Scott. without result. On one occasion three years ago, in front of her first husband's picture, the portrait of Salvin Perry Collins, decedent swore roundly at it and cursed him and said she hoped he was in the nethermost portion of the infernal regions, or words to that effect.

Mrs. Nellie Swall, a niece of the first husband of the decedent, testified that she knew her ever since she could remember. The witness was born in 1858; her father, Lemuel Perry Collins, died before her uncle, Salvin Perry Collins. Witness used to visit the house of decedent from the time she was a child and spent weeks there together. Decedent and her first husband used to quarrel at times in regard to his drinking. On such occasions each indulged high words and low language. Decedent had a quick temper and when she was cross she swore and cursed at anybody at whom she was angry. Her habits were always the same as wife and widow and wife again; she was very nervous; she had dyspepsia and indigestion and stomach troubles; when feeling well she was very nice and pleasant to everyone. When she became the wife of Mr. Scott she often came in to see witness at her home in Mountain View when she got off the train on the way to her ranch; she got mad at witness frequently and then would swear at her. In the lifetime of the uncle of witness the decedent would accuse him of keeping a woman down town, and of running with that class of women. De-

cedent left her first husband at one time and went to the house of her sister, Mrs. Garcia, and remained there until Collins induced her to return and sought to win her by various kind acts and to reclaim her affection, and he would take her out riding and thus reinstated himself in her good graces. Decedent was very fond of dress and dressed younger than her age. She began taking the massage treatment while she was a widow. As to her sanity, witness thought she was sane; she was smart in business ways.

Mrs. Swall was a witness for proponent and is the wife of George Swall and lived for a part of the time with her sister, who before her decease was the wife of the present husband of witness and had charge of the children, of whom she is stepmother and aunt, and who are minors and legatees under the will in contest. Witness used to live off and on for years with her uncle, Salvin Perry Collins, and subsequently for some time with his widow, and she says that Mr. Collins was a kind and courteous gentleman. He seldom quarreled or gave offense to anyone. Mrs. Collins was not an untruthful woman, but her temperament was excitable. She did accuse witness of trying to poison her, which witness denied, and she thinks that decedent believed her, although she afterward repeated the accusation. Decedent said that Mr. Scott was trying to poison her and trying to put her in an insane asylum. Witness asked her why she married him, and she said it was in a business manner, as she wanted somebody to attend to her affairs and she thought he was capable, but she found he was very different. Decedent did say that Mr. Scott was running after other women; but did not specify any particular person. She had made similar remarks about Mr. Collins, her first husband. She said that Scott was trying to get her out of the way and that he had told her that all that he had married her for was her money.

Mrs. Helen Louise Gerrish, a niece of decedent and a daughter of her sister, Mrs. Frank Garcia, knew Mrs. Scott always. The witness lived in San Francisco prior to her marriage, which was in 1881, and from that time went and lived north in Port Townsend, in the state of Washington. During that period she made frequent visits here, about every year, three

months at a time; one visit was for four months. Witness met decedent always on her visits. Remembers her when she was Mrs. Collins, but he died before witness was married; is now forty-two years of age. When she was a girl she often went to visit Mr. and Mrs. Collins; knew of their having difficulties. Decedent was suspicious of her husband, Mr. Collins. Once she went away from him and came over to the house of the mother of witness and remained there three months. Mr. Collins used to come there to visit his wife and finally induced her to return home. Decedent did not enjoy good health; she had stomach troubles and dyspepsia. Saw her when she was suffering many times while she was a wife and after she became a widow. Saw her at such times exhibit a violent temper when she was the wife of Mr. Collins, also when she was his widow and when she became the wife of Mr. Scott. Never saw her break anything in her transports of passion, but she would swear and curse and have trouble with the servants. Decedent had to be strict in diet. Witness thought she was perfectly sane. Mrs. Gerrish was also a witness for proponent.

It should seem from these testimonies coming from intimate kin that the decedent's peculiarities of behavior were of long standing, and that for twenty-seven years at least, according to her niece, Mrs. Meily, she was habituated to forbidden forms of discourse in colloquial converse, and that there is no line of demarcation to be drawn at or after the time of second marriage.

These eccentric habits of speech were not suddenly acquired, and are not, therefore, to be considered as presumptive evidence of insanity: Taylor's Medical Jurisprudence, 632.

Mr. Shurtleff, however, insists that it cannot be said that this woman manifested merely eccentricities, and that her acts and language are much more serious in their relation to insanity than eccentricity, which is, according to the definition of Dr. Hatch, a peculiarity of character pertaining to an individual, and may be marked by strong or weak individuality, where, as Dr. Maudsley says, the person does not

run in the common tracks of thought and feeling, yet is not insane: Maudsley's Pathology, 59.

Maudsley remarks that eccentricities of this sort may be of all kinds and degrees, from mild and odd to grotesque and silly, running through a scale reaching from actual insanity to the borderland of genius; on the one hand it may ripen into insanity when it is not counterbalanced by a strong judgment which fits the individual to weigh things, himself included, in their just proportions from the outside, and, if need be, to satirize himself as a fool among fools. In Dr. Taylor's Medical Jurisprudence it is said that an eccentric man may be convinced that what he is doing is absurd and contrary to the general rules of society, but he professes to set these at defiance. In eccentricity there is the will to do or not to do. Eccentric habits suddenly acquired are, however, presumptive of insanity.

Instances and illustrations of eccentricities in individuals otherwise noted for intellectual excellence may be numerously cited, such as Dr. Samuel Johnson's habit of touching all the lamp-posts in Fleet street. Balfour Browne says that as long as this was merely automatic it was an eccentricity, but when it came to demand an expenditure of energy it became insanity: Browne's Medical Jurisprudence of Insanity, sec. 255.

A man ever so eccentric will generally reason calmly and rationally upon the subjects upon which he entertains peculiar views; but a monomaniac will, upon an attempt to reason with him, become excited, and reject all reason because the delusion takes full control of his reasoning powers; he is unable to reason upon a subject; the delusion is dominant over all the other faculties; but in a mere eccentric the contrary occurs, and he is even amused and laughs at his own oddities. Many examples of eccentricity in men of high station and of large mental calibre may be recalled from experience or reading, such as dispensing with some nonessential article of attire, or what may be deemed superfluous appanage of apparel, such as a necktie or collar, as in the case of the governor of Massachusetts, George N. Briggs, who was for six terms a representative in Congress, and never wore

a collar, or in the instance of a local celebrity, noted as a publicist and orator, who uniformly dispenses with a necktie; but tested by any definition of eccentricity, suspicion that she would be poisoned by her husband or by those whom he might induce to do so; that he and others were attempting to place her in an insane asylum; that he was unfaithful to her,—all of which suspicions were unfounded, cannot be said to be eccentricities: they plainly indicated a diseased condition of the mind, so far as her husband was concerned. These were well-defined insane delusions, and they operated upon the testamentary act. Suspicions may be entertained to such a degree as to render one insane. As said by the expert witness, Dr. F. W. Hatch, often these delusions arise from misinterpreted suspicions, and the gradual building up of those suspicions finally results in a fixed delusion.

Dr. Hatch is eminent in his profession, and for several years has been connected with the management of insane asylums in this state, and is at this time in chief direction of all the hospitals for the insane in California, and he has given it as his opinion, predicated upon the accuracy of the hypothetical questions, that the decedent was insane and possessed of three fixed delusions: (1) That her husband was unfaithful to her; (2) That he was trying to poison her; (3) That he was trying to put her in an insane asylum; and that if such delusions continued for years they would constitute habitual insanity. Dr. Hatch says that it is a fact that a person of ordinary perception may be acute and accurate, with a retentive memory, his statements reliable in the main, and even his judgment on matters connected with his peculiar train of delusions, belief, or feeling, accepted as trustworthy, but notwithstanding this mental activity he may harbor delusions, not always exposed in casual conversations, which may be called forth by anyone cognizant of their existence and of his cerebral conditions, and all the authorities so hold, and such has been the personal observation and experience of Dr. Hatch himself: 1 Beck's Medical Jurisprudence, 729.

Expert evidence is really an argument of the expert to the court, and is valuable only with regard to the proof of the

facts and the validity of the reasons advanced for the conclusions; therefore, if we find the facts assumed in the question to be unsupported by proofs in any essential particular the conclusion must be rejected; so it must be with the testimony of Dr. Hatch if it shall appear, when the grounds are tested, that there is no adequate reason for his opinion.

Each side in this case, as in all others of like kind, chooses to criticise evidence of this character and to suggest that the average expert is necessarily a partisan in the case. It is not necessary, however, to asperse the integrity, intellectual or moral, of any professional gentleman called upon to testify herein; it is sufficient to allude to the commonplaces of judicial expression that no tribunal would be justified in deciding against the capacity of the testatrix upon the mere opinion of witnesses, however numerous or respectable, and that it is the province and the duty of the court or jury to draw the inference of fact from the evidence before them regulated by the rules of law—being assisted but not superseded in that function by the opinions of experts: In re Redfield, 116 Cal. 655, 48 Pac. 794.

Dr. Hatch says that monomania or partial insanity is characterized by some peculiar illusion or erroneous conviction imposed upon the understanding and giving rise to a partial aberration of judgment, and the individual thus affected would be rendered unable to think correctly on subjects connected with the particular illusion, while in other respects he would not betray any palpable disorder of the mind; this is according to authority and is the result of this doctor's experience: Hammond on Insanity, 13-24.

It is a fact that in conversing with patients on topics foreign to their delusions one will find no difference between them and other persons untainted by mental malady; they seem sane on all subjects until one strikes the spring which is the source of their intellectual disturbance: Ray, sec. 285.

In the case assumed in the hypothetical questions propounded by counsel for contestant, where a woman born and reared in respectable circumstances, fairly well educated, and surrounded by wealth and luxury, with all the advantages of wealth and position enjoyed by her for many years, mani-

fests at an advanced period of life, say at the age of fifty or sixty years, a complete revolution in her external character, and frequently, when under excitement, and at other times when calm, and without apparent cause or reason, both in the presence of servants and of acquaintances and comparative strangers, indulges in vulgar, profane, obscene and blasphemous language, breaks dishes and smashes things generally, and goes around naked and unadorned, and perpetrates other acts and antics of an abnormal character, she is insane.

Dr. Hatch's answers to the hypothetical questions propounded to him were based upon his understanding that the phenomena presented therein appeared after the marriage of the lady to Mr. Scott. He took it from that time as to one of the hypothetical questions, the first question went before her marriage to Mr. Scott, to 1884 or 1887 or somewhere along there; but he took the whole business of it, and his judgment of her mental state proceeded on the accuracy of the assumptions postulated in the entire proposition. His conclusion was dependent upon their truth; if the hypothetical questions were so framed as to show that for many years she had been obscene in her language, violent in her conduct, profane, suspicious of her servants, and of everybody around her, charging her former husband in his lifetime with immoral conduct and infidelity, and that for long years she had been drinking to excess, such facts should be taken into consideration and would affect the conclusion as to her sanity; and if it should appear that her associations had been mainly and almost entirely with her servants and with men whose customary conversation was unrefined, and that for a quarter of a century prior to 1896 she had been suspicious, irritable, annoyed at trifles, unable to retain domestics on account of her crankiness, and that she had been during this period immodest at times in her deportment, all these facts would be taken into estimation as lessening the importance of the symptoms.

Dr. H. N. Rucker, an accomplished physician and surgeon, now president of the board of health in Oakland, and formerly for a term of four years superintendent of the Stockton Asylum, and three years and upward director of that in-

stitution and now engaged in general practice, but continuous in his special studies of insanity and often called in consultation in such cases, concurs in the opinion expressed by Dr. Hatch, that a person such as is described in the hypothetical questions must be insane. Dr. Rucker says that such a person would have habitual mania characterized by fixed delusions. In conversation with insane persons there is no difference between them and others in speaking on topics foreign to their delusions; that is to say, this is true of persons possessed of delusions upon certain subjects, or monomaniacs. Of course, in answering hypothetical questions, the correctness of the premises is assumed.

In commenting upon this evidence, Mr. Shurtleff naturally lauded his own side and said that the testimony coming from the other side of an expert character showing at the times they came in contact with her she was rational, is of no importance, when it appears that their acquaintance was of a slight and casual kind, not affording an opportunity to judge of her mind from all around observation. These mere business acquaintances, seeing her for a few minutes only at a time and then on some special subject, foreign to her delusion, are clearly inferior in value and weight, and cannot furnish a safe criterion to establish a conclusion of sanity; they did not see her in circumstances calculated to enable them to form an intelligent opinion of her calibre or capacity. A person possessed must be under observation for some time and under a variety of conditions in order that her delusion may be detected. An insane delusion may be concealed from many who occasionally meet a person and whose conversation and observation are contracted by the circumstances of the occasion, while a few who are within a closer social circle with superior chances for inspection of all sides of the subject will be better able to pronounce a more perfect opinion, because the delusion is more liable to develop itself under the provocation or inducement of general or protracted and local intercourse in the home circle. where the conventional circumspection and guards which obtain outside are not always maintained. At home, where she was at ease, she spoke freely; abroad on business she kept a guard on her mouth.

It were well if she could have pursued the precept of the preacher and practiced his lesson of virtue always and everywhere, at home and abroad, to set guard on her mouth, a sure seal upon her lips, that she might not fall by them, and her tongue destroy her not, and that she might have put up her petition as did David, when he cried out,—

> "Set a watch, O Lord, before my mouth;
> And a door round about my lips;
> Incline not my heart to evil words,
> To make excuses in sins."

But she cared little, according to all accounts, for preacher or psalmist, and preferred a tongue sharpened like a serpent with the poison of adders under her lips.

That decedent uttered apprehensions of being poisoned and implicated Scott appears from the evidence. In 1889 she made statements to that effect to Mrs. Meily and A. E. Ball; in 1890 to Lloyd Scott, Wesley Scott and Mrs. Paisley; in 1890-91 to Joseph Mortier, and from 1890 to 1897 to Geo. F. Dyer; in 1891 to Major Hammond, Miss Richards, and T. H. Froelich; in 1892 to John A. O'Dea and Thomas Talman; in 1893 to Revilo F. Morton; in 1895 to Mrs. Ogilvie and Miss Anderson; in 1896 to Mrs. Cook, and in 1897 and 1896 to Miss Gustafson; in 1897 to William Warwick, Mrs. Burnham, Dr. Spencer, Dr. Mays. Dr. Spencer examined matter for poison, at request of Dr. Greth, who took the matter for examination at instance of Mrs. Scott. Many of the witnesses for proponents testified to similar statements; in 1891-93 Mrs. Scott so spoke to Edward Lewis Brown; she also made mention of her fear of poisoning to several others on the same side, Mrs. Gerrish, Mrs. Putman, Mrs. Nellie Swall, and in 1897 to Wealthy Wormell. A. E. Ball testified that she made the remark to him that she had to keep her whisky under lock and key to keep it from being poisoned, for she was afraid that somebody whould put poison, or something of that kind in it. Lloyd Scott said that she complained that his father was trying to poison her, that he would get the cook to do it for $10. Lloyd and his brother Wesley always tasted her food at the table at her request to see if it was poisoned; she claimed her whisky

had been poisoned with arsenic. Lloyd's brother, Wesley, testified she said his father was trying to poison her, and he used to have to taste her food every day to see if there was poison in it. He thinks it was about the month of July, 1890, when he came back from New York when he first heard Mrs. Scott say that his father was trying to poison her; she talked about it most every day. In cross-examination Wesley modified his statement about having to taste the food every day, and said that his stepmother would have periods of two or three months that she would make him taste it, and then the rest of the time she would not care about it. This might seem to show a suspension of the alleged delusion for nine or ten months at a time. So in regard to this item, it was not continuous, persistent, or fixed.

Mrs. Paisley said that Mrs. Scott stated that there was poison in her food, principally mush. Mrs. Paisley could not tell how frequently this statement was made to her by Mrs. Scott.

Joseph Mortier testified that she said Mr. Scott was trying to poison her, this was some time after Scott came back from New York, in the latter part of 1890 or 1891; she said it at different times during that period.

George F. Dyer testified that she accused Scott of trying to poison her. Dyer went to her house one morning; she sent for him and she sent word downstairs that she was sick and wanted him to come upstairs, and she said that she had been poisoned by Scott or somebody else in the household that he had employed to do it. She said her husband was trying to get away with her, trying to kill her, to get her property and poison her.

A. C. Hammond testified that she said that she was afraid of her life, except for the presence of the children she did not know that she would be safe from poisoning. This was in a conversation with Mrs. Scott in 1891, relative to her husband; the second or third interview Hammond had with her, somewhere about August, 1891, she spoke of the use of poison by her husband.

Miss Richards said that Mrs. Scott said that they intended to poison her, accusing Mr. Scott and those all around her.

Theodore Froelich said she told him that Scott and Mr. Ball were poisoners; this was in 1890 or 1891.

John O'Dea testified that she said the people were trying to poison her and did want to poison her. Thomas Talman testified that she said Mr. Scott or some one else was trying to poison her. She asked Talman if he would taste the milk; he tasted it and said that there was nothing the matter with it at all. She said to this witness that he would poison her as quick as anybody, to which the witness replied that he had no object in poisoning her, because he did not think that she would ever leave him anything.

To Revilo F. Morton in 1893 she said that Scott was trying to poison her, and that she had been poisoned before Morton knew her.

To Mrs. Ogilvie she accused Scott of having put something in her enema several times. Mrs. Ogilvie would be there fixing tea for her and she told her to hide it for fear Scott would put something in it.

To Ulrica Anderson she said he tried to poison her. Ulrica had to take an egg every morning and beat it in her room, so that he should not be able to poison it; she had to taste her food so that no poison could be in it. Mrs. Scott was afraid there was poison in it. She charged Mr. Scott with trying to poison her. Ulrica had tasted the food before Mrs. Scott ate it and was none the worse for it.

To Mrs. Cook decedent said that Scott would poison her whisky. Mrs. Scott kept the whisky locked up and used a little every morning with an egg.

To Ida Gustafson she said he tried to poison her and she used to ask Ida to taste her beef tea for her. She would accuse Mr. Scott of poisoning her steak and her beef tea, and Ida would have to taste it in the mornings before Mrs. Scott would drink it. Mrs. Scott said that it would not affect Ida as she was stronger than herself.

Mrs. Scott asked William Warwick if he thought that Scott would put any poison or anything into her liquor when she drank.

Mrs. Burnham testified that Mrs. Scott would talk to her about how Mr. Scott was trying to poison her. She thought that the food and almost everything she ate was tampered

with. She suspected that Mr. Scott had some one put poison in it—if he did not put poison in it himself; that he had the cook or the coachman put poison in it. Mrs. Burnham always had to taste Mrs. Scott's steak, her cream, or her mush before she would use it herself.

Dr. Spencer testified to the signing of a certificate to the effect that the articles brought to him by Dr. Greth at the request of Mrs. Scott contained absolutely no poisonous matter. Dr. Mays said that Mrs. Scott told him that people were trying to poison her and that she had some one to taste her food before she would eat it. Dr. Greth took the articles in the certificate signed by Dr. Spencer at Mrs. Scott's request, because she begged him to have it done for her. These were all witnesses for contestant.

To Edward Lewis Brown, a witness for proponent, she made a statement that some one was trying to poison her food. She said she was afraid Scott would poison her, and she gave as a reason that Scott was a young man and she was an old woman, and she thought that therefore he would try and poison her, and that he was no husband to her. Mrs. Helen Gerrish says she heard Mrs. Scott say she thought Mr. Scott might poison her. She accused Mrs. Nellie Swall of trying to poison her and made this lady sometimes taste her food. Mrs. Swall told her that she was not trying to poison her, and thinks she believed her, although she afterward repeated the accusation and she talked to her about Scott's trying to poison her. Mrs. Scott told Mrs. Swall as a reason why she thought Mr. Scott was trying to poison her was that he was after her money; that he married her for her money and was trying to get her out of the way. She told her this down at the house in Mountain View the year Scott returned from the east after doing some business for her.

Wealthy Wormell heard Mrs. Scott say once there might be poison in the food; she did not say who might be poisoning her food.

Mrs. Scott told Mrs. Putman that Scott had been trying to poison her.

Mr. Grossman does not remember much about any statement of the kind, although he might have heard something, but found it hard to "memorize" anything.

It is claimed by counsel for contestant that the delusions existing in the mind of the decedent as to Scott's unfaithfulness to his marriage vows with servant maids and other women and as to a conspiracy to send her to an insane asylum are also established by these witnesses, whose testimony may here be summarized in these respects:

Miss Ulrica Anderson was employed by Mrs. Scott at her house in this city as an upstairs girl; went there in April in 1895, and left there in August, 1895. Mrs. Scott was a woman of very violent temper and used coarse language. Ulrica was her maid. Mrs. Scott was in the habit of using oaths and obscene words: she would fly into a passion and become wild, tear her hair, slap her face, pound the tables. and break articles, throw them down on the floor, smash crockery, whatever was near at hand; any trifle would start her. She was most excitable, a proud and vain woman, very vain of her personal charms; she would at times undress and dance before her mirror and display her figure in that manner with evident self-admiration; she had a fine form, and soft, white skin, clear and free from blemish, tall and well developed, proportions ample without angles, easy curves; she had massage treatment, not from her maid, but from a regular masseur; she was very jealous of Mr. Scott; she was anxious to obtain some knowledge of wrongdoing on his part; she said she would give Ulrica $1,000 if the maid would try to inveigle him into sleeping with her, but the girl declined to engage in any such enterprise and told her that she was virtuous and would not allow herself to entertain so vile a proposition. Mrs. Scott was quick-tempered, strong-minded, obstinate, violent in her anger; and she broke out constantly and without cause, but Mr. Scott was a modest and nice gentleman.

Mrs. Estella Burnham, who is now living at 1743 Franklin street, the Scott mansion, knew the late Mrs. Scott and was engaged as her maid from June 18, 1897, to the summer of that year, and was with her from 6 o'clock in the morning until 9, 10, or even 11 o'clock at night when she retired. She spent her nights at the house of Mrs. Scott and had a separate bedroom. Mrs. Scott's constant topic was the supposed infidelity of Mr. Scott, whom she accused of unfaith-

fulness with the various girls in service and also with a Mrs. Meily, a niece of her own, and with a Mrs. Paisley, a sister of her first husband, an elderly lady. Mrs. Scott never accused Mrs. Burnham to her face, but she did say that all women were bad and that she would not trust any woman, and that she would give $1,000 to any girl who would seduce Scott so that she could catch him in the act. She just suspected that Scott was running around all the time with the women when he was down at the ranch, that was her sole subject of conversation from morning until night. She was always talking of her suspicions of her husband's infidelity and of his poisoning of her and putting poison in her food and drink, and Mrs. Burnham had to taste what Mrs. Scott ate and drank before she would touch anything for fear of poison. There was nothing of the kind in reality, no poison in the house; there was not the least provocation for her spells. Mrs. Burnham could always tell in advance in the morning when Mrs. Scott was going to have a bad day; her eyes would show when she slept ill and she would be wild in her appearance, and then they would have a time. She was always harping on the same subject—Scott's amours. She was desirous of finding out whether he was really true. After Mrs. Burnham left on the 4th of December, 1897, she visited the house several times but did not return to the service during the lifetime of the decedent. While she was there witness was asked by Mrs. Scott to act as a detective three times in two weeks, and pretended to comply and put on a sort of disguise and went out and came back without any discovery, but made no attempt to pursue him, as she would not do so except by way of pleasing Mrs. Scott, as she was in her employ and necessitated to make this pretense of watching him to retain her situation; so she consented to play the part.

Frederick J. Bockwoldt was foreman of the Scott ranch in Mountain View for a while. Mrs. Scott used to send for him to come to her room every time she came down to the ranch to talk with her. He often went and spent an hour or two at a time; at first she would talk about business, but after a while she would converse about Scott, and said she believed that he was unfaithful to her with certain ladies

in the vicinity, and she asked Bockwoldt to find out if this was not true. He told her that Scott never went off the ranch except accompanied by him and Lloyd. Mrs. Scott's conduct was immodest in the extreme, and she would talk in the most shocking manner.

When Mr. Scott was in the east Mrs. Scott sent for A. E. Ball and complained of Scott's infidelity and that he was running with other women, and that he had taken a woman east with him, in 1889.

Mrs. Cook worked for Mrs. Scott in 1896; was employed as a servant doing the upstairs work. Mrs. Scott was in the habit of using very bad language, and said that Mr. Scott was running after every woman in the city; she said she never could keep any girl more than a month, then they slept with Mr. Scott. She wanted her to sleep with him, offered to give her money if she would do so, but Mrs. Cook told her that she did not want to make money that way and refused to consider seriously her proposal. Mr. Scott was calm and considerate to all and always tried to pacify his wife, but she was not to be quieted. She was always talking of Mr. Scott's running with other women and wanted to catch him.

George F. Dyer knew Mrs. Scott from about 1890 until three or four months before she died: saw her as often as one hundred to one hundred and fifty times. In the earlier times his opportunities of seeing her were considerable; she engaged him to sell her ranch in Santa Clara; she used to get him to call at her house with data about the ranch; this was about the spring of 1891; perhaps in June or July. Dyer had some purchasers for the property; she said she wanted to sell; she sent the persons down to see the property and on their return Dyer entered negotiations, and when they came to the house to do business she "flew off the handle," and raised the price. She talked to him on a great many subjects besides business; she used to say that she was perfectly willing to sell, but she was afraid that the money would fall into somebody else's hands; she talked about Scott running after women and wanted to find out what he was doing; she would send for Dyer down to his house to come there at all hours of the day and sometimes

at night and wanted him to track Scott on his alleged amorous adventures; she said that she suspected that Scott and Ball and another man were concocting a plan to rob her, and she was afraid of being poisoned. Mrs. Scott told Dyer that her husband had said that she was insane, and that they were trying to put her into the asylum or plotting to get rid of her in some way. Dyer had known Scott for fourteen or fifteen years and he was always a gentlemen in his behavior. Mrs. Scott would use very coarse and indelicate language, obscene and vulgar, and witness gave a sample of the coarsest quality which he said made the hair stand on end. She called Scott by the most opprobrious epithets before this witness in speaking of him; nothing was too vile or vulgar for her tongue; this was from 1890 to 1893. Her manner of talking on subjects was such that Dyer quit trying to do business with her, as he did not consider her competent to transact business. Dyer was invited to her house to dinner; she invited him there to talk about the ranch and then asked him to remain to dinner. He sat down to the dinner table and after two or three minutes she ordered him up and out of the house and he went out. He saw no reason for this conduct and she gave none except that he was a friend of Scott and that he was trying to get the ranch away from her or something of that kind. Dyer thought the woman was crazy; that she did not have her right mind; and his reasons were because she floated from one proposition to another; she would take the property away from him one day and give it to him the next, and wanted to employ him as a detective to pursue Scott and find out and tell her about this woman; and she frequently visited Dyer's house —came down there without any apparent cause whatever. She would curse Scott at her own home and she would send for Dyer at all hours, and when he got there he found there was nothing to it, therefore, he thought she was not a woman of strong mind.

It appears that Dyer first made the acquaintance of Mr. Scott in 1884, when the business of witness was mining, and that he was intimately acquainted with Mr. Ball and his mining operations with him and with Mr. C. C. Tripp, and had been to the office occupied in common by these gentle-

men during all the years since 1884, and whenever he called there he always saw Mr. Scott. Mr. Ball told Mr. Dyer that Mrs. Scott wanted to sell the ranch, and Scott introduced him to Mrs. Scott, but he cannot recall who introduced him to Mr. Scott. Dyer says he was looking for a piece of property and Mr. Ball told him that the Scott ranch was for sale. Then Scott introduced him to his wife, and Dyer had a talk with her at that time alone, her husband left after the introduction; Dyer went in with her into the little office off the hall in her house and Scott went outside somewhere. She and Dyer had quite a talk for about an hour; she did not give him a description of the ranch but gave him the outlines; she did not seem to have her mind made up as to price at that time and asked Dyer to call again. He went back there the next day or a day or two afterward alone; was there about an hour and a half or two hours. Mrs. Scott and he were discussing the ranch, she going into the minutest details about all its phases of income, area, acreage, number of vines, their age, condition of improvements, character of soil and climate, expense of operating ranch, number of men employed, amount of machinery upon the property, cooperage, storage, the buildings, and all the details; she gave him a paper, a report of all the property and all of those items were in it. The two conversed for an hour and a half on that topic and incidentally on others.

Theodore H. Froelich, a wine broker, who formerly lived in San Jose, and was engaged as a wine-maker there, knew Mrs. Scott before she married her second husband. He had had many conversations before and after that time. She told him at one time that she had thoughts of getting married again, and said she was a foolish woman to think of such a thing. When she married she told Froelich of it and that she had met a man to her liking, and she introduced Scott to him, and he told her that he thought she had made a good match and that Mr. Scott would make a good husband. Froelich gave up his business in San Jose in 1891, and returned and set up as a broker in San Francisco in the fall of 1892. He had been ten years in business in San Jose and the acquaintance begun with Mrs. Scott there was continued here. She was frequently in his office here on busi-

ness; he acted as her wine broker and she called two or three times a week and sometimes every day. Froelich handled her wine for local and eastern markets. When she called she would often talk about her domestic affairs. She was very jealous of her husband and said that he was running after other women and that she knew that he and Ball had concocted a conspiracy to send her to an insane asylum and deprive her of her property. Her language was very vulgar, profane, and obscene beyond description. She was a good friend of witness so far as giving him the business was concerned. One could not cheat her for a cent, but still Froelich did not consider her a good business woman. She was mean and parsimonious, and they had a quarrel finally on their business relations, which resulted in a lawsuit still pending.

Ida Gustafson was employed as a servant in the house of Mrs. Scott at two different times, first from October to December, 1896, and last from April to June, 1897. Mrs. Scott was very rough in her talk and Ida could not repeat her language, it was so bad. She was very violent in conduct—half crazy. She said she paid $100 a month to a detective to watch Scott and that she was willing to pay a girl to trap him into intercourse. She was very jealous of Scott, broke all the furniture in his room at one time; she would go around naked and dance about the room before the mirror because she was so well built. Ida was of opinion that Mrs. Scott was insane; her constant talk was that her husband was unfaithful.

Anselm C. Hammond was employed by Mrs. Scott, then Mrs. Collins, to copy the will of her first husband and to find out what became of the proceeds; this was in July, 1891. He did so. He frequently conversed with her from that time until 1897, the burden of her talk was that her second husband was unfaithful to her. She spoke of his having intercourse with her nieces and others. She told him that Scott and Ball, one of the attorneys in this contest, were trying to railroad her into the insane asylum. Her language in reference to her husband and his habits with women was such as Hammond had never been accustomed to in a woman. It was vulgar and obscene to a degree. She

charged Scott even in 1891 with running with women. Hammond formed the opinion in 1891 that she was not mentally sane after he had made returns to her about the Spring Valley Water stock which were unsatisfactory, and because of her dissatisfaction at his work, Hammond became annoyed; she spoke about poison and Scott's infidelity to her; she was continually talking about being railroaded to the asylum by Scott and Ball. Hammond had never seen anything wrong in the conduct of Scott. His office was and is at Room 39, Merchants' Exchange, and Mr. Scott has a desk in the same office. Hammond is an expert accountant and was employed by the decedent in 1891. He made a report to her before August, 1891, the report was unsatisfactory to her and that annoyed witness greatly.

Mrs. Ella Joseph went to live at the house of Mrs. Scott at the time the husband of the decedent was in the east; she was very vile and violent in her language—in fact the conduct and conversation of the decedent were so coarse and vulgar that witness told her that she would lose her grace if she remained there. The witness was a church member—Third Baptist Church. She never stopped in the house of Mrs. Scott at nights, but was there about a year and a half. Mr. Scott had gone east but a short time when this witness went to live there, and after he returned she remained there about eight or nine months. When witness went there after a little while she asked Mrs. Scott if she had a husband. She answered, "Yes, of course I have." Witness then said, "You will excuse me if I intrude, but where is your husband?" Mrs. Scott said that he was in the east with a woman. She was always talking of his running with a woman or women; accused him to the witness of improper conduct with the servants in the house and with other women. So far as witness saw, Mr. Scott was a very nice gentleman in his behavior.

Joseph Mortier is an orchardist and wine-maker; was so engaged at Mountain View at the Scott ranch from July, 1889, to September, 1892. Mrs. Scott used to come on an average about once in two months; she used to talk to Mortier about Mr. Scott, and asked him if Scott did not visit a certain widow and some young ladies in the neighborhood,

very respectable persons, and witness told her not so far as he had observed. The witness considered the decedent insane, because she could never carry on a talk for ten minutes at a time, and she would jump from one subject to another. Witness thought she was off on the point of jealousy of her husband.

Revilo F. Morton went into the service of Mrs. Scott in January, 1893, as bookkeeper. She used to talk to him for hours; she began to talk about her husband as early as March, 1893, and continued that way until her death. The first conversation was when she sent for the witness and talked to him for three hours. Among other things, she said that Scott wasted and squandered $100,000 of her money in the first year of her marriage. The decedent also said that her husband was not faithful to her and was familiar with the servant girls. She said that he had sold the Spring Valley Water stock. Mrs. Scott also said that she had been defrauded in her first husband's estate, which ought to have been worth at least $500,000, but only came out about $275,000, and that through Mr. Estee and his partner, Mr. Wilson, she had been robbed of the remainder. She said that her first husband had said he was going to buy the Stevenson building, and she thought he must have had another box in the safe deposit vault wherein were contained other securities that were not in the inventory of his estate. She had no confidence in anyone. She said that Scott was trying to poison her and that she had been poisoned before the witness knew her. She told Mr. Morton once that she had a circus with Scott at the breakfast table and she smashed all the crockery, and she said that when she had one of those spells she must smash something. She told the witness that she was making a codicil and she was going to give Scott very little and cut Mrs. Meily off with a dollar because they had been intimate. In her figuring on the prices of her wines she was frequently at fault; she would ask such prices above the market rate that she could not secure a purchaser. In his opinion she was during this period insane, his reasons being then and now that she entertained those suspicions of certain acts and persons which had no grounds for her beliefs. In all the time that Mr.

Morton knew her he found no ground for her belief or accusations of fraud and poisoning and of the infidelity of Mr. Scott; quite the contrary was the result of his researches and observations. She used in her talk so much profanity and vulgarity that the witness could not believe that any woman who talked that way habitually could be sane. If she were asked a price for the wine she would take the market rates and then she would add several cents and insist upon this higher rate, which could not be obtained. She would insist upon such quotations in advance of the local market prices. She made a price higher than others in the business. He did not think she used good business judgment in such a case. Her custom at the banks was to borrow money on her own note without security to carry on the ranch. She borrowed money from the Bank of California and the First National Bank. She borrowed $25,000 at one time and at the time of her death she owed the latter $35,000. Mr. Morton kept the books from data furnished by her.

Mrs. Anna Elizabeth Ogilvie was a seamstress for the late Mrs. Scott, who was all the time complaining of her husband, Mr. Scott, and telling how he had connection with all the girls who were there, the servants in the house and then went down town after other women. She said he had intercourse with the colored girl in the front room, of which she had auricular evidence as she had heard the bed shake. She also said he had improper relations with her own niece, Mrs. Meily, as she had stood at the latter's door and had heard the sounds which satisfied her of the fact. She would follow Scott all around the house calling him vile names. This would happen nearly every day. Mrs. Scott told the witness that she had a bad temper, which she inherited.

Mrs. Catherine O'Connor worked for Mrs. Scott from 1889, two weeks after her marriage to Mr. Scott, off and on until last October, 1897. She would go to work in the morning at 8 o'clock and leave at 5 o'clock in the afternoon; never slept in the house, as she had her own house and home for many years. Mrs. Scott talked to this witness a great deal and the strain was always the same—the alleged infidelity of her husband, whom she continually accused of dalliance

with other women. She was jealous of a colored girl in the house and used to stand nude looking over the banisters, and witness asked her why she stood there in danger of cold, and she said she was watching Scott and the colored girl downstairs. She used very vile language; witness never heard anything so low. She told the witness that the reason why she had hired the colored girl was because Scott was after all the white girls and she was going to give him enough of it now. Mrs. O'Connor never heard her say anything about Scott except that he was untrue to her and all she feared was that he would put her into an insane asylum: in the opinion of the witness Mrs. Scott was crazy—strictly crazy.

Mrs. Eliza J. Paisley deposed that she lived in California once upon a time from April to August, 1890, on Franklin street with Mrs. Scott. Mrs. Paisley is the sister of the first husband of decedent, Salvin Perry Collins. Witness went there by her invitation. She had a great many conversations with Mrs. Scott, who talked a good deal about Mr. Scott, finding fault with him about being untrue to her in a great many instances. She accused him of numerous illicit actions. Witness could not tell as to their truth. Mrs. Paisley lived there three months and saw the decedent and Mr. Scott every day and was always treated "extra well" by him, he never making any improper advances to her. She never saw anything improper in his attitude toward anybody. His conduct was everything that was right toward everybody and he always behaved himself. While she was there Mrs. Scott did not conduct herself in relation to her person as she thought becoming to a woman. She had seen her do a great many things that were improper; as exhibiting herself in a naked manner, dancing about in the room before a glass—when she did that she was naked. The deponent had heard her make threats against Mr. Scott and his children. She saw her use a pistol not exactly to him, but she would say she could shoot and would shoot Scott sometime. She did not threaten to kill him, but she threatened the children. Sometimes when she would be carrying on she would say, to spite Mr. Scott she would do something to the children. At one time she said

she could poison those children, by putting something on their lips. When the deponent left to go home they came to see her off. In the last conversation she had with Mrs. Scott at the ferry, the latter said that she would draw blood, or felt like doing so, before she got home. Mrs. Scott was highly. wrought up at that time.

Edward G. Perkins first met Mrs. Scott at Pescadero in 1872; she was then Mrs. Collins. He did not have any further acquaintance with her until 1891, when he went to see her about purchasing a horse that he heard she had for sale; nothing came of that. It was with Mrs. Scott that the witness had the conversation about the horse and its pedigree—Mr. Scott not knowing anything about the pedigree of the horse although he knew of the negotiations; he took no part in that. Mr. Perkins was about three months pottering over the matter of the negotiations for the sale of the ranch. His compensation was to be dependent upon the success of the sale, and that never came to pass. He was then engaged in buying and selling mining stocks on his own account through a broker. Mr. Scott knew of the negotiations about the sale of the ranch, and he said to him once that he did not think it worth the while of the witness to be carrying on the affair as the decedent would change her mind so often, and after a while it so turned out; the matter dropped off and after about three months of vain negotiations the end came. When Mr. Perkins first met her in 1891 he thought she was one of the most villainous women in her tongue he had ever encountered, but after a while he came to the conclusion that she was insane; her vile language and violent actions convinced him that she was insane. Sometimes she would put her hands to the side of her head and pace up and down the room and talk to herself incoherently and then break out into a torrent of indescribable vulgarity.

Mrs. Annie J. Robinson knew decedent from October, 1889, to January, 1890; witness was acting as maid for her; at the time she was there Mr. Scott was in New York and returned two weeks before witness left. Mrs. Scott was in the habit of saying that Scott had a woman with him. She was very vulgar and profane in her expressions. She

removed her clothing and exposed her person, saying she was a perfect Venus. She took massage at times, but it was not for that purpose that decedent undressed before witness; it was for no other reason, so far as witness could observe, but that Mrs. Scott should ask her opinion about her form as to being a perfect Venus. Witness did not think decedent was a Venus nor did she consider hers a pretty form, but did not say anything. After witness left Mrs. Scott's house she went to work elsewhere. She had no quarrel with Mrs. Scott, but could no longer put up with her—existence ceased to be endurable with her.

Miss Elizabeth Jane Richards, dressmaker, went to work sewing for Mrs. Scott about a year after her marriage to Mr. Scott, say from 1890, and the decedent frequently rode out to the home of witness on Point Lobos avenue and spent the whole day there. When witness first went to the house of deceased Mr. Scott was absent in the east. Witness was there then for a week. She met him first on the second or third occasion of her working there. He came into the room and Mrs. Scott introduced witness to him; prior to that time witness had never met him. Witness used to stay at the house of decedent as much as two weeks at a time, sewing all day, and decedent would spend the time with her. Witness never spent a night there but took her luncheon and dinner at that house. On the very first night or the first day that she spent there decedent presented herself in the room before the witness stark naked and asked witness if she did not think she had a fine figure and form and was a well-built woman, and if there was any occasion for Mr. Scott to go after other women. The witness said she did not know, as she made no studies of ladies below the waist line, and told her that she wished she would not act in that way before her. The decedent was always talking about Mr. Scott, and his consorting with women, the servants in the house and others whom she suspected. She made threats of killing him often, and said she would shoot him to death if she caught him with a woman; said she would give $1,000 to any girl who would seduce him and sleep with him. She said that Judge E. D. Sawyer and Mr. Ball were con-

spiring to railroad her to an insane asylum but that she would see them in hell first. She was very coarse and violent in her speech—most profane and vulgar. She would dance before the mirror, wring her hands and carry on at a great rate; she would also indulge in high kicking; she would square off before her mirror and spar and swear at herself. Witness did not remember the names of the girls who were there at that time—decedent had so many girls; she would have three in a day. Witness could not keep track of the girls; decedent had about one for every day in the month. She would discharge them; they would not stay with her because her wrangling and her actions were so bad that they could not stand her and the food was insufficient. Decedent had to get three different girls in a day in order to get her work done. She would have to do it herself and go on her hands and knees, yet notwithstanding that fact witness remained with decedent eight years.

E. D. Sawyer, who is an attorney and counselor at law and has been practicing for forty-odd years in this city and state and was formerly for a term of six years judge of the old fourth judicial district, prior some years to the adoption of our present state constitution, and is now representing in this estate and contest absent and minor heirs by appointment of the court, cannot say that he had any acquaintance with the late Mrs. Scott. Mr. Ball was at one time his partner, but witness had nothing to do with Mrs. Scott and had no hand, act or part in any plot against her.

Lloyd Nudd Scott is now twenty-one years of age, a student in the University. He first saw Mrs. Scott about a month before her marriage to his father, who took his brother and himself to see her. This was in October, 1889, when witness was fourteen years old. Witness and his brother accompanied their father to the train when he went east. She said that he had a woman in the car with him; she talked about his father all the time in 1889 and 1890, as to his running with other women; she took the lock off his door so that she could go in and see if he had any servant girl with him; she told Lloyd that she put a thread on the stairs to see whether the girls went up or down at night; she said that

he and Ball were trying to railroad her to an insane asylum; she used to say that the servants in the house were lewd women who came there to rest up and that father was intimate with them. These tantrums or spells would last for a long time and then she would quiet down for a while and express her regret for her conduct, saying that she did not know what she was doing while she was in such a condition. She would throw herself into a terrible tantrum and become so violent and irritable that everyone was obliged to let her have her own way for fear of the consequences, and after one of those tantrums his father, his brother, and himself were obliged to leave the house and go to the Hotel Langham, and after that to the Geysers, whence they returned to the house on Franklin street, upon the receipt of a message from her. After a short respite she would renew her conduct. Father used to ask her to come with him to the theater, but she would decline on the ground that she had to arise early. She spent her evenings at home and so did father. She was not given to reading but a great talker on one topic. Father would not remain to listen to this but would get up and go out. Wesley testified to the same effect as his brother.

Thomas M. Talman lives at 1743 Franklin street, the house of the late Mrs. Scott, and is attending to the garden there. He was first engaged by Mrs. Scott in 1892 and continued in his employment until 1894. His occupation consisted in attending to things generally. Mrs. Scott began to talk about her husband to him from the first. At the ranch she talked to him for hours on the same subject. On one occasion while he was attending on Mr. Scott, who was ill and under the weather, he occupied one room and she another room; the witness was up nights looking after him; the decedent came into the room clad only in a chemisette and went to the fireplace and raised her garments in the rear with her back to the fire, the witness being in front of her. According to Talman she was always flighty in her talk, jumping from one subject to another, no connection in her talk. The witness took charge of the chickens and some of the horses. They had three or four hundred chickens. The pay of the wit-

ness was ten dollars a month. He has been now (March 31, 1898) about three or four weeks at Mr. Scott's.

John F. Uhlhorn was introduced to Mrs. Scott at her house by Mr. Scott in the year 1891, and after the introduction Scott went out and Mrs. Scott at once engaged in conversation with the witness and began by asking him if he knew that Scott and Ball were trying to railroad her to an insane asylum. Witness answered that he did not. Mrs. Scott said that it was so, and she went on with a tirade, swearing vociferously, saying that Scott was running after women and cohabiting with all the women that he met and with the servant girls in the house. Uhlhorn formed the opinion she was insane on account of her conduct and conversation at that interview. About a month afterward he had a similar conversation; her talk was the same, and that corroborated his opinion previously formed. In the year she called upon him at the Cafe Zinkand on Market street and spent an hour at a time talking with him on the same topic. She asked him if he did not know that Scott and Ball kept a harem at the Hotel Grosvenor on Sutter street, but the witness did not know anything of the kind. Witness had known Mr. Scott for about twelve years. When he first met Mrs. Scott her husband took him up to see her, saying that he wanted to make him acquainted with her. After a few moments, Scott excused himself and left witness and Mrs. Scott alone in the conservatory. On the second occasion she met Uhlhorn on the street one day and invited him to dinner, and he went the next day. Scott was not present on that occasion. She said that she expected Scott to dinner but he did not come. On an occasion about three months subsequent Scott invited Uhlhorn to dinner at his house and he went and they had dinner. Everything was agreeable at the table. Afterward they went into the parlor. Mr. Scott went upstairs and she and Uhlhorn conversed for about ten minutes. She was harping on the subject of her husband's assumed escapades and his running after women with Ball. After Mr. Scott came into the parlor he remained a few minutes and they then left the house. After the conversation the first time witness spoke to Scott saying it was strange his wife should

mention such matters to him the first time they met. Witness chaffed him a little about his running with women and he said that was all nonsense. Witness did not repeat to him what she said about the insane asylum, as he considered it was too delicate. In 1893 she invited him to go down to the ranch with Scott, as she thought it would do them both good to have a little outing. He accepted the invitation, and went down with him. Decedent wanted him to write for her a detailed description of the ranch in a letter and he did so. She paid a visit to the ranch while he and Scott were staying there, saying she wanted to see what the men were doing—having a good time, running around with women. This was the general trend of her talk, and she did not seem to have any respect for herself or anyone else in her manner of talk. Mr. Uhlhorn wrote a detailed description of the ranch for her in or about October, 1897, and gave it to her, and she seemed satisfied with it.

William Warwick worked for a while for Mrs. Scott in the year 1897. He went to seek employment in response to an advertisement for men at a vineyard. He first met her about September 15th, 1897. He heard that she had a vineyard at Mountain View and he went there to see if he could obtain a job. She told him that she did not have work in the vineyard but that she could give him work watching Mr. Scott. Warwick accepted the situation and entered upon the duty. He went on his trail and followed him about from that day, September 15th, until about the 6th or 7th of October, 1897, without detecting in him any impropriety or discovering him visiting any place of doubtful repute. The witness followed him all around San Francisco every day that Mr. Scott was in town, kept constantly in his wake all the time. Left the house every morning that he did and took the same car and returned in the evening when he did; wherever Scott went Warwick pursued. He did this at her request. She told him she wanted to catch Scott going with Mrs. Meily particularly. She instructed him to keep his eye on Scott and watch whithersoever he went and report results to her. She wanted to catch him with a woman so that she could take down the bed and move his trunk for him. She said that

Scott was of illegitimate extraction, using a vulgar epithet to describe his immediate female ancestor. She kept the witness running around after him, but as he found nothing unbecoming a gentleman in Mr. Scott's conduct he quit the pursuit and relinquished the employment.

John A. O'Dea is a plumber and a resident of San Francisco for nearly forty years. He knew Mrs. Scott from January 12, 1892, when he went to do some work for her and continued the acquaintance for the balance of her life. Had many conversations with her on topics other than business. She would insist on talking of her domestic affairs when the witness wanted to talk business and he strove by evasive answers to avoid such talk, but she persisted until he managed to excuse himself and left her. Her language was usually very profane and vulgar. She was very violent in her speech and manner at all times. His first experience was when he went there in response to a message through her coachman, and when he reached the house he was met with a volley of violent vulgarity, much to his amazement. With a torrent of torrid expletives she assailed his ears in so fierce a manner as to cause him to make a hasty retreat because of the linguistic bombardment, which was a novel experience to him—so much so that he declined to stay or return, but was induced to do so by the coachman, who assured him that that was only her customary way of expressing her emotions, that she spoke thus strongly on all occasions. The witness so found in his subsequent dealings with her. She would curse and swear and indulge in vulgar remarks to an extent and with a variety previously unknown to him. She always paid her plumbing bills. The last job he did for her was in 1896. She was not extraordinarily acute in her dealings.

Mrs. Gerrish heard Mrs. Scott say she could not keep her servants on account of the familiarity of Scott with them, and that her husband was running with other women, Mrs. Meily being one of them.

To Edward Lewis Brown decedent expressed herself that Scott was unfaithful to her and that he was no husband to her.

Mrs. Scott complained to Nellie Swall that Scott was running with other women and that he was trying to put her into an insane asylum.

To Charles E. Elliot decedent said that she could not keep a woman in the house without Scott's trying to get in bed with her. This was when Elliot advised her to have a companion.

Decedent told Amanda Johnson that Ball and Scott were going up to the Napa Insane Asylum to pick out a room for her.

To Sumner C. Murray she said that her husband was running around with "chippies," and to Wealthy Wormell she said that Mr. Scott was running around with other women.

When Mrs. Putman went to Mrs. Scott's the latter told her on the first day that Scott had improper relations with servant girls. She also mentioned a relative of Mr. Collins and said that Mrs. Paisley and Mr. Scott were conniving to do away with her. Mrs. Putman did not know exactly how, but the tale of Mrs. Scott was to the effect that she thought they were in common against her. Mrs. Putman had some grievance against Mrs. Meily on account of some stories that were repeated as coming from her, and thought she would be justified in retaliating by retailing some account of Mr. Scott's visit to Mrs. Meily, and she went and saw Mrs. Scott and began telling her about Mr. Scott visiting Mrs. Meily. Mrs. Scott said she knew that already and told the witness that she had made a visit there and was confident that Mr. Scott was with Mrs. Meily on that occasion. She told the witness that Mr. Scott had at one time tried to put her in an insane asylum.

Adolph Herman Grossman says that Mrs. Scott did sometimes complain of Mr. Scott going with women, but she did not speak of any particular woman.

Mrs. Mary J. Larmer says that Mrs. Scott was very vulgar and profane in her conversation, cursed and swore, and was violent.

Charles August Armstrong heard her swear on occasions. He was a cooper and did cooperage for her. Mrs. Scott did her business on strictly business principles, and whatever

engagements she made she kept to the letter. She said she had to attend to all the business herself as she had no one to do it for her, as her husband did not seem disposed or able to assist her. If Armstrong and Mrs. Scott had a disagreement about the price of her work she would swear at times at his propositions, but he would not mind it, because it was her way, and he thought it was a sane act for her to swear at him.

From these particulars of evidence counsel for contestant deduces proof of delusions sufficient to overthrow the will as an offspring of a mind diseased. Mr. Estee claims that there is here a perfect concatenation of circumstances, conduct, and conversation. No one link may suffice, but the chain is perfectly joined in all its parts. He claims to have shown that there was no foundation, howsoever slight, for her suspicion in any of the particulars specified, not a jot or tittle, not an iota of evidence to sustain the suspicion of the infidelity of Scott or the unchastity of the venerable sister in law or the niece of the decedent. The idea of either of these ladies being intimate with Scott was too absurd to be entertained by a normal mind. She knew that she had no proof of such a fact and with the cunning of insanity endeavored to fabricate proofs of his infidelity by trying to induce others for money to subscribe to statements incriminating him, but she did not succeed, because there was no proof possible and those whom she tempted were unpurchasable for such a purpose.

All this is stated in the strongest manner for contestant: but were her suspicions of Scott founded on a fixed belief? Was there nothing to induce belief in her mind, no scintilla on which to base suspicion—a very meager item, even—which would warrant her in concluding that he was unfaithful? There was something in the incident in the hugging of a servant girl at the fireplace or grate in the parlor which was related in the testimony of Carl Anderson, when upon her approach the girl repulsed Scott and he escaped through the window into the conservatory and the girl explained that he was only pushing her; this little incident is significant and might easily induce a jealous woman to suspect the constancy of her husband and to believe that he was in the habit

of being unduly familiar with the female domestics in her household. Her suspicions may have been unjust and her inferences too general, but that was merely an error of logic and not an evidence of insanity or of insane delusion. She had a right to infer however erroneously or from inadequate premises to a universal conclusion, for false logic or faulty ratiocination is far from the manifestation of insanity, so long as the process is formally correct, not incoherent nor inconsequential. Her suspicions or apprehensions that he and others were contemplating sending her to an insane asylum or poisoning her may have been unfounded in fact and yet have some germ sufficient to develop and fructify in her mind a rational fear that her life or liberty was or would be in peril from that source.

Mrs. Scott may have reasoned in her mind, however faultily, that some one meditated terminating her existence in some furtive manner. It is not hard to conjecture how she may have sat down and wrought out a theory of poisoning; her consciousness that her death was regarded as a consummation devoutly to be wished for by those who would expect to profit by her decease; no regrets in such a case except for the undue protraction of the period anterior to the inevitable event; but did she say that he premeditated poisoning her with real belief in it, or was it merely her habit of speaking in an exaggerated vein, characteristic of persons of more or less coarse cultivation? What is there in this testimony as to her suspicions of poisoning? If she really believed that she was in danger of being poisoned, she would not be apt to allow the attempt to be successful but would quickly rid herself of the presence of the designer. A woman of her resolute will would not hesitate to act at once and thus end the opportunity of the nefarious plotter. This testimony is colored and its importance magnified as such points are apt to be by those interested in presenting the features that for their purpose seem salient; but a fear of poisoning is not unreasonable where elderly persons of wealth are aware that their juniors are expectant of their demise. The instances are not few where such hastening of the exit of wives and others is accomplished, and it is not unnatural or irrational in persons

situated as was this decedent to apprehend that impatient expectants might so act.

It is not necessary to accuse the contestant of an intent to assassinate his wife by poison or otherwise, for it may be conceded that there is nothing to justify a suspicion or to warrant an insinuation of such a design, and that he is the mildest mannered man that ever entered the circuit of the clientele of counsel, but that he contemplated her earthly exit in the order of nature with some sense of satisfaction and prospect of relief is shown by the deposition of Charles E. Elliot, a venerable gentleman of nearly four score years, cousin of the decedent, who saw her at her house in San Francisco in the latter part of March, 1896, where he met her husband, the contestant. He had no conversation with him then and there, but did have a talk with him about that time at Mrs. Scott's vineyard, called the "Pebble Side Ranch," regarding the relations between himself and wife. As near as deponent could remember, Scott said his wife was crazy or insane; that she was very mean; that she gave him but very little money; that she treated his sons badly; that she was vulgar and had no religious principles, was very jealous, and in short he said about everything he could that was bad concerning her. Elliot said to him, "Why do you live with her, if she is so bad as you say?" Scott answered that he was going to hold on; that she would die very soon and that his lawyer had told him that she could not make a will that would stand, and Mr. Scott said to the deponent on that occasion, "If she don't make a will to suit me, I shall break it." Most of the conversations deponent had with decedent occurred when they were driving on several occasions early in April, 1886. She spoke about Mr. Scott and how she was disappointed in him; no help to her; no business capacity; complete failure; she had to do all details herself. In the opinion of Elliot she was level-headed, smart—a woman of sound mind.

It is argued that she had a fixed belief in nonexistent facts without any atom of evidence to support it, out of which it was impossible to reason her and that her mind was infected by this insane delusion and no argument could avail for its

disinfection; but when her physical condition is considered, we may take into account the opinion of Doctor Levi Cooper Lane, given in answer to the questions propounded in cross-examination by counsel for contestant:

Dr. Lane said that in case of a person, described as in the question presented, who had stomach troubles and female difficulties, who mistakenly believed she was being poisoned, and who almost daily insisted on her relatives tasting her food before she would touch it, when it did not poison them, and she saw that it did not have that effect, and she yet still maintained that her food was being poisoned, and that this continued for a number of years, with her surroundings and what she told the doctor, if she did not entertain such a suspicion, she would have been insane; her suspicions would not be evidence of insanity in view of all the circumstances; if there were no truth in the statements there might possibly be evidence of some incoherence of intellect. A person suffering from stomach trouble is almost necessarily irritable and may lose temper and swear and cut up generally and break dishes, destroy bric-a-brac, and play havoc with furniture, and yet be of sound mind. The doctor had known certainly of one occasion where one of the most intelligent men in this city, as he was regarded in his lifetime, behaved in such a manner, smashing chinaware and the like; he was sane; he lived a long time after this incident and he was regarded as an intelligent man. Dr. Lane spoke from his knowledge of insanity based upon long and extensive observation.

It may be conceded that she at times feared poison, but if it were a delusion, in the circumstances of this issue, it must have been continuous and persistent and operative upon the volitional capacity; otherwise it is not to be permitted to invalidate the testamentary act: Estate of Redfield, 116 Cal. 637, 48 Pac. 794.

When suffering from the chronic condition of her stomach, she may have imagined or believed that her food had been tampered with, but her mistaken belief would not, as matter of law, amount to an insane delusion: Estate of Carpenter, 94 Cal. 407, 29 Pac. 1101.

Unfounded and unreasonable suspicions are not insanity: Will of Cole, 49 Wis. 181, 5 N. W. 346.

The deceased suffering from her stomach trouble was at times peevish and petulant and sometimes suspicious even of her best friends and intimated fears of poisoning, but never acted on such apprehensions, thus showing that she had no fixed delusions thereon. She was a naturally suspicious person and showed this characteristic in the lifetime of her first husband, whom she undoubtedly loved. She left his home on one occasion for several weeks on account of suspicion of the fidelity of Collins, but he courted her with a lover's assiduity, and, induced by aroused affection and his amorous allurements, she returned to bed and board and there remained until he died and in token of his love and devotion left her almost his entire fortune, which constitutes the foundation and bulk of the wealth in this estate.

For five years she remained constant to his endeared memory. During that period of viduity the characteristics and peculiarities adverted to continued in manifestation; indeed these attributes were aggravated by her isolated condition. She was alone without associates or congenial companions; her husband and his friends had gone out of her life and she naturally sought a substitute and successor.

She told Dr. Lane that, after the death of Mr. Collins, she had a great deal of care and trouble with the management of her property, and she had been advised by some of her friends to marry and get somebody to assist in her affairs. She had adopted this advice and had accepted Mr. Scott as her spouse, and had assumed that he possessed the regular business qualifications to make an efficient auxiliary or to act as manager of her property, but she soon discovered that he was destitute of ability to aid her to any degree or in any manner. She found, in fact, as she said to Dr. Lane, that his chief object and main design was to secure possession of her property and that his purpose was entirely mercenary and selfish, and not any benefit to herself. She was not willing to allow him to accomplish his object in this regard and so her domestic life was encompassed by unhappiness. She was very unhappy at his conduct. In reference to

making a will she solicited Dr. Lane's advice as to what measures of precaution or circumspection she could adopt against any assault upon its stability or legal integrity, and he advised her to select some two or three gentlemen of pronounced professional character and standing in their specialty, who would be conceded experts in their department of medical jurisprudence, to decide the question of her mental status as to sanity, or at least to be prepared to testify in the event of its ever becoming a practical issue in any litigated controversy in court. Dr. Lane suggested in this connection certain names—Dr. Clark of Stockton, Dr. Gardner of Napa, and one or two others. In their conversations about the testamentary disposition of her property, the doctor said to her, "Mrs. Scott, you have a great deal of property; you ought to give some to charity." She had been talking about giving it to Mr. Collins' relatives and her own. She replied that she had a great number of relatives and she wanted to give her property so it would help those that were in need. Dr. Lane said to her that she ought to give something to charity. "Well," she answered to this suggestion, "I have enough poor relations for that purpose and I don't propose to give anything in that way." She visited the doctor a number of times on the subject of her sanity until it finally became tiresome. During the years 1896 and 1897 he told her that he was tired of the topic, and he summed up the situation by saying she was as smart as any woman he ever saw. She called to see Dr. Lane several times about the will and about her property. He knew nothing of the facts except as she told him—nothing personally about her domestic affairs or her household. From what Dr. Lane observed of her and learned from her, he considered her to be perfectly sane—entirely sound in mind. He had known her for many years, when she was Mrs. Collins, and in the lifetime of her first husband, and during the last two years of her life she visited him at his office and he visited her at her residence. He was not attending her then as a physician. She wanted to make a will that would stand in law, as she had been threatened that whatever will she made would be broken by her husband, Mr. Scott. She said that he had made such a threat, and

in these conversations she talked to Dr. Lane about her property. If this woman assumed that people were trying to put her in an insane asylum without any iota of basis for her assumption, and continued for many years to indulge this belief, still, in the circumstances of this case, she might be merely the victim of erroneous inference and be perfectly sane. It might or might not be symptomatic of insanity; the diagnosis would be dependent upon the entire congeries of causes or summation of symptoms. If she accused her husband falsely of holding improper relations with her servants, black and white, with her near relatives, very old women, it would seem that she was very jealous; it would not be evidence of insanity. She might forget herself temporarily, but that would not be insanity, even though her husband had given no reason for her jealous suspicion. Dr. Lane should say, regardless of the reason or want of reason, while she might be irresponsible for the moment she would not be insane, she had simply a very jealous temperament. If in the presence of some persons she pointed out of her window on the lawn and said, "There's my husband and so and so," naming a third person on the lawn with him, when there was no one at all there, it would be a temporary delusion. If she pointed on the carpet in her own room to persons who were present and said, "There is Scott with so and so," naming a certain woman, "engaged in sexual intercourse," or tantamount words, when there was no such spectacle nor any person there, it would to the doctor import the offspring of an inordinately jealous mind; it would be an hallucination; the mind not absolutely normal; it would be a deviation from her ordinary and normal condition, but be restricted to that occasion.

Consider her circumstances: She was inordinately jealous, even in the lifetime of her first husband, of whom she was very fond, and who was a man after his kind, engaged in an occupation that was fraught with temptations to indulgence in liquor and developed in inducements to pleasures of the palate. It is not surprising that he drank occasionally or often to excess; he did drink and at times became intoxicated and then would express himself in indelicate terms. His

wife acquired these habits and took on the roughness and grossness which were the accompaniments of the times and places. She was a woman of strong characteristics, strong beliefs, strong sentiments, strong speech, and strong purposes, and indifferent to the conventionalities of the society of the later and present era of settled social form and orthodox observances. It might have been different with her in a more conservative community, although it is not fair to generalize from the small premise of her special surroundings that the society of San Francisco was crude and unrefined, for we know that from a very early date this city contained its fair proportion of as good and true women as ever adorned any community. It is historical, and the court has a right to note it, that in the early summer months of 1849 family homes began to appear in every direction in San Francisco, and by the fall of that year they could be said to be numerous, and from that time forward they steadily increased, and a year afterward they were a leading feature of the young city, and for the next few years not even twenty per cent of the population could be subjected to criticism from the severest censors. It is true that the obnoxious elements made themselves so conspicuous and kept so constantly in evidence and on parade that one just arriving in the city might imbibe the impression that the proportion was much larger, but that this ratio is right may be ascertained by authentic annals, such as a work of the late Hon. William F. White, entitled "A Picture of Pioneer Times in California," which is valuable for its accurate data and details, verified by a writer who with his family, one of whom is now a senator of the United States, formed a part of this community; but nevertheless it does not appear that the decedent cultivated this element. Her associations were mainly such as centered and converged and crystallized in that class which found its social circle and status and ethical standard and moral atmosphere in the saloon, which however reputably conducted, was not naturally nice or choice in its conventional criteria of the proprieties of conversation or conduct. In other circumstances a more pleasing portrait might have been presented of the heroine of this contest, but such as she was we have her here; her

stomach was weak and sensitive until this condition became chronic, presenting symptoms not ordinarily understood by the common mind; her diet delicate, mostly mush, crackers, juice of beefsteak, and a very little bread; her disposition somewhat affected by her dyspepsia; prone to anger, in the ebullitions of which she breaks dishes and destroys bric-a-brac, and makes life very tropical for her intimates, employees, and dependents generally; while so suffering irritable and disagreeable, otherwise a pleasant person.

In all these circumstances it is not remarkable that she was troubled with megrims and that her slumbers were broken by nightmare, when she had an hallucination that a murder had been committed in the hall of her house, which incident may have resulted from her oversizing her drams of whisky, for, according to Mrs. Meily, she was an habitual and hard drinker of alcohol during her latter years, and an extra dose of this sort of poison may have been the cause of this nocturnal aberration. Mrs. Meily testified that she had seen her aunt Angelia several times under the influence of liquor, and it may have been that upon this occasion, when his stepmother told Wesley Scott that some one was being murdered in the hallway, when no such transaction was in progress, that her aspect was so dazed and distraught as to suggest that the whisky had been exceptionally potent. The distemper of drink may have wrought this transient condition of her nerves and temporarily disturbed the diapason of her wits.

She was at times troubled with insomnia, as was natural with one who was afflicted with an intestinal disease, and then momentarily, like Lady Macbeth, "she was troubled with thick-coming fancies that kept her from her rest," but her mind was not necessarily diseased.

She was a very nervous and unhappy woman, and what did her husband do to alleviate her distress? She was living unhappily with him and he was tolerating her for the sake of the future when he hoped to possess and enjoy her fortune. Why did she marry Scott? Was it for love, or was it merely a commercial union? Was it solely that she might have a domestic partner who could manage her affairs, protect her property, and relieve her of the strain of business

cares? The truth seems to be that her motive was composite, and the reasons she gave from time to time are reconcilable to this theory. She needed some one as an affectionate associate in married life—some one to supply the love element in her nature and to attend to her material interests at the same time, and when she came in contact with Scott she imagined that she had attracted her affinity in both regards, but this may have been an insane delusion, for a short experience caused her to rue the day she married him; they were married but not mated, and hence infelicity. Two motives entered as ingredients in her choice of him, only one in his selection of her; his was a merely mercenary motive. She craved for something more than money; she believed that Scott could fill the aching void in her heart; that she could find in him a suitable successor to her deceased spouse; but it was a bitter disappointment in every respect. The contract so far as sentiment went was unilateral; she wanted a conjugal mate who would relieve her head from business cares and occupy the vacant space in her heart and the vacant chair at the table once filled by Collins, but Scott married her for money; his motive was mercenary and marital misery followed from his incompatibility and incapacity. In true love and as a business union this marriage was a failure. She was jealous, and in the philosophy of love it is said that this malign sentiment is its bitter fruit, and it survives youth, especially in women. But it was different with him; he was not jealous, for he loved her not, although he had once listened to her, pretending to reciprocate, when she said she loved him, for

> "When a woman loves a man
> The man must hear her, though he love her not."

Why did she love him? Is human love the growth of human will? These are questions that only a woman can answer, and the age is not yet so far advanced that she can make response in judicial decision.

> "It is not virtue, wisdom, valour, wit,
> Strength, comeliness of shape, or amplest merit
> That woman's love can win, or long inherit
> But what it is, hard to say, harder to hit."

It is enough to say that there is evidence in this record that she did love him, but the love was not mutual and did not bring life's discords into perfect tune. Her passion was unrequited and she was conscious that he did not return in sincerity the sentiment that he professed before marriage and at the altar. Jealousy is said to be the offspring of love, and this was decedent's only child. She was enamored of Scott and in her passion was constantly thinking and talking of him, for it is true, as George Eliot tells us, that jealousy can no more lose sight of its object than love.

In regard to him it may be said that for the purpose of passion it would not be natural to seek satisfaction in the embraces of antiquity, and it is fair to assume that her complaint that he was not a husband to her was founded on fact, although he testified that he was a husband to her up to the day of her death, with all that that implies, but this statement is antagonized by her declarations and by circumstances that render its truth improbable. It may be conceded that her suspicions of the fidelity of contestant persisted in, as it is claimed they were, without evidence to support them and against all reasonable probabilities of truth have the semblance of insane delusion. Yet it is not necessarily so.

Observation teaches us that there is a very large class of people, whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who upon the most trivial, even whimsical, grounds will wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons confessedly sane are to a greater or less degree afflicted with it, to justify us in saying that because the deceased was so afflicted she was insane, or the victim of insane delusion. The line between unfounded and unreasonable suspicions of a sane mind (for doubtless there are such) and insane delusions is sometimes quite indistinct and difficult to be defined. However, the legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity to prove it. Hence in a doubtful case,

unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way: Will of Cole, 49 Wis. 181, 5 N. W. 346.

She was suspicious of his constancy. Suspicion is the imagination of the existence of something, especially something wrong, without proof, or with but slight proof; it is an impression in the mind which has not resulted in a conviction. It is synonymous with doubt, distrust, or mistrust—the mind is in an unsettled condition. Suspicion existing, slight evidence might produce a rational ultimate conviction or conclusion; this without evidence however slight, would be a delusion. Is there evidence, however slight? This is the test. The suspicion may be illogical or preposterous, but it is not, therefore, evidence of insanity: Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

A most unwilling witness was Mrs. Louisa M. Putman, who was very reluctant to testify and who said that her husband, Dr. Putman, had been greatly opposed to her coming forward in that capacity. She came, however under constraint, and under the subpoena of proponents, being served with great difficulty, and here is her story in short meter:

Mrs. Putman first saw Mr. Scott at Mrs. Meily's house, 730 Union street, between Powell and Mason, in or about January 1895, at the bedside of Mrs. Meily's sick son, who was the husband of the witness and who died in January, 1895, and was buried from that house. She could not say definitely how often she saw Mr. Scott in 1895 and 1896, but it was several times. He usually called in the morning about 10 or 11 o'clock, on week days; sometimes in the afternoon; he would remain sometimes fifteen or twenty minutes or perhaps half an hour, sometimes an hour. Mrs. Putman knew the decedent and visited her shortly before she died. Mr. and Mrs. Scott were there several times during the illness of the husband of the witness. Mrs. Scott introduced Mr. Scott to the witness there. He always conducted himself with propriety in the presence of the witness. Witness was not residing with Mrs. Meily but would stay a week or so at a time when she was not otherwise occupied at work. If witness happened to be unemployed at her occupation

she would pay Mrs. Meily a short visit, merely that and nothing more. When employed witness was engaged at dressmaking. She could not say definitely how long she spent at a time at Mrs. Meily's but was there, she thought, in the months of January, February, or March, 1896. Two months was the longest period of time she was in that house continuously after she was married to the son of Mrs. Meily, but she could not name the two months. Sometimes she would call of an afternoon. Witness was nursing at the time and it would depend when she would obtain relief—sometimes in the forenoon and other times in the afternoon. While she was on friendly terms whenever she had a little time off she visited Mrs. Meily. She first saw Mrs. Scott at her house in August, 1897. No one told her to go but she guessed she was moved by a malicious feeling on her part toward Mrs. Meily, against whom she had a grievance. Witness had heard that Mrs. Meily had spoken unkindly of her and she felt unfriendly about it. They never had any words, no quarrel, but some stories were repeated as coming from Mrs. Meily that annoyed witness, so she thought she would be justified in retaliating by retailing some account of Mr. Scott's visits to Mrs. Meily. She first went to Mrs. Garcia, who refused to tell Mrs. Scott; told witness to tell her herself; witness then went and saw Mrs. Scott and began telling her about Mr. Scott visiting Mrs. Meily. Mrs. Scott said she knew that already and told witness that she would give her $500 if she would put in writing charges against Mr. Scott that would incriminate him with Mrs. Meily. Witness could not remember all that Mrs. Scott wanted on the paper which she desired her to sign. It was not exactly the writing of the witness, who never made any remark that improper relations existed between Mr. Scott and Mrs. Meily, or that she ever saw anything of the kind. After the first visit Mrs. Scott began sending the housekeeper, Mrs. Burnham, down to ask the witness to call and see her. She visited Mrs. Scott again after the August visit in response to a request conveyed to her in letters. The witness wrote a letter to Mrs. Scott about the first part of September, 1897, in the following words:

"You told me you would say nothing that would bring me into family affairs, in fact would not mention my name. Now I am willing to face anything I say, but to be mixed up in family troubles, I beg you will refrain from asking me to do such. What I told you was for your own personal good. . . . . Mr. Scott said Mrs. Meily was crying all the time over it. How did he know it? If you did not give him the address here, who did? Perhaps Mrs. Meily?"

That letter speaks of Scott; he called on witness and said that Mrs. Garcia has told his wife a great deal or that Mrs. Garcia had said to him that witness had told or said a great many things about him, and he asked witness if she had anything against him. She said she had not. He was a perfect stranger to her in the first place, and he told her that his wife and he had some trouble and that she had accused him of acts that were purely imaginative, simply what she herself thought, and remarks that the witness was supposed to have made with regard to improper relations, and witness denied that she ever said so; but there is the letter, and it speaks for itself. Mrs. Scott told the witness that she had been to Mrs. Meily's house twice in one day, that she could not get in and went away and came back again. she said that she knew Scott was inside because she felt something from within, the influence of his personality, magnetism, or something of that sort.

It is not necessary to inculpate the suspects in such a case; it is enough that there were circumstances in the association of the persons to impress the jealous mind, and the evidence of Mrs. Putman so reluctantly and cautiously educed, even were it but a feather's weight, shows that decedent had material for suspicion. There was at least slight evidence that her husband was visiting another lady clandestinely and surreptitiously, and that was enough to remove the stigma of insane delusion, although by no means sufficient to justify this court in concluding that her niece was guilty of misconduct. Mrs. Meily's entire innocence in intent and act is consistent with the ill-timed and indiscreet visits of Scott to her house, so far out of his direct course from his own home to his office.

No matter how tenuous these threads of testimony are, they are sufficient to support her suspicion. In regard to the caressing of the servant girl it was denied by Mr. Scott when on the witness-stand. In reference to the Meily matter Mrs. Burnham testifies that Mrs. Putman came to Mrs. Scott with a story about Mrs. Meily. Mrs. Meily testifies that Scott did visit her repeatedly, at her home, 730 Union street, on his way down town from Franklin and Sacramento street to his office in the Merchants' Exchange. It is only necessary to indicate these points of departure and terminus in his daily travel to illustrate at what inconvenience of time and circuitousness of route he paid these visits to her alone and in the absence of her husband. Mrs. Putman knew of these visits and testified that she went to Mrs. Scott with a story about Mrs. Meily for the purpose of maliciously injuring that lady, but whatever was her purpose or her grievance, she added fuel to the flame of jealousy already existing in the mind of Mrs. Scott, who was impressed by her tale. Still there was no ultimate conviction in her mind; she had doubts; and constantly sought information to resolve them. She employed detectives, who seemed to have deceived her and conveyed their stories to her husband, with whom they have been since on intimate terms. She offered rewards of proof of the facts; tried her own hand at detective work; visited Mrs. Meily to ascertain the truth; interviewed Mr. Scott's gentlemen friends to elicit information; and in many ways showed that she had no fixed belief of Scott's infidelity, and the statements on that subject which she made were mainly to Scott's particular friends and her servants who faithfully communicated them to him and have since reproduced them in evidence. William Warwick is a sample of those who practiced the system of espionage in her behalf. Mrs. Burnham is another who made a pretense of acting as a spy, disguising herself and deceiving her mistress, to save her situation. This lady naively confesses that she practiced deceit and duplicity and did not even make an attempt to act the part she pretended to play; but she failed to save her situation, leaving there on the 4th of December, 1897, and did not return to the service during the lifetime of decedent. Subsequently she did so return

and is now an inmate of the Scott mansion. In respect to this item of infidelity, it may be said that there being slight evidence to support suspicion there was no delusion; and there being no settled conviction, there is no delusion.

Was the expressed apprehension of the decedent that contestant had conspired to confine her in an asylum an insane delusion?

There is evidence ample in the record that Scott twitted her from time to time with being crazy, and said that he could break any will that she would make, and he is here now engaged in the execution of that threat. That he taunted her with his ability to set aside her will, as he could prove her insanity and that he nagged her on this point with the view of instilling into her mind some doubt of its soundness is established to the satisfaction of the court. Undoubtedly this worried and annoyed her, and it was but natural that she should entertain an apprehension that he and his close friends might conspire to that end. The testimony of Carl Anderson, the coachman, although denied stoutly by contestant, is circumstantially credible in respect to the conversation in the coupe; that they had a quarrel on the way out to the Cliff House, where Scott left and she returned alone in the vehicle driven by Anderson, is certainly true, and I can perceive no evidence of animus in this witness against contestant to justify me in rejecting his testimony Anderson may himself have said, as is testified to by the impeaching witnesses, that she was "crazy" or "absent-minded," or he may merely have advised some of the persons employed by her or others not to mind her quick temper or swearing as she did not mean it, but that does not authorize the court to discard or discredit his entire statement. Mr. Ball, recalled to impeach this witness, testified that Carl Anderson said to him in his office on or about February 1, 1890, that Mrs. Scott was crazy. Anderson came to the office of Ball on some errand for Mr. Scott, who was absent at the moment. Ball asked Anderson, "How is the old lady?" and Anderson answered, "Just as crazy as ever." In this connection it may be worth while to allude again to Mr. Ball's evidence. Mr. Ball was present when the decedent was married to contestant, who had an office

with him at that time, dating back to 1884 or 1885. When Scott was east, Ball visited her two or three times a week and remained there from 6 or 7 to any hour up to 12 in the evening, and continued to visit her up to 1892, but did not remember being there in 1893. She visited Ball's office in 1892 and asked him if she looked crazy enough to be put into an insane asylum. "I thought perhaps it was one of her lucid intervals." In 1890 she said to Scott in the presence of Ball, "That E. W. wanted to look out or she would use a pistol on him." During Scott's absence in the east Ball was at her house twice a week for four months; her conversation was continually on the same topic and was very tedious and tiresome—indeed, became very monotonous. One time they had a drink together; they were in the dining-room and she went out of the room and brought the whisky in a small decanter. Sometimes he would go there and dine with her; other times he would go there immediately after taking his dinner, say about half-past seven in the evening, and on one occasion in the course of her conversation, doubtless after draining the decanter, Mr. Ball paints a vivid picture of an incident that occurred consequent upon a remark he made to her. "She instantly became like an enraged tigress—jumped up from the table. Her countenance changed, and she looked like a fiend. Her eyes hung out of her head, and she smashed the table, a marble-topped table and she said: Mr. Ball then recites the language of this fiend-like woman after she had jumped up in the manner of an enraged tigress and with her paw fractured the marble-topped table. Mr. Ball's delineation of this unfortunate victim of morbid delusion was realistic in the extreme. Her appearance, attitude, and action so artistically arranged in Mr. Ball's description portray one demoniacally possessed. Uhlhorn testifies that when he was introduced to Mrs. Scott by Mr. Scott in August, 1891, the first thing she said to him was that Mr. Scott and Mr. Ball were trying to railroad her to the insane asylum.

It is a curious fact if this woman were as crazy as they would make her out through all these years, from 1890 to her death in December, 1897, and if she had murderous designs, as some of them say, that they would care to visit

her or live with her or be under the same roof in such close and constant intimacy with a dangerous lunatic.

Anderson testifies without appearance of bias, and on the whole seems well disposed toward Scott, who, he says, was quiet and good tempered, as a rule, although at times he would provoke her. Scott is a superficially smooth, plausible man, with a pleasing exterior, and understood his interest sufficiently to curb such temper as he had, at times manifested some spirit, when thrown off his guard; but Carl Anderson does not appear to have any ill-will toward him, and when he relates what occurred on the trip to the beach and what he told Scott at the stable in answer to his inquiry as to what she said, after Scott left the coupe at the Cliff, there seems no sufficient ground to doubt it. Mr. Scott on his recall denied the main feature of Carl's statement and said "he was never in the habit of making a confidant of servants," but it appears that the coachman was an old servant of eleven years' standing, and such servants are often the voluntary or involuntary recipients of family confidences. It is fair to infer from this and other statements in the record that Scott did say what was imputed to him and tormented her with insinuations as to her sanity. She was thus led to believe that he desired to have her so situated that he could enjoy the fortune for the sake of which he married her, and that when he should be no longer handicapped by her presence he would pursue the path of pleasure unmolested so long as her wealth would be under his control without interference from her. There was some evidence then to support this belief, and it was, therefore, not an insane delusion.

It is proper to note, without invidious reflection, that the witnesses for the contestant may be placed in two categories:

1. The intimate and personal friends of the contestant, E. W. Scott.

2. Persons who for a period were in the employ of the testatrix, Mrs. Scott, and who failed to retain their situations, and who for one reason or other have been dissatisfied.

Among these in the first category we find Hammond, the friend and office companion of contestant; Dyer, personal friend introduced by Scott; Perkins, personal friend; Estella

Burnham, private seamstress, and now in the employ of contestant; Morton, the bookkeeper, personal friend introduced by Scott; and Uhlhorn, another personal friend of contestant.

In the second category, Catherine O'Connor, who was employed in a sort of general capacity doing all that there was to do and doing all the talking with Mrs. Scott, and did more talking with her than anything else, and who from the voluble manner in which she gave her testimony was quite capable in that respect; Joseph Mortier, orchardist and winemaker of the vineyard; Ida Gustafson, Sena Cook, Ulrica Anderson, house servants; Talman, the chicken-man; Mrs. Mary J. Larmer, nurse in house of Mrs. Meily's mother; Fred Bockwoldt, erstwhile foreman at the Scott ranch; Mrs. Ella Joseph, colored domestic in the Scott mansion; Froelich, the wine broker who had litigation with Mrs. Scott; O'Dea, the plumber; and finally Elizabeth Jane Richards, who worked for her from 1890 until the death of testatrix, in December, 1897, and whose testimony can hardly be treated with the traditional tongs, but as a specimen of her feeling toward the deceased this charitable observation may be culled from the record: "Mrs. Scott said that she would be dead and stiff in hell by Christmas day. I guess she was." This witness made this remark professing at the same time to have been very friendly with the decedent. As a sample of her reckless statements on the stand reference may be made to her testimony that decedent employed and discharged as many as three girls in a day, and that they would not stay because her language and habits were so bad, and that there was not food enough for them. When the court called the attention of this witness to the fact that three girls a day would be many in a month, she responded that she did not think that decedent had so many in a month but she had one every day in the month. This woman's extraordinary nerve in voluntarily narrating incidents from which even a degenerate masculine mind would revolt was so abnormal as to shock every one within hearing and to cause the counsel for contestant to suggest that if it were to continue, the case had better proceed with closed doors; yet she affected delicacy in reciting the remarks of dece-

dent, saying she could not explain all the language used. "A man might do it; not a lady." Yet notwithstanding the brutish behavior and ineffable grossness of the decedent, from the first day to the last, this lady remained with her for eight years.

Mr. Estee, of counsel for contestant, in commenting on the mode of conducting trials of this kind, made some remarks, the substance of which the court has preserved, because of their general value. He said that the asperities generated in the course of controversy should cease when the time for argument arrives; then the heat of the trial being over the cool reason only should govern; the abuse of one attorney by another is not argument and can avail nothing before a court constituted to try a cause, nor is the abuse of witnesses serviceable in the illustration of the important issues in such a case. Most men and women are honest, women as a rule more so than men, but the intentions of most are upright and desirous of honest dealings. Some men make poor witnesses, most women show to poor advantage on the witness-stand, but that is not because they are not telling the truth but because they are so constituted that their feelings are enlisted and their sensibilities are superior to those of men and not so easily controlled. It is proverbial, therefore, that women are poor witnesses; so with old men, who seldom do well when under examination of counsel in court; they mean to testify truthfully, but because of age or sex are easily disturbed in their train of thought and current of connected discourse. Counsel therefore did not undertake to descant upon the duplicity or deceit or falsehood of witnesses whom he did not believe to be in any way guilty of perjury, but who by reason of feeling or age, or other natural accident of constitution, may have colored or exaggerated or innocently diminished or distorted the facts in their testimony. Counsel has the greatest respect for Dr. Lane personally and in his professional character, but thought his feelings dominated his evidence; as for Mrs. Richards, he did not think she was a good witness, but she was entitled to animadversions to no such extent as was indulged, and counsel for contestant knew her to be a good woman not-

withstanding the unpleasant tenor of her testimony, which, being the truth, she was bound to disclose.

The court is in perfect accord with the sentiments of the learned counsel, and if the lady whose testimony has been presented has been dealt with unfairly, she may abide by the record which will be the final test for all concerned.

Opposed to the witnesses enumerated are those for the proponents, whose character and standing are not challenged, save in some exceptional cases, such as poor Pontus Ahlstedt, whose prenomen provoked a pun, and Carl Anderson, whom counsel for contestant thought it not necessary to abuse because he was a poor, ignorant man who got mixed up in his memory and substituted imagination, as much as he had of it, for actual occurrences, and counsel thinks it is charity to Carl to say he was mistaken; but as to the others, they are let off lightly, with the suggestion that they are mere business acquaintances and not up to the standard of Uhlhorn, Dyer, Perkins, Richards, and the others already cited and quoted; but many of them had large opportunities to observe and belonged to an intelligent and discerning order of observers; if their testimony was of the negative kind, in some instances, it was of a high character and from persons not apt to be deceived or mistaken, and met the improbability of much of contestant's positive or affirmative evidence.

In connection with the witnesses for the contestant there are many circumstances of suspicion giving color to their testimony. Some of these suspicious circumstances may be mentioned; such as the method of introduction of Major Hammond, Mr. Scott's office companion; the peculiarities surrounding the sudden desire of Scott to introduce Uhlhorn leaving Uhlhorn alone with her; the dinner which followed at which Scott did not participate; after that the dinner at the invitation of Scott; the scene in the parlor when she was left alone again with Uhlhorn; the suggestion of Uhlhorn at his first visit that she was crazy; the line of real estate men introduced by Scott to sell her property, and the care and zeal with which they pursued their wealthy quarry; the frequent visits and the time they spent in the pursuit, notwithstanding their settled conviction at the very

outset that she was crazy and could not competently transact any business of importance; the fortunate circumstance of Annie Robinson going to the office to obtain a witness to an instrument; the chance meetings on the streets and on boats; the remarkable ability to discover and marshal servants of years gone by who had been dismissed from employment; many of these discarded domestics are brought in to testify to trivial transactions, inconsiderable incidents and segregated circumstances, designed to promote the purpose of contestant in traducing the memory of deceased and to expose her infirmities of temper and magnify her foibles into the dimensions of disease of mind, every atom of acerbity on her part and every ebullition of anger, no matter how evanescent, is exaggerated and accentuated as evidence of insanity.

The value of the evidence of business men and acquaintances acquired in commercial dealings has been favorably regarded by the courts in all cases of this character, and the persons here produced by proponents are certainly entitled to credit within the sphere of their observation. A brief résumé may here be given of the evidence adduced in favor of the sanity of the testatrix:

Edwin Lewis Brown was an accountant and bookkeeper for the decedent for some years after 1879. Brown used to go to her house at stated periods to make up the books. She was a shrewd and suspicious woman, distrustful to a degree. She was aggrieved apparently at her husband, Mr. Scott, and spoke of her suspicions of his fidelity to her. She said she married him because she loved him and she wanted some one to handle her affairs, and Scott was reported to her as a business man and was introduced as such. She said she did not think he reciprocated her affection, and she suspected he was not true to her, as he was no husband to her and she knew enough about men to know that this was because he was going with other women. She stated on more than one occasion that Mr. Scott had charged her with being crazy or said that she was crazy, and told her so to her face, and such remarks had a tendency to provoke and worry her; she was sane.

George Swall knew Mrs. Scott since 1885, and thought she was sane.

Mrs. Nellie Swall knew decedent all her own life and believed her to have been sane.

Gustave Messinger, a fire insurance agent, knew her for twenty-three years, and handled her insurance about three years prior to her death; saw her three or four times a year, and carried about $123,000 for her. She always selected her own companies, giving particular personal attention to the paying of premiums and the exacting of receipts, for she would not trust anyone to pay the premiums, not even this witness, and in his opinion, from her appearance and manner of doing business, she was rational.

Sumner C. Murray, a carpenter and builder for thirty years in San Francisco, knew the decedent and worked for her at least a dozen times in the two or three years before her death, always dealing with her personally. Her conduct and appearance was rational, and in his opinion she was of sound mind.

William H. Rhodes, engaged in the safe deposit department of the California Safe Deposit and Trust Company, knew decedent as a customer of that concern for two years. Had many conversations with her on her visits to that place, sometimes for a few minutes and sometimes for as much as half an hour at a time. Saw her once a month or once in two months; in his opinion Mrs. Scott was perfectly sound in mind.

Mrs. Olivette M. Folsom testifies that she has been married about ten years. Her mother in law died about two years ago of a stomach trouble. She had suffered several years prior to her death. The senior Mrs. Folsom came to this coast on the same steamer with Mrs. Scott and the friendship continued until death. Each had this similar chronic complaint and both had the same physician. They used to compare notes as to their symptoms. After the senior Mrs. Folsom's death Mrs. Scott used to visit the junior repeatedly, which visits were returned, and the young woman went to drive on a number of occasions with the elder one, and they talked habitually of the symptoms of Mrs. Folsom in her last illness. The mother in law of witness

had to be very careful in her diet in the last year of her life. Witness heard from them that her mother in law and Mrs. Scott came out to California together. She heard Mrs. Scott complaining of her stomach troubles; the two talked before her on the subject matter of their abdominal ailments. She never heard Mrs. Scott accuse anybody of attempting to poison her; never heard her use profane, vulgar, or obscene language or say or do anything unbeseeming a lady. She was perfectly sane. Witness gave as her reasons that she always conducted herself in a rational manner and talked sensibly, her conversation was the same as that of any other sane person. In all these conversations there was no suggestion made by Mrs. Scott that she had been poisoned, that she thought her trouble arose from poison, or anything whatever about poison.

Robert Frank Clark, in the insurance line for twenty years last past transacted some matters for and with decedent. She did business the same as anyone else. Clark saw her at her house, talked with her for as much as half an hour at a time. The conversation occurred in a little room off the hall, apparently a reception-room. Decedent may have talked about her properties in a general incidental way. She alluded to her physical infirmities, giving Clark to understand that she was possessed of a very sensitive stomach and was of the dyspeptic order. Witness thought she was very suspicious in business matters, a nervous woman. She never told Clark that she feared being poisoned. He never saw her excited. She was emphatically sane. Clark gave as reasons for his opinion that she conducted her business with scrupulous care in regard to data and details, very exact in money matters. She never talked to him about her domestic affairs. The transactions of witness with her were from November, 1886, to November, 1893.

Amanda Johnson was employed by Mrs. Scott for nine months in 1893. Decedent was delicate, just sick. She did not tell witness what was the matter. She took massage treatment while witness was there, who used to have to stay in the room during the time. While the rubbing was going on decedent would have some covering over her. Never heard her say that she was in danger of being poisoned.

She was not easy to get along with. She used to become angry sometimes. She said she had too much business to attend to; that she thought Scott did not care for her because she was too old; that he drank sometimes; that they would try to break her will when she was dead by trying to prove that she was crazy, that Scott would try and do this. Once when the witness was with her passing in sight of an insane asylum, decedent pointed in that direction and said that Ball and her husband had picked out a room in that institution for her. In the opinion of the witness Mrs. Scott was sane.

George A. Folsom came out to this coast on the steamer with decedent, 1857, and afterward the acquaintance continued here. He saw her three or four times after her marriage to Mr. Scott in 1889; the last time in November, 1897. She was perfectly sane.

Joseph Henry Marshall, a resident for thirty years of this city, a salesman for the Dunham-Carrigan Company, dealers in hardware, knew Mrs. Scott as a customer of that firm years ago. Her transactions with the witness were purely on business and continued for a period of six years. The acquaintance was begun in the store where witness was employed. She came about once in two or three months, perhaps about thirty times in all. She was very bright in making purchases, in looking after cash discounts. She came about once in three months. Marshall thought she was perfectly sound in mind and very bright.

James S. Bock, floor superintendent of Newman & Levinson, on Kearny street, for twelve years, knew decedent as a customer since before she married Scott and had many conversations with her on matters connected with her purchases. She was very reserved and aristocratic in her demeanor and mannerisms. She was always dressed up to date, very particular as to appointments of apparel and a close and exact buyer, a hard customer to please, with an excellent knowledge of fabrics and a good judgment user in the selection of materials. She always wanted the latest styles and she was a good judges of modes. Had no conversation with her except in the line of his calling. She was sane.

John M. Ver Mehr deposed that he was an assistant accountant at the California Safe Deposit Company, and knew the decedent as a customer; saw her many times but had no considerable conversation with her, but so far as he could judge Mrs. Scott was perfectly sane.

John J. Doyle knew Mrs. Scott since 1888 and had business with her down to November, 1896. Witness has been engaged since 1881 in selling the product of the vineyard Las Palmas, which is by the road three miles and a half from the Scott ranch, the Pebbleside. She often came to his office in the Safe Deposit Building to consult about the price of wine and other cognate matters. Had no conversations with her except on business. She impressed him as an intelligent and shrewd woman of business and had a good knowledge of the market generally. She was thoroughly sane; conversant with the condition of the market and connected in her discourse, discussed the future of the market and reasoned well upon the probabilities of prices.

Samuel G. Murphy, president First National Bank, knew Mrs. Scott since January, 1896, and she was sane beyond any question.

Miss Clara L. Wilson knew Mrs. Scott twenty years. Had seen her often in the last ten or twelve years. When she was out riding in this city she frequently stopped at the house of the witness. She used to talk to the father of witness, Ezekiel Wilson, about her vineyard and some property she had on Point Lobos Avenue and some horses. Witness last saw decedent in 1897, and in her opinion Mrs. Scott was perfectly sane.

Thomas Brown, cashier of the Bank of California, knew Mrs. Scott as a customer of that institution in which her account was closed prior to her death. She was sane. His opinion was based on observation of her in transactions with the bank. He had no other means of judging of her mental condition.

William Plageman, engaged in the milling business in this city, knew Mrs. Scott, and had conversations with her on matters of business. In his opinion she was sane, and the witness saw nothing in her action or talk to indicate insanity.

Ezekiel Wilson, nearly eighty-two years of age, and a resident of San Francisco for forty-eight years, and very well known during all that time, knew the decedent intimately for twenty-five years. Never heard her swear or use unseemly language. She was always a lady. She talked about her health, stomach trouble, dyspepsia, had to use care in her diet. She was a very bright, intelligent, first-class business woman, rational and shrewd in her ideas. She was sane and he never thought otherwise. Her conversation and conduct showed sanity.

C. A. Armstrong, already alluded to elsewhere, thought she was sane.

As to the habits of contestant it is not open to doubt upon the evidence that he sometimes took a drop too much. In his own testimony he says that for two or three years when he was selling wine and associating with drinking men he may have drank a shade too much, but he was never under the influence of liquor to an inordinate extent; he was always able to take care of himself, and did not need aid of any person to assist him home or otherwise. The testimony of Berry, Coyle, and Kelly, hackdrivers; Wallace, car conductor, and farmer Ahlstedt, is hardly overcome by this general denial of contestant. It is not surprising that this gentleman at times was tempted beyond his powers of resistance, for such a dragon as he makes out decedent would drive a regiment of teetotalers to drink. "The man had a shrew for a wife and there could be no quiet in the house with her." This phase of the case may be passed without further remark.

In regard to the evolution of these testamentary instruments we must consider at some length the evidence of those immediately concerned in and about the act of execution.

Philip G. Galpin began his practice in San Francisco as early as 1858, and has been identified with his profession in this place since that time, and for more than twenty years continuously has resided in this city, engaged in active and extensive legal business. Mrs. Angelia R. Scott came to his office in relation to the drawing of the document dated October 22, 1897, to which his name is subscribed as a witness in association with Jacob C. Johnson and Edward H. Horton.

He made a draft from the instructions given to him by her. She gave the details of the devises and legacies. He first made her acquaintance after she married Scott—to the best of his memory a short time before the making of the will in 1891. The witness identified his signature on the instrument dated October 22, 1897, and also the signatures of the other subscribing witnesses, Jacob C. Johnson and Edward H. Horton, just above his own, and stated that he saw the testatrix write her name in their presence. At that time the decedent said that she published and declared it for her last will and testament. From the time witness first knew Mrs. Scott she came occasionally to his office, during the last few years a great many times. He prepared the paper of October 22d, at her direction.

Mr. Reuben H. Lloyd was also consulted. Mr. Galpin never had any conversation with Mrs. Garcia in connection with the drafting of the codicil. Neither she nor Mrs. Gerrish was ever present at any of the interviews. Mrs. Scott always came alone. She gave the data and information obtained in drawing the will. At first, she stated generally what she wanted to do; then when it came down to a division among the different parties in interest, she made a list of the names that she gave to witness and indicated what fractional interest each was to receive, and then from time to time she would keep changing these interests, substituting different fractions opposite different names. She was engaged in this way for two or three weeks. She would come to his office, perhaps twenty times in all, and suggest changes in the will. The witness formed the opinion she was sane, and judged so from her manner and appearance and her conversation and mode of doing business. He had no reason to suspect her sanity. Witness had no other business with decedent for some short space prior to the time she commenced talking about the will. She began to consult him on that subject more than a month before the date of the execution of the codicil, October 22, 1897. During that period that was the only transaction between them as attorney and client. She said she desired to give Mr. Scott expressly what she had given him in the will which was drawn

by the witness in 1891. She said that she was attached to his children and did not regard them as responsible for his shortcomings; that she was inclined to give them something which she had not done by the former will, and desired Mr. Galpin to so fix that Scott's share should be the same and that the amount to his children should be specified. She also said she was very apprehensive that the codicil would be broken and desired great pains taken. She desired a will so drawn, if possible, that it could not be broken, and also she wanted great care taken that it should not be stolen, which she apprehended might happen. Decedent informed the witness that she was told that Mr. Estee and Mr. Ball would undertake to break this will. She was very anxious about the safety of the will and codicil and told the witness that she proposed to put it in her box in the Safe Deposit Building, and consulted him as to how she could do that and prevent some person obtaining access to the box and purloining the paper after her death. The codicil was drawn in duplicate, at his suggestion, to anticipate its possible loss. One copy was attached to the original will of 1891 and the other copy was retained by him for a while and kept in his safe and then Mrs. Scott took it away. She was a very suspicious woman. She said she would put that will where she thought it would be safe. She did not disclose the place where she was going to put it. Subsequently it was returned to him and is now in his possession. The witness had no recollection of Mrs. Scott's saying anything about community or separate property, but she did say that a large part of her property was derived from her first husband, Salvin P. Collins, and she thought that it was but right that she should remember his relatives in the will.

Edward H. Horton has been manager of the house of J. C. Johnson & Company on Market street for about fifteen years. J. C. Johnson has been dead for some months. The late Mrs. Angelia R. Scott used to call frequently there and the house had transactions with her in selling goods. After the death of Mr. Collins she used to come to obtain advice from Mr. Johnson about her business affairs, and in the last ten years Mr. Johnson was absent a good deal on account of

illness, so she consulted witness many times. She spoke to him about the will and she told him that Mr. Scott was continually nagging her about making a will and that sometimes Scott made her sick by this talk. Horton identified the signatures to the different instruments. One was that of his uncle, Jacob C. Johnson, and the other his own, and the other that of Mrs. Angelia R. Scott, subscribed to the instrument dated September 7, 1891; also the same may be said of the paper dated February 25, 1892; likewise the same as to the third paper appended dated October 22, 1897, to which a third signature, P. G. Galpin, is subscribed. Decedent declared the first to be her will, and signed it and asked himself and Mr. Johnson to be witnesses and they signed in her presence. It was the same of the second and third papers. Horton's recollection is that one will was executed in duplicate, she saying that if one were lost the other would serve. Mrs. Scott told witness that Scott was worrying her to death about her will; that he was making her life a perfect hell on earth; that he said he could smash any will that she could make. She told him that Mr. Scott was always at her and annoying her about the making of a will and saying to her that she was "crazy as a bedbug." Witness advised her that she might have that settled by an examination by competent physicians and this was done afterward at the time of the execution of the third paper, October 22, 1897, in the office of Mr. Galpin, the attorney. After the examination she came into the room where the witnesses were in waiting and said that she was all right and that she was sane, and those present assented to that proposition with the remark that if she were not sane no one was. The witness gave it as his opinion that she was sane.

We come now to an important item of evidence in this case: The examination of the decedent by the doctors, which it appears was the result of suggestions emanating from Mr. Horton and Dr. Lane. Counsel for contestant comments on the singularity of this circumstance, and thinks its unusual character significant, and cites a case in Oregon in which a similar proceeding was regarded as an unusual precaution and itself importing a consciousness of the existence of the

very fact inquiry into which it was intended to foreclose, and that, as in Twine's case in Coke's Reports, it was like a clause in a deed that it was made honestly, truly, and bona fide, and would lead to a suspicion against the integrity of the instrument: Greenwood v. Cline, 7 Or. 28.

As against these dicta and in connection with the consideration of expert testimony in general, reference may be made to the opinion of Dr. Clouston, an eminent alienist, in his Clinical Lectures on Mental Diseases, in which he says, in regard to will-making, that the great trouble is that medical men are usually not consulted at the time of making the will, when the real capacity of the testator could be examined into, but are placed on the witness-stand after he is dead, with one-sided imperfect information, and with every motive on the side calling the experts to prevent their getting at all the facts. It is most important, says Dr. Clouston, that a skilled and experienced physician should be asked to examine into the testamentary capacity of such cases before the destination of great sums of money is irrevocably decided by a document that above all things needs soundness of judgment for its validity. It would be well were qualified physicians oftener called for this purpose.

In the Oregon case it may be noted that the will was not set aside upon the ground of insanity but upon that of undue influence, and in the case at bar there is no evidence of undue influence. The facts as to the certificate in this case were brought out first by the cross-examination of Dr. William Henry Mays, who was called as an expert by contestant, and whose ability is admitted and experience exceptional in mental diseases.

Dr. Mays was for two years the assistant physician for the insane asylum at Stockton and also for an equal period superintendent of that institution, and he is a graduate in medicine of the University of California. In his direct examination he said in answer to the hypothetical questions that he considered the person described insane, assuming hypothesis. About all the constituents of insanity were present in that question; fixed delusions as to various fictitious circumstances, thought by the person to be facts without any basis

for belief. On cross-examination Dr. Mays said he knew the late Mrs. Scott; met her at Mr. Galpin's office on the occasion of the execution of the codicil. His acquaintance with this case began in this way: He was called by Mrs. Scott herself to testify or to give a certificate as to her sanity at a particular moment. He knew Mrs. Scott prior to that time. He called at her house once or twice before at her request. On the first occasion he had a conversation with her for three-quarters of an hour or perhaps a full hour and on the second occasion for perhaps an equal space. The first time was about a week before the meeting at the lawyer's office and the second two or three days prior to that. The purpose and object of these conversations was on her part to acquaint the witness with her and to enable him to form a judgment of her sanity. She did not tell him that in so many words, but she exhibited her books and accounts and went over them with him to a certain extent to show apparently that she was a bright business woman. He met her after those conversations in Mr. Galpin's office in conjunction with other medical gentlemen for the purpose of testifying to her mental condition at that time with the view of her making a codicil. That was the third time he met her. The date is in the codicil but he did not remember the date. The interview on that occasion took about one hour and a half. There were present Mr. Galpin, Dr. Robertson and Dr. Gardner, of Napa, himself, and Mrs. Scott. Mrs. Scott was left in the room with the witness and the other physicians for the greater part of an hour, perhaps, hardly as long as three hours; it may have been two hours. The three physicians were there to investigate into her mental condition at that time prior to her signing a codicil to her will, it being her wish that her sanity be established by these examining physicians. She announced that as her object, saying she was apprehensive of the will being attacked after her death on the ground of her insanity. They conversed with her with a view of ascertaining her mental condition; talked with her about her husband and about her relations with him; talked about a Mrs. Meily. The doctors referred to all these matters; they made as thorough an examination as was possible then and

there with no counter-evidence. The physicians were called by Mrs. Scott and after the examination they signed a certificate of the result in answer to a request in writing, which request and certificate are as follows:

"To Drs. Gardner, Robertson, and Mays:

"Gentlemen: Having been informed that the husband of Mrs. Angelia R. Scott proposes to break any Will that Mrs. Scott may make, and being desirous to perpetuate evidence as to her mental condition at the time of executing the Codicil to her Will this 22nd day of October, 1897, I would be pleased to know what her mental condition is.

"October 22nd, 1897.

"PHILIP G. GALPIN."

"San Francisco, October 22nd, 1897.

"In compliance with the above request, we have this day carefully examined into the mental condition of Mrs. Angelia R. Scott, and in our opinion she is of perfectly sound and disposing mind.

"W. H. MAYS, M. D.
"J. W. ROBERTSON, M. D.
"A. M. GARDNER, M. D."

Another paper was written and signed by the witness and delivered to Mrs. Scott through the mail on the day of its date, October 22, 1897, and reads as follows:

"San Francisco, October 22nd, 1897.

"I have this day in compliance and in company with Dr. Gardner and Dr. Robertson, at the office of Attorney Galpin, made a careful examination of Mrs. A. R. Scott, with regard to her mental condition. I find her of sound mind and in full possession of her mental faculties. I also conversed with her at her home. I also conversed with her at some length some two or three weeks ago at her residence with the same end in view. On each of these occasions I made a special endeavor to get some evidence of mental impairment, but without success. On the contrary, she impressed me as a person of more than ordinary mental keenness and unusual power of memory."

Another paper introduced reads as follows:

"1118 Sutter Street, San Francisco, October 22nd, 1897.—Mrs. A. R. Scott to Dr. Mays, for professional services, examination, consultation, and certificate of mental condition.

"$100.

"Paid, W. H. Mays."

Witness said that that was his bill, signature, and receipt for the services specified. Dr. Mays thought that the first conversation he had about her mental condition after her death was with Mr. Galpin and Dr. Robertson. He told Dr. Robertson how he had seen Mrs. Scott after making that certificate and found that she had fooled them, and that she had been playing a part, and how he had seen her since and found undoubted evidence of insanity of the most atrocious character, and that he must go to Mr. Galpin to explain matters. He went to Mr. Galpin and told him that he had seen Mrs. Scott since and found her undoubtedly insane, and that would very much modify his previous statement of her mental condition made October 22, 1897. The witness did not say at that conversation and in the presence of Mr. Galpin to him or to Dr. Robertson, or at any time before, that he had a talk already with Mr. Estee on the subject. Witness did not know how long Mrs. Scott had been dead at the time now alluded to. It was some little time after, perhaps very soon after, may have been a month after that event. The doctor changed his mind about the mental condition of the lady about two weeks subsequent to the giving of that certificate. He saw her two weeks after that and found her insane. He did not go then and inform Mr. Galpin. He first told him some little time after she died, about two or three weeks after that event. Witness thought she died December 14, 1897. He talked with Dr. Robertson and told him how he had found undoubted evidence of insanity, and they talked the matter over about the way she had played her part, and then he proposed going to see Mr. Galpin, saying to Dr. Robertson, "We must not leave the matter in this condition," and they went down there and witness related the circumstance to Mr. Galpin. The witness had thought

over this matter a good deal; had been in consultation with Dr. Rucker, Dr. Hatch, and Mr. Estee. They all took a hand in framing the hypothetical question.

Dr. John W. Robertson is a physician and surgeon, graduate of the University of California medical department, proprietor of the sanitarium at Livermore, and formerly connected with the public hospitals for the insane, having had large and diversified experience in cases of insanity. Knew the late Mrs. Angelia R. Scott and at her request made an examination of her sanity. With the other physicians, they attempted to test her intellect, her memory, her ability to make a will. In speaking of Mr. Scott she began with a discussion of his first marriage—she was speaking with reference to her own—she said that Mr. Scott was not a good business man, that he had been married previously and had almost ruined the fortune that he had gotten of his first wife; that he had charge of her business affairs and that he had managed them very poorly; that it was only the untimely death of his first wife that saved anything at all to his children; that when she herself married she had been anxious to place her business affairs in the hands of Mr. Scott, but she soon found that it would meet the fate of his first wife's fortune; that when he went to New York he conducted all the business affairs in his own way; that his bank account grew very large, while her account decreased; that Mr. Scott had no money at all when he married her; that he had then in a little while thereafter several thousand dollars in bank; that in the course of time she found it absolutely necessary for her protection that she take her business affairs away from him; that she had been a kind mother to his children, that she loved them and desired to do something for them, and that, therefore, she wanted to make a will, a codicil to the will which would increase their share of the estate; she said that she did not particularly hate Mr. Scott, she disliked him on business grounds; that he had been unfaithful to her, that he had been unkind to her; that he had done everything to her that a husband should not do; that she did not intend to take away the part that she had given Mr. Scott and that while he had fallen in her estimation the children had risen

very much; she spoke of her relation with the children, of how well they were doing in the University, of what hope she had for their future; and that she had been instrumental in helping them along and desired that a part of her fortune should go to them; she again spoke of her sister in law, Mrs. Paisley, the sister of her deceased first husband, and at this time the witness again questioned her and she again said she did not believe that there had been any carnal intercourse between the two, but she felt that Mrs. Paisley had undoubtédly taken Scott's part and that he had made certain overtures to that lady and that she ought to have resented them more strongly than she had; she felt that they were nearer together than further away after those advances and overtures; that as Mrs. Paisley stayed along in the house she seemed to take Scott's part rather than hers and on that account Mrs. Scott made her go back home; and she did not care to leave any of her property to her. Mrs. Scott asked the witness if there was any insane delusion in that. He answered that he could discern no delusion in that disposition. Then the Meily question came up again. She again went fully into all the reasons for her suspicions there. She spoke of the thin partition and of the fact that when she went there she heard a noise of creaking of the bed—she heard it squeak and she heard voices after she had knocked and the noise kept up. She stood there awaiting the cessation of the noise and she heard a man's step going out to the kitchen and down a back way into the street. A little while later the door was opened and she went in. She found that the bedclothes had been rumpled; she believed that it was her husband. She asked the witness if this was an insane delusion provided all those were facts, and the doctor answered that all she needed for a basis was a fair suspicion. She claimed that certain persons had been to her and told her that Scott had visited Mrs. Meily on the afternoon in question; and she argued this point that it was not absolutely essential for her to have seen this with her own eyes but simply to have such evidence as would fairly warrant a suspicion. She asked the witness if there was any such evidence, if she could prove to him that she heard those noises while she stood there and

heard a man's step going away, and it was also shown that her husband had visited Mrs. Meily that afternoon, would he regard it as an insane delusion? The witness answered, "Certainly not," but that it would be a matter for legal investigation and he could not go into all these facts. She spoke with reference to her husband—she felt, she said, that in place of taking away from him she was adding to his share. The three points asked of her were the three changes made in the will: 1. With reference to Scott; 2. Mrs. Meily; 3. Mrs. Paisley. The physicians went over the point as to Mrs. Paisley time and again for the three hours they discussed the matter, and the witness finally came to the conclusion that no amount of discussion would enlighten him further. So he concluded to write another letter practically the same as this. In that other letter he said nothing about insane delusions. The witness identified a letter shown to him as the second letter dated October 22, 1897, entirely written, dated and signed by his hand; it must have been written about that date; it was written on the night he got home while everything was fresh in his memory; that is, the first letter was so dated and written; the second letter was written about three weeks afterward, and was a copy substantially of the first with certain matter eliminated, to which she took exception, and is as follows:

"October 22nd, 1897.

"Mrs. Angelia R. Scott,

"My dear Madam: By your request, I have made a thorough examination of your mental condition with reference to your capacity for drawing or altering your Will and signed a paper certifying your competency, and I now more explicitly state my reasons for so doing. I have carefully read your Will made several years ago, and thoroughly investigated your reasons for the changes made. I find you usually intelligent, rational and possessing excellent memory and able to sustain continuously a line of thought and saw nothing either in demeanor, method of expression, or mental peculiarity to in any way suspect mental weakness. I judge you to be a most remarkable business woman and unusually free from intuitively conceived reasoning, clear-headed, broad-

minded, and just. The best proof of which I judge to be the Will you propose.

"(Signed) Respectfully,
"J. W. ROBERTSON."

The doctor's reasons for leaving out of this letter the portion she objected to in the former were: After the first interview the only suspicion in his mind was the possibility of insane jealousy, but that was only a possibility and a matter that he could not determine. After these conversations he still had no more reasons to omit what he did omit than he had at the first letter. He did so simply because of a personal request and because of the fact that as he saw more and more of her he became more and more fully convinced of her mental soundness and naturally did not care to put a stigma where he saw no valid reason for so doing. He became as satisfied as he could possibly be of her soundness. He had no mental reservation in his judgment of her sanity. He knew nothing of Mrs. Meily or whether Mrs. Scott had made those visits, but the statements of Mrs. Scott were plausibly put and well thought out, and whether the premises were false or true the syllogism was perfect, reasons excellent and explicit, and he could perceive no reason for a base fabrication. What he omitted in her second letter was simply a matter of courtesy to her; but he reserved his letter, placed it on file, and desired to use it. In the conversations with her she said that Mr. Scott said that she was insane and that he would break any will that she made. She was for that reason very anxious for the medical gentlemen to pass on that proposition. She exposed her mind fully to them and promised to answer as they should propound to her without reserve, evasion, or equivocation, and she certainly did so and gave them every opportunity of determining the question presented. After a full and thorough examination Dr. Robertson came to a positive conclusion that at the time he observed her she was sane. He did not suspect even mental weakness in her case. In his first letter there occurs this expression: "The only question that could arise was, whether or not this judgment of yours was based on a delusion; as this was the only question that could be raised as to your

sanity.'' That was omitted from the second letter simply because after his various conversations with her he saw no reason to entertain the slightest suspicion of any mental weakness. Her reasoning was logical, her statements plausible and possible. Regarding her sister in law, Mrs. Paisley, she made no charges whatever of immorality. With regard to Mrs. Meily it was impossible for him to test its truth; he had to accept the statements of Mrs. Scott as bases of belief. She argued the whole matter over with them. In regard to the hypothetical questions presented by the respective counsel, the answer is always based upon the assumptions of the premises.

Counsel for contestant comments upon the testimony of Dr. Robertson, saying that so far from contradicting or varying from the revised opinion or ultimate judgment of Dr. Mays, Robertson agrees with it in every essential particular, and if he had seen what Dr. Mays saw in his last observation or visit to Mrs. Scott, he would not have subscribed to her sanity, and counsel says that so far from Dr. Mays' conduct being censurable, it is highly to be commended as the act of a conscientious and dignified gentleman and reputable physician, for when he found that he had been deceived by her in the ''most atrocious'' manner and discovered the deception, he did his duty and corrected his original opinion and gave his evidence as he was bound in honor and conscience to do. When upon that visit to Mrs. Scott's house she pointed out through the window to an imaginary object standing outside near the barndoor, when there was no one there, and ''the whole was the inveterate phantom of a morbid imagination,'' he became convinced that she was the victim of an insane delusion: Dew v. Clark, 3 Add. 79, reprinted in Eng. Ecc. Rep. 436.

This cited case is entitled to attentive perusal for its bearing on the facts here adduced in evidence on the issue of insane delusion; the elaborate treatment of the topic and the minute and thorough examination of the phenomena of mental perversion occurring in that case with the reasoning leading to the conclusion reached by Sir John Nicholl, the trial judge, are pertinent and instructive.

The court has read this opinion with renewed interest, having previously examined it with care, and indorses the encomium of counsel as to the ability with which the author treated the issues and evidence.

Counsel for contestant says, further, that the examination in Mr. Galpin's office shows a lack of thoroughness. It was not comprehensive nor profound—so superficial that it was easy for Mrs. Scott to conceal the point upon which she was really daft. She carefully avoided allowing them to approach some of her most salient symptoms of insanity. This is one of the features of persons possessed of delusions, to throw the searcher off the scent; but when the insane person is off guard, the delusion is detected. This is how Dr. Mays came to change his opinion, and his reason for believing that he had been deceived by this designing woman in the first instance is satisfactory; but when he saw the clear manifestation of her mania as she pointed out the window of her residence and professed to see persons on the outside when no one was in the direction indicated, he became convinced that he was dealing with a person whose mind was infected by an insane delusion. Counsel contends that Dr. Mays was right in his final opinion, but erred egregiously in his certified conclusion, although he accounts satisfactorily for the cause of the original error, and he acted in a professional manner in seeking on the stand to correct the mistake into which he had been led by the cunning characteristic of this species of insanity.

While the court does not choose to adopt the severe strictures applied by proponents to the conduct of Dr. Mays, as there is no necessity of ascribing his alteration of attitude to a corrupt motive, yet it cannot acquiesce in the views of counsel for contestant, so speciously presented, that there was a lack of thoroughness in the examination of the decedent in Mr. Galpin's office and that it was neither comprehensive nor profound. Dr. Mays himself testifies that the examination was thorough and occupied hours, and his testimony throughout shows, including the certificate and his own letter, that his first judgment was better based than his second, founded as the latter was upon a casual incident

scarcely sufficient to operate so extensive an inference. The inadequacy of his grounds for modifying his judgment, as compared with the predicate of his first opinion, seems to the court plain, taken in connection with his delay in communicating his change of conviction until after the death of testatrix. As the court reads the record there is no satisfactory explanation for not divulging his discovery before the death of Mrs. Scott.

The testimony of Dr. Robertson is certainly strong and clear and without any vein of vacillation or symptom of partisan bias, and he came to a positive conclusion, as he himself says, "after a full and thorough examination," that she was sane, in the fullest sense of that word, and he adhered to this opinion after a most searching cross-examination. Dr. Robertson is a friend of Dr. Mays and a weekly visitor to the latter's office in this city, which seems to be his local headquarters and the place where he received word to call and see Mrs. Scott, and whence he went, with the result that she took him to task for the form of his letter which he recast, leaving out the portion to which she took exception hereinbefore quoted. Notwithstanding this intimacy of relation and closeness of communication between these two doctors, Dr. Robertson has never altered his certified conviction in favor of the sanity of testatrix, and, on the whole, the court considers his conclusion correct.

It appears, as a reason for the omission to call the third signer of the certificate, Dr. Gardner, that he was absent from the city at the time of the trial when his presence was sought.

As to the utility of an inquisition into the testamentary capacity of a person prior to decease, undoubtedly an impression exists that it is a wise precaution, and in this case it has proved useful as tending to establish the fact that decedent was certainly not a victim of an insane delusion with respect to the designs of her husband, who has verified her apprehensions in his attempt to set aside this will. That there is an impression current that such an ante-mortem examination would be a salutary provision of the law has been shown in a bill introduced in the legislature of this state to admit wills

to probate prior to the death of testator, which measure, however good in principle, was impracticable in details and was not passed: Assembly Bill, No. 199, introduced in January, 1895.

The will may be considered in proof of its own validity and of the sanity of its maker. A careful reading of the entire instrument will justify the opinion rendered by Dr. Robertson that it was the product of a clear-headed person, and that the best proof of her clearness of mind is in the instrument itself. She may have been mistaken in her premises and violent in her prejudices, but strong, violent and unjust prejudices do not show mental incapacity: Trumbull v. Gibbons, 22 N. J. L. 117.

Her antipathy to Scott was not deep-seated, and was by her rationally explained. If she were the victim of an insane delusion in 1897 she would have taken away the part that she had given him in 1891; but so far from doing that she really added to it, as she herself said, because although he had abated in her affection, her regard for the children had risen. So far as the will of November 7, 1891, is concerned it can hardly be pretended that there is sufficient evidence to prove that at that time testatrix was not competent. The only witnesses who testified that in their opinion she was insane in 1891, were Hammond, Mortier, Perkins, Dyer, Uhlhorn and Mrs. O'Connor. It cannot be claimed that the testimony of the experts was in any manner applicable to the original will which was executed in that year. The court has already commented sufficiently upon the testimony of the witnesses named. By that will testatrix makes legacies of a few thousand dollars and the residuary interest in the estate. She gives thirty-three two-hundredths or about one-sixth to relatives of her former husband, Mr. Collins, and the remaining one hundred and sixty-seven two-hundredths to her relatives, less two-fiftieths to Mr. Scott.

By the second will she gives twelve-fiftieths or about one-fourth to relatives of Collins and of the remaining thirty-eight-fiftieths she gives thirty-three-fiftieths to her own kin, and to Scott the same as in the first will and to his sons and daughter one-fiftieth and one-fiftieth to charity. The

extraordinary care to do what was right all around and the soundness of her reasons for discriminations are shown in the evidence of Mr. Galpin, whose office she visited a score of times and who visited her house several times for consultation, until he was quite worn with the work of arranging the data and information which she gave and in readjusting the particulars until she was finally satisfied with the disposition. Her idea of equity was exhibited in remembering the relatives of her deceased husband. The power and tenacity of her memory were manifested in carrying all the various intricacies and details in her mind. Her understanding of her relation to objects of bounty and the natural and moral rights of others was shown by the evidence of Dr. Lane in regard to what she said about charities when he besought her out of her abundance to give to some benevolent institution and she replied that she had enough of poor relations for that purpose, and bestowed her benefactions accordingly. Her reasons for curtailing the expectancy of Scott have been dealt with sufficiently. Scott was not the natural object of her bounty, yet she did not discard him nor make any change in her two wills to his disadvantage, but, on the contrary, rather increased his proportion by the share she gave to his children, and in this regard it is a circumstance tending to show that she was not as black as she has been painted—that one of the reasons for changing her testament proceeded from her kindness of heart toward these children, and that while the boys were inmates of her household, which was from the moment of their father's marriage to her, they had met with affectionate treatment at her hands. The amount paid for board is a comparative bagatelle. The books show that notwithstanding that the two boys made their home at this house, and that Scott had an allowance of $2,400 per annum from the estate of his wife to support them, that in 1891 he paid on account of board, $25. In 1892 and 1893 he paid nothing. In 1894, he paid $339. In 1895, he paid $200,—making a total of $564 paid into this house for the board of these two boys for a period of six years, a little less than $78 per year, these boys having in their own right, as they

testified, from fifty to seventy-five thousand dollars, which they received from their mother and from some relatives.

If she were a mean woman, a miser, or a heartless stepmother, she would not have allowed the children to remain in such circumstances, and if she was so base as is said, the father and guardian disregarded his duty in allowing the children to stay in an establishment which one of his witnesses testified she thought on the first day she went there was a fast house.

Testatrix was not forgetful of Mr. Scott's children although they had an ample fortune of their own, and notwithstanding the alleged delusions, and all the reasons that would have prompted to cut off Mr. Scott, she accords him substantial recognition.

If there were causes sufficient to have induced a sane woman to ignore him in her will or reduce what otherwise would have been a just allowance, the fact that she entertained an unjust or an unfounded suspicion, in regard to his treatment of her, or unjust prejudice against him, would not affect the will nor demonstrate that she was necessarily of unsound mind: Clapp v. Fullerton, 34 N. Y. 196, 197, 90 Am. Dec. 681; Coit v. Patchen, 77 N. Y. 537, 538.

The tests of testamentary capacity are: 1. Understanding of what testatrix is doing; 2. How she is doing it; 3. Knowledge of her property; 4. How she wishes to dispose of it; 5. Who are entitled to her bounty: Clark v. Ellis, 9 Or. 147.

Applying these tests to the facts of this case there can be no doubt of the result.

In Daniel v. Daniel, 39 Pa. 191, it is said that testamentary capacity implies that the testator fully understands what he is doing, and how he is doing it; he must know his property and how he wishes to dispose of it among those entitled to his bounty. If he understands in detail what he is doing, and chooses with understanding and reason between one disposition and another, it is sufficient.

In Horne v. Horne, 9 Ired. 99, with reference to the amount of testamentary capacity necessary, it is said it is sufficient if the testator knew what he was doing, and to whom he was giving his property; and in 1 Redfield on Wills, 125, 127, it

is said that this is about as accurate and brief a definition as can be given.

In Kinne v. Kinne, 9 Conn. 104, 21 Am. Dec. 732, the court say: "Had he an understanding of the nature of the business he was engaged in, a recollection of the property he meant to dispose of, and of the persons to whom he meant to convey it, and of the manner he meant to distribute it between them?"

In Stevens v. Vancleava, 4 Wash. C. C. 262, Fed. Cas. No. 13,412, Washington, J., said: "To sum up the whole in the most simple and intelligent form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will?"

The point of time, then, to be considered at which the capacity of the testatrix is to be tested, is the time when the will was executed. This is the important epoch. Judge Washington says: "The evidence of the attesting witnesses and next to them, of those who were present at the execution, all other things being equal, are most to be relied upon."

In this case the attesting witnesses were present at the execution, and the two who survive have testified to the soundness of her mind at that time. The evidence of the attorney who drew the will according to her instructions, and who was a witness to the last codicil, and the positive and uncontradicted testimony of the subscribing witness to all the instruments, of the soundness of the testator's mind at the time the will was executed, in addition to the other witnesses whose evidence has been examined and reviewed, establish beyond doubt that the testatrix was rational, and did know and understand what she was doing at that time. As was said in the case of Lee's Heirs v. Lee's Executors, supra, "There was so much deliberation and thought in all this, that even if the testatrix had been before afflicted with habitual insanity, yet this conduct was sufficient to establish a complete intermission."

The prayer of the contestant's petition is denied and judgment ordered for proponents.

The Principal Case has been before the appellate courts in 124 Cal. 671, 57 Pac. 654; 128 Cal. 57, 60 Pac. 527; 1 Cal. App. 740, 83 Pac. 85; 77 Pac. 446.

ESTATE OF ANGELIA R. SCOTT, DECEASED.

[No. 19,473; decided Jan. 14, 1903.]

Wills—Implied Revocation by Codicil.—When a new will is made in the form of a codicil, it does not require an express revocation to make the intent to revoke the prior will clear; it is sufficient that the intent to make a disposition of the estate in the new instrument, which is inconsistent with the prior gifts, is made as clear as the original.

Wills—Meaning of "Residue" or "Residuum."—Residue or residuum, technically, is the remainder or that which remains after taking away a part; in a will, such portion of the estate as is left after paying the charges, debts, devises, and legacies; and the presumption is that the testatrix used it in that sense, unless a contrary intention clearly appears.

Wills—Meaning of Residue, How Determined.—Where a will is drawn for a testatrix by an attorney, the word "residue," as used in the instrument, will be taken technically, and no resort can be had to artificial aid in its interpretation when natural reason and the circumstances of its insertion make clear its meaning.

Wills—Revocation by Codicil Which Omits Legatee.—In this case the codicil of the testatrix, which in effect was a new will, omitted one of the residuary legatees named in the original will. The court found that the codicil was inconsistent and irreconcilable with, and worked the revocation of, the original will in respect to this bequest, and therefore denied the right of the legatee to participate in the distribution of the residuum.

Application for partial distribution by Eugene Wormell.

L. Seidenberg and R. P. Clement, for applicant.

Galpin and Bolton, Houghton & Houghton, contra.

COFFEY, J. Whether or not Eugene Wormell is entitled to relief in this proceeding is dependent upon the discovery of the intent of the testatrix as expressed in her will and codicils or deduced therefrom by process of construction as matter of law.

To understand the question the instruments should be presented in full, and they are as follows:

"IN THE NAME OF GOD, AMEN. I, Angelia R. Scott, of the City and County of San Francisco, State of California, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament.

"I. I give, devise and bequeath to the officers of Apollo Lodge of the Independent Order of Odd Fellows in the City and County of San Francisco, and by their successors in office, the sum of Two Thousand (2,000) Dollars, to be by them invested and the proceeds thereof to be used in the preservation and care of the cemetery lots in the Odd Fellows Cemetery in the City and County of San Francisco, in which my late husband, Salvin P. Collins, and my nephew, John Quincy Wormell, are buried.

"II. I give, devise, and bequeath to Horatio Stebbins the sum of Three Thousand (3,000) Dollars, to be used by him at his discretion to advance the interests of the First Unitarian Church in this City and County.

"III. I give, devise, and bequeath to Carl Anderson, my coachman, who has served me faithfully for five years, Five Hundred (500) Dollars.

"IV. I give, devise, and bequeath my diamond earrings, one bar pin with one diamond, my finger ring set with three large diamonds, my chain and charms to my niece, Helen Garish, and my watch to my niece, Ella Perkins.

"V. I give, devise, and bequeath my cluster diamond ring and one small solitaire diamond ring, the gift of my late husband, S. P. Collins, to his sister, Mrs. Rachel Johonnot.

"VI. I give, devise and bequeath one diamond solitaire finger ring to Mrs. Frank Garcia, wife of my nephew, Frank Garcia.

"VII. I give, devise and bequeath all the rest and residue of my property as follows: One fiftieth thereof to each of the following persons, children of my late brother, Amos P. Wormell, namely: One fiftieth to Andrew Wormell of Dover, New Hampshire; one-fiftieth to Charles Wormell, of Sunbury, Ohio; one-fiftieth to William Wormell of the same place; one-fiftieth to Eugene Wormell of Livermore, Maine; one-fiftieth to Lettie Wormell of Colorado, and one-fiftieth to Salvin Ulysses Wormell of Phillips, Maine;

two-fiftieths thereof to Louisa E. Roe, daughter of my late brother, Amos P. Wormell, of Island Pond, Vermont; six-fiftieths thereof to my sister Mary A. Cowan and her daughter Amanda Meily, share and share alike; six-fiftieths thereof to M. S. Chamberlain, nephew of my late husband, S. P. Collins, now residing at Concord, New Hampshire; one-fiftieth thereof to Mrs. Rachel Johonnot, sister of my late husband, residing at Montpelier, Vermont; one-fiftieth thereof to Florence Swall, wife of George Swall of Mountain View, California, niece of S. P. Collins, deceased; one-fiftieth thereof to Eugene Wormell, son of my brother, Nathaniel Wormell, now residing at Seattle, Washington; one-eighth to my nephew, Frank Garcia; one-eighth to my niece Helen Gerrish, wife of Charles Gerrish of Port Townsend, Washington; one-eighth thereof to Mrs. Ella Perkins, of Santa Clara County, California, wife of Caleb F. Perkins; one-tenth thereof to Mrs. Louisa Garcia, my sister; and one-fortieth thereof to Chester and Nellie Swall, son and daughter of George and Florence Swall of Mountain View, California, share and share alike, two-fiftieths thereof to my husband, E. W. Scott.

"In case any of my legatees contest the probate of this will, I, hereby revoke the legacy of such contestant, and direct that such legacy become a part of my estate.

"VIII. I nominate and appoint Charles S. Tilton, Caleb P. Perkins, and Frank Garcia, Jr., as executors of this my last Will and Testament without bonds.

"In Testimony Whereof, I have made, published and declared the foregoing as my last Will and Testament.

"ANGELIA R. SCOTT. (Seal.)

"Signed, sealed, published and declared to be her last Will and Testament by the aforesaid Angelia R. Scott, in our presence, who in her presence and in the presence of each of us, and at her request have hereto set our hands and seals, as witnesses this seventh day of November, A. D. 1891.

"JACOB C. JOHNSON, 1519 Van Ness Ave.
"EDWARD H. HORTON, 30 Post Street.

"Whereas, I, Angelia R. Scott, by my will subscribed on the 7th day of November, 1891, appointed Caleb F. Perkins

together with Charles S. Tilton and Frank Garcia, Jr., to be executors of my last Will and Testament.

"Now, then, I hereby revoke the nomination and appointment of said Perkins as one of my said executors, and it is my desire that this Codicil be annexed to and made a part of my last Will and Testament as aforesaid to all intents and purposes. ANGELIA R. SCOTT.

"Signed, sealed, published and declared to be and as and for a codicil to her last Will and Testament by Angelia R. Scott, in our presence, who in her presence, and in the presence of each of us and at her request have hereto set our hands and seals as witnesses this 25th day of February, A. D. 1892. "J. C. JOHNSON,
"E. H. HORTON.

"Whereas, I, Angelia R. Scott, of the City and County of San Francisco, have made my last Will and Testament in writing, bearing date the seventh day of November, in the year of our Lord, one thousand, eight hundred and ninety-one, in and by which I give and bequeath to my sister, Mary A. Cowan and her daughter, Amanda Meily, six-fiftieths of the residue of my estate (after providing for certain legacies) to be divided share and share alike between them, and whereas, since then said Mary A. Cowan has died, and I desire to revoke so much of said Will as devises six-fiftieths to her and to her daughter Amanda Meily.

"And Whereas, by the same instrument, I have devised one-fiftieth of said residue to Florence Swall, wife of George Swall of Mountain View, and since that time said Florence has died, leaving three children; and whereas I also devised to Eugene Wormell, son of my brother, Nathaniel Wormell, residing at Seattle, Washington, one-fiftieth part of said residue, and since then he has died; and whereas, I also desire to change the devise to Frank Garcia, of one-eighth of my estate, and to decrease the amount thereof and whereas, I did devise one-eighth of my said estate to Helen Garish, wife of Charles Garish; and I desire to increase the amount devised to her; and whereas, I did devise one-eighth of the residue of my said estate to my niece Ella Perkins, I now desire to devise something to her four children; and whereas, I

now desire to make a bequest to the Old People's Home of San Francisco, and to the three children of my present husband, E. W. Scott; and whereas, I desire to revoke the gift of two thousand dollars to the Apollo Lodge of the Independent Order of Odd Fellows, and desiring to preserve the general features of my former will making new distributions when necessary by deaths which have happened since the making of that will, I prefer to do this by way of another codicil to my former Will instead of executing a new Will; but in any respect in which this codicil shall conflict with the provisions of my former Will, I fully intend that this codicil shall control the provisions of the former Will, and that otherwise the former Will and the codicil thereof shall stand unaffected by it.

"I revoke the bequest I made in my said Will of Two Thousand Dollars to the Apollo Lodge of the Independent Order of Odd Fellows, and I give, devise and bequeath Two Thousand Dollars to the Apollo Lodge of the Independent Order of Odd Fellows in the City and County of San Francisco, and I request them to take care of my cemetery lot in the Odd Fellows Cemetery in this City and County of San Francisco.

"I give, devise and bequeath the sum of One Dollar to each of the following persons: To Mrs. Amanda Meily, daughter of Mary A. Cowan; to Mrs. Nellie Swall, wife of George Swall; to Mrs. Eliza Paisley, wife of Donald Paisley, sister of my late husband.

"I give, devise and bequeath to my maid, Estella Burnham, Five Hundred Dollars, if she is in my employment down to the time of my decease.

"I give, devise and bequeath my emerald finger ring set with diamonds, and also my large solitaire diamond finger ring to Mrs. Helen Garish.

"I give, devise and bequeath all the rest and residue of my estate subject to all unrevoked legacies and bequests of my Will, and subject to those herein contained as follows:

"Of such residue, two-fiftieths thereof to my nephew, Andrew Wormell of Dover, New Hampshire.

"Two-fiftieths thereof to Charles Wormell, of Sunbury, Ohio.

"Two-fiftieths thereof to my nephew, William Wormell of the same place.

"Two-fiftieths thereof to my nephew, Salvin Ulysses Wormell, of Phillips, Maine.

"Three-fiftieths thereof to my niece, Louisa E. Roe, of Island Pond, Vermont, daughter of my brother, Amos P. Wormell.

"One-fiftieth thereof to Lulu Wormell, of Oakland, daughter of my nephew Eugene Wormell, now deceased.

"Six-fiftieths thereof to Mortimer S. Chamberlain, residing at Concord, New Hampshire, nephew of my late husband, S. P. Collins.

"Three-fiftieths thereof to Mrs. Rachel Johonnet, sister of my late husband, S. P. Collins.

"Three-fiftieths thereof to Ella Perkins, of Santa Clara County, wife of C. F. Perkins.

"Three-fiftieths thereof to be divided share and share alike between the four children of said Ella Perkins, or the survivors of them at my decease.

"Seven-fiftieths thereof to Helen Garish, my niece, wife of Charles Garish of Port Townsend, Washington.

"Four-fiftieths thereof to my sister, Mrs. Louisa Garcia, wife of Frank Garcia (senior).

"Three-fiftieths thereof to be divided share and share alike between the children, now living or the survivor of them, at my death, of Florence Swall, and George Swall, of Mountain View, California; said Florence Swall being a niece of my late husband, S. P. Collins.

"Four-fiftieths thereof to Frank Garcia, Jr., son of Frank Garcia.

"Two-fiftieths thereof to my husband, E. W. Scott.

"One-fiftieth thereof to Lloyd N. Scott, for himself, for his brother, Wesley B. Scott, and his sister, Laura May Scott, share and share alike; but he is to receive and hold in trust the shares of Wesley R. Scott and Laura B. Scott, invest the same, and use the income or principal, if necessary, for their education and support until both beneficiaries shall die or become of age; and in case of the death of either beneficiary the share of such decedent shall be divided equally between

the survivors, unless decedent leaves issue him or her surviving, and in that event the share of said decedent shall go to said issue.

"One-fiftieth thereof to the Old People's Home of San Francisco.

"One-fiftieth thereof to the San Francisco Protestant Orphan Asylum.

"And in case any of my devisees or legatees shall contest the probate of this Will the bequest or devise to them is hereby revoked, and the amount bequeathed or devised to such contestant shall go back and become a part of my estate, and be divided pro rata among the residuary devisees.

"I also nominate and appoint Charles Garish to be another executor of my estate.

"I also revoke the bequest of my one large solitaire diamond finger ring to Mrs. Frank Garcia, formerly wife of, Frank Garcia, Jr., and I give, devise and bequeath the same to Helen Garish.

"(Seal) ANGELIA R. SCOTT.

"Signed, sealed and published and declared to be and as and for a codicil to her last Will and Testament by Angelia R. Scott in our presence, who in her presence and in the presence of each of us and at her request, have hereto set our hands and seals as witnesses this 22d day of October, A. D. 1897.

"JACOB C. JOHNSON, 1519 Van Ness Ave.
"EDWARD H. HORTON, 2110 Devisadero St.
"PHILIP G. GALPIN, 1738 Broadway."

The general scheme of testatrix in the will was preserved in the codicil, which declares that she desired to preserve the general features of her former will, making new distributions made necessary by deaths occurring since its execution; that she preferred to do this by way of another codicil of her former will instead of executing a new will, but in any respect in which the last executed document should conflict with the first she declared her intent that the codicil should control, but otherwise the former should stand unaffected.

Now the question is, Are the provisions of this codicil which omit any allusion to Eugene Wormell consistent with

the claim upon his part that she did not design to revoke her bequest to him? This codicil is, in effect, a new will. Testatrix declared that for reasons she preferred to make a new will in the form of a codicil, and we should construe it in that view.

The general features of the old instrument are preserved, but the dispositions are somewhat varied.

In each case she divided the residuum into fractions, but in the original will the parts were not symmetrically segregated, while in the codicil they were divided into fiftieths This plan is perfectly plain, and by keeping it in mind any difficulty in divining her design will disappear. It does not require an express revocation to make the intent to revoke clear; it is sufficient that the intent to make a disposition of the estate in the new instrument which is inconsistent with the prior gifts is made as clear as the original.

Counsel for petitioners quote the decision in Re Ladd, 94 Cal. 674, that a codicil is never construed to disturb the dispositions of the will further than is absolutely necessary to give effect to the codicil, and that a clear disposition made by the will is not revoked by a doubtful expression or inconsistent disposition in a codicil, and, taking this expression of the court in connection with section 1321 of the Civil Code, counsel deduces this truth.

In order to revoke a clear disposition in a will, the codicil must contain a provision that is not simply inconsistent, but one that is absolutely irreconcilable, with the disposition in the will.

Such a condition, counsel contend, is not presented by the case at bar, for the dispositions are not even inconsistent let alone irreconcilable.

Is it evident, as counsel contend, even upon the most casual consideration, that in this case there is no absolute necessity, nor any necessity, to disturb the bequest in the will to petitioner, in order to give effect to the codicil, and that, therefore, it must stand?

If this were as patent to the court as to the counsel, there would be no hesitancy in determining the issue in their favor, but that there is some lingering doubt in the mind of counsel as to the validity of their position is suggested

by their appeal to equity in one of their earlier briefs, in which they claim that there is no difficulty in carrying out the provisions of the will and codicil, for it is only necessary to ascertain the value of the estate after the payment of debts, expenses of administration and providing for the unrevoked general and specific bequest of the will, then deduct two-fiftieths, one for the petitioner and the other for the children of Lettie Wormell Byron, and the remainder constitutes the residue disposed of by the codicil and makes the petitioner substantially a general legatee under the will of an amount equaling one-fiftieth of the estate after the payment of debts, expenses of administration, and the payment of the other unrevoked general and specific legacies under the will, there being no reason why, in this manner, the petitioner may not receive the share given in the original will; "but if this cannot be done, it is certainly within the equitable powers of the court to let the petitioner in to share equitably in the residue under the codicil, it being clear that it was the intention of the testatrix not to annul or impair the legacy given in the will." All the grounds urged for Eugene Wormell apply with equal force to the Byron children. This court has no equitable power in the premises, and it is not clear that the omission of this Eugene Wormell and the children of Lettie Wormell Byron was an oversight of testatrix.

There is no room for the suggestion of an alternative. It is no case of equity. It is a matter for interpretation and construction; it is for the court to find out the sense in which the testatrix employed certain words; that is, the idea which she intended to convey by the use of certain expressions or terms, and to draw from the whole text a conclusion which shall construe the intent of the maker of the instrument. The object is not to make or mar or modify the testament, but to discover its sense; hence, the whole document is to be construed integrally. There is no case here for extrinsic evidence; and, consequently, the intimation of oversight must be resolved without recourse to that species of proof.

In their final brief counsel for Eugene Wormell repeat their suggestion of an alternative, but rely upon their primary proposition that petitioner has a clear right to the

legacy in the will, and that in her readjustment of the bequests in the codicil his name was omitted through oversight.

Counsel do not persist in the contention that there may be two residues, one for one purpose and another for another, but insist that they have consistently adhered to the position that there is only one residue to deal with; but they assert that the language of the codicil shows clearly that the testatrix used the word "residue" without understanding its exact meaning; that evidently the testatrix, in using this term in the codicil, had in mind not a residue in its technical, legal sense, but simply the remainder of her estate after the payment of debts and expenses of administration.

Residue or residuum, technically, is the remainder or that which remains after taking away a part; in a will, such portion of the estate as is left after paying the charges, debts, devises, and legacies, and the presumption is that the testatrix used it in this sense, and a contrary intention must clearly appear.

Considering the circumstances in which the codicil came into existence, it is hardly just to impute ignorance of the meaning of the word or lack of understanding of its legal import to testatrix. It was drawn, according to the record in the contest, by one of the counsel for respondent here (Mr. Galpin) from the instruction given to him by her; she gave the details of the devises and legacies, and he prepared the paper at her direction. If it were an instrument written by herself without legal assistance, there might be some reason in which to intimate her ignorance of the technical term, but that may not be done with impunity where there was a skilled draughtsman and expert lawyer.

The word "residue," therefore, is to be taken technically, and no resort can be had to artificial aid in its interpretation when natural reason and the circumstances of its insertion make clear its meaning.

Counsel for Eugene Wormell argued that the purpose of testatrix clearly was to have paid out of that remainder all unrevoked legacies and bequests of her will and general legacies and bequests of the codicil, to which, in terms, the so-called "residue" in the mind of the testatrix was made

subject; then to have two-fiftieths of the remainder paid to Eugene Wormell and Lettie Wormell Byron, and then to dispose of the remainder, which would constitute the real residue, in fiftieths; and, counsel continue in this strain, that if all of this estate were reduced to cash, and all debts and expenses of administration paid, it would be in exact conformity with the codicil to pay, out of what remained, the unrevoked legacies and bequests of the will, and the general and specific legacies of the codicil, then to pay two-fiftieths of what remained, one to the petitioner and one to the children of Lettie Wormell Byron, and to distribute the remainder, which would constitute the actual residue of the codicil, in fiftieths; and counsel confess their entire inability to see how this simple course of carrying out what strikes them as the unmistakable intention and purpose of the testatrix would make two residues, which, it appears to be admitted, are repugnant to the law, if possible to mathematics.

This simple device would also, it is said, eliminate the need of the assumption of any equitable authority by the court, as such division would be plainly in pursuance of the plan adopted by the testatrix.

If it were the intent of the testatrix to cut Wormell off from her bounty, would she not have done the same with his interest as she did with some others, and expressly revoke her bequest to him, is the query of counsel, to which they return response that undoubtedly she would have so done, if that had been her deliberate design; but it will be asked in turn, Why did she not, then, carry him into the codicil? To this self-propounded interrogatory, counsel answer, that he may have been omitted from the codicil by oversight.

If mention were unnecessary, omission should be harmless. and conjecture useless.

Counsel aver their belief that it may have been the intention of testatrix to carry him into the codicil and to thus make him a sharer in her bounty in equal proportion with the other residuary legatees. If such were her intention, she never executed it, and how can he benefit by her failure to execute such fancied purpose? But is her omission, caused by an oversight, to be construed as an intention to deprive him entirely from sharing in her bounty? Or, con-

tinue counsel, it may have been her actual intention to give Eugene Wormell and Lettie Wormell Byron two-fiftieths of the residue, and to divide the remaining forty-eight—fiftieths among the residuary legatees of the codicil; but all this is indulging the imagination to no practical benefit, for, as counsel finally admit, in any event we must take her will as she made it and not as we fancy she might, could, would, or should have made it.

All of these speculations are, in a manner, interesting and some of them abstruse, but to this complexion do we come at last: Was there any intent at the time of making the codicil in the mind of the testatrix that Eugene Wormell should receive any part of the residue of her estate?

To resolve this problem we must resort to the will and codicils and confine ourselves to their terms.

By the former will one-fiftieth of the residue was bequeathed to Eugene Wormell of Livermore, Maine, and another fiftieth to Eugene Wormell of Seattle, Washington; by the latter every fiftieth is given to some person other than Eugene Wormell of Livermore, Maine, and in regard to the other Eugene, it is explained that he died in the interval between the dates of the two transactions. No mention is made in the codicil of Eugene Wormell of Livermore, Maine, nor of Lettie Wormell, of Colorado, who had died on the 6th of October, 1892, five years prior to the date of the latter instrument. An inspection of the two papers shows that in preparing the codicil the order of the will was closely pursued; the variations serve to indicate an adherence to the text of the original; and in going down the line she passed over the names of "Eugene Wormell of Livermore, Maine, and Lettie Wormell of Colorado," to whom she had given each one-fiftieth of the will, in nominal juxtaposition, and the necessary inference is that this departure from the sequence of names was designed and that she meant to omit them from her bounty.

It is manifest that the distribution of the codicil was intended to be a new one and a substitute for the old, while retaining the general form of the original, but the division was different in fractions, names of donees, and amounts allotted to each and the quantity of residue distributed.

The intent to make a disposition of the residue in fiftieths is clear to the court, and such an intent is inconsistent with the prior bequests made in the will to those whose names were not found in the codicil. The court has no authority to divide the residue under the codicil into fifty-two parts, and assign one part to Eugene Wormell and one part to the children of Lettie Wormell Byron, for to do this would be to alter the disposition of testatrix and make for her a new will, which is beyond judicial power.

The claim of petitioner is inconsistent, in my judgment, with the plan of the testatrix, as outlined in the codicil, and no reasonable construction can reconcile the two propositions where the repugnance is so evident, and she herself has said that in any respect in which this codicil should conflict with the provisions of her former will, she fully intended that the codicil should control, and this court is, finally, of opinion that it is executing her intention in letter and spirit by denying the prayer of petitioner, and it is so ordered.

The Principal Case was affirmed by the supreme court in 141 Cal. 485, 75 Pac. 44. The general rule is, that a codicil does not disturb the will, except so far as inconsistent with it or in terms or by necessary intendment revokes it: Estate of McCauley, 138 Cal. 432, 71 Pac. 512.

ESTATE OF THOS. J. HILL, DECEASED.

[No. 4,382; decided February 27, 1886.]

Will—Undue Influence.—The Evidence in this contest of a will, examined and held insufficient to establish a charge of undue influence.

Will—Inebriety of Testator.—The Evidence in this will contest examined and held not to sustain a charge that the testator was so addicted to the excessive use of intoxicants as to deprive him of testamentary capacity.

Will—Unsoundness of Mind.—The Evidence in this will contest held insufficient to establish a charge of unsoundness of mind on the part of the testator.

Will—Insane Delusion.—A Belief based on evidence, however slight, is not delusion.

Will.—The Fact that a Guardian has been Appointed for a person because of his incompetency to manage his affairs is not conclusive of his incapacity to make a will.

The Words "Insane" and "Incompetent" defined and distinguished.

Contest of will.

Giles H. Gray, for proponent, J. M. Haven.

John R. Glascock, for contestant, Jno. Woolley.

H. L. Adams, also for contestant.

COFFEY, J. On the second day of July, 1885, James M. Haven, through his attorney, Giles H. Gray, Esq., filed in this court a petition setting forth that one Thomas J. Hill died on or about the twenty-fourth day of June, 1885, in this city and county, of which he was then a resident, leaving estate therein consisting of personal property of the probable value of $5,000 cash; that said Hill left a will, dated March 22, 1884, in possession of the petitioner, naming him, the said petitioner, executor, and Wm. H. Aiken, Thos. J. Conroy, Mary E. Connor, John Woolley, Mrs. John Woolley, and the children of Mr. and Mrs. Woolley, the Grand Army Cemetery Association and the Veteran Home Association, corporations, devisees or legatees; that John Connor and Maggie E. McCann were subscribing witnesses to said will; that the next of kin of said testator and heir at law is John Woolley, aged about fifty years, residing in Placer county, California, a son of a deceased sister of said testator; that at the time of the execution of said will, March 22, 1884, said testator was over the age of eighteen years, and aged sixty years or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was in every respect competent by last will to dispose of all his estate; and that it was executed in the manner and form prescribed by the statute; and that the executor named consents to act. The petition of said Haven further avers: That said decedent Hill also left another will in the possession of one Mrs. Mary E. Connor, dated November 13, 1884, in which said Haven is named as executor, and Wm. H. Aiken, Mary E. Connor, John Wool-

ley, Maggie E. McCann, all adults; Eugene McCarty and Annie Riley, minors, and "The Soldier's Home" of California, a corporation, are named as devisees or legatees; that the witnesses to said will are John E. Donnelly and Maurice J. Burns, and that at the time said will was executed, November 13, 1884, said testator was of competent age and of sound and disposing mind; and, in view of the premises, petitioner prays the admission of both instruments to probate, and that letters issue to him as executor.

The application of said Haven is opposed by John Woolley, who contests the probate of the wills above mentioned upon the grounds (after alleging that he is the nephew and next of kin and heir at law of decedent Hill), that the said wills were not executed according to law, nor signed by Hill nor by his direction, and were not his last will; that at the time of their execution Hill was and for a long time prior thereto had been of great age, blind, feeble, debilitated and deranged, both in bodily and mental health, and incapacitated thereby from executing a will; that at the time of the alleged signing said Hill was, and had been for a long time prior thereto, habitually intemperate from the constant and excessive use of intoxicating liquors, and was thereby so mentally deranged as to be incapacitated from making a will; that at the time of the alleged signing of said wills said Hill was unlawfully influenced and coerced by certain persons, beneficiaries named in said wills, who took advantage of his weakness and his trust in them to compel him to make such disposition of his property according to their desires, and not his own; that in and prior to the month of February, 1884, contestant Woolley had the custody and care of the person of said deceased; that during said time and prior thereto he enjoyed the confidence and trust of said deceased; that in or about said month of February, 1884, said deceased was removed from his care and custody by the order of said Haven, who was then guardian of the person and estate of said Hill, and consigned to the care of Mary E. Connor (one of the beneficiaries named in said will), where Hill remained until his decease in June, 1885, that after the removal of Hill to the care and custody of said Mary E. Connor, the contestant made repeated ef-

forts to see him, but was repulsed, and in every instance refused permission to enter the house of said Mary E. Connor, where said Hill was kept; that said Haven and the others named as beneficiaries in said wills, with intent to deceive and to influence Hill to make said wills, prevented contestant from seeing said deceased, and excluded him from the society of Hill; that none of said persons named as beneficiaries is of kin to deceased, nor entitled to a distributive share of his estate; that all of them knew that at the time of the alleged signing of said wills Hill was, from the causes already specified, easily influenced by those by whom he was surrounded, and that so knowing they so wrought upon his bodily and mental weakness to influence, by false tales and accusations directed against said contestant, that he became causelessly embittered and angry with contestant, and was thus induced and influenced to make said wills; that a long time prior to the alleged signing of said will the superior court of San Francisco granted to said Haven letters of guardianship of the person and estate of said Hill, on the ground that said Hill was then and there an incompetent person; that at the time of said alleged signing of said wills and prior thereto said Haven was the legally appointed, qualified and acting guardian of said Hill, and continued to act as such to the time of Hill's decease; that Aiken, named as one of the beneficiaries in said wills, had acted as Hill's attorney, legal adviser and confidential friend in matters connected with the pension and arrearage thereof due said deceased from the government of the United States; and that the other persons aforementioned as beneficiaries were in more or less close and intimate relations with said deceased, and used every means to obtain his confidence up to the time of the said alleged execution of the said wills, and did so obtain his confidence, and that they knew his mind was weak aul easily influenced; and that they and each of them did perpetrate a fraud upon said deceased by inducing him to sign said paper; that they and each of them suggested to said deceased, prior to the time of said alleged signing, that contestant was an impostor, and was attending to and caring for said deceased for the purpose of getting his money and estate, that contestant was constantly rob-

bing deceased of his money, and other suggestions of like nature; which suggestions were false and fraudulent, and made with intent to deceive said deceased and had that effect, embittering his mind against contestant, and inducing him while in such frame of mind to sign said will.

The foregoing is the substance of both counts of the contest, to which answer was made by the proponents and by the legatees named in said will, denying specifically all the charges and averments of the said contest tending to establish its invalidity, and alleging that said will or wills were in all respects valid and entitled to admission to probate.

Thos. J. Hill, the testator, came to California as a soldier in the Stevenson Regiment in 1847, having enlisted in New York in the year preceding; in October, 1848, he was discharged, and went, in 1849, to the mines, being mainly engaged in Tuolumne county, where he took an active interest in public affairs, and was a candidate for sheriff of the county, without success, and the occupant of the post of deputy sheriff, and otherwise locally conspicuous; his career was marked by the vicissitudes common to the experience of early days in California, until, in 1861, he re-entered his country's service as a volunteer, and continued until the expiration of his term of enlistment. The exposure and hardship undergone by him during a portion of this period, while stationed in Arizona, resulted in an impairment of his vision which compelled him to enter the County Hospital, and ultimately his entire loss of sight and transfer to the almshouse. Upon being awarded a pension by the government, sufficient to enable him to live comfortably, according to his station, he left the Almshouse and came to the city.

Here he lodged at different places, having hired attendants, until his nephew, John Woolley, the contestant, was sent for to the country and came to care for him in May, 1883, remaining until February, 1884, when he left, according to his own testimony, because the service was too confining and he couldn't get along with the boy, Thos. J. Conroy, whom Hill had hired about three years before, and who was and had been for nearly all that time the personal attendant of the blind man, who had acquired an attachment for the boy, in

spite of certain censurable traits in the latter's character. The pension was procured through the agency of W. H. Aiken, an attorney at law employed by Hill for that purpose, who began his acquaintance with Hill in 1869, when the latter visited him at his office to secure his services in that behalf, and from that time on they continued intimate, and when, the pension being obtained, Hill came out of the Almshouse, it was Aiken who selected a room for him and visited him frequently, and obtained from time to time financial favors from him, and seems to have been his main adviser until, on account of the transaction between Hill and Pension Agent Cox, which came to a head in 1882, the decedent was placed under guardianship. That transaction, with which Aiken testifies he had nothing to do, consisted in Hill's allowing Cox to invest $5,000 of his pension moneys in a mortgage on a mill that burned down, and a mine that "petered out"; which conduct of Cox coming to the notice of the government, a special agent of the treasury, a Mr. Magan, was sent out to investigate, and, as a consequence, a restitution of the amount was made by Cox to Hill. Thereafter, in January, 1883, the special agent Magan introduced to Hill the proponent, James M. Haven; this was at a house on Vallejo street, where Hill was in charge of Conroy and a Mrs Clark, a house attendant. January 29, 1883, the petition of said Magan was filed, asking, for the reasons that Hill being upward of sixty years of age, totally blind and in feeble health, and by reason of extreme old age and of recent sickness which had impaired his mind, being mentally incompetent to manage his property, that a guardian of his person and estate be appointed, and praying that said Haven be appointed. On the 5th of February the court found that said Hill had estate that needed care, and "that said Thomas J. Hill, by reason of blindness, old age and physical infirmity, is incompetent to manage his business or take charge of his estate," and ordered that Haven be appointed guardian, and that letters issue upon filing a proper bond. From that time Haven took charge of Hill as guardian, and directed his affairs until the death of the ward; visiting him frequently at his various places of residence, counseling him, and seeing

to the service of attendants. During this period Conroy, and after him one Adams, waited on Hill until Woolley came as stated, and Woolley had principal personal charge until February, 1884. Woolley went to the office of the guardian, Haven, and said he couldn't remain longer with Hill because of the latter's abuse; and immediately Haven caused Hill to be removed to the house of Mrs. Mary E. Connor, whither Hill was content to go. There, it is said, he improved greatly in condition, and at that house he executed the will of March 22, 1884, and of November 13, 1884, which instruments are here under contest.

The first question to be considered is the effect of the existence of the letters of guardianship upon the capacity of Hill to make a will.

Counsel for contestant contends that the testator, having been declared mentally incompetent, he could not execute a will until his restoration to capacity, and that such restoration must be determined in the same manner as his incapacity, according to section 40 of the Civil Code, which reads:

"Section 40. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum, to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge."

The section as here quoted was adopted in 1878, and was an amendment of the statute which theretofore read as follows:

"Section 40. After his incapcity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity he may make a will, though his restoration is not thus determined."

Counsel for contestant claims that the section as amended in 1878, and as it has continued since, is a conclusive bar to testator's act, until he shall be restored to capacity by judicial decree. But the section of the Civil Code speaks of "a person of unsound mind," and would seem to refer to those persons whose minds are so deranged as to necessitate committal to an asylum for the insane, and even in such case it is not at all clear that "restoration to capacity" means a judicial ascertainment and declaration to that effect. If it were intended to have such meaning, one word only was necessary to place it beyond doubt; the legislator could easily have employed the epithet "judicial," qualifying "restoration to capacity"; instead of which he has amended by striking out the clause "is judicially determined" after those words, leaving it to be implied, if it be not explicit and in no need of implication, that actual restoration to capacity is the true intent of the section.

But it is not clear to my mind that "insane" and "incompetent" are, as counsel for contestant contends, convertible terms. A person may be incompetent by reason of insanity, or from some other cause incapable of caring for his property—the statute speaks of the "insane or incompetent" person (Code of Civil Procedure, section 1763); it speaks further (section 1766) of the proceeding for judicial restoration to capacity before the court of the county in which the person "was declared insane"; it requires notice to be given to the guardian and relatives of "the person so declared insane or incompetent." From a consideration of the whole of the statute, I am of opinion that there is a distinction and a difference between "insane" and "incompetent," and that they are not, in the sense of the statute, convertible terms. Now, what did the court declare in the proceedings to adjudge Hill incompetent? Was he declared insane? It seems not; for the finding of the court is in these words: "That said Thomas J. Hill, by reason of blindness, old age and physical infirmity, is incompetent to manage his business or take charge of his estate."

Upon the finding, the result of the "full hearing and examination" (Code of Civil Procedure, section 1764), by

the court, Haven was appointed the guardian of Hill. Now, I apprehend that, in judging of the effect upon Hill's testamentary capacity of the guardianship proceedings, this court must have resource to the decree or "declaration of incompetency" and be bound by its terms; and the whole of that decree or declaration, as hereinabove quoted, contains no item importing insanity. I have given to this question the greater consideration, because the full and forcible presentation of the views of counsel for contestant impressed me strongly at the hearing, and I have felt in duty bound to examine carefully the grounds of his judgment, as stated in argument; but after examination I am constrained to differ from him. I do not think that the guardianship proceedings which resulted in the order of February 5, 1883, took away the testamentary capacity of Thomas J. Hill, or that it is "a conclusive bar" to this proceeding. It is proper, therefore, to consider the evidence as to the sanity of the testator at the times of the execution of the instruments propounded for probate.

Was Thomas J. Hill, the testator, of sound mind on March 22, 1884, and November 13, 1884, or on either of those occasions, when the papers offered for probate were signed? Civ. Code, sec. 1270.

Contestant alleges that at those times decedent was of great age, blind, feeble, debilitated and deranged in bodily and mental health, and thereby incapacitated from executing a will; and that also at said times decedent was intemperate from constant use of intoxicating liquors, and thereby so mentally deranged as to be incapacitated from making a will.

In support of these allegations contestant, after producing the documents to assail their validity, introduced James M. Haven, who testified that Hill died June 24, 1885—Haven is the proponent—Maggie E. McCann, a subscribing witness to the first will, who identified the instrument and narrated the circumstances under which she signed as a witness. She testified that Hill was blind; that he said to her, "Margaret, sign this," and that at the time he was of sound mind and acting of his own will and declared it to be his will, etc. John E. Donnelly, a subscribing witness to the will of November

13, 1884, testified that he knew Hill, and that he signed the paper at 224 Eleventh street, San Francisco, at Hill's request, in his presence and in the presence of the other witness, Maurice J. Burns, Hill declaring the paper to be his last will and testament. Witness Donnelly drew this last will, and every word of it was dictated by Hill; witnesses Donnelly and Burns were inmates of the same house where Hill was residing, and had known him in that way for some months prior to this occasion. Donnelly further testifies that Hill dictated the outlines of the will and he wrote it. Hill said, "Give to so and so," and then the scribe filled it out; the testator said to Burns, the other witness, "Maurice, sign this." The will was read to Hill by witness; Hill made his mark + to the paper, and one Charles H. Middleton wrote his name as witness to the mark. The testator was very particular about his will, so testifies Donnelly. After the testimony of Donnelly contestant offered in evidence the papers in the guardianship matter, to show that the testator was of unsound mind at the time of signing the wills; and then called Eleanor White, who testified that she knew Hill, who rented apartments of her at 1141 Folsom street, where Mr. Woolley was his nurse, to whom he was very friendly. This began in June, 1883; Hill was intemperate in his habits; he drank to excess; his mind was very weak; she saw him once or twice a week for the first two months, and not so often the last month; saw him an hour or two at a time; herself and husband frequently called upon Hill; in her opinion Hill was not of sound mind; her reason for this opinion was what she saw of him and his conduct; his nephew, the contestant, was with him all the time, and was very kind to him; Hill appeared to her at all times like a man who was under the influence of liquor; Conroy was Hill's attendant during this time; witness never had seen an insane person, and her opinion of Hill's unsoundness was based upon his habits of drinking and his changeable views.

The next witness was Dr. N. P. Foster, a physician whom Woolley took to see Hill in November, 1883, and he found Hill suffering from alcoholic poisoning. The witness defined the different phases of alcoholism; Hill was delirious; wholly

oblivious to everything; not conscious of any of his surroundings; taking his condition altogether, he might be the victim of chronic alcoholism; he was in an advanced stage of alcoholism; the witness judged from his observation of Hill that he had been a hard drinker for years; chronic alcoholism impairs the mind and gradually leads to general imbecility.

Dr. Foster further testified that he saw Mr. Hill at 106 Langton street; he was there about half an hour; Hill's condition couldn't have been brought about by a single debauch; the room was comfortably furnished, and Hill was cleanly clad. Woolley was sober enough to know what he was about, although the witness paid no particular attention to him, as Woolley was not his patient.

Thomas J. Conroy, the attendant of Hill, testified that he first went to work for him in 1881; left him three or four times; worked for him over three years off and on, took charge of his room, led him around wherever he wanted to go; never heard any of the Connor family talking to him about anybody; Hill called Mrs. Connor "mother," she called him "papa," and the children called him "Papa Hill"; the children were up there nearly all the time. Eugene McCarthy waited on Hill a good deal. Eugene is a beneficiary in one of the wills, as is Conroy in the first will. Conroy testifies that Hill was not a firm man, very changeable in mind; he would never have his right mind talking; he said he would never have Woolley come near the house; this was said in presence of the Connors; Hill drank very much; if liquor was not given to him he would jump up and get mad, curse and swear, and say, "if he couldn't have liquor he might as well die"; he would rather drink whisky than eat. Mr. Aiken would come and borrow money sometimes, and he would stay half an hour talking; witness was present sometimes during their conversations. Aiken had an influence over him; everything Aiken would tell him to do he would do; Hill was easily influenced by those around him. Witness is a few months over eighteen years of age; witness was present at the time Mr. Haven drew the will of March, 1884, in which he (witness) is a legatee for $500; Hill sent for Haven to make out a new will; witness couldn't remember the con-

versation; Haven was there half or three-quarters of an hour. Hill was very firm in insisting on his whisky; he was strong on that subject, and he was very stubborn on the question of refusing admission to the Woolleys; witness read the paper to Hill every morning, and got books from the library; Hill used to talk politics with persons sometimes; he also planned to go out on Decoration Day, and we went out; he used to know when witness went out and when he came in; still, witness thought there was no great intelligence about him; he could recognize a man by his voice, not by his step.

John Bush, another witness, was the landlord of the place 1305½ Vallejo street, which was occupied for a while by the deceased; witness saw Hill occasionally, used to visit him to keep his spirits up when he had no society; Hill was blind, paralyzed a little on the right side, a little lame in the arm; he had a nurse, a lady, and a boy to attend him; Hill was so fickle-minded that witness didn't think he knew his own mind; Hill used to say, "They are robbing me entirely"; he said Haven, his guardian, threatened to take his pension away; in witness' opinion Hill could be led by those about him: Mr. Aiken rented the place from me for Hill; witness saw Aiken there on several occasions. Hill said that Aiken charged him $750 for the furniture in the "flat," which, in witness' opinion, was worth no more than $150: Hill said that if he didn't do as Haven told him the latter would stop his pension and put him back in the Almshouse; witness took a drink occasionally with Hill; at one time Hill got a Mr. McManus to see a lawyer to change his guardianship, but Hill changed his mind, and the man said: "Hill, I want no more to do with you; you're a fickle-minded man and don't know your own mind."

Sarah Clark testified that she was nurse for Hill for nine months, and kept house for him; saw him every day; he was in the habit of drinking every day; deprived of his dram he became very ugly; he always spoke well of Aiken and Haven; he had no confidence in anybody but Aiken; wanted Aiken to come every day; if he wanted to buy anything in the shape of dry goods he wanted Aiken to make the purchase; he told her on one occasion that Haven said that if

he didn't do as he (Haven) wanted him to do, he would put him in a private asylum; Hill told witness that he gave Aiken $1,000 for procuring his pension; when special agent Magan visited Hill, the latter told him that Pension Agent Cox had $5,000 and Aiken $1,000, and he spent money for furniture; that Cox had invested in a mining mill at four per cent. or something, and he thought Aiken earned his thousand dollars. Magan introduced Haven to Hill. Hill seemed to know what was going on; he knew the voices of persons but not their step; he said he had no relations; he drank a great deal, whisky every fifteen or twenty minutes; we always put water in it; once he had delirium tremens; Conroy, the boy attendant, used to give him whisky; couldn't help it, because he would get ugly for it; Conroy used to treat Hill cruelly, would provoke him; sometimes the boy would go away and stay the whole night; this would make the old man wild, but he would easily forgive him, as he liked the boy very much. Tommy (Conroy) used to carry the money; during the time of Mr. Magan he didn't drink so much, perhaps five cents worth of beer a day, for say two months, January and February, 1883; witness left him in May, 1883.

Dr. James D. Whitney, physician and surgeon, of over twenty years' practice here, visited Hill once when the latter had broken his arm, but another doctor nearer by was called and there was no occasion for witness; this was in Vallejo street; Hill was in a very nervous condition and required anodynes; witness was afraid he would go into delirium tremens; he was evidently suffering from alcoholism; couldn't say, except from information, whether he was in a primary or advanced stage; assuming he was suffering from alcoholism and partial paralysis, witness should say he was of unsound mind; if his mind was not too much affected before, a change to comfortable conditions would tend to restore him to a normal state.

Patrick Lynch, a resident of San Francisco off and on since 1847, testified that he knew Hill from 1846, when he first saw him on Governor's Island, New York, then afterward in 1847 at the Presidio; after that saw him on Guerrero street during the year 1883, called there frequently to see him; had

conversation with him; would not think he was insane but wouldn't put him up for a man of strong mind; witness' opinion was that Hill was a man of changeable mind; didn't think he was in his right, sound mind at any time he visited him on Guerrero street, when Woolley had charge of him, say in 1882; Woolley's treatment of Hill was kind, food good, rooms clean; their relations very friendly; Hill spoke kindly of Woolley, called him "nephew," and Woolley called him "Uncle Tom." Witness was a subscribing witness to a revocation of a will, together with Woolley; the revocation was drawn by John Quincy Adams and was signed by Hill on Guerrero street; had conversations with Hill about his blindness; he told witness it was caused by neuralgia, and heat and exposure in Arizona; saw James Adams and others on Guerrero street; Adams had been acting as nurse; there were four rooms in the house which they occupied; house well kept, and Hill's personal condition neat and cleanly; Hill was generally intelligent in conversation; he and witness would talk over the topics of the day and over old times when they were soldiers together; from 1849 to 1873 or 1874 witness lost sight of Hill; once Hill was angry because he wanted to set up Woolley in business and let him have $2,500 or $3,000, and Haven wouldn't allow it; witness didn't advise one way or other, but simply said he thought it might be a good thing.

James Hill knew deceased in 1883; they were neighbors in 1141 Folsom street; they were veterans of the war, witness of 1861-65, deceased of the Mexican War; witness knew of no particular delusion, except when Hill was in liquor.

John Woolley, contestant, testified that deceased was witness' mother's brother; first met him on Guerrero street; he had sent a letter inquiring for witness, who didn't care to stay with him, as witness had a family in Placer county; witness took charge of him May 11, 1883, and left him in February, 1884; their relations were good; witness treated him as kindly as if he were a child, and the feeling was kind in return, until Hill's mind was poisoned against witness; witness gave Mr. Haven as a reason for leaving Hill that the life was too wearing for him and he was too closely confined; witness didn't know who poisoned Hill's mind against him,

but he thought so from Hill's changes; he cursed him and his wife; witness didn't receive any particular compensation; witness went there from love, because Hill was his mother's brother; Hill offered him twenty dollars per month; witness told Hill he couldn't take any such sum, but witness did draw some; the day witness left he had a conversation with Hill in Haven's presence, when witness asked Hill for some money, and Hill answered that he didn't owe him "a d——d cent"; witness told his uncle he thought that was pretty hard after his kind treatment of him, and Hill said witness treated him well; witness was housekeeper and nurse, and did the cooking. There was also introduced in evidence by contestant a paper purporting to be a will of Hill, dated August 20, 1882, to show that a large number of persons named as beneficiaries were relatives of Aiken, named therein as executor; this paper came from the possession of James M. Haven, who proceeded to explain certain pencil marks and memoranda on the margins of the paper, made and used in the drawing of another will by Haven for Hill; this document was called the "Blood," or "Aiken," or "Blood-Aiken" will to distinguish it from the others.

I think the foregoing is a fair short statement of the substance of the testimony for contestant and plaintiff herein.

For the proponent and defendant Donnelly testified as before substantially, and also that Hill was a very neat and tidy man, of cleanly habits, intelligent and well posted in affairs, could hold his own in argument; fond of music, delighted with witness' banjo playing; witness is an actor and variety performer; witness was of opinion that Hill was perfectly sane at time of making the wills of March 22 and November 13, 1884; judged so from his conversation and conduct and manner; he was logical and clear in argument. Maurice J. Burns, the other subscribing witness to will of November 13, 1884, corroborated witness preceding. Both these witnesses were friends of the Connor household.

Edward Barthrop came to California in same regiment with Hill, knew him continuously thereafter until 1849; were mining partners in Tuolumne and other mines; afterward witness met Hill at the beginning of the war of 1861-65, in which

they both served in different branches of the Union Army; next saw him in Guerrero street; had a conversation with him of about an hour's length at that time; he was perfectly sane in mind; witness' reason for this opinion was that he could discern no difference between Hill then and when he had seen him before, except that physically he was blind and paralyzed; saw him again on Guerrero street; paid a third visit and he had moved to Langton street, where he was not as comfortably situated; Woolley was attending to him there; James Adams was his attendant on Guerrero street; had conversed with him on Langton street for about twenty minutes; he was of sound mind; next saw him on Eleventh street at Mrs. Connor's; his condition as compared with what it was on Langton street was materially improved in his surroundings, and as to his manner and his cheerfulness; called there about twice in November, 1884, about two or three times a week witness called there; had one conversation of three hours' duration; Hill said he was contented; his memory was good, he set witness right as to dates, had a retentive memory; he was sane in mind; witness never had any reason to doubt it; Hill said to witness that he was glad to get rid of Woolley; that if he had stayed there with Woolley he would have died, if he had remained on Langton street, whence Haven had removed him; Hill told witness he had been left alone in the house at night, and that his money had not been properly accounted for; Hill said he was satisfied with his guardian and was contented; witness disclaimed any knowledge of the terms of the will, or intimacy with the parties.

Frederick L. Post first met Hill in New York in 1846, at the headquarters of Company A. Stevenson's Regiment, where Hill was mustered in as a drummer, witness was orderly sergeant; in October, 1848, the regiment disbanded; next saw deceased in 1861, and again in 1874 or 1875; after that he went to Almshouse; in 1878 he was brought in to get his pension, and Colonel Stevenson and witness identified him; in 1882 witness had a Thanksgiving dinner with Hill; their conversations were usually about the old regiment, its survivors, and like topics; Hill desired witness to make inquiries about his relatives, as he desired to leave them what he had; at his

instance I wrote to Wm. Woolley, his sister's husband, at Campo Seco, who was a member of their old company; next saw Hill on Guerrero street; his nephew had charge of him; witness used to stay there an hour or two at a time; once Wm. Woolley was there on a visit; on Decoration Day of 1883 witness accompanied Hill in a carriage to Odd Fellows' Cemetery, was with him three or four hours that day, the best part of the day; witness next saw him on Langton street; he seemed to feel uncomfortable; whisky was the trouble; saw him again when he removed to Eleventh street, in 1885, and in June 1884, was there two or three hours. The witness said that Hill complained of Woolley in some particulars; Hill seemed to think Woolley's family were too great a tax upon his resources; Hill was well treated at the house of Mrs. Connor, but he had too much whisky; this was true at all times; on Thanksgiving Day, 1882, when witness was at dinner with him, Hill was mentally sane; witness said he could not but be struck with Hill's extraordinary memory; was struck with its retentive power,. especially with regard to the details in obtaining his pension from the agent; his memory was strong in accounting for those whom he had known, or in recounting the scenes through which he and witness had passed; this was while Hill was at Mrs. Connor's house; witness used to visit there on Sundays; Hill was generally clear and lucid; sometimes witness said (in answer to counsel for contestant) he didn't think he was of sound mind; he was weak and vacillating, except upon the question of drink, and upon that point he was very positive; witness thought that persons who constantly plied him with liquor could do anything they pleased with him; when witness was at Mrs. Connor's, Hill was supplied with liquor upon his demand; not more than two or three times upon any occasion; he was subject to vagaries; the one who was nearest to him and humored him most could do almost anything with him; witness thought Hill had more liquor at Vallejo street than elsewhere; when he was under care of Mrs. Clark and the boy Conroy; on Folsom street Hill talked as if he was ill-used; witness saw him there only once; he seemed aggrieved about Conroy's conduct; witness thinks Hill was unduly influenced by the Connor family; there was

too much cajolery, in the opinion of witness, more than could be paid for by so much a month; Hill was very well taken care of; there was so much done to make him happy, there seemed to be something behind that witness couldn't explain exactly.

Miss Mary E. Morrison, a school teacher, an intimate friend and frequent visitant at the home of Mrs. Connor, saw Hill often while there; never saw him under the influence of liquor; thought he was mentally sane, because he talked to her so lucidly; he discussed political issues and seemed well informed; Hill improved very greatly in the Connor house; when he first came he was not so cheerful as he afterward became; he grew stout; he told witness that at one time he wanted to put a pistol to his head and Woolley put one in his hand, and Master Conroy corroborated this statement.

Mrs. Ann Hennings, another intimate friend of the Connor household, testified to same effect as to sanity of Hill.

Chas. H. Middleton, as to will of November 13, 1884, testified that he witnessed the mark, and Hill was mentally sane at the time; witness lived in the same house, and saw much of Hill and conversed with the old man; for the last five weeks of Hill's life witness was with him night and day, except two nights, when witness was relieved.

Dr. M. A. Cachot visited Hill for the first time on May 20, 1885, made in all thirteen or fourteen visits; the patient always answered promptly and to the point all questions; witness never saw any sign of insanity in him; he was sane; witness was family physician of the Connors, is a graduate of college, at one time in charge of St. Mary's Hospital; Hill was not suffering from alcoholism when witness saw him; bore no symptoms of alcoholism.

Dr. S. R. Gerry, a thirty-six years' practitioner in San Francisco, a physician since 1839, knew Hill in the Almshouse, of which institution witness is and was resident physician; Hill had amaurosis, paralysis of the optic nerve; otherwise he was in good corporal condition; had frequent conversations with him, reminiscences of Mexican War and topics like that; afterward witness visited Hill on Chestnut street about twice, two or three years ago; in the Almshouse pre-

scribed occasionally a little whisky and brandy for him, not regularly or continuously; Hill was in the Almshouse ten or twelve years; he was bright and intelligent, mentally sane at all those times; witness based his opinion on the general tenor of Hill's conversation; he was a very tractable patient. easily governed, but he had a strong will of his own, as witness judged from his positive manner; witness didn't think that he was easily influenced.

Dr. L. L. Dorr, a physician and surgeon, first met Hill before the pension board, of which witness was a member, in 1880; afterward in 1882 for a half hour, perhaps, treated Hill for some ailment of the bowels; conversed with him on his physical condition, about his blindness; this was July 18, 1882; he was perfectly sane; if he were not sane in the examination before the pension board, witness would so report. Witness said a person suffering from chronic alcoholism might be competent to make a will.

Miss Maggie E. McCann repeated substantially her testimony as to execution of will of March 22, 1884; she knew Hill all the time he was at her mother's house, of which witness was an inmate; conversed with him frequently; he spoke of Mr. Woolley, said he tried to beat him once on Langton street, and Conroy saved him, and that was the reason he liked the boy; at the time of the execution of the will of March 22, 1884, Hill asked Haven if he would accept anything, and Haven said: "I don't wish any of your money; don't need it." On November 13, 1884, Hill was sane in witness' opinion.

Dr. Julian Perrault, physician and surgeon in San Francisco since 1859, saw Hill September 25, 1882; treated him for quite a severe injury to the arm; thought Hill had been drinking too much; Hill was rather an intelligent old man, and witness sometimes chatted with him when time permitted; never saw him intoxicated; he was an old soldier, and witness thought his condition required stimulants, and witness allowed him a certain quantity of whisky; Hill was a man of strong will and good understanding; there was nothing about him to indicate chronic alcoholism when witness saw him; the quantity of liquor witness prescribed would be

about two gallons a month; the first night witness saw Hill he was suffering from acute alcoholism—that is, the result of one debauch; whether three gallons a month would be too much liquor would depend on a man's physical organization; some men can stand that much without injury.

James H. Adams knew Hill in 1846, a fellow-soldier; had the care of Hill on Guerrero street and on Vallejo street; he was correct in his habits; after Woolley came the quantity of whisky was greatly increased; Woolley drank and others, outsiders; Hill was very generous and liked to treat his friends well; he was never intoxicated before Woolley came; never under the influence of liquor; afterward witness saw Hill intoxicated, sometimes very far gone; always considered Hill perfectly sane; he was as clear and level-headed as any man witness ever had to do with; witness was with Hill six weeks; four weeks before Woolley came, and two weeks after that event.

Wm. Kane worked for Hill two days and a night, and lived hard-by Hill on Langton street for about two months; went there after Woolley left; Hill wasn't very clean; clothes old and shabby; no shoes on; wore slippers when we took him to Mrs. Connor's; Hill was afraid of Woolley's coming back; witness remained to protect him as much as anything else; Hill told witness to throw Woolley out if he came back.

Eugene McCarthy took care of Hill from May 1, 1884, until his decease; attended on him, gave him a tablespoonful of whisky when he wanted it; used to read to him and wait on him; witness has been at Mrs. Connor's about three years; Hill paid him same as Conroy, fifteen dollars per month; saw Hill intoxicated three times—Decoration Day, his birthday, and Fourth of July.

W. H. Aiken testified as to his relations with Hill, and gave his opinion that he was sane at all times, remarkable memory, and acute hearing and sensible conversation were characteristics of Hill; he could tell a person by his step; was very bright and intelligent.

John Hogan, a resident in the Connor house, testified substantially the same as other inmates therein, who saw Hill frequently and conversed with him.

Mrs. Mary E. Connor testified that she was the person mentioned by that name in the instruments propounded; she became acquainted with Hill on Langton street; called there with the sister of Conroy to see Hill; Mr. Woolley was there and said he was going to leave; Hill complained of Woolley; said he could drink more than himself; could take beer three or four times a day, and whisky in the morning; Hill was neat and intelligent; had taste for reading, and liked persons to read for him newspapers and books; liked music greatly; was perfectly sane; he didn't want to see Woolley; didn't want him in the house; didn't think it right that Woolley brought his family to live on him, and to make him support them; she felt friendly toward Woolley.

James M. Haven testified that he was the executor named in instrument dated March 22, 1884; Hill told him he was never married; witness became acquainted with Hill in January, 1883; was introduced by special treasury agent Magan, in Vallejo street, when Conroy and Mrs. Clark had charge of Hill; after the Woolley family came, Hill complained of the circumstances, and of what Woolley's wife once said when Hill spoke of the noise made by the children; Mrs. Woolley said she wished "his old carcass was at the bottom of the bay"; once when witness was present Woolley and Hill had very rough talk; Woolley said he couldn't stay with Hill, nor could anybody else; afterward Woolley came to witness' office and said he couldn't stay longer with Hill, because Hill abused him, called him vile names and so on; the next day after Woolley left, Hill was removed to Mrs. Connor's house; witness selected the place and caused the removal, and Hill was content to go there; after that he improved very greatly; witness was with him when he died; saw him for two hours and a half before; on March 22, 1884, Hill was perfectly sane; as to the instrument called the "Blood" or "Aiken" will, witness made the pencil marks at the direction of Hill, when he was giving witness instructions for drawing the will of March 22, 1884; on November 13, 1884, Hill was sane; he acted at all times like a sane man; his conversation was intelligent; there were times when Hill was under the influence of liquor when his mind was not

sound; Hill told witness that Woolley wanted him to revoke the "Blood-Aiken" will. Hill told witness to give Woolley, his wife and children $1 each; witness suggested larger sums for the wife and children, saying he didn't think they should suffer for Woolley's wrongdoing, but Hill said, "No, I'll give them but a dollar apiece." Hill was not a man easily susceptible to influence; it was very hard to influence him; witness never said that if Hill didn't do as he wished, he would put him in a lunatic asylum; but did insist on Hill's leaving Vallejo street, and getting into a better locality.

H. J. Stafford, a justice of the peace of San Francisco, and an attorney at law, knew Hill; met him two or three times before last election (1884); had conversation with him on general topics; upon politics so far as it was safe for witness to venture; Hill was very radical in his views, and witness, being of opposite opinions, didn't think it prudent to pursue such discussions; Hill was sane; there was nothing about him to indicate insanity, and witness never had a suspicion of Hill's sanity; he was a man of very strong convictions and wanted to argue; ready for argument; clear and logical in his processes of reasoning.

The foregoing is a fair view of the substance of the testimony on both sides.

So far as the execution of the documents propounded are concerned, they are both executed in all particulars conformably to the statute: Civ. Code, secs. 1276, 1278.

The case of the contestant with respect to the soundness of mind of the testator is not established; the great preponderance of evidence being that he was at all times—when not under the influence of liquor—intelligent, clear and strong in mental faculties, with a retentive memory and a positive will; the physicians particularly are upon this point plain-spoken. Doctors Cachot, Perrault, Gerry and Dorr saw much of him, and speak with precision and emphasis; Doctors Foster and Whitney each but once, and under circumstances not so favorable as the others for absolute judgment All these gentlemen are in good professional standing, and entitled to credence and respect; but the conditions under which the two last named saw their patient differ from the

others to such an extent as to render their testimony much less valuable; and their testimony as experts is entitled to no greater consideration than that of the other physicians who oppose their opinions. I do not think any other conclusion can fairly be drawn from the evidence than that Thomas J. Hill was a man of sound mind. Even if at times vacillating and vagarious, as the witness Lynch and Post in substance said, and other witnesses on the same point corroborated, the general tenor of their testimony supports the theory of sanity; Barthrop, James Hill, James H. Adams and John Hogan are clear upon this question, and they saw the decedent frequently during his latter years; two of them —Barthrop and Adams—being his comrades in the Mexican War; in addition is the evidence of Miss Morrison and Mrs. Hennings, which is assailed as interested; but the nature of their interest is not such as to discredit them; that they are "friends of the family" is not of itself sufficient to justify a judge or jury in rejecting their testimony. I do not deem it necessary to advert further to the testimony upon this point, an abstract of which I have endeavored to make in the preceding pages; nor is it necessary to quote here long definitions of soundness or sanity of mind, in order to show how far short contestant's proofs fall in establishing his allegation. I shall only cite: Estate of Black, Myr. 27, 28; 1 Redfield on Wills, 59, 60 et seq.; 1 Jarman on Wills, 103; Estate of Crittenden, Myr. 51; 1 Redfield on Wills, pp. 84, 85; Estate of Tittel, Myr. 12.

The testator seems to have had some reason arising from his nephew's conduct for his antipathy toward him; the evidence of Kane and Post is clear upon this point, the latter especially strong, and there is other testimony to same purport, and explaining this fact as the secret of Hill's affection for the erratic youth, Conroy. Belief based on evidence, however slight, is not delusion. The testator's mind was not "possessed" in this particular: Estate of Tittel, Myr. 14.

As to the allegation of habitual inebriety, while it appears that the decedent was profound in his potations, it is not established that his habits so impaired his mind as to incapacitate him from making a will at the times of the execution

of these instruments. Notwithstanding his frequent and copious indulgence in liquor, without which he declared life not worth living, he seems to have retained an intelligence and an interest in human affairs that made him to many pérsons an entertaining companion. Mr. Post spent hours with him, and others visited him on account of his agreeable converse. The testimony of the physicians, Gerry, Perrault, Cachot and Dorr, is certainly worth considering, with their knowledge of Hill's habits. Upon this issue the Estate of Black, Myr. 27 et seq., is very instructive; and the work of Balfour Browne on the Medical Jurisprudence of Insanity, sections 351-360, and Dr. Ordronaux's Judicial Aspects of Insanity, 382, may be consulted with profit. The case of Peck v. Carey 27 N. Y. 9, 84 Am. Dec. 220, should also be read. Julke v. Adam 1 Redf. 456, and O'Neill v. Murray, 4 Redf. 318, are good cases in support of these views; and it is not necessary to add to those cited.

Was either will made under undue influence? Civ. Code, secs. 1272, 1575.

Counsel for contestant made strenuous contention that the circumstances surrounding Hill, at the time of the execution of those instruments, were such as to carry the inference that the wills were not the offspring or emanation of the mind of the testator; but that the craft of Counselor Haven, the arts and artifices of Aiken, and the manner in which he practiced upon the susceptible nature and the guileless heart of Hill, the subtle influence of the presiding genius of the Connor household, "the fairy godmother of the boy Conroy," Miss Maggie McCann, over the blind paralytic, and the whole atmosphere of undue influence surrounding Hill, produced the wills, by which comparative strangers acquire his estate to the disherison of the next of kin. But it does not appear that there were such ties between Woolley and Hill as should raise a presumption of obligation on testator's part to him; his life with Woolley was on the whole not a happy one; and there was a great change when the transfer was made to the Connor house; the last days of his life were made cheerful; and in this all the witnesses agree who visited Hill at his home with that family. Whatever the motive, it was the fact that Hill benefited bodily and mentally by

the change. I think a careful examination of the facts in evidence will fail to substantiate the averments of contestant that the will was procured to be made by undue influence; and it will not do to base a conclusion upon surmises and suspicions of sordid motives for kind acts, where there is no direct evidence to fortify such deduction. As to what constitutes "undue influence," the counsel must be content with citations, as everything (even a judicial opinion) must have an end. Judge Myrick's valuable probate reports furnish excellent and convenient definitions and illustrations and references: Estate of Black, Myr. 31; 1 Jarman on Wills, 132-134; 1 Redfield on Wills, 518-520; Children's Aid Soc. v. Loveridge, 70 N. Y. 387.

The opinion of Miller, J., in this last cited case is worthy of perusal: See 1 Jarman on Wills, 141; 1 Redfield on Wills, 523, 524.

The allegations of undue influence are not established, and the like remark may be made with respect to the charges of fraud: Civ. Code, 1575. Lack of time and pressure of other duties compel me to abbreviate the discussion of the principles involved in this case, and to refer counsel to the summary of the evidence to support the court's conclusion that the wills should be admitted to probate. Let an order to that effect be prepared: 1 Redfield on Wills, *435.

As to What Undue Influence will vitiate a will, see Estate of Ingram, ante, p. 122, and note.

The Appointment of a Guardian for a Person alleged to be non compos mentis, by a court having jurisdiction, is perhaps prima facie, but certainly not conclusive evidence of his lack of testamentary capacity: Estate of Johnson, 57 Cal. 529; Ames v. Ames, 40 Or. 495, 67 Pac. 737.

One may Place Himself so Far Under the Influence of Intoxicating Liquor that for the time being he cannot do any legal act, or he may, by an excessive use of alcoholic stimulants for an extended period of time, perhaps permanently dethrone his reason. A person may, therefore, by an inordinate indulgence in intoxicants, temporarily and possibly permanently incapacitate himself to make a will. Yet the fact that one is addicted to the excessive use of liquor, or that he is in some measure under its influence, manifestly does not, as a matter of law, establish a want of testamentary capacity. Nevertheless, such inebriety is always admissible in evidence as tending to

show unsoundness of mind, or vulnerability to undue influence, its effect being a question of fact for the jury: Estate of Tiffany, post, p. 478; Estate of Cunningham, 52 Cal. 465; Estate of Gharky, 57 Cal. 271; Estate of Johnson, 57 Cal. 529; Estate of Lang, 65 Cal. 19, 2 Pac. 491; Estate of Wilson, 117 Cal. 262, 49 Pac. 172; In re D'Avignon's Will, 12 Colo. App. 489, 55 Pac. 936; Estate of Van Alstine, 26 Utah, 193, 72 Pac. 942; Estate of Rathjens, 45 Wash. 55, 87 Pac. 1070.

ESTATE OF ALICE SKAE, DECEASED.

[No. 29,150; decided February 15, 1905.]

Equitable Conversion—Whether Takes Place by Implication.—Equitable conversion may take place by implication as well as by express words.

Equitable Conversion—When Worked by Implication.—If a will authorizes the executors to sell real estate, and the general scheme of the testament manifests an intention on the part of the testator that there shall be an equitable conversion of the realty into personal property, such a conversion will take place, although the power to sell is not imperative.

1. Application for partial distribution by Alice Warren Skae, sole heir at law. Opposition by Mercantile Trust Company.

2. Application for final distribution by Mercantile Trust Company of San Francisco, testamentary trustee. Opposition by Alice Warren Skae.

Wilson & Wilson, for heir, cited the following authorities: Civ. Code, secs. 857, 864, 1384; Carpenter v. Cook, 132 Cal. 621, 84 Am. St. Rep. 118, 64 Pac. 997; Morfew v. San Francisco & S. R. R. Co., 107 Cal. 595, 596; Estate of Fair, 132 Cal. 523, 546, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000; Cooke v. Platt, 98 N. Y. 35; Chamberlain v. Taylor, 105 N. Y. 185, 194, 11 N. E. 625; Henderson v. Henderson, 113 N. Y. 11, 20 N. E. 814; Woerz v. Rademacher, 120 N. Y. 62, 23 N. E. 1113; Steinhardt v. Cunningham, 130 N. Y. 292, 29 N. E. 100; Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110; McCurdy v. Otto, 140 Cal. 50, 73 Pac. 748; Estate of Walkerly, 108 Cal. 627, 628, 652, 49 Am. St. Rep. 97, 41

Pac. 772; Estate of Young, 123 Cal. 343, 55 Pac. 1011; Estate of Sanford, 136 Cal. 100, 68 Pac. 494; Estate of Dixon, 143 Cal. 511, 77 Pac. 412; Estate of Pichoir, 139 Cal. 684, 73 Pac. 606; Estate of Fair, 136 Cal. 79, 68 Pac. 306; Am. & Eng. Ency. of Law, 1st ed., p. 510, and cases cited; Janes v. Throckmorton, 57 Cal. 368, 383; Bank of Ukiah v. Rice, 143 Cal. 270, 271, 101 Am. St. Rep. 118, 76 Pac 1020; Scholle v. Scholle, 113 N. Y. 270, 21 N. E. 84; Clift v. Moses, 116 N. Y. 157, 22 N. E. 393; Fraser v. McNaughton, 58 Hun, 31, 11 N. Y. Supp. 384; White v. Howard, 46 N. Y. 162; Estate of Pforr, 144 Cal. 121, 77 Pac. 826; Crouse v. Peterson, 130 Cal. 175, 80 Am. St. Rep. 89, 62 Pac. 475, 615; Estate of Lahiff, 86 Cal. 151, 24 Pac. 850; Fletcher v. Ashburner, 1 White & Tudor's Leading Cases in Equity, part 2, p. 1118 (and cases cited on p. 1134); 2 Story's Equity Jurisprudence, sec. 1214; 1 Beach on Modern Equity Jurisprudence, sec. 523; Wheldale v. Partridge, 5 Ves. Jr. *397, and note. Walker v. Denne, 2 Ves. Jr. *186; Samuel v. Samuel, 4 B. Mon. (Ky.) 253, 254; King v. King, 13 R. I. 501; Becker's Estate, 150 Pa. 526, 24 Atl. 687; Mills v. Harris, 104 N. C. 629, 10 S. E. 704; Tickel v. Quinn, 1 Dem. (N. Y. Sur.) 428; Keller v. Harper, 64 Md. 82, 1 Atl. 65; Lynn v. Gephart, 27 Md. 563.

Morrison & Cope, for trustee, cited the following authorities: Civ. Code, sec. 1338; In re Pforr's Estate, 144 Cal. 121, 77 Pac. 827; Dodge v. Pond, 23 N. Y. 69; Dodge v. Williams, 46 Wis. 97, 50 N. W. 1103, 1106; Bogert v. Hertell, 4 Hill, 492-497, and cases cited; Ford v. Ford, 70 Wis 19, 5 Am. St. Rep. 117-124, 33 N. W. 188; Lent v. Howard, 89 N. Y. 169, 177; Moncrief v. Ross, 50 N. Y. 431-436; Doughty v. Bull, 2 Wms. 430; Delafield v. Barlow, 107 N. Y. 535, 14 N. E. 498; Morse v. Morse, 85 N. Y. 53, 59; Allen v. Watts, 98 Ala. 384, 11 South. 646; Harrington v. Pier, 105 Wis. 485, 76 Am. St. Rep. 924, 82 N. W. 345, 50 L. R. A. 307, 313; Given v. Hilton, 95 U. S. 591, 24 L. Ed. 458; Power v. Cassidy, 79 N. Y. 602, 613, 35 Am. Rep. 550; Clarke v. Clarke, 46 S. C. 230, 57 Am. St. Rep. 675, 24 S. E. 202, 205-207; Fraser v. Trustees U. P. Church, 124 N. Y. 479, 26 N. E. 1034; Cherry v. Greene, 115 Ill. 591, 4 N. E.

257; Going v. Emery, 16 Pick. (33 Mass.) 107, 112, 113, 26 Am. Dec. 645; Wurt's Exrs. v. Page, 19 N. J. Eq. 365, 375; Fahnestock v. Fahnestock, 152 Pa. 56, 34 Am. St. Rep. 623, 25 Atl. 313; Chick v. Ives, 2 Neb. (Unofficial) 879, 90 N. W. 751, and authorities therein cited; Becker v. Chester, 115 Wis. 90, 117-126, 91 N. W. 87, 97-100, 650.

COFFEY, J. Alice Warren Skae is the only child, and sole heir at law of Alice Skae, decedent, who died in New York City on the sixth day of July, 1903, leaving estate, real and personal, in San Francisco and elsewhere, which she sought to dispose of by a will admitted to probate primarily in the New York county surrogates' court and by authenticated copy subsequently in this jurisdiction on September 12, 1903, wherein letters testamentary were issued to Mercantile Trust Company of San Francisco, a corporation, which thereupon qualified as executor and ever since has acted and now is acting in that capacity. The jurisdictional facts being established, Alice Skae, as heir at law, asks that certain property described in her petition be distributed to her.

The executor resists this application and avers that the property described was disposed of by testatrix in and by her will, admitted to probate as aforesaid, which made a complete distribution of all her property in trust as follows: To the said Mercantile Trust Company of San Francisco in trust to receive the rents, income and profits thereof, and to pay therefrom the proper and necessary expenses of managing and caring for said property and of putting and keeping in repair the burial vault owned by said deceased in the cemetery at Oakland and a proper compensation for its services as trustee and to apply the balance of such rents, income and profits to the use of said Alice W. Skae, during her natural life, with authority in said trustee to sell, at public or private sale, the whole or any part of the real estate of the decedent and the proceeds to invest for the purposes of said trust; also to lease the real estate and mortgage the same to secure any loan required to pay an existing mortgage thereon or to rebuild or improve the buildings thereon; and after the decease of the said daughter, Alice

Warren Skae, the decedent testatrix directed the said trustee to pay out of the principal of said trust fund the sum of $50,000 to the lawful husband of said daughter, who should survive, if any, and to distribute the remainder among her children, who should survive her, if any, it being understood that the issue of a deceased child should take together the share per stirpes which such child would have taken, if he or she had survived said daughter of testatrix; and in case said Alice Warren Skae should leave no issue, then the testatrix directed that the trustee should out of the trust property which would have gone to such issue, if any had survived, pay certain gifts to and for certain persons and purposes and then to divide the remainder among indicated individuals.

In order to arrive at the intention of the testatrix it may be better to reproduce here the language of the will, for the rule is, as stated by our supreme court, to ascertain the meaning of the writer by the terms he employs to signify his purpose. It is not, what did he mean? but, what do his words mean? Estate of Fair, 132 Cal. 546, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

The first item of the will need not be rendered literally, as it was revoked by the codicil; but the subsequent paragraphs will be better understood if given in their exact phrase than by abstract or synopsis. These items are as follows, in their order:

Item—"I give, devise and bequeath all the rest, residue and remainder of my property and estate, real and personal, of which I may die seized or possessed, or to which I may be in any wise entitled at the time of my decease, unto the Mercantile Trust Company of San Francisco, California, in trust, to receive the rents, income and profits, thereof, and to pay therefrom the proper and necessary expenses of managing and caring for said property and a proper compensation for its services of Trustee, and to apply the balance of such rents, income and profits to the use of my daughter Alice Warren Skae during her natural life.

"I authorize and empower the said Trustee to sell at public or private sale, the whole or part of my real estate and the proceeds to invest for the purposes of said trust. Also

to lease my real estate and to mortgage the same to secure any loan which may be reasonably required to pay off an existing mortgage thereon, or to rebuild and improve the buildings thereon.

"After the decease of my daughter Alice Warren Skae, I direct that said Trustee pay out of the principal of said Trust Fund, the sum of Fifty thousand dollars to the lawful husband of said Alice Warren Skae, who shall survive her, if any, and to distribute the remainder of said Trust property among the children of said Alice Warren Skae, who shall survive her, if any, it being understood that the issue of a deceased child of said Alice Warren Skae shall together take the share per stirpes which said deceased child would have taken, if he or she had survived said Alice Warren Skae."

Item—"In case my daughter Alice Warren Skae shall leave no issue of her body her surviving, then I direct that the said Trustee shall out of the said Trust property which would have gone to such issue, if any had survived, pay the following gifts, viz": (Naming persons and objects.)

Item—"After all the preceding gifts shall be fully paid so far as may be lawful or possible, I direct the said Trustee to divide all the residue which shall then remain of said Trust property (including all gifts that may lapse, and the sum given in trust for Mary Skae, after the termination of said trust) unto and among the following named persons, viz": (Naming them.)

The property of this estate, according to the inventory and appraisement filed June 30, 1904, was in personalty valued at $31,427.87 and in land $150,000, with improvements thereon $50,000. So far as this discussion is concerned, the actual status of the property at this date may be considered as realty, amounting in value to $200,000.

In support of the application for partial distribution, it is conceded that the trust to receive the rents, income and profits and to apply the same to the use of the daughter during her natural life is valid unless it fail by reason of the invalidity of the other trusts, which are claimed to be repugnant to the statute. The trust for the husband is assailed as clearly void under section 857 of the Civil Code,

and not authorized by any of its subdivisions. Subdivision 1 provides for a trust to sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust. It is argued that in this case there is not only no direction that the real estate be sold and the $50,000 paid out of the proceeds, but the will contains no imperative direction whatever that the real estate be sold, and a trust under this subdivision must be imperative and mandatory and not left to the discretion of the trustee, and if so left, it is not a trust under this statute.

The second subdivision of this section relates to trusts to mortgage or lease real property and the clause concerning the husband is not within its purview.

The third subdivision relates to trusts to receive the rents and profits of real property and apply them to the use of certain persons. This provision covers the trust for the benefit of the daughter, but does not seem to have any bearing upon the clause for the possible surviving husband as that is not to receive rents and profits and apply the same to his use but is a trust to pay him a certain sum out of the principal.

The fourth subdivision provides for a trust to receive the rents and profits of real property and to accumulate the same for certain purposes, and has no application to the husband trust.

If section 857 of the Civil Code be depended upon to support the fifty thousand dollar clause, it would seem as if that trust provision is void.

Following the clause providing for the husband is the direction to the trustee "to distribute the remainder of said trust property among the children of said Alice Warren Skae," and it is maintained, on her behalf, that this is a trust to convey real property and is, therefore, void under the authorities, since the property would not vest in the children on the death of the mother, and it would be necessary, under this trust, for the trustee to convey the land to them and such an act is inhibited by law. The only trusts of real property are those stated in section 857 of the Civil Code, which contains no allusion to trusts "to distribute."

If this provision is to be construed as a trust to convey, it seems to be the settled law of this state that it is invalid, and it is insisted on behalf of the daughter that the words "to distribute," as used in the will, are the equivalent of "to convey"; for, it is said, they certainly contemplate that the trustee upon her death shall execute a conveyance of the remainder of the trust property to each one of the children then living and the issue of any deceased children; for it was evidently contemplated that there might be a number of persons who would be entitled to the trust property at the death of the daughter and the testatrix directs the trustee to distribute the property in proper proportions to each one of such persons and it is not easy to conceive of any method of carrying out this direction except by the execution of a conveyance.

Section 864 of the Civil Code provides that the author of a trust may prescribe to whom the property shall belong on the termination of the trust, but it is contended that there is no such prescription when there is a plain direction to the trustee as in this case.

It is admitted that the intent of the testatrix is evident, but the courts of last resort have ruled that this intention is immaterial unless the disposition be valid. If the trustee could "distribute" by one mode only, and real estate must pass by conveyance alone, and if we treat this trust in that class, the disposition is void. It is asserted on authority that the will containing no words of direct devise, which are essential, a conveyance to the children from the trustee would be indispensable to transfer title.

The trustee submits three reasons why the application of the daughter should be denied and the will in its integrity be sustained:

1. The court should strive to sustain rather than overthrow the will; it should be industrious to carry out rather than defeat the plain purposes of the testatrix, and to prevent rather than create intestacy.

2. There is no trust to convey in this will.

3. The authority given to the trustee to sell the real estate, coupled with the other provisions of the will showing the intention of the testatrix that the property should be

distributed as personal property rather than real estate, is sufficient to create an equitable conversion.

In support of the third reason or proposition the trustee relies upon the Estate of Pforr decided by our supreme court, California Decisions, volume 28, No. 1509, page 105, opinion written by Commissioner Harrison (144 Cal. 121, 77 Pac. 825), which it is claimed has become the law of the state and is the latest expression of the court itself upon the important questions therein discussed. In that case the testator desired and directed the executors to take charge of the property, to collect its rents and income, defray expenses, renew mortgages, and execute new ones when necessary for a term of two years from the date of his demise, and then he desired them to have the property sold at public auction or otherwise and to divide the net proceeds into six equal parts and distribute the same among his heirs and devisees as therein set forth.

The commissioner held that the provision for the sale of the property and the distribution of its proceeds among the six beneficiaries operated as an equitable conversion of the real estate into personalty, under section 1338 of the Civil Code, which provides that when a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of testator's death; and this result is not overcome by reason of the testator having used the word "desire" instead of "direct" in authorizing the sale, for the words "I desire" that my real estate shall be sold are the equivalent of the words "I will" that it be sold, as while the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when given to his executor. The commissioner further held that whether such a conversion is effected depends upon the intention of the testator as gathered from the entire provisions of his will; and, if it is apparent from its terms that it was his will that the estate be sold and the proceeds given to his beneficiaries an equitable conversion results, even if the direction for the sale is not imperative, citing a New York case, Dodge v. Pond, 23 N. Y. 69, in support of this

point, and adding, from a New Jersey opinion, that the question of conversion is one of intention, the real question being, Did the testator intend his land should be converted into money at all events before distribution? Wurts v. Page, 19 N. J. Eq. 375. The applicant admits that the words "at all events" in this quotation state the law correctly, in the sense that the direction, whether express or implied, must be mandatory, but as to the part of his opinion given upon the authority of Dodge v. Pond, counsel says that the language of the learned commissioner is based on a syllabus not corresponding to the text. As this case is considered of authoritative importance, it may be worth while to compare the syllabus, page 69, with the terms of the opinion on page 76 of the report. The syllabus is: "Where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative." Judge Selden, in delivering the decision said: "It is, perhaps, not very important, so far as the questions argued at the hearing are concerned, to determine whether the power of sale conferred upon the executors by the first clause of the will is to be regarded as imperative, or merely discretionary, or whether we treat the property as partly real and partly personal, as at the death of the testator, or as all converted into personalty. If, however, it is deemed to have any bearing on the questions presented, there can be no doubt, from the terms of the power and the general provisions of the will, that the testator intended that the whole real estate, except that portion devised to the widow, should be sold and converted into money, prior to the general distribution provided for in the twentieth clause, and that, upon the established principles of equitable conversion, this should be considered as done." The first clause of the will authorized and empowered the executors to sell and convert into money all the testator's estate, real and personal (except that given to his wife), either at public or private sale, and upon such terms as they might think conducive to the interests of his estate. Counsel for the daughter discredits

this decision and asserts that it is not authority even in New York, and is not followed there by any one of the leading cases, to which his adversary answers that it has been frequently approved in that and other states, and that none of the cases cited in any way modify or overrule the doctrine therein enunciated, and in that connection calls the attention of the court to Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550, particularly pages 613 and 614 of the opinion of Miller, J. It may be said, by the way, that the syllabus on page 603 is in words almost identical with that in Dodge v. Pond, supra. Judge Miller held that the court below was clearly right in deciding that by the terms of the will there was an equitable conversion of all the testator's real estate into personalty. The whole scope and tenor of the will evinces that the testator intended such a conversion and that the estate should be divided as personal estate. The doctrine of equitable conversion is quite familiar and the rule on the subject well settled. It is obvious upon the face of the will that the testator intended that such conversion should be made. The executors are vested with full power and authority to sell as they may deem proper, and after making ample provisions for the wife of testator and directing the payment of certain legacies, the residue is to be divided: one-third to the widow, one-third to a nephew, and the "balance" among a class of institutions to be designated and in proportions to be fixed as directed. The language could not have been more emphatic, said Judge Miller, nor more direct to carry out the design of a division of the remainder as personal estate. The estate could only be effectually divided, and the purposes of the will efficiently carried out, by converting the real into personal property; and the judge proceeds to point out what, in his judgment, would be the impropriety and embarrassment and possible loss attendant upon a contrary construction which would necessarily interfere with the designs and purposes which the testator had in mind when he made his will, and would, moreover, be adverse to the general rule of interpretation which is applicable in cases of this description. Judge Miller concluded his decision on this head by remarking that the circumstance that

the direction to sell was not imperative, was by no means conclusive, for the reasons already recited in the syllabus in Dodge v. Pond, supra, which he cites and repeats in the exact words found on page 69. It appears in this instance, at least, that the syllabus does correspond to the text; but counsel for the daughter says that the Pforr case does not uphold the executor's contention that there is in the will of Mrs. Skae an implied direction to convert sufficient to effect a conversion of her real estate into personal property. In Pforr's estate the direction to the executor to sell was mandatory and imperative; nothing was left to the discretion of the executor except the manner of sale; the sale had to be made in any event; and this worked a conversion, according to counsel, under the rule laid down in the leading California cases, but has no bearing on a case where the equitable conversion is effected by implied direction. An examination of the record in the Estate of Pforr shows that no point had been raised as to equitable conversion in either trial or appellate court; but the learned commissioner, nevertheless, held that the express and mandatory directions in the will caused a conversion; that is to say, he imported a new question into the controversy which was not referred to by counsel in the argument nor considered by the court below nor in any manner alluded to in the briefs or transcript on appeal. In that case, however, although the attention of the court was called in the petition for rehearing to the fact that the doctrine of equitable conversion was not relied upon or mentioned by the parties or their counsel, the application was denied and thus the executor considers the discussion of the value of the decision is at an end, and it is binding on this court in this case. In the Pforr estate the commissioner quoted from Pomeroy's Equity Jurisprudence, but inasmuch as an erroneous deduction is imputed to him, it may be well to consider the text of the entire section of which his quotation forms the last two sentences. Professor Pomeroy says in section 1160, in treating of what words are sufficient to effect a conversion, that the whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a duty resting

upon the trustee to do the specified act; for unless the equitable ought exists, there is no reason for the operation of the maxim, equity regards that as done which ought to be done. The rule is therefore firmly settled, that in order to work a conversion while the property is yet actually unchanged in form, there must be a clear and imperative direction in the will to convert the property—that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting is left to the option, discretion, or choice of the trustee, then no equitable conversion will take place, because no duty to make the change rests upon him. It is not essential, however, that the direction should be express, in order to be imperative; it may be necessarily implied. Where a power to convert is given without words of command, so that there is an appearance of discretion, if the trusts or limitations are of a description exclusively applicable to one species of property, this circumstance is sufficient to outweigh the appearance of an option, and to render the whole imperative. Thus if a power is given to lay out money in land, but the limitations expressed are applicable only to land, this will show an intention that the money should be so laid out, and will amount to an imperative direction to convert, for otherwise the terms of the instrument could not be carried into effect. In fact, the whole result depends upon the intention. If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion takes place.

In the New Jersey case, Wurts v. Page, from which Commissioner Harrison made a short quotation in the Pforr estate, the chancellor said that the doctrine of equitable or notional conversion is well established, the difficulty being in its application. Wherever a testator has positively directed his real estate to be sold and distributed as money, it will be considered for the purposes of succession as personal: but in that case there was no such direction. The direction to sell simply authorized and empowered his executors to sell any part of his real estate in case they should at any time deem it advisable. The court held that this was

not a direction to convert, but, on the contrary, a seeming direction to let it remain as real estate, until it became advisable from time to time to sell it; and the chancellor said if this were the only part of the will to guide him, the real property could not be considered as converted until actually sold; but the question of conversion is one of intention; the real point is, Did the testator intend his lands to be converted into money at all events before the distribution? In the Wurts case, it seemed to the chancellor that the directions in other parts of the will show clearly that he did so intend. The spirit of the whole directions showed that conversion was intended. All the directions showed that the testator intended that his estate should be converted into money before it was distributed by his trustees, and they would be required to convert it into money before distribution and to pay it over in that form; and the rule is well settled that if the will requires the real estate to be converted into money at all events, notwithstanding the executors may have a discretion as to the time, it must be considered as converted into money from the death of the testator. One of the directions was that the portions of his sons and his grandson were to be paid to them upon their arriving respectively at the age of twenty-two years.

In connection with these authorities, it is argued by the respondent in the case at bar that the duty to convert results from the duty of the trustee to carry out the provisions of the will; and it is claimed that the decisions abundantly establish the doctrine that where there is an authority to sell and the language of the entire instrument shows that it was the intention of the testatrix that the bequests should be paid in personal property rather than in real estate, the duty results to convert real estate into personal property. The words used by her indicate the purpose of testatrix to have the entire property distributed as personal rather than transferred as real estate. The testatrix throughout uses the words "pay" and "paid," the idea of which necessarily involves liquidation in money or personal equivalent. She provides that the trustee shall "pay" out of the principal of said trust fund $50,000 to the surviving husband and "dis-

tribute the remainder of said trust property among the children," if any, of her daughter. In case her daughter die leaving no issue, the trustee shall "pay" out of the trust property which would have gone to such issue certain "gifts," and after all these gifts shall be fully "paid" the trustee is directed to "divide" the residue. If it had been the intention of the testatrix that the property should go in kind to the children, the apt words would have been "transfer and convey," and it would have been the plain duty of the draftsman of the document to have used such phrase, if that had been the idea communicated to him as the direction of decedent. If this contention be correct, there is no trust to convey in the will of Alice Skae. In this view of the case, it does not seem possible to carry out all the terms of the testament without a sale of at least a portion of the real estate; but, the trustee contends that even if it were possible to do so in a certain contingency, such possibility should not be seized upon as a reason for overthrowing the manifest intention of the testatrix as collected from the entire instrument. The scheme of the will evinces a far-reaching purpose to provide for every contingency that might possibly arise. After the provision for the daughter during her lifetime, she establishes a fund the result of an investment of the proceeds of sale of the whole or any part of her estate, which she authorized and empowered them to make, and out of those proceeds are to be "paid," "distributed," and "divided," in the contingencies mentioned, her various bounties and benefactions. This comes close to the Wurts case cited in the Pforr estate, wherein the chancellor remarked upon the direction to invest as implying a sale of the real estate.

Counsel for the daughter disputes the authority of the Pforr estate, declaring that its dicta are at variance with the decisions of our supreme court in important cases, which announced the fundamental principles of the law after thorough consideration and deliberation, the first cited being Janes v. Throckmorton, 57 Cal. 368, decided in 1881, a case of magnitude as to the interests and principles involved, in which, it is claimed, the rule is established that in order to work a conversion it must be obligatory on the trustee to

sell the land in any event, and it was held there was no conversion because the deed was not imperative that the land be sold. The case involved the construction of a covenant in the nature of a declaration of trust. The statement of the question made by counsel for the trustee herein seems to be substantially correct. The covenant provided that Throckmorton should sell so much of the real estate as he might deem necessary to pay off certain debts and encumbrances, and that he should account and pay over to two persons named the one-fifth part of the moneys remaining after paying the indebtedness and expenses; that the said Throckmorton should sell all of the lands within three years of the date, or at his option convey the undivided one-fifth part of all lands remaining unsold, after the discharge of the debts and expenses, to those persons, and the question before the court was as to the character of their interest under this covenant. It was held to be an interest in the lands. The action was brought to enforce an alleged trust in favor of plaintiff against defendant in the one-fifth part of all money proceeds of sales of the lands and an undivided one-fifth part of all the lands remaining unsold. Among other defenses, one was that the covenant was a personal one purely, providing for no interest in real estate, and that no trust respecting the lands thereby arose. In discussing this defense, the court reviewed cases upon equitable conversion, among them Dodge v. Pond, but expressed no dissent from the conclusion of that decision; and, indeed, it had no need to consider that phase of the doctrine, which is to the effect that where the power to sell is discretionary, but it appears from a consideration of all the terms of the instrument that it was the intention of the donor that the property should be sold before distribution an equitable conversion would result. The court repeated the rule from 2 Story's Equity Jurisprudence, section 1214, that the inclination of courts of equity upon this branch of jurisprudence is not generally to change the quality of the property, unless there is some clear intention or act by which a definite character, either as money or as land, has been unequivocally fixed upon it throughout; and, if this intention do not clearly appear, the property

retains its original character. As counsel for the daughter, remarks, this is an authority of the greatest weight and is either alluded to or quoted in nearly every American decision on its subject. In the case in 57 California, the court said that the most that could be claimed was, that Throckmorton had the discretion to sell all of the land; but so far from its being obligatory upon him to do so, it was manifestly contemplated that a portion of it might be saved from sale. The Estate of Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772, decided in 1895, by the full court, is claimed to be a similar case in which the question here discussed was fully argued and considered and the law laid down with precision, in these terms: "The rule of equitable conversion merely amounts to this, that where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes and in aid of justice consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not; but whenever the direction is for a future sale, up to the time fixed it is governed by the law of real estate." This extract is quoted with approval in Bank of Ukiah v. Rice, 143 Cal. 270, 101 Am. St. Rep. 118, 76 Pac. 1020, which says that it clearly expresses the doctrine that there can be no conversion until the executor shall have the power to make the sale. The opinion in the Bank of Ukiah v. Rice was written by Commissioner Harrison, May, 1904, and confirmed by department 2 of the supreme court, and counsel for the daughter insists that it firmly establishes the law on this point in this state. In the Ukiah case the commissioner said that if the will postpones the time of sale until the happening of some future event or until some fixed date, the conversion is likewise postponed. In the case at bar, it is claimed by the daughter that there is not only no mandate to sell, but the beneficiaries could, at any time before an actual sale, elect to take the land, instead of its proceeds, and thus extinguish the authority of the trustee to make a sale. This proposition is advanced on the authority of the Bank of Ukiah v. Rice, page 271, of 143 Cal., but is answered by the suggestion that it is difficult to conceive

that the beneficiaries in this case would exercise an election to take the land instead of its proceeds when such an act would defeat their right to take at all, even if it were true that the property could be distributed in kind by the trustee without violating any of the testamentary provisions. In the Estate of Walkerly it seemed to be claimed that the equitable conversion took place at the death of the testator. The will contained an imperative direction to the trustees to sell and convey all the trust estate at the expiration of twenty-five years from the date of the death of the testator. The court held that this clause unlawfully suspended the power of alienation, and was therefore void, remarking that the doctrine of equitable conversion could not be invoked to aid that trust. The counsel in that case had urged that under that doctrine the land should be treated as sold and converted into personal property, and that such a trust in personal property would be valid, and that, therefore, the Walkerly trust must be upheld; but the court observed that would not only be a surprising application of the doctrine, but would be a novel and startling method of evading the law against perpetuities by invoking an equitable fiction; and then the court proceeded to explain the rule in the language already quoted, ending with the sentence: "But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate." In the matter of the will of Alice Skae, there is no fixed period during which the property must be retained as real estate. It is claimed by the trustees that this is the precise condition which calls for the application of the doctrine as defined in the Walkerly case, in which, it may be repeated, it was held that where the will provided that the property should not be converted for a determinate period an equitable conversion could not be raised prior to the point of time prescribed; and, it is argued, that in the numerous cases of the construction of wills in which the doctrine of equitable conversion has been applied there was no positive direction for a sale and there was no particular time within which a sale was required to be made, but the courts have held that all that is necessary is to put the doctrine into operation is an

intention implied from the whole instrument that the sale should be made at some time before the ultimate distribution, and, if such an intention appears, the conversion will be deemed to have been made at the death of the testator. Pomeroy says, concerning the time from which conversion takes effect, that this, like all other questions of intention, must ultimately depend upon the provisions of the particular instrument. The instrument might in express terms contain an absolute direction to sell or to purchase at some specified future time; and if it created a trust to sell upon the happening of a specified event, which might or might not happen, then the conversion would only take place from the time of the happening of that event, but would occur when the event happened as though there had been an absolute direction to sell at that time. Subject to this general modification, the rule is settled that a conversion takes place in wills as from the death of the testator. The same commissioner who wrote the opinion in the Bank of Ukiah case in May, 1903, exactly two months later delivered the decision in the Pforr estate, July, 1904. The later expression of his views is hardly to be presumed inconsistent with the earlier, and both may be reconciled with the matter of Walkerly, so far as they are made applicable to the case at bar. The fact is, however, that after all our examination of cases and authorities, we receive but little assistance in reaching a conclusion in the matter in hand, except (as has been said repeatedly by courts) for the establishment of general principles in the construction of wills; for it seldom or never happens that two cases can be found precisely alike: Le Breton v. Cook, 107 Cal. 416, 40 Pac. 552, quoting Washington, J., in Lambert's Lessee v. Paine, 3 Cranch, 131, 2 L. Ed. 389, decided in 1803. As it was one hundred years ago, so it is to-day. Each case must be considered as a whole with reference to the object of the testator. The general principles are evident enough; the difficulty is, as remarked by our supreme court, in their application to a given case. The end of the inquiry of the court is the discovery of the intent of the testator, and its investigation must be limited to the language of the testament. When that end is attained, the duty of the court is

to execute that intent. It may be that the result of the judicial inquiry may be contrary to the real design of the decedent, but the intention to be sought after is not that merely which existed in the mind, but that which took form in the written words of the testator; and if those words admit of no other construction than one which clearly shows that she attempted to dispose of her property in a manner forbidden by statute, the intention of the testatrix should be interpreted in defeasance of her purpose. This may seem a harsh result, as was said in the Walkerly case, to interpret an instrument contrary to the will of the testator; but if the intent be expressed in terms at variance with the law, the trust must fail; for, even though it be true that such was not the testator's intent, he must do more than merely evince an intention in a certain direction, he must make a valid disposition of his property. It is always with reluctance that courts declare a will or a provision thereof void, and in all cases they endeavor to carry out the intentions of a deceased person, as expressed in the will, if it can be done without disregarding the law and the statutes of the state; and they would violate their duty and the trust reposed in them if they should disregard the law enacted by the legislature and its mandates to carry into effect a will in violation thereof: Estate Dixon, opinion by Commissioner Cooper, department two, supreme court, June 10, 1904, 143 Cal. 511, 77 Pac. 412.

Is this court, in considering and construing the will of Alice Skae, deceased, placed in the predicament described in which, it is confessed, the natural and true intention of the testatrix was made to yield to legal interpretation of her language; for it is admitted here that the intent of the testatrix is evident, but that such intent is to be nullified by judicial construction of her words. At the risk of repetition there may be introduced here from Beach on Modern Equity Jurisprudence, what counsel for the daughter in the case at bar says is a statement of the doctrine under discussion which declares the rule in the most clear and concise terms. Equitable conversion, remarks Beach, may take place by implication as well as by express words. When-

ever the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion. The necessity of a conversion to accomplish the purposes expressed in a will is equivalent to an imperative direction to convert. But the provisions of the will must, at least, be of such a character as to leave no doubt of the testator's intent that there should be a conversion. In a late case in New York (1892) it was said that to justify a conversion there must be a positive direction to convert, which though not expressed may be implied, but, in the latter case, only when the design and purpose of the testator is unequivocal and the implication so plain as to leave no substantial doubt: Clift v. Moses, 116 N. Y. 157, 22 N. E. 393. Where only a power of sale is given, without explicit and imperative directions for its exercise, and the intention of the testator can be carried out without a conversion, none will be adjudged; and where there are no express directions for a conversion none will result because it would be convenient as an aid to the distribution of the estate; it must be necessary and essential. In support of this text is cited, among many other cases, Power v. Cassidy, heretofore considered in this opinion.

As recognizing and tending to illustrate the doctrine and its application contended for by the trustee herein, he calls particularly the attention of the court to the decision in King v. King, 13 R. I. 510, in which it was said that the equitable conversion of a testator's realty into personalty depends, as to both extent and existence, upon his intention judicially determined from his will. In that case it was not contended that the clause under construction contained any direction expressly given that the real estate should be converted at all events. The language was permissive, not mandatory; it conferred an authority, but did not, at least in express terms, issue a command; indeed, the authority was not unqualifiedly given. The trustees were empowered to sell and convey and change investments, not arbitrarily or absolutely, but "as they may deem to be for the interest of the said trust," "or to the advantage of the said trust," or "when the sale of any of said estate may be necessary for the payment of any legacy hereunder." The court said

that this was not such language as would naturally have been used if an out and out conversion had been intended, but it thought, however, that the specific legacies were intended to be paid in money, and that, therefore, for lack of personal estate to pay them, there would have been necessarily implied a direction, operating pro tanto as a conversion, to sell enough of the real estate to pay them: but there was in the same clause a significant provision, which in itself was consistent with conversion at all events, that the legatees might take the real estate in payment at a valuation in lieu of money, and in addition there was no lack of personalty.

In the case at bar there is next to no personal property, and there is no provision contemplating an election of land in lieu of money in the instrument. The dominant idea of the testatrix seems to have been to bestow her benefactions in money, and the terms employed by her leave no room for doubt of her intention. Now, is that intention to be defeated by imputing to her words a meaning foreign to her manifest and persistent purpose? Can this court, without distorting her diction, destroy her will and produce intestacy where it is clear she intended to dispose of every particle of her property in pursuance of an intelligent design in a well wrought out scheme? Is not the exercise of the power of sale rendered necessary and essential by the scope of the will and its declared purposes; and is there not here an implied direction to convert, by reason of the unequivocal manner in which the designs and purposes of the testatrix are expressed, making the implication so strong as to leave no substantial doubt? Is not the direction necessarily implied? In order to answer accurately these questions, we must consider carefully the whole scheme of the will and weigh the words of the testatrix with the facts and circumstances of the case. At the time of her death she had, in round numbers, about $30,000 in cash, no other personalty of consequence; one parcel of real estate, 120x206.3, part of Western Addition block, on Larkin street, fronting from Fulton street to Birch avenue, valued at $150,000, with improvements thereon appraised at $50,000.

The personalty would have been virtually consumed by the first bequest, if it had not been changed by the codicil; but, notwithstanding the revocation, it exhibited the intention of the testatrix at the time she executed the will. It provided for the discharge of debts and funeral expenses, and as part of the latter directed the demolition of the burial vault wherein lay the remains of her husband and two deceased children and the erection of a new vault at a cost of from twenty to twenty-five thousand dollars. After this the testatrix had practically only real property to deal with, so far as the actual present species was concerned; but she used the technical expressions appropriate to carry both real and personal, "give, devise and bequeath," thus implying her knowledge of the legal force and effect of the different testamentary words and the import of the distinct ideas so represented. She then authorized and empowered the trustee to sell the real estate, and then follows the clause which furnishes the bone of contention in this case. Giving all due weight to the argument of counsel for the daughter, this court cannot accept his conclusion without, in its judgment, doing violence to the intention of the testatrix. Taking the words in their logical and actual relation, they indicate a connection in her mind between the idea of a sale and the distribution of the proceeds thereof. The entire context admits of no other interpretation. The sale produces the fund and the funds to be distributed in dollars, cash payments. Testatrix then provides, for the event of the death of the daughter without issue, all money bequests, "gifts" to be paid, in cash, so many dollars to each donee. Without a sale of real estate, these legacies could not be paid; conversion is necessary to their satisfaction. Finally, testatrix directs that after all of these gifts shall be fully paid, the trustee shall divide all the residue which shall then remain of said trust property (including all gifts that may lapse, and the sum given in trust for Mary Skae, after the termination of said trust), unto and among six persons, names and addresses given. A partition of the property can hardly be ascribed to testatrix under this item. The remarks of the New York court of appeals in Power v. Cassidy, supra, page 614, are here somewhat in point. The

evidence in the case at bar shows that a partition of the real estate into six pieces, with the structures thereon as they were at her death and are now would be impracticable, and, even if there were no improvements, such a course might seriously diminish the value of the property, and lessen the avails to be distributed. The words used in this clause, moreover, apply to real rather than to personal property; no one word being exclusively pertinent to realty, some never so applied, and all pointing to a disposition of personalty.

Taking the instrument in its entire form and substance, letter and spirit, construing and interpreting its language in the light of reason and authority, this court is of opinion that the whole scope and tenor of the will imports an equitable conversion; and, thus the application for partial distribution must be and is denied.

Equitable Conversion is that change in property by which, for certain purposes, real estate is considered as personal, and personal as real: Haward v. Peavey, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503, note in 5 Am. St. Rep. 141. Whether such a result is worked by a will depends upon the intention of the testator. If it is apparent from the express terms of the instrument, or by necessary implication, that he intended his real estate to be sold and the proceeds given his beneficiaries, an equitable conversion results, although perhaps the direction to sell is not imperative, as where the word "desire" instead of "direct" is addressed to the executors: Estate of Pforr, 144 Cal. 121, 77 Pac. 825. "Where the will directs the sale of real estate expressly, or by clear implication, or where a sale is absolutely necessary to the execution of the provisions of the will, such real estate is equitably converted into personalty from the time of the testator's death": Penfield v. Tower, 1 N. D. 216, 46 N. W. 413. But see Estate of Lahiff, 86 Cal. 153, 24 Pac. 850.

ESTATE OF JOHN FAY, DECEASED.

[No. 26,323; decided March 12, 1902.]

An Olographic Will Which by Mistake Bears a Date at least twenty-eight years prior to the time of its execution should be denied probate. [*See note at end of opinion.*]

Louis S. Beedy, for the proponents.

Bart Burke and Chas. J. Pence, for the contestants.

COFFEY, J. This is a proceeding for the probate of a certain instrument alleged in the petition to be the last will and testament of John Fay, deceased.

The proposed will is olographic in form, was entirely written, dated, and signed by the hand of the testator himself. It bears date "May twenty-fifth eighteen hundred and fifty-nine."

This alleged will makes certain bequests and devises to the surviving wife and children of the deceased, naming them, and, among others, to a daughter, Mary Montealegre.

It appears that at the date of said will the said testator was unmarried and none of his said children was yet born; that Mary Montealegre, his daughter, was married on the thirty-first day of January, 1887, to Charles F. Montealegre, from whom she was divorced on the twenty-ninth day of July 1890, and by the provisions of the decree of divorce she was authorized to resume her maiden name of Mary Fay. She died March 29, 1900, nearly two years prior to the death of the testator, leaving her surviving no child or children or lineal descendants. Luke Fay, the oldest son of said deceased, was born February 28, 1861, nearly two years subsequent to the date of said will.

It is apparent, therefore, that the will in question could not have been executed earlier than January 31, 1887, the date of the marriage of his daughter as aforesaid, and probably not later than the decree of divorce rendered July 29, 1890, when she resumed her maiden name, as it is not likely that after such date the deceased would have named her in his will as "Mary Montealegre."

The question to be determined is, Was this instrument duly executed as an olographic will?

This will bears a date at least twenty-eight years prior to its execution. Does this comply with section 1277 of the Civil Code? That section is as follows: "An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

That a date is one of the requisites of an olographic will, and that such date must be written by the testator himself is the settled law of this state.

In Estate of Martin, 58 Cal. 530, there was no date to the will, which was olographic, and it was held invalid, although it contained a declaration that the testator was "of the age of sixty years."

In Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555 and in Estate of Billings, 64 Cal. 427, 1 Pac. 701, it was held that an olographic will in which the date was partly written and partly printed was invalid.

In Estate of Behrens, 130 Cal. 416, 62 Pac. 603, it was conceded that the olographic will in question in that case, bearing date in the writing of the testator of "Febr. 12, '98," was sufficiently dated under the code.

In Estate of Lakemeyer, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961, it was held that the words and figures, "New York, Nov. 22, '97," used in an olographic will, constitute a date, and that the will was sufficiently dated.

In no case reported in this state or elsewhere have I been able to find the question involved in the case at bar decided. Its solution, however, does not seem to me to be difficult. It was evidently the intention of the legislature that an olographic will should not only be dated, but that it should state the true date of the execution thereof. In Estate of Martin, 58 Cal. 530, the court say:

"It is claimed that the dating of a will is a mere formal matter, not absolutely necessary. We do not think so. The legislature has seen fit to require three things to concur, for the execution of an olographic will, viz.: That it be written, dated, and signed by the hand of the testator. We

are not at liberty to hold that the legislature intended any one of these requirements to be of any greater or less importance than the others. If we may omit one, why not either of the others?

"The paper is not aided by the declaration contained in it, of the age of sixty years. It does not appear in the paper when he was of the age of sixty years. It may have been one day before his decease; it may have been ten years."

The language of the court above implies that the will must not only be dated, but must bear the date of its execution; and this in reason ought to be so. The word "date" is defined in the Universal Dictionary as follows: "1. The formula appended to a letter, deed, etc., to denote the year, month, and day when such letter or deed was signed or executed." Webster defines the word "date" thus: "That addition to a writing which specifies the year, month and day when it was given or exercised."

There are several reasons why the correct date should be stated in olographic wills. Some of them are noted in the case of Succession of Robertson, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 South. 586, as follows:

"The law enjoins the date on two grounds: The first, the most essential, is in order that the precise date the testator made a disposition of his property may be known, rendering it possible to determine whether the testator had the capacity of giving at the date the testament was made. The second ground is secondary. If there are two testaments, it should be manifest which is the last, in case of opposing or incompatible dispositions."

In that case the date was partly written and partly printed, and the proposed will therein was held invalid by the court.

In Heffner v. Heffner, 48 La. Ann. 1088, 20 South. 281, other reasons were noted. The will in that case closed as follows: "Written, dated and signed in my own handwriting, on this —— day of June, 1893. William Heffner." The court in that case used the following language:

"When the code comes to prescribe the olographic testament, the notary, the witnesses and all forms of authentica-

tion are dispensed with, and the requirement is that such a will to have the validity must be wholly written, dated, and signed by the hand of the testator. The policy of the law to secure the true representation of the testator's wishes and guard against fraudulent wills is marked in the requisite of the testator's handwriting, including the expression of the date when he writes the paper and affixes the signature it bears. The date in the testator's handwriting is part of the evidence the law requires of the verity of the instrument. If the paper is forged, the date it must bear may furnish the means of detection, on any issue of the sanity the dates indicate and restrict the period of inquiry."

If the instrument in the case at bar were admitted to probate as the last will of deceased, and within the time allowed by law, a contest should be inaugurated in which the mental capacity of the testator to make the same were challenged, at what point in time would the court direct or restrict the evidence to the point in issue? The sanity of the testator must appear at the time of the execution of the will: In re Wilson, 117 Cal. 269, 49 Pac. 172, 711.

But no person living knows, so far as the court is informed, when this will was executed. It was probably written between January 31, 1887, the date of the marriage of the daughter of the testator and July 29, 1890, the date of her divorce, but it may have been executed at any time after the former date and prior to the testator's death, which occurred January 28, 1902. Thus the court in the event of a contest would have to indulge in probabilities in fixing an event that might have occurred at any time within the period of fifteen years, or thereabouts.

In Heffner v. Heffner 48 La. Ann. 1088, 20 South. 281, the will must have been written within the month of June, 1893, yet the court declared it was not dated.

Again, there may have been another will, olographic or otherwise, of this testator. Suppose one were found bearing the subsequent date, yet executed prior to January 31, 1887. This would in fact be a prior will, but should such a will be admitted and produced, would it affect this will if admitted to probate bearing date as it does, "May twenty-fifth eighteen hundred and fifty-nine"?

There are many reasons, it may be urged, why the true date of an olographic will should be stated; none whatever for a wrong date. Suppose the date of this instrument were A. D. 1000; this would be a technical compliance with the law, but would it meet the legislative intent incorporated in section 1277 of the code? Manifestly not. It would in effect be no date at all. And so in the case at bar, where almost thirty years must have intervened from the date of the instrument and the actual time of its execution: Fuentes et al. v. Gaines, 25 La. Ann. 85, 107.

In the case last cited it was sought to establish a lost olographic will. Referring to the testimony of the witnesses the court said: "In this case two witnesses, Harper and Bellechasse, state that the will was wholly written, dated and signed by Clark. Bellechasse states it was dated in 1813. Harper says it was dated in July, 1813. Is this sufficient? Is a statement, which is dated A. D. 1813, or July, A. D. 1813, to be deemed dated in the sense of the law? Certainly not, if the term "dated" is to be understood in its common and usual signification.

The reason why a wrong date to an olographic will renders the same invalid might be further illustrated and amplified, but it is unnecessary. If the motives and reasons given the cases cited are valid, and consonant with the legislative intent in enacting section 1277 of the Civil Code, then the instrument in the case at bar is certainly invalid, and the same should be rejected and probate thereof refused.

For the reasons and upon the authorities hereinabove recited and set forth the paper propounded is denied probate.

The Principal Case was reversed by the supreme court in 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340. It is doubtful, however, whether the action of the supreme court in this case is consistent, either with its prior or subsequent decisions, on the law of olographic wills: See Estate of Martin, 58 Cal. 530; Estate of Billings, 64 Cal. 427, 1 Pac. 701; Estate of Plumel, 151 Cal. 77, 121 Am. St. Rep. 100, 90 Pac. 192.

OLOGRAPHIC WILLS.

An Olographic Will is One Written Entirely by the hand of the testator: Bouvier's Law Dictionary, title "Holograph"; Rapalje & Lawrence's Law Dictionary, title "Holograph"; Neer v. Cowhick, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588; note to Lagrave v. Merle, 52

Am. Dec. 591. Where, however, there is a codicil, the will and the codicil may be considered separately, and one be olographic and the other not. Hence to a will not in the handwriting of the testator, but duly witnessed and attested, there may be a codicil wholly in his handwriting, and therefore, though not witnessed, entitled to admission to probate as an olographic will: In re Soher, 78 Cal. 477, 21 Pac. 8.

A Paper is not Necessarily Entitled to Probate because it is testamentary in scope and wholly written by the testator and attested by his signature, for the whole subject of wills is under statutory control, and every paper presented as a will, whether olographic or not, must conform to the requisites of the statute. At the common law and by the earliest statutes upon the subject of wills witnesses thereto were not required, and an olographic will must have been good, though not witnessed, because it would have been equally good though not olographic, provided it had been executed by the testator. The necessity for witnesses resulted from the statute of 29 Charles II, chapter 3, relating to frauds and perjuries. It is believed that in each of the states of this Union statutes have been enacted without compliance with which no will is entitled to admission to probate or to otherwise be given effect as a will. Such being the case, the requisites of olographic wills must be found in those statutes, and where they prescribe any general rule respecting the execution and attestation of wills, such rule is equally applicable to olographic wills, and the fact that a will is wholly in the handwriting of the testator does not exempt it from the rule. Thus if a statute declares that all wills to be valid must be in writing, witnessed by two competent witnesses, and signed by the testator or by some person in his presence and by his direction, and that an olographic will may be proved in the same manner that other private writings are proved, wills of the latter class are still subject to the provision requiring witnesses: Neer v. Cowhick, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588. So a statute may impose limitations upon olographic which do not apply to other wills, or may provide that persons competent to make the latter are not competent to make the former. Thus, if a statute declares that a married woman may dispose of her separate estate by will without the consent of her husband, and may alter or revoke the will as if she were single, and that her will must be attested, witnessed and proved in like manner as are other wills, she cannot make an olographic will, though the same statute recognizes the general right to make such wills: Scott v. Harkness, 6 Idaho, 736, 59 Pac. 556.

Provided It Conforms to the Statutory Requisites in Other Respects, any writing or combination of writings (Estate of Skerrett, 67 Cal. 585, 8 Pac. 181) may constitute an olographic will, if it expresses, however informally, a testamentary purpose in language suffi-

ciently clear to be understood. Sums bequeathed may be stated in figures as well as in words: Succession of Vanhille, 49 La. Ann. 107, 62 Am. St. Rep. 642, 21 South. 191. "To the validity of a will the law does not require it should assume any particular form, or that any technically appropriate language should be used therein, if the intention of the maker is disclosed and the distribution of his property at his death is designated." Hence a paper which commences with a synopsis of some of the principal events of the writer's life and a statement of property acquired by him, and that Charlie Webster has helped him to improve it, and concluding, "I have requested my executors to give a clear deed for the property after my death to Maggie, his wife, and Charlie," is entitled to admission to probate as the will of the writer. The fact that he labored under a mistaken impression that it was necessary for his executors to make a conveyance does not prevent the writing from operating as his will: Webster v. Lowe, 107 Ky. 293, 53 S. W. 1030.

It will be seen from this that it is not necessary for the writer to know that the paper which he writes will amount to a will or otherwise fully accomplish his purposes. It is sufficient that he manifests his wish that, on his death, his property, or some part of it, shall go to another person by him designated: Outlaw v. Hurdle, 1 Jones (46 N. C.), 150; Estate of Knox, 131 Pa. 220, 17 Am. St. Rep. 798, 18 Atl. 1021, 6 L. R. A. 353. Nor is it necessary that such designation be so complete that parol evidence is not necessary to make it understood. Thus the words, "Dear old Nance: I wish to give you my watch, two shawls, and also five thousand dollars," properly dated and subscribed by the writer, is an olographic will, and parol evidence is admissible to prove who is the person whom he designated as "Old Nance": Clarke v. Ransom, 50 Cal. 595. It is sufficient that the will merely states that the person named therein is the testator's heir if it is also indorsed in his handwriting as his will: Succession of Ehrenberg, 21 La. Ann. 280, 99 Am. Dec. 729.

A will may take the form of a direction to the testator's executors to pay the beneficiaries a sum specified at a future designated date: Pena v. Cities of New Orleans and Baltimore, 13 La. Ann. 86, 71 Am. Dec. 506. An olographic will may be contained in, or be a part of, a letter written by the testator to the beneficiary or to another: Buffington v. Thomas, 84 Miss. 157, 105 Am. St. Rep. 423, 36 South. 1039; Barney v. Hayes, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282; Alston v. Davis, 118 N. C. 202, 24 S. E. 15; or may consist of an entry in the testator's diary: Reagan v. Stanley, 11 Lea, 316.

Whether Directions for the Writing of a Will may of themselves constitute an olographic will is not free from doubt. A paper entitled, "Directions how I want my will wrote," was denied admission to probate in Virginia, but the reasons for such denial were not stated by the court, and, as they may have related to the uncertainty of the directions thus referred to and the impossibility of

ascertaining from them, even if so admitted, what disposition was made of the property therein referred to, the case can hardly be regarded as authority on one side or the other side of the question: Hocker v. Hocker, 4 Gratt. 277. In Barney v. Hayes, 11 Mont. 99, 571, 28 Am. St. Rep. 495, 29 Pac. 282, 384, it appeared that the testator, after having executed a will which was duly attested by witnesses, married and subsequently wrote to his attorneys referring to his marriage, and stating, "Now, what I want is for you to change my will so that she will be entitled to all that belongs to her as my wife. I am in very poor health and would like this attended to as soon as convenient." Application was made for the admission to probate of this letter as a codicil to the pre-existing will. It was conceded that the marriage had revoked the original will, but that if the letter could be admitted as a codicil, it republished the will, and that the will and codicil together constitute the last will and testament of the decedent. "The whole gist of the case," said the court, "therefore, is whether said letter was a codicil; that is, whether it was testamentary in character. The court submitted to the jury a great number of questions, which seemed to have included all matters of fact in the case. The court also required the jury to determine whether said letter was a codicil. The jury said it was." The trial court set aside this finding and held that the letter was not a codicil. Its action was reversed upon appeal, the appellate court holding that the words contained in the letter "disclosed an animus testandi," that the reasonable construction of the letter was that the testator wished his wife to have a certain portion of his estate, and that no one could read the letter and be in any doubt as to what the decedent intended should be the disposition of his property to his wife, and that such intention being clear, the intent must not be ignored because the language was not technical:

The Omission of Any of the Requirements of the Statute in the execution of an olograph will not be overlooked on the ground that it is beyond question that the paper was executed by the decedent as his will while he possessed abundant testamentary capacity and was free from fraud, constraint, or undue influence, and there is no question of his testamentary purpose and no obstacle to carrying it into effect had his will been executed in the manner prescribed by the statute: Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555; Succession of Armant, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 South. 50; Baker v. Brown, 83 Miss. 793, 36 South. 539; Warwick v. Warwick, 86 Va. 602, 10 S. E. 843, 6 L. R. A. 795. When, on the other hand, the paper offered has been executed in compliance with all the requisites imposed by the statutes, the courts will construe it on the same principles applicable to other wills, by seeking to ascertain, though its language is untechnical and ungrammatical, or words are omitted from it, what was the intention of the testator, and by giving effect to that intention, whenever lawful, and

thus capable of ascertainment. Therefore, the words, "Crolldepdro, february 3, 1892, this is to serifey that ie levet to mey wife Real and persnal and she to dispose for them as she wis," may be construed as if it had been written, "Corral de Piedra, February 3, 1892. This is to certify that I leave to my wife (my) real and personal (property), and she to dispose of them as she wishes": Mitchell v. Donohue, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614.

Though Certain Words Taken by Themselves have no apparent connection with other portions of the will, "the testatrix must be deemed to have written them with the intention that some effect should be given them, and that intention, so far as it can be gathered from the will itself and the circumstances under which it is executed, is to be ascertained by the court and effect given thereto accordingly. The order in which the words of a will are written is not determinative of the testator's intention, and under a well-recognized rule this order will be transposed if thereby the intention of the testator can be ascertained. So, too, a word that has been manifestly omitted and is essential to an understanding of the intention of the testator will be supplied": In re Stratton, 112 Cal. 513, 44 Pac. 1028.

A Will cannot be Olographic if Any Part of It is not in the Handwriting of the testator. The material with which it is written is immaterial. It may be in pencil as well as in ink: Philbrick's Heirs v. Spangler, 15 La. Ann. 46; Estate of Knox, 131 Pa. 220, 17 Am. St. Rep. 798, 18 Atl. 1021, 6 L. R. A. 353. But whether in ink or in pencil, every part of it must be in the testator's handwriting. Therefore, if a printed form has been used, so that the paper consists partly of such printing and partly of clauses written by the testator, no part of it can be admitted to probate as his olographic will: In re Rand's Estate, 61 Cal. 468, 44 Am. Rep. 555; Williams' Heirs v. Hardy, 15 La. Ann. 286. The same result must follow if the will is written on a printed letterhead, some of the words or figures of which constitute an essential part of the will: In re Billing's Estate, 64 Cal. 427, 1 Pac. 701; Succession of Robertson, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 South. 586. Perhaps, where it appears that all the words necessary to a completely executed will are in the handwriting of the testator, it may be admitted to probate, though it is proved that a few other words are in the handwriting of another: McMichael v. Bankston, 24 La. Ann. 451; and certainly this is true where the words are written preceding the will as a mere caption: Baker v. Brown, 83 Miss. 793, 36 South. 539.

The Question Whether an Olograph may, by Referring to Another Paper not in the handwriting of the testator, make it a part of the will is not free from doubt. In Virginia, where it appeared that a will had been drawn purporting to give all the testatrix's property to her sisters Margaret and Sallie, but had not been sub-

scribed or otherwise executed, and that the testatrix had written on the same sheet of paper, "As Margaret is dead, I give her share to my niece Lizzie Leigh Gibson," and followed this with her signature and the proper date, it was held that this latter writing could not be admitted to probate. It was conceded that had the original will been duly executed, the additional writing would have been entitled to probate as a codicil thereto, but a majority of the court was of the opinion that, as the original will was never duly executed, nor in the handwriting of the testatrix, the subsequent writing could not be admitted to probate as a codicil or otherwise: Gibson v. Gibson, 28 Gratt. 44. Where a paper purporting to be a codicil is executed with the formalities required of a will, or imports a reference to some already existing document regarded by the testator as his will, to identify that instrument and to interpret that reference as applying to it, all the surrounding circumstances may be shown: Estate of Plumel, 151 Cal. 77, 121 Am. St. Rep. 100.

Like doubt seems not to exist when the paper referred to is in the handwriting of the testator. In Estate of Skerrett, 67 Cal. 585, 8 Pac. 181, it appeared that the decedent signed and acknowledged a deed of gift to his sister which never became operative for want of delivery. Afterward he sent her a letter containing a copy of the deed, declaring that nothing further was necessary than to have it recorded, and that the property therein described would then become hers, and that he wanted her to know that she was provided for under all circumstances, and that if it should please God to call him away, she would have her own property to depend on, sufficient to make her independent while she lived. The copy of the deed, as well as the letter, was in the decedent's handwriting. It was held, reversing the judgment of the trial court, that the deed itself could not be admitted to probate as a will, because it contained no words of testamentary character, but that the copy and the letter, though neither in itself constituted a will, because the one was not testamentary in character and the other had no date, together as one complete document, clearly showed an animus testandi, and were entitled to admission to probate. Where a paper is written on the reverse side of an olographic will, not effectively executed, and is styled, "codicil," this word imports a reference to some prior paper as a will, and if executed with the formalities requisite for a will, makes good an invalidly executed olographic will written on such reverse side: Estate of Plumel, 151 Cal. 57, 121 Am. St. Rep. 100.

The Statutes Seem Unanimous in Requiring Olographs to be Dated; failure to respect this requirement is fatal to the will: In re Martin's Will, 58 Cal. 530; Fuentes v. Gaines, 25 La. Ann. 85; Heffner v. Heffner, 48 La. Ann. 1088, 20 South. 281. Though all the rest of it is conceded to be in the handwriting of the testator, if the date is proved to have been written by another, it must be denied admission to probate: Estate of Behrens, 130 Cal. 416, 62 Pac. 603. The

whole of the date must be in the testator's handwriting; and if he writes his will on a letterhead, using the figures printed thereon as part of the date and without considering such figures, the date cannot be known, the will cannot be supported as an olographic will: Succession of Robertson, 49 La. Ann. 868, 62 Am. St. Rep. 672, 26 South. 586. See, too, Estate of Plumel, 151 Cal. 77, 121 Am. St. Rep. 100.

Abbreviations in the Date are permissible if they are such as are in common use, easily understood, and leave no question of the date intended to be expressed. The words, "New York, Nov. 22/97," constitute a good dating. "In this case the expression under consideration is entirely unambiguous, and to everyone familiar with the usage of language it expresses the month, day and year as clearly as though these had been written out in full. It is, or rather, during the century just expired, it was, the common usage—universally understood—to designate the year by the last two figures of its number, omitting the figures designating the century": In re Lakemeyer's Estate, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961.

A Dating is not Sufficient to satisfy the requirements of the statute if it omits either the day, the month or the year: Fuentes v. Gaines, 25 La. Ann. 85; Heffner v. Heffner, 48 La. Ann. 1088, 20 South. 281; though when the existence of the will is in issue, as where its admission to probate as a lost will is sought, it is sufficient that the testimony shows that it was dated on some day in a designated month and year without specifying that day, if the inference, supported by the testimony, is that the day was specified in the will, though the witnesses testifying do not remember what it was: Gaines v. Lizardi, 3 Woods, 77 Fed. Cas. No. 7175. If a will in the handwriting of the testator closes with the proper dating and signing, and is followed by a further clause signed by the testator, but bearing no separate date, such clause will be presumed to have been written at the same time as the original will, and therefore the whole will be deemed to be properly dated: Lagrave v. Merle, 5 La. Ann. 278, 52 Am. Dec. 589. It is not essential that the date stated truly represented the time when the will was written or signed. An obvious mistake in this respect is not fatal to the will: Estate of Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340. Whether his action is due to a mistake or not, the testator may adopt as the date of his will any date previously written by him: Estate of Clisby, 145 Cal. 407, 104 Am. St. Rep. 58, 78 Pac. 964.

The Place Where the Date must be Written is not prescribed by the statute, and hence it is not material in what part of the instrument it appears: Zerega v. Percival, 46 La. Ann. 590, 15 South. 476. It may follow the signature: Succession of Fuqua, 27 La. Ann. 271; or even be found on a piece of paper different from that which expresses the testamentary purpose and to which the signature of the

testator is written. Thus, where a testator sent to his sister what purported to be a copy of a deed conveying certain property to her, dated April 26, 1881, and acknowledged on the day following, inclosed in a letter bearing no date, but showing his intention that she should have such property at his death, such copy and letter were together held to constitute an olographic will, and to justify such holding, it was necessary for the court to adopt, and it did adopt, the date as expressed in such copy as the date of the olographic will: Estate of Skerrett, 67 Cal. 585, 8 Pac. 181.

Necessity for Signature.—At the common law a will of personal property in the testator's handwriting was good, though without his signature and unwitnessed, and in some of the states a common-law will is still sufficient in exceptional circumstances, as when made by a soldier in actual service, or a mariner at sea, for the purpose of disposing of his wages and personal estate: Leathers v. Greenacre, 53 Me. 561. The general rule, however, is that wills must be signed by the testator, and special reasons exist for the rule and its enforcement when the will is not witnessed. The absence of the testator's signature upon what is claimed as an olographic will must be regarded as fatal, except in cases where the common law has been left in force as to soldiers and sailors.

The Statutes Requiring the Signing of Wills by the testator have rarely, if ever, declared what constitutes a signing or signature, and, while there are many decisions upon that subject in its relation to other wills, there are few indicating whether the results reached are equally applicable to wills which have been admitted to probate only on the ground that they are olographic. The question whether a signature to a will may consist of the testator's mark cannot arise, because the existence of the balance of the will in his handwriting demonstrates his ability to write, and hence the absence of any necessity for using a mark. There is certainly no need of his writing his name in full, but it is doubtless sufficient that the signature written is that ordinarily used by him in other business transactions. It may probably consist of initials, or even of a fictitious or assumed name. "The title by which a man calls himself and is known in the community is his name, whether it be the one he inherited or had originally given him or not. So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. Nor is there any fixed requirement how much of the full name shall be written." Hence, an olographic will signed only by the testatrix's given name "Harriet" was upheld: Estate of Knox, 131 Pa. 220, 17 Am. St. Rep. 798, 18 Atl. 1021, 6 L. R. A. 353.

The Place of the Signature is not Material unless made so by statute. It need not be at the end: Estate of Stratton, 112 Cal. 513, 44 Pac. 1028; Estate of Camp, 134 Cal. 233, 66 Pac. 227. It is true

that the name of the testator written in the body of the will cannot be treated as his signature when not intended to be such: In re Armant's Will, 43 La. Ann. 310, 26 Am. St. Rep. 193, 9 South. 50; and that where, as in Virginia, the statute declares that the name of the testator written in a will shall not be regarded as his signature unless there is something on the face of the paper indicating that it was intended to be such, the mere presence of such name in the will in his handwriting cannot be accepted as his signing or signature in the absence of any such intention so appearing: Waller v. Waller, 1 Gratt. 454, 42 Am. Dec. 564; Ramsay v. Ramsay, 13 Gratt. 664, 70 Am. Dec. 438; Roy v. Roy, 16 Gratt. 418, 84 Am. Dec. 696. Still, the general rule is, in the absence of some statutory prohibitions, that the name of the testator written by him, either in the introductory or closing clause of his will, constitutes his signature: In re Camp's Estate, 134 Cal. 233, 66 Pac. 227; Lawson v. Dawson's Estate, 21 Tex. Civ. App. 361, 53 S. W. 64; and even under the Virginia statute, the concluding clause of a will stating "I, William Dinning, say this is my last will and testament," sufficiently indicates that the name so written was intended as the signature of the testator, and entitles the will to admission to probate as olographic: Dinning v. Dinning, 102 Va. 467, 46 S. E. 473. Not at all reconcilable with the foregoing statements is the decision in Booth's Estate, 127 N. Y. 109, 24 Am. St. Rep. 429, 27 N. E. 826, 12 L. R. A. 452. The will there in question was witnessed and attested by two persons and was wholly in the handwriting of the testatrix, and though not otherwise signed by her, contained her name in the opening clause and also her maiden name at the end. One of the subscribing witnesses testified that the testatrix said to her: "This is my will; take it and sign it." The court held that this evidence was insufficient to sustain a finding or verdict that the testatrix's name written by her in the first line of the document was there written with the intent that it should have effect as her signature in the final execution of the will, saying: "Whenever the name of a testator appears, whether in the body or at the end of a will, it must have been written with intent to execute it, otherwise it is without force. When a testator or the maker of a contract subscribes it at the end and in the manner in which legal instruments are usually authenticated, a presumption arises that the signature was affixed for the purpose of creating a valid instrument. But when the name is written near the beginning of the document, where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent."

The Following Summary of the French Doctrine upon the subject appears to meet the approval of the supreme court of Louisiana:

"Although the natural place of the signature be at the end of the act, because it expresses the final approval given by the testator to the dispositions of last will which he has made, it is, however, admitted that the writing by the testator of his name toward the end of the act may be considered as a signature, if it is placed after all the dispositions constituting the testament. It does not matter that after the name there may follow some words connected with it, if the words thus following are superfluous or useless." In the case whence this quotation is made it appeared that the will in question commenced with a caption as follows: "Testament d'Aglae Armant." The court was of the opinion that the name as thus written could not be accepted as signature, partly upon the ground that it was not written in the ordinary manner of a signature and was "without a paragraph," the evidence showing that the testatrix ordinarily employed one, and further, "that the coupling of the 'd' with the name in itself excludes the idea of its being intended as a signature." The decision was also partly upon another ground, which the court thus expressed: "Even apart from the name's not being at the end of the testament, we think the proof does not show that she intended to sign at all. It simply shows that she did not think or know that a signature was essential. If she had known that it was necessary that the testament should be signed, it is impossible to conceive how, in so important a matter, she should have acted so ambiguously and so differently from the course universally pursued by her in signing other acts and documents of every description. The simple fact is, she did not know that a signature was necessary, and therefore did not sign. Her mistake in this respect is unfortunate in the interests of justice, but it cannot save the will."

Necessity for Witnessing and Attesting.—The authorities, in so far as they speak upon the subject, indicate that the recognition of olographic wills does not exempt them from the general provisions contained in the statutes respecting the manner of witnessing and attesting wills. Hence, in the absence of any statutory provision to the contrary, olographic wills must be published, witnessed and attested in the same manner as others, but criticism of the term of what is claimed to be a sufficient publication need not be so severe as where the will is not wholly in the testator's handwriting: Trustees v. McKinstry, 75 Md. 188, 23 Atl. 471; Matter of Application of Becket, 103 N. Y. 167, 8 N. E. 506; Matter of Hunt, 110 N. Y. 281, 18 N. E. 106; Matter of Turrell, 47 App. Div. 560, 62 N. Y. Supp. 1053; 166 N. Y. 330, 59 N. E. 910; In re Aker's Will, 173 N. Y. 620, 66 N. E. 1103, 74 App. Div. 461, 77 N. Y. Supp. 643; Neer v. Cowhick, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588. In many of the states, however, olographic wills need not be published nor witnessed, nor otherwise attested than by the testator's signature. In other words, such a will is entitled to admission to probate on proof in the manner required by statute that it is wholly written, dated,

and signed in the handwriting of the testator: Ariz. Rev. Stats., ed. 1887, secs. 3234, 3235; Cal. Civ. Code, sec. 1277; Idaho Rev. Stats., sec. 5728; Scott v. Harkness, 6 Idaho, 736, 59 Pac. 566; Toebbe v. Williams, 80 Ky. 661; Webster v. Lowe, 107 Ky. 293, 53 S. W. 1030; La. Civ. Code, arts. 1581, 1588; Williams v. Hardy, 15 La. Ann. 286; Buffington v. Thomas (Miss.), 36 South. 1039; Barney v, Hays, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282; Outlaw v. Hurdle, 1 Jones (N. C.), 150; Alston v. Davis, 118 N. C. 202, 24 S. E. 15; Estate of Knox, 131 Pa. 220, 17 Am. St. Rep. 798, 18 Atl. 1021, 6 L. R. A. 353; Regan v. Stanley, 11 Lea, 316; Lawson v. Davison's Estate, 21 Tex. Civ. App. 361, 53 S. W. 64; Dinning v. Dinning, 102 Va. 467, 46 S. E. 473; West Va. Laws, ed. 1882, c. 84, sec. 3.

A Will, Though Olographic, may be Followed by an Attestation Clause, or may otherwise indicate that the testator intended to have it witnessed and attested in the same manner as if not olographic. In such circumstances, if there are no subscribing witnesses, or not a sufficient number of them, or one is incompetent to act as such, it may be claimed that the testator had designed to complete the execution of the will as if it were not olographic, and that, because of his failure to do so, it cannot be admitted to probate. The answers, however, have been uniform to the effect that if the will was executed in the manner required of olographic wills, it was entitled to admission to probate, notwithstanding the fact that the testator intended to execute it in the presence of subscribing witnesses, and believed such presence essential to its validity: In re Soher, 78 Cal. 477, 21 Pac. 8; Toebbe v. Williams, 80 Ky. 661; Andrew's Exrs., 12 Mart. (O. S.) 713; Succession of Roth, 31 La. Ann. 315; Brown v. Beaver, 48 N. C. 516, 67 Am. Dec. 255; Hill v. Bell, 61 N. C. 122, 93 Am. Dec. 583; Allen v. Jeter, 6 Lea, 672; Perkins v. Jones, 84 Va. 358, 10 Am. St. Rep. 863, 4 S. E. 833.

A testamentary document in the handwriting of the testator, and having subscribing witnesses, may be proved either as an olographic or as an attested will: Estate of Dama, 4 Cof. Pro.

The Place Where the Will was Lodged or Found is generally not material, but in two of the states it must have been found among the valuable papers and effects of the decedent, or have been by him lodged with another person for safekeeping: Winstead v. Bowman, 68 N. C. 170; Tate v. Tate, 11 Humph. 464. The meaning of these requirements has not been much litigated. The decedent may have two or more places in which he keeps papers and valuables, and one may be so far superior to the other, or so much more resorted to by him as a depository of his valuables that an olographic will found in the other will not be admitted to probate: Little v. Lockman, 49 N. C. (4 Jones) 494. Nevertheless, the circumstances must be rare in which the courts will consider, as between two places where valuable papers and effects are kept, which is the only one in which

an olographic will may be safely placed, and if found in either place, it will generally not be refused probate because the court deems the other the safer place or the one which the decedent has been in the habit of leaving the more valuable papers and effects: Winstead v. Bowman, 68 N. C. 170.

The depository may be a drawer in a desk or bureau (Hughes v. Smith, 64 N. C. 493; Harrison v. Burgess, 8 N. C. (1 Hawks Eq.) 384), or a trunk left for safekeeping with a friend (Hill v. Bell, 61 N. C. (Phil. L.) 122, 93 Am. Dec. 583), if therein are left the valuable papers and effects of the decedent. Of course, the real question is, whether from the place where the will is found, the inference is reasonable that the testator left or caused it to be left there as and for his olographic will: Marr v. Marr, 2 Head, 303; Hooper v. McQuary, 5 Cold. 129; Douglass v. Harkrender, 3 Baxt. 114. The surroundings and habits of one person may be such as to make it exceedingly improbable that he used a depository, the use of which in the case of another person would be entirely reasonable. It is sufficient that the testator kept or preserved his will in the same manner that he kept other valuable papers: Winstead v. Bowman, 68 N. C. 170; Tate v. Tate, 11 Humph. 464. As to the will itself, it need not be a separate or formal document, but may be written in a book of accounts, if such book is found with other valuable papers of the decedent: Brown v. Eaton, 91 N. C. 26. From the finding of the will among the papers of the decedent, it will be presumed that he placed it there on the day it bears date: Sawyer v. Sawyer, 52 N. C. (7 Jones) 134.

By valuable papers is not necessarily meant deeds, important contracts, etc., or papers of great pecuniary value, but simply such papers as the decedent seems to have regarded as important to him and to the preservation of which he has given the same attention as to his olographic will: Marr. v. Marr, 2 Head, 303. But an olograph is not found among valuable papers when it is found in box in which the testator kept stamps and stationery belonging to a post-office of which he had charge, while he kept his deeds, notes and the like in a trunk at his residence, some distance away: Brogan v. Barnard, 115 Tenn. 260, 112 Am. St. Rep. 822, 90 S. W. 858.

The mere finding of a will among the papers of a third person is not sufficient to show that it had been left with him by the testator for safekeeping: St. John's Lodge v. Callender, 26 N. C. (4 Ired.) 335. The person with whom the will is deposited may be the wife of the testator: Harrison v. Burgess, 8 N. C. (1 Hawks Eq.) 384. Where the will is a part of a letter written by the testator to another, it is not necessary that the latter should have received any instructions from the former respecting its preservation or safekeeping: Alston v. Davis, 118 N. C. 202, 24 S. E. 15.

ESTATE OF WILLIAM ARTHUR GREEN, DECEASED.

[No. 5,719; decided April 7, 1888.]

Homestead—Residence of Deceased—Conclusiveness of Finding.—Where, upon the admission of a will to probate, the legal residence and domicile of testator is found as a fact, and certified and judicially determined, the question is placed outside the pale of controversy thereafter. So held, upon an executor's opposition to an application for a homestead by the testator's widow.

Homestead—Nature of Right.—The right to a homestead is wholly statutory; it cannot be asserted as a natural right. The law-making power is competent to repeal the provisions of the statute regulating the right, and thereafter homesteads would be unknown.

Homestead—Probate and Voluntary Distinguished.—There is a distinction between a homestead under section 1262, Civil Code, and the homestead selected by the court in the administration of a decedent's estate. The latter is governed wholly by the provisions of section 1465, Code of Civil Procedure. In the case of a homestead selected in the decedent's lifetime, the claimant's title accrues by survivorship; as to a homestead selected in the administration of decedent's estate, the claimant's title accrues only upon the decree of the court or judge setting it apart.

Homestead.—The Probate Court has no Discretion to deny an application for a homestead by the family of a decedent, presented under section 1465, Code of Civil Procedure.

Homestead—Testamentary Power.—The power or duty of the court to set apart a homestead for the family of a decedent is not limited by the fact that the decedent disposed of his property by will.

Homestead.—The Power of Testamentary Disposition is Given and defined by statute, and is subordinate to the authority vested in the probate court to appropriate property for the support of testator's family, including a homestead, and for the payment of debts.

Homestead.—The Right of a Widow to have a Homestead Set Apart to her from the estate of her former husband must be determined from the facts as they exist at the date of the action of the court.

Homestead.—The Executor's Answer to the Widow's Application for a homestead alleged that two adult daughters (one being married), referred to in the widow's petition, were always considered and treated as part of the decedent's household and family. The court ignored this claim for the daughters, and set apart the homestead to the widow alone.

Homestead.—In this Case the Widow Applied to have a Homestead set apart to her, and the executor answered, setting up that

decedent's residence and home was in England, where he died and left a homestead, which he devised to his wife and daughters. The court found on the probate of the will here that the decedent had a domicile and legal residence in California, and was only temporarily in England for his health; and held that the applicant, being the decedent's widow at the date of the application, and a resident of the state, and there being property suitable for a homestead, all the conditions required by the statute existed to entitle her to a homestead.

Homestead—Separate Property.—In this case the court ordered that the property, being decedent's separate estate, be set apart only during the applicant's widowhood.

Homestead—Value of Premises.—In this case the court held that the value of the premises ordered set apart as a homestead should be taken as of the date of the application; any subsequent increase in value being immaterial.

This was an application by the widow to have a homestead selected and set apart by the court. The executor, R. H. Lloyd, filed two answers to the petition; the first answer was the same as the second one, except that it left out an important special defense attempted to be made by the executor, viz.: (1) that it was the intent and expressed wish of the testator that the legacy made by his wife should be in lieu of all rights she might claim against his estate; (2) that it was testator's express desire that his wife should have a homestead out of his estate. After argument upon a motion and demurrer addressed to this special defense, Mr. W. S. Wood, counsel for the executor, asked leave to withdraw the answer, and filed a new one (being the one referred to in the court's opinion), which omitted these special allegations. Throughout the entire proceedings had on the homestead petition, the attitude taken by the executor, Lloyd, was objected to, it being claimed that the positions he took, and the defenses he attempted to set up, and the manner in which he and his counsel contested the matter, were that of a partial, prejudiced and interested party, and that he really represented the daughters of testator, who were opposed to the widow; that an executor's duty required him to be impartial and take no sides in a controversy, further than to offer such information as he might have, for the benefit and instruction of the court; and that he was not interested to defeat the applicant out of a homestead, where he made no denial of

her status as a widow, or the fact that no homestead had been actually selected in decedent's lifetime. The court, in its opinion below, calls attention to this objection made to the attitude of the executor; but elects to consider the facts independently of the objection.

After filing of the opinion the question came up on presentation of findings prepared for the widow, as to what the extent of her estate should be, and the court refused to grant any other limitation than for widowhood.

The executor further opposed the setting apart of the property selected by the court, upon the ground that since the appraisement the land had increased in value. But the court held that the date of the filing of the application was the period to be considered, and not the time of setting apart.

Timothy J. Lyons, for applicant.

William S. Wood, for executor, opposing.

COFFEY, J. This is an application by Julia Green, the widow of William Arthur Green, deceased, to have a homestead set apart by the court for her use.

The petition recites that letters testamentary were issued out of this court on December 7, 1886, to R. H. Lloyd, one of the executors named in the last will of decedent, who immediately entered upon the discharge of his duties as such executor, and has ever since continued to act in that capacity; that the executor has published notice to creditors according to order of the court; that he has made and returned herein the inventory and appraisement as required by the statute; that it appears by the said inventory and appraisement that the whole estate of the decedent is about $270,000, yielding a monthly income of about $1,200 net; that the executor claims the whole estate to be separate property of decedent. but as to this the applicant has no information other than the statement of the said executor; that the petitioner is the surviving wife of the decedent, and that his family consisted and consists of herself alone, who was, at the date of the petition, temporarily residing in England (but who has since

returned to California, and was at the time of the hearing actually residing in San Francisco). The decedent also left him surviving two daughters, Amy Eliza Green and Frances Peddar, wife of Sydney Hampden Peddar, of London, England, both of whom are above the age of legal majority by the law of California, as well as by the law of England, in which last-named country they are both resident, according to the information and belief of the applicant; that at the time of his death, and continuously and uninterruptedly for many years immediately prior thereto, the decedent was a resident of and had his domicile in the state of California, as well also that of his family, which family consisted at the time of his death solely of himself and the petitioner, but that he died in England, where he was then temporarily residing on account of and for the benefit of his health; that his surviving wife, the petitioner, constituting his said family, has not changed the California domicile, which she had and retained with decedent at the time of his death, but has always and continuously retained and still retains her California domicile aforesaid, and at the date of the hearing was actually a resident and domiciled in the city and county of San Francisco, State of California; that no homestead was selected, designated or recorded in the lifetime of the decedent, either by him or by the petitioner, and that no homestead has been selected, designated or recorded, or set apart by this court out of the estate of the decedent now being administered upon herein, nor has any property of any kind been set apart or ordered set apart by this court out of decedent's estate. The petition proceeds to set forth certain parcels of property alleged to be suitable for the purposes of homestead, out of which she prays the court to select, designate and set apart to her such homestead. To this petition the executor, R. H. Lloyd makes answer in substance: That he was the attorney for the decedent for a long time prior to his marriage to the applicant and up to the time of his death, and as such attorney was familiar with the property owned by the decedent; that all said property was owned and possessed by said deceased prior to his marriage with the applicant; that the family of the

decedent did not consist solely of the applicant; that he had an unmarried daughter, Amy Eliza Green, and also a married daughter, Frances Peddar, whom he had always considered and treated as part of his household, and was constantly aiding and assisting in supporting and maintaining them, and said daughters and petitioner constituted and were his family; that the applicant is and has been ever since marriage a resident of England; that long prior to the death of decedent he purchased a homestead at a place called Wyresdale, in England, and fitted and furnished the same, and took up his residence there, and was residing there at the time of his death; that the decedent left a last will other than that admitted to probate by this court, specifying and concerning his property and effects in England, and in and by said last will he devised to petitioner and his daughters the said homestead with its contents, and that the said applicant was, at the time of filing her application herein, residing in said homestead in England, and that such was her home and her place of residence; but no homestead was designated or recorded in this state by the decedent, because of the selection of a homestead in England; and that pending these proceedings, and since the filing of the petition for a homestead herein, the said homestead in England has been sold and the applicant has received or is about to receive her portion of the proceeds of such sale. The counsel for the applicant objected to the interference of the executor in this application, insisting that, as executor, he had no part to play in this proceeding, and counsel still insists upon such objection; but the court has chosen to inquire fully into the facts, notwithstanding such objection.

The will admitted to probate in this court December 6, 1886, begins with the recital:

"I, William Arthur Green, a resident of the City and County of San Francisco, State of California, now temporarily in England, being of sound mind and disposing memory, do make and publish and declare this my last will and testament, in manner and form following: (1) I declare that all my property, be it real, personal or mixed, is my

separate property and estate, having been acquired by me prior to the marriage between myself and wife, Julia."

The instrument then proceeds to make various devises and bequests. The petition of R. H. Lloyd, one of the executors named in the will, for the probate thereof, filed November 17, 1886, alleges, among other things, that William Arthur Green died on or about the tenth day of November, 1886, in England; that at the time of his death he was a resident of the city and county of San Francisco, in said state of California (being temporarily in England at the time of his death); that he left estate in said city and county, consisting principally of real estate and a small amount of personal property. Upon the hearing on the sixth day of December, 1886, the court found as a fact, and so certified and judicially determined, that William Arthur Green died on the tenth day of November, 1886, in England, where he was temporarily for his health, and at the time of his death was a resident of the city and county of San Francisco. This finding and judgment places the question of the legal residence and domicile of the decedent at the time of his death outside the pale of controversy; and the question is, therefore, reduced to whether the fact of the actual residence of the deceased at the time of his death affects the status or impairs the rights asserted by the applicant. William Arthur Green was a native of England, but a naturalized citizen of the United States, and a pioneer of California, having resided here from the year 1849, and acquired very valuable possessions, mainly in city real property. It appears he was married twice, being separated by decree of divorce from his first spouse, the mother of the two children, Amy Eliza Green and Frances Peddar. In May, 1882, he departed from the state of California, in company with his second wife, the applicant, whom he had married almost immediately prior to the departure. He never returned to California. He and his wife never occupied any abode in common in this state. They went to England, where Mr. Green purchased a place and remained until he died. Counsel for the respondent claims that whether the decedent purposed to change his domicile is not involved in the present discussion, but

that it is enough for the purposes of this controversy to say that the decedent acquired and occupied a place of residence in England, which was designed to be permanent during his stay there, and that he and the petitioner used that place as their home at the time of his death; that they had no home or residence in California; they resided in England; and that the determination of the issue now before the court depends upon the fact of residence rather than that of domicile. Counsel contend that the right to homestead is wholly statutory; no one can assert it as a natural right. The legislature might repeal all the provisions of the act regulating the right, and thereafter homestead would be unknown. This is true. Counsel further contend that an examination of the provisions of the code and the numerous decisions in this state upon the question leads to the inevitable conclusion that residence is the controlling principle of the homestead claim; the idea of the foundation of all legislation and adjudication upon the subject is to protect from forced sale the home in which the family reside; it was designed at the outset to save from creditors the roof which covers the family, and upon that all homestead legislation has been founded, and that in view of all the legislature has done, and the courts have said, it must be conceded that the whole purpose and intent of both departments of the government have been directed toward the protection of the families of residents of the state; that it will be conceded that a nonresident cannot claim the benefit of a homestead; and that the first fact necessary to a declaration is residence upon the property; a temporary absence from the home at the time of the filing of the declaration destroys its force and does away the claim of exemption. Endeavoring to enforce his proposition, the counsel presents numerous cases; a good sample of which is Maloney v. Hefer (Cal.), 15 Pac. 763, in which the supreme court say: "It has been frequently decided by this court that to constitute a valid homestead the claimant must actually reside in the premises when the declaration is made. It is true they went away temporarily and were gone only about four months, but during that time they certainly did not actually reside on any part of the lot filed upon."

Counsel says it will be seen that the supreme court has drawn a very clear line between actual and legal residence. In the case cited the property claimed for a homestead was the legal residence of the family, and while residing there the wife executed the declaration, but before filing it she went away to visit friends in another county, and during the absence the declaration was filed, and the supreme court held that such filing in her temporary absence defeated the right.

Counsel says this decision points with great force the argument that residence, actual and in fact, is the corner-stone of the homestead, and he claims that the decision in Maloney v. Hefer is in direct pursuance of the general definition of homestead declared in the leading case of Gregg v. Bostwick, 33 Cal. 221, 91 Am. Dec. 637, from which it will be gathered that residence is the essential and primary fact upon which the right to a homestead is founded. Now, says counsel, it will be conceded that William Arthur Green could not, while residing in England, have filed any valid claim for a homestead covering any property in this state, and have thereby defeated the claims of his creditors, and the claim of the widow depends wholly upon the state of facts existing at the time of Mr. Green's death; her rights cannot be any greater than his were. She cannot be permitted to assert any claim to a greater protection than he enjoys; her rights all rest in the fact that she was his wife and is his widow; and whether she is entitled to a homestead, or must be refused one, depends on the status which he occupied at the moment of his death, and whether at that moment he could have claimed the right. In support of this view, counsel quotes from the Estate of Delaney, 37 Cal. 176, in which the supreme court said: "The homestead and the tests by which it is ascertained are the same, whether the question arises between those claiming the homestead, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. There is not one homestead as against a creditor, and a different one, when the survivor asserts his or her claim, as against the heirs of the deceased."

In the concluding portion of the opinion in the case just cited the court makes a suggestion, which counsel thinks of considerable importance in this discussion, as showing that the supreme court looked at this question in the light in which it is now sought to place it before this tribunal. There the widow had petitioned for a homestead, as in the present case, and the supreme court remarked: "It is proper to add, though the point is not made, that the petition is radically defective because it does not state that she and her husband were entitled to or held any land as their homestead at the time of his death."

It will be observed, says counsel, that the court distinctly holds that the petition for a homestead must show a right thereto existing at the time of the husband's death, and counsel claims that he has shown that residence is a necessary and material fact; then the result must follow that the nonresidence of the parties prior to the husband's death deprived them of the right; and such nonresidence continuing up to his death, must be held to deprive the widow of the right.

The decedent died testate. His will had been admitted to probate, and, by lapse of time for contest, its validity is no longer subject to question, and counsel insists that by the will he has made disposition of all his property, and that disposition is subject only to the rights of such persons as bring themselves clearly within the statutory provisions. The fallacy of counsel's argument is in the apparent assumption that there is no distinction between a statutory homestead and a probate homestead, all the cases cited by him involving the question of statutory homestead, under section 1262 et seq., of the Civil Code; but this application is brought under section 1465 of the Code of Civil Procedure, which provides that, upon the return of the inventory, or any subsequent time during the administration of an estate, if no homestead has been selected, designated and recorded, the court must, on its own motion, or on petition therefor, select, designate, set apart and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children; or, if there be no surviving husband or wife, then for the use of the minor children. When application is

made that a homestead be set aside under this section, the court has no discretion in the matter, but must grant the application. Nor is the power or duty of the court in this respect limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside. The power of testamentary disposition of property is conferred and defined by statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate: Estate of Ballentine, 45 Cal. 696; Sulzberger v. Sulzberger, 50 Cal. 385; In re Davis, 69 Cal. 460, 10 Pac. 671.

The Matter of Davis, last cited, went to the supreme court upon appeal from this probate department, in which the homestead was set apart for the minor children of the deceased, notwithstanding the will, which directed that all the property should be sold and a portion of the proceeds given to her brother: See Estate of Bridget Davis, Deceased, No. 3,232, Superior Court, Department 9, Probate, San Francisco. Decree entered March 18, 1885, Coffey Judge. The section under which this application is preferred was construed In re Bowman 69 Cal. 244, 10 Pac. 412. This case of In re Bowman would seem to afford a complete response to the claim of the counsel for the opponent herein. The court, through Mr. Justice Ross, declared that this statute does not attach the condition that the decedent must have resided upon the premises before a given piece of property can be set apart for the use of the survivor, or, in case of his death, to the minor children of the decedent; but in express terms provides that if no homestead has been selected, designated and recorded (under the general homestead laws), or, in case the homestead so designated and recorded was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate and set apart and cause to be recorded a homestead, etc. Such a homestead, as was held in the matter of the Estate of Busse, 35 Cal. 310, may be carved out of any property left by the decedent, which is capable of being made a homestead. In the Estate of Bo-

land, 43 Cal. 640, the court, construing the sections of the old probate act, which are now incorporated in section 1465 et seq., Code of Civil Procedure, through Mr. Justice Niles, said: "That a probate homestead differs from a case of a homestead created during the existence of the community by a compliance with the provisions of the homestead act, the title to which vests in the wife upon the death of the husband, by right of survivorship. In the latter case the property becomes the property of the widow by operation of law. In the case presented it could only become hers by the decree of the court or judge."

The right of the applicant to have a homestead set apart to her from the estate of her former husband must, therefore, be determined from the facts as they existed on the day when the order of the probate court was made. In the case of Higgins v. Higgins, 46 Cal. 265, the supreme court, speaking through Mr. Justice Crockett, held that a woman could claim a homestead out of her second husband's estate, although one had been set apart to her out of the estate of her first husband. Said the court: "It is said that if she can claim both she will be protected in the enjoyment of two homesteads at the same time—a result which, it is claimed, was not contemplated by the statute. But it is to be observed that a homestead to be set apart under the probate act, for the use of the widow and minor children, is a mere reservation out of the property of the estate, for their benefit, and is for the use of the minor children as well as the widow. Under the general homestead act, however, the homestead goes to the wife alone, if she survives her husband; and her children by a former marriage would have no interest in it, while the children of her last marriage would have no interest in the homestead set apart from the estate of the first husband. Looking to the policy which dictated the two classes of homesteads, we think the fact that a homestead had been set apart from the estate of her former husband, for the use of Mrs. Higgins and her minor children, did not stop her from claiming a homestead out of the estate of her second husband."

In the Estate of Moore, 57 Cal. 443-446, the supreme court, through Mr. Justice Myrick, said: "The right to a

probate homestead, so called, is not the subject of sale. This court has already held that the status of the widow, at the time of the application, must be considered, and if she, by subsequent marriage, has ceased to be the widow of the deceased, she cannot have a probate homestead set apart to her. If a testator devised his entire estate, his separate property, his widow would still be entitled to a homestead; but if she were to execute a deed of all her interest in the estate, her grantee could not have a homestead set apart to him. If she should, after the conveyance, die or marry again, there would be no right of homestead to survive her or her widowhood. Before the action of the probate court no estate has vested in the family, so far as homestead is concerned. It is merely a right to have the court, as a part of the administration, set apart property; and not until such action can it be said that any estate has become vested, either at law or in equity. The right to have a homestead set apart is no estate, either in law or in equity. As the court said, in Bates v. Bates, 97 Mass. 395: The estate of homestead is one of a peculiar nature. It is a provision, by the humanity of the law, for a residence for the owner and his family."

This opinion of Mr. Justice Myrick was subsequently confirmed unanimously by the court in bank, he being again the exponent of the law, and he draws a clear distinction between a statutory and a probate homestead, refusing to apply to the latter a section which he considered was designed for the former description of homestead, saying: "We are therefore of opinion that the section does not apply to the case before us. It might be said that, even if the legislature intended that a right to apply for a probate homestead was the subject of bargain and sale, it was not intended that any less interest than the entire right should be acquired by a vendee; for, if one of the parties entitled to apply—say the mother of minor children—could sell her right, and her grantee applied, such grantee would be entitled to the possession of the homestead as against the mother, and would have a joint interest with the children, to the exclusion of the mother, which would be repugnant to the very idea of a homestead. It being the office of the legislature to provide

for a homestead, i. e., a place of home for a family, we cannot hold that a statute enacted for that purpose shall have the construction and effect of destroying the object in view."

It appearing in the case at bar that the applicant, Julia Green, was, at the date of her application, the surviving wife and widow of the decedent, William Arthur Green, a resident of this state and county, and that there is property suitable for the purpose and adapted to the use of a homestead, she has fulfilled all the conditions which, under the law which she invokes, entitle her application to be granted; and it is so ordered. Let a decree be drawn and presented to the court according to the conclusion of this opinion.

ESTATE OF DAVID McDOUGAL, DECEASED (No. 2).

[No. 2,278; decided February 27, 1884.]

Appraisers—Choice by Court.—In the opinion of this court, it would best subserve the interests of estates if in all cases the court actually chose all the appraisers, instead of having the representatives of the estate or their counsel choose some of them.

Family Allowance—Necessity of Notice.—Under section 1464, Code of Civil Procedure, no notice of an application for family allowance is necessary; yet, in the opinion of the court, it would be a salutary rule to require, and the court of its own motion requires notice to be given to the attorneys for absent or minor heirs, or for persons in adverse interest, in all practicable cases.

Executor—Duty to Account for Assets.—It is the duty of an executrix to make a showing to the court of the disposition of the difference between what the estate is prima facie entitled to, and what it is claimed was the whole amount received by her.

Executor—Removal for Fraud.—The evidence reviewed, and the charge of fraud against the executrix held not proved. The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue, and a court is not justified in placing upon a person charged with fraud the onus of showing that she is guiltless; on the contrary, it is incumbent upon the person making a charge of fraud to maintain it by a preponderance of proof.

Executor.—The Unfriendliness of an Executrix Toward a Mother, who is striving to obtain what she can by legal means for her chil-

dren, will not justify the court in adjudging the executrix incompetent.

Minor Heirs.—The Court will Endeavor to Conserve the Interests of Minors, and will at all times aid their attorney in obtaining for them their full rights; and any application in that behalf will be welcomed by the court, which regards with the highest favor, the claims of minor heirs.

Evidence.—It would be Contrary to all Rules of Evidence to Accept Testimony that lacks clearness and certainty, and that is without corroboration, as against adverse evidence, positive and particular in its nature, and without successful assailment, and going to the main fact in issue itself.

Fraud—Evidence.—Other Things Being Equal, where oath is opposed to oath, on a charge of fraud, the charge must fail.

Witness.—A Court is not Warranted in Imputing Want of Veracity to a witness, unless it appears that willful falsehood has been told.

A Witness False in One Part of His Testimony is to be Distrusted, but the court should be satisfied that the witness has testified falsely, and may discriminate between distrust and utter rejection of testimony.

Evidence.—Entries Made in an Account-book at the Request of One Person by another, as to the ownership of property, are of no more value than any other verbal admissions which the writer orally testified to, which ought to be received with great caution. An entry in favor and not against the interest of a party dictating it is disentitled to consideration on that account. And a party cannot be affected by the declaration or entry of a party in his own favor, made without the cognition or consent of the former. Evidence of such character, even when admitted without objection, cannot be too carefully scrutinized, for it is in all cases the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse.

Application for removal of executrix.

P. J. Van Loben Sels, for petitioner.

A. J. Le Breton, for executrix.

COFFEY, J. In the trial of the issues raised by the petition of the attorney for the minor heirs, the reading of briefs of counsel (seventy-three pages in all), the re-examination of the evidence, and the consideration of the authorities, an amount of labor has been imposed upon the judge of this court, in addition to his ordinary tasks, that

it is to be feared, counsel little appreciate in the intensity of their zeal for their respective interests. The petitioner requests of the court a written opinion and "full findings," to which first request the court endeavors here to make response. Counsel also made an oral request that a "finding" be made as to his personal and professional conduct of the cause committed to his custody by the court. Without conceding the necessity of such a "finding" or opinion, the court cheerfully awards him credit for earnestness, energy and exemplary fidelity in prosecuting this petition, which he undoubtedly prepared in good faith and upon premises that apparently justified him in his attempt to add to the assets of the estate, or to prevent their appropriation or spoliation by the executrix in her own interest or to the prejudice of the minor heirs.

The petitioner, in behalf of the minor heirs, the children of Charles J. McDougal, deceased, demands the removal of the executrix on the grounds, generally, of (1) fraud, (2) incompetency, and (3) waste and mismanagement of the estate.

In support of the charge of fraud, the petitioner alleges that the executrix procured, with intent to reduce the valuation of the assets of the estate, the appointment of incompetent appraisers, who, acting under the direction and influence of executrix undervalued the assets of the estate. Two of these appraisers were nominated by the executrix, or by her counsel, and the third, appointed of the court's own desire, was not called upon to act by the executrix. It turned out on the trial of this matter that the two nominees of the executrix acted in good faith; and the reason the third did not act that he was not found in the city, and was supposed to be temporarily absent therefrom. This charge was not pressed by petitioner; but it suggests to the court the comment that it might be better if in all cases the court actually chose all the appraisers.

The petitioner further charges, among the fraudulent acts of the executrix, that she omitted from the inventory mention of large sums of money belonging to the estate, particularly specifying a portion of the "Japanese Indemnity Fund," amounting to $6,300. The whole amount was $21,-

000, and it is claimed, on behalf of the executrix, that the portion omitted was appropriated in pursuance of a contract for the payment of agents who were employed to obtain the amount from the government.

It is also charged that the executrix obtained, through imposition upon the judge at the time temporarily acting in this department, and without notice to the attorney for the minor heirs, an excessive "family allowance."

The petitioner's gravest charge is: "That since the death of David McDougal, but before any letters testamentary were issued to her, to wit, on the twelfth day of September, A. D. 1882, said executrix, with intent to cheat and defraud said minor children, executed and delivered a conveyance to one of her daughters, to wit, Mrs. Di W. Van Voorhies, of a large and valuable tract of land, belonging to the community property of the said David McDougal, deceased, and that no mention of this transaction is made in said inventory, and that said property does not appear in said inventory among the assets of said estate."

1. The first specification, alleging fraudulent conduct in the appointment and acts of appraisement, is not proved.

2. In reference to the "Japanese Indemnity Fund," the court is of opinion that, while no fraudulent conduct is established, the executrix should make a showing of the disposition of the difference between what the estate is prima facie entitled to, and what it is claimed was the whole amount received. This should have been done without compelling the petitioner to have recourse to this mode of procedure to ascertain the facts. In this respect the executrix is guilty of error of judgment, but under the evidence I cannot find fraud in her conduct. As to the character or classification of this property, I do not deem it necessary in this proceeding to venture an opinion. This is an inquiry as to the fraud alleged to have been practiced by the executrix, and I find no fraud.

3. As to the allowance made by order of July 8, 1883, which the petitioner alleges was obtained by false and fraudulent representations and imposition practiced upon the judge temporarily presiding here, and contrary to the custom, rules and practice of this department, it seems to

have been procured in conformity with the section of the statute, which does not necessitate notice such as is suggested by the petitioner: Code Civ. Proc., sec. 1464. Yet, in the opinion of this judge, it would be a salutary rule to adopt in such cases as the one under consideration, and the present judge of his own motion requires the attorney for absent or minor heirs, or other attorney for persons in adverse interest, to be notified in all practicable cases. But the law does not literally require it; and, however censurable the conduct of counsel may be, fraud is not lightly to be imputed to a client for his counsel's conduct. Under the circumstances of this case, the court can only suggest that the allowance would seem to be in excess of the needs of the widow, considered with reference to the other interests. The order was legally applied for and obtained in the customary mode.

4. As to the charge that the petition for the setting apart of a homestead was for the purpose of fraudulently monopolizing assets of the estate, as the issue involved herein is under consideration in another application, it would be more appropriate to withhold an opinion in this proceeding, except to formally indicate that there is no fraud proved as to that particular matter.

5. The charge of fraudulently conveying a certain tract of land in Oakland to her daughter, Mrs. Van Voorhies, is the last item of the specifications, according to the order in which the court has chosen to consider them. The answer to this accusation was, that the property involved in this issue was purchased by the money of Mrs. Van Voorhies, and placed in her mother's name on account of certain apprehensions of the purchaser proceeding from her unhappy domestic circumstances. It was testified by Mrs. Van Voorhies that the money wherewith she made this purchase was the result of her savings of sums donated to her from time to time by her deceased father, David McDougal. Assaults and counter-assaults upon the credibility of the witnesses have been made by counsel with reference to the evidence adduced concerning this matter, but it is just possible to decide this issue either way without imputing perjury to any witness. If there be sufficient support for the story of Mrs

Van Voorhies that the property back of Tubbs' Hotel, in Oakland, was purchased with the $200 derived by her as she has stated, the executrix will be relieved of the charge of fraud: but it may be questioned whether the court is justified in placing upon her the onus of showing that she is guiltless. Without reference to this question of burden, I shall attempt an examination of the probability of her story of the purchase.

Mrs. Van Voorhies testifies that she purchased the property "back of Tubbs' Hotel" in 1862, with her own money, $200, savings accumulated from donations of small sums at different times from her father; that the title was put in her mother's name because of the uncertainty and unhappiness of her domestic relations, and to protect her child; she considered it prudent, because of her domestic relations, to put this piece of property in her mother's name, "for that reason only." Here is a fact testified to and a motive assigned for it—the purchase and payment with her own means and the placing of title in her mother's name and the reason for such conduct. Counsel cross-examining the witness upon this point, she reaffirmed the statement as to the uncertainty and unhappiness of her domestic relations and her apprehensions for the protection of herself and child, as the motive for the conduct.

As to the fact of purchase and the manner of her acquisition of the means of purchase, Mrs. Van Voorhies' testimony is corroborated by Mrs. Le Breton, her sister, who testified that her father, David McDougal, told her it belonged to his daughter "Di," Mrs. Van Voorhies, who had bought it with her own savings, and that it was put in the mother's name for prudential motives; upon cross-examination she said: "My father always spoke of the property back of Tubbs' Hotel."

Mr. Le Breton, in his testimony, relates a conversation had with David McDougal, in which he said this property was purchased by his daughter "Di" with her own savings.

Mrs. Caroline M. McDougal testifies that the property "back of Tubbs' Hotel" was purchased by her daughter, "Di" W. Van Voorhies, with her own savings; that neither she (the witness) nor her husband (David McDougal) put

any money at all into that property; that the failure to reconvey it until after his death was a mere oversight; that "he often said that he would make a deed of it, but put it off without doing so." This statement was not varied on cross-examination.

The testimony of Robert Foster Patten is not very definite; but, so far as it has any tendency, it is in support of the claim that Mrs. Van Voorhies was the owner of the property involved in this inquiry; and, so far as Wm. Patten's testimony is concerned, it is too indefinite to be taken into account.

Mrs. Van Voorhies testified further, with regard to the purchase (p. 31, vol. 3, Reporter's Notes), that she paid the purchase price, $200, with her own hands, to one Hezikiah P. Jones, from whom she bought the property, he acting for his sister who owned it.

Mr. Jones was called by petitioner, and the tendency of his testimony is to support the statement of Mrs. Van Voorhies. (Vol. 4, Reporter's Notes.)

Counsel for the petitioner, claiming that the testimony of Mrs. Caroline McDougal, Mrs. Van Voorhies, Mrs. Le Breton and Mr. Le Breton is a concocted story, for the purpose of carrying out the alleged conspiracy to appropriate the assets of the estate, and is overthrown by the evidence submitted on the part of the petitioner, and by the cross-examinations conducted by himself, serving to show how untrustworthy the story of the purchase told by Mrs. Van Voorhies, asks the court to reject it.

Mrs. Kate Coffee McDougal testifies that Mrs. Caroline McDougal stated to her that she had bought that property for a very small sum; that she had bought it herself; that she made such a statement at various times, but she cannot locate time or place of conversation, and is quite indistinct in her recollection upon this point, and her testimony in this respect is contradicted by the other party, who says she does not remember ever having had any such interview, and does not think there ever was any, and she did not talk business before her (vol. 3, Reporter's Notes).

Mrs. Kate C. McDougal, being cross-examined, says she did not hear David McDougal speak of it very much, indeed

very seldom, but she heard Mrs. McDougal speak of it very often, for she (Mrs. Caroline McDougal) was very confidential with witness' husband about her affairs and spoke to him very often, and she said in her presence that she (Mrs Caroline McDougal) wanted to keep that property back of Tubbs' Hotel for herself; she wanted to keep that; she considered that a valuable piece of property; originally it was bought for a small sum, and it had increased beyond their expectations, and the other members of the family spoke of it as Mrs. McDougal's property; nothing was said about David McDougal's interest in it; he did not speak of it very much; she thinks he was present at some of these conversations; he did not claim it; he spoke of it as his wife's property. Witness could not recollect any time or place at which those conversations occurred. This testimony is met by Mrs. Caroline McDougal as already alluded to (vol. 3, p. 21, Reporter's Notes). Witness also testified to her intimacy with Mrs. Van Voorhies, which intimacy did not involve any discussion of family relations until 1866, in which year witness intermarried with Charles J. McDougal, the son of the executrix and brother of Mrs. Van Voorhies. Witness testifies that at that time the domestic relations of Mrs. Van Voorhies were pleasant and harmonious so far as she knew; that she had a conversation with Mrs. Van Voorhies in 1877 or 1878, at which the latter referred to some money that Mr. Van Voorhies sent to her from Aurora in 1863, with which she purchased the property in Oakland, "in front of Tubbs' Hotel"; this was after Mrs. Van Voorhies' return from Europe, whither she had gone in 1869, and witness further testified that Mrs. Van Voorhies, after her return from Europe, spoke about her unhappy relations with her husband (vol. 2, Reporter's Notes): that such conversations occurred in September, 1875, and in speaking of such relations Mrs. Van Voorhies was relating back to a period of eight or ten years; the impression witness derived from her conversations with Mrs. Van Voorhies was that the relations of the latter were and had been "not very happy."

Mr. Van Voorhies was called, and testified that in 1862 and 1863 his relations with his wife were agreeable, and that he, before and after that year, and he concluded in that year,

contributed to the support of herself and child; he sent her money from Aurora, to which place he went about 1863; and it was admitted that the amount he sent was as much in all as $3,000. Witness, under cross-examination, testified that he supported his family always according to his ability, and that, while he was practicing law and occupying public office, he provided for them. He said that his marital relations, with the exception of some intervals which were, perhaps, chargeable to him, were agreeable up to 1868 or 1869, when they went to Europe, where they spent seven or eight years; while there he sent them various sums of money; he lived at the Cosmopolitan Hotel, in San Francisco, for awhile after marriage, but had no idea at this time whether his wife's bills there were paid by her father or otherwise.

Mrs. Van Voorhies, being recalled for cross-examination by petitioner, said that from 1857 to 1862 her husband contributed little or nothing to her support, that their bills were paid by her father and mother; that in 1862 her mother raised the money to enable witness' husband to go to Aurora; that after he went to Aurora he sent her money on two occasions, but these she did not call "regular remittances"; after he returned from Aurora, a few months subsequently, he led the same dissolute life; he gave witness nothing, and her father and mother supported her all the time, and educated her daughter; in 1869 she went to Europe to remove her daughter from such influences, and at intervals he would send her one or two pounds at times; she denied that cordial relations existed between them while she was in Europe, or that she wrote him very cordial letters; and she did not remember that at stated intervals he sent ranging from five to seven and twenty and fifty pounds to her, and that she acknowledged the receipt of same in letters; and, in explanation of letter introduced, she tried to write letters as kind and encouraging as she could.

Several such letters were introduced by petitioner and they seem to be of an affectionate nature, acknowledging receipts of considerable sums, suggesting straits on account of her daughter's education, and encouraging her husband in certain aspirations, admonishing him as to her apprehen-

sion of a return of his habits, and giving certain advice as to material considerations, laying stress upon his regarding money rather than fame, and the necessity of providing for their declining years. She was in Europe nearly seven years, and from the time of her departure hence until in the court-room in the progress of this controversy, she had never seen or spoken to Mr. Van Voorhies; from 1869 they never resumed marital relations; while in Europe, and long before, her father and mother mainly supported her; her husband's contributions "amounted to nothing" (the witness' language); in San Francisco, while staying with her husband at the Cosmopolitan Hotel, her mother paid her board and all her bills; this was in 1868; at the Eureka Hotel, in Oakland, he would procure her bill, and have it made out to her mother, and his own bill separately, and her mother would pay the witness' bill and the husband would pay his own; between the years 1862 and 1868 he was very intemperate, "scarcely drew a sober breath during that time"; that was his mode of life, witness said she might say, as far back as 1854; his sober intervals were rare; she tried to conceal this, and shield him all she possibly could, and she reared her daughter to respect him. This is a summary of her story of domestic infelicities.

Mr. Van Voorhies, on recall, denied that from 1857 to 1862 his mother paid all his expenses or those of his wife; but thought his mother in law advanced money to aid him to go to Aurora, and the money for her and child to go to Europe; he did not remember that he accompanied them to Sacramento, nor that he took $100 from her of that money, but would not deny it if his former wife said so: he would believe her; his condition was such while his wife was in Europe that he could not support his wife and child, no matter how cheaply they were living; but while they were in Europe property they had bought with money he had supplied them was mortgaged to raise money to pay their expenses in Europe; he reiterated that his relations with her at all times had been agreeable; they continued to be so; the correspondence between them continued until a month or two prior to her return from Europe, she returned from

Europe incognito, and witness did not know when she came until he was advised by Col. Coffee that she was in San Francisco. Their relations, notwithstanding their tender correspondence, seem to have terminated here in fact, and in law they were shortly afterward separated in 1877.

A Mr. Wood was introduced to prove remittances from Aurora by Mr. Van Voorhies, and the fact that Mrs, Van Voorhies had large amounts of valuable mining stocks standing in her name, which he believed was hers; but this testimony was contradicted by Mrs. Caroline McDougal and Mrs. Van Voorhies, who swore that the property belonged to Mrs. Caroline McDougal.

Mrs. Kate Coffee McDougal was recalled, and testified that her husband, Charles J. McDougal, kept accounts and managed the property "back of Tubbs' Hotel"; and witness identified a book produced by petitioner as an account-book. and that certain entries were made by him in her presence and at the instance of Mrs. Caroline McDougal before she went to Europe; this book, it is claimed, contained an account of all the property that Mrs. McDougal possessed at that time, and that Mrs. Van Voorhies possessed; also the directions that Mrs. McDougal gave him at the time as to the management of the property and what she wanted done with it, and a full and complete account of everything, of what the lots sold for, and all appertaining to the business (vol. 3, Reporter's Notes, pencil page 6). Witness said the instructions and directions were set down in her presence.

Mrs. Caroline McDougal, being called, said she never saw this account-book before; the items therein were never made in her presence, and the account was never made in her presence; when witness went to Europe she left everything in her son's hands, and she didn't positively know if she said anything about the particular property "back of Tubbs' Hotel," she considered it of so little importance, and her daughter always told her if she wanted money to sell the lot and not be cramped for money; it yielded only road assessments. which witness had to pay as her daughter had no money. Witness repeated the mode of acquisition by her daughter of the money wherewith the property was pur-

chased; David McDougal, witness' husband, gave his daughter $100 at one time to buy a winter cloak, and she put it by, and he frequently gave her small sums, ten or twenty dollars, which she saved, and with the savings bought this property in 1862.

Mr. W. K. Van Alen testified that he knew the history of the property in question, and that they all said that piece of property belonged to Mrs. Van Voorhies. Mr. Van Alen was the agent of the family.

The petitioner claims that the whole story of the purchase for $200, in 1862, by Mrs. Van Voorhies, is falsified by the testimony of Mrs. Kate Coffee McDougal, corroborated by the account-book kept by Charles J. McDougal; by the letters from Mrs. Van Voorhies, while in Europe, to her husband; by the testimony of Mr. Van Voorhies; by the remittances from him to her.

Mrs. Kate Coffee McDougal's testimony, standing by itself, lacks clearness and certainty in its details, and it would be contrary to all rules of evidence to accept it, without corroboration, as against adverse evidence, positive and particular in its nature and without successful assailment, and going to the fact itself of the purchase of the property with the means and in the manner testified by the opposing witnesses. It is claimed by petitioner that the testimony of Mrs. Kate Coffee McDougal is corroborated by the account-book of Charles J. McDougal, and by the statements or memoranda contained therein, written in purple ink on four separate pages, the whole of which I here transcribe:

"Mrs. Caroline McDougal possesses the following property, viz.:

"Three houses and lots, corner of Waverly Place and Sacramento street, unincumbered.

"Block E in the Whitcher Tract, in the Township of Oakland, Alameda County, on which is a mortgage held by the Savings & Loan Society of San Francisco for $4,000. Interest at the rate of 1¼ per cent. per month, payable monthly. The note for the above sum falls due on the 28th November, 1870. W. K. Van Alen attends to this, pays interest, etc.

"Southern half of Block 142, County of Alameda, Town of Clinton, unincumbered. A man named Russel has had the use of this land on payment of the taxes.

"Two lots in the Excelsior Homestead Association in San Francisco, unincumbered," on one page.

On the next page:

"Thirty shares stock Vallejo Savings and Commercial Bank. Fifteen per cent. of the par value has been paid on this stock, amounting to $450.

"Block 20, Town of Brooklyn, Alameda County. This block is in the name of Mrs. Caroline McDougal, but belongs to Mrs. D. W. Van Voorhies. This block is mortgaged for $3,000 to Lovell Hardy, Esq., interest at the rate of 1¼ per cent., payable quarterly. On the 14th November, 1870, the next payment of interest, $112.50, is due.

"One lot in the Excelsior Homestead, standing in the name of Mrs. D. W. Van Voorhies; and two lots numbered 1,025 and 1,030 on Gift Map No. 3, in the name of Mary Caroline Van Voorhies; and four lots numbered 1,069, 1,071, 1,073 and 1,075 on Gift Map No. 3, in the name of Margaret Stockton McDougal. Mrs. McDougal has the care."

On another page:

"Pays taxes on, etc. These lots are known as Harvey Brown's $10 lots."

On another page:

"GENERAL INSTRUCTIONS.

"If possible, the Whitcher Tract, or any part of it, is to be sold to pay off the $4,000 mortgage. $12,000 is the price of the entire tract, a smaller quantity at a proportionate price. The result of any sale of this property to go toward satisfying the mortgage.

"Block 20, in Clinton, is to be sold if possible, and the proceeds used to satisfy the mortgage on it for $3,000, held by L. J. Hardy, Esq. $10,000 is the price of the block."

And on a fifth other page is the following:

"Mrs. D. W. Van Voorhies owns three houses and lots on Silver street, numbered 25, 27 and 29, on which there is a

mortgage for $6,000, held by the Savings and Loan Society on Clay street, Mr. Burr, President; interest at the rate one per cent. per month. The interest is paid by W. K. Van Alen, who attends to the property and collects the rent of houses Nos. 25 and 29. House rent of No. 27 is paid to C. J. McDougal.

"At present the following rents are received from this property:

"House 25	$35 00
House 27	27 50
House 29	50 00."

The foregoing is, as nearly as practicable, a literal transcription of that portion of Charles J. McDougal's account-book, said to have been taken down by him at the instance of and in the presence of Mrs. Caroline McDougal, and in presence of Mrs. Kate C. McDougal; and for the purpose of illustrating the comments of the court, I will insert, from the testimony of the last named lady, an extract from the Reporter's Notes, after the introduction and reading of the foregoing:

"Q. (By Petitioner.) This is entered by your husband?

"A. That is my husband's handwriting; his own account.

"By the Court. Did you say that all these entries were made in your presence?

"A. That was the instructions and directions.

"By Mr. Van Loben Sels. Were you present when these instructions were given and taken down?

"A. Yes, sir; I was present when they were taken down.

"The Court. There are no dates to them.

"Witness. There are dates.

"The Court. Not in the articles you have read.

"A. Not in the articles I have read.

"Mr. Van Loben Sels. The book is allowed to go in by the gentleman on the other side.

"Mr. Le Breton. I do not see any date to it, and so it goes in only for what it is worth.

"Q. Now, Mrs. McDougal, can you state about the time when those instructions were given and taken down?

"A. At the time of Mrs. McDougal's departure for Europe.

"Q. What time about was that?

"A. I think it was in 1870, in the fall.

"Q. About that time?

"A. In the fall of 1870."

Now, the account-book coming in without objection, "for what it is worth," the question is, What is it worth in corroboration of Mrs. Kate Coffee McDougal, and in proof of the claim here made as to the actual property? If the introduction of this account-book had been objected to, it is difficult to understand upon what principle or rule of evidence its admission could be sustained. I have examined carefully the code and treatises, with a view of ascertaining accurately how this book should be treated, without arriving at any conclusion favorable to its admission; but it is in, and is to be considered for "what it is worth."

In the argument of counsel for petitioner, great stress was laid upon this memorandum or account-book, as corroborative of Mrs. Kate Coffee McDougal, and contradictory of the adverse witnesses. The book contains certain memoranda claimed to have been set down by dictation of Mrs. Caroline McDougal. Are its contents as to these memoranda to be treated as her declaration as to the property "back of Tubbs' Hotel"? That is the only pretext for its consideration. What does it establish? There is no date to that portion which Mrs. Kate Coffee McDougal testified was taken down at the dictation of Mrs. Caroline McDougal. There is a considerable blank before the first page in purple ink, and a page or two after the fifth page in purple ink, before the next entry, which is in another colored ink. As the court remarked, in that portion of the testimony of Mrs. Kate Coffee McDougal hereinbefore quoted, there are no dates to that portion of the book taken down (as testified) in the presence of Mrs. Kate C. McDougal, and by direction of Mrs. Caroline McDougal; but the former witness says that the matter was written at the time of Mrs. Caroline McDougal's departure for Europe, "in the fall of 1870."

This evidence of Mrs. Kate McDougal is met by the denial of Mrs. Caroline McDougal of any knowledge of the book

or of its contents, or of any interview with her son such as was stated, at which the entries were taken down.

Now, assuming the fact to be as stated, irrespective of the flat denial by the party charged with making the admissions contained in those entries or memoranda, what do the entries impart?

The purple ink memoranda begin: "Mrs. Caroline McDougal possesses the following property, viz.": then follows enumeration including the property in question. It is a fact that Mrs. Caroline McDougal did "possess" that property, in so far as holding it in her name, so that that statement cannot operate as a negation of the ownership by Mrs. Van Voorhies; but on the page following the "general instructions" is the statement: "Mrs. D. W. Van Voorhies owns three houses and lots," etc. Here the writer seemed, by his manner of entering the memoranda, to make a distinction between the "possession" of property and the "ownership." Is there any argument deducible from the omission in this last referred to page, of the property back of Tubbs' Hotel? Certainly no implication injurious to the right of Mrs. Van Voorhies can arise therefrom, because there is no doubt she had nothing to do with the making of the memoranda; at that time she was in Europe. But it is true Mrs. Caroline McDougal possessed that property, and did so in the manner always, from the time of its alleged purchase, as testified to, until the conveyance to Mrs. D. W. Van Voorhies; but so far as these memoranda are concerned, it is worth while to consider critically how far they impute to her "ownership." If these memoranda were all made at one time—the memoranda embraced in these five pages—there must have been some distinction running through the mind of the writer as to "possession" and "ownership." But the utmost importance that can attach to these entries is their significance as admissions by Mrs. Caroline McDougal. They are not the declarations of the deceased, Charles J. McDougal, for they come under no rule entitling them to be so considered. If they have any value, they are the admissions of Mrs. Caroline McDougal, and are to be considered as of no greater worth than if the writer were living and orally testifying to

them. They are of no more account than any other verbal admissions, which, as the treatises on evidence repeatedly remark, ought to be received with great caution, as it is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning or the witness having misunderstood.

Another point in which this testimony may be considered and criticised: At the time of the admission or entry, it was in favor of and not against the interest of the party who, it is claimed, dictated it, and such declaration might be assailed as disentitled to consideration on that account.

The statute, also, in treating of the effect of evidence, declares that the evidence of the oral admissions of a party must be received with caution: Code Civ. Proc., sec. 2061. But how could the admission of Mrs. Caroline McDougal in her own favor charge the property of Mrs. Van Voorhies? Or how is the latter to be affected by entries made without her cognition or consent? This character of evidence cannot be too carefully scrutinized or too closely criticised. In all cases it is the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse. In most cases it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Much more might be said to the same purport, but it is not necessary to repeat statements of principles well understood by counsel, or to transcribe from text-books or books of decisions.

So far as the contents of this memorandum or account-book of Charles J. McDougal are concerned, it could not occupy any place in this controversy without the illustrative testimony of Mrs. Kate Coffee McDougal. That testimony tends to connect with the entries Mrs. Caroline McDougal, but she denies the whole statement. Oath opposed to oath, so far as that interview is concerned, if all other things are equal, the charge must fall. As to the import and importance of its contents, enough has been said.

The title stood in the name of Mrs. Caroline McDougal, it was "possessed" by her, and at the time indicated in the testimony it was not esteemed of great value, and the right

to dispose of it, in case of emergency, was given by Mrs. Van Voorhies to Mrs. Caroline McDougal. It is not remarkable, therefore, that it was treated as if it belonged to the latter. But it is noteworthy that nowhere in the testimony is there any claim or assertion that David McDougal ever laid any claim to its ownership. Repeatedly, and under various conditions, has it been reported that he spoke of it as his daughter's property, sometimes, it is said, although this testimony is very vague, as his wife's, but never as his own. The petitioner says the recital of a consideration raises a presumption in favor of its being community property; the law says that the recital of a consideration is not conclusive as to the fact, and the testimony here is to the effect that Mrs. Caroline McDougal never paid anything to the grantor, and whosoever paid it, it might be construed as given to her, so that at all events there is something to show it never was community property—no testimony is in to that purport—so that argument as to that is vain; it is founded at most on a presumption overthrown by evidence, unless the court greatly errs in its view of the testimony.

With regard to the letters produced from Mrs. Van Voorhies to her husband, and their effect upon the main item of her testimony, with respect to the purchase of the property, while they show she received some sums of money from him from time to time and breathe a spirit of affection, there is throughout an intimation of straitened circumstances and dependence on some other source. One letter, underlined by petitioner in pencil, says: "I enclose you the last bill I have received for Carrie's schooling, without her music, which I wish you would attend to at once. Charlie sent the £7 in his last letter which you intended to go towards her other bill; but as it is not nearly the sum, I wish you would lose no time in sending the amount of this one."

The sentences subsequent to this are not underlined: "I find I am very much cramped for money, but Carrie must have her school bills paid. I can do without a great deal that others have, but Carrie must be educated. It is a sacred duty of a parent to a child, and you are fortunate in only having one, and one, too, who has never cost you very much."

This is a letter from Florence, November 29th, no year indicated. There are many other sentences in the letters in a similar strain; also intimations as to his infirmity of intemperance, and admonitions which, in this opinion, have been already alluded to, and showing without doubt that her condition of mind was not very happy; that she was in financial straits; that she had other source of subsistence than his contributions afforded. Were their relations cordial, contrary to her evidence? Do these letters show that, or are they a thin veneering put on, as she said, to "keep up appearances," and to do what she could to maintain an attitude of amity on account of her child? Is it not a pregnant fact, supporting her statement on the stand, that from the time she went to Europe until in this very courtroom in this controversy, she never saw her husband, and marital relations were never resumed, and, although writing tender missives until within a month of her return to this city, she came incognito, and neither sought the other out?

Is it not, also, to be weighed that he himself testified that he could not, by reason of his condition, support her while in Europe; that such money as he sent came from another source; that he was furnished with funds to go to Aurora by her mother, the executrix here; that the money he sent from Aurora went to purchase the property in front of Tubbs' Hotel; that her mother gave her funds to go with her and his child to Europe; that he took $100 of that money from her; that during a long period, from 1857 to the time of the dissolution of the community, his habits were such as to destroy his ability to support her, and that it is in proof that was largely, at least, if not mainly or wholly, dependent upon her parents? I am requested to disregard the testimony of Mrs. Van Voorhies as to the purchase of the property, because of her contradictions in the respect of the letters and her relations with her husband, and remittances from her husband, and certain other remittances; but the testimony must be regarded as a whole, and the court is not warranted in imputing inveracity to a witness, unless it appears that willful falsehood has been told. "A witness false in one part of his testimony is to be dis-

trusted''; but the court should be satisfied that the witness has testified falsely, and then the evidence must be distrusted. To distrust and reject utterly may be discriminated; but it is unnecessary to discuss the meaning of terms, if the substance of her statement be corroborated. There is no inherent improbability in the story of the purchase; the price was not inadequate; the motive was not incredible; the means of acquiring the money to purchase were such as might well be believed; the deposit of title in her mother in itself, as a prudential measure, was not an extraordinary act. She swears she bought it in the manner, and with the money acquired as already told; her mother tells a like tale: her sister confirms her story as to the reputation of ownership in the family, and what her father told her (vol. 2, Reporter's Notes, p. 4); Mr. Le Breton testifies in the same strain; but the petitioner says all the testimony must be rejected; because they are concerned with the executrix. The court cannot perceive how Mr. Le Breton and his wife can be interested in the appropriation of these assets, and the court must apply legal rules in testing such questions; but there are circumstances of corroboration in the testimony of Mr. Van Alen, already referred to, and in the testimony of one of the Pattens, called by petitioner, and in the testimony of Hezekiah P. Jones, called by petitioner, from whom Mrs. Van Voorhies claimed to have made the purchase; and, in the same connection, it ought to be noted that there was no attempt apparent, upon the part of respondent, to shut out testimony; and much has come in that might have been questioned with respect to relevancy and competency. A disposition to meet and not to evade the issue was so far manifested.

It was incumbent upon petitioner to maintain his charge by a preponderance of proof. The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue. This is a familiar and cardinal rule of evidence. Has the petitioner complied with this legal obligation? His own opinion of his success may be quoted from his first brief (page 31), and it is here inserted: "We repeat what we stated in our argument: If the fraud and incompetency proven in this case are not sufficient to convince

the court of the unfitness of the executrix for her trust, let these provisions, under which we proceed, be stricken from the statute book, and let it be known to litigants that such is the case. It will thenceforth be safe for any number of heirs, actuated by selfish motives, to conspire and spirit away property belonging to an estate, and although it may then be proven from old residents, from old family records and memoranda, accounts from old agents, that the property for over twenty years belonged to the estate, that as such all acts of ownership were performed by the deceased, and although the veracity of the conspiring heirs has been attacked by contradicting their testimony in almost every point, in a most convincing manner, let it be known that it will be sufficient for those heirs to deny, and to concoct a theory of their own, uncorroborated by any testimony or any document to insure for them immunity for their covin, and the court will pronounce them proper persons to hold positions of honor and trust.''

Most assuredly, if the counsel's assumptions of the facts established here were well based, this court would make no such announcements; and whatever announcement the court makes, it must respond to the touchstone of evidence and the rules by which evidence is tested. But, in the opinion of the court, the counsel errs in assuming so much as proved ''from old residents''; it is not proved by the Pattens, nor by Van Alen, for their testimony tends in a contrary direction; ''old family records'' I do not understand to be in evidence, the evidential character of the account-book of Charles J. McDougal has been already discussed by the court; ''accounts from old agents that the property for over twenty years belonged to the estate, that as such all acts of ownership were performed by the deceased''; this is an erroneous assumption of counsel; for the twenty years alluded to the deceased never claimed or acted as owner, nor was the property at any time in his name; there is no evidence here that he asserted title in himself, the most that can be claimed is that he said it was Mrs. McDougal's; but I have already dwelt upon this point, also upon the quantity and quality of the evidence for the respondent, which, in my view of the law of evidence, I am compelled to consider preponderant

as to the point of the purchase of the property. Of course, if I am warranted in finding the story of the purchase, told by Mrs. Van Voorhies, sustained by the whole evidence, the charge of covinous conduct against this executrix must fall. This disposes of the last charge specified.

I do not think the charge generally of incompetency and mismanagement is supported by proofs. The executrix may have been in some instances misadvised by counsel, as to the making up of the inventory, for example, and the application for allowance as to the amount, and there may be in our mind an unfriendly feeling toward the mother of the minors, who is striving to obtain what she can by legal means for her children; but the court cannot for those reasons of sentiment adjudge the executrix incompetent. The court will endeavor to conserve the interests of the minors. and will, at all times, aid their attorney in obtaining for them their full rights; and it is proper here to say that any application in that behalf will be welcomed by this court, which regards with the highest favor, as such courts should always regard, the claims of minor heirs. Impressed with the conviction that the petitioner began and has prosecuted this proceeding in good faith and upon grounds apparently justifying it; and recognizing the force of his argument that the adverse counsel should have shown greater consideration, courtesy and candor toward the mother of the minors, who is entitled to be treated with respect, and has an incontestable legal right to urge the claims of her children; and, also, believing that if the counsel for the executrix had advised her that the petitioner was at least morally entitled to be enlightened as to all the facts compulsorily developed in this investigation, and that, therefore, a certain responsibility for this proceeding rests upon the respondent, the costs are imposed upon her, and with this understanding the petition must be denied. Let findings be prepared to correspond with the conclusions herein announced.

ESTATE OF ROBERT J. TIFFANY, DECEASED.

[No 5,317; decided December 24, 1887.]

Will—Testamentary Capacity—Intoxication.—A man temporarily overcome by a single debauch is, for the time being, of unsound mind, and has not testamentary capacity; so a person to whom intoxication has become such a habit that his intellect is disordered and he has lost the rational control of his mental faculties, is of unsound mind.

Will Contest.—Where the Questions of Unsoundness of Mind and Undue Influence are presented in the same case, and in their consideration may overlap one the other, it has been said that as legal propositions they are to be kept distinct and apart. But considering the two issues together, it is noted that although mere weakness of intellect does not prove undue influence, yet it may be that in such feeble state, with the mind weakened by sickness, dissipation or age, the testator more readily and easily becomes the victim of the improper influences of those who see fit to practice upon him.

Will—Unreasonableness does not Vitiate.—The will of one having testamentary capacity cannot be avoided because unaccountably contrary to the common sense of the country. If not contrary to the law, it stands for the descent of his property, whether his reasons for it are good or bad, provided they are his own reasons, not influenced by the unlawful influence of others.

Will—Undue Influence.—There is a Distinction Between the Influence of a Lawful Relation and that of an unlawful relation. A lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing the execution of a will. However great the influence thus generated, there is no taint of unlawfulness in it; nor can there be any presumption of its unlawful exercise merely because it is known to have existed and to have manifestly operated on the testator's mind as a reason for his testamentary disposition. It is only when such influence is exerted over the very act of devising, preventing the will from being truly the testator's act, that the law condemns it as vicious.

Will—Undue Influence.—While the Natural Influence of a Lawful Relation must be lawful, even where affecting testamentary dispositions, the natural or ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relations and unfavorably to the lawful heirs. So, it would be doing violence to the morality of the law, and thus to the law itself, if courts should apply the rule recognizing the natural influence arising out of legitimate relationship to unlawful as well as

to lawful relations; and thereby make them both equal, in this regard at least, which is contrary to their very nature.

Maxim.—No One Shall Derive any Profit, Through the Law, by the influence of an unlawful action or relation.

Wills—Undue Influence.—If the Law Always Suspects and Inexorably Condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian and trustee, much more sternly should it deal with unlawful relations, where they are, in their nature, relations of influence over the kind of act under investigation. In their legitimate operation, trust positions of influence are respected; but where apparently used for selfish advantage they are viewed with deep suspicion; and it would be strange if unlawful relations should be more favorably regarded.

Will—Undue Influence.—General Cases and Authorities, as to what does and what does not constitute undue influence, are inapplicable in a case where the influence charged originated and was exercised under an unlawful relation.

Will—Insane Delusion.—If a Person Persistently Believes Supposed Facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, as far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. So, if a testator labored under such a delusion in respect to his wife and family connections, who would naturally have been the objects of his testamentary bounty, and the court can see that the dispository provisions of his alleged will were or might have been caused or affected by the delusion, the instrument is not his will.

Will—Evidence of Undue Influence.—Upon the issue of undue influence in the execution of wills, the evidence must often be indirect and circumstantial. Very seldom does it occur that a direct act of influence is patent; persons intending to control the actions of another, especially as to wills, do not proclaim the intent. The existence of the influence must generally be gathered from circumstances, such as whether the testator formerly intended a different disposition; whether he was surrounded by those having an object to accomplish, to the exclusion of others; whether he was of such weak mind as to be subject to influence; whether the instrument is such as would probably be urged upon him by those around him; whether they are benefited to the exclusion of formerly intended beneficiaries.

Will—Intoxication and Undue Influence.—The testator in this case had been a prominent and respected citizen, but for some years before his death he became an habitual drunkard, and after becoming such his whole being changed with respect to his affection for his wife and children, as well also in his personal habits and his social

nature and disposition. During this period he became acquainted, while taken away from home, with a woman whom he permitted to act as his nurse; and who subsequently obtained a control over him, to the exclusion of his family, and so that he never again returned to his wife or children. Six months before his death he executed a will wherein this woman was made residuary legatee, and for nearly all his estate; his wife and children were expressly excluded by the instrument. They contested the probate of the will, and tendered as issues unsoundness of mind, and undue influence exercised by the residuary legatee. The court found in favor of the contestants upon both issues, and denied the probate of the will.

W. W. Foote and T. C. Coogan, for contestants.

E. N. Deuprey, for respondents and proponents, J. W. Brumagim and W. M. Pierson.

COFFEY, J. On the tenth day of June, 1886, there was filed in this court the petition of William M. Pierson and John W. Brumagim, setting forth that Robert Joyce Tiffany died on the sixth day of June, 1886; that he was a resident, at the time of his death, of the city and county of San Francisco, state of California, and left an estate in said city and county consisting of real and personal property, the real estate consisting of about fourteen parcels of land, one parcel of land improved with buildings and the others vacant; that the improved real estate brings in a rental of about $200 a month, all of which real estate is valued at about $30,000, and personal property at about $500; all of which real and personal property is alleged to be the separate property of the deceased. That said deceased left a will dated the 15th of November, 1885, and a codicil bearing the date the 15th of December, 1885, in the possession of the petitioner, Pierson, which the petitioners believe and allege to be the last will and testament of the deceased; that the petitioners, Pierson and Brumagim, are named in said will as executors; that Cecilia Harvey McGregor, infant daughter of Emma M. McGregor, Alice Tiffany, the Old People's Home of San Francisco, the managers of the Kindergarten School on Mission street near Twenty-ninth street, San Francisco, the Boys' and Girls' Aid Society of San Francisco, Willie Patterson, Mrs. John Marshall and Mrs. Lura Churchill are named in said will as legatees and devisees;

that said Cecilia Harvey McGregor and Willie Patterson are minors, and reside in said city and county of San Francisco; that Alice Tiffany is the adult sister of the deceased, and resides out of the state of California, and in the state of New York; that Mrs. John Marshall and Mrs. Lura Churchill are adults and reside in San Francisco; that the said Old People's Home, the managers of said Kindergarten School and the Boys' and Girls' Aid Society are charitable and educational institutions existing in San Francisco; that the subscribing witnesses to said will are Walter B. Anderson and Charles Rowell, and to said codicil George W. Reynolds and S. H. Regensburger, all residing in San Francisco; that the next of kin of said testator and his heirs at law are; Phoebe Jane Tiffany, his surviving wife, Peer Tiffany and William Tiffany, his sons of adult years, and his daughter Emma M. McGregor, of adult years, residing in said city and county; that at the time said will was executed, to wit, on said fifteenth day of November, 1885, and at the time said codicil was executed on said fifteenth day of December, 1885, the said testator was over the age of eighteen years of age, to wit, over sixty years, and was of sound and disposing mind and not acting under duress, menace, undue influence or fraud, and in every respect was competent by last will to dispose of all his estate, and that said will was duly executed according to law. Wherefore, the petitioners pray that the will and codicil be admitted to probate.

The will and codicil referred to in the foregoing petition are in the following words:

"(1.) I bequeath to said Cecilia Harvey McGregor, my grandchild, the daughter of my daughter Emma M. McGregor, the sum of five hundred dollars, to be paid to the said Emma M. McGregor for the use of her said daughter.

"(2.) I bequeath to my sister, Alice Tiffany, five hundred dollars.

"(3.) I bequeath to the Old People's Home of San Francisco five hundred dollars.

"(4.) I bequeath to the Manager or Managers of the Kindergarten School on Mission street, near Twenty-ninth street, San Francisco, five hundred dollars.

"(5.) I bequeath to the Boys' and Girls' Aid Society of San Francisco five hundred dollars.

"(6.) I direct that a scholarship in the best business college in San Francisco be bought by my executors in the name and for the benefit of little Willie Patterson, the grandson of P. J. Cody.

"(7.) All the rest and residue of my real estate, personal and mixed, I devise and bequeath to Mrs. Lura A. Churchill, who has been to me in all my sickness a true and tender friend and nurse.

"(8.) Should any of the bequests to any of the educational or charitable organizations in this will fail for any reason, then such bequests are to go into the rest and residue of my estate.

"(9.) I have made no provision in this will for my wife, nor for my children, Peer, William and Emma, for the reason that by a deed and agreement of separation made some years ago between myself and wife, she was fully provided for, and for the further reason that the conduct of my said wife and children towards me since that time does not commend them, or either of them, to my consideration.

"(10.) I now make and appoint John W. Brumagim and William M. Pierson the executors of this will, and direct that no bonds be required of them for the performance of their duties as such executors; and I further direct that if it shall be considered advisable by my said executors to sell all or any portion of my estate, they may do so without the order of any Court.

"In witness whereof I have hereunto set my hand and seal, this fifteenth day of November, in the year eighteen hundred and eighty-five.

"[SEAL] R. J. TIFFANY."

(Here follows attestation clause.)

"Witnesses:

"WALTER B. ANDERSON, 426 Kearny Street.

"CHARLES ROWELL, 1330 Pine Street.

"By this codicil to the above last will and testament, I bequeath to Mrs. John W. Marshall, of San Francisco, the

sum of five hundred dollars, and in all other respects confirm and publish said will.

"San Francisco, December 15, 1885."

(Here follows attestation clause.)

"Witnesses:

"GEORGE W. REYNOLDS, 609 Sacramento Street.

"S. H. REGENSBURGER, 214½ Grove Street."

STATEMENT OF CONTEST.

On the fifteenth day of September, 1886, there was filed an amended contest by the widow and children of the deceased to the probate of the instruments hereinabove copied, in which were alleged as reasons for contest and grounds of opposition (1) that at the time of the execution of said will and of the codicil said deceased was not competent to execute said will or said codicil and was not at either of said times of sound and disposing mind, but was incompetent to execute said will or said codicil, he being at both said times insane; (2) that at both the times last above mentioned said deceased was, and for many years prior thereto had been, habitually intemperate from the excessive use of intoxicating liquors, and was by reason thereof incapacitated from and incompetent to execute said will and said codicil. And, for a further and separate ground of opposition and contest, it was alleged that at the time of the execution of the said will and codicil the said deceased was not free from duress, menace, fraud and undue influence, but said deceased was at both times unduly influenced by the residuary legatee named in said will to execute both said will and said codicil; and in support of the allegation of undue influence on the part of the residuary legatee the contestants allege as follows, that:

(*a*) Prior to the execution of said will and said codicil the said residuary legatee induced the deceased to separate from his said wife and children, and to occupy the same apartments occupied by her at a lodging-house situated at the southeast corner of Fifth and Market streets, in the city and county of San Francisco, and thereafter prevailed upon the deceased to continue his said separation and occupation

of said apartments with her, and he was so occupying them at the times of the execution of said will and said codicil.

(*b*) Prior to the execution of said will and said codicil, and prior to the time he separated from his wife and children, and while he was so living separate from them, as last above stated, the said residuary legatee poisoned the mind of the deceased against the contestants by falsely asserting to the deceased that the contestants had caused him, the deceased, to be placed in an insane asylum and in the Home for the Inebriates, situated in the city and county of San Francisco, without any cause; and that they, the contestants, were inimical to him, and would again place him in an insane asylum or Home for the Inebriates if he should return and live with his wife and children; that deceased believed these assertions of the residuary legatee, and at the times of the execution of said will and said codicil the deceased was laboring under the delusion that they were true; and the contestants allege that said assertions, each and all of them, were false, and known to the residuary legatee to be such.

(*c*) Prior to the execution of said will and said codicil said residuary legatee abused contestants in the presence of deceased, and told him that contestants had turned him out of his own home and into the streets; that contestants had no love for him, and that she was the only true friend that he had; and that the reason why contestants desired the deceased to live again with his wife and children was that they, the contestants, might thereby obtain control of his property, and, if they did so, they would then turn him into the streets penniless; and at the times last above mentioned said deceased was laboring under the delusion that these statements were true; and the contestants allege that said assertions, each and all of them, were false, and known to the residuary legatee to be such.

(*d*) While deceased was living at the same apartments as the residuary legatee, as above stated, and for some time prior to the execution of the said will or codicil, and even subsequent thereto, said residuary legatee was not willing that any of the contestants should see the deceased except

in her presence; and on one occasion she ordered his said wife out of the said apartments, and told deceased, in the presence and hearing of his wife, that he must choose between "that woman," referring to his, deceased's, wife, and herself.

(*e*) Prior to the execution of the said will and the codicil said residuary legatee persuaded deceased to transfer to her, without any consideration, certain of his real estate and certain of his personal property; that she concealed all these transfers from contestants, and at the times of the execution of said will and the codicil she had complete control of the deceased's mind.

(*f*) Said deceased for several years prior to his death was in the habit of using intoxicating liquors to excess, and was easily influenced by anyone who would supply him with such liquors; and that said residuary legatee, contrary to the advice and directions of the physicians of deceased, prior to, at the time of and subsequent to the execution of said will and the codicil, constantly supplied the deceased with intoxicating liquors, and thus obtained such control over deceased as to unduly influence him.

RESPONSE OF PROPONENTS.

On November 1, 1886, the proponents answering denied generally and specifically each and every of the allegations of the contest.

The trial of the issues thus joined began on the 18th of January and ended on the 3d of September, 1887, occupying from first to last ninety-two days. Of course this period did not include a continuous consumption of time, for the struggle was intermittent in its character, owing partly to conflicting engagements of one or the other of the counsel, and partly to the demands of other business pressing upon the court. The actual time consumed in the trial and the arguments was about three hundred and fifteen hours, or sixty-three days of five hours each, which was the average daily length of the trial, as appears from the two hundred and thirty-five pages of the legal-cap notes taken by the judge. There were forty-eight witnesses examined for con-

testants, fifty-three for proponents and ten in rebuttal, making a total of one hundred and eleven. The cause was most stubbornly contested by the counsel for the respective parties, and every legitimate weapon of forensic warfare was used with skill and dexterity by the advocates for either side. In such a conflict the vanquished party can attribute the result only to the lack of merit in his cause or to the mistaken judgment of the judge, who may have failed to weigh accurately the facts or to apply correctly the law. However the court may err, the counsel have capably and conscientiously discharged their duty.

POINTS OF CONTROVERSY.

This controversy is reduced by the evidence to two points:

1. Was the testator of unsound mind at the dates of the execution of the instruments propounded as his will and codicil?

2. Was he unduly influenced in the disposition he made of his property by the residuary devisee and legatee named in the said instruments?

Robert Joyce Tiffany died in San Francisco, June 6, 1886, having been born about sixty-six years prior to that date in Albany, New York. He was married to the contestant, Phoebe, in New York City, April, 1845. He came to California in 1849, and after a few years returned to New York, and came back in 1856. His wife followed him in a few months, and thereafter they lived in domestic harmony in San Francisco until he retired with a considerable fortune from the business of manufacturing and vending hats, in which he engaged on his second advent from New York, in or about 1856. He was also a director in the Savings and Loan Society, a most important and flourishing financial institution, known popularly as the Clay Street Savings Bank, from 1863 to 1878. Some time after he retired from active employment in the hat business he began a habit of unusual indulgence in liquor, and in the summer of 1878 a trip was made to Europe with a view to correcting this infirmity, and by a temporary separation from unfavorable influences and associations to restore him to his former temperate habits.

But the result was not the reform anticipated or hoped for, for upon his return to San Francisco, in the fall of 1878, he resumed his habits of drinking, indulging at times to excess and for protracted periods. Before this time, when it is alleged the radical change occurred in his character, and while he was actively engaged in affairs which demanded regularity and punctuality in performance, the evidence shows that he was a careful and continuously energetic man of business and successful in his pursuit; he was very neat and precise in dress, courtly and gallant in address, a model of deportment, and a man of reasonable judgment and due discretion in all his concerns. Upon these points, up to a certain time, there is no divergence of testimony. Prior to the present decade the evidence does not indicate that the mind of the decedent had suffered material injury or had become unhinged by abuse of ardent spirits. But about the year 1880 a change began to be observed by many persons among his acquaintances; then those who had previously noted his neatness of apparel and circumspectness of conduct remarked an alteration. About this time he became quite dissipated; he was seen frequently in public under the influence of intoxicants; he was often encountered in shabby habiliments, and disordered by drink to such a degree that some of his old friends avoided him, his condition and conversation making intercourse intolerable. Herein was a radical change from his earlier years, when he was one of the most amiable and pleasant gentlemen to be met with, refined and polished in manner and utterance. Those who were formerly entertained by his conversation became disgusted at his coarse and salacious speech and accompanying eccentricities of conduct. Many instances are related in the testimony for contestants which tend to show a material moral modification of character in the testator from 1880, increasing in intensity to the time of his last illness. From the period of his return from Europe, in the latter end of 1878, until his final separation from his wife, the domestic history was one of affliction and trial, caused by his irregularities and the endeavors of his wife and family to reclaim him from his evil courses and associations. The European tour

failed of its purpose, for upon his return he evinced no improvement. From that on the family lived at different boarding-houses; first at the Chamberlain, where they remained until the latter part of 1881; this was at the corner of Bush and Stockton streets, when, upon the marriage of his daughter, the family being broken up in a measure, he took a room at Mrs. Harding's, on Taylor street, and his wife went to her daughter's place, and subsequently, at his request, joined her husband; after a month or six weeks he made another change to a Mrs. Allen's, on Powell street, where he and his wife stayed for about a month; he became very ill there, and was taken to a place in the country in Napa county, where they sojourned for about two months, when, upon his request, they returned to town to attend to some business, and made their stay at their daughter's house; after his return he came in one day and told his family that he had taken rooms at the corner of Fifth and Market streets, at the house of Mrs. Bither; this was in September, 1881, and his wife assenting to this arrangement accompanied him to that place. This was the house known as No. 1 Fifth street. Here they remained until November 24, 1881. After the first week at the house 1 Fifth street he became quite sick; he would go out and come home intoxicated, and from that became so very ill that it was thought he would not recover; it was here and during this period that his wife first met Mrs. Lura A. Churchill, the residuary legatee. Upon his recovery from this fit of sickness, which lasted several weeks, he went to the house of his daughter, Mrs. McGregor, and was there several months; for a while he seemed to improve, but after a few months he began again to drink to excess; he became in his demeanor violent to the inmates of the McGregor household; he would get up in the night and alarm the members of the family; he would arise and go to the front door in his night clothes; would go into the kitchen and hunt for the carving knife, declaring his purpose to kill them all; it was very difficult to quiet him on such occasions; there appeared to be no provocation proceeding from his family for these outbursts at such times, and it was in striking contrast to his former conduct toward them—before liquor had

made him its victim he was always kind and loving to his wife and children; after that he became the reverse. Many instances are recited in the testimony showing the growth and progress of the disease, which finally, it is claimed, unbalanced his mind to such an extent as to destroy testamentary capacity. On one occasion at the Chamberlain house, in October, 1880, he entered his son William's room at 4 o'clock in the morning in his nightgown and got into the bed, and asked if there was a pistol, saying that it was time he or "mother" (his wife) should die; upon another occasion he went into the same son's coalyard, took off his coat and began to shovel coal; this was done without request or necessity; again he told his son that he had engaged a room opposite his son's coalyard on Ellis street, and one night he awoke and wanted to know where "mother" (Mrs. Tiffany) was, and didn't know where he was himself; upon a visit to this son's coalyard he would give imitations of celebrated characters, such as Edwin Booth, the tragedian, and John L. Sullivan, the pugilist; this mimetic performance was a favorite pastime of his, as several witnesses testify—not in itself standing isolated significant, perhaps, but to be considered in connection with other circumstances; this was in the fore part of 1882; during this period he was frequently intoxicated; he spent his time largely around saloons, until in October, 1882, he went to the eastern states, whence he returned in January, 1883, in very bad order; he was to all appearances demoralized, his dress and person were untidy and unclean, his clothing being in very bad condition, and he complained that he had lost his trunk on the way, he didn't know where; he was very feeble, much emaciated, covered with vermin, and his apparel so infested that it had to be burned up; he told a story of how he fell on the cars, and that they were attacked by "cowboys," and in other ways manifested symptoms of mental disturbance. At a subsequent time, while he was lodging at the Lick House, he would arise at night and give his imitations of his favorite actors, pugilists and wrestlers—his son William was with him at this time; one night William awoke in the front room of the suite, being aroused by his father's striking against the cot

whereon the son was lying; the father was standing over him with a cane in his hand; the son asked him what he was doing; he answered: "I thought you were that damned blackguard Blaney, and I was going to kill you"; Blaney was the name of the attorney who had appeared in the insanity proceedings. At another time he said to his son that this same "Blaney was going to marry mother, and he would kill him and prevent it."

At table he would take a carving knife, and raising it above his head assume a tragic attitude and recite: "Is this a dagger which I see before me?" And again he would pose as the patriot Tell, the slogger Sullivan, the wrestler Muldoon, and other men of mark; these imitations or exhibitions were noticeable for their incongruity as to time and place; other instances are related by witnesses which tend to show a lowered tone as to decency of conduct (see Judge's Notes of Testimony, page 25, lines 19, 20, 21, for a notable illustration); his language was at times grossly vulgar and obscene; whereas, in former years he was habitually chaste and clean in expression and free from profanity, in which latterly he was wont to indulge inordinately; friends of many years' intimate acquaintance were shocked at the change which they observed in this respect (see Judge's Notes, page 50, lines 12-19; also, same page, lines 23, 24, and page 51, lines 1, 2, 3). In the year 1882, on his trip to the east, it was noticed that his conduct was peculiar; among other eccentricities, he sat on the lower step of the car platform, with his feet dangling down (Judge's Notes, page 59); while in the east at this time he acted very strangely, once appropriating from the hotel bar a lemon-squeezer and carrying it with him to his room, and so deporting himself as to attract attention among his acquaintance to the marked alteration in the man from what they had known in early days (Judge's Notes, page 77). He made strange choice of companions; brought to the house of his daughter a character known about town as "Sconchin," and presented him with a cane, and introduced him to the family, to their great astonishment, who, when they discovered the identity of their uninvited guest, hastily withdrew, leaving host and guest alone; at

another time he introduced to his friends an individual known as "Shorty Simpson," whom he kissed and embraced and denominated "his dear friend"; another person known as "the Maori," a prizefighter, was presented in like manner; and again he brings up the rear of a procession of the admirers of a noted fistic champion, one Charley Mitchell, upon that person's arrival in San Francisco, the deceased in a buggy, accompanied by a tattered urchin whom he had picked up on the way and raised to a seat beside him in his vehicle. During his visit to New York, he started out with his son Peer one night to go to a place called "Harry Hill's," a noted free and easy variety show; on the way he encountered a prayer-meeting in progress on the street and stopped, and entered the hall after the meeting adjourned to the inside; after a while the leader of the meeting, "the Salvation Army," asked persons to join, and the deceased stepped forward and signed the roll and asked his son to join, which the latter declined; the leader gave the new recruit a religious volume, which he promised to read; when he returned to his hotel he read the book and then threw it aside, saying it was "damned trash"; after this diversion he resumed his visits to Harry Hill's theater, or dancing and variety hall, and there frequently so acted as to suggest that his mind was not normal. An incident is related of his conduct in San Francisco, where, at a banquet of the Pioneer Society, he became intoxicated and cut a guest, and had to be taken home in a carriage; he was frantic, and was with difficulty subdued. Another time, upon the occasion of the funeral ceremonies of General Grant, he dressed himself in the regalia of a past president of the Pioneers, and behaved so boisterously upon the public street that he had to be removed from the procession. This was noticed by many of his old pioneer friends as a remarkable transformation in character from the period before he had become addicted to the use of ardent spirits (see Judge's Notes, pages 64, 66); some observed him in public very greatly intoxicated, his attire awry, hair disheveled, necktie disarranged, vest loose, unbuttoned, and he generally demoralized; these were among the elements of change in conduct and appearance noted by some who

had known him as a model in the opposite direction (Judge's Notes, page 73) ; he became very greatly changed in all respects (Judge's Notes, pages 74, 75, 76, 77). These are a few among many incidents and instances adduced in evidence to show the inroads gradually made by his drinking habits upon the deceased's condition and character, until his mind was so impaired as to destroy its balance and render him an easy prey to the designs of those who were intent upon securing his property. For years he had been drinking inordinately and habitually; from the time he had retired from active employment and business, he had devoted himself to drink with such diligence as to subject himself almost entirely to its dominion; and an important question in this case is, how far did this habit impair his intellect? While this issue is intimately related to, it is also separable from the other of the two issues to which this contest is confined, to wit: undue influence.

MEDICAL EVIDENCE.

The testimony of the physicians for the contestant is designed to establish the conclusion that the deceased was afflicted with softening of the brain, the result of long-continued indulgence in intoxicants. The autopsy made June 9, 1886, the death occurring June 6th, showed that "the body was greatly emaciated. On the left anterior portion of the chest four distinct abrasions found. The tissues covering sacrum were in a state of extensive ulceration, evidently bed-sore.

"Thoracic cavity—Heart in a state of fatty degeneration. Muscular walls soft and flabby.

"Lungs—Normal in size, and no adhesions to costal pleura. Fatty degeneration of blood vessels.

"Abdominal cavity—Stomach and bowels empty; evidence of chronic catarrh of both; no signs of ulceration or acute inflammation.

"Liver found to be far advanced in a state of fatty degeneration.

"Kidneys—Left kidney atrophied and contracted, the result of both general and circumscribed inflammation. General inflammation, as the pyramids were entirely obliterated;

circumscribed, as an abscess was present upon superior anterior surface connected with pelvis of kidney and filled with pus. Large deposits of fat found in pelvis of kidney; right kidney contracted and in a state of fatty degeneration; bladder empty.

"Cranial cavity—Dura-mater adherent to cranial bone separated with great difficulty; opaque and thickened, weight one ounce; pia-mater highly injected, brain weight, forty-five ounces; softening of base of lateral ventricles, punctiform injections, softening of cerebellum."

CONDITIONS PRODUCED BY ALCOHOLISM.

It is testified by two physicians, Dr. James Stanton, the county coroner, and Dr. James Murphy, that these conditions were produced by alcoholism, resulting in softening of the brain, and that this disease must have been in progress for about two years. Softening of the brain was defined by one of these physicians as a progressive disease—retrograde progression—and that even when indulgence in intoxicants ceases the disease progresses (Judge' Note's, page 93). Dr. Stanton testified that the condition of the kidneys "would indicate that he was afflicted with chronic interstitial nephritis, caused by alcoholism and sufficient to cause death; pyemia is blood poisoning caused by absorption of pus by the blood; uremia is blood poisoning caused by absorption of urea (a constituent of urine) by the blood" (Judge's Notes, page 91). Dr. J. Grey Jewell, a resident physician of the Home of the Inebriates, testified that deceased died from softening of the brain, produced by extreme chronic alcoholism, and that the causes were in operation for five years preceding, and that in his judgment deceased was insane six or eight months prior to his death. This physician testified that he knew the deceased for four or five years before his death; deceased had been in the Home of the Inebriates three times; first, for one day, February 3, 1883; second, for one month from January 21, 1884; third, for one month from March 15, 1884. This witness testified that he had had many cases of alcoholic patients; that he had visited deceased at 1 Fifth street; that deceased appeared to be utterly sat-

urated, thoroughly soaked, with alcohol; that he warned the attendant that she would be held responsible if death ensued; that the patient was dying from the effects of the potions (alcohol) given to him. Another physician, Dr. Julian Perrault, who had known deceased sixteen or seventeen years, intimately from 1870, testified that in 1883 deceased was insane from abuse of alcoholic stimulants. Dr. R. Beverly Cole, who had known deceased since 1852, testified that from his observations of the deceased's mental state during the last year of his life he was unqualifiedly of the opinion that he was non compos mentis—not of sound mind (Judge's Notes, page 96). As the cause of decedent's death, the only important testimony at variance with what has been referred to was given by Dr. Washington Ayer. Strangely enough, the physician, Dr. Charles Rowell, who attended the deceased in his last sickness, and who certified to the cause of his death, was not examined as to the assigned cause, but was questioned on the direct examination only as to the fact and circumstances of the execution of the will, to which he was a subscribing witness. No question was put to him as to the truth of the certificate of decedent's death, which stated that he died of "typhoid fever." In this connection the testimony of Dr. Ayer should be considered, as he is the only physician introduced to combat the medical testimony for contestants. (Dr. Sharkey was not examined as an expert to this point: see Judge's Notes, page 114.) Dr. Ayer is a doctor of high degree, forty years' practice, Professor of Hygiene in University of California, and an author of medical treatises and assays, and a pioneer associate, acquaintance and friend of the deceased, and well qualified to oppose his opinion to that of any other physician as to the question here involved, and it becomes of consequence, therefore, to note whether he is in substantial accord or in essential conflict with the medical witnesses for contestants. Dr. Ayer testified in substance upon this point: He was first called in to attend the deceased professionally on April 20, 1886, and down to June 7, 1886, from recollection, he should say he paid him about fifteen visits; the deceased was suffering from a deep-seated abscess in the pelvis, in the left side

of the pelvis, lumbar muscle. From Dr. Ayer's diagnosis of the case, that was the principal disease. The deceased was very much prostrated, in a state approaching anemia, assimilating low grades of typhoid, but could hardly be classified as typhoid. The witness prescribed remedies for the deceased to tone up his system; among other things, he prescribed whisky combined with egg, or "egg nog," and gave directions that some stimulant might be given occasionally, in the discretion of the nurse. In his opinion anemia was the cause of the death of the deceased; he did not think the cause of the death was uremia; he did not treat deceased for alcoholism, and found no evidence of alcoholism. After having examined the memorandum of autopsy made by Dr. Stanton and Dr. Murphy, the witness said that the clinical conditions presented no such symptoms, and that these autopsical phenomena might possibly have been postmortem. From the minutes of that autopsy the witness should say that physicians might have found uremia as the cause of death; another physician might have said it was pyemia; the abscess was the principal cause of the conditions of the deceased's last illness, but his advanced age and the faltering forces of nature producing incapacity to resist the invasions of disease, also contributed to the end. It was not a case of typhoid fever; death was not caused by typhoid fever. The only professional relation the witness ever had with the deceased was during the latter's last illness; he preserved no memorandum of his visits, nor did he make any charge. He had a friendly consideration for the deceased, as well as a professional relation. After his first call upon the deceased, he made the usual inquiries about his illness, and after inquiry and examination he prescribed poultices—flaxseed meal, and anodynes, sulphate of morphia and bromide of ammonium—the office of these anodynes is to allay pain; the bromide is to produce sleep without allaying pain. When the witness so prescribed Dr. Rowell was present. In the judgment of Dr. Ayer, as a medical man, the deceased did not die of typhoid fever. The witness said that postmortem is not always the means of determining the cause of death; where there are obscurities it is usually the positive means of ascertaining the cause of death; where much time

elapses, changes may occur between the time of death and the time of examination, which would cause decomposition and disintegration, thus obscuring the cause of death. Dr. Ayer agreed with Dr. Murphy and the other physicians that softening of the brain is a progressive disease, yet thought there might be cases in which the progress of the disease might be arrested, and the brain restored to its normal condition (Judge's Notes, pages 171, 173 and 176). Dr. Ayer's testimony disposes of the typhoid theory completely, and, taken as a whole, it does not contradict the positive testimony of the physicians for the contestants, that the deceased's death was caused by alcoholism.

The result of all the doctors' evidence is that the deceased came to his end by alcoholism, accelerated by the conditions described by Dr. Ayer as the accompaniments of old age, lessening the capacity to resist the inroads of many years of undue indulgence in intoxicants.

From the time the decedent left the regular routine of business he became more and more addicted to the habit of drink, until it gradually effected a change in his character and conduct that was noticed by all his old-time friends. It is true some testify that this was observable only in his periods of intoxication, and that in his sober moments he was as sensible as any other person; but intoxication became such a constant quantity with him as to affect his physical and mental organization to such a degree as to render him easily susceptible to the most immediate influence which encouraged indulgence. The evidence shows that when in normal condition the testator's general business capacity was equal, if not superior, to the average of mankind. He was the owner of what may be considered large property, not requiring, perhaps extraordinary ability, but yet good judgment, prudence and diligence for its successful management; and this property was not only preserved, but the amount was augmented by him. Notwithstanding that it was thought necessary to take steps more than once to place testator in custody of the law as an incompetent, yet some persons of fair judgment and unimpeached integrity have given their opinion that he was the same throughout life; but this business capacity may co-

exist with monomania; and even assuming that liquor had not produced a total obscuration of the testator's intellect, yet there may have been a partial eclipse sufficient to avoid this instrument as a will: American Bible Soc. v. Price, 3 West. Rep. 69. A monomaniac may make a valid will, when its provisions have no connection with the particular delusion, and there is no reason to think such provisions are influenced by it; but when the delusion relates to the persons who would in the natural and usual course become the objects of the maker's care, solicitude and bounty, and especially upon whom the law would cast the inheritance of his property, the instrument must be regarded as invalid to pass the estate, because it does not express the will of a sound, disposing mind: American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619, 640. A person whose mind is enfeebled by the drink disease or other cause may have sufficient testamentary capacity remaining, except as to the object concerning which he is under delusion, and that delusion may be fostered by a beneficiary to the extent of unduly influencing the direction of the testator's bounty; that is to say, the insane delusion may operate either against the natural and legitimate recipient of the testator's wealth, or in favor of a stranger exercising undue influence and encouraging the delusion to enhance that influence.

It is claimed by the contestants that they have established here that, at the date of the execution of the instruments, the mind of the testator was so impaired by habitual intemperance that he had not sufficient capacity to make any testamentary disposition; and that, furthermore, he was the victim of an insane delusion, and from these causes that he was peculiarly liable to be, and that he was, unduly influenced by the residuary legatee herein to make and execute the instruments here propounded.

EFFECT OF INORDINATE USE OF INTOXICANTS.

The law books and medical treatises, and our own observation, confirm the fact that the inordinate use of intoxicating liquors does incapacitate men from making wills It is known that it vitiates the blood, produces softening of

the brain, disorders the intellect, saps the vital forces, unsettles the healthy action of the body and mind, and destroys them both. Yet not in every case of the use of liquors do these results follow. Some men live on from year to year, drinking deeply, attending to their own affairs, and occasionally reach a ripe old age; others break soon. There is no rule by which to determine how much the system of any one man can endure. One man may be perceptibly affected by a single debauch, while another may remain sound in mind after many of them. A man temporarily overcome by a single debauch is, for the time being, of unsound mind, and has not testamentary capacity; so, a person to whom intoxication has become such a habit that his intellect is disordered and he has lost the rational control of his mental faculties, is of unsound mind. There are several kinds of drunkenness, and different kinds of drunkards. Balfour Browne, in his Medical Jurisprudence of Insanity, discusses drunkenness and its relations in this wise: "It is, it seems to us, necessary to distinguish several kinds of drunkenness, and the appreciation of the distinctions which exist between each of these will go far to make the relations of drunkards to the law and to their fellow citizens easily understood.

"First, there is the accidental drunkard. Any man may get drunk by accident. Children who know little of the effects of alcoholic liquor are apt, when these are first presented to them, to drink to excess, and it is only when the next morning's wakening comes, with a head full of wonderful aches instead of wonderful dreams, that the child learns that there is 'death in the pot.' Men may be led astray by the hilarity of some occasion, by the persuasion of friends, by physical feelings which prompt to relief by means of stimulants, and may become drunk. It has been remarked with truth that in a fit of ordinary drunkenness we have an epitome of an attack of mania. And it is to be remembered that during the continuance of the influence of this poison the man is, to all intents and purposes, insane. It is true that the attack is only temporary, but so are many incursions of mental disease; it is true that the cause of the aberration is one which the ordinary habit of the system will counteract and remove, but that remark is equally true of

many of the causes of insanity. Second, we have regular drunkards; they get drunk when it suits them; they are sober all day, and transact their business with sense and discretion, but they get drunk regularly at night; or it may be that the indulgence of this propensity comes at rarer intervals; still, there is a regularity to be noted in connection with these bouts. These are really sane drunkards. They have complete control over their passions, but they voluntarily throw the reins on its neck, they could resist temptation if they chose; they do resist temptation upon all occasions when indulgence would be inconvenient or dangerous, but on other occasions they do not care to resist. Third, there is a class of drinkers who scarcely deserve to be called drunkards, but who must, nevertheless be regarded by those who understand the true relations of this indulgence in liquors to pathology. Sir David Lindsay, in one of his poems, speaks of some men who were 'ever dying and never dead'; and this third class might be well spoken of as 'ever drinking and never drunk.' But these men who soak or tipple very frequently come under the cognizance of the medical psychologist, although their names may not appear on the books that are kept at the police cells. It is much to be feared that this class is on the increase. Many men boast of being 'seasoned casks,' meaning thereby that they can drink a great deal without showing the symptoms of intoxication; but the boast is vain, for even these men cannot escape the consequences of their acts, and the decadence of bodily and mental health is the too common result of their frequent indulgence. Fourth, we have habitual drunkards. As we have seen, in considering the psychology of drunkenness, a single gratification of the appetite for stimulants is followed by renewed craving for the same pleasures. The urgency of this craving increases, and as time goes on the measure of such indulgence becomes more excessive, and the interval between them more limited. This is not the place to discuss the large questions connected with the doctrine of the nature of volition and the freedom of the will; but no one can doubt that, whether the will is only a general name for the plus quantity in ruling motives or not, that motives have a very great deal to do with the exercise of

helping volition or controlling power. But what is the result of repeated indulgences upon the motives of the man? The habit to indulge becomes stronger, the bodily cravings grow in strength, and other motives lose their weight. In this way the moral sense of the individual becomes obscured, the self-respect and the self-restraint which depend so much upon this moral estimate of one's worth are no longer guiding principles of the life; the man has become the slave of an artificial appetite, and is no longer the free ruler of his own conduct; his organism rules over him, and the rule is not that of a constitutional monarch who is ruling in conformity with the laws of health, but the tyranny of a despot, who is ruling with the caprice of disease. Here, again, we find the real distinction between health and disease, and the basal principle of the legal distinction between sanity and insanity. We here pass from habitual drunkenness to dipsomania. This point was very well brought out by Dr. Crichton Browne in his evidence before a House of Commons Committee; the essential distinction, he said, appears to be that in habitual drunkenness the indulgence of the propensity is voluntary, and may be foregone, and in dipsomania it is not so. . . . . The points of distinction between dipsomania and drunkenness are several. I find that as a rule dipsomaniacs urge the internal craving as an excuse; they say, we cannot resist it. The drunkard, as a rule, urges some external excuse for his debauch; he says that he met a friend, or that it was his birthday; whereas, with the dipsomaniac it is the internal craving. The dipsomaniac is driven into the debauch by an impulse; the drunkard seeks the intoxicating effects. This seems to us to be not only a correct philosophical, but physiological distinction, and it serves as a good description, not only of drunkenness, but of that disease known as dipsomania": Section 353.

Professor Ordronaux, in his "Judicial Aspects of Insanity" (page 382), treating of habitual drunkenness, remarks: "Another point deserving consideration is the fact that in habitual drunkards the sudden abstraction of the accustomed stimulant, particularly in weakened conditions of the body, leaves the brain within that degree of factitious stimulation which has become, through habit, a sine qua non

for the performance of any acts requiring the least mental effort. Between the stimulating periods produced by fresh cups a habitual drunkard is in a state of depression, or properly disease. He cannot do his best mentally, because there is no natural force to call upon, and his mental process and his will are as flaccid as his muscles. Can such a mind intelligently survey the field of varied property—of duty to others and to society, and, more difficult still, can it, after long imbrutement, respond to the dictates of natural affection toward either offspring, or kindred, or relatives, or resist the artful trammels of the designing and dishonest seducer who plays upon its weakness in order to lead it astray? Surely no occasion ever comes when the work of deception can be so successfully accomplished under the mask of friendship and sympathy, as when the mind of an habitual drunkard is worked upon in its waning moments upon earth by a cunning and interested party."

It is claimed by contestants that they have established the substance of the issue involving insane delusion and undue influence, and that this was an occasion when the work of deception was successfully accomplished under the mask of friendship and sympathy by a cunning and interested party (the residuary legatee), who wrought upon the mind of an habitual drunkard (the testator) in its waning moments upon earth.

It has been said that the law indicates as two distinct grounds of opposition, unsoundness of mind and undue influence; and that while, when advanced in the same case, the consideration of each of them may overlap the other, yet as legal propositions they are to be kept distinct and apart. Considering the two issues together, it must be noted that, although mere weakness of intellect does not prove undue influence, yet it may be that, in such feeble state, with the mind weakened by sickness, dissipation or age, the testator more readily and easily becomes the victim of the improper influences of unprincipled and designing persons who see fit to practice upon him: Reynolds v. Root, 62 Barb. 250. It is claimed that the residuary legatee induced the deceased to separate from his wife and children, and to occupy the same apartments occupied by her at the lodging-house on the

corner of Fifth and Market streets, the house known as No. 1 Fifth street, and thereafter prevailed upon the deceased to continue such separation and occupation of said apartments with her, and that he was so situated at the times of the execution of the papers propounded, November-December, 1885. We first find deceased at this house, as related in his wife's testimony, in September, 1881, after he came from his sojourn in the country place of Mr. Strand, in Napa county; after he and his wife returned to town he came to his daughter's house one day and said he had hired a room at the corner of Fifth and Market streets—1 Fifth street—the house kept by Mrs. Bither, and thither the wife went a day or two after he had taken the room. For the first week deceased behaved very well and was quiet; then he became sick and was very ill; his illness was caused by liquor; he would go out and return intoxicated, and from that became so ill that his life was despaired of. During this time he was attended by Dr. Perrault, and it was there and then that his wife first met the residuary legatee—Mrs. Churchill—who was, it appears, in a manner managing the house, and with whom, the wife testifies, she had an interview upon one occasion in reference to the deceased, who at the time had been ill for three or four weeks. The wife testifies that she was in the kitchen making some beef tea for her husband when Mrs. Churchill came in and said to her: "You are a foolish woman to worry yourself and your children over your husband in this manner. I had a drunken husband once; I sent him home to his children; he soon died. You will only get curses, and he will die in the gutter. If I had him to deal with I would set a barrel of rotgut beside his bed, and let him drink himself to death."

After these remarks the wife said she wanted nothing more to say to her, and that she (the wife) was there for the purpose of taking care of her husband, and that she would do it to the best of her ability. The wife further testified that during this period Mrs. Churchill objected to going into the room where the deceased was lying—it being part of her household duty to attend to the lodgers' apartments—saying she was afraid to enter the room, as the deceased was crazy; she would hand the linen to the wife,

who told her that she would take care of the room herself. At this time there was another person than Mrs. Churchill employed in the house in a domestic capacity, one Mrs. Katie Donnelly, who, it is testified, was present at the kitchen interview. On November 24, 1881, husband and wife left this place and went to the home of their daughter, on Mason street. This ended the first sojourn of deceased at No. 1 Fifth street. They went to Mason street and continued there to reside until October, 1882. Two or three months after going to the daughter's, deceased left home one day and did not return, and after a hunt for him his wife found him at 1 Fifth street, where he was ill; she nursed him, and at his request they went back after two or three days to their daughter's. Mrs. Lura Churchill was at the house, 1 Fifth street, during this time; she was, according to her own testimony, the housekeeper at 1 Fifth street in 1881, and remained as such until January, 1883, when she left, and returned in May, 1884, when she became housekeeper again, and so acted until September 1, 1885, when the house changed proprietors; after which date she resided there until June 16, 1886, but had no position there during this period. During the times that deceased remained at this place this lady had opportunities for cultivating his acquaintance, which, it is claimed, she improved with a view to obtaining mastery over his mind, in order to secure for herself a large portion of his property. During the first stay of deceased at 1 Fifth street she professed a great aversion to coming in contact with him or entering his room, although it was within the scope of her duty to do so, in managing the house and looking after the rooms; but upon the occasions subsequently that he visited and lodged at the house this aversion was apparently changed into a friendly concern for him, and to so great an extent that she surrendered her own apartment to his use, although she denies that she ever shared it with him meretriciously (Judge's Notes, page 184). She explains how he happened to occupy her room in the first place, that he had come in from the street to see Mrs. Bither, and he was taken with a congestive chill; Mrs. Bither was not in the house at the time; he was taken very suddenly, and so Mrs. Churchill allowed him

to occupy her apartment, room No. 2, while she occupied room No. 19, with Miss Baty, who, it seems, was for a time engaged in a capacity similar to that of Mrs. Churchill (Judge's Notes, page 184). Miss Baty testifies that the deceased came frequently, from March, 1884, to the house 1 Fifth street; that he was out and in nearly every day; that he called to see Mrs. Bither, for whom she was then acting as housekeeper. She says that the deceased was ill there several times, very ill; the first time, according to her knowledge, was in the fall of 1885, for a period of two or three weeks. At that time Dr. Beverly Cole was called, and came twice; subsequently the deceased had a very serious attack of sickness, in 1885, when Dr. Charles Rowell was called. Mrs. Churchill nursed and attended him at his request, and Miss Baty says that she assisted her and did a great deal for him; she saw him all the time in 1885 and 1886, when he was sick, and conversed with him every day. In 1885, at the time of the first attack, deceased occupied room 2, and at the time of his last illness he occupied room 4, when, as Mrs. Churchill and Miss Baty testify, they occupied together room 19. This was Miss Baty's room, but upon Mrs. Churchill yielding her own apartment to the deceased, under the circumstances narrated, she accepted a share of the room of Miss Baty, who states that Mrs. Churchill never occupied the same room with the deceased, except when he was very ill and she had to take care of him at night, but she never occupied the same bed with him. This lady never saw anything improper between them, although she claims that she would have observed it if anything of the kind had occurred, but that Mrs. Churchill was nothing more than a nurse taking care of a sick man (Judge's Notes, page 178). It is claimed on the part of proponents that, thus situated, Mrs. Churchill did but an act of kindness for the deceased when he was sick and needed nursing, and that there is not an atom of evidence that there was the least taint upon the morality of her relations to or with him, and that, so far as the record shows, she is perfectly pure, and that there is not a particle of proof that she ever used any influence upon the testator at any time, and most certainly not at the time of the making of the will and codicil, to keep him separate from his

wife and family, or to exclude them from his presence or to divert the disposition of his property; and that the evidence shows that he was kindly cared for and nursed at No. 1 Fifth street when he was deserted and abandoned by his own wife and family, and that the residuary legatee urged his return home and always spoke kindly of his family, striving to reconcile him to them, but that he would not go to those who had thrust him out, and that therefore he was harbored in the house of Mrs. Bither, who had a sisterly fondness for him, and who felt it to be her duty to receive him and accord him attention when he was ailing, and that it was in consonance with Mrs. Bither's desire that Mrs. Churchill devoted herself to nursing the deceased when he was ill. On the other hand, it is contended by the contestants that the evidence shows that the residuary legatee and the deceased sustained other than lawful mutual relations; that it was a case of man and mistress rather than of patient and nurse, and that all the circumstances of the conduct of the residuary legatee make irresistible the inference of undue influence and sustain the charge that she used her proximity and position toward him to foster and fasten insane delusions in his mind with reference to his wife and family, and that of this influence and these delusions the will was the offspring. If this contention be borne out by the evidence, much of the argument of the proponents as to the character and extent of importunity that will fall short of undue influence goes for naught, because there is a distinction between the influence of a lawful relation and the influence of an unlawful relation.

The will of a man who has testamentary capacity cannot be avoided because it is unaccountably contrary to the common sense of the country. His will, if not contrary to law, stands for the law of descent of his property, whether his reasons for it be good or bad, if indeed they be his own, uninfluenced by an unlawful influence from others. Lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it, and there can be no presumption of its actual un-

lawful exercise merely from the facts that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary dispositions. Such influences are naturally very unequal and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and the law cannot criticise and measure them so as to attribute to them their proper effect, no will can be condemned because the existence of such an influence is proved, and because the will contains in itself proof of its effect. It is only when such influence is unduly exerted over the very act of devising, so as to prevent the will from being truly the act of the testator, that the law condemns it as a vicious element of the testamentary act; so the law always speaks of the natural influence arising out of legitimate relations. But we should do violence to the morality of the law, and therefore to the law itself, if we should apply this rule to unlawful relations; if we should thereby make them both equal in this regard at least, which is contrary to their very nature. If the law always suspects and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian and trustee, where such persons seem to go beyond their legitimate functions and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence over the kind of act that is under investigation? In their legitimate operation those positions of influence are respected; but, where apparently used to obtain selfish advantages, they are regarded with deep suspicion; and it would be strange if unlawful relations should be more favorably regarded.

The voice of the law on this general subject is distinct and emphatic, transmitted through many generations and embodied in many Latin maxims, all of which may be summed up in one sentence: No one shall derive any profit through the law by the influence of an unlawful action or relation. The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions; for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so

far as it affects testamentary dispositions favorably to the unlawful relations and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former it is right, because the influence is lawful; and in the latter it may be condemned, together with its effects, because the relation is unlawful. There can be no doubt that a long-continued relation of meretricious intercourse is a relation of great mutual influence of each over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life or very close observation of persons around us in order to reveal the fact. If there was such a relation between the testator and the residuary legatee at the time of the making of the will, it would render inapplicable the cases cited for proponents, and go far to establish the case of contestants: Dean et ux. v. Negley et al., 41 Pa. 316, 80 Am. Dec. 620.

A charge that the parties sustained toward each other illicit relations ought not, as was said in Wallace v. Harris, 32 Mich. 393, to be lightly hazarded, and when once made it should be substantiated by very cogent evidence; unless sustained by clear and satisfactory proof, it should be dismissed. There can be no doubt that it would be pertinent to show the existence of such relation as a fact to prove the prevalence of undue influence. But the proof may fall short of establishing meretricious intercourse, and yet show anomalous conduct between the parties as to justify the inference that, if they were not carnally intimate, they were upon such close terms of acquaintanceship as rarely obtains between nurse and patient. Reputable persons have testified to scenes and incidents and circumstances that support the theory of unlawful relations, and while this is denied and disputed by the witnesses for the proponents, yet it is clear upon the whole record that there was on the part of deceased a fatuous fondness for the residuary legatee and a simulated reciprocation, which strongly tend to establish contestants' charge that she was, during the long period of his ultimate illness, as well as for some time prior thereto, something nearer and dearer far than a mere nurse and attendant. The residuary legatee is a woman of masculine

vigor of understanding, of a native shrewdness of character and enriched by an extensive experience in worldly affairs, and it is by no means inconceivable that she exercised a potent influence over the deceased, and that she practiced for her own profit upon the weak mind of this old man, demented by drink and made incapable by his condition of overcoming the effect of her crafty designs and artificial allurements; and that this influence covered an extended period before and after and including the time, and reaching to the act of making the will and codicil; and, if this influence is shown to have once existed, by whatsoever means produced or acquired—whenever the mind of one person is reduced to a state of vassalage to that of another, and a gift is shown to have been made by the weaker party to the stronger—there the burden of proof will be shifted, the gift will become presumptively void, and the onus of upholding its fairness and validity will rest upon the shoulders of the recipient of the gift. This rule is firmly established in regard to gifts made by deed, and the same principle should hold in regard to wills, and so courts have declared: Gay v. Gillilan, 92 Mo. 250, 1 Am. St. Rep. 712, 5 S. W. 11.

In connection with the issue of undue influence must now be noticed the insane delusion imputed to deceased, and, as thereto related, the insanity proceedings taken against him. It is said by counsel for proponents that there was no delusion whatever in the mind of deceased; that so far as his testamentary disposition adverse to his wife and family was concerned, it was based upon fact and not upon fancy; and that his declaration that he made no provision in his will for his wife or for his children, for the reason that the conduct of his wife and children toward him since the time of the deed of separation (March 30, 1881) did not commend them, nor either of them, to his consideration, was founded upon the truth. What was this conduct? What had they done to alienate them from that consideration which this language implies would have been accorded if the conduct of the one had not been unwifely, and of the others unfilial? Was there any foundation for this disherison, or was it the product of delusion sedulously nurtured by the residuary legatee, whom he describes as having been to him in all his

sickness "a true and tender friend and nurse"? The counsel for proponents declares that the testator was moved to this declaration because a great and unpardonable wrong had been done him by his family; that his spouse had acted as an unloving wife, and his sons and daughters as ungrateful children: that they were constantly harassing him; that he was laboring under no delusion; they were endeavoring to incarcerate him as a lunatic, and that the language of the will shows that the testator fully understood the situation, and had good reasons for what he did. In the same connection counsel for contestants asks the court to compare the will with the complaint in the divorce case between the deceased and his wife, and claims that they are both the product of the same mind; this is the document published as an advertisement in the "Evening Post" newspaper of September 13, 1884, and for the purposes of reference is appended, as printed, to this opinion. This document counsel for contestants denounces as the emanation of the brain of Brumagim, one of the proponents, and it is urged that the authorship is a fact and circumstance in this case that goes to demonstrate that this controversy is the result of a vile conspiracy concocted by the said Brumagim, who has not appeared on the witness-stand because, it is argued by counsel for contestants, he did not dare to come in where his testimony would expose his own infamy in connection with this case. It is claimed that this is a most pregnant circumstance against proponents. Mr. Brumagim seems to have been attorney of record for the deceased in the divorce case, and is one of the executors here, and his counsel say that there is no justification for the assault upon him, forasmuch as he has done nothing in the matter except what was devolved upon him as duty.

The composition of this complaint, so far as its peculiar phraseology goes, may be attributed to the attorney who signed it; while the publication in the periodical and its circulation broadcast may have been solely the act of the plaintiff, without being aided and abetted by his attorney in so unusual a mode of advertising a client's domestic history and marital miseries. This complaint purports to contain a recital of the ultimate facts constituting the cruelty

which was the cause of action, and begins by charging the wife defendant with endeavoring, by false statements in her petition, filed in March, 1881, to have her husband adjudged insane and incompetent, thereby to injure him and get possession of his property and estate; and that she only dismissed such petition when he deeded one-half of his property to her by an agreement, a copy of which is subjoined to the complaint. The actual language of the petition of March 3, 1881, is, in this regard, as follows: "That said Robert J. Tiffany is of unsound mind and is mentally incompetent to manage his property, and, as your petitioner believes, has been thus incompetent for more than six months last past. That he is and for a considerable time past has been squandering, wasting and mismanaging his estate; that, as your petitioner is informed and believes, he is, by reason of his mental incompetency, frequently taken advantage of by impecunious and irresponsible persons, and induced to loan them money without any security for or reasonable prospect of repayment; and that he is liable at any time to make conveyances of real estate and transfers of his personal property upon inadequate considerations, or upon no consideration at all. That the mental condition of said Robert J. Tiffany is not amending, and, as your petitioner believes, is likely to grow worse and still further to unfit him for the management of his property; that unless a guardian be appointed there is great and imminent danger that all the personal property of said estate will be wasted and dissipated, and that the means of maintenance of said Robert J. Tiffany and his family will be destroyed or at least largely reduced. That by reason of his mental condition the said Robert J. Tiffany is violent, imprudent and erratic in his conduct, and is incapable of taking care of himself, and is exposed to injury at his own hands and from others."

The complaint further charges the wife with instigating the insanity inquisition of February, 1883, and the subsequent and consequent guardianship proceedings in which Mr. Eastland was appointed guardian, all of which proceedings, it is alleged, were secretly kept from him, and were willfully and maliciously promoted by his wife, and that the letters were willfully and surreptitiously obtained for the sole pur-

pose of injuring plaintiff and getting possession and control of his property. In connection with this accusation by the husband against the wife, it appears from the official record of insane commitments (volume 6, folio 159, Superior Court, Department 10) that upon the sworn complaint of one M. A. Sweet, made on the third day of February, 1883, the deceased was brought before F. M. Clough, judge of the superior court, who, after having heard the testimony of Dr. James J. Birge and Mrs. Tiffany, and upon the certificate of Drs. L. J. Henry and I. S. Titus, graduates in medicine, and being satisfied that the said Robert J. Tiffany was insane and dangerous to be at large, and of the truth of the certificate of the doctors, which, among other things, declared that he had been more or less affected during the previous six years, ordered him to be taken and placed in an insane asylum at Stockton, and charged the sheriff with the execution of the order. In the matter of the letters of guardianship, the application for which, it is said, was secretly kept from the plaintiff and surreptitiously obtained, it appears that a petition was filed on February 9, 1883, by McClure & Dwinelle, attorneys for Phoebe J. Tiffany, in which she alleged, among other things: "That the said Robert J. Tiffany is insane, by reason of which insanity he is mentally incompetent to manage his property, whereby it becomes necessary that some suitable person should be appointed guardian of his person and estate; and it is the desire of your petitioner and of his said children that your petitioner be appointed guardian of his person and estate. And your petitioner further shows that on the third day of February, 1883, the said Robert J. Tiffany, having had a legal examination by and before a board of physicians duly and legally constituted to examine him as to his sanity, was by it pronounced to be insane, whereupon, and on the day and year aforesaid, he was by one of the judges of this court committed to the authorities of the State Insane Asylum at Stockton, and under such commitment he was conveyed and is now in charge of the authorities of said asylum at Stockton; and your petitioner further shows that she is informed by Dr. Shurtleff, the principal resident physician at said asylum, that in his opinion the said Robert J. Tiffany is hopelessly insane, and that he will probably never

recover his reason, and that your petitioner believes he will be unable to attend this court on the hearing of this petition. Wherefore your petitioner prays that she, or some other competent person, be by this court appointed guardian of the person and estate of said Robert J. Tiffany, with the powers and duties in such cases by law made and provided; that a time and place be appointed for the hearing of this petition, and that notice of the hearing of the same be served upon the said Robert J. Tiffany at least five days before the time that shall be appointed for such hearing."

Upon this petition it appears that on the same day an order was made setting the nineteenth day of February, 1883, for the hearing of said petition, and ordering notice to be given to the said Robert J. Tiffany of the time and place of hearing, at least five days before the time appointed, by serving upon him personally a copy of the citation addressed to him. In accordance with this order it appears from the return of the Sheriff of San Joaquin County that on the twelfth day of February, 1883, he personally served such citation upon said Tiffany. It further appears that it was filed in this court upon the nineteenth day of February, 1883, the return day named in said order, a paper indorsed "Certificate of Dr. Shurtleff," couched in these words:

"Insane Asylum of the State of California,

"Stockton, Cal., February 15, 1883.

"I hereby certify that Robert J. Tiffany is now under my care and treatment for insanity, he having been regularly committed to the State Insane Asylum at Stockton on the 3rd instant by Judge F. M. Clough, of San Francisco; that he is of unsound mind and physically feeble; and that, in my opinion, he is not able to attend Court in San Francisco on Monday, the 19th instant, and will not then be able, without injury to his health generally, and greatly aggravating his mental disorder.

"G. A. SHURTLEFF, M. D.,

"Med. Supt."

Subsequently, on April 2, 1883, an order was made which recited that "the petition of Phoebe Jane Tiffany for the appointment of herself or some other person as the guardian

of the person and estate of the said Robert J. Tiffany coming on regularly to be heard, and also her further petition that Joseph G. Eastland, of said city and county, be appointed such guardian, being also heard, and the matter submitted for decision, and it appearing to the court and to the judge that the said Tiffany is an insane person, and that a guardian of his person and estate should be appointed, and that the said Eastland is a competent and proper person to be appointed such guardian, it is ordered that the said Eastland be and he is appointed guardian of the person and estate of said Tiffany, and that letters of guardianship be issued to him'' upon his giving the proper bond. It will appear from this comparison that the allegations of the complaint are somewhat at variance with the probate records of the proceedings. The complaint proceeds further to set forth the recovery of the health of the plaintiff and his judicial restoration to capacity upon the 31st of October, 1883, and the discharge of the guardian upon the delivery of the property of his ward to him. The complaint goes on to relate the proceedings in Department No. 8, beginning with the petition filed on the 29th of December, 1883, which, it is charged, was instigated by the wife for reasons similar to those which prompted the preceding proceedings and which resulted in a trial by jury and a verdict on the 12th of March, 1884, that plaintiff was not insane. Then the complaint proceeds to recount numerous charges of false rumors spread abroad by his wife and children, cruelly done for the purpose of annoying and injuring him before the business community, and to cast disgrace upon his life and character, and to get possession of his property. And the complaint further charges defendant with having caused the plaintiff to be confined in the inebriate asylum, and to be hounding the plaintiff with her bitter persecutions, and to have, by her envenomed tongue, caused him great mental anguish and suffering, and that her wicked, cruel treatment toward him, and her conduct had been so utterly at variance with the principles of common decency and kindness that it caused his life to be one of perpetual social sorrow; and so bitterly persecuting had been her conduct and personal treatment toward him that she made it utterly intolerable for him to live with

her in the marital relations, and that her ceaseless aim had not been his social happiness and their mutual enjoyment, but one of bitter persecution and "general cussedness" in her conduct toward him; that she had blighted his life in her fiendish persecution, so that it would be utterly impossible for him to ever have that relation of social, moral and intellectual communication with her that should exist between man and wife. The summing up of the ills visited upon him in the phrase "general cussedness" is a unique contribution to the forms of pleading and an addition to the language of the law that hereafter may aid the draftsman of divorce complaints.

It is asserted by counsel for proponents that the deceased never was actually confined in an insane asylum, but after the commitment sojourned at a hotel in Stockton; and it is asked, if he were insane would that have been allowed? It seems from the testimony that he stopped at the Yosemite House in Stockton by permission of the authorities of the asylum and in charge of a nurse from that institution, and that he was taken care of there by his wife. The certificate of Dr. Shurtleff, the medical superintendent, hereinabove inserted, is of itself a sufficient statement of his condition at that time. All of the proceedings in the insanity inquisition and the application for guardianship were regular, and did not show that the charges in the complaint as to secrecy or surreptitious conduct were true. It appears rather that they were based upon well-grounded apprehensions that the conduct of the deceased was calculated to impair the substance of his estate, and to produce injury to himself and to those dependent upon him. Until he became a hard and habitual drinker, and in many respects a sot, his relations with his wife and family were always loving and affectionate, and it is testified that nothing ever took place between the husband and children to alienate his affections from them. It was after that time when the change in his habits and character became apparent, that when they remonstrated with him for his behavior and endeavored to reclaim him from his debasing courses, that the difficulties occurred. There is no credible evidence here that his wife was lacking in conjugal affection; there is no evidence whatever that she was an un-

faithful spouse, although there is testimony that the mind of the testator was infected with the delusion that she was a party to a low intrigue with a hackman, and that she submitted herself to an embrace with one of the witnesses for the contestants over the corpse of her husband immediately after his decease (Judge's Notes, page 142, line 25 to 32; see page 145, lines 17 to 22). The whole course of her conduct, as revealed by the evidence, and her appearance and demeanor on the stand command credence in the claim that Mrs. Phoebe J. Tiffany was a true wife and a good mother.

It may be, as counsel for proponents argues, that while upon the stand she was acting for effect, but it is hard to believe that this is true when we compare her testimony with the record of her years of tribulation caused by her husband's erratic conduct and the patience with which she endured the trials consequent thereupon. Her conduct was characterized by that charity which suffers long and is kind; which does not behave unseemly, and is not easily provoked; which bears and believes, and hopes and endures all things for the sake of its object, which in this case was the reclamation of her erring husband. It does not seem probable that this woman has been acting a part as a witness in order to delude the court into a judgment contrary to the truth. It is scarcely credible that this wife of forty years has become in her old age so clever an amateur actress that she can make falsehood appear fact without detection. Notwithstanding the charges in the divorce complaint, the court does not believe that her ceaseless aim was to destroy her husband's social happiness and their mutual enjoyment, and that her conduct toward him was characterized by bitter persecutions and "general cussedness"; or that she had blighted his life in her fiendish persecution; or that she had an "envenomed tongue"; or that her conduct toward him was so utterly at variance with the principles of common decency and kindness that it caused his life to be one of perpetual social sorrow. It would seem rather that, owing to his unfortunate infirmity, the contrary of this statement was the case. Her conduct was marked by tender care and solicitude for her husband, notwithstanding the charges so painfully elaborated in the bill of complaint advertised in the "Post" newspaper.

There is nothing inconsistent with this in the filing of the petitions to place her husband under restraint on account of his condition. It is the part of a good wife (when moral means have been unavailing) in the last recourse to resort to the law for the protection of the husband and of the property which is in danger of destruction through his conduct. Her conduct in withdrawing the first application, and in the negotiations which led to the making of the agreement of partition of property and separation, which was done under advice of counsel, should not prejudice her position in this controversy.

Tiffany's mental condition in 1881 was not so fully developed as four years later, although his aberrations were so apparent as to cause apprehension in the minds of those who were most observant of his conduct, and it was the part of sheer prudence to place beyond the reach of wreck some portion of his estate. The circumstances of the Estate of Noah, decided by this court and affirmed by the supreme court (73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287), differed very materially from those surrounding this case, and cannot be considered as affecting the decision of the issues here presented. When the second application for letters of guardianship was made, the deceased was in Stockton, at the Yosemite Hotel, in care of the nurse provided by the superintendent of the asylum, and that application was made in accordance with his request by his wife, as she testifies. Apart from the official certificate of the service of the citation upon Mr. Tiffany, which is conclusive as contradicting the statement that the proceedings against him were secretly and stealthily conducted, his wife testifies that she was present in their parlor at the Yosemite House when the citation was served. She watched him and cared for him, and subsequently in the country at Haywards, and at Oakland and elsewhere. When he was judicially restored to capacity, November 13, 1883, she made no opposition, and says that the proceeding was taken at her request, being in the line of her efforts to reclaim him by considerate and indulgent treatment. The application which was tried before a jury in Department 8 was not made at the request of the wife, according to her testimony, but by the desire of the children; and,

curiously enough, these parties mingled amicably every day, husband and wife and children going to court together. Notwithstanding the nature of the proceeding, there was no apparent acrimony in the family circle at that time. The proceedings were prosecuted and resisted without any bitterness of sentiment, and during the intervals of recess husband and wife and children discussed the situation in a friendly manner. A few days after the verdict the wife testifies that she saw her husband at the Home of the Inebriates, where he remained for about a month, but she had nothing to do with his confinement in that institution at any time.

THE FIFTH STREET ENVIRONMENT.

Concerning the circumstances which environed deceased at number 1 Fifth street, it is said on behalf of proponents that his family did not visit him while he was lying sick, although they were not barred out; that the latch was always down; that no obstacle was placed in the way of free communication between him and his wife and children; that so far from preventing the members of his family from seeing him, or keeping him from returning to them, the residuary legatee was always trying to induce him to return, trying to reconcile him to his family, but he said that he could not trust them (Judge's Notes, page 186); and the witness Ann Baty, who appears to have been assisting the residuary legatee in her attendance upon the deceased during his last illness, testifies that she never saw his wife before that time; that she saw his son William in the fall of 1885 in the house twice; that on the first visit no one was in the room but the deceased, herself and the son, and that on the second visit the daughter accompanied her brother; then only the deceased, the son and the daughter, the residuary legatee and the witness were in the room; that the deceased did not wish to speak to his daughter, but Mrs. Churchill said, "Mr. Tiffany, your daughter is here," and he said "Emma, since you have come, I will speak to you; how is Cecil [that was her child, his little granddaughter]? I should like to see her." Mrs. McGregor said she would bring the child next time; then she said, "Father, why don't you come up to the house? We have a nice room for you there." He

said he would not trust himself to them any more, as he was afraid they would poison him. This witness said she had heard the deceased speak of the treatment of him by his family. She testified that he said his wife had a very violent temper, that at times she had "bit and scratched him in the face until the blood ran down to his collar." This witness also testified that the deceased told her that his son Willie once jumped on his back when he (the son) tried to throw him down. The witness said that she had heard the deceased repeat "time and time again" that his wife had bitten him in the arm, and he told her shortly after he came to 1 Fifth street, in 1884, about his wife scratching and biting him. Miss Baty further testified that the physician, Dr. Rowell, told them not to leave the room when Mr. Tiffany's family came, as he, the doctor, would feel responsible on account of the threats made by them that they "would shut his wind of," and also Mrs. Churchill's, or that he should leave the house. It was in the fall of 1885, she testified, that Dr. Rowell told her about the threats of Mr. Tiffany's family, and told her and Mrs. Churchill not to leave him alone with the members of his family in his room (Judge's Notes, pages 179 to 182).

TESTIMONY NOT EASILY RECONCILABLE.

If this witness speaks the truth, her testimony is not easily reconcilable with the claim that the family had access to the deceased at all times, and that they were always welcome, because there was certainly some restraint imposed by the restrictions which were imputed to the physician, Dr. Rowell. It does seem that when the members of the family visited the deceased before and after the making of the will, with the expectation of having confidential and private conversations with him, the residuary legatee or the witness Miss Baty remained in the room, so that no such intercourse took place without it being exposed to them. It would appear that the wife of deceased and his daughter were always anxious, ready and willing to go and nurse him during his illness, and to reside with him, or have him reside with them, on condition that he would sever his connection with the residuary legatee, and of this he was fully aware, but he still

refused to break the association with the residuary legatee. On many, if not on all, of the occasions when the friends of the deceased called on him, the residuary legatee or the witness Miss Baty made it a practice of remaining in the room during the whole time of the visit, and overhearing all that passed between them: 41 Pa. 314, 315. Why didn't his family visit him at 1 Fifth street? The contestants respond to this question by citing the circumstances of his sojourn at that house and the repellant influences there meeting them. There was certainly some impediment in the way of those who were supposed to be connected with his family in obtaining access to him. (See Judge's Notes, page 69, testimony of Alfred M. Learned, who, upon his first visit, was refused admission by Mrs. Churchill.) With regard to the statements in the testimony of Miss Baty credited to the deceased, there is not a scintilla of evidence supporting such act of physical cruelty on the part of his wife or his relatives; and, if he made such statements, they must have been the product of an insane delusion which led him to regard as certain truths, and actually believe in the existence, on the part of his wife and of his relatives, of conduct and intentions substantially such as he imputed to them. I am perfectly satisfied that there was no foundation in fact for the gross imputations upon his wife or the charge against his relatives, all or any of them, of a design upon his life, or an intention to do him any bodily injury; and that the idea of a conspiracy upon their part to injure him in such manner was purely imaginative, if it at all existed. If a person persistently believes supposed facts which have no existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act and speak like a sensible man. If the deceased in the present case was unconsciously laboring under a delusion, as thus defined, in respect to his wife and his family connections, who would naturally have been the objects of his testamentary bounty, when he executed his will or when he dictated it (if

he did dictate it), and the court can see that its dispository provisions were or might have been caused or affected by the delusion, the instrument is not his will, and cannot be supported as such in a court of justice. The conduct and designs which he imputed to his wife and relations were such as, upon the assumption of their existence, should have justly excluded them from all share in the succession to his estate: 33 N. Y. 624, 625.

NOT A PARTICLE OF PROOF.

There is not a particle of proof in this case that the wife of deceased was ever guilty of the act of which she was accused by Mr. Tiffany, according to the testimony of Miss Baty. I am bound to believe that this is either a figment of his diseased imagination, or a fabrication by her. The wife testifies that she went to this house No. 1 Fifth street, to see her husband, with her son in law, Mr. McGregor. She went to the door and knocked; her son in law was just behind her. Mrs. Churchill came to the door. When she saw who it was she pushed it to in her face, but the wife pushed past and entered the room. The husband was lying on a lounge much too short for a man of his height, with his head toward the door. The wife went up to him and said, "Papa, how are you, papa? I heard you were ill." He put out his arms and he said, "Oh, my dear mamma, I am so glad to see you." The wife said, "I know you are," and she kissed him; he took her hand, and she took her glove off, and he took her hand and he said, "Sit down. I am so glad to see you; I knew you would come to see your old papa when you knew he was sick, anywhere, even into this house, to this room." Then she sat down, and they talked of the loved ones that had passed away, and she talked to him about the dead and those that were remaining and during this time Mrs. Churchill got up twice and gave him whisky; the second time the wife said, "Oh, don't give him that." Mrs. Churchill took notice of the remark, and sat down again. Then the deceased looked around the room and seemed to recognize the residuary legatee and the wife, and said, "Oh, Mrs. Churchill, this is mamma, my wife." Mrs. Churchill got up off her chair and said, "There is no use of your introducing the lady

to me; I know her well, and when she knew me I was no prostitute." The wife turned and looked at her. Mrs. Churchill sat down again, and presently got up and gave him some more whisky, and then took her seat. The husband still held the wife's hand, and kissed it occasionally. She went on talking to him about the family, and after awhile Mrs. Churchill got up and said, "Now, Robert, I will not stand this; that woman cannot come to my rooms again; you have got to choose this very night between her and me; now, right now; she shall not come; and you, too, McGregor, you shall not come." The wife then said to her husband, "Will you not come home? This is no place for you; you will never get well here; I will go with you to any hotel, and I will take rooms in this house if you will let me take care of you, papa; I will nurse you back again to health, as I have so many times before." And the husband said, "Mamma, this is no place for you; go home to the children; I will be out in a day or two." He then kissed her hand, and the wife said, "Papa, let me take care of you; come away from this place; I will take care of you." He said, "I will be out in a day or two." The husband took the wife's hand and kissed it, and said, "Mamma, you know if I was living with you and my wife should come it would not be pleasant; go home, I will see you in a day or so." The wife said, "Papa, I am your wife; it is my place to be beside you; I will take care of you." He said, "I will be well in a day or two; I will come and see you and the children." The wife bade him goodnight and said, "Papa, I will go away." It was then nearly 10 o'clock at night. He kissed her, and she said to him, "Papa, shall I come to see you?" He said, "Yes, mamma." The wife said, "Do you want to see me?" He said, "Yes, mamma, come and see me as often as you can; I will be out in a day or two," and then she went away. Both Mrs. Churchill and Miss Baty in their testimony, who were present at the time, contradict this statement (Judge's Notes, page 185); but there is at least enough in the whole statement to show that Tiffany had not lost affection for his wife. His daughter Emma visited him altogether six or seven times. When she would go there he would put his arms around her and kiss her, and ask how "dear mamma" was and ask after

his daughter's husband; he was under the influence of liquor every time; the daughter brought him some wine jelly once, but did not bring him anything else; she last visited the house the day before Thanksgiving, 1885, but did not see her father there that time; she saw him two days before, and he was so ill he could not walk; he was greatly emaciated, and Mrs. Churchill and Miss Baty were there. She went twice to the theater with her father in the spring of 1886, the second time the 20th of March; she went with her child to see "Buffalo Bill" on Saturday afternoon; she met her father at the theater door; that day at the theater he took her by the hand and said, "Mrs. Churchill cannot turn me against you; I have made my will and provided for you."

BRUMAGIM AT 1 FIFTH STREET.

In April, 1886, was the first time she saw Brumagim at No. 1 Fifth street; Mrs. Churchill followed him out; he only remained a few minutes; she never saw her father alone in that place; she made a visit there in May, 1886; her father said he wanted her to speak to Mrs. Churchill and Mrs. Churchill to speak to her, and they did so; Mrs. Churchill said, "Robert, Mrs. McGregor is the only one of the family who understands this case." On Sunday, the 23d of May, 1886, the daughter being on a visit to the father, he turned to Mrs. Churchill and asked her to leave the room, as he had occasion to speak to his daughter; she did not leave the room, nor make answer. When the daughter visited No. 1 Fifth street, Mrs. Churchill and Miss Baty, one or both, were always there; sometimes Mr. Brumagim was there, sometimes a Mr. Pat Lynch; one time the daughter at her own home heard her father say he was going to marry Mrs. Churchill at Pioneer Hall, and would drive the family there in a coach and four (Judge's Notes, pages 9 to 13). A witness Mrs. Catherine Donnelly, testifies that she was employed at No. 1 Fifth street by Mrs. Bither as chambermaid; that Mrs. Churchill at that time was also a chambermaid; that there was a kitchen on the second floor, and she saw the wife of deceased there when Mrs. Churchill was in the kitchen, and the wife was making beef tea. Mrs. Churchill said to her, "If she was his wife she would buy him a barrel of rotgut,

and let him drink himself to death; that he would go to the gutter, anyhow." On one occasion she testifies that she heard the deceased say to Mrs. Churchill, "Don't call me Mr. Robert; call me your dear Robert," and kissed her. On another occasion she had conversation with Mrs. Churchill about the deceased, and Mrs. Churchill had said that his wife had thrown him out, and she had picked him out of the gutter; and his wife was only a common whore, and that he had caught her in a house of assignation with a hackman. This last conversation spoken of was in March, 1885. Again she met her on Kearny street and had a conversation with her, and the witness said to Mrs. Churchill, "I see you have bought a lot; how did you get the money so quick?" to which inquiry the response was, "I have made a great deal of money in stocks, and have bought the lot and paid for it." Once again, on Fifth street, Mrs. Churchill said, "I have had a handsome Christmas present, a pair of blankets, two oil paintings and a diamond ring, which Mr. Tiffany gave me." This was in April or May, 1886 (Judge's Notes, pages 16, and 17). All of these statements are denied by Mrs. Churchill (Judge's Notes, page 184). The deceased went to room at 628 Sutter street, in the house of Mrs. Kate E. Learned, in December, 1884, and was there about a year and a half; he came with a Mr. Rapp; he stayed in the first room six or seven months, then he took a small room for eight or nine months; he went away five or six months after he came, and then returned; his attorney, Joseph M. Wood, paid for three or four months: Mrs. Churchill paid one month, the rest of the time he paid himself; he did not stay there half the time in the first period referred to; during the second period he was absent for a month at a time; Mrs. Churchill had a key to his room, also of his trunk; Mr. Tiffany introduced Mrs. Churchill to Mrs. Learned; he said that Mrs. Churchill was a dear friend of his; she lived at 1 Fifth street, and did the chamber work for Mrs. Bither; Mrs. Churchill may have remained there fifteen or twenty minutes at the time in his room; she was introduced to the witness two or three months after Mr. Tiffany first came, and the witness saw her there afterward during the first period of his stay at the house: she would come sometimes two, or three, or four times a

month; she would be accompanied by him, and remain a half hour at a time, and he would go out with her; she would always be at his room. The witness learned from Mr. Tiffany that he went from her house to 504 Sutter street, to a Mrs. Meyers; he subsequently returned to the house of Mrs. Learned to see if he could get a room, and said, "I was sorry I left your house, but Mrs. Churchill desired it, as she and Mrs. Meyers were friends, but now they have quarreled and I now want to come back." He and the witness had a conversation about Mrs. Churchill; he said, "What is the rent of the front suite of rooms, and what will you board me and Mrs. Churchill for? I am going to get a divorce, and am going to marry Mrs. Churchill." The witness had a great many conversations with him upon that topic. She had also a conversation with Mrs. Churchill in the latter part of 1885. Mrs. Churchill came to her house and said she wanted his things. The witness said she was glad, as she did not want him in her house; Mrs. Churchill said she had taken a room for him in O'Farrell street, that his family had tried to put him in the insane asylum, that she would take care of him, that his family were willing that she should take care of him, but were not willing to do anything for him; that she would show them she should take care of him, and would do so to spite his wife. Mrs. Churchill took his trunk and other things belonging to him. The witness said Mr. Tiffany would very seldom come in before 12 or 1 o'clock at night; he was always intoxicated when he came in; he wore ornaments on his person during the second period, a tooth in his necktie. The tooth, he said, was Mrs. Churchill's, a diamond ring, which he said she gave him as a present. He told her he gave to Mrs. Churchill all the money, and she paid the bills and collected the rents. There was another conversation on that subject, in which he said he had given her certain property, and had her name put in large letters, "Churchill Court." The witness told her that on the occasion of the divorce trial he told her he was going to appeal, and would beat them, and said, "I will beat them, you bet your bottom dollar, and on the first of the month I will marry Mrs. Churchill." This was in August or September, 1885 (Judge's Notes, page 31). Another witness, Mrs. Sallie Johnson, an

old friend of the deceased, saw him frequently in 1885, and observed him closely, and was frequently with him, and visited him in November, 1885. On one occasion he was lying on a lounge too short for him, in the room, his clothes were badly disordered and uncleanly. This was on November 7, 1885. He was very glad to see her; he wanted to kiss her, and said, "I am very glad to see you, good lady, that you have come to see me." She said she was very sorry to see him so ill; he spoke of some of his family very abusively. There was a woman in the room to whom she was introduced as Mrs. Churchill. The second time this witness called the deceased was very ill and very excitable, and said to her, "Do you see that on the mantle-piece there [pointing to what appeared to be a glass of jelly]? They have brought that to poison me." He said his daughter brought it; he asked witness to drink with him, liquor of some kind, which she declined; the liquor was handed to him by Mrs. Churchill; the deceased got angry and abusive to the witness when she declined, and said, "Damn it, cannot you take a drink with an old friend?" He abused the members of his family, said they were going to rob him and poison him; the witness communicated to the daughter the information of the conversation with her father (Judge's Notes, pages 33 and 34). Another witness, Mrs. Sarah B. Cooper, an old acquaintance and friend of the deceased and his wife, and superintendent and manager of the kindergarten system of schools, relates many peculiarities of the deceased as a basis of her opinion that he was insane in November and December, 1885. From May to November of that year he visited her school as often as forty-eight times; that she believed him to be unsound of mind (Judge's Notes, pages 34 to 38). A witness, E. H. Neville, a twenty-five years' acquaintance of the deceased, very intimate with him from 1878, testifies to peculiarities indicating a change in his character, from daily observations, and recites numerous incidents and instances of his conduct indicating insanity. For five years the deceased occupied a desk in the office of the witness, and was in there every day, or nearly every day. Once in 1884, the deceased showed to the witness a human tooth, mounted as a pin on his scarf, which he told him came from the mouth of

Mrs. Churchill, whom he described as "the loveliest and most angelic woman on earth," and that he was going to marry her. The deceased also showed to the witness a picture of a woman pasted in his hat, on which was written, "From Lura to Robert." The witness related that the deceased brought several persons to his office upon one occasion and introduced them to him, one as his dear friend "Shorty Simpson," whom he kissed and embraced; another was Herbert Slade (known as the "Maori," a prizefighter); also another one, "Sconchin" Maloney, and others of more or less like character. One time, after the divorce suit was brought, the deceased came to the witness' office with his wife, and said it was the happiest day of his life, all his troubles were arranged, he and his wife were going to see his Mission property, and they went out together; subsequently on the same day the deceased came into the witness' office and said he was much pleased that it was all arranged. The witness asked him, "How about the divorce suit?" The deceased said that was "all nonsense," he would not have brought it, but he "was persuaded to do so by that Brumagim," using an opprobrious epithet. Another witness, John Mason, an old citizen and acquaintance of the family, testified that after the witness had gone into business as a brewer at the Mission, Twenty-ninth and Tiffany avenue, in March, 1884, he saw the deceased as often as four times a week, from that time to his last sickness, except when he was sick and away from there; he had drank with the deceased may times, too numerous to mention; sometimes at the place called Cody's, on Twenty-ninth and Mission streets; he had numerous conversations with the deceased, which occurred during the progress of the work of construction of the Tiffany block, when the witness, at the instance of deceased, noted the manner in which the work was done. The witness saw Mrs. Churchill once at Cody's, and was introduced to her by the deceased, who came down to the brewery and insisted on the witness going to be introduced, which the witness did not desire. The witness said to deceased that he did not want to go; that the deceased had no grounds for separation or divorce from his wife; but he went, and in the back room adjoining the bar-room saw Mrs. Churchill; he was introduced

by the deceased to her as the lady to whom he was going to be married as soon as he got a divorce; she made no remark; the three had a drink together. The witness saw her subsequently several times out there, and saw the deceased in the fall of 1885, sometimes at the brewery and sometimes at Cody's. Once the deceased came out to the brewery; the deceased said that he was something of a pugilist himself, and took off his coat and vest and rolled up his shirt sleeves to show his muscles, and said he was as vigorous as a man of twenty-five or thirty years of age; that when John L. Sullivan came out he would have a set-to with him; he could not live without sleeping with a woman and Mrs. Churchill "just filled the bill." The witness said to him that he was foolish to talk in that manner. Subsequently, and in the same conversation, the deceased said he was going back to his "mamma"; that she was a good wife to him and true, and he was going back, as his advisers were not advising him right. The deceased also said he had made his will, and everything was going to his two sons, his "mamma," his daughter and his grandchild. Another witness, D. B. Jackson, an acquaintance of the deceased from 1843, when he worked with him in New York City, after testifying to many events during that period, says that in the fall of 1884 he met the deceased at the Bay District Race Course, accompanied by Mrs. Churchill, whom the witness identified in the courtroom as the person to whom the deceased introduced him at the time; the deceased showed the witness her card photograph in his hat. Prior to the introduction the deceased said to the witness, "I want to introduce you to my daisy"; that was after the State Fair in October, 1885. He often said to the witness, of Mrs. Churchill, that "she was the dearest creature on earth, taking the nicest and best care of him." A few days before the deceased was taken down finally, he came to the office of the witness with his daughter and grandchild, and said that they were provided for; he had made everything all right.

A large number of witnesses, in addition to those already alluded to, relate the declarations and conversations of the deceased on a great variety of occasions to the same general purport as those stated. The proponents have examined a

large number of witnesses, many of whom knew the deceased but slightly, although the period of their acquaintance was of long duration, and while their social and business standing may be good their opportunities for intimate observation were not sufficient upon which to predicate a judgment as to his state of mind; such gentlemen as John K. Orr, with whom the deceased transacted business in a retail way for many years, but whom he did not meet socially, except as he was pleasant in intercourse when he came into his store, and would talk about his travels in Europe, and his visits to Ireland; and Colonel Wason, whom he would meet on the street frequently or at the Pioneer Hall; or Charles H. Burton, whom he met casually on the street; or R. T. Van Norden, Solomon Tesmore, H. A. Cobb, A. A. Enquist and others of like good character who speak of their occasional contact with him. This class of witnesses when they found him able to transact the ordinary affairs of business, and saw nothing extravagant or peculiar in his manner readily pronounced him of sane mind. Witnesses of equally good character, many of whom had enjoyed a long and intimate acquaintance with the person of whom they were called upon to speak, testified with great positiveness to the contrary; and while these witnesses are sought to be discredited by the counsel for the proponents as belonging to one of two classes outside of the family, either their partisans or the friends of Mr. McGregor, yet they do not appear to be otherwise discredited, and there is no reason why the court should consider their opinions as of less value than those of others with no superior opportunities of observation. Take the testimony of John Mason, or Raphael Weill, of Henry White, Thomas D. Mathewson, Philip A. Roach, E. B. Vreeland, Cyrus W. Carmany, John J. Haley, Amory F. Bell, M. H. De Young, A. C. Bradford, Davd Scannell, R. F. Bunker, John Perry, Jr.—scarcely any of these men can be said to be partisans, and they all concur in the conclusion that in November and December, 1885, the deceased was of unsound mind. I have examined, with great attention, the mass of evidence in this case, but have found it impracticable to make such an analysis as I have desired. There is much of the evidence to which I have not alluded, and to which, on account of its

volume, it is almost impossible to allude with advantage. I think the facts in evidence warrant the conclusion that the deceased was of unsound mind at the time he executed the papers offered for probate; and even if this issue were not satisfactorily established, I think it is clear that he was acting under undue influence. Upon this second issue the evidence must often be indirect and circumstantial. As it is laid down in the authorities, naturally, persons who intend to control the actions of another, especially in the matter of the execution of wills, do not proclaim that intent. Very seldom does it occur that a direct act of influence is patent. The existence of influence must generally be gathered from circumstances, such as whether the testator had formerly intended a different disposition of his property; whether he was surrounded by those having an object to accomplish, to the exclusion of others; whether he was of such weak mind as to be subject to influence; whether the paper offered as a will is such a paper as would be probably urged upon him by the persons surrounding him; whether they are benefited thereby to the exclusion of formerly intended beneficiaries. Undue influence can rarely be proved by direct and positive testimony. It may be inferred from the nature of the transaction, from the true state of the affections of the testator, from groundless suspicions against members of his family if any such have been proved, and from all the surrounding circumstances.

The legal principles which relate to insanity, insane delusions and undue influence have been so frequently laid down by this and other courts, and are so familiar as to render repetition idle. I do not deem it necessary to consider critically the evidence of the witness Swasey, whose "daily journal," or diary, furnished the basis of his recollection of what occurred during the last sickness of the deceased. I do not agree with the counsel for contestants in the theory that that book was written up pending the contest for the use of the witness, but my impression is that it was written up from day to day during the period of the deceased's last illness, with a view to its possible use in some dispute arising over the disposition of his property, and that its opportunity was found and improved in this controversy. Coun-

sel for proponents claim that the evidence of Mr. Pierson, one of the executors, and the gentleman who drafted the will, should carry conviction, because he stands in his profession where the most ambitious might wish to attain for learning and integrity. Notwithstanding Mr. Pierson's character as a man and his learning as a lawyer, it is not impossible that he erred in opinion as to the soundness of the mind of the person whose will he drafted, and that he was not fully aware of the circumstances that surrounded and the influences that governed the testator.

MR. PIERSON'S EVIDENCE.

Mr. Pierson testified that he had been a practicing lawyer in San Francisco for twenty-five years; that he had a nodding and speaking acquaintance with Mr. Tiffany for that length of time prior to the latter's death; that he had business relations with him; was employed as counsel for him in the divorce case in 1885; that he had frequent consultations with him until the case was actually tried, in August, 1885; some time after he was employed in that case, the witness was engaged in an action brought by his wife against him, and had a consultation with the deceased once or twice; also, he was consulted in another case, on a promissory note against him, and he also drew his will on the 15th of November, and the codicil on the 15th of December, 1885. The preliminary consultation for the will was on Sunday, November 15, 1885; it was an exceedingly stormy day; it was 11 o'clock when the witness arrived at No. 1 Fifth street and went to the room, one of the suite where the deceased was; they had a cursory conversation about half an hour before the witness asked the deceased if he was about to make his will, while the witness was seated by the fire getting warm and dry; the deceased gave the witness instructions about the composition of the will; while he was giving such instructions the lady whom the witness subsequently knew as Mrs. Churchill came into the room; while the testator was saying to the witness, "Leave the rest to Mrs. Churchill," she said, "Mr. Tiffany, if you are making a will, don't name me in it, as it will only cause me trouble"; the deceased said, "What business is it of yours? Leave the room," and she left. The witness went

into another room, wrote it out, came back, found there—in Mr. Tiffany's room—Dr. Rowell, Mr. Anderson and the testator. Mr. Tiffany was "perfectly sound" in mind; at different times deceased spoke of his wife and family having conspired against him, put him in the Home of Inebriates, having had him declared insane for the purpose of robbing him and getting possession of his property; he spoke of trying to obtain a loan and being met at all points by members of his family, who interfered with his purpose by threatening bankers and others with suit. This was substantially what he said to the witness, who never saw the deceased under the influence of liquor. The codicil was drawn in the office of the witness December 15, 1885, at which time the mind of the testator was "perfectly sound"; it was so at all times that the witness had business relations with him. The deceased wanted the witness to have $1,000 in the will, but he declined to draw any will wherein he would be named as a beneficiary, and told the testator that if he wanted him to benefit by his bounty he must get some one else to draw the will. The subscribing witness, Dr. Rowell, is the man who certified that the deceased died of typhoid fever, and the other subscribing witness, Anderson, is a person who was without occupation and was accommodated by Rowell with lodgings in his office, and was not produced at the contest owing to his absence in unknown parts (Judge's Notes, page 199).

CONCLUSION OF COURT.

In all that Mr. Pierson did he may have been acting in a perfectly professional manner, and yet have erred in his opinion as to the soundness of the mind of the testator, for experience teaches even those who come into daily contact with insane persons how difficult it is to discern the fact of insanity, and the slightness of Mr. Pierson's acquaintance with the testator is shown when he states that although he had known him for twenty-five years he had never seen him under the influence of liquor. My own conclusion is, upon the whole case, that the testator was not of sound mind at the time of the execution of the paper offered for probate, and that he was unduly influenced thereto by the residuary legatee.

BASIS OF CONCLUSION.

This conclusion is based upon the entire body of evidence, which has been thoroughly examined by me. I have not undertaken to digest the testimony of every witness, but no one of them has been excluded from consideration in reaching the result, which seems to me the inevitable event of an examination of the facts elicited in the progress of a contest which was characterized throughout on both sides by a determination and spirit rarely equaled.

Probate denied.

One may Place Himself so Far Under the Influence of Intoxicating Liquor that for the time being he cannot do any legal act, or he may, by an excessive use of alcoholic stimulants for an extended period of time, perhaps permanently dethrone his reason. A person may, therefore, by an inordinate indulgence in intoxicants, temporarily and possibly permanently incapacitate himself to make a will. Yet the fact that one is addicted to the excessive use of liquor, or that he is in some measure under its influence, manifestly does not, as a matter of law, establish a want of testamentary capacity. Nevertheless, such inebriety is always admissible in evidence as tending to show unsoundness of mind, of vulnerability to undue influence, its effect being question of fact for the jury: Estate of Hill, ante, p. 380; Estate of Cunningham, 52 Cal. 465; Estate of Gharky, 57 Cal. 274, 278; Estate of Lang, 65 Cal. 19, 2 Pac. 491; Estate of Wilson, 117 Cal. 262, 49 Pac. 172; In re D'Avignon's Will, 12 Colo. App. 489, 55 Pac. 936; Estate of Van Alstine, 26 Utah, 193, 72 Pac. 942; Estate of Rathjens, 45 Wash. 55, 87 Pac. 1070. "We cannot say, as a rule of law, that because a man is a drunkard, therefore he is of unsound mind. It is a question of fact for the jury or court below to determine whether the inebriety has had the effect of rendering his mind unsound, either permanently or temporarily, covering the time of the execution of the alleged will": Estate of Johnson, 57 Cal. 529.

A Will is not Invalid Because It may Appear Unwise, Unjust, or Unnatural in its provisions, for the law does not make the right of testamentary disposition dependent upon its judicious exercise: Estate of McDevitt, 95 Cal. 17, 30 Pac. 101; Estate of Spencer, 96 Cal. 448, 31 Pac. 453; Estate of Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192; Estate of Donovan, 140 Cal. 390, 73 Pac. 1081; Estate of Morey, 147 Cal. 495, 82 Pac. 57; Ames v. Ames, 40 Or. 495, 67 Pac. 757; In re Turner's Will (Or.), 93 Pac. 461; Estate of Gorkow, 20 Wash. 563, 56 Pac. 385. Nevertheless the injustice or unnaturalness of a will is a circumstance which may be considered with

other evidence tending to show, on the part of the testator, an unbalanced mind or a mind susceptible to or swayed by undue influence: Field v. Shorb, 99 Cal. 661, 34 Pac. 504; Estate of Wilson, 117 Cal. 262, 49 Pac. 172, 711; Estate of Langford, 108 Cal. 608, 41 Pac. 701; Hubbard v. Hubbard, 7 Or. 42; Rathjens v. Merrill, 38 Wash. 442, 80 Pac. 754. "That a will is what may be called undutiful is material only when the circumstances are such as to show that the testator, if uninfluenced, would most likely have made what is called a dutiful will": Estate of Ruffino, 116 Cal. 304, 48 Pac. 127.

On Undue Influence as invalidating a will, see Estate of Hill, ante, p. 380, and note.

ESTATE OF PATRICK CURTIS, DECEASED.

[No. 16,787; decided July 30, 1896.]

Probate Court—Jurisdiction to Try Title.—The superior court, sitting in probate, has no authority to adjudicate the question of title to personal property in dispute between a third person and the estate of a decedent.

The administratrix of the estate of Patrick Curtis, deceased, filed a petition alleging that certain personal property belonging to the estate was in the possession of Patrick Reddy, who refused to deliver it to her. The petitioner prayed for an order requiring him to do so. A citation was issued and served upon the respondent, who filed his answer wherein he denied that he had any property of the estate in his custody, and alleged that decedent had given him the property claimed by the petitioner.

Quitzow & Hurlbut, for administratrix.

J. C. Campbell and W. H. Metson, for respondent.

COFFEY, J. In obedience to the order and citation of this court, certain writings of Patrick Curtis, now deceased, have been submitted to the court for examination and interpretation, and the questions are:

First. Do these writings make and constitute a valid gift causa mortis? And if not, then,

Second. Do they make and constitute a testamentary disposition of the property of the decedent—or, in other words, can those writings be proved and probated as the last will and testament of the deceased?

The writings are all dated November 6, 1896, and it is claimed by Mr. Reddy that he obtained possession of all the property by gift on the eleventh day of November 1895, and the evidence shows that Patrick Curtis died November 25, 1895; so that in case Mr. Reddy did obtain possession of this property by gift on November 11, 1895, he obtained possession prior to the death of the donor.

Section 1149 of the Civil Code is as follows: "A gift in view of death is one which is made in contemplation, fear or peril of death, and with intent that it shall take effect only in case of the death of the giver."

In this matter we find Mr. Curtis in bed suffering from the effects of a severe surgical operation, sending to Mr. Reddy, through the agent of Mr. Reddy (not the agent of Mr. Curtis), the property that he then possessed. The means of obtaining possession and control of the thing was thus given to Mr. Reddy, and there was an actual delivery of the thing to him during the life of Mr. Curtis. Hence section 1147 of the Civil Code was complied with. Mr. Reddy actually reduced the property to his possession before the death of Mr. Curtis. The gift was made in contemplation of the near approach of death by the donor. The proof showed the existence of a bodily disorder, an illness which imperiled the donor's life and which eventually terminated it. The gift was made, therefore, by Mr. Curtis in contemplation, fear and peril of death, and if Mr. Curtis had not expressed his intent respecting a gift of that character it made no difference. The expression of his intent respecting the gift would neither add to the strength nor detract from it. Section 1149 of the Civil Code is conclusive upon that matter. It determines the intent. It declares that "with intent that it shall take effect only in case of the death of the giver."

To repeat: There was a very sick man; there was a delivery of the property from him to Mr. Reddy for the donee during the lifetime of the giver. The giver parted with all

dominion over the property at that time, and Mr. Reddy actually reduced the property to his possession and control during the lifetime of the donor. The transaction, therefore, was legally complete in every respect when the property passed from the control of Curtis to that of Mr. Reddy, the intent being fixed by statute, and Mr. Curtis actually dying from that same sickness: See Daniel v. Smith, 64 Cal. 346, 30 Pac. 575.

Counsel for administratrix argue strenuously that no possession, actual or symbolical, was given to Mr. Reddy by the decedent. It is difficult for the court to understand how, in the conceded circumstances of this case, delivery to the donee could have been more effectual.

With reference to an acceptance of the gift on the part of the donee, in case of a beneficial gift, the assent of the donee is presumed until the contrary appears. The authorities so hold: 9 Am. & Eng. Ency. of Law, p. 1351.

A gift in view of death is one which is made in contemplation, fear or peril of death, and with intent that it shall take effect only in case of the death of the giver: Civ. Code, sec. 1149.

"There must be a delivery of the property, either to the donee or to some person for his use or benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time during his life to revoke the gift. (Dole v. Lincoln, 31 Me. 428, 429; Curry v. Powers, 70 N. Y. 217, 26 Am. Rep. 577; Hatch v. Atkinson, 56 Me. 327, 96 Am. Dec. 464; Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486.) All the authorities agree that there must be a delivery of the property intended to be the subject of the gift. (Hamor v. Moore's Admr., 8 Ohio St. 242; Fiero v. Fiero, 5 Thomp. & C. 151; Case v. Dennison, 9 R. I. 88, 11 Am. Rep. 222; McGrath v. Reynolds, 116 Mass. 566.)" Daniel v. Smith, supra.

Is there any such delivery established by the evidence in this case, with intent by decedent Curtis to part with all dominion over the property?

Counsel for administratrix insist that neither the writings submitted in evidence nor the oral testimony show a delivery to the donee in any sense whatever, and insist that the respondent Reddy was the agent of the donor; but counsel mistake the evidence, or this court misapprehends its effect, for, if I have rightly understood the facts, the respondent was constituted the agent of the donee, and as such agent was the recipient of the gift, thus making a perfect donation causa mortis, according to the statute and the decision of the supreme court in Daniel v. Smith, supra, which I have carefully read, and which agrees with all the authorities sustaining the contention of counsel, that to constitute a valid gift causa mortis the gift must be made (1) with a view to the donor's death; (2) the donor must die of that ailment; (3) there must be an actual delivery to the donee; (4) there must be an acceptance of the gift by the donee; and (5) all these elements must concur or transpire during the lifetime of the donor; all of these conditions must be fulfilled to make the donation perfect. The fallacy, if it be a fallacy, of the argument of counsel for the administratrix lies in their reversal of Reddy's relation to the deceased; he was not his agent, he was acting for the donee; the delivery to respondent was a delivery to that donee; there was an actual transfer of the property to the donee, or to some person for his use and benefit, which complied with the requisite essential to the validity of the gift causa mortis.

The gift was made in contemplation of the near approach of death by the donor Patrick Curtis, to take effect absolutely only upon his death; there was a delivery of the property—"a manual tradition" (according to Mr. Justice Thornton in Daniel v. Smith, page 350, 64 Cal., 30 Pac. 575)—to the respondent Reddy for the use and benefit of the donee John Edward Curtis, a reduction to actual possession, an acceptance in law, during the life of the donor Patrick Curtis, and the title had so vested in the donee, subject to the right of the donor at any time during his life to revoke the gift. He died without having made any revocation and the title became absolute in the donee, a complete and perfect investiture.

Out of respect to the counsel who have presented so elaborate and erudite an essay upon the subject matter of this opinion, I have taken the pains to examine a question which this court, sitting in its purely probate character, has no power to deal with determinatively, for it has been held more than once, notably in Ex parte Casey, 71 Cal. 269, 12 Pac. 118, that the probate forum has no function in these premises, and therefore whatever judgment I might attempt to pronounce would be vain and void.

Shortly stated, this court, sitting in probate, has no right conferred by the constitution or by the statute to adjudicate the question of title to property in a proceeding of this kind, and, of course, such a point may not be waived, even if it were not expressly saved herein by the party respondent, Reddy; for, as the supreme court has said, such an issue, vital to the exercise of the court's power, cannot legally be determined in such a proceeding. He is entitled to be heard according to the forms of law, in an appropriate tribunal: Ex parte Hollis, 59 Cal. 406.

Upon the ground of lack of jurisdiction in this particular department of the superior court, the application of the administratrix is denied and the citation is dismissed.

ESTATE OF HARLOW S. LOVE.

[No. 2,287; decided April 10, 1883.]

Executor—Compensation for Legal Services Rendered by Himself.—Where an executor is himself an attorney, he cannot claim extra compensation for the use of his legal knowledge in administering his testator's estate.

Executor—Commissions When Value of Estate Disputed.—Where an executor claims commissions on the appraised value of the estate, which value is disputed, his commissions should be based on the true value of the property as proved by experts on the hearing of his account.

Executor—Performance of Decedent's Contract.—Where an executor carries out the contract of his decedent to perform legal services, the money received therefor should belong in part to the estate and in part to the executor.

Executor—Delay in Settling Estate.—Negligence was not, under the peculiar circumstances of the case, held imputable to the executor, notwithstanding the administration of the estate was not closed for nearly sixteen years.

Executor.—Where an Executor Allowed Judgment to Go Against Him for realty which had come into his possession, he having acted in good faith, he should not be charged with the value of the lot, but only for an amount which he received in consideration of his consent to the judgment.

Executor.—An Executor's Right to Commissions, given by the statute, is absolute; neglect of duty, or delay in closing the administration, will not take it away.

Executor—Commissions.—A Quitclaim of All the Executor's Interest in his decedent's property will not operate or be construed as a waiver of commissions.

Executor.—Where Items in an Executor's Account are payments arising out of mortgages given by the universal devisee and legatee, they should nevertheless be allowed, where the moneys were devoted to the maintenance of the widow and family, and paid at her request, she being universal devisee.

Executor.—Items in an Executor's Account of expense for abstracts of title and driving squatters off of realty should be allowed, when paid for the widow's benefit and at her request, she being the universal devisee.

Executor.—Items in an Executor's Account of Expense of flowers for grave, of insuring personalty never in his possession, examining tax lists and recording a deed to a legatee, should be disallowed.

Executor.—Items of Expense in an Executor's Account for printing a brief, the amount or payees not being shown; interest on a note made by a legatee, for $100, without voucher, and tax charges without sufficient voucher, were disallowed.

Executor.—An Item of Expense in an Executor's Account, for redemption under tax sales, may be allowed.

Executor.—Where Property of an Estate has been Taken by the City for a Park, the executor should not be charged with the value of the land, but only with the amount received by him from such source.

Executor—Commissions.—Where a Bank Loaned Money to a universal devisee on the executor's representation that a speedy distribution could be had and he would obtain it, and the executor filed a worthless petition therefor, he is estopped from claiming commissions as against the bank.

Executor.—An Expense of $147.50 for a Wall Around a Cemetery Lot may be allowed as a proper and usual charge against a decedent's estate.

Executor.—A Mortgagee of Land Inventoried in the Estate, under a mortgage made by the universal devisee and legatee of the testator, is a party interested in the estate, and entitled to be heard upon the executor's accounts, and on any distribution of the estate. Likewise, a judgment debtor of such devisee, who has acquired, under execution upon the judgment, title to a parcel of the realty inventoried in the estate, is also a party interested in the estate; so, also, is a mortgagee of such judgment debtor.

The opinion of the court in this case was rendered upon a motion to confirm the report of John M. Burnett, referee to examine and report upon the final account of John Lord Love, executor, and the exceptions thereto, which report was filed December 7, 1882. As a general statement of the whole case (apart from the special facts considered with reference to the specific objections to the account), the following is taken from Mr. Burnett's report:

"From the proofs, both oral and documentary, and the admissions of the parties, I find the following facts:

"Harlow S. Love, the testator, died on the 15th day of March, 1866, leaving a last will by which he devised and bequeathed to his wife, Martha C. M. Love, all his estate, with the exception of a small legacy to each child, and appointed his son, John Lord Love, executor.

"The will was filed in the then Probate Court of this city and county, on the 12th day of June, 1866, and on the 28th day of September, 1866, was duly admitted to probate. Letters testamentary were issued May 16, 1867, to John Lord Love, who qualified on said day, and has ever since been executor. On the 29th day of March, 1870, an order of publication of notice to creditors was made, and on the 24th day of October, 1871, a decree showing due publication of such notice was entered and filed.

"On the 18th day of December, 1877, the executor filed in the Probate Court his petition for a distribution of the estate, setting forth he was about to make an inventory, and was 'about to file his accounts as said executor,' and containing the allegation that all the 'debts of said deceased and of said estate, and all the expenses of the administration thus far incurred,' had been paid and discharged, and that the estate was in a condition to be closed.

"The inventory was filed October 10, 1882, and no account was filed until November 1, 1882, when the present account was filed after a citation was issued by this court.

"On the 17th day of August, 1868, Mrs. Love made a mortgage to the German Savings and Loan Society (in which she was joined by John L. Love, as an individual) for $2,500; on the 23d of September, 1868, another mortgage (in which she was also joined by him as an individual) for $2,500; on the 31st day of September, 1868, to the French Bank (in which she was joined by Mr. Love as executor) for $3,000; on the 24th of November, 1869, to the German S. & L. Society aforesaid (in which she was joined by Mr. Love as an individual) for $4,500. Finally, in December, 1877, she made a mortgage to the Hibernia Savings and Loan Society to secure the payment of $30,000, which mortgage covered the lands described in the objections of the said Hibernia Bank. This mortgage was foreclosed in due course, and the title of the mortgagors to the mortgaged property finally vested in the bank by sheriff's deed, which corporation now holds the same.

"On the 3d day of December, 1878, Louis T. Lazme commenced an action against M. C. M. Love to recover certain moneys, and, on a judgment being rendered in his favor, sold under execution the property thirdly and fourthly described in the inventory. In due course of time a sheriff's deed was made, conveying the same to Leila L. Foster, the contestant herein, who is now the owner thereof, subject to mortgages made by her to the Pacific Bank, which mortgages are unpaid.

"About the year 1872, fifty-vara lot number 1 in block 599, and an irregular long strip running into blocks 521 and 600, were taken for the Buena Vista Park, under order 800 of the Board of Supervisors; and in the year 188—, a decree quieting title as against the estate was rendered in the case of Bornheimer v. Baldwin et al., for a part of the land described in the inventory.

"I find that by these transactions the entire interest of Mrs. Love, the residuary legatee and devisee, in the estate was divested, and that the contestants are interested in the estate" (pp. 2-5).

The special findings of fact and conclusions of law by the referee, with respect and directed particularly to the various specific objections and exceptions to the executor's account, are also here given, to be read in connection with the opinion of the court.

As to the value of the estate referred to in the court's opinion, the referee's report said:

"Proof was made as to the value of the lands described in the inventory, and I find the value, at the date of filing it, to be $49,000. On this amount the commissions of the executor if allowed would amount to the sum of $2,090" (p. 9).

As to the executor's right to retain the fee received in Clark v. Reese (arising out of a personal contract of decedent), the referee said:

"I further find that in February, 1866, the testator made a contract with Mrs. Clark to bring a suit against Michael Reese, and associated Alexander Campbell, Jr., with him. The suit was commenced during the lifetime of the decedent, but was not tried until after his death. Mr. Love, the executor, made no contract with Mrs. Clark or with Mr. Campbell on his father's death, but went into the case and assisted to prepare it for trial; participated in the trial; prepared amendments to the statement on motion for a new trial, and assisted generally in the case until its final disposition in the supreme court. The decedent and Mr. Campbell were to get one-half of the amount recovered, and were to divide equally among themselves. The plaintiff eventually received $6,000 in currency, and of the $3,000 coming to the attorneys, $1,500 was paid to Mr. Love. He contends the whole belongs to him—the contestants aver he holds the entire sum for the benefit of the estate.

"It is evident some part of the money belongs to the estate. The testator had performed a portion of the service by which the money was earned; on the other hand, the contract of an attorney is personal, and the relation between him and his client is severed by death. I think the executor should only be charged with $350 in gold, being one-third of the amount as near as may be" (pp. 11, 12).

As to the delay in settling the estate, which was excused by the court, the referee's statement will be found below in the quotation from the referee's report as to the executor's right to commissions (pp. 13, 14).

As to the Bornheimer lot, referred to by the court, overruling the referee, the report of the referee said:

"The suit of Bornheimer v. Love et al., Executor, was for the property firstly described in the inventory. I find the executor not only allowed judgment to be taken, but received $825 for so doing, for which he has given no account.

"While the judgment was without costs, yet, as the law requires executors to exercise the greatest care, I hold he had no right to consent to such a judgment. Having received the property in his possession, his account of its loss is not sufficient, and he must be charged with its value, which is $3,000. I recognize the fact that this is a hard case, but it seems to me the law is clear" (pp. 12-13).

As to the executor's absolute right to commissions, as held by the court, the referee's report said:

"The contestants object to any allowance of commissions to the executor, on the ground that there has been gross neglect, delay and carelessness in the administration of the estate. I find that the executor has kept no accounts whatever; that as testified to by him, the account filed was made up from vouchers and his memory; that nearly a year elapsed from the filing of the will until letters testamentary were issued to him; that nearly four years elapsed from the filing of the will until notice to creditors was published; that no inventory was filed for over sixteen years, and that no account was filed until citation was issued. It is also in proof that he is a lawyer, the only son of decedent and the residuary legatee and devisee; his mother was not acquainted with business, and was not fit to manage her affairs alone. Mr. Love was called on frequently to join his mother in the mortgages given by her, and on each occasion must have felt the necessity of a settlement of the estate. Our law contemplates the speedy settlement of estates. I feel compelled to hold, under the authorities cited by counsel, that commissions should not be allowed" (pp. 13, 14).

As to the executor's waiver of commissions claimed by objectors and contestants, the referee said:

"Contestants read in evidence a quit-claim deed from John S. Love to M. C. M. Love, dated in 1877, and executed just prior to the 'Hibernia Bank Loan,' and claim it operates, per se, as a waiver of commissions. I do not so consider it. While the deed covered all the land of the estate, it only conveyed the interest of the grantor, acquired by a prior deed from Olds, or such other as he had in the law, and not his right to commissions as executor" (p. 15).

As to payments made to the German and French Banks, arising out of mortgages given by the universal devisee and legatee, the referee found and held:

"All the items of payments made through the German Savings & Loan Society and French Bank (not specially withdrawn), and which aggregate: Paid German Bank $4,396.35, paid French Bank $943—$5,339.35, I reject, on the ground that they were payments made on mortgages given by the residuary legatee, and are not proper charges against the estate" (p. 7).

As to items numbers 18, 37 and 25; items numbers 4, 26, 86, 118 and 112; items numbers 13, 66, 72 and 80; items 82, 83, 84, 85, and item 92, referred to in the court's opinion, the referee said:

"I also reject item 4, of $7 for flowers for grave. Item 26, of $29 insurance on personal property, which the executor never took into his possession, but turned over to the residuary legatee; item 18, of $10 paid Brooks & Rouleau for abstract, which I find was for the use of Mrs. Love to secure loan from German Bank; item, 25, of $75 paid Michael Dalton, for driving off squatters and burning of fences; item 37, for $15 paid Rouleau & Mills for abstract, which I find was for Mrs. Love's purposes; item 86, of $5 paid G. F. Sharp for looking up tax lists, which was executor's duty; and also item 118, of $5 paid Hart for similar services, and item 112, of $2.25 paid for recording deed from Olds to John L. Love, on the ground that they were not proper charges against the estate.

"I also rejected item 13, for $20 paid for printing brief in Judson v. Molloy, because the testimony did not show the amount nor persons to whom paid; $50 of item 66, paid Rouleau, as interest on note made by Mr. Love, on the ground that the executor had no right to pay interest; item 72, paid Jarboe & Harrison $100, on the ground that there was no voucher, and no proof as to amount paid; item 80, paid J. P. Dameron for taxes 1871-2, $25.89, on the ground that there was no sufficient voucher.

"The items for redemption of property from tax sales 1871-2, being items 82, 83, 84, 85, amounting in the aggregate $142.64, I have allowed in part and rejected in part. The executor should have distributed the estate, as nearly six years had elapsed when the items were paid since the will was admitted to probate, or should have made a sale to provide money for taxes. I have credited him with the taxes, and have rejected the fifty per cent. required for redemption, as shown by the annexed account.

"I have rejected item 92, for $47.75, taxes 1872-73, on block 520, because there is no voucher" (pp. 7-9).

As to land taken for Buena Vista Park, the referee said:

"The executor has failed to charge himself in his accounts with any receipts of money, but admits in his report of having received $780 for property taken for Buena Vista Park. With this amount he should certainly be charged, but the contestants seek to charge him with the value of the land taken, which is estimated by an expert to have been $2,000. The executor testified that he only received the $780.20; that there were benefits assessed against the property of the estate, as well as damages awarded for the land taken, and that, according to his best recollection, the amount he received was for the difference. The public records by which the matter could be settled have been lost or destroyed, and I am compelled to decide upon the evidence as it now stands. As the executor cannot be held responsible for the loss of the records, and as the law provides for such assessments and awards, I hold that he shall only be charged with the sum received" (pp. 10-11).

As to the estoppel claimed by the Hibernia Savings and Loan Society in its favor, against the executor, the referee said:

"In 1877 the Hibernia Bank was about to loan money on mortgage to Mrs. Love. The attorney of the bank was assured by Mr. Love that there was no obstacle in the way of a speedy distribution of the property to his mother, and that he would attend to the matter. The bank's attorney required a petition for a distribution to be filed, and a letter from the clerk of the Court certifying to that fact, before the loan was passed. The petition was filed and the letter was sent, but as the document was worthless as a petition it was never acted upon. The loan was made under these circumstances. As to the bank, the executor should be estopped from claiming commissions" (p. 14).

There is also another item, not specially referred to in the opinion of the court, but as to which the action of the referee is in general terms confirmed. The item is thus set forth in the referee's opinion:

"I allow $147.50 for wall around cemetery lot (included in item 47), on the ground that it is a proper and usual charge, although the Estate of Barclay, 11 Phil. 123, is directly against such allowance. I find the rulings of our own Courts sustain my position" (pp. 9-10).

As to the fact and legal conclusion that the contestants were parties interested in the estate, and so treated by the court, the referee's statement of facts and his conclusions on that point will be found above in the first quotation from the referee's report.

OBJECTIONS CONSIDERED BY REFEREE.

There were presented objections to the executor's account on behalf of all the parties claiming to be interested in the estate.

On November 13, 1882, Leila L. Foster filed exceptions as daughter, and successor in interest by various deeds, conveyances, etc., of M. C. M. Love, the widow and residuary legatee and devisee of decedent, to the lands thirdly and fourthly in the inventory described, upon the grounds: (1) That no

vouchers were presented in support of the account; (2) that the payments specified in the account were made with moneys obtained by M. C. M. Love from mortgages given by her on property of the estate, or moneys advanced by her and by the objector, to the executor; (3) that executor has not charged himself with various moneys received (among others, moneys received by Mrs. Love on mortgages); (4) that executor has grossly neglected and violated his duties and trust, and no commissions or compensation for extra services should be allowed him; (5) that executor has caused valuation and appraisement of the estate to be increased to three times its true value in order that his commissions may be thereby increased; (5a) that executor's services were to be free, and for the advantage of his mother, the universal devisee; that no charge for services should be allowed, as all the estate was realty, and the executor in December, 1877, released all his interest in it to his mother; (7) disbursements and advances claimed by executor are barred by sections 337, 338, 339, 343, Code of Civil Procedure; (8) the credits claimed by the executor are stale; and (9) the estate should have been closed before January 1, 1869, and so executor is not entitled to claim for advances or services.

On November 16, 1882, the Hibernia Savings and Loan Society (of San Francisco) filed objections on same grounds made by Mrs. Leila L. Foster, and also as follows: (1) Objector is successor in interest of M. C. M. Love, and has acquired her title to land in inventory described, under foreclosure of mortgage made by her to the bank to secure a sum of money borrowed; (2) "Said loan was negotiated for in part by said John L. Love, and was made upon an express agreement, personally made between said corporation and said John L. Love, that said property was free from all liabilities to said John L. Love, arising from his connection with said estate or otherwise, and that said property should be distributed to said M. C. M. Love as soon as possible after the making of said loan; and that he, the said John L. Love, would take the necessary proceedings for that purpose; and said loan was made upon the faith of said agreement." (4 [3]) Said John L. Love conveyed to said M. C. M. Love,

by deed, all his right, title and interest in and to said real property at the time said loan was made.

On November 25, 1882, objections were filed by Pacific Bank (of San Francisco), showing: That objector is mortgagee of Leila L. Foster, under mortgage upon two parcels of land in inventory described; that at dates of mortgage Leila L. Foster had acquired title of M. C. M. Love, the universal devisee, to the aforesaid lots of land, and, therefore, Foster is entitled to distribution. So objector, as such mortgagee, is interested in the estate.

There were also objections to the referee's report filed on behalf of the executor December 14, 1882. These objections by the executor were detailed and elaborate, but not necessary to be set out here.

It should also be noted, what does not appear in the report of the referee, or the opinion of the court, that the aggregate valuation of the estate (all realty, seven lots), as fixed by the official appraisement returned by the executor, was $86,000. The experts independently examined by the referee, and whose testimony was accepted by the court, were different persons from the appraisers previously appointed.

John M. Burnett, referee.

Geo. R. B. Hayes (Stanly, Stoney & Hayes), for Leila L. Foster.

Tobin & Tobin, for Hibernia Bank.

Winans, Belknap & Godoy, for Pacific Bank.

John S. Bugbee, with him Mr. T. B. Bishop, for executor Love.

COFFEY, J. This is a motion to confirm the report of the referee to whom the matter of the final account of the executor was referred, and to settle said account in accordance with said report, and for a decree distributing the property of said estate to the parties entitled thereto. The motion comes before this department on stipulation. The parties interested are the executor, John Lord Love; Leila L. Foster, who appears as the successor in interest by purchase

of Martha C. M. Love, the widow and residuary legatee and devisee of the decedent; the Pacific Bank and the Hibernia Savings and Loan Society, mortgagees.

On the hearing of the motion the executor appeared by John S. Bugbee, Esq., and T. B. Bishop, Esq., who opposed confirmation of the report of the referee; and Leila L. Foster, contestant, appeared by Geo. R. B. Hayes, Esq.

As to claim for extraordinary services: There is no error here. In my judgment the executor is entitled to no compensation for extraordinary services.

It is true he performed a duty advantageous to the estate, but he would have been grossly negligent if he had not used his ability in and knowledge of the law to have done so; and it appears a particular stress was laid by his mother upon the fact that he was a lawyer, and there was no necessity of going to extra expense of employing another to do the duty the executor was competent to perform. The principle and the policy which oppose the allowance of such a claim are too well settled to be now disturbed or assailed: Collier v. Munn, 41 N. Y. 143.

As to value of estate: I think the proof is that the value of the estate was no more than $49,000, according to evidence of Middleton and Magee; and I think the commissions of executor should be based upon this proof. As to valuation, there is no error.

As to fee in Clark v. Reese, it seems to me Harlow S. Love earned a right, dependent upon the result, to the portion allowed by the referee; and that when the executor was paid the one-half of the contingent fee, his associate, Campbell, paid it in recognition of the interest the decedent had in the case as attorney. The moral right of the estate to a portion of this fee is very clear; and the apportionment by the referee seems to be based upon a correct principle. If there is any doubt in my mind, it is that the estate has had less than its due awarded to it.

As to the delay in settling the estate, some indulgence may be extended to the executor, after examining his evidence. While ordinarily in such a case he might seem to be chargeable with great negligence, and an extreme lack of diligence

in closing the estate, the peculiar circumstances here induce me to view his apparent dilatoriness with charity; and I should not feel justified in imputing to him very great blame. Much of the delay was caused by the exaggerated notions of his mother as to the value of the property, and while a more methodical business man would not regard such considerations, we cannot entirely remove from our view the influence his mother had over him in protracting the settlement, in view of her interest in the estate.

As to the Bornheimer lot, I think the referee did not err in charging the executor with the sum of $825. Beyond that, I think the referee erred in charging the executor with the full value of the lot. I think the executor acted in good faith and used his best judgment in that case, and should not be held accountable for error in the exercise of that judgment, if it were an error.

The items aggregating $351.31 (page 7 of referee's report) were properly rejected, the claims not having been properly presented or allowed, except the items of $20 and under, Nos. 6, 20, 115, 117: Code Civ. Proc., sec. 1632.

As to commissions of executor: The right to commissions on the part of executor is absolute under the statute.

The strongest cases uphold this view where the compensation is fixed by law. In this respect the referee erred, and the executor is entitled to his commissions on the proved value of the estate, to wit, forty-nine thousand dollars ($49,000).

As to payments made to German Savings and Loan Society and the French Savings Bank: I think the referee erred in rejecting the claims for the payments to these accounts, because it appears the moneys obtained were devoted to the maintenance of the widow and her family, and with a view to the preservation, care and management and settlement of the estate; and it was done for and at the request of his mother, who was the universal devisee and legatee.

As to items rejected, No. 18 (for abstract in loan from German Bank), No. 37 (for abstract), and item No. 25 (paid Dalton for driving off squatters), the referee erred, as I think these items were proper charges against the estate. Items

Nos. 4, 26, 86, 118, 112 were properly rejected by the referee. Items Nos. 13, 66, 72 and 80 were also properly rejected, for the reasons set forth in the report of referee.

I think the referee erred in rejecting the percentage for redemption in the items Nos. 82, 83, 84, 85, as under the circumstances adverted to in the executor's testimony I do not feel at liberty to hold him culpable to this extent.

Item No. 92 was properly rejected.

As to $780 received for property taken for Buena Vista Park, the referee has not erred in his findings in that particular. The executor is properly chargeable with that sum, and I find nothing in the record which justifies a reversal of the referee's judgment as to that.

As to the estoppel claimed for the Hibernia Savings and Loan Society: I think the loan made by the bank was upon the faith of representations made to its attorney by the executor, which estop him from claiming commissions as against the bank. In this finding of the referee I see no error.

In all respects, except as herein modified, the report of the referee should be confirmed, and it is so ordered.

In Case an Executor or Administrator is Himself an Attorney, he cannot charge the estate with the expense of another attorney to assist him in conducting an ordinary administration, unattended with any legal or other complications. He is required to exercise his own professional skill, and this without extra compensation. Undoubtedly complications or litigation may arise which will entitle an administrator, though himself a lawyer, to the assistance of legal advice and counsel, but he cannot enlist such assistance, and have the cost thereof allowed in his account, in conducting ordinary probate proceedings: 1 Ross on Probate Law and Practice, 765.

An Executor or Administrator does not Necessarily Forfeit His Right to Compensation by dereliction of duty. In the event of the estate sustaining loss by his default or neglect, he should be charged with such loss in his account, and be allowed his commissions: Estate of Carver, 123 Cal. 102, 55 Pac. 770.

The Value of an Estate, for the Purpose of Calculating the Commissions of the executor or administrator, is determined prima facie by the appraisement contained in the inventory. The appraised value is not conclusive, however, and if it is questioned, the court

may institute an inquiry into the actual value: Estate of Carver, 123 Cal. 102, 55 Pac. 770; Estate of Fernandez, 119 Cal. 579, 51 Pac. 581; Noble v. Whitten, 38 Wash. 262, 80 Pac. 451; Estate of Mason, 26 Wash. 259, 66 Pac. 435; Estate of Smith, 18 Wash. 129, 51 Pac. 348; Wilbur v. Wilbur, 17 Wash. 683, 50 Pac. 589.

ESTATE OF THOMAS HAYES, DECEASED.

[No. 4,017; decided Nov. 25, 1895.]

Homestead.—When Application is Made by a Minor child of a decedent to have a homestead set apart from community property, the surviving widow having died, and the other children having attained majority, without applying for a homestead, the court must grant the application and set aside the homestead absolutely, not limiting it to the period of minority or otherwise.

Homestead—Selection from Separate Property.—It is only when a homestead is set apart from the separate property of the decedent that it is required to be for a limited period.

Homestead—Success or to Right.—The right to a probate homestead may be lost, and there can be no successor to that right.

Homestead—How Far an Estate.—The right to have a probate homestead set aside is not an estate; it becomes such when a decree is made setting aside the homestead and title then vests in the beneficiaries.

Homestead—Effect of Setting Aside.—When property is set apart as a probate homestead, the property is then taken out of the jurisdiction of the court.

Homestead.—The Right to a Probate Homestead is tested or considered not as of the date of the death of the decedent but as of the time of the application.

Courts.—It is the Duty of Courts to Administer the Statute Law as they find it, and not to account for its incongruities.

Stafford & Stafford, for petitioner.

P. J. Mogan, for adult heirs, contra.

COFFEY, J. This is a petition to have certain property set aside for the use and benefit of Agnes Hayes, a minor, under section 1465, Code of Civil Procedure. The facts are briefly these: Thomas Hayes died on September 30, 1884,

leaving him surviving as his only heirs his widow, Margaret Hayes, who died on May 15, 1885, and five children. All these children are now over the age of majority, except the petitioner herein.

Decedent Thomas Hayes left only one piece of property, which is situated in San Francisco. It was community property, and it is sought herein to have it set aside as a homestead.

Neither the widow in her lifetime nor any of the children during their minority, except petitioner, applied to have a homestead set aside.

It is asked that the property be set aside absolutely to Agnes Hayes.

Counsel for the other and adult children oppose this, and wish the decree to state that the homestead be set aside to petitioner during her minority.

1. It is the right of the minor to have, and it is the duty of the court to set aside absolutely to her, said homestead, without limitation: Code Civ. Proc., sec. 1465.

"When application is made that a homestead be set aside under this section, the court has no discretion in the matter, but must grant the application: Estate of Ballentine, 45 Cal. 696"; Estate of Davis, 69 Cal. 458, 10 Pac. 671.

2. When once set aside it ceases to be a part of the assets of the estate. It is therefore excluded from the jurisdiction of the court: Estate of Hardwick, 59 Cal. 292; Estate of Burton, 63 Cal. 36; Schadt v. Heppe, 45 Cal. 433.

The homestead must be set aside for the use of the minor children.

If the clause be added "during her minority," the mandatory provisions of the section are not followed, because said clause is a limitation—just as much as if this court undertook to set it aside for one year or two years. It must be conceded that this could not be done. Section 1474, Code of Civil Procedure, alone provides when the court may set a homestead aside for a limited period, to wit: when it is taken from the separate property of the decedent: Phelan v. Smith, 100 Cal. 170, 34 Pac. 667.

The court say: "It is only where a homestead is set apart from the separate property of the deceased that it is required to be for a limited period."

In that case a decree was upheld which set apart the homestead for the use of decedent's widow and family. (See page 170 of report.) See, also, on same point: Code Civ. Proc., sec. 1468; In re Lahiff's Estate, 86 Cal. 151, 24 Pac. 850; Lord v. Lord, 65 Cal. 84, 3 Pac. 96; Hutchinson v. McNally, 85 Cal. 619, 24 Pac. 1071; Estate of Moore, 96 Cal. 522, 31 Pac. 584.

Agnes Hayes has a right to have a homestead set aside. This right is not an estate: Estate of Moore, 57 Cal. 443.

When the deceased mother, Margaret Hayes, and the now adult children failed to apply for a homestead—neglected to avail themselves of this right—they waived it; they lost it.

"If a widow die before applying for a probate homestead, any right to apply which she may have had is gone; no person succeeds to that right; no adult child of hers can have a right": Estate of Moore, supra, p. 445; Estate of Boland, 43 Cal. 642.

A right to a homestead is one that may be lost, and there cannot be any such thing as a successor to that right.

Again, all rights of the widow as survivor of the community, all rights of heirship and testamentary disposition, as well as all rights of creditors, are subordinate and subject to this right to have a homestead set aside under section 1465, Code of Civil Procedure: Estate of Moore, 57 Cal. 442, 443.

The court say: "Setting apart a homestead is a part of the probate proceeding, as much as is the family allowance. . . . . The homestead, when set apart, is to be set apart for the benefit of the widow and children. Every minor child has an interest, and has a right to be named in the decree": Keyes v. Cyrus, 100 Cal. 325, 38 Am. St. Rep. 296, 34 Pac. 722.

The case of Estate of Moore, 57 Cal., is directly affirmed in Phelan v. Smith, 100 Cal. 158, 34 Pac. 667. On page 164 it is held that the surviving wife takes one-half of the community property, subject to the payment of debts, and subject to the exercise by the probate court of the powers over

it vested in that court, and qualified or subject to be qualified by the exercise of those powers.

What those powers are the court then proceeds to define. The heirs take under section 1384, Civil Code, and the widow under section 1402, Civil Code, subject to those powers.

When the proceedings of the probate court are set in motion for the exercise of this right, viz., to have a homestead set aside, and a decree is made, then the homestead becomes an estate, a vested title in those to whom it is set aside.

"And not until such action (setting aside homestead) can it be said that any estate has become vested, either at law or in equity": Estate of Moore, 57 Cal. 443.

Setting apart a homestead vests the title in the party to whom set apart: Fealey v. Fealey, 104 Cal. 360, 43 Am. St. Rep. 111, 38 Pac. 49; Estate of Boland, 43 Cal. 640; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Estate of Schmidt, 94 Cal. 334, 29 Pac. 714; Mawson v. Mawson, 50 Cal. 539; McKinnie v. Shaffer, 74 Cal. 614, 16 Pac. 509.

When a homestead is set apart under section 1465, Code of Civil Procedure, the title thereto vests in accordance with the provisions of section 1468, Code of Civil Procedure.

"The homestead is to be set apart in pursuance of the statute in force at the time when the order is made, and the interest therein which the widow and the surviving child will take is to be determined by the same statute": Sulzberger v. Sulzberger, 50 Cal. 388.

"The decree setting apart the homestead vested the title thereto in the minor children as well as in the mother, ... and the application for the homestead, together with the order setting it apart, were made under the provisions of section 1465, Code of Civil Procedure, ... and by the provisions of section 1468, when property is thus set apart to the use of the family, 'the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one' ": Hoppe v. Hoppe, 104 Cal. 94, 37 Pac. 894.

In other words, the title to land set apart out of the community does not vest according to the provisions of sections 1384 or 1402 of the Civil Code. When the right to have a

homestead set apart under section 1465 is applied for by any of the parties entitled thereto, it is the duty of the court to set it aside absolutely, if taken out of the community property; and for a limited period, if taken from the separate property of decedent. The property is then out of the jurisdiction of the court. The right to have a homestead then becomes a vested estate.

The title thereto vests, then, absolutely according to the provisions of 1468, Code of Civil Procedure. If all the parties entitled thereto lost this right given under section 1465, then this property would vest under sections 1384 and 1402, Civil Code, and not under section 1468, Code of Civil Procedure.

The title under this section vests in the party to whom the property is set aside under section 1465, except it be decedent's separate property.

If there be no minor children, although there may be adult children, the title no doubt vests in the surviving widow or husband.

If there be a widow and minor child or children, the title vests, one-half in the widow, and one-half in the child, or in the children, in equal shares.

This is so though there may be adult children. If there be only a minor child or children, the whole belongs to the child or children.

The statute is plain. The rights of the parties are to be tested or considered not as of the date of the death of Thomas Hayes, but as of the time of the application: Sheehy v. Miles, supra.

If the title to property set apart as a homestead under section 1465, Code of Civil Procedure, vests as provided in section 1468, Code of Civil Procedure, how can the adult Hayes children acquire any interest in the property, when that section does not give them any? Neither does the decree.

"It is our duty to administer the statute law as we find it, and not to account for its incongruities": Mawson v. Mawson, supra.

Application granted.

The Duty of the Court to Set Apart a Homestead when a proper application therefor is made is imperative. It has no discretion to refuse the application, but must grant it, for the words "may set apart," as employed in the statute, are construed "must set apart": Demartin v. Demartin, 85 Cal. 71, 24 Pac. 594; Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116; Estate of Burton, 63 Cal. 36; Ballentine's Estate, 45 Cal. 696; Estate of Walley, 11 Nev. 260; Estate of Syndegaard, 31 Utah, 490, 88 Pac. 616.

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Executors—Right to Counsel Fees.—The trust imposed upon an executor makes the probate of the will a part of his duty, for which he may employ attorneys and charge their fees against the estate.—Estate of Chittenden, 1.

Executors—Right to Counsel Fees in Procuring Letters.—Counsel fees incurred by an executor in applying for letters are a proper charge against the estate, notwithstanding he renounces his trust before letters are issued.—Estate of Chittenden, 1.

An Executor is Entitled to the Assistance of Counsel, Even When He is Himself an Attorney; and he will be granted an allowance for counsel employed by him; but in dealing with the question, the court will be mindful of the fact that the executor is an attorney of ability. Estate of Shillaber, 101, 120.

The Administrator was Allowed Counsel Fees, Although His Counsel was His Law Partner, in the case at bar, it being proved that in this service such counsel was not the business partner of the administrator.—Estate of Shillaber, 101, 120.

Counsel Fees.—There is no Authority in the Probate Court to allow an attorney appointed by the court under section 1718, Code of Civil Procedure, compensation for services performed in a suit brought by the executor. The attorney's remuneration must be restricted to proceedings before the court of administration.—Estate of Fisher, 97.

Executors—Right to Counsel.—An executor, acting in good faith, is entitled to aid of counsel in all litgation concerning the estate. Estate of Fisher, 97.

Executors—Allowance for Counsel Fees.—It being an executor's duty to defend or prosecute for the estate in all matters where in good faith he believes it necessary, he should be reimbursed though the suit be lost.—Estate of Fisher, 97.

Attorney.—An Administratrix has Power to Employ an Attorney to institute proceedings to recover damages for the death of her intestate.—Estate of Lund, 152.

Claim for Counsel Fees—Jury Trial.—A claim of an attorney for fees for services rendered an estate is an expense of administration, and is not a proper matter for trial by jury. But the claim of an attorney for fees for services rendered to a decedent during his lifetime differs materially from a claim for services rendered to the estate.—Estate of Traylor, 164.

Attorney—Compensation.—An Attorney Who Renders Services for the Benefit of an estate, at the request of the administratrix thereof is entitled to reasonable compensation therefor. The probate department is the proper forum in which to present his claim for such services; they are "expenses of administration," and the probate department has exclusive jurisdiction to adjust and enforce such demands.—Estate of Lund, 152.

Attorney—Contingent Fee.—An Administratrix has no Power to Make a Contract with an Attorney for the payment of a contingent fee to him out of the assets of the estate. But the employment of an attorney to perform services, and a promise to pay him a contingent fee for such services, are separable. The retainer of the attorney, and rendering of services by him in pursuance of such retainer, may be considered by the court apart from the promise to pay a contingent fee, and the compensation will be adjudged according

to the proof of the reasonable value of the services. An attorney accepting employment and rendering services, under such circumstances, must rely upon the subsequent action of the court in adjudging proper compensation, and consents to perform his duty without other compensation than may so be allowed.—Estate of Lund, 152.

2. Amount of Fees.

Counsel Fees.—In the Consideration of Applications for Fees by attorneys appointed by the court, the appointee and applicant should be especially indulgent to the court which has chosen him in its endeavor to properly adjust the rights of the applicant. The duty of submission to the court, stated in the second headnote above, is especially applicable to these attorneys.—Estate of Blythe, 110.

Counsel Fees.—Whether an Estate in Probate is Large or Small, whether it may escheat or not, or go to claimants then unknown, the principles of law governing the compensation of an attorney are the same, and should be applied rigorously by the court.—Estate of Blythe, 110.

Counsel Fees.—In Fixing Attorneys' Fees There are no Established Rules; the character and circumstances of every case, founded upon general principles of justice, and the reasonable value of a capable attorney's services, must furnish the rule.—Estate of Blythe, 110.

Counsel Fees.—In Determining the Compensation of an Attorney it has been the practice, and has become the rule of the court, that expert testimony as to the value of the services will not be considered. The judge will determine the matter for himself.—Estate of Blythe, 110.

Counsel Fees.—The Difficulty and Delicacy of the Court's Duty, in adjusting applications of attorneys for allowance of fees, expressed. Estate of Blythe, 110.

Executors.—The Fees of Attorneys Employed by an Executor in probating the will, being a charge against the testator's estate, can be fixed only by the probate court.—Estate of Chittenden, 1.

See Attorneys, 3; Executors and Administrators, 2.

Note.
- right of executor to counsel fees when he himself is an attorney, 550.
- right of executor to allowance for attorney fees in probate proceedings, 155.
- right of administrator to counsel fees in procuring letters, 4.

COURTS.

Courts.—It is the Duty of Courts to Administer the Statute Law as they find it, and not to account for its incongruities.—Estate of Hayes, 551.

CUSTODY OF CHILD.

See Guardian and Ward.

DEBTS.

See Claims Against Estate; Expenses of Administration.

DECREE OF DISTRIBUTION.

See Distribution.

DEFINITIONS.

See Words and Phrases.

DELUSIONS.

See Insanity and Insane Delusions.

DESCENT.

See Succession.

DETECTIVE SERVICE.

See Special Administrators, 2.

DEVISEES.

See Legatees and Devisees.

DISTRIBUTION.

Note.

jurisdiction of equity to vacate decrees of distribution, 266.
compelling executor to obey decree of distribution, 134.
may be had before the expiration of time for contesting will, 141.

DISTRIBUTION OF ESTATE.

1. In General.

A Distribution of a Partnership Interest, owned by the estate, may be ordered without a previous accounting by the surviving partners to the administratrix.—Estate of Wallace, 118.

Distribution Disposes of the Subject Matter, and Nothing Remains within the jurisdiction of the court, except to compel obedience to its decree, when necessary.—Estate of Wallace, 118.

An Administratrix must be Held to have Concurred, as such, in a request made by her in her own behalf as widow and as guardian of a minor heir.—Estate of Wallace, 118.

An Administratrix, as Such, is Estopped from Attacking a Decree Made upon Her Request, as widow and as guardian of a minor heir, and concurred in by her as administratrix.—Estate of Wallace, 118.

2. **Failure of Executor to Comply With Decree.**

Executor—Failure to Comply with Decree of Distribution—An executor who refuses to make payment to distributees in accordance with the decree of distribution is punishable for contempt, and he cannot plead inability to pay, when his account on file shows the contrary.—Estate of Treweek, 132.

3. **Partial Distribution.**

Partial Distribution—Time for Making.—An application for partial distribution of a decedent's estate in course of administration may be made at any time after the period of administration mentioned in the statute, upon allegations showing the existence of the conditions and circumstances required by the statute.—Estate of Lynch, 140.

Partial Distribution—Time for Making.—The rule prescribed by the statute, as to whom and under what circumstances a partial distribution of a decedent's estate may be had, is the same whether the decedent left a will, or died intestate. And a petition for the partial distribution of a testate's estate is not premature merely because the year given by the statute, within which a contest to the probate of the decedent's will may be filed, has not elapsed.—Estate of Lynch, 140.

Partial Distribution—Petition by Executrix.—A party is not incapacitated to apply for partial distribution of a decedent's estate because she is an executrix of his will.—Estate of Donahue, 186.

Partial Distribution.—Assuming that the Question of Giving a Bond upon partial distribution can be considered upon demurrer to an application for partial distribution, and the objection taken that the party to give the bond is both distributee and executrix—obligor and obligee; the answer is that the law is so written.—Estate of Donahue, 186.

Partial Distribution—Petition by Administrator.—The Practice of the Court since its institution, in recognizing the right of an heir or devisee, although he is also the representative of the estate, to apply for and have partial distribution, referred to and cases cited.—Estate of Donahue, 186.

Partial Distribution—Petition.—Various Grounds of Special Demurrers for ambiguity, presented to a petition for partial distribution of a decedent's estate, are overruled in this case.—Estate of Donahue, 186.

Decedent's Widow Applied for Partial Distribution of the Estate, alleging that "a portion" of it was separate property, and "the other portion" community property, particularly describing and claiming the portion alleged to be community. Demurrer, on the ground that it appeared from the petition to be necessary to ascertain and determine the title to the property asked to be distributed, and that title could only be determined upon final distribution, or

under section 1664, Code of Civil Procedure, overruled. (See Estate of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, affirming Coffey, J.)—Estate of Donahue, 186.

Partial Distribution—Petition by Widow.—Where one petitions for partial distribution of an estate, and alleges that she is the widow of deceased, and is desirous of having her share of the community property therein described assigned and distributed to her, it sufficiently appears that the petitioner is an heir. As widow she is included in the statutory term ''heir.''—Estate of Donohue, 186.

Partial Distribution—Sufficiency of Petition as Showing Title and Seisin.—Where the widow of a decedent petitions to have her share of the community property assigned to her, by way of partial distribution, alleging that certain property described in the inventory of the estate, and then particularly describing it, was conveyed to decedent by a particular person named, and on a particular date mentioned, such averments of title in the decedent and seisin at the time of his death, are sufficient.—Estate of Donahue, 186.

Partial Distribution—Sufficiency of Petition as Showing Community Property.—An allegation in the petition of a widow to have her share of the community property assigned to her by way of partial distribution, that the property (describing it) ''was acquired by the said deceased after his marriage with your petitioner, to wit'' on a day named, ''and was not acquired by gift, bequest, devise or descent; but, on the contrary, by purchase for a valuable consideration, and as she is advised and insists was, and is the community property,'' is sufficient, as a statement of the character of the property. It is sufficient treating the petition as a pleading; but especially so as an application for partial distribution.—Estate of Donohue, 186.

Partial Distribution—Informality of Petition.—A petition for partial distribution of a decedent's estate should not be treated as severely as a common-law pleading. All that it need show is that the person applying has the status of an applicant as described in the statute, and that the administration of the estate is in a sufficient state of forwardness to authorize a distribution.—Estate of Donohue, 186.

Partial Distribution.—Whenever the Administration of an Estate has Advanced so far as to be in a sufficient state of forwardness to authorize distribution, it is the duty of the court, upon petition of any party interested, to proceed to a partial distribution, and for that purpose to make the necessary investigation of facts.—Estate of Donahue, 186.

DISTRIBUTION, PARTIAL.

Note.

persons entitled to petition for partial distribution, 200.
form and contents of petition for partial distribution, 200.

EQUITABLE CONVERSION.

See Conversion.

EQUITY RELIEF IN FROM ORDERS IN PROBATE.

Note.
power of equity courts in general.
vacation of decrees settling accounts, 263.
vacation of orders directing sale of property, 265.
vacation of decrees of distribution, 266.
vacation of orders granting probate of wills, 266.
vacation of orders granting letters of administration, 266.
limitation upon the right to obtain relief in equity, 268.

EVIDENCE.

1. **In General.**

Evidence—Inference from Failure to Produce.—The failure of a party to produce evidence within his power to produce is a circumstance to be taken against him.—Guardianship of Danneker, 4.

Evidence.—It would be Contrary to all Rules of Evidence to Accept Testimony that lacks clearness and certainty, and that is without corroboration, as against adverse evidence, positive and particular in its nature, and without successful assailment, and going to the main fact in issue itself.—Estate of McDougal, 456.

Evidence.—Entries Made in an Account-book at the Request of One Person by another, as to the ownership of property, are of no more value than any other verbal admissions which the writer orally testified to, which ought to be received with great caution. An entry in favor and not against the interest of a party dictating it is disentitled to consideration on that account. And a party cannot be affected by the declaration or entry of a party in his own favor, made without the cognition or consent of the former. Evidence of such character, even when admitted without objection, cannot be too carefully scrutinized, for it is in all cases the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse.—Estate of McDougal, 456.

2. **Expert Testimony.**

Expert Evidence—Its Nature and Value.—Expert evidence is really an argument of the expert to the court, and is valuable only with regard to the proof of the facts and the validity of the reasons advanced for the conclusions.—Estate of Scott, 271.

See Witnesses.

EXECUTORS AND ADMINISTRATORS.

1. Distinction Between.

Executors.—There is a Distinction Between Executors and Administrators. An executor is appointed by the will to carry out its provisions and the wishes of the testator, who burdens the executor with the trusts created by the will and charges his estate with the expenses necessary to carry out his views as expressed in his will; but an administrator has no trust imposed upon him by the decedent, and he looks solely to the statute for his duties, authority, and compensation.—Estate of Chittenden, 1.

2. Appointment and Issuance of Letters—Persons Qualified.

Letters of Administration—Who may Apply for.—The person to whom letters of administration are issued must apply by his own petition, signed by himself or his counsel; a petition by an heir for the appointment of another person is insufficient, and an order appointing an administrator on such petition must fall. Such petition is in effect no petition, and is not subject to amendment.—Estate of Riddle, 215.

Administrator.—A Surviving Wife has the Right to Nominate an administrator of her husband's estate, although she has been removed from her position as executrix of his will because of her permanent removal from the state.—Estate of McDougal, 109.

Appointment of Administratrix.—When a Widow Marries, she ceases to be the widow of her first husband; and then being a married woman, she loses her right to administer his estate, or to nominate an administrator.—Estate of Pickett, 93.

Letters of Administration.—The Order in Which Letters of administration are granted is a matter of statutory regulation, and to the statute the court must resort for decision.—Estate of Lane, 88.

Letters of Administration—Next of Kin.—Where a man dies intestate, and subsequently his widow dies before letters are taken out on his estate, her niece is not entitled to administer his estate as next of kin, for she was not such when he died.—Estate of Lane, 88.

Executor.—The Unfriendliness of an Executrix Toward a Mother, who is striving to obtain what she can by legal means for her children, will not justify the court in adjudging the executrix incompetent.—Estate of McDougal, 456.

3. Removal and Revocation of Letters.

Letters of Administration—Revocation in Favor of Person having Prior Right.—Where letters of administration have been granted to a person who is not entitled to them in his own right, and who was not nominated by the person entitled, they will be revoked upon

the application of the person entitled to letters.—Estate of Rothschild, 167.

Revocation of Probate Because Obtained by Fraud.—The superior court, sitting in probate, has no jurisdiction to revoke the probate of a will because procured by fraud or artifice; the remedy of the party aggrieved is by independent suit in equity.—Estate of McLaughlin, 257.

Executor—Removal for Fraud.—The evidence reviewed, and the charge of fraud against the executrix held not proved. The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue, and a court is not justified in placing upon a person charged with fraud the onus of showing that she is guiltless; on the contrary, it is incumbent upon the person making a charge of fraud to maintain it by a preponderance of proof. Estate of McDougal, 456.

4. **Powers, Duties and Liabilities.**

Executors—Duty to Collect Assets.—It is not only the duty of an executor to seek to recover assets of the estate, but should he forbear the endeavor he would be liable as for malfeasance or nonfeasance.—Estate of Fisher, 97.

Executors—Good Faith in Bringing Action.—Where a suit brought by an executor presented issues of a "serious" and "difficult" character, and occupied many days in trial, a nonsuit being refused, it must have afforded grounds to the executor's judgment in its institution and prosecution.—Estate of Fisher, 97.

Administrator—Liability for Rents When He Places Devisee in Possession.—In the face of objection an administrator will be held accountable for the rental value of realty specifically devised by his testator, which he has placed in the possession of the devisee. But where the premises contained certain articles of personalty, which the testator directed to have left there and which the administrator claimed should be cared for, the court will take into account the care bestowed upon the property by the devisee.—Estate of Shillaber, 101.

Executor—Liability for Interest on Funds.—An executor who withdraws funds from the capital account of a firm of which the testator was a member, and permits them to lie idle in a bank, is chargeable with interest thereon.—Estate of Murphy, 12.

Executor—Duty to Account for Assets.—It is the duty of an executrix to make a showing to the court of the disposition of the difference between what the estate is prima facie entitled to, and what it is claimed was the whole amount received by her.—Estate of McDougal, 456.

Executor—Delay in Settling Estate.—Negligence was not, under the peculiar circumstances of the case, held imputable to the executor,

notwithstanding the administration of the estate was not closed for nearly sixteen years.—Estate of Love, 537.

Executor.—Where an Executor Allowed Judgment to Go Against Him for realty which had come into his possession, he having acted in good faith, he should not be charged with the value of the lot, but only for an amount which he received in consideration of his consent to the judgment.—Estate of Love, 537.

Executor.—Where Property of an Estate has been Taken by the City for a Park, the executor should not be charged with the value of the land, but only with the amount received by him from such source.—Estate of Love, 537.

Executor—Performance of Decedent's Contract.—Where an executor carries out the contract of his decedent to perform legal services, the money received therefor should belong in part to the estate and in part to the executor.—Estate of Love, 537.

See Compensation of Executors; Special Administrators, 2.

Note.
jurisdiction of equity to vacate appointment of administrator, 266.
competency of married woman as executrix, 95.
persons disqualified to act, 208.
right of nonresident surviving spouse to nominate administrator, 110.

EXHIBITS.

See Accounts of Executor.

EXPENSES OF ADMINISTRATION AND THEIR ALLOWANCE.

Administration—Extravagant Costs.—The Impression, Widely Prevalent, of the extravagant cost of administering estates, referred to and the court's position stated.—Estate of Blythe, 110.

Executor—Insurance—Proof of Loss.—It is an executor's duty to prepare proofs of loss in case of a destruction of insured property and hence he will not be allowed a charge incurred for having such proofs prepared.—Estate of Shillaber, 120.

Account of Executor—Objections to Expense of Lease.—Upon the settlement of the account of an executor containing items of expenditures in executing a lease under authority of the will, which items the heirs contest on the ground of the invalidity of the lease, the court will not consider the lease invalid.—Estate of Murphy, 12.

Account of Executor—Expense of Repairs.—Where an executor, as an inducement to the heirs to join with him in the execution of a lease, represents to them that the expense of alterations and fitting up for the tenant will not exceed a certain sum, he cannot be allowed for expenditures beyond that sum.—Estate of Murphy, 12.

Account of Executor.—Expenditures that do not Add to the Rental Value of premises to be leased, and injudiciously made, should be disallowed.—Estate of Murphy, 12.

Executor.—Where Items in an Executor's Account are payments arising out of mortgages given by the universal devisee and legatee, they should nevertheless be allowed, where the moneys were devoted to the maintenance of the widow and family, and paid at her request, she being universal devisee.—Estate of Love, 537.

Executor.—Items in an Executor's Account of expense for abstracts of title and driving squatters off of realty should be allowed, when paid for the widow's benefit and at her request, she being the universal devisee.—Estate of Love, 537.

Executor.—Items in an Executor's Account of Expense of flowers for grave, of insuring personalty never in his possession, examining tax lists and recording a deed to a legatee, should be disallowed.—Estate of Love, 537.

Executor.—Items of Expense in an Executor's Account for printing a brief, the amount or payees not being shown; interest on a note made by a legatee, for $100, without voucher, and tax charges without sufficient voucher, were disallowed.—Estate of Love, 537.

Executor.—An Item of Expense in an Executor's Account, for redemption under tax sales, may be allowed.—Estate of Love, 537.

Executors are Entitled to have the Costs of an Appeal Allowed them in their account, the prosecution of which is necessary to obtain a final determination of their rights in relation to commissions.—Estate of Ricaud, 220.

Administrator—Allowance for Traveling Expenses.—Where an administrator has, in good faith, journeyed to a distant state upon business of the estate, and has incurred an attorney's charge in connection therewith, an allowance will be made to him therefor; and this whether or not he misconceived his legal duty.—Estate of Shillaber, 120.

Executor—Costs of Copying Papers.—All proceedings necessary to be taken by the executor in the administration of the estate are part of his duty, and any papers drawn in connection therewith are covered by the statutory compensation provided for his services; and the costs of engrossing or copying the same are not taxable against the estate.—Estate of Shillaber, 120.

Executor—Allowance for Clerical Help.—When, in a large estate, the impracticability is shown of doing without clerical assistance to collect rents and keep accounts, the court usually makes some allowance therefor; but guardedly, and never without rigorous proof of necessity, although no objection be interposed.—Estate of Shillaber, 120.

The Administrator may be Allowed a Charge for Costs Paid in Serving Notices required by law to oust a defaulting tenant, and al-

though paid to an agent of the estate, receiving a compensation for collection of the rents.—Estate of Shillaber, 120.

An Item in an Account for "Executor's Loss of Time" will be stricken out.—Estate of Shillaber, 120.

See Counsel Fees; Special Administrators, 2.

Note.

traveling expenses, allowance for, 106.
services of bookkeeper, allowance for, 107.

EXPERT EVIDENCE.

See Evidence, 2.

FAMILY ALLOWANCE.

Family Allowance—Necessity of Notice.—Under section 1464, Code of Civil Procedure, no notice of an application for family allowance is necessary; yet, in the opinion of the court, it would be a salutary rule to require, and the court of its own motion requires notice to be given to the attorneys for absent or minor heirs, or for persons in adverse interest, in all practicable cases.—Estate of McDougal, 456.

FEES OF COUNSEL.

See Counsel Fees.

FEES OF EXECUTOR.

See Compensation of Executors.

FILING PAPERS.

Filing a Paper Consists in Presenting It at the Proper Office and leaving it there, deposited with the papers in such office.—Estate of McGovern, 150.

Filing Papers.—Section 1030 of the Political Code Defines and Fixes the hours during which public offices shall be kept open; and a paper which is left in a public office one hour after the time fixed by law for its closing, is left there when the office is legally closed.—Estate of McGovern, 150.

See Costs.

FIXTURES.

Fixtures.—The Question as to What are or are not "Fixtures" depends for its determination upon the circumstances of the construction and intended use of the articles.—Estate of Murphy, 12.

FLOWERS FOR GRAVE.

See Expenses of Administration.

FRAUD.

Fraud—Evidence.—Other Things Being Equal, where oath is opposed to oath, on a charge of fraud, the charge must fall.—Estate of McDougal, 456.

Note.
jurisdiction of equity to vacate orders and decrees in probate on the ground of fraud, 263.

FUNERAL, BURIAL EXPENSES.

Funeral Expenses.—The Surviving Husband is Liable for the funeral expenses of his wife, where he has resources sufficient to respond. Estate of Fitzpatrick, 117.

Executor.—An Expense of $147.50 for a Wall Around a Cemetery Lot may be allowed as a proper and usual charge against a decedent's estate.—Estate of Love, 537.

Note.
liability of husband for wife's funeral expenses, 117.

GUARDIAN AND WARD.

1. **In General.**

Guardianship.—The Probate Court has no Jurisdiction to appoint a guardian for a child who has been awarded to a parent in divorce proceedings, while the divorce court retains the right to control the custody of the child.—Guardianship of Murphy, 107.

Guardianship—Religious Instruction of Ward.—Where a child is baptized in a particular faith to which its mother belonged, the guardian of the child should secure to her instruction in the faith of the mother, until the child arrives at an age when she is presumptively competent to determine her own doctrine of religion.—Guardianship of McGarrity, 200.

Guardianship.—The Custody of Minors is Always Within the Discretion of the court; and this discretion is to be exercised in the light of the particular and peculiar circumstances of each case. The court is not bound to deliver the custody to any particular person, not even the father.—Estate of Smith, 169.

Guardianship—Interest of State.—In the matter of the guardianship of minors, the state is interested in having beneficial influences surround and impress its future citizens.—Guardianship of Hanson, 182.

2. **Eligibility of Person as Guardian.**

Guardian—Eligibility of Nonresident.—Where the mother of a minor is a nonresident, she is legally incapable of obtaining letters

of guardianship over the child in this state.—Guardianship of Hansen, 182.

Guardian—Eligibility of Married Woman.—Where the mother of a minor is a married woman, she is ineligible to become guardian.—Guardianship of Hansen, 182.

Guardian.—Where Application is Made for Guardianship of a Minor, if there is no person before the court who is legally entitled to the guardianship, it must be shown, to justify a resistance of the application, even by the nonresident mother, that no guardian is needed for the child, or that the applicant is an unfit person.—Guardianship of Hansen, 182.

3. Choice and Nomination of Guardian by Child.

Guardian—Nomination by Minor.—A minor, aged sixteen years, who is intelligent and of fair education, is legally competent to nominate her own guardian, subject to the court's approval.—Estate of Zimmer, 142.

Guardian—Nomination by Minor.—Although an intelligent minor over fourteen years of age is competent to nominate its own guardian, and its intelligent preference for a guardian must be considered, yet the court must be guided in its determination by what appears to be for the child's best interests, as to its temporal, mental and moral welfare.—Estate of Zimmer, 142.

Guardian.—The Nomination and Preference of the Minor in this case of her aunt for guardian as against the child's mother, who had remarried after divorce from the child's father to one who was the object of the child's aversion—discussed, but not decided.—Estate of Zimmer, 142.

Guardian—Nomination by Minor.—In this case it was held that an application for guardianship by the minor's nominee should be denied, although the applicant and minor were closely related and affectionately disposed toward each other, having lived and loved as if mother and child for years; it appearing that, from the circumstances of the applicant, a grant of guardianship would not be for the best interests of the child as to its temporal welfare.—Estate of Zimmer, 142.

Guardian—Nomination by Minor—Nonresidence.—Where an applicant for guardianship of a minor, claiming as the minor's nominee, is a nonresident of the state, and only awaits the determination of the application to return home, the court will not be justified in confirming the minor's choice, even if legally permitted to do so.—Estate of Zimmer, 142.

Guardian—Nomination by Minor.—In this case the court, in determining an application for guardianship upon the nomination of the minor over fourteen years of age—involving the minor's compe-

tency and the applicant's rights, with the court's duty in the premises—considered and construed sections 1748, 1749, Code of Civil Procedure, and section 246, 253 (subdivision 6), Civil Code.—Estate of Zimmer, 142.

Guardian—Choice of Child.—A child ten years of age who has been educated carefully and is a bright girl may be capable of expressing "an intelligent preference" for a guardian, which the court will consider.—Guardianship of Hansen, 182.

Guardianship—Election and Nomination by Child.—It has become the rule, in awarding the custody of a minor, to give the child, if of proper age, the right of election in the matter. In California, fourteen years is the age fixed, when the minor has a right of nomination, subject to the court's approval; and the law also permits a minor, "if of sufficient age to form an intelligent preference," to express such preference, which may be considered by the court.—Estate of Smith, 169.

Guardianship—Child's Choice of Custodian.—Mere mental precocity is not the test of a child's capacity to express a choice of custodian; acuteness of apprehension, sharpness of intellect on the part of the child, will not alone be sufficient for the judge. The minor must be capable of exercising a discretion in the premises; its mere impulses will not weigh. In this case, a child thirteen years and eight months old was held "of a sufficient age to form an intelligent preference," within the meaning and intent of section 246, Civil Code, relating to the custody and guardianship of minors.—Estate of Smith, 169.

Guardianship—Preference of Minor.—In determining what is for the best interests of a child, in adjudging its custody or guardianship, the court may consider the child's preference, if it is of sufficient age to form an intelligent preference.—Estate of Smith, 169.

4. **Examination of Minor by Court.**

Guardianship—Examination of Minor.—In this case, in accordance with the practice of the court in matters of guardianship, the minor was examined, separate and apart, at length, first by the respective counsel and the judge, with the official reporter; then by the judge alone, counsel being absent; and finally was requested to express her own wishes in writing, she being alone and without any influence whatever. Her written views, with her transcribed testimony, were then filed as part of the record.—Estate of Smith, 169.

Guardianship.—One of the Objects of the Court's Private Examination of the Minor, in guardianship matters, is to discover the child's capacity; its appreciation of the object of the proceedings; the strength of the natural affections, and its idea of filial duty and parental right; and the child's freedom of expression, that is, absence of influence or teachings adverse to parents. The court looks

with distrust upon any choice of the minor contrary to the natural affections in favor of a parent.—Estate of Smith, 169.

5. **Considerations in Awarding Custody of Child.**

Guardianship—Custody and Welfare of Child.—In appointing a guardian and awarding the custody of a child, the court is bound to do what in its judgment appears to be for the best interest of the child in respect to its temporal, its mental and moral welfare.—Guardianship of Danneker, 4.

Guardianship.—The Affection of a Child for the Person seeking its custody as guardian is always given consideration by the court.—Guardianship of Danneker, 4.

Guardianship—Social and Private Life of Guardian.—It is the duty of the court to inquire into the social relations and private life of a person seeking to be appointed guardian of a child, so far as they may affect the child's welfare.—Guardianship of Danneker, 4.

Guardianship—Wishes of Deceased Mother.—In the appointment of a guardian for a minor, the court must regard the dying declaration of the mother as to her wishes in the premises, when not inconsistent with the welfare of the child.—Guardianship of McGarrity, 200.

Guardianship—Considerations in Awarding Custody of Child.—It is within the court's sound discretion whether the custody of a child will be given to the father. The court should consider not only the father's fitness, but the condition of the child with its present custodians, its relation to them, the present and prospective provision for its support and welfare; the facts as to its present home—its duration, and whether with the father's consent, and upon understanding of permanency; the strength of the ties formed, and the child's wishes if it is of an age of discretion.—Estate of Smith, 169.

Guardianship.—Where the Best Interests of a Child require that it should remain in the home where it has been fostered from infancy, that consideration will be deemed paramount to the father's natural right, although the father is in every way competent and suitable.—Estate of Smith, 169.

Guardianship.—The Welfare of a Minor Means Its Permanent, not temporary, welfare. The court is governed by that which, looking to the previous condition, and the future continued residence of the child, will contribute to its permanent happiness and welfare. Estate of Smith, 169.

Guardian—Best Interests of Ward.—In awarding the custody of a minor, or appointing a general guardian, the court is guided by what appears to be for the child's best interests as to its temporal, mental and moral welfare.—Guardianship of Hansen, 182.

Guardianship—Welfare of Child.—The First Point to be Considered, in adjudging the custody or guardianship of a minor, is the best

interests of the child with respect to its temporal, mental and moral welfare.—Estate of Smith, 169.

Guardianship—Welfare of Child.—In guardianship matters the court acts for and on behalf of the child, and must regard, as the paramount consideration, the interest and welfare of the child. To this every other consideration must yield.—Estate of Smith, 169.

6. **Parents' Right to Custody of Child as Against Third Persons.**

Guardianship.—Assuming that a Father's Right to the Custody of his child revives upon the death of the mother, who had been awarded the custody under a divorce decree, yet it must be shown that the minor's interest will be conserved by recognizing the father's right.—Estate of White, 128.

Guardianship.—Where a Husband Deserts His Wife, who is left to care and provide for their infant child, this will be considered as an abandonment of the child, upon the father's application for guardianship after the mother's death.—Estate of White, 128.

Guardianship.—Reluctant as the Court Always is to Interfere with a Father's natural right to his child's custody, it will do so where the child's interest demands.—Estate of White, 128.

Guardianship.—In the Case at Bar the Court Refused Guardianship of a minor of divorced parents to its father, applying after the death of the mother, and granted letters to the maternal grandmother of the minor, for the following reasons: The child had been awarded to the mother by a divorce decree against the father; the father never provided for the child, except when compelled by judicial process; he never showed any interest in the child from the time of his desertion of the mother, and by his continued course of conduct manifested a lack of paternal instinct; the maternal grandmother had received the mother and child when deserted by the father, and had ever afterward given them shelter and assistance, and she was the nominee of the mother, by the latter's dying request.—Estate of White, 128.

Guardianship.—The Father is Prima Facie Entitled to the Custody of His Child. But this is not an absolute right; it may be controlled by other considerations; and, if the father is unable or unfit to take charge of the child and educate it suitably, the court will not interfere to take the child from those who are fit and able to so maintain and educate it.—Estate of Smith, 169.

Guardianship—Father's Right to Child's Custody.—As a general rule, courts assent to the proposition that natural right and public policy, as well as the safety of the social structure, require that the father should have the custody of his child. But this is not impera-

tive upon the court; it bends to the interests of the child.—Estate of Smith, 169.

Guardianship Awarded to Aunt Rather than to Father.—In this case an application for guardianship of a minor was filed by its aunt, and a counter-application and opposition presented by its father, the mother being deceased. The minor was aged thirteen years and eight months, and held to have proven herself fully capable of expressing an ''intelligent preference'' in the matter, which she did in favor of her aunt, after undergoing a thorough examination. The child was born in the dwelling of her aunt while her parents were members of the aunt's domestic circle; and the mother and child ever afterward continued to live with the aunt until the mother's decease, when these proceedings were instituted. The child's mother had, some years before her death, obtained a divorce from the father, by default, and with it the custody of the child; and it was her last wish that her child should remain with the aunt. Estate of Smith, 169.

Guardianship Awarded to Aunt—Right of Father to Visit Ward.—In this case the court found that the best interests of the child required that it should remain with the aunt, with the right of the father to visit and enjoy the society of the child at all reasonable times; and, in awarding the minor's custody to the aunt, the court said that the parties ought to reach an amicable understanding whereby the child should spend part of her time with her father, and so allow opportunities for mutual affections and interests to grow up between her and her paternal relatives.—Estate of Smith, 169.

Guardian—Stranger Preferred to Mother.—Where a mother, after desertion by her husband, committed her child to the care of the petitioner, agreeing that he should adopt it (which he never legally did), and afterward, under judgment in an action for divorce by the mother, the child was awarded to petitioner; and the petitioner kept the child for nearly six years, until the mother wanted to get the child again, when he applied for guardianship of her, the mother opposing it, and the divorce decree being modified pending the guardianship proceedings, so as to remit the question of custody to the guardianship department; and during all the period aforesaid petitioner and his wife treated and educated the child as if she were their own; and the mother is legally incapable and ineligible to become guardian, being a nonresident and married; and the child has expressed a preference for petitioner, and it would not be for the child's best interests to place her anywhere but with petitioner, guardianship should be granted to petitioner; but so restricted that the mother may communicate with and visit the child.—Guardianship of Hansen, 182.

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HOLOGRAPHS.

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HOMESTEADS.

1. In General.

Homestead—How Far an Estate.—The right to have a probate homestead set aside is not an estate; it becomes such when a decree is made setting aside the homestead and title then vests in the beneficiaries.—Estate of Hayes, 531.

Homestead—Effect of Setting Aside.—When property is set apart as a probate homestead, the property is then taken out of the jurisdiction of the court.—Estate of Hayes, 551.

Homestead.—The Purpose of the Statute in Giving a Homestead right to the surviving spouse out of the decedent's separate estate is to provide a home for the survivor, which no one can touch; merely depriving the survivor of the power of alienation.—Estate of Tate, 217.

Homestead—Residence of Deceased—Conclusiveness of Finding.—Where, upon the admission of a will to probate, the legal residence and domicile of testator is found as a fact, and certified and judicially determined, the question is placed outside the pale of controversy thereafter. So held, upon an executor's opposition to an application for a homestead by the testator's widow.—Estate of Green, 444.

Homestead—Probate and Voluntary Distinguished.—There is a distinction between a homestead under section 1262, Civil Code, and the homestead selected by the court in the administration of a decedent's estate. The latter is governed wholly by the provisions of section 1465, Code of Civil Procedure. In the case of a homestead selected in the decedent's lifetime, the claimant's title accrues by survivorship; as to a homestead selected in the administration of decedent's estate, the claimant's title accrues only upon the decree of the court or judge setting it apart.—Estate of Green, 444.

Homestead.—The Probate Court has no Discretion to deny an application for a homestead by the family of a decedent, presented under section 1465, Code of Civil Procedure.—Estate of Green, 444.

Homestead—Value of Premises.—In this case the court held that the value of the premises ordered set apart as a homestead should be taken as of the date of the application; any subsequent increase in value being immaterial.—Estate of Green, 444.

2. **Nature of Homestead Right—Date at Which Determined.**

Homestead—Nature of Right.—The right to a homestead is wholly statutory; it cannot be asserted as a natural right. The law-making power is competent to repeal the provisions of the statute regulating the right, and thereafter homesteads would be unknown.—Estate of Green, 444.

Homestead—Successor to Right.—The right to a probate homestead may be lost, and there can be no successor to that right.—Estate of Hayes, 551.

Homestead.—The Right of a Widow to have a Homestead Set Apart to her from the estate of her former husband must be determined from the facts as they exist at the date of the action of the court.—Estate of Green, 444.

Homestead.—The Right to a Probate Homestead is tested or considered not as of the date of the death of the decedent but as of the time of the application.—Estate of Hayes, 551.

3. **Persons Entitled to Homestead.**

Homestead.—When Application is Made by a Minor child of a decedent to have a homestead set apart from community property, the surviving widow having died, and the other children having attained majority, without applying for a homestead, the court must grant the application and set aside the homestead absolutely, not limiting it to the period of minority or otherwise.—Estate of Hayes, 551.

Homestead.—A Widow Without Minor Children is Entitled to have a homestead selected and set apart by the court out of decedent's separate estate, there being no community property.—Estate of Tate, 217.

Homestead.—It does not Impair or Diminish the Right of the Widow to have a homestead set apart that there are no minor children.—Estate of Maxwell, 126.

Homestead.—The Probate Court must, upon proper application, set apart to the widow a homestead, if none has been selected during the lifetime of the decedent. It has no discretion in the premises. Estate of Maxwell, 126.

Homestead.—The Court must Set Apart a Homestead upon the application of a widow, if none has been selected in the lifetime of the deceased spouse. There is no discretion in the matter.—Estate of Tate, 217.

Homestead.—The Executor's Answer to the Widow's Application for a homestead alleged that two adult daughters (one being married), referred to in the widow's petition, were always considered and treated as part of the decedent's household and family. The court ignored this claim for the daughters, and set apart the homestead to the widow alone.—Estate of Green, 444.

Homestead.—In this Case the Widow Applied to have a Homestead set apart to her, and the executor answered, setting up that decedent's residence and home was in England, where he died and left a homestead, which he devised to his wife and daughters. The court found on the probate of the will here that the decedent had a domicile and legal residence in California, and was only temporarily in England for his health; and held that the applicant, being the decedent's widow at the date of the application, and a resident of the state, and there being property suitable for a homestead, all the conditions required by the statute existed to entitle her to a homestead.—Estate of Green, 444.

4. **Selection from Separate Estate.**

Homestead—Separate Property.—In this case the court ordered that the property, being decedent's separate estate, be set apart only during the applicant's widowhood.—Estate of Green, 444.

Homestead.—If a Homestead is Selected from the Separate Property of the decedent, the court can set it apart only for a limited period, to be designated in the order.—Estate of Maxwell, 126.

Homestead—Selection from Separate Property.—It is only when a homestead is set apart from the separate property of the decedent that it is required to be for a limited period.—Estate of Hayes, 551.

The Right of the Surviving Spouse to a Homestead in separate estate of the decedent is limited to an estate for years, for life, or until the happening of some event, as the marriage of the survivor, as may be decreed by the court. But the exercise of the court's power is limited by a sound discretion acting upon the circumstances of the particular case; if the survivor is young and likely to remarry, a limitation for life might be indiscreet, otherwise where she is of an advanced age.—Estate of Tate, 217.

5. **Testamentary Power.**

Homestead.—Even if the Testator Devises His Entire Estate, which was separate property, his widow will still be entitled to a homestead. Estate of Maxwell, 126.

Homestead—Testamentary Power.—The power or duty of the court to set apart a homestead for the family of a decedent is not limited by the fact that the decedent disposed of his property by will. Estate of Green, 444.

Homestead.—The Power of Testamentary Disposition is Given and defined by statute, and is subordinate to the authority vested in the probate court to appropriate property for the support of testator's family, including a homestead, and for the payment of debts.—Estate of Green, 444.

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HUSBAND AND WIFE.

Marital Obligation—Filial Devotion.—A husband should not allow the duty he owes to his wife to be overcome by his love for his parents. Where one's marital obligation comes into conflict with his filial devotion, the latter should give way to the former.—Estate of White, 128.

See Marriage.

INSANITY AND INSANE DELUSIONS.

1. Insanity in General.

The Words "Insane" and "Incompetent" defined and distinguished.—Estate of Hill, 380.

Insanity—Unreasonable Suspicions.—Unfounded and unreasonable suspicions are not insanity.—Estate of Scott, 271.

Insanity—Insomnia.—The mind of a testatrix is not necessarily diseased because she is at times troubled with insomnia while afflicted with an intestinal ailment.—Estate of Scott, 271.

Insanity of Testator—Evidence and Burden of Proof.—The legal presumption is in favor of the sanity of a testator, and the burden of proof is on the contestant of his will to demonstrate the contrary; and if the contestant prevails, in a case of doubt, it must be by a preponderance of proof, and the number, character and intelligence of witnesses, and their opportunity for observation, should be taken into account.—Estate of Scott, 271.

2. Committing Lunatic to Asylum.

Insanity.—In Order to Commit a Person to an Asylum for the insane, the court must be satisfied, upon examination, pursuant to section 258, Civil Code, that such person is of unsound mind, and unfit to be at large. The provisions of the codes as to such examination summarized.—Matter of Ingram, 137.

Insanity.—There are no "Commissioners of Insanity." Physicians are merely summoned to hear the testimony, and to make a personal

examination of the alleged insane person; and, if they believe him to be dangerously insane, they make a certificate of certain facts, whereupon it is reserved to the judge, upon whom rests the responsibility, to adjudicate upon the charge.—Matter of Ingram, 137.

Insanity.—Although a Person is Subject to Certain Delusions, where the court is not satisfied that he is "so far disordered in mind as to endanger health, person or property," or "unfit to be at large," it is bound to give him the benefit of such reasonable doubt as it entertains upon the whole charge.—Matter of Ingram, 137.

3. Insane Delusions in General.

Will—Delusion.—It is not the Strength of a Mind which determines its freedom from delusion; it is its soundness.—Estate of Ingram, 222.

Will—Delusion of Mind is a Species of Insanity.—The main character of insanity, in a legal view, is the existence of a delusion.—Estate of Ingram, 222.

Will.—A Person is the Victim of Delusion when he pertinaciously believes something to exist which does not. Belief of things which are entirely without foundation in fact is insane delusion; that is, where things exist only in the imagination of a person, and the nonexistence of which neither argument nor proof can establish in his mind.—Estate of Ingram, 222.

Will.—If a Person is Under a Delusion, though there is but Partial Insanity, yet if it is in relation to the act in question, it will defeat a will which is the direct offspring of that partial insanity.—Estate of Ingram, 222.

Insane Delusions—Business Capacity.—Business capacity may coexist with monomania or insane delusions.—Estate of Scott, 271.

Insanity—Faulty Logic.—False logic or faulty ratiocination is far from the manifestation of insanity, so long as the process is formally correct, not incoherent or inconsequential.—Estate of Scott, 271.

Insane Delusions—Fear of Poisoning.—A fear of poisoning on the part of a testatrix, even though a delusion, must, in order to invalidate her testamentary act, be continuous, persistent, and operative upon her volitional capacity.—Estate of Scott, 271.

Insane Delusions—Fear of Poisoning.—The mistaken belief of a testatrix, when suffering with chronic stomach trouble, that her food has been tampered with, does not, as a matter of law, amount to an insane delusion.—Estate of Scott, 271.

Insane Delusions—Unfounded Suspicions.—The sanity of the testatrix in this case being questioned because she suspected that her husband was unfaithful to her, and that he was attempting to poison her and to send her to an insane asylum, the court observed: There is a very large class of people whose sanity is undoubted, who are

unduly jealous or suspicious of others, and especially of those closely connected with them, and who upon the most trivial, even whimsical, grounds wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons confessedly sane are to a greater or less degree afflicted with it, to justify us in saying that because the deceased was so afflicted she was insane, or the victim of an insane delusion.—Estate of Scott, 271.

Insane Delusions—Suspicions—Evidence and Burden of Proof.—The line between unfounded and unreasonable suspicions of a sane mind and insane delusions is sometimes quite indistinct and difficult to define. However, the legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way.—Estate of Scott, 271.

Insane Delusions—Suspicions—Tests of Insanity.—Suspicion is the imagination of the existence of something, especially something wrong, without proof, or with but slight proof; it is an impression in the mind which has not resulted in a conviction. It is synonymous with doubt, distrust, or mistrust—the mind is in an unsettled condition. Suspicion existing, slight evidence might produce a rational conviction or conclusion; this without evidence, however slight, would be a delusion. Is there evidence, however slight? This is the test. The suspicion may be illogical or preposterous, but it is not, therefore, evidence of insanity.—Estate of Scott, 271.

Insane Delusions—Suspicions as to Husband's Constancy.—If a wife has evidence, though slight, on which to base a suspicion of her husband's unfaithfulness, and has no settled conviction on the subject, her suspicion does not amount to an insane delusion.—Estate of Scott, 271.

Insane Delusion—Conspiracy to Confine Wife in Asylum.—The contention in this case that the testatrix was afflicted with an insane delusion in that she believed her husband conspired to confine her in an insane asylum, was found by the court to be unsupported by the evidence, especially in view of the fact that the husband had twitted her of being crazy and threatened to break her will.—Estate of Scott, 271.

Insane Delusions—Testimony of Business Men.—The value of the testimony of business men and acquaintances, acquired in commercial dealings with a person alleged to be the victim of insane delusions, is favorably regarded by the courts, on the issue of insanity.—Estate of Scott, 271.

Insane Delusions—Vulgarity of Testatrix.—Where the vulgarity in behavior and speech of a testatrix is relied upon to establish the

presence of insane delusions, her whole conduct, at home and aboard, should be considered, and not merely her conduct within her own house, the alleged acts of immodesty in this case being confined to the home premises of the testatrix, while her behavior abroad was not subject to adverse criticism.—Estate of Scott, 271.

Insane Delusions—Eccentricities not Suddenly Acquired.—Eccentric habits of speech, if not suddenly acquired, are not evidence of insanity.—Estate of Scott, 271.

Insane Delusions—Suspicions as to Husband's Constancy.—Where there was at least one instance in the conduct of a husband which might arouse in the mind of the wife a suspicion as to his constancy, the fact that her suspicions may have been unjust and her inferences too general, is merely an error of logic, and not an evidence of insanity or of an insane delusion. She has a right to infer, however erroneously, or from inadequate premises, to a universal conclusion.—Estate of Scott, 271.

4. Belief Based on Some Evidence.

Insane Delusion—Wrong Conclusions as Evidence.—If any fact exists as a foundation for a testator's belief that a child borne by his wife is not his, he cannot be said to be the victim of an insane delusion, however mistaken he may be in his conclusion.—Estate of Solomon, 85.

Insane Delusion.—A Person may Act on Weak Testimony, yet be under no delusion.—Estate of Solomon, 85.

Will.—Belief Based on Evidence, However Slight, is not Delusion; delusion rests upon no evidence whatever; it is based on mere surmise. The burden of proof is upon the party alleging insanity or insane delusion.—Estate of Ingram, 222.

Will—Insane Delusion.—If a Person Persistently Believes Supposed Facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, as far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. So, if a testator labored under such a delusion in respect to his wife and family connections, who would naturally have been the objects of his testamentary bounty, and the court can see that the dispository provisions of his alleged will were or might have been caused or affected by the delusion, the instrument is not his will.—Estate of Tiffany, 478.

Will—Insane Delusion.—A Belief based on evidence, however slight, is not delusion.—Estate of Hill, 370.

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INSURANCE, PROOF OF LOSS.

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INTEREST.

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INVENTORY.

Inventory.—An Administrator must Make a True Inventory and appraisement of all estate of the decedent coming to his possession or knowledge; and he is accountable with respect to this duty.—Estate of Partridge, 208.

Inventory—Adverse Claim Against Property.—If any portion of a decedent's estate is the subject of an adverse claim, it is prudent on the part of the administrator to add a memorandum to the inventory, stating the asserted claim. But the property must be inventoried; the administrator cannot stand neutral because the decedent's title is disputed.—Estate of Partridge, 208.

Inventory—Property Claimed Adversely to Estate.—An administrator cannot omit to inventory property said to belong to his intestate which is the subject of an adverse claim, on the pretense that he wants to stand neutral between the estate and the adverse claimant, leaving the merits of the controversy to the court's determination. The administrator cannot assume an attitude of neutrality; the statute points out his duty; and for the court to pass upon the merits of the adverse claim would be to assume a jurisdiction which, in probate, it cannot exercise.—Estate of Partridge, 208.

Inventory—Disputed Title.—The Probate Court ought not, it seems, to reject an inventory of a decedent's estate, or order it modified, because it contains property, the title to which is disputed.—Estate of Partridge, 208.

Inventory—Trying Questions of Title.—Where part of an inventoried estate of a decedent is in dispute, the adjudication of the title belongs to common-law tribunals; a probate court cannot conclude the question.—Estate of Partridge, 208.

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INVESTMENT OF FUNDS.

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JURISDICTION.

1. **Of Probate Court in General.**

Probate Court—Jurisdiction.—The Superior Court, sitting in probate, cannot exercise other than purely probate jurisdiction; its jurisdiction, as succeeding the powers of the former probate court, is not enlarged.—Estate of McLaughlin, 257.

Probate Court—Jurisdiction.—The Superior Court, sitting in probate, has no greater jurisdiction than the probate court which it succeeds.—Estate of Maxwell, 135.

Probate Court—Jurisdiction.—The Superior Court, while engaged in the exercise of probate jurisdiction, cannot entertain a cause of action to obtain relief upon the ground of fraud, such as a petition to disregard and declare void a devise alleged to have been procured through fraud, and to make distribution to the heirs.—Estate of Maxwell, 135.

2. **Of Probate Court to Try Title.**

See Inventory.

Probate Court—Jurisdiction to Try Title.—The superior court, sitting in probate, has no authority to adjudicate the question of title to personal property in dispute between a third person and the estate of a decedent.—Estate of Curtis, 533.

3. **As Depending on Residence of Decedent.**

Jurisdiction—Residence of Deceased.—The Issuance of Special Letters of administration to the public administrator in one county is not a final determination of his right to general letters of administration as against the public administrator of another county.—Estate of Sealy, 90.

Jurisdiction—Residence of Deceased.—The Issuance of Special Letters of administration leaves the jurisdictional facts still to be ascertained prior to the issuance of general letters.—Estate of Seely, 90.

Jurisdiction—Residence of Deceased—Conclusiveness of Determination.—Where the public administrators of two counties each file an application for letters of administration, there being a doubt as to which county the decedent was a resident of, and one applicant contests the application of the other, the adjudication of the court that it has jurisdiction is a bar to the contestant's own application in the other county.—Estate of Seely, 90.

LEGATEES AND DEVISEES.

Devisee—Right to Possession.—A Tenant of Realty, specifically devised to her for life, is not entitled to possession on testator's death. But as she will be entitled to the rents, issues and profits upon distribution of the estate, her intermediate occupancy might not ordinarily challenge criticism; yet aliter, if objection made.—Estate of Shillaber, 101.

A Legatee of a Specific Bequest can Take Only Such Interest in the property bequeathed as the testator had a right or power to dispose of by will.—Estate of Ricaud, 212.

Where Property Specifically Bequeathed is Sold Under Order of Court, the legatee is not entitled to the proceeds before distribution, but the same must be held subject to administration.—Estate of Ricaud, 212.

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LETTERS TESTAMENTARY AND OF ADMINISTRATION.

See Executors and Administrators; Jurisdiction, 3.

LIMITATION OF ACTIONS.

See Trusts, 4.

LUNATICS.

See Insanity and Insane Delusions.

MARRIAGE.

Unsolemnized Marriage—Evidence to Establish.—Where it appears that parties, without the sanction of any ecclesiastical ceremony, agreed between themselves to live together as man and wife, and did live as such in one place of domicile for years, and in other places, and so held themselves out to others moving in the same limited social sphere; and it further appears that each of the parties testified in a legal controversy, wherein they were both called as witnesses, to being, respectively, married persons, and stated their respective places of habitation to be where in fact they lived together at the time, their marriage is proved.—Estate of Whalen, 202.

Unsolemnized Marriage—Evidence to Establish.—Where persons called to prove that a man and woman lived as husband and wife and held themselves out as such to others living in the same social sphere, are credible witnesses, no matter how circumscribed is their social environment, their testimony is sufficient to establish repute.—Estate of Whalen, 202.

Unsolemnized Marriage—Declarations to Support.—Where it appears that an alleged spouse of an unsolemnized marriage has testi-

fied as a witness, subsequently to the alleged marriage, that he was a married man, such declaration is the most important evidence that can be offered in support of such a marriage.—Estate of Whalen, 202.

Marriage.—Where the Relation of Husband and Wife is Once Established, no subsequent conduct of either spouse, which does not culminate in a legal dissolution, can affect the judicial determination of the question of their status.—Estate of Whelan, 202.

See Husband and Wife.

MAXIMS.

Maxim.—No One Shall Derive any Profit, Through the Law, by the influence of an unlawful action or relation.—Estate of Tiffany, 478.

MINOR HEIRS.

Minor Heirs.—The Court will Endeavor to Conserve the Interests of Minors, and will at all times aid their attorney in obtaining for them their full rights; and any application in that behalf will be welcomed by the court, which regards with the highest favor, the claims of minor heirs.—Estate of McDougal, 456.

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PROBATE OF WILL.

1. In General.

The Probate of a Will and the Appointment of an Executor are distinct emanations from the will of the court, usually, though not necessarily embodied in one order, but determined upon entirely different sets of facts.—Estate of McLaughlin, 80.

2. Notice and Hearing.

Probate of Will—Setting for Hearing, Evidence of.—When it is claimed that the clerk did not set a petition for probate for hearing, a notice in fact issued by him and fixing the day is the best evidence that the law has complied with.—Estate of McLaughlin, 20.

Probate of Will—Setting for Hearing.—Any Omission in matters of form in fixing the date for hearing a petition to probate a will may be disregarded by the court or ordered supplied when the proper fact is made satisfactorily to appear.—Estate of McLaughlin, 80.

Probate of Will.—**The Publication** of the **Notice** fixing the day for hearing the probate of a will, when made in a weekly paper, must appear on at least three different days of publication, but not necessarily in three consecutive weekly issues.—Estate of McLaughlin, 80.

3. **Revocation of Probate.**

Probate of Will.—A Creditor cannot Petition for a Revocation of the probate of a will.—Estate of McLaughlin, 80.

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Record.—Matters Prejudicial to the Character of any person will be excluded from the record when not essential to a proper decision. Guardianship of Danneker, 4.

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See Executors and Administrators, 4.

REVOCATION OF PROBATE.

See Probate of Will, 3.

REVOCATION OF WILL.

See Wills, 12.

SALES BY ADMINISTRATOR.

Administrator's Sale—Advance Bids and Resale.—When, upon the hearing of a return of an administrator's sale of personal property, the purchaser increases his bid from $3,000 to $5,000, it is manifest that the price obtained is greatly disproportionate to the value of the property; and in such case the court will refuse confirmation of the sale, and will order a new sale to be had under circumstances calculated to bring the utmost value of the property.—Estate of Jennings, 155.

Administrator's Sale—Release of Bidder.—If a bidder at a private sale by an administrator states that she has not had time to examine the title because of the shortness of the notice, and does not wish to be bound unless the title is good, to which the administrator assents, she should be released from her bid when her counsel advises against the title, whether or not his view of the law is correct.—Estate of Neustadt, 95.

Administrator's Sale.—The Court Should Require an Additional Bond from the administrator upon ordering the sale of any real property belonging to the estate.—Estate of Riddle, 215.

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jurisdiction of equity to vacate sales, 265.
rule of caveat emptor, 96.

SETTLEMENT OF ACCOUNTS.

See Accounts of Executor.

SPECIAL ADMINISTRATORS.

1. **In General.**

Special Administrator—Person Entitled to Letters.—In making the appointment of a special administrator, the court must give preference to the person entitled to letters testamentary or of administration, unless he is shown incompetent for the position. The court has no discretion.—Estate of Held, 206.

Special Administrator—Want of Integrity and Improvidence.—The evidence in this case is held insufficient to establish improvidence or want of integrity on the part of the applicant for special letters of administration.—Estate of Held, 206.

Where It Appeared that a Special Administrator had been a Trustee for the decedent in her lifetime, and there was a large balance at the time of decedent's death, for which he should be held accountable, and he has made no statement of his indebtedness or trust in his account rendered as special administrator, he should be charged with the amount of such indebtedness upon the settlement of his account.—Estate of Armstrong, 157.

Special Administrator.—It is the Duty of a Special Administrator to Collect and preserve, for the executor or administrator, all personalty and choses of every kind belonging to the decedent and his estate; also to take the charge of, enter upon and preserve from damages, waste and injury the realty.—Estate of Shillaber, 101.

Special Administrator—Actions by and Against.—For all purposes of the performance of the duty of a special administrator to collect and preserve the assets, real and personal, of the decedent, and for all necessary purposes, he may commence and maintain or defend suits and other legal proceedings, as in the case of a general administrator.—Estate of Shillaber, 101.

2. **Accounts, Expenditures and Compensation.**

Special Administrator—Expenditures for Business Trip.—Where a special administrator has in good faith journeyed to a distant state upon business of the estate, an allowance will be made to him therefor; but he will be entitled to no greater remuneration than, in the court's opinion, would be proper for the dispatch of the business of such journey.—Estate of Shillaber, 101.

Special Administrator.—For the Compensation of a Special Administrator, the court can accept no other standard than that furnished by section 1618, Code of Civil Procedure (for general administration). Commissions are here allowed on the amount accounted for, including an additional sum of one-half of such commissions for extra service, as permitted under such section.—Estate of Shillaber, 101.

Special Administrator—Accounts.—The Accuracy of a special administrator's account will be tested by strictly legal methods, under the rule of section 1415, Code of Civil Procedure, and his duty as therein found, and as defined in the first and second headnotes above. Estate of Shillaber, 101.

Special Administrator—Allowance **for Clerical Assistance.**—In this case the court allowed the special administrator for clerical help in collection of rents, and keeping the accounts, four per cent upon the collections; but reserved the right in other cases to deal differently with a similar item.—Estate of Shillaber, 101.

Special Administrator.—**An Item of Expense for Detective Service,** claimed to be incurred for the estate's interest, was in this case disallowed by the court.—Estate of Shillaber, 101.

Special Administrator—Expenditure on Personalty.—Until distribution, an article of personalty specifically bequeathed by decedent must be treated as part of the estate, and not allowed to deteriorate. Hence, where the special administrator has made an expenditure upon such article to prevent its deterioration, the item should be allowed in his account.—Estate of Shillaber, 101.

See Jurisdiction, 3.

Note.
preference to persons entitled to letters, 207.

STATUTES.

Construction of Statute Adopted from Another State.—The rule that a statute adopted from another state will be given the construction placed upon it by the courts of that state prior to its adoption, is not absolute, especially where there has been a single decision which has since been questioned or repudiated in the foreign state.—Estate of Doe, 54.

SUCCESSION.

Succession—Vesting of Estate in Heirs.—Heirs succeed to the property of their intestate immediately upon his death; then their interest becomes vested, subject only to the lien of the administrator for the payment of the debts of the decedent and the expenses of administration.—Estate of Lane, 88.

Succession.—The Next of Kin Entitled to Share in the Distribution of the estate of an intestate are such only as are next of kin at the time of his death.—Estate of Lane, 88.

The Widow can Claim to Own an Undivided Half Only of Such Property as is distributed in kind. If she receive one-half of the community property, her right as survivor is satisfied.—Estate of Ricaud, 220.

TRAVELING EXPENSES.

See Expenses of Administration.

TRUSTS.

1. In General.

Trust.—The Following Language in a Letter Written by One Who has Collected and holds moneys for another, establishes a trust: "It leaves a balance in your favor of $15,000, besides what has accumulated since the estate was fixed up, which I will loan out [at] about nine per cent, being the best I can do at present."—Estate of Armstrong, 157.

Trusts—Liberal Interpretation of Statutes.—Provisions of the codes in respect to testamentary trusts should be construed liberally.—Estate of Doe, 54.

Trusts—Purpose and Validity.—If a testator, after making specific gifts, devises the residue of his estate to trustees "for" certain beneficiaries, and elsewhere in the will provides that the executors, who are also named as trustees of the trust, shall pay to the persons designated as those "for" whom the property is held, a specified sum per month, the payment of that sum constitutes a trust pur-

pose of the trust of the residuum, and the latter is not void as a naked trust.—Estate of Doe, 54.

Trusts—Whether Bare and Void.—A devise "in trust" for others is not invalid as a bare trust, when it imposes on the trustee the duty of paying the rents and profits of the property to the beneficiaries.—Estate of Doe, 54.

Trusts—Effect of Partial Invalidity.—An invalid provision in a trust, which is not an integral or essential part of the trust scheme, will not necessarily vitiate the other provisions.—Estate of Doe, 54.

2. Duration—Unlawful Accumulations.

Trusts—Construction as to Duration.—In determining the duration of a trust term, the inherent character of the trust and its essential limitations may form an element in the construction to be given to the language creating it.—Estate of Doe, 54.

Trusts—On Whose Lives Term may be Limited.—A trust created under subdivision 3 of section 857 of the Code of Civil Procedure, to receive the rents and profits of real property, and apply them to the use of designated beneficiaries, may be limited on lives of persons other than the beneficiaries.—Estate of Doe, 54.

Trusts—Duration Limited by Purposes.—A trust in real property to pay the rents and profits thereof to designated beneficiaries cannot endure longer than the lives of the beneficiaries, where, upon the assumption that they will outlive the trusts, the lives of the latter are made the measure of the trust.—Estate of Doe, 54.

Trusts—Unlawful Accumulations.—A direction to trustees to pay taxes, street assessments, and other charges and expenses incurred in improvements, out of the income of the trust estate, does not provide for an unlawful accumulation.—Estate of Doe, 54.

Trusts—Unlawful Accumulations.—A provision in a trust for retaining the income of the estate and paying it over to the beneficiaries annually is not void.—Estate of Doe, 54.

3. Use and Investment of Funds by Trustee.

Trustee—Use and Management of Funds.—An agent or trustee has no right to use the funds intrusted to him as his own, nor to mingle them with his own funds, without clear authorization; it is his duty to keep the funds separate and intact, and free from any liability such as he incurs in the use of his own moneys.—Estate of Armstrong, 157.

Trustee—Management of Funds.—An agent or trustee must pursue with exactitude the instructions given as to funds intrusted with him, or show that his particular act was ratified with full knowledge on his principal's part as to the nature of the act.—Estate of Armstrong, 157.

Trustee—Loaning Funds.—Where an agent or trustee is instructed to "loan out" funds held by him, it means that he is to invest them for his principal's account, and to make an accounting to the principal of such investment. He is not authorized to borrow the funds for his own purposes.—Estate of Armstrong, 157.

Trustee—Investment of Funds.—Where confidence is reposed in a trustee to judiciously invest the funds in his hands, this confidence is abused when he places himself in the position of a debtor to the principal, without fully advising the latter of the risk he runs, and giving him an opportunity of knowing the hazard that the funds are subjected to.—Estate of Armstrong, 157.

Where a Trustee to Invest has Made Himself a Debtor to His Principal, and thereby subjected the funds to a risk and hazard, he must show that he fully advised his principal in the premises, in order to avoid responsibility for the loss his conduct may cause.—Estate of Armstrong, 157.

4. Limitation of Actions.

Trust—Limitation of Actions.—Where one occupies a fiduciary relation, the statute of limitations cannot avail as a defense. Lapse of time is no bar to a subsisting trust, clearly established.—Estate of Armstrong, 157.

Trust—Limitation of Actions.—Where one has occupied a fiduciary relation, the statute of limitations cannot be availed of, unless and until a demand on the part of the principal, and a refusal by the trustee are shown.—Estate of Armstrong, 157.

See Charitable Bequests; Wills, 11.

UNDUE INFLUENCE.

1. In General.

Will.—A Will Produced by Undue Influence cannot stand.—Estate of Ingram, 222.

Will.—Undue Influence is any Kind of Influence, either through fear, coercion, or importunity, by which the testator is prevented from expressing his true mind. It must be an influence adequate to control the free agency of the testator. If a weak-minded person is importuned to such an extent that he has not sufficient strength of mind to determine for himself, so that the proposed script expresses the views and wishes of the person importuning, rather than his own, and is not his free and unconstrained act, it is not his will. Undue influence, or supremacy of one mind over another, is such as prevents that other from acting according to his own wish or judgment.—Estate of Ingram, 222.

Will—Undue Influence.—Neither Advice, Argument, nor Persuasion will vitiate a will made freely and from conviction, though such

will might not have been made but for such advice and persuasion. Neither does undue influence arise from the influence of gratitude, affection or esteem.—Estate of Ingram, 222.

Will.—Undue Influence may be Defined as that which compels the testator to do that which is against his will, through fear or a desire of peace, or some feeling which he is unable to resist, and but for which the will would not be made as it is, although the testator may know what he is about when he makes the will, and may have sufficient capacity to make it.—Estate of Ingram, 222.

Will.—What would be an Undue Influence on One Man might be no influence at all on another. This depends upon the capacity, in other respects, of the testator.—Estate of Ingram, 222.

Will.—Undue Influence must be an Influence Exercised in Relation to the will itself, and not in relation to other matters or transactions. But it need not be shown to have been actually exercised at the point of time that the will was executed.—Estate of Ingram, 222.

Wills—Undue Influence.—If the Law Always Suspects and Inexorably Condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian and trustee, much more sternly should it deal with unlawful relations, where they are, in their nature, relations of influence over the kind of act under investigation. In their legitimate operation, trust positions of influence are respected; but where apparently used for selfish advantage they are viewed with deep suspicion; and it would be strange if unlawful relations should be more favorably regarded. Estate of Tiffany, 478.

Will Contest.—Where the Questions of Unsoundness of Mind and Undue Influence are presented in the same case, and in their consideration may overlap one the other, it has been said that as legal propositions they are to be kept distinct and apart. But considering the two issues together, it is noted that although mere weakness of intellect does not prove undue influence, yet it may be that in such feeble state, with the mind weakened by sickness, dissipation or age, the testator more readily and easily becomes the victim of the improper influences of those who see fit to practice upon him.—Estate of Tiffany, 478.

2. **Lawful or Unlawful Relation of Parties.**

Will—Undue Influence.—While the Natural Influence of a Lawful Relation must be lawful, even where affecting testamentary dispositions, the natural or ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relations and unfavorably to the lawful heirs. So, it would be doing violence to the morality of the law, and thus to the law itself, if courts should apply the rule recognizing the natural influence arising out of legitimate relationship to unlawful as well as

to lawful relations; and thereby make them both equal, in this regard at least, which is contrary to their very nature.—Estate of Tiffany, 478.

Will—Undue Influence.—There is a Distinction Between the Influence of a Lawful Relation and that of an unlawful relation. A lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing the execution of a will. However great the influence thus generated, there is no taint of unlawfulness in it; nor can there be any presumption of its unlawful exercise merely because it is known to have existed and to have manifestly operated on the testator's mind as a reason for his testamentary disposition. It is only when such influence is exerted over the very act of devising, preventing the will from being truly the testator's act, that the law condemns it as vicious.—Estate of Tiffany, 478.

Will—Undue Influence.—General Cases and Authorities, as to what does and what does not constitute undue influence, are inapplicable in a case where the influence charged originated and was exercised under an unlawful relation.—Estate of Tiffany, 478.

3. Evidence and Burden of Proof.

Will.—Undue Influence cannot be Presumed, but must be Proved, and the burden of proving it lies on the party alleging it. Such evidence must often be indirect and circumstantial, for undue influence can rarely be proved by direct and positive testimony. The circumstances to be considered, stated.—Estate of Ingram, 222.

Will—Insane Delusion—Undue Influence.—The Evidence in this Case reviewed at length and the conclusion reached, that the testatrix was the victim of an insane delusion, of which the instrument propounded was the offspring, and that the testatrix was unduly influenced to make the will in favor of proponent.—Estate of Ingram, 222.

Will—Evidence of Undue Influence.—Upon the issue of undue influence in the execution of wills, the evidence must often be indirect and circumstantial. Very seldom does it occur that a direct act of influence is patent; persons intending to control the actions of another, especially as to wills, do not proclaim the intent. The existence of the influence must generally be gathered from circumstances, such as whether the testator formerly intended a different disposition; whether he was surrounded by those having an object to accomplish, to the exclusion of others; whether he was of such weak mind as to be subject to influence; whether the instrument is such as would probably be urged upon him by those around him; whether they are benefited to the exclusion of formerly intended beneficiaries.—Estate of Tiffany, 478.

Will—Undue Influence.—The Evidence in this contest of a will, examined and held insufficient to establish a charge of undue influence.—Estate of Hill, 380.

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evidence establishing, 251.
presumption and burden of proof, 251.
when invalidates will, 251.

WILLS.

1. **Testamentary Capacity in General.**

Testamentary Capacity—Test for Determining.—The tests of testamentary capacity are: (1) Understanding of what the testatrix is doing; (2) how she is doing it; (3) knowledge of her property; (4) how she wishes to dispose of it; (5) and who are entitled to her bounty.—Estate of Scott, 271.

Will.—Every Person Over the Age of Eighteen Years, of Sound Mind, may, by last will, dispose of all his estate remaining after payment of his debts.—Estate of Ingram, 222.

Will.—A Person is of Sound and Disposing Mind who is in the possession of all the natural mental faculties of man, free from delusion, and capable of rationally thinking, reasoning, acting and determining for himself. A sound mind is one wholly free from delusion. Weak minds differ from strong minds only in the extent and power of their faculties; unless they betray symptoms of delusion their soundness cannot be questioned.—Estate of Ingram, 222.

Will.—If the Testator has Sufficient Memory and Intelligence fairly and rationally to comprehend the effect of what he is doing, to appreciate his relations to the natural objects of his bounty, and understand the character and effect of the provisions of his will; if he has a reasonable understanding of the nature of the property he wishes to dispose of, and of the persons to whom and the manner in which he wishes to distribute it, and so express himself, his will is good. It is not necessary that he should act without prompting.—Estate of Ingram, 222.

Testamentary Capacity—Will as Evidence.—A will may be considered in proof of its own validity and of the sanity of its maker.—Estate of Scott, 271.

2. **Unsoundness of Mind.**

See Insanity and Insane Delusions.

Will—Unsoundness of Mind.—The Evidence in this will contest held insufficient to establish a charge of unsoundness of mind on the part of the testator.—Estate of Hill, 380.

Will.—The Fact that a Guardian has been Appointed for a person because of his incompetency to manage his affairs is not conclusive of his incapacity to make a will.—Estate of Hill, 380.

Testamentary Capacity—Inquisition Before Execution of Will.— The examination by medical experts of a testatrix prior to her execution of her will, for the purpose of determining her testamentary capacity, is discussed by the court, both as a suggestion of insanity, and as a wise precaution.—Estate of Scott, 271.

Testamentary Capacity—Insane Delusions.—In this case the husband of the testatrix contests her will on the ground that she was of unsound mind by reason of being the victim of insane delusions that her husband was unfaithful, that he was trying to poison her, and that he was conspiring to confine her in an insane asylum, but the courts find against the contestant and sustains the will.—Estate of Scott, 271.

Testamentary Capacity—Suspicion of Husband.—If there are causes sufficient to induce a sane woman to ignore her husband in her will, or reduce what otherwise would have been a just allowance, the fact that she entertains an unjust or an unfounded suspicion in regard to his treatment of her, or an unjust prejudice against him, does not affect the will nor demonstrate that she is necessarily of unsound mind.—Estate of Scott, 271.

Testamentary Capacity—Testimony of Attesting Witnesses.—The testimony of the attesting witnesses, and, next to them, the testimony of those present at the execution of the will, are most to be relied upon in determining the question of testamentary capacity.—Estate of Scott, 271.

3. Intoxication.

Will—Testamentary Capacity—Intoxication.—A man temporarily overcome by a single debauch is, for the time being, of unsound mind, and has not testamentary capacity; so a person to whom intoxication has become such a habit that his intellect is disordered and he has lost the rational control of his mental faculties, is of unsound mind.—Estate of Tiffany, 478.

Will—Inebriety of Testator.—The Evidence in this will contest examined and held not to sustain a charge that the testator was so addicted to the excessive use of intoxicants as to deprive him of testamentary capacity.—Estate of Hill, 380.

Will—Intoxication and Undue Influence.—The testator in this case had been a prominent and respected citizen, but for some years before his death he became an habitual drunkard, and after becoming such his whole being changed with respect to his affection for his wife and children, as well also in his personal habits and his social nature and disposition. During this period he became acquainted,

while taken away from home, with a woman whom he permitted to act as his nurse; and who subsequently obtained a control over him, to the exclusion of his family, and so that he never again returned to his wife or children. Six months before his death he executed a will wherein this woman was made residuary legatee, and for nearly all his estate; his wife and children were expressly excluded by the instrument. They contested the probate of the will, and tendered as issues unsoundness of mind, and undue influence exercised by the residuary legatee. The court found in favor of the contestants upon both issues, and denied the probate of the will.—Estate of Tiffany, 478.

4. **Execution and Attestation.**

Will—Attestation in Presence of Testator.—There must be two attesting witnesses to a will, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence. In the presence of the testator means that he must not only be present corporally, but mentally as well, capable of understanding the acts which are taking place before him.—Estate of Fleishman, 18.

A Will is not Attested in the Presenec of the Testatrix when the witnesses subscribe their names in an apartment adjoining the room in which she is lying ill, where it is impossible for her to see them, she having previously signed her name while reclining on her bed, not being able to rise therefrom.—Estate of Fleishman, 18.

5. **Olographs.**

An Olographic Will Which by Mistake Bears a Date at least twenty-eight years prior to the time of its execution should be denied probate.—Estate of Fay, 428.

6. **Construction of Testament.**

Will.—The Words of a Will are to Receive an Interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.—Estate of Maxwell, 145.

Wills—Construing Parts in Relation to Each Other.—All the parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole.—Estate of Maxwell, 145.

Will—Contradictory Clauses.—Where several parts of a will are absolutely irreconcilable, the latter part must prevail; but the former of several contradictory clauses is never sacrificed except on the failure of every attempt to give all such a construction as will render every part effective.—Estate of Maxwell, 145.

Will.—When the Meaning of Any Part of a Will is Ambiguous or doubtful, it may be explained by any reference thereto or recital thereof in another part of the will.—Estate of Maxwell, 145.

Will.—The Words of a Will are to be Taken in Their Ordinary and Grammatical Sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.—Estate of Maxwell, 145.

Will.—A Will Consisting of Several Parts, separately executed by the testator, must be considered as a single instrument completed in all its parts at one time.—Estate of Maxwell, 145.

Will.—A Bequest of ''Her Wardrobe'' by the testatrix is held in this case not to include her ''ornaments.''—Estate of Taylor, 252.

Will.—Where a Testator Gives to B a Specific Fund or property at the death of A, and in a subsequent clause disposes of all his property, the combined effect of the several clauses, as to such fund of property, is to vest it in A for life, and after his decease in B.—Estate of Maxwell, 145.

Will.—A Bequest of ''Ornaments'' is in this case construed to embrace jewelry and ''jewels in general.''—Estate of Traylor, 252.

7. Avoiding Intestacy.

Will—Construction Avoiding Partial Intestacy.—The law prefers a construction of a will which will prevent a partial intestacy, to one which will permit such a result, unless a construction involving partial intestacy is absolutely forced upon the court, for the fact of making a will raises a very strong presumption against any expectation or desire, on the part of the testator, of leaving any portion of his estate beyond the operation of his will.—Estate of Maxwell, 145.

Wills—Construction as to Intestacy.—Of the two modes of interpreting a will, that is to be preferred which will prevent a total intestacy; but if the legal effect of the expressed intent of a testator is intestacy, it will be presumed that he designed that result.—Estate of Doe, 54.

8. Residuary Clause.

Wills—Meaning of ''Residue'' or ''Residuum.''—Residue or residuum, technically, is the remainder or that which remains after taking away a part; in a will, such portion of the estate as is left after paying the charges, debts, devises, and legacies; and the presumption is that the testatrix used it in that sense, unless a contrary intention clearly appears.—Estate of Scott, 368.

Wills—Meaning of Residue, How Determined.—Where a will is drawn for a testatrix by an attorney, the word ''residue,'' as used in the instrument, will be taken technically, and no resort can be

had to artificial aid in its interpretation when natural reason and the circumstances of its insertion make clear its meaning.—Estate of Scott, 368.

9. **Supplying Defects by Implication.**

Will—Supplying Defects by Implication.—When, from the whole will, the court can determine that the testator necessarily intended an interest to be given, which is not bequeathed by express and formal words, the court should supply the defect by implication, and so mold the testator's language as to carry into effect, as far as possible, the intention which he has in the whole will sufficiently declared.—Estate of Maxwell, 145.

10. **Unreasonableness of Will.**

Will—Unreasonableness does not Vitiate.—The will of one having testamentary capacity cannot be avoided because unaccountably contrary to the common sense of the country. If not contrary to the law, it stands for the descent of his property, whether his reasons for it are good or bad, provided they are his own reasons, not influenced by the unlawful influence of others.—Estate of Tiffany, 478.

11. **Devises in Trust.**

Wills—Acceleration of Devise When Trust Invalid.—If a devise is limited to take effect upon the termination of a trust and the trust proves invalid, the devisees come immediately into their own.—Estate of Doe, 54.

Wills—Devise on Termination of Trust.—A devise to the widow and daughter of the testator, one-half to the daughter absolutely and the other half to the widow for life with remainder to the daughter, is valid, regardless of the validity of a devise in trust of an intermediate or precedent estate.—Estate of Doe, 54.

Wills—Creation of Vested Remainder.—The devise in this case to the widow and daughter of the testator upon the "termination of the trust" is held to be a devise of a vested remainder, postponed in possession merely.—Estate of Doe, 54.

12. **Revocation by Codicil.**

Wills—Implied Revocation by Codicil.—When a new will is made in the form of a codicil, it does not require an express revocation to make the intent to revoke the prior will clear; it is sufficient that the intent to make a disposition of the estate in the new instrument,

which is inconsistent with the prior gifts, is made as clear as the original.—Estate of Scott, 368.

Wills—Revocation by Codicil Which Omits Legatee.—In this case the codicil of the testatrix, which in effect was a new will, omitted one of the residuary legatees named in the original will. The court found that the codicil was inconsistent and irreconcilable with, and worked the revocation of, the original will in respect to this bequest, and therefore denied the right of the legatee to participate in the distribution of the residuum.—Estate of Scott, 368.

See Charitable Bequests; Contest of Will; Homesteads, 5; Undue Influence.

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WILLS, ATTESTATION AND WITNESSING.

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WITNESSES.

Witness.—**A Court is not Warranted in Imputing Want of Veracity** to a witness, unless it appears that willful falsehood has been told. Estate of McDougal, 456.

A Witness False in One Part of His Testimony is to be Distrusted, but the court should be satisfied that the witness has testified falsely, and may discriminate between distrust and utter rejection of testimony.—Estate of McDougal, 456.

Witnesses—Manner of Testing Credibility.—Each witness is a man or woman to be treated as an individual, a moral unit, tested for integrity and veracity on his merits or her title to credit by the inherent and extrinsic elements of belief, or the circumstantial criteria of credibility. These are the only considerations for the court in weighing evidence.—Estate of Scott, 271.

Witnesses—Credibility as Affected by Station in Life.—Persons employed in domestic service and other categories of honest labor are entitled, as witnesses, to credence equally with those who plume themselves on their higher level, affecting to look down on those who work for wages as inferior. Before the law there is no such distinction, and in courts of justice all must be co-ordinated, irrespective of the accidents of artificial and conventional social relations.—Estate of Scott, 271.

See Wills, 4.

WITNESSES TO WILL.

See Wills, Attestation and Witnessing.

WORDS AND PHRASES.

"Surviving Wife" and "Widow," 93.
"Improvidence" and "Want of integrity," 206.
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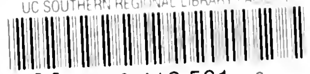
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