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 THREE.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1909.

San Francisco:
The Filmer Brothers Electrotype Company,
Typographers and Stereotypers.

TABLE OF CASES.

TABLE OF CASES CITED.

CITATIONS.

CALIFORNIA.

STATUTES.

CODE OF CIVIL PROCEDURE.

CODE OF CIVIL PROCEDURE—Continued.

CIVIL CODE.

CIVIL CODE—Continued.

POLITICAL CODE.

PENAL CODE.

COFFEY'S

PROBATE DECISIONS.

Estate of CLARA HARRIS, Deceased.

[No. 2,853; decided November 18, 1908.]

Will Contest—Nature of Proceeding.—The contest of a will is not a civil action; it is a special proceeding of a civil nature, and not subject, except as to the mode of trial, to the provisions of part 2 of the Code of Civil Procedure.

Administration.—Proceedings for the Settlement of the Estate of a decedent, and matters connected therewith, are not civil actions within the meaning of the Code of Civil Procedure, sections 392-395, nor within the meaning of section 15 of article 1 of the constitution.

Guardians—Classes and Definitions.—Guardians are either general or special; a guardian of the person, or of all the property of the ward within the state, being a general guardian, and all others being special guardians.

Guardian Ad Litem—Appointment in Will Contest.—Where the mother of minors who is their general guardian has no interest adverse to them, there is no occasion for appointing a guardian ad litem to represent them in a will contest.

Will Contest—Pleading Unsoundness of Mind.—If unsoundness of mind is relied upon in a will contest, it is sufficient to state that the deceased at the time of the alleged execution of the proposed paper was not of sound and disposing mind.

Will Contest—Pleading Fraud and Undue Influence.—When the grounds of a contest embrace duress, fraud, undue influence, or execution of a subsequent will, such matters not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded.

Will Contest.—In Pleading Fraud the Facts must be Clearly stated, so that the court may determine therefrom whether the charge is well founded.

Will Contest—Injustice or Unnaturalness of Gifts.—A will cannot be contested on the ground that it is foolish, unnatural, capricious or unjust.

Will Contest.—In Pleading Fraud and Undue Influence it is not sufficient to state the nature of the fraud and undue influence, but the facts should be alleged; and they should be stated with certainty and expressly connected with the testamentary act.

Will Contest.—Allegations of Fraud and Undue Influence should be as positive, precise and particular as the nature of the case will allow. The mere fact that the beneficiary had an opportunity to procure a will in his own favor or that he had a motive for the exercise of undue influence, does not raise a presumption of its exercise. Such exercise must be directly pleaded as bearing upon the testamentary act.

Will Contest—Evidence of Undue Influence.—The fact that the proponent of a will was the son of the testatrix and lived in the same house with her for years, and acted as her agent in certain business affairs, does not import fraud or undue influence. It may have afforded an opportunity coexistent with a motive, but the law does not presume, from the mere fact that there was an opportunity or a motive for its exercise, that undue influence was exerted.

Will Contest.—Undue Influence, in Order to Invalidate a will, must be such as to destroy the free agency of the testator at the time and in the very act of making the testament; it must bear directly upon the testamentary acts.

Will Contest.—The Facts Constituting the Cause of Action in a will contest should be stated in ordinary and concise language.

Will Contest—Manner of Pleading.—Under Our System of Pleading facts only must be stated. This means the facts, as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. Those facts, and those only, must be stated, which constitute the cause of action or the defense.

Will Contest—Pleading Undue Influence.—An allegation that influence was overpowering or that the testatrix was unable to resist, without the recital of the facts supporting such conclusion, is not sufficient.

Will Contest.—An Allegation that "Contestants are Informed and Believe" that a certain event occurred is not positive. The averment must be direct, although it may be based on such information and belief. The fact itself must be alleged in set terms.

Will Contest.—Allegations of Fraud Should State the Facts sufficient to constitute the fraud; otherwise a special demurrer will be sustained.

Testamentary Capacity—Manner of Acquiring Property.—Persons contesting a will may introduce evidence of the manner of acquisition of the property disposed of in the will, as bearing in some degree, however remotely, on the question of testamentary capacity.

Contest to probate of will; demurrer to contest.

Vogelsang & Brown, for demurrant.

Frank J. Sullivan, for contestants.

Galpin, Elkins & Frost, also for contestants.

COFFEY, J. Contestants insist that this court has jurisdiction where a guardian ad litem appears for minors and cites sections 372 and 373 of the Code of Civil Procedure and certain cases in support of this claim; but the supreme court, in the Matter of Carpenter, 75 Cal. 596, seemed to hold the contrary, saying that they did not think the provisions referred to applied to probate proceedings. At that time, however, section 1718, Code of Civil Procedure, was in existence, and there was no necessity for a guardian ad litem, if the trial court in a will contest exercised its power to appoint an attorney to represent minor heirs. In the Carpenter case the supreme court cited the Estate of Scott, 15 Cal. 220, and Ex parte Smith, 53 Cal. 204, to the effect that probate proceedings are not "civil actions," and the court repeated that they are not to be considered such within the purview of sections 372 and 373; but in the circumstances of that case the court thought the mere name or description of the officer of the court appointed was not material, since the purpose of the statute was accomplished and the rights of the infant protected by the appointee.

Since that decision, section 1718, Code of Civil Procedure, has been repealed, and now the court, sitting in probate, has no power to appoint an attorney to represent minor heirs, as such, and seems to be limited to the general laws of guardianship. Counsel for contestants say that section 1747, Code of Civil Procedure, prescribed that the "court may appoint a guardian of minors who have a guardian legally appointed by will." This is a misapprehension. The section says: "The court may appoint guardians of minors who have no guardian legally appointed by will or deed."

Estate of Cahill, 52 Cal. 52, in contestants' brief is a miscitation. The correct citation is 74 Cal. 52, 15 Pac. 364, in which the opinion was written by the same judge who decided

the Carpenter case later, in April, 1888. The precise point decided in the latter case was not raised in the former. The power of the probate tribunal was not challenged; it was only the regularity of its exercise. In the Carpenter case, the power of a court in probate to appoint a guardian ad litem under sections 372 and 373 was denied by the court; but the circumstances made the denial merely dictum, and it may now be considered as at least open to discussion, although the dictum may have attained the dignity of a decision of the appellate tribunal, since it has been followed in this forum up to the time of the case at bar, but the reasoning of the court still remains.

The supreme court has determined that a contest of a will is not a civil action. It is a proceeding in probate, although by special provision (part 3, "Of Special Proceedings of a Civil Nature," title 11, "Of Proceedings in Probate Courts," chapter 2, article 2, sections 1312, 1313, 1314, Code of Civil Procedure), the trial must be conducted in the same manner as in civil actions. On the trial the contestant is plaintiff, and the petitioner defendant. This applies simply to the mode of trial, but it does not alter the nature of the case; it does not make this proceeding a civil action.

A civil action is an ordinary proceeding in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense: Code Civ. Proc., sec. 22. Every other remedy is a special proceeding: Code Civ. Proc., sec. 23.

Part 2, Code of Civil Procedure, treats of civil actions. In this part is found the sections authorizing appointment of guardians ad litem. If there were any conflict between these parts or titles, the probate act must prevail as to all matters and questions arising out of its subject matter; but there is no such conflict, and, therefore, there can be no dispute that a will contest is a special proceeding of a civil nature, and not subject except as to the mode of trial, to the provisions of part 2, concerning civil actions. The term "special proceeding" is used in contradistinction to "civil action." This distinction is well recognized: In re Central Irr. Dist., 117 Cal. 387, 49 Pac. 354.

The proceedings for the settlement of an estate, and matters connected therewith, are not civil actions within the meaning of the practice act, sections 18 to 21 (corresponding to Code of Civil Procedure, 392-395; Estate of Scott, 15 Cal. 221), and it is manifest they are not a civil action within the meaning of section 15 of article 1 of the constitution of California: Ex parte Smith, 53 Cal. 207.

In substance, the supreme court so said in Estate of Davis, 136 Cal. 590, 69 Pac. 412, and in numerous other cases. In the Davis case, Mr. Justice Garoutte said that the character and extent of probate jurisdiction is a matter solely under legislative control, and the procedure by which that jurisdiction may be invoked and rights thereunder adjudicated is expressly laid down by the probate statute, and that that procedure must be followed or relief under such jurisdiction cannot be secured; that is to say, relief sought in probate must be dependent at all points upon the power conferred by the probate statutes. The same justice said in Re Flint, 100 Cal. 400, 34 Pac. 865, that a contest arising upon the probate of a will is a civil action within the meaning of subdivision 4 of section 1881 of the Code of Civil Procedure; but that was a point of evidence incident to the mode of trial, and in no wise affected the question of jurisdiction here suggested.

Contestants assert that the law is clear that the guardian ad litem is the proper person to act in this situation, for the mother's interest might be adverse to the minors; she might be the sole heir and wish to support a will obtained by fraud. Will it be argued that a guardian ad litem is not necessary in such case? If it be true in one, why not in all where a judge approves? Contestants argue that this construction is clearly the right one, and that the sections of the Code of Civil Procedure must be read together.

Counsel says that section 1307 prescribes that heirs may contest a will through guardians appointed by themselves, or by the court for that purpose. This is not the literal language of the statute which reads:

"Sec. 1307. Who may appear and contest the will. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by

the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided in article four of this chapter; nor does the nonappointment of an attorney by the court of itself invalidate the probate of the will."

Since the adoption of that section the power to appoint attorneys has been abrogated.

In this case, it appears that the mother's interest is not adverse to the minors, for it was on her petition that the appointment was made. Her petition alleged that the minors were under the age of ten years; that they were interested in the estate of Clara Harris, their grandmother, as the heirs of her son, Stephen Loring Harris, and that a guardian ad litem was necessary to defend their interests. Whereupon the court made an order appointing a guardian ad litem as prayed for.

Counsel for contestants contend that this order was valid and proper under section 373, Code of Civil Procedure, which is to the effect that a court appoints a guardian when an infant is plaintiff under the age of fourteen years upon the application of a relative or friend, and that this was the procedure here. The practice in all civil cases is to apply before the suit is filed to a judge to have a guardian ad litem appointed; then when the order is made, the suit in his name as guardian is filed with the county clerk. It is the same in probate cases, also, say the counsel, and it is necessary to allege appointment of guardian, citing Crawford v. Neal, 56 Cal. 321; but this was a civil action, and, as has been seen already, does not apply to probate matters.

Counsel for contestants further assert that there is no showing here that there is a general guardian, and as all the papers in the probate proceedings of Stephen L. Harris are destroyed, and as restoration of them has never been made, it must be assumed that the mother is the general guardian. This is not a legal assumption in these premises, and if it were, there would be no necessity of a guardian ad litem, her interest not being adverse or hostile, but friendly, as is established by her application in this instance; and, in that case, if she were general guardian, it would be proper for her to institute the contest on behalf of the minors as such general

guardian. She is the guardian by nature and for nurture, and, being otherwise competent, is entitled by appointment to the guardianship of the estate of the minor: Civ. Code, sec. 246; Lord v. Hough, 37 Cal. 669.

The fact and manner of the appointment should be pleaded so as to permit proof or traverse; although if the traverse were found to be true and the appointment held defective, the error could be cured by judicial leave to file a new petition and secure a valid order. At worst, this would be mere inconvenience and not operate a hardship to the infants. It is corrigible error, and does not necessarily invalidate the proceeding otherwise correct: Reed v. Ring, 93 Cal. 96, 28 Pac. 851; Foley v. California Horseshoe Co., 115 Cal. 195, 47 Pac. 42.

In ordinary civil actions a judgment against an infant where no guardian has been appointed is not for that reason void (Childs v. Lauterman, 103 Cal. 387, 37 Pac. 382), but it may be questioned whether that rule applies to a probate contest where the statute provides a saving clause for infants, allowing a period of one year after majority to contest the will: Code Civ. Proc., sec. 1333.

Ordinarily, the judgment is not void, but is merely voidable at his instance; it may be affirmed by him, and, as in the case of any other obligation that he has assumed during infancy which is susceptible of ratification, it will be considered as affirmed by him if he takes any action in reference thereto, after he becomes of age, which is consistent only with assuming its validity.

Counsel for contestants say that if this court have any doubt as to the power of appointment in probate of a guardian ad litem, they would prefer to test this point at once by an appeal, rather than go to trial and have the case reversed on the plea of lack of jurisdiction. Whatever doubt the court may have otherwise, the supreme court itself in the Carpenter case held that the sections depended upon by counsel did not apply in probate matters, while there was a statute providing for the appointment of an attorney to represent infants in such proceedings; but there is now no such statute, hence no power at all in probate except through a general guardian. Now, where the interest of the guardian in a particular matter

is contrary to that of his ward, or where he occupies a dual or duplex position, as, for instance, where he is simultaneously administrator and guardian, manifestly he cannot legally occupy these antagonistic attitudes. So far as general uses are concerned, the two situations are not necessarily incompatible; but if by reason of circumstances, as an attempt by the administrator to divest the title of the infant heir by a sale, under a probate order, of lands to pay debts of an intestate, his position became hostile to the infant, he could not represent the ward: Townsend v. Tallant, 33 Cal. 52. The minor then having no guardian quoad the petition, it became the duty of the court, before acting, "to appoint some disinterested person his guardian for the sole purpose of appearing for him and taking care of his interests." This was the language of section 159 of the old probate act; but these words are not to be found in section 1539 of the Code of Civil Procedure, which is the statute that superseded the old act. The present probate law mentions "any general guardian of a minor so interested," and so differs from the former.

The code, with characteristic brevity, declares that guardians are either general or special; a guardian of the person, or of all the property of the ward within the state, being a general guardian, and all others being special guardians: Civ. Code, 236-240; 2 Ross' Probate Law and Practice, 936.

Now, if the general guardian is adverse in interest, as in Townsend v. Tallant, 33 Cal. 52, above cited, although the language of the statute has been changed by the code, it should seem anomalous that the infant may not be protected by a special guardian with functions limited to the particular action or proceeding in probate, whether it be a sale of real estate, as in that case, or an application for the revocation of a probate of a will, as in the matter under advisement. Such a provisional order was made in a contemplated contest in the Estate of Robert P. Hastings, Deceased, at the instance of the former Judge Serranus Clinton Hastings, where the widow was executrix of the will and guardian of the minor, although this court questioned the technical power, yet it deemed it advisable for the protection of the infant to make the special appointment.

So in this case the court might act in like manner; but inasmuch as the interests of the mother and minors are not adverse, there should seem to be no similar reason for a special guardian, as she could be appointed general guardian and in that way protect the legal rights of the infants.

I choose, however, to pretermit this point for the present and to pass to the main grounds of demurrer, formally overruling the objections stated in paragraphs 1 and 2 of demurrer.

Paragraph 3 of demurrer is addressed to the sixth ground of contest, to wit, the allegation on information and belief that the alleged will and testament of decedent admitted to probate is not her last will, and was never executed by her because, "as they are informed and believe, the said original will was destroyed by fire in April, 1906." This averment is technically ill in form, because it should be direct and pleaded absolutely as a fact. The physical destruction of the original will by fire in and of itself would not operate to prove the nonexecution of the instrument propounded, nor to sustain an implication of forgery of the latter. Counsel for contestant in support of this allegation claim that, in connection with their fourth ground of contest, that there is here a distinct charge of forgery, but this is not as clear to the court as to the counsel.

In stating the grounds of contest, if unsoundness of mind is relied on, it is sufficient to state that the deceased, at the time of the alleged execution of the proposed paper, was not of sound and disposing mind; unsoundness is the ultimate fact to be found, and other causes are to go to the jury, from which they are to find, and the issue upon that subject is to be of the ultimate fact only; but when the grounds of contest embrace duress, menace, fraud, undue influence, due execution and attestation, subsequent will or the like, such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded, not in the language of the statute, but the facts (not evidence of the facts) relied on must be stated, and the issues relating thereto submitted to the jury, to the end that the court, either upon demurrer to the statement of the grounds of contest, or upon the verdict, may determine whether, as a matter of law, such facts so pleaded or found constitute a valid reason why the proposed

paper should not be admitted to probate. This course is plain, logical, direct, and is a certain guide to the court, to counsel, and to the jury; the other course leads to uncertainty as to what is relied upon, and to doubt as to what may be the basis of the verdict: Estate of Gharky, 57 Cal. 279.

The fourth "ground of contest" is a conclusion, and as such cannot be connected as a statement of fact with this sixth ground. Demurrer sustained as to the sixth ground of contest.

The count on fraud should be recast to correspond to the requirements of the code rules of pleading as interpreted by the supreme court. It is a well-known rule, says that tribunal, that in pleading fraud the facts must be clearly stated, so that the court may determine therefrom whether the charge is well founded: Estep v. Armstrong, 69 Cal. 538, 11 Pac. 56.

Counsel for contestants say that their pleading clearly states the facts of undue influence and fraud, "if forgery of a will is fraud." But there is no specific allegation of fraud.

It is urged that the will is unnatural as to the contestants; but that does not constitute a ground of opposition, and does not enter into the issue of fraud or undue influence. A testator of sound mind and free from restraint has a right to make a will, whether it be foolish, unnatural, capricious, or unjust: Estate of Donovan, 140 Cal. 394, 73 Pac. 1081; citing Estate of McDevitt, 95 Cal. 33, 30 Pac. 101, and Estate of Kaufman, 117 Cal. 289, 49 Pac. 192.

Counsel for contestants say in their brief under the head of "Fraud," that it is alleged that this will of May, 1902, is not the will of decedent; that the original will was destroyed by fire, and that the document on file was procured by the fraud of Lawrence Harris and Vogelsang & Brown, attorneys. Here, say counsel, is a distinct charge of forgery which is made to state a fact connected with the allegation not demurred to by proponents, namely, in paragraph 4: "That said alleged will is not the will of Clara Harris, deceased, and was never executed by her and was not her free act and deed."

Counsel for contestants say that the demurrer does not attack this allegation nor the allegation 5 which alleges that decedent in May, 1902, was incompetent to make a will.

As already seen, these allegations are assailed by the demurrants in their grounds 1 and 2, which have been formally overruled, although paragraph 4 is a conclusion, and paragraph 5 is subject to some slight verbal criticism as to its form. In the opinion of the court the facts constituting the alleged fraud on the part of proponent and the complicity of his attorneys are not stated with the particularity required by the authorities cited.

The terms of the charges are general, and not pointed to the act itself. It is not sufficient to state the nature of the fraud, undue influence, or fraudulent representations, but the facts should be properly alleged: Estate of Clark, Myr. Rep. 265. These facts should be stated with sufficient certainty and precision, and should be expressly connected with the testamentary act.

The cases cited by contestants are mainly upon the evidence required and the presumptions indulged and not upon the pleadings. The distinction between what is pleadable and what is probative may be difficult; but it must be observed according to all the authorities. It is quite possible to reconstruct this seventh ground of contest and free it from the objections advanced by the demurrer. The allegations of fraud and undue influence should be as positive, precise and particular as the nature of the case will allow. The mere fact that the beneficiary had an opportunity to procure a will in his own favor, or that he had a motive for the exercise of undue influence, does not raise a presumption of its exercise. Such exercise must be directly pleaded as bearing upon the testamentary act.

Ross v. Conway, 92 Cal. 632, 28 Pac. 785, relied upon by contestants, was a case of a spiritual adviser who employed an attorney and directed his conduct in concocting the documents disputed, and there were direct allegations connecting him in that confidential capacity with the execution of the instruments for the benefit of himself and his church. The question was whether he had used the influence which he had acquired over her by virtue of being her spiritual adviser for the purpose of procuring her to make such disposition of her property, and the court declined upon the proof to uphold the transaction. The supreme court very properly said that the influence which the spiritual adviser of one who is about to

die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised. Any dealing between them under such circumstances will be set aside as contrary to all principles of equity, whether the benefit accrue to the adviser or to some other recipient who, through such influence, may have been made the beneficiary of the transaction. In such case the testatrix should have had independent advice and be at arm's-length with the beneficiary.

In the case under advisement the proponent was not a spiritual adviser, but a member of the family who acted in business affairs for the decedent, and it does not necessarily follow that his relation was such as to raise a presumption of undue influence, although evidence might establish that fact.

That he was her son and lived in the same house with her for years and acted as her agent in certain business affairs does not import fraud or undue influence. It may have afforded an opportunity coexistent with a motive, but the law does not presume from the mere fact that there was an opportunity or a motive for its exercise, that it was used, that undue influence was exerted, for it is not a presumption, but a conclusion from the facts and circumstances established by proof under the pleading.

The fact that the son transacted business as alleged is not of itself evidence of undue influence. Influence not brought to bear upon the testamentary act is not undue influence such as will operate to set aside a will on that ground. Undue influence must, in order to have such effect, destroy the free agency of the testatrix at the time and in the very act of making the testament. It must bear directly upon the testamentary act: Estate of Donovan, 140 Cal. 394, 87 Pac. 380.

The demurrer to the seventh ground of contest should be sustained.

Contestants say that the code does not demand that the evidence to be given at the trial be stated, and it points out clearly what is necessary in a pleading and how it shall be construed. The facts constituting the cause of action should be stated in ordinary and concise language. It does not say the evidence of those facts. It is the ultimate fact, and not the prior or probative facts, which should be set forth. Presumptions of evidence cannot dispense with averments of ultimate facts. Probably no better statement can be made of what is required than that contained in the opinion of Mr. Chief Justice Field in Green v. Palmer, 15 Cal. 414, in which he engaged at length in a discussion upon this topic. The syllabus on page 412 of that volume is an accurate abbreviation of the context.

Under our system of pleading, facts only must be stated. This means the facts, as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. Those facts, and those only, must be stated, which constitute the cause of action or the defense. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged; and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved. If every fact essential to the claim or defense be not stated, the adverse party may demur; and if any fact not essential to the claim or defense—in other words, any except issuable facts—be stated, the adverse party may move to strike out the unessential parts. An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and need not be proved or disproved. Whether an allegation be material may be determined by the question, "Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. All statements in a pleading must be concisely made, and when once made, must not be repeated.

It is true that judicial construction must be liberal, and that no error or defect should be regarded unless it affects substantial rights; but liberal construction must not incline

to laxity where the rules of pleading are well established and have been so for many decades interpreted by the supreme courts, as in this class of cases. Substantial rights can be conserved only by adherence to those rules.

The points raised by the demurrer in regard to paragraph 7 of the contest do not seem to be technical; if this court so regarded them, they would be overruled, but they appear to conform to the authorities requiring particularity in pleadings of this kind.

It has ever been the rule that it is essential to the issue that there shall be certainty, clearness, distinctness and particularity in pleading. When it is said that the issue must be certain, the meaning is that it must be particular or specific as opposed to general. Each issue tendered must be single, certain and material in its quality. The allegations should be definite, precise and positive, so as to acquaint the respondent with the matter that he is called upon to traverse. These rules are recognized, adopted and universally approved by the courts, and need not be enlarged upon here: See Stephen's Pleading, Andrews' Am. ed. 1894, secs. 100-103.

An allegation that influence was overpowering or that the testatrix was unable to resist, without the recital of the facts supporting such conclusion, is not sufficient. An allegation that "contestants are informed and believe" that a certain event occurred is not positive. The averment must be direct, although it may be based on such information and belief. The fact itself must be alleged in set terms.

An allegation "on information and belief" that the will of Clara Harris was absolutely overpowered by the lies and misrepresentations of Lawrence Harris continued daily after the death of Stephen L. Harris in February, 1902, lacks certainty, under the rule, because it does not specify the lies nor particularize the species of misrepresentations which dominated the will of decedent. Allegations of fraud should state the facts sufficient to constitute the fraud, otherwise a special demurrer should be sustained: Scearce v. Glenn County, 100 Cal. 419, 35 Pac. 302.

These are specimens of imputed infirmities in the pleading here demurred to, of which the court feels compelled to take notice and which may be cured by an amended contest. The court does not favor dilatory pleas, nor does it design to en-

courage the demurrer habit, but there are certain well-recognized rules of pleading which it cannot, if it would, disregard.

Paragraph 8 of the contest is subject to the foregoing remarks, as all the allegations of 7 are incorporated therein, except, perhaps, the part beginning with line 17 on page 4 down to and including line 18 on page 6. This seems to be fairly within the matters of Ruffino, 116 Cal. 304, 48 Pac. 127, and Wilson, 117 Cal. 280, 49 Pac. 711. The contestants may introduce evidence of the manner of acquisition of the property disposed of in the will, as bearing in some degree, however remotely, on the question of testamentary capacity. The substance of this clause may be considered proper to support evidence within the limitation suggested, although the form might be remodeled to correspond to the views of this opinion.

Otherwise, the demurrer should be and it is sustained, with ten days within which to file an amended contest.

The Principal Case in Denying the Power of the superior court in probate to appoint a guardian ad litem is important, in that it decides a question not infrequently raised and hitherto perhaps not free from doubt. The notes in the pages to follow have to do with guardians ad litem in civil actions generally, not in probate proceedings, and hence the authorities and statements therein are not to be construed as in any way modifying the decision of Judge Coffey in the principal case.

RIGHTS, DUTIES, AND POWERS OF GUARDIAN AD LITEM.

Power to Sue.—Infants, being persons under disability, cannot conduct their own legal proceedings, and the usual custom is for them to appear either by next friend or guardian ad litem. Under a Mississippi statute, a guardian ad litem is considered the full representative of the rights and interests of the minor for the particular case in which he was appointed, and has the same powers as a general guardian: Burrus v. Burrus, 56 Miss. 92; while in Pennsylvania a next friend of an infant, though recognized for certain purposes, is held not to have the power of a trustee or guardian: Turner v. Patridge, 3 Penr. & W. (Pa.) 172.

A suit may be brought by the next friend of an infant without first obtaining leave of the court or of the infant: Bethea v. McCall, 3 Ala. 449; Barwick v. Rackley, 45 Ala. 215; O'Donnell v. Broad, 11 Pa. Co. Ct. 622, 1 Pa. Dist. Rep. 650. But see In re Whitlock, 19 How. Pr. 380. He is, however, under the control of the court, and may be removed and another appointed if the interests of the infant require it: Ex parte Kirkman, 40 Tenn. (3 Head) 517. And in proceedings for the sale of real estate of a minor, the spe-

cial guardian appointed was held to be an officer of the court; and that until he reached his majority, and the purchase money had in fact been paid over to him, and as long as it remained in the hands of the special guardian, the court had control over it and over all the proceedings in the application: In re Price, 67 N. Y. 231, affirming 6 Hun, 513.

Where a life insurance policy provided that in case of death the insurance should be paid to the children or their guardian, if under age, the guardian ad litem may sue therefor, and it need not be in the name of the general guardian: Price v. Phoenix etc. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

Such Representative of an Infant can Act Only in the Matter for which he was appointed: Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212. So a special guardian appointed to represent a minor in a private sale of land cannot bind him by a judgment in a suit brought by the guardian to compel a purchaser to take title: Armstrong v. Weinstein, 53 Hun, 635, 6 N. Y. Supp. 148. His authority does not extend to bringing or prosecuting more than the one particular action in which he was appointed: Rosso v. Second Ave. R. Co., 13 App. Div. 375, 43 N. Y. Supp. 216. Therefore a guardian ad litem cannot agree that a decision in one case shall determine that in another, although the same facts are involved, the same parties, and substantially the same points of controversy: McClure v. Farthing, 16 Mo. 109. Where such a guardian is appointed in an action for the settlement of a trust, he cannot bind the infant by a stipulation in regard to the expenditure of money coming from a totally distinct source: In re Kennedy's Estate, 120 Cal. 458, 52 Pac. 820.

The Power of a Next Friend Commences with the suit; and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless the defendant has waived the necessity therefor: Miles v. Boyden, 20 Mass. (3 Pick.) 213. His authority terminates with the judgment in the case: Davis v. Gist, Dud. Eq. (S. C.) 1; or with the minority of the infant: Lang v. Belloff, 53 N. J. Eq. 298, 31 Atl. 604.

The Acts of a Guardian Ad Litem are Binding on Infant parties for whom they are performed, when not impeached for fraud, collusion or gross misconduct: Smith v. Taylor, 34 Tex. 589. So if a party is served with process and a guardian ad litem is appointed to represent him, who appears and files an answer, the ward is brought into court for all purposes of the suit and is charged with notice of all new pleadings that may be filed either by the original parties or any others who may come into the case; and he is bound by whatever judgment may be recovered by or against any person who was a party to the suit at the time of its rendition: Deering v. Hurt (Tex.), 2 S. W. 42.

Duty to Make Vigorous Defense.—The law is exceedingly jealous in guarding the interests of infant suitors, and exacts of their next

friends or guardians ad litem as vigorous a defense to the action as its nature will admit: Sconce v. Whitney, 12 Ill. 150; Rhoads v. Rhoads, 43 Ill. 239; Tyson v. Tyson, 94 Wis. 225, 68 N. W. 1015. In Stunz v. Stunz, 131 Ill. 210, 23 N. E. 407, it is said: "It is the duty of the guardian ad litem, when appointed, to examine into the case and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate. He is not required to make a defense not warranted by law, but should exercise that care and judgment that reasonable and prudent men exercise, and submit to the court for its determination all questions that may arise, and take its advice, and act under its direction in the steps necessary to preserve and secure the rights of the minor defendants. The guardian ad litem who perfunctorily files an answer for his ward, and then abandons the case, fails to comprehend his duties as an officer of the court." See, also, Stammers v. McNaughten, 57 Ala. 277; Stark v. Brown, 101 Ill. 395. He cannot fail to plead just because the infants are necessary or improper parties: Farmers' etc. Trust Co. v. Reid, 3 Edw. Ch. 414. And if the interests of the minors are prejudiced through the failure of the guardian ad litem to raise a proper objection to an action he is liable to them therefor: Reed v. Reed, 46 Hun, 212, 13 Civ. Proc. Rep. 109. See, also, Banta v. Calhoun, 9 Ky. (2 A. K. Marsh.) 166.

Making Prejudicial Admissions.—So far as concerns the substantial rights of his ward, a guardian ad litem can make no admissions to bind him, but everything must be proved against an infant: Hooper v. Hardie, 80 Ala. 114; Pillow v. Sentelle, 39 Ark. 61; Evans v. Davies, 39 Ark. 235; Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212; Cochran v. McDowell, 15 Ill. 10; Taylor v. Parker, 1 Smith (Ind.), 225; Melton v. Brown, 20 Ky. Law Rep. 882, 47 S. W. 764; Benson v. Wright, 4 Md. Ch. 278; Burt v. McBain, 29 Mich. 260; Cooper v. Mayhew, 40 Mich. 528; and this holds good both at law and in equity: Atchison etc. R. Co. v. Elder, 50 Ill. App. 276; Collins v. Trotter, 81 Mo. 275.

In Atchison etc. R. Co. v. Elder, 50 Ill. App. 276, an infant was injured in a railroad accident. His father, as next friend, entered into a compromise with the railroad company, whereby a suit was instituted, attorneys employed by the company preparing the papers. The matter was submitted to the court, without a jury and without evidence, and a judgment for plaintiff entered for $250, pursuant to the compromise. An amended declaration was filed, whereon a hearing was had and the recovery increased to $2,500. The appellate court affirmed this judgment, holding that no estoppel applicable to the father could affect the infant. That a plaintiff in ejectment may be estopped from claiming land by recitals of ownership in a deed of his special guardian, see Esterbrook v. Savage, 21 Hun, 145.

Must Exclude Illegal Evidence.—If incompetent and illegal evidence is introduced, without any objection on the part of the guardian,

the court is bound to notice and exclude it: Cartwright v. Wise, 14 Ill. 417; Turner v. Jenkins, 79 Ill. 228. And such guardian cannot consent to the taking of testimony before a person not properly authorized to take it: Fischer v. Fischer, 54 Ill. 231.

A guardian ad litem should not consent to a general reference to a master to take an account against an infant, until he has ascertained that his rights can be protected on such reference: Jenkins v. Freyer, 4 Paige, 47. Where infants sue by their next friend to obtain a settlement of an administrator's account, an attorney employed by such next friend cannot bind the infants by an agreement to waive proof of the vouchers and accounts presented by the administrator, or to allow commissions other than allowed by law: Crotty v. Eagle, 35 W. Va. 143, 13 S. E. 59.

Assenting to Acts not Prejudicial to the Infant.—While a next friend cannot admit or stipulate away any substantial rights of the minors whom he represents, he may assent to arrangements which will facilitate the trial, and the infant is bound thereby. So he may consent to a trial of the case at the first term of court: McMillan v. Hunnicutt, 109 Ga. 699, 35 S. E. 102. A similar question arose in Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, where Justice Harlan, speaking for the court, said: "It is undoubtedly the law in Illinois, as elsewhere, that a next friend or guardian ad litem, cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian ad litem or prochein ami from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. There is but one supreme court of Illinois, although for the convenience of litigants it sits in different places in that state, and, unless the consent of parties is given, can take cognizance, when holding its session in a particular grand division, only of cases arising in such division. But it is the same court that sits in the respective divisions, and a consent by the next friend or guardian ad litem that a case be heard in a particular division could not possibly prejudice the substantial rights of the infant. It is true that the consent of the plaintiff's next friend and guardian ad litem, that the case should go to the central grand division, brought it to a more speedy hearing than it would otherwise have had, if such consent had not been given. But, certainly, it was not to the interest of the plaintiff that the final determination of his case should be delayed." So he may consent to the removal of a cause from one court having jurisdiction thereof to another court of like jurisdiction: Lemmon v. Herbert, 92 Va. 653, 24 S. E. 245, citing Morriss v. Virginia Ins. Co., 85 Va. 588, 8 S. E. 383. And he may, in his answer, admit such facts as do not tend to prejudice his ward: Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291. He may also stipulate as to the condition of a bank account and so obviate the necessity of introducing the bank books in

evidence, such not prejudicing the infant: Rarick v. Vandevier, 11 Colo. App. 116, 52 Pac. 743. In Biddinger v. Wiland, 67 Md. 359, 10 Atl. 202, an infant defendant was regularly summoned, and, under the law then in existence, a commission to assign a guardian and take her answer was issued, and returned unexecuted. A second commission was issued, and also returned unexecuted. Meanwhile, and before the court, under the new rules, appointed a guardian to defend, the case being at issue as to other parties, adults, testimony was taken which fully established plaintiff's case. After that testimony was taken and returned, the court appointed a solicitor of the court to answer and defend for the infant, who did so, submitting the infant's rights to the protection of the court. It was then agreed in writing between the plaintiff's solicitor and the guardian, that the case should be submitted without argument to the court, the testimony already taken to have the same effect as if taken by the examiner after the infant's answer had been filed. This agreement was objected to as unauthorized, but the court held it proper; that the guardian must be presumed to have done his duty, and knew of no other testimony which could be procured in the infant's behalf; and the judgment was affirmed.

A guardian may adopt a report of the division of land in a partition suit, after the infants have been served, and so avoid the necessity for another division, where they were not made parties to the suit, and it was therefore reversed: Kentucky etc. Land Co. v. Elliott, 12 Ky. Law Rep. 812, 15 S. W. 518.

Where by statute a different rule is prescribed as to the power of a guardian ad litem to admit material facts in the conduct of a trial, or to control the case with as full authority as the minor could if he were of full age, such guardian may bind his ward by stipulation in the nature of a waiver of proof: Le Bourgeoise v. McNamara, 82 Mo. 189, affirming 10 Mo. App. 116.

Power of Compromise.—The general rule undoubtedly is, that the next friend or guardian ad litem of an infant has no power to compromise or settle the claim of his ward, and no agreement to that end can bind his ward, unless sanctioned by the court: Isaacs v. Boyd, 5 Port. (Ala.) 388; Johnson v. McCann, 61 Ill. App. 110; Edsall v. Vandemark, 39 Barb. 589; and especially is this so after it has been prosecuted to a judgment: O'Donnell v. Broad, 2 Pa. Dist. Rep. 84; Fletcher v. Parker, 53 W. Va. 422, 97 Am. St. Rep. 991, 44 S. E. 422. So if a next friend commutes a debt or judgment due his infant ward, he is responsible for the amount thereof and interest: Forbes v. Mitchell, 24 Ky. (1 J. J. Marsh.) 440; or the court may set aside such wrongful compromise: In re Etna, 1 Ware (462), 474, Fed. Cas. No. 4542. Where a next friend of minors died, and they inherited from him a greater amount of property than the judgment which he compounded, chancery will not prevent their looking to the judgment debtor, especially where the composition is of a doubtful nature, and make the debtor

resort to the estate of the next friend: Miles v. Kaigler, 18 Tenn. (10 Yerg.) 10, 30 Am. Dec. 425.

In George v. Knox, 23 La. Ann. 354, an agreement was made by the attorney of the vendor of real estate with the curator ad hoc, who represented the vendee in a suit to rescind the sale, by which the vendee was to take the rents of the property during the time that he had it in possession as an equivalent for a part of the price that he had already paid. This agreement was held not binding on the vendee, the curator ad hoc not being authorized to make it.

While holding that a next friend cannot enter into a compromise made out of court and not approved by the court, or where judgment is not entered in pursuance thereof, the case of Tripp v. Gifford, 155 Mass. 108, 31 Am. St. Rep. 530, 29 N. E. 208, is to the effect that a fair adjustment in court is allowable. It is there said: "We see no reason why the next friend should not have authority to institute or to entertain negotiations for a settlement of the controversy. His position with reference to it is like that of a general guardian, or the guardian ad litem of an infant defendant. It is to be expected that he will act fairly and intelligently for the real interest of the plaintiff; but it cannot be said that every suit brought in the name of the infant is upon a good cause of action, or that, if well brought, the just amount of the recovery cannot be arrived at without a trial, or that when the next friend and the defendant, and their respective counsel, who are sworn officers of the court, act in good faith, it is necessary that an investigation of the fairness of a proposed adjustment should be made or ordered by the court before disposing of the cause. The next friend is intrusted with the rights of the infant so far as they are involved in the cause, and acts under responsibility both to the court and the plaintiff. It may well be considered to be within his official duty to negotiate, if possible, a fair adjustment, without subjecting the plaintiff to the expense and risk of a trial."

Power to Arbitrate Claim.—A guardian ad litem or next friend cannot bind his wards by submitting the suit in their name to arbitration; but it is his duty alone to conduct the suit in court: Fort v. Battle, 21 Miss. (13 Smedes & M.) 133; Hannum v. Wallace, 28 Tenn. (9 Humph.) 129; Tucker v. Dabbs, 59 Tenn. (12 Heisk.) 18.

Power to Receive Money Recovered and to Satisfy Judgment.—The weight of authority is to the effect that a next friend has no authority to receive the money recovered in the action prosecuted by him, his power of representation ending with the suit; and for the same reason he cannot enter satisfaction on the record: Isaacs v. Boyd, 5 Port. (Ala.) 388; Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429; Glass v. Glass, 76 Ala. 368; Westbrook v. Comstock, Walk. Ch. (Mich.) 314; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Miles v. Kaigler, 18 Tenn. (10 Yerg.) 10, 30 Am. Dec. 425; American Lead Pencil Co. v. Davis (Tenn.), 67 S. W. 864. Therefore, a judgment for the plaintiff, a minor, for personal injuries, should not direct payment of the money to his next friend, but should require it to be deposited with

the clerk of the court, and by him paid to the minor's guardian: City of Austin v. Colgate (Tex. Civ. App.), 27 S. W. 896. Where by statute it is provided that any judgment recovered by a minor not exceeding $500 may, if he have no guardian, be taken charge of by his next friend, such next friend has no authority to receive a recovery of a sum exceeding that amount: Gulf etc. Ry. Co. v. Younger, 19 Tex. Civ. App. 242, 45 S. W. 1030.

If a next friend admits satisfaction of judgment on the record, it will be set aside in equity at the suit of the plaintiff therein after he has attained his majority: Cody v. Roane Iron Co., 105 Tenn. 515, 58 S. W. 850. There the court, after stating the general rule that a payment made to the next friend will not operate as a satisfaction, continued: "Hence the payment made to the next friend of this complainant was and is, in legal contemplation, the same as no payment at all.

"Such being true, the case now before the court is one in which there is a recited satisfaction in the face of a judgment where, in fact and in law, no satisfaction has been had, and that recitation, if allowed to stand, must inevitably preclude the complainant from the collection of his recovery, and thereby work a great wrong and fraud upon his confessed and adjudged rights.

"It is the peculiar province and pride of a court of equity to vouchsafe all needed and appropriate relief in such a case.

"It cannot be said against the complainant that he has been guilty of any wrong or fault at any point. The loss, if any, to be sustained through the payment already made, is due alone to the joint and illegal act of this defendant and the next friend, each of whom was charged with knowledge that such payment was wholly unauthorized in law; and it is better, if such be the ultimate result, that a participant in that act pay twice, than that the only person entitled to the money, and who is entirely innocent, should not be paid at all."

Payment to a prochein ami may, however, be legal satisfaction of recovery if ratified by the minor after attaining his majority or his legal representative after his death: Allen v. Roundtree, 1 Spear (S. C.), 80.

The minority view holds that the next friend may receive the recovery, give a sufficient acquittance and satisfy the judgment: Baltimore etc. R. Co. v. Fitzpatrick, 36 Md. 619; O'Donnell v. Broad, 2 Pa. Dist. Rep. 84; and it may be paid to his regularly appointed attorney, but the right of the next friend or his attorney to receive the money is subordinate to that of the regular guardian: Baltimore etc. R. Co. v. Fitzpatrick, 36 Md. 619. See, also, Stroyd v. Traction Co., 15 Pa. Super. Co. 245.

In Cody v. Roane Iron Co. (Tenn.), 53 S. W. 1002, affirmed, 105 Tenn. 515, 58 S. W. 850, it is held that though a next friend has no right to take the money paid him out of court, he may acknowledge satisfaction on the record; that the proper course is for the court to direct the money to be paid into court, for the purpose of being

subsequently paid out to the regular guardian, or of being lent out under order of court for the benefit of the infant.

Power to Contract for Legal Services.—Where it is for the infant's benefit that counsel be employed, the guardian ad litem or next friend may do so: Glass v. Glass, 76 Ala. 368; Baltimore etc. R. Co. v. Fitzpatrick, 36 Md. 619; Colgate v. Colgate, 23 N. J. Eq. 372. But see In re Johnston, 6 Dem. Sur. (N. J.) 355, holding that a guardian ad litem in the surrogate's court will employ counsel at his own expense.

There is a conflict as to whether such guardian may enter into a contract for the services of an attorney. In Yourie v. Nelson, 1 Tenn. Ch. 614, it is held to be his duty to make a contract with counsel for professional services, or agree with him as to his compensation, and such expenses fall under the head of just allowances to which fiduciaries are entitled. Other cases take an opposite view, under which he cannot bind his ward by a contract for attorney's fees: Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78; Houck v. Birdwell, 28 Mo. App. 644. In the former of those cases it is said: "The guardian ad litem is an officer of the court appointing him; his duties 'are to represent the infant, insane or incompetent person in the action or proceeding': Code Civ. Proc., sec. 372. He may, doubtless, employ an attorney to assist him in the prosecution or defense of the action, but he may not make a contract for the payment of compensation which shall absolutely bind the ward or his estate. . . . . His powers are certainly no greater than those of a general guardian. Like the latter he may be allowed a credit for moneys advanced or paid out of the fund collected, as reasonable compensation for the expenses, and for the services of an attorney. But he has no power by specific agreement with the attorney to fix such compensation absolutely. An attorney accepting employment, and rendering services under such circumstances, must rely upon the subsequent action of the court in ascertaining and adjusting proper compensation. He cannot determine the amount, nor can he retain what he or the guardian ad litem may deem a proper sum, leaving it to the general guardian to sue for the excess. There is no place here for the doctrine of an implied promise upon a quantum meruit. The presumption of a promise is rebutted by the fact that the guardian had no power to contract in such manner as to bind the assets of the ward except conditionally."

Power to Purchase at Sale of Infant's Property.—The question has arisen as to how far a next friend or guardian ad litem is a trustee in such a sense as to be prohibited from purchasing the infant's property at a sale. The Kentucky courts hold that he is not such a trustee, and the rule does not apply: Mitchell v. Berry, 58 Ky. (1 Met.) 602. In Spencer v. Milliken, 4 Ky. Law Rep. 856, it was held that a sale was not void because a guardian ad litem was the purchaser, the infant having been represented by a trustee who defended for him.

The decisions of the other courts, however, consider a guardian ad litem as a trustee within the meaning of the rule, and will not uphold a purchase by him at a sale of the infant's property: Collins v. Smith, 38 Tenn. (1 Head) 251; Starkey v. Hammer, 60 Tenn. (1 Baxt.) 438; Gallatian v. Cunningham, 8 Cow. 361; nor can he acquire the property of infant heirs pending a litigation in respect to it: Massie v. Matthews, 12 Ohio, 351.

The rule prohibiting a purchase by a guardian ad litem, not made for the benefit nor in behalf of his infant wards, is absolute, and it makes no difference that the purchase was made, not for the guardian's own benefit, but for that of some other person: Le Fevre v. Laraway, 22 Barb. 167. The presumption in the case of a purchase by the guardian ad litem is that it is for his benefit, and the burden is on him to show that it was made for the infant's good: O'Donoghue v. Boise, 92 Hun, 3, 37 N. Y. Supp. 961. That the remedy of infants against persons purchasing from their guardian ad litem, who bought the property at a sale, is, in the absence of any statutory provision, in equity, and hence voidable and not void, see Dugan v. Denyse, 13 App. Div. 214, 43 N. Y. Supp. 308.

Power to Waive Service of Process.—As a general rule, a guardian ad litem cannot waive service of process: Robbins v. Robbins, 2 Ind. 74; Pugh v. Pugh, 9 Ind. 132; Cormier v. De Valcourt, 33 La. Ann. 1168. So the answer of guardian ad litem does not make his wards parties and dispense with the necessity of services of process: Frazier v. Pankey, 31 Tenn. (1 Swan) 75. In Hannum v. Wallace, 28 Tenn. (9 Humph.) 129, however, it was held that, if not prejudicial to their interests, the guardian might waive service of a copy of the declaration and notice, thus saving delay and a useless accumulation of costs.

In Banta v. Calhoun, 9 Ky. (2 A. K. Marsh.) 166, it was held that if the guardian appeared, it was not necessary for process to be served on the infant. And where a minor has been served with citation, and a guardian ad litem appointed for him, such guardian may waive notice of citation, and consent to a hearing: Pollock v. Buie, 43 Miss. 140. Where a warning order published against a minor defendant was not entirely definite as to the place at which he was warned to appear, and a guardian ad litem was appointed by the court, who filed an answer for his ward, it was held that the notice and appearance were sufficient to bind the latter: Williams v. Ewing, 31 Ark. 229.

Right to Appeal.—A guardian ad litem may and should appeal whenever, in his opinion, it is necessary to protect his ward's interest: Sprague v. Beamer, 45 Ill. App. 17; Loftis v. Loftis, 94 Tenn. 232, 28 S. W. 1091; Tyson v. Tyson, 94 Wis. 225, 68 N. W. 1015; and leave of the court is not necessary: Jones v. Roberts, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883.

Under a statute restricting the right of appeal to parties to a suit, a guardian ad litem may be a party thereto, and as such has the right

of appeal on behalf of the infants, to protect or advance their interests: Thomas v. Safe Deposit etc. Co., 73 Md. 451, 21 Atl. 367, 23 Atl. 3. In Harlan v. Watson, 39 Ind. 393, it is held that such a guardian cannot appeal in his own name.

Power to Make Oath for Infant.—The next friend of an infant may verify a pleading in the action in which he is acting: Turner v. Cook, 36 Ind. 129; and he may make an affidavit in replevin: Wilson v. Me-ne-chas, 40 Kan. 648, 20 Pac. 468; and also for an attachment, and stating therein that he has commenced the action as next friend sufficiently avers the agency: McDowell v. Nims, 15 Week. Law Bull. (Ohio) 359.

Duty to Use Good Faith.—A guardian ad litem must act toward the infant whom he represents in good faith: Spelman v. Terry, 74 N. Y. 448. In that case a special guardian attempted to make use of an invalid claim and to put a purchaser of such claim from him in possession of land of an infant. The court condemned any such action in the following words: "We do not hold that one appointed special guardian to sell infants' real estate, who then holds a valid encumbrance upon or a claim against the same, thereby loses his rights in his encumbrance or claim, or is to forego the sale of it to his own advantage. What we do hold is, that he may not, after he is appointed, so use an invalid claim held by him as to put a purchaser of it from him into possession of the lands; whereby an action of ejectment is made necessary to regain possession by the one lawfully entitled. It is an act in hostility to the interests of his ward, and inconsistent with the duty he owes. For the damage from such act he should make just compensation. Such rule is a branch of the principle that one holding a relation of trust to another cannot deal with the trust estate or fund to his own profit and the harm of the cestui que trust." If the next friend plays his infant ward false, the judgment is not thereby rendered void, but the defrauded plaintiff may resort to a court of equity to set aside and undo the fraudulent work and to wipe out the record, falsely obtained, by which he is confronted: Cudleigh v. Chicago etc. Ry. Co., 51 Ill. App. 491.

In Ivey v. McKinnon, 84 N. C. 651, it is held that if in partition proceedings the interest of a prochein ami is adverse to that of the infant, a decree therein will not on that account be disturbed unless fraud or collusion is established. Where an infant sues a guardian personally for positive and specific fraud, no prior accounting from the guardian is necessary, as it is where an action upon a guardian's bond against his sureties is sought to be brought: Koch v. Le Frois, 61 Hun, 205, 15 N. Y. Supp. 928. It is not a badge of fraud that a decree, rendered on a certain day, was entered as of a week previous, without objection from the guardian ad litem; nor that he failed to apply for a rehearing: Kingsbury v. Buchner, 134 U. S. 650, 10 Sup. Ct. 638. And taking a second mortgage by a special guardian is not wrongful, nor necessarily a breach of trust, where appointed for

the sale of infants' lands: Monroe v. Osborne, 43 N. J. Eq. 248, 10 Atl. 267.

Miscellaneous Rights and Duties.—The powers of a guardian ad litem are strictly limited to the matter before the court. Hence he cannot bind his ward by a release, to qualify a witness to testify: Walker v. Ferrin, 4 Vt. 523; nor can he make a demise in ejectment: Massies v. Long, 2 Ohio, 287, 15 Am. Dec. 547. He cannot consent to a sale of his ward's real estate to satisfy notes for purchase money, before their maturity: Melton v. Brown, 20 Ky. Law Rep. 882, 47 S. W. 764. If, however, a sale of the minor's property is for his benefit, it will not, without complaint on his part, be set aside on the application of the purchaser: Curd v. Bonner, 44 Tenn. (4 Cold.) 632. Where a special guardian of infants entered into a contract of sale conjointly with the adult owners, and the deed tendered the purchaser was executed by the guardian jointly with the other owners, it was held no objection, the fact that other parties owning other interests joined in the same contract and deed not depriving either instrument of its binding effect upon all concerned: O'Reilly v. King, 28 How. Pr. 408.

Where an order is made by a court of chancery appointing a guardian for certain infants, and authorizing him to cancel a bond and mortgage belonging to them, upon receiving another one on unencumbered real estate, this latter provision is a condition precedent to his discharging the bond and mortgage, and he has no right to do so unless he receives the security mentioned in the order: Swarthout v. Swarthout, 7 Barb. 354.

A replevin bond in a suit by an infant is valid, though executed by his next friend as one of the two sureties required by statute, he not being a party, but in the nature of an attorney: Anonymous, 2 Hill, 417. He may elect to bring the infant's estate into hotchpot: Andrews v. Hall, 15 Ala. 85.

Where a mortgage is given to the special guardian of an infant for the latter's benefit, such special guardian is the proper person to file a bill for the redemption and assignment of a senior mortgage upon the same premises: Pardee v. Van Anken, 3 Barb. 534. The investment of infant's money by a guardian ad litem in the capital stock of a bank is legal, though it afterward fail: Haddock v. Planters' Bank, 66 Ga. 496.

A next friend falls within the principle that statements made in the course of judicial proceedings with regard to third persons are conditionally privileged and not actionable if made without malice, with probable cause, and under such circumstances as to reasonably create the belief that they were true: Ruohs v. Backer, 53 Tenn. (6 Heisk.) 395, 19 Am. Rep. 598.

ESTATE OF JAMES McGINN, DECEASED.

[No. 7,054; decided April 20, 1889.]

Jurors—Consideration of Rejected Evidence.—Jurors should banish from their minds all evidence ordered stricken out by the court in the course of the trial, all questions which the court ruled should not be answered, and all remarks of counsel in presenting or arguing such matters for the consideration of the court. (Court's Charges A, B.)

Jurors—Consideration of Testimony Stricken Out.—If proof of an essential fact is dependent upon testimony stricken out by the court, such essential fact must be considered by the jury as not proved. (Court's Charge B.)

Jurors—Consideration of Question When Evidence Stricken Out.—If proof of an essential fact in an issue submitted to a jury is rendered incomplete because of testimony struck out by the court, the jury must consider such fact as unproved, unless the defect of proof is supplied by other testimony. (Court's Charge B.)

Jurors—Weight of Testimony and Credibility of Witnesses.—**Any Remark or Statement by the Court** during the course of a trial by jury, which concerns the weight of testimony or the credibility of a witness, or any matter within the jury's province, should be utterly disregarded by the jury; a consideration of it in reaching their verdict would be error. (Court's Charge C.)

Special Verdict—Instruction as to Form.—**Special Verdicts** with blanks to be filled out by the jury, by way of answer to each issue. (Court's Charge D.)

Special Verdict—Instruction as to Manner.—**Reaching** and returning verdict by a jury; and duty as to required information touching evidence or law during the deliberations. (Court's Charges E, F.)

Will Contest—Verdict of Jury.—Whenever three-fourths of a jury on a will contest agree on an answer to an issue, it becomes the jury's verdict on that issue; and whenever three-fourths agree on a verdict, the jury must be conducted into court and the verdict rendered in writing by the foreman, whereupon, if more than one-fourth of the jurors disagree, upon polling, the jury must be sent out again, otherwise the verdict is complete. (Instruction 1. Court's Charges E, F.)

Evidence.—**Direct Evidence Proves the Litigated Fact** in a direct manner, without (the necessity of) inference or presumption. (Instruction 4.)

Evidence.—**Indirect Evidence is Proof of a Fact** other than the litigated fact, but which justifies an inference or presumption of the existence of the litigated fact. (Instruction 4.)

Evidence.—Indirect Evidence is of Two Kinds, namely, inference and presumption. (Instruction 4.)

Evidence.—A Presumption is a Deduction Made by the Law from proof of particular facts. (Instruction 4.)

Evidence.—An Inference is a Deduction Made by the Reason of the jury from proved facts; the law being silent as to the effect of such facts. (Instruction 4.)

Evidence—Conclusive Presumption.—A Jury must Find a Fact in accordance with a conclusive presumption of law announced by the court. (Instruction XXVIII.)

Evidence.—An Inference must be Founded upon a Fact Legally Proved, and upon such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. (Instruction 4.)

Evidence—Weight and Reliability of Expert Testimony.—The testimony of experts (here medical witnesses) based upon hypothetical questions, is frequently unsatisfactory and often unreliable; and while accepted in law, and so requiring consideration, is not entitled to as much weight as are facts, especially in cases of conflict between opinion and fact. (Instruction XLV.) (*This instruction is hardly in accord with Estate of Blake, 136 Cal. 306, 70 Pac. 171, holding that it is the sole province of the jury to determine the credibility of experts and the weight to be given their testimony.*)

Evidence.—Experts and Opinion Evidence, Contrasted with Non-experts and nonopinion evidence (facts), and discussion as to characteristic differences in the certainty or uncertainty of the various subjects themselves, embraced within the domain of expert evidence. (Instruction XLV.)

Evidence—Estimation According to Intrinsic Weight and Power to Produce.—Evidence is to be estimated not only by its own intrinsic weight, but also in view of the evidence which it is in the power of one side to produce, and of the other side to contradict. (Instruction 3.)

Evidence—Power to Produce.—Evidence Should be Viewed with Distrust when it appears that stronger and more satisfactory evidence was within the power of the parties to produce. (Instruction 3.)

Evidence.—Jurors are the Exclusive Judges of the Credibility of each and every witness. (Instruction 3.)

Evidence.—While Jurors are the Sole and Exclusive Judges of the value or effect of the evidence in a case, their power is not arbitrary, but subordinate to the rules of evidence and the exercise of legal discretion. (Instruction 2.)

Will Contest.—The Failure of a Party to a Will Contest to be a Witness in his own behalf does not authorize a jury to draw any inference therefrom. (Instruction XLVIII.)

Evidence—Failure of Party to Testify.—There is No Presumption or inference of law from the default of a party to be a witness in his own behalf. (Instruction XLVIII.)

Evidence—Failure of Party to Testify.—The Nonlegal Effect of the election of a party to an action or proceeding to refrain from exercising his right to be a witness in his own behalf only refers to the want of legal bearing upon the entire evidence in the case, as being thereby rendered weaker or stronger, or satisfactory or unsatisfactory; and has no application to the question of the quantum or totality of the evidence offered. (Instruction XLVIII.)

Evidence.—In Determining the Weight and Credibility of the Testimony of a party to a will contest, a jury may take into consideration his interest in the result of the verdict, and all the circumstances of the case and environment of the party. (Instruction XLVII.)

Evidence.—A Jury is not Bound to Decide in Conformity with the declarations of any number of witnesses which do not produce conviction, as against a smaller number, or as against a presumption from the evidence of the latter which satisfies the minds of the jury. (Instruction 3.)

Evidence.—A Witness is Presumed to Speak the Truth, but this presumption may be rebutted by the manner in which he testifies, or the character of his testimony, or evidence affecting his character for truth, honesty and integrity, or evidence in contradiction of it. (Instruction 3.)

Evidence.—If a Jury Believes that a Witness has Willfully Sworn Falsely upon a material matter, it may disregard his entire testimony except to the extent of its corroboration. (Instruction XLVI.)

Wills—Subscription and Attestation.—A Will not Olographic or Nuncupative in Character may be set aside, if it was not subscribed and attested as prescribed by the Civil Code, section 1276. (Issues 1 to 10, inclusive. Instructions VII, 6.)

Wills—Lack of Testamentary Capacity.—A Will may be Set Aside if the testator was not of sound and disposing mind at the time of the alleged execution thereof. (11th Issue. Instructions VIII, 31, 58.)

Wills—Undue Influence.—A Will may be Set Aside if made through undue influence exerted upon the testator by any beneficiary thereunder, touching the subscription or publication of the will, or the making of any disposition therein. (12th Issue. Instructions XVII, 5, 12.)

Wills—Misrepresentation to Testator.—A Will may be Set Aside if made through fraudulent misrepresentation exerted upon testator by any beneficiary thereunder, touching the subscribing or publishing of the will, or the making of any disposition or provision therein, or the disherison of any heir. (13th Issue. Instructions XXXVI, 5, 13, 14.)

Wills—Fraud Against Testator.—A Will may be Set Aside if made through fraud practiced upon testator by any beneficiary thereunder,

touching the subscribing or publishing of the will, or the making of any disposition therein. (14th Issue. Instructions XL, 5, 14.)

Wills—Insane Delusion.—A Will may be Set Aside if executed under a delusion or illusion, affecting the testator, as to any beneficiary or heir at law. (15th Issue. Instructions XLI, 40.)

Wills—Revocation by Subsequent Will.—A Will may be Set Aside if, subsequent to the execution thereof, the testator duly executed another will which in express terms revoked all former wills. (16th Issue. Instruction 7.)

Wills—Revocation by Subsequent Will.—A Will may be Set Aside if, subsequent to the execution thereof, the testator revokes it (as prescribed by Civil Code, section 1292). (17th Issue. Instruction 7.)

Will Contest.—The Decree Admitting a Will to Probate, in the First Instance, is not evidence as to any issue raised in a subsequent contest, or of any fact contained in any issue. (Instructions 61, 62.)

Will Contest.—The Respondent in a Will Contest must Establish by a preponderance of evidence the formal statutory execution of the propounded will, where the contestant has raised an issue as to the fact of execution. (Instruction 18.)

Will Contest.—The Contestants in a Will Contest have the Burden of Proof as to establishing the issues raised by them; and this burden must be sustained by a preponderance of evidence. (Instructions VI, 17, XXXVIII, XL.)

Will Contest.—The Preponderance of Evidence is Determined not by the number of witnesses, but by a consideration of the opportunities of the several witnesses as to the subject matter of their respective testimony, their manner while testifying, their interest or lack of interest in the case, and the probability or improbability of their testimony in view of all the other evidence or circumstances of the case. (Instruction XLIX.)

Separate Property.—All Property of a Married Man owned by him before marriage, and all property which he acquires during marriage by way of gift, bequest, devise or descent, together with the rents, issues and profits of all such property, is his separate estate. (Instruction I.)

Separate Estate.—All Property of a Married Woman owned by her before marriage, and all property which she acquires during marriage by way of gift, bequest, devise or descent, together with the rents, issues and profits of all such property, is her separate estate. (Instruction I.)

Community Property.—All Property Acquired During the Marriage by either husband or wife, which is not acquired by way of gift, bequest, devise or descent, or as the rents, issues or profits of property so acquired, or as the rents, issues or profits of property owned by such spouse at the time of marriage, is community property. (Instructions I, 60.)

Community Property.—Upon the Death of a Married Man, the Community Property devolves one-half to the surviving wife, and the other half as follows: First, subject to the husband's testamentary disposition; and, second, in the absence of such disposition by him, to his descendants, equally if in the same degree of kindred. (Instructions II, 60.)

Community Property.—The Admission of a Will to Probate does not Affect the Surviving Wife's statutory right to one-half of the community property. (Instruction 60.)

Minors.—The Father is Entitled to the Custody, Services and Earnings of his legitimate unmarried minor child, until its majority or marriage, provided he has not relinquished such right. (Instruction V.)

Minors—Compensation for Services to Parent.—If a child remain in the father's home after reaching majority, continuing in the same services rendered during minority, there is no presumption of a contract or obligation by the father to pay therefor; an express agreement must be proved to create a liability. (Instruction V.)

Wills—Right of Owner to Dispose of Property.—The law places property wholly under the owner's control, and subject to such final disposition as he chooses to make by will. (Instruction III.)

Succession.—All Property of a Person, which is not effectually disposed of by his will, devolves upon the persons who are prescribed by the law as his legal successors. (Instructions II, III, IV, 60.)

Wills—Who may Make and What may be Disposed of.—Every person over the age of eighteen years, if of sound mind, may by will dispose of all his estate, real and personal; provided that a married man, as to community property, has no power of testamentary disposition as to the one-half thereof specially devolving upon his surviving wife. (Instructions II, III, 60.)

Wills—Manner of Execution.—Every will, except a nuncupative will, must be in writing; and every will, other than olographic and nuncupative wills, must be executed and witnessed as provided in section 1276 of the Civil Code. (Issues 1 to 10, inclusive. Instruction 6.)

Wills.—The Paramount Right of Testamentary Disposition is regarded as one of the most sacred of rights, and as the most efficient means which a person has in protracted life or old age to command the attention due his infirmities. (Instruction XIV.)

Wills.—The Paramount Right of Testamentary Disposition gives the owner of property the right to elect and determine whether he will allow his estate to descend, upon his death, to the persons designated by the law as his successors, or whether he will prevent such descent, and make a disposition by will. (Instructions III, IV.)

Wills.—The Paramount Right of Testamentary Disposition Given by law is absolute; it is not subject to any power of prevention by

testator's children, or widow, excepting only as to the statutory rights of the widow, by survivorship, in the community property. (Instruction III.)

Wills.—A Parent may Elect Whether to Allow His Estate to Descend by the law to his children equally, or dispose of it by will to one or more of his children to the exclusion of the others. (Instruction IV.)

Wills.—Parents, as Well as All Other Testators, have the Absolute Right to judge who are the proper objects of their bounty; and children have no right, legal or equitable, in the parent's estate which can be asserted against a competent parent's free act. (Instruction III.)

Wills—Testamentary Capacity—Bodily Affliction.—The paramount right of testamentary disposition is not forfeited, nor subject to be defeated, because a person may have been stricken with apoplexy, or afflicted with hemiplegia or paralysis, or stutters or stammers in speech, or suffers from any bodily affliction. (Instruction XIV.)

Wills—Immoral or Unjust Testator.—The paramount right of testamentary disposition is not forfeited, nor subject to deprivation, because a person may be immoral or unjust. (Instruction XIV.)

Wills.—Intellectual Feebleness or Weakness of the Understanding, of whatever origin, is not of itself a disqualification of the testamentary right. (Instruction X.)

Will Contest.—Upon an Issue of Unsoundness of Mind in a will contest the jury must determine, and the real point is, whether the testator was or was not of sound and disposing mind at the precise time of the subscription and declaration of the instrument. (11th Issue. Instructions VIII, XIII, 31, 58.)

Wills.—Unsoundness of Mind Embraces Every Species of Mental incapacity, from raging mania to that debility and extreme feebleness of mind which verges upon and even degenerates into idiocy. (Instruction 46.)

Wills.—A Person is of Sound and Disposing Mind Who is in full possession of his mental faculties, free from delusion and capable of rationally thinking, acting and determining for himself. (Instruction 8.)

Wills.—A Person may be Said to be of Sound and Disposing Mind who is capable of fairly and rationally considering the character and extent of his property; the persons to whom he is bound by ties of blood, affinity or friendship, or who have claims upon him or may be dependent upon his bounty; and the persons to whom and the manner and proportions in which he wishes the property to go. (Instruction IX. And see XII, XVI, 8, 33, 34, 35, 36.)

Wills.—A Partial Failure of Mind and Memory, even to a considerable extent, from whatever cause arising, will not disqualify testator, **if there** remain sufficient mind and memory to enable him to com-

prehend what he is about, and ability to realize that he is disposing of his estate by will, and to whom disposing. (Instruction XI.)

Wills.—**In Deciding as to Testamentary Capacity, It is the Soundness of Mind** and not the state of bodily health that is to be considered. (Instruction XII.)

Wills.—**A Person's Bodily Health may be in a State of Extreme Imbecility,** and yet he may possess testamentary capacity; i. e., sufficient understanding to direct the disposition of his property. (Instruction XII. And see 33, 36.)

Wills.—**Neither Old Age, Distress, nor Debility of Body Incapacitates** to make a will, provided there remain possession of the mental faculties and understanding of the testamentary transaction. (Instruction XIII.)

Wills—**Injustice of as Showing Want of Testamentary Capacity.**—The prima facie character of a will as just or unjust, equitable or inequitable, is no test of testamentary capacity. (Instruction XV.)

Wills.—**Weakness of Mind is not the Opposite of Soundness of Mind;** weakness is the opposite of strength, and unsoundness the opposite of soundness. (Instruction 8. And see XLI.)

Wills.—**A Weak Mind may be a Sound Mind,** while a strong mind may be unsound. Illustration of men of contrasting grades of intellect. (Instructions 8, XLI.)

Wills.—**Neither Weakness nor Strength of the Mind** determines its testamentary capacity; it is the healthy condition and healthy action—the even balance—which we denominate soundness. (Instruction 8.)

Wills.—**There may be Partial Insanity, or Monomania Insanity,** as to one or more persons or subjects, coexistent with soundness otherwise. (Instruction 8.)

Wills.—**In Cases of Partial Insanity or Monomania,** the testamentary capacity is affected as to the subject matter of such unsoundness. (Instruction 8.)

Wills.—**Monomania Consists in a Mental or Moral Perversion,** or both, as to some particular subject or class of subjects, whilst otherwise the person seems to have no such morbid affection. (Instruction 9.)

Wills.—**Monomania has Various Degrees;** in many cases the person is entirely capable of transacting business out of the range of his peculiar infirmity, and as to such matters may be entirely sound; while as to matters within the range of his infirmity he may be quite unsound. (Instruction 9.)

Wills.—**A Will Which is the Direct Offspring of Partial Insanity** or monomania is invalid, notwithstanding the general capacity is unimpeached. (Instruction 9.)

Wills.—**Unsoundness of Mind may be the Result of Disease, Drunkenness,** or one of many other causes. (Instructions 10, 33, 36.)

Wills.—Drunkenness, to Result in Unsoundness of Mind, must overcome the judgment and unseat the reason, either temporarily—the litigated moment—or permanently. (Instructions 10, 33, 36.)

Wills.—There are Two Conditions of Drunkenness Which may result in mental unsoundness, viz.: Where a person is overcome by the delirium of intoxication, or where the use of intoxicants has been so extended and excessive as to permanently disable the mind; in either case the judgment must have been overcome and the reason unseated. (Instructions 10, 33, 36.)

Wills.—The Commitment of a Person to the State Asylum for the Insane, on the ground of insanity, makes the legal presumption of continued insanity conclusive, where no evidence is offered to show restoration to mental sanity. (Instruction XXVIII.)

Wills.—In Determining the Soundness of a Testator's Mind, it is the right and the duty of the jury to take into consideration the provisions of the will and the condition and nature of the estate disposed of; the condition, mental and physical, of the beneficiaries, their age, and whether dependent upon the testator's bounty; the relations between the testator and any excluded children, their age, condition and dependence upon his bounty, and their conduct toward him; and in connection with all other admitted evidence as to the testator's mental soundness. (Instructions XVI, 55.)

Wills—Discrimination Against Children.—It will not be Presumed that a parent was of unsound mind because he discriminated between his children in his testamentary disposition. (Instruction IV.)

Wills—Condition of Testator Before and After Execution.—The mental condition of the testator, before and after the alleged execution of a will, is only important to throw light upon and show the actual mental condition at the time of execution. (Instructions XIII, 58.)

Will Contest—Effect of Admitting to Probate.—Upon the contest of a will after probate, the decree in the first instance admitting the will does not create any presumption of law, nor is it evidence that the testator was mentally sound at the time of the execution. (Instructions 61, 62.)

Wills.—If Mental Unsoundness Existed at the Time of Execution of a probated will, no act or declaration of testator, subsequent to the execution, could validate the same as a will. (Instruction 58. And see XIII.)

Wills.—If Mental Unsoundness Existed at the Time of the Execution of a will, the jury should disregard all evidence of sanity existing at a subsequent date. (Instruction 58.)

Wills.—The Issue of Undue Influence is Entirely Distinct from that of unsoundness of mind; and the principles governing each are entirely different. (Instruction 12.)

Wills—Undue Influence.—**A Person of Sound Mind** may be the victim of undue influence; so, also, may a person of unsound mind. (Instruction 12.)

Wills—Undue Influence, **What Amounts to.**—To define or exactly describe that influence which in law amounts to undue influence is not possible; it can be done only in general and approximate terms. The decision must be reached, in each case, by applying the general principles on the subject to the special litigated facts and their surroundings. (Instruction 12.)

Wills—Undue Influence, **What is not.**—All influences are not unlawful. Persuasion, appeals to the affections, or ties of kindred, or sentiment of gratitude for past services, or pity for future destitution or the like, are legitimate, and may be fairly pressed on a testator. (Instruction XIX.)

Wills.—**Undue Influence Consists in:** The use, for the purpose of an unfair advantage, of a confidence reposed by another, or a real or apparent influence over him; or taking an unfair advantage of another's weakness of mind; or taking a grossly oppressive or unfair advantage of another's necessity or distress. (Instructions XVII, XXIX, 11.)

Wills.—**Undue Influence is not that Influence** which arises from gratitude, affection or esteem; but must be the control of another will over that of the testator's, whose faculties are so impaired that he has ceased to be a free agent, and submits and has succumbed to such control. (Instruction XVIII.)

Wills—Undue Influence.—**The Question for Determination** upon an issue of undue influence over a testator is whether at the time of the alleged execution of the will he was free to do as he pleased, or was so far under the influence of the beneficiaries charged, or any of them, that the will is not his will, but is the will of one or more of the beneficiaries. (Instruction 12.)

Wills—Undue Influence.—**Before a Will can be Set Aside** upon the ground of undue influence, the jury must believe and find that at the execution of the will the mind of the testator was so under the control and influence of the beneficiaries charged, or some or one of them, that testator could not, if he had wished, have made a will different from that executed. (Instruction XXXIV.)

Wills—Undue Influence.—**Before a Will can be Set Aside** upon the ground of undue influence, the jury must believe that the testator had not at the time of the execution of the will sufficient strength of mind to resist the influence of the beneficiaries, and each of them, charged as undue. (Instruction XXXIV.)

Wills.—**Proof of Undue Influence** must generally be gathered from the circumstances of the case; very seldom is a direct act of influence patent; persons intending to control another's actions, especially as to a will, do not proclaim the intent. (Instruction 12.)

Wills—Undue Influence, Circumstances Showing.—Among the circumstances from which proof must generally be gathered of undue influence exercised upon a testator are: Whether he had formerly intended a different testamentary 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 will is such as would probably be urged upon him by those surrounding him; whether the persons who surrounded him were benefited by the will to the exclusion of formerly intended beneficiaries. (Instruction 12.)

Wills.—Undue Influence is not a Presumption, but a conclusion from proven facts and circumstances. (Instructions XXXII, XXXIII.)

Wills.—Undue Influence Should not be Found upon mere suspicion. (Instruction XXXIII.)

Wills.—Undue Influence cannot be Presumed; and it lies upon the contestants of a will to prove it by a preponderance of evidence. (Instructions XXXI, XXXII, XXXIII.)

Wills.—The Law will not Presume Undue Influence from the mere fact of opportunity or a motive for its exercise; or because of the testator's mental or physical condition; or because his children, or any of them, were excluded from the will. (Instruction XXXIII.)

Wills—Undue Influence.—It is Only that Degree of Influence which deprives a testator of his free agency, and makes the will more the act of others than his own, which in law avoids it. (Instruction XVIII.)

Wills.—Undue Influence must be Exerted upon the Very Act contested; it must be a present influence acting upon the testator's mind at the time of alleged execution. (Instruction XVIII.)

Wills.—To Exert an Undue Influence the Person charged must be of sound mind. (Instructions XXIX, XXX. And see XXVIII.)

Wills—Undue Influence Exercised by Lunatic.—Where a beneficiary under a will who was charged with having exerted undue influence over the testator had been adjudged insane at a date before the execution of testator's will, and there had been no judicial restoration to sanity, the jury were instructed that such beneficiary must be deemed incompetent to have entered into any agreement or conspiracy with anybody. (Instructions XXX, XXVIII.)

Wills.—Procuring a Will to be Made, Unless by Foul Means, is nothing against its validity. (Instruction XVIII.)

Wills—What is not Undue Influence.—A will procured to be made by kindness, attention and importunate persuasion which delicate minds would shrink from, cannot on that ground alone be set aside. (Instruction XVIII.)

Wills—What is not Undue Influence.—Neither advice, argument nor persuasion vitiates a will which is executed freely and from con-

viction, notwithstanding the will might not have been made but for such advice and persuasion. (Instruction XVIII.)

Wills.—Influence Arising from Legitimate Family and Social relations must be allowed to produce its natural result, even in the making of last wills; such influence being a lawful one. (Instruction XX.)

Wills.—However Great may be the Influence Exerted by and through legitimate family and social relations, there is no taint of unlawfulness in it; and there can be no presumption of its actual unlawful exercise merely from the fact of its known existence and its manifest operation on the testator's mind as a reason for his testamentary dispositions. (Instruction XXI.)

Wills.—The Influences Arising from Legitimate Family and Social relations are naturally very unequal and naturally productive of inequalities in testamentary dispositions, and no will can be condemned because of their proved existence, and evidence in the will itself of their effect; for such influences are lawful in general, and the law cannot criticise and measure them so as to attribute to them their proper effect. (Instruction XXII.)

Wills—Undue Influence.—A Wife has the Right to advise and to exercise her influence to move and satisfy the testator's judgment. (Instruction XXVII.)

Wills—Undue Influence.—A Husband's Testamentary Disposition to a Wife cannot be denied effect because it was due to the influence she acquired over him by her good qualities and kind attention. (Instruction XXIII.)

Wills—Undue Influence.—If a Wife Urge upon Testator the propriety of leaving her his property, and excluding others, it does not constitute undue influence. (Instruction XXVI.)

Wills—Undue Influence.—If a Wife, by Her Virtues, has gained such ascendency over her husband and so riveted his affections that her good pleasures are law to him, such influence can never be ground for impeaching a will in her favor, even though it exclude the rest of the family. (Instruction XXIV.)

Wills—Undue Influence.—Children may Exert Influence to induce the parent to make a will. (Instruction XXVII.)

Wills—Undue Influence.—A Will cannot be Set Aside because it is the result of an undue fondness for one member of testator's family, or a causeless dislike for another. (Instruction XXV.)

Wills—Undue Influence.—While a Person of Unsound Mind may be the victim of undue influence, the question as to any influence, or the character of it, becomes immaterial if the jury finds mental unsoundness at the execution of the contested act—a probated will—there being an issue, also, as to soundness of mind. (Instruction 12.)

Wills—Undue Influence.—The Court Instructed the Jury that their verdict upon the issue of undue influence must be "No," if they be-

lieved from the evidence that the will was prepared upon and according to testator's instructions, and was read to and understood by him, and accorded with his wishes; that at such times and at execution of the will he possessed sufficient mental strength and control of his faculties to determine such matters; and that if he had wished he could have made other disposal of his estate. (Instruction XXXV.)

Fraud.—A Fraudulent Misrepresentation must Contain these elements: materiality; falsity; knowledge of its falsity by the party making it, or want of reason by him for belief and lack of belief in its truth; intent to deceive; accomplishment of intent; resultant act of party deceived contrary to what it otherwise would have been. (Instructions XXXVI, XXXVII, XXXVIII, 13.)

Wills.—A Fraudulent Misrepresentation Sufficient to Avoid a Will must have been made by a beneficiary, and have operated upon the testator, and so operated that the will would not have been made, or would have been different, except for misrepresentations. (Instructions 13, XXXVI, XXXVIII, XXXVII.)

Fraud.—The Materiality Essential to Characterize Misrepresentation as fraudulent in law is lacking if the transaction would have taken place without the representation. (Instruction XXXVII.)

Fraud.—The Character of Materiality Essential to a Fraudulent misrepresentation must exist notwithstanding that there were no other inducements than the misrepresentation charged to cause the party to act as he did. (Instruction XXXVII.)

Fraud.—Fraudulent Misrepresentations must be Proved as they are alleged; and only the acts alleged can be proved. (Instructions XXXIX, XXXVIII, 13.)

Will Contest.—Upon an Issue of Fraudulent Misrepresentations in the execution of a will, a jury cannot raise a presumption of falsity as to a representation by a beneficiary. (Instruction XXXVIII.)

Will Contest.—Upon an Issue of Fraudulent Misrepresentation in the execution of a will, the consideration of delusion or insanity is not involved. (Instruction 13.)

Will—Fraud in Procuring.—A Testator may be of Sound Mind, and yet the victim of fraudulent misrepresentation. (Instruction 13.)

Will Contest.—The Issue of Fraud in a Will Contest can be Established Only by proof of the commission of a fraud; the constituent facts, and of what the fraud consisted; the influence of the fraud upon the testator, and the execution of the will as its result, and that otherwise the will would have been different. (Instruction XL.)

Will Contest.—The Actual Fraud Sufficient to Set Aside a Will must involve the commission by a beneficiary or with his connivance of some one of the acts set forth in section 1572 of the Civil Code,

with intent to deceive the testator, or induce him to subscribe or publish the will, or make a provision therein. (Instructions XL, 14.)

Wills—Fraud in Procuring.—If a testator be circumvented by fraud, the testament is without legal force. (Instruction 14.)

Wills.—Circumvention of a Testator by Means of Fraud is to be considered in the same light as "constraint by force," and will have the same effect in setting aside the will. (Instruction 14.)

Wills—Fraud in Procuring.—Honest Intercession or Request is not prohibited; but it is otherwise as to those fraudulent and malicious means which secretly induce the making of testaments. (Instruction 14.)

Wills—Duress in Procuring Execution.—If a testator is compelled by violence, or urged by threats, to make a will (or part of it), it is ineffectual. (Instructions 14, 5.)

Fraud.—Fraud is Never Presumed, but must always be proved. (Instruction XL.)

Will Contest.—Proof Under the Issue of Fraud in a Will Contest must be confined to the particular fraud alleged. (Instruction XL.)

Wills.—Delusion of Mind is to an Extent Insanity. The main character of insanity, in a legal view, is the existence of a delusion. (Instructions XLI, 37, 38, 40, 41, 42.)

Wills.—A Sound Mind is One Wholly Free from delusion. (Instruction XLI.)

Wills.—It is not Strength of Mind, but Soundness of Mind, that is the test of freedom from delusion; a weak mind is sound if free from delusion. (Instruction XLI, and see X.)

Wills.—Delusion Rests upon No Evidence, but is based on mere surmise. (Instruction XLIII.)

Wills.—An insane delusion is the pertinacious belief in the existence of something nonexistent, and acting upon the belief. (Instructions 15, XLI.)

Wills.—Belief in Things Without Foundation in Fact, which no sane person would believe, is insane delusion. (Instructions 15, XLI, 38, 42.)

Wills—Insane Delusion.—Belief Based on Evidence, however slight, is not delusion. (Instruction XLII.)

Wills—Insane Delusion.—A Person Who Against All Evidence and probability believes and supposes facts to exist which have no existence, and who acts, though logically, on such assumption, is essentially mad or insane as to those matters; notwithstanding that as to other subjects he possesses reason, or acts or speaks like a sensible person. (Instruction 38.)

Wills—Insane Delusion.—A Person may as to Some Subjects, and even generally, possess sufficient mind, memory and sense; while as to

his children, or some of them, he may be unsound in mind. (Instructions 39, 40.)

Wills.—A Will can be Revoked or Altered in the manner and cases prescribed in section 1292 of the Civil Code. (Instruction 7.)

Wills.—Subscribing Witnesses to a Will are not Required to be informed or have any knowledge of the contents of the instrument. (Instruction L.)

Wills—Testamentary Capacity.—The Court Instructed the jury to return a verdict of unsoundness of mind, if they found that the testator had not sufficient mind and memory to enable him to remember, weigh and consider the relations, connections and obligations of family and blood, and the claims of his disinherited children, whether resulting from excessive indulgence in intoxicants, apoplexy, paralysis or other disease, any mental delusion as to any of the children, or their filial affection, or any other cause. (Instructions 33, 34, 35, 36.)

Wills—Insane Delusion.—The Court Instructed the Jury to return a verdict of unsoundness of mind, if they found that the testator labored under a delusion as to any of his disinherited children; and that such delusion caused or affected the dispositive clauses of the will; although the testator might have been mentally sane as to everybody else. (Instructions 37, 41.)

Wills—Insane Delusion.—The Court Instructed the Jury to return a verdict of unsoundness of mind, as the result of insane delusion, if they found that the testator believed that his disinherited children had no affection for him, and that there was no foundation therefor, and that he could not be permanently reasoned out of such belief. (Instruction 42.)

Will Contest—Finding as to Fact of Execution.—The court instructed the jury that upon an issue contesting the formal execution of a will, they must return the year, month and date of signing, if they found the fact of execution. (Instruction VII.)

This was a contest of a will after probate, instituted by two of the testator's six children by his first marriage. The will disposed of all the estate to his second wife and the five children of the second marriage. The contest was based upon every statutory ground against the validity of a propounded will, viz.: 1. The alleged will was never signed by testator; 2. Testator never declared it to any witness; 3. Testator never requested the action or subscription of any person as witness; 4. Testator was of unsound mind; 5. Testator was the victim of fraud; 6. Of fraudulent misrepresentation; 7. Of duress; 8. Of menace; and 9. Of undue influence.

Issues were raised as to each of these grounds by all the beneficiaries, and also, separately, by the executors.

The contest was had before a jury and occupied sixty-seven days of actual trial, beginning November 15, 1888, and ending April 20, 1889. There were seventeen special issues submitted to the jury. Each issue was answered against the contestants except the eleventh issue, the response to which declared the testator to have been of unsound mind. Upon the coming in of the jury's verdict, the court ordered the will set aside, and the previous probate annulled as to everybody, noncontestants as well as contestants. Afterward a motion for new trial was made, heard and denied, and an appeal taken to the supreme court. The judgment and order of Judge Coffey was affirmed on this appeal, sub nom. Clements v. McGinn, by opinion filed August 30, 1893 (33 Pac. 920).

In the meantime—since April, 1889—the instructions given to the jury by Judge Coffey, in this case, had been used and approved by other judges in various will contests throughout the state. The affirmance by the supreme court may be taken as an approval of the entire instructions because, while the appellants' instructions (proponents of the will) were not the subject of specific exception on the appeal, yet the refused instructions upon which the appeal was based necessitated an examination of all the instructions, as to which the supreme court said: "The instructions were voluminous, and presented to the jury the questions of law applicable to the case with great clearness." And the court further specially held that the instructions "given on behalf of contestants were proper." There is also a special discussion by the supreme court of the meaning of the legal phrases "sound mind" and "unsound mind," which renders of especial interest the elaborate instructions of Judge Coffey on this head. Two important rulings of Judge Coffey, apart from the instructions, were also sustained on the appeal, viz.: That where a will is set aside under a contest begun before the year after probate has elapsed, the will is absolutely annulled, and not merely set aside as to the contesting heirs. Also, that an objection to a witness on the ground of mental incompetency is a question of fact purely, and should be

determined with reference to the competency at the time of objection.

Instruction XLV should be read with Estate of Blake, 136 Cal. 306, 70 Pac. 171.

The special issues submitted to the jury and the instructions and special charge given by the court are here reported in toto.

The respondents' allowed instructions are designated by Roman numerals, the contestants' by Arabic notation, and the court's own special charge by letters.

James L. Crittenden, for contestants (Mary A. Clements and Emma Burns).

Smith & Murasky, for executors (Eugene McGinn and Joseph Byrne).

Reddy, Campbell and Metson, for beneficiaries under will (Johanna McGinn and others).

INSTRUCTIONS OF THE COURT.

Allowed and Given on the Part of Respondents.

I. All property of the wife owned by her before marriage, and that acquired afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property.

All property owned by the husband before marriage, and that acquired afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property.

All other property acquired after marriage by either husband or wife, or both, is community property.

II. Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and, in the absence of such disposition, goes to his descendants equally, if such descendants are in the same degree of kindred to the decedent.

III. Every person over the age of eighteen years, of sound mind, may by last will dispose of all his estate, real and

personal; and such estate, not disposed of by will, is succeeded to, if it be community property, in the manner described in the instructions last above given—that is to say: Upon the death of the husband, one-half of the community property goes to the surviving wife; and, if there be no testamentary disposition by the husband of the other half, such half goes to his children, if there are any, in equal shares.

From this you will see that every person over the age of eighteen years, of sound mind, is given the right to elect and determine whether he will allow his estate to go to his descendants in equal shares, as provided by law, or whether he will prevent such descent and succession and dispose [of it] by will. Every person has the right, by his last will and testament, to bestow his property on whomsoever he pleases, and his children cannot prevent such disposition of his property, for they have no right, either legal or equitable, in such estate, which can be asserted against his disposition of it by will. The law of the land has placed every person's estate wholly under the control of the owner, subject to such final disposition of it as he may choose to make by his last will and testament, limited only by the statutory rights of his widow.

All parents have a right to judge as to who are the proper objects of their bounty; and if free from undue influence and insane delusions, and of sufficient mental capacity, may give their property to any person whomsoever.

IV. The law having conferred on every person over the age of eighteen years, and of sound mind, the right to elect and determine whether he will allow his estate to descend to his children in equal shares, or whether he will bestow his entire estate upon one or more of his children, to the exclusion of all others, it will not be presumed in law that he was insane, or of unsound mind, because he has exercised that right, and discriminated between his children in the disposition of his estate.

V. The father of a legitimate unmarried minor child is entitled to its custody, services and earnings, until the majority or marriage of the child, unless the parent relinquishes such earnings or services.

If any child remain in the domicile of the father after attaining its majority, and continue in the services in which it had been engaged prior to its majority, no contract or obligation on the part of the father will be presumed to pay for such services, unless an express agreement to that effect is proved.

VI. The burden is upon the contestants in this proceeding to prove and establish the issues made herein, by a preponderance of evidence, and, unless so established, you will find each and every issue against said contestants.

VII. As to the Tenth Issue, you are instructed to determine, from the evidence in the case, in what year and month, and on what date, the will in evidence was signed by said James McGinn, and set forth the month, year and day so determined upon, in your answer, if you should find that it was ever signed by said McGinn.

VIII. Upon the Eleventh Issue, the court instructs you that you should determine, from all the evidence in the case bearing upon the question, whether the said James McGinn was of sound and disposing mind at the time of signing the instrument offered in evidence, and purporting to be the last will and testament of said James McGinn, and if you find, from the evidence, that he was of sound and disposing mind at the time the said instrument was subscribed by him, and when the said James F. Tevlin and James F. Smith signed their names to the same, your answer to said Eleventh Issue should be "Yes."

IX. A person may be said to be of sound and disposing mind who is capable of fairly and rationally considering the character and extent of the property to be disposed of, the persons to whom he is bound by ties of blood, affinity or friendship, or who have claims upon him, or who may be dependent upon his bounty, the persons to whom, the manner and proportions in which, he wishes the property to go.

X. Intellectual feebleness alone, or mere weakness of the understanding—whether this condition of mind is brought about by natural causes, or the result of an injury or disease—does not disqualify a person from making a valid will.

XI. A partial failure of mind or memory, even to a considerable extent, whether it arises from an attack of apoplexy,

hemiplegia, or paralysis, or from any other cause, is not in itself sufficient ground for setting aside a will, if there still remain sufficient mind and memory to enable the testator to comprehend and understand what he is about, or what he is doing, and ability to understand that he is disposing of his estate by his will, and to whom he is disposing of it.

XII. In deciding upon the capacity of the testator to make his will, it is the soundness of mind, and not the particular state of bodily health, that is to be attended to. The latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of.

XIII. Neither old age, distress, nor debility of body, incapacitates to make a will, provided the testator has possession of his mental faculties and understands the business in which he is engaged. The real point in issue and for you to determine is, whether the testator was of sound or unsound mind at the precise date of the making and execution of the will in question. What his mental condition was before and after executing the will is only important as it throws light upon his mind, and shows its actual condition when the will was executed.

XIV. The law gives to every man of sound mind the right to dispose of his property by last will, and this is regarded as one of the most sacred rights and the most efficient means which he has, in protracted life or old age, to command the attention due to his infirmities, and a man cannot legally be deprived of this right and power because he may have been stricken with apoplexy, or afflicted with hemiplegia, or paralysis, or because he may stutter or stammer in speech. However that may be, a person cannot be deprived of it for any of the reasons stated, or because of any bodily affliction —whatever it may be. He may be moral or immoral, just or unjust—the right belongs to him, if he be of sound and disposing mind.

XV. It makes no difference whether the will appears to your mind to be just or unjust, equitable or inequitable; you are not for that reason to find that the testator was of unsound mind; for a man may be of sound mind and strong mind, and yet be exceedingly unjust.

XVI. In determining the question of the soundness of mind of the testator, James McGinn, the jury have the right and it is their duty to take into consideration the provisions of the will itself, and the condition and nature of the estate disposed of; the condition, mental and physical, of the beneficiaries under the will, their age, and whether otherwise independent, or dependent upon the bounty of the testator; the relations between the testator and any children excluded from any benefit under the will, their age, condition, and whether dependent or independent of his bounty in the matter of self-support, and their conduct toward him, in connection with all the other evidence that has been offered on the question as to whether the deceased was or was not of sound mind at the time of the execution of the will in evidence.

XVII. The Twelfth Issue is: Was the signing or subscribing, or publication or acknowledgment of said instrument, or any part thereof or therein, or any one or more of the dispositions of the property in said instrument contained, made under or procured by, or made by or under any undue influence exercised by Johanna McGinn, the surviving wife of said James McGinn, Ellen Frances McGinn, the daughter of said James McGinn, and Joseph McGinn, the son of said James McGinn, or by either of them.

Undue influence consists:

1. In the use by one in whom a 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 unfair advantage of another's necessity or distress: Civ. Code, 1575.

XVIII. The undue influence must be present influence acting upon the mind of the testator at the time of making his will, and the exertion of the undue influence upon the very act must be proved.

Procuring a will to be made, unless by foul means, is nothing against its validity. A man has a right by fair argu-

ment to induce another to make a will, and even to make it in his own favor.

A will procured by honest means, by acts of kindness, attention, and by importunate persuasion which delicate minds would shrink from, would not be set aside on that ground alone.

It is only that degree of influence which deprives a testator of his free agency, and makes the will more the act of others than his own, which will avoid it.

Neither advice or 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 is not 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, and that he has ceased to be a free agent, and has quite succumbed to the power of the controlling mind or will.

XIX. All influences are not unlawful. Persuasion appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution or the like—these are all legitimate, and may be fairly pressed on a testator.

XX. Lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural result, even in influencing last wills.

XXI. However great the influence thus exerted may be, it has no taint of unlawfulness in it, and there can be no presumption of its actual unlawful exercise, merely from the fact that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary disposition.

XXII. Such influences are naturally very unequal, and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and as 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.

XXIII. A wife cannot be denied the place accorded to her in her husband's will, because it was due to the influence which she acquired over him by her good qualities and kind attention in his lifetime.

XXIV. If a wife, by her virtues, has gained such an ascendency over her husband, and so riveted his affections that her good pleasures are law to him, such influence can never be a reason for impeaching a will made in her favor, even if it exclude the residue of the family.

XXV. A will cannot be set aside because it is the result of an undue fondness for some member of the testator's family, or a causeless dislike for another.

XXVI. If a wife urged upon a testator the propriety of leaving her his property, and to exclude others, it does not constitute undue influence to vitiate the will.

XXVII. The wife has the right to advise and to exercise her influence to move and satisfy the judgment of the testator.

And a son and daughter may exert some influence to induce the father to make a will.

XVIII. The record of the commitment of Mrs. McGinn to the State Asylum for the Insane at Napa, California, on account of her insanity, has been admitted in evidence. As appears by the record, Mrs. Johanna McGinn was committed to said Insane Asylum long prior to the alleged execution of the will offered in evidence. There is no evidence to prove, or tending to prove, that Mrs. McGinn has been restored to mental sanity, and, under the circumstances, it is a conclusive presumption of law that she is, and has been ever since said order of commitment, insane, and it is your duty to find in accordance with said presumption—that is to say, that she has been, ever since said commitment, insane.

XXIX. To constitute undue influence there must be an intention on the part of the person exercising it to take an unfair advantage of another's weakness of mind, or to take a grossly unfair advantage of another's necessity or distress. In order that such an intention may exist in the mind of the person exerting influence, it must appear that such person was at the time of sound mind, and capable of forming such intention.

XXX. You are also instructed that by reason of the adjudged insanity above mentioned of Mrs. Johanna McGinn, she must be deemed incompetent to enter into any agreement or conspiracy with any person or persons whomsoever.

XXXI. Undue influence cannot be presumed, but must be proved in each case, and the burden of proving it by preponderance of evidence lies on the contestants in this case.

XXXII. Undue influence is not a presumption, but a conclusion from the facts and circumstances proved.

XXXIII. Undue influence is not to be presumed, nor should it be found upon mere suspicion, but upon facts proved to your satisfaction. The law will not presume, from the mere fact that there was an opportunity or a motive for the exercise of undue influence, nor is there any presumption of law, that undue influence was exerted, because of the mental or physical condition of the testator, or that his children, or any of them, were excluded from any benefit under his will.

XXXIV. Before this will can be set aside, you must believe and find from the evidence that at the time of the execution of the will the mind of James McGinn was so under the control and influence of his wife, Johanna McGinn, his daughter, Nellie McGinn, and his son, Joseph S. McGinn, or some one of them, that he could not, if he had wished, have made a will different from this.

You must believe that he had not sufficient strength of mind to resist such influences exerted by them at the time of the execution of the will.

XXXV. If you believe from the evidence that James McGinn gave the instructions to his attorney for the preparation of the will, that it was prepared according to those instructions, that said will was read to him, that he heard it read, and knew its full contents, and understood its provisions, and that its provisions were in accordance with his wishes, and that at these times, and when the will was executed, he had sufficient strength of mind and control of his faculties to determine for himself that this will disposed of his property as he wished, and that he could if he had wished have made any other disposition of his estate, your answer to and verdict on the Twelfth Issue should be the word "No."

XXXVI. The Thirteenth Issue is: Was said James McGinn induced to sign said instrument, or to acknowledge, or publish, or declare the same to be his will, or to make any disposition of his property, or any provision therein contained, by the, or any, fraudulent misrepresentations or statements made to him, the said James McGinn, by Johanna McGinn, the surviving wife of said James McGinn, Ellen Frances McGinn, the daughter of said James McGinn, or Joseph S. McGinn, the son of said James McGinn, or either of them?

To constitute a fraudulent misrepresentation, it must be made with the intention of deceiving the person to whom it is made. The statement or misrepresentation must be false, and it must be known to the party making it to be so, or the party making it must have no reason for believing it to be true.

XXXVII. The fraudulent misrepresentation must be material, and it is not material if the transaction would have taken place without it.

A representation must be material, even though there were no other inducements to cause the party to act as he did. That is to say, the representations—if any were made in this case—must have been false; they must have been made with the intention of deceiving James McGinn; they must have had that effect, and they must have been such that the testator, James McGinn, would not have made the will in question without them, or would have made a different will if such alleged misrepresentations had not been made.

XXXVIII. You are not to presume that any false representations were made to the testator by Johanna McGinn, Ellen F. McGinn, Joseph S. McGinn, or any of them, and you should find that no such representations were made unless the contestants have proved by a preponderance of evidence:

1. That the representations were made;
2. What the representations were;
3. That they were false;
4. That the parties making them knew them to be false, or had no reason to believe them to be true, and did not believe them to be true;

5. That they were made with the intention of deceiving;

6. That they did deceive the testator, and cause him to act contrary to what he otherwise would have acted.

XXXIX. The representations, if any were made, must be such as are alleged in the petition filed by the contestants. No other representations than those set forth therein should be regarded by you.

If the representations which are alleged in the petition of contestants are not proved, no others can be.

XL. The Fourteenth Issue is: Was said James McGinn induced to sign said instrument, or to acknowledge, or publish, or to declare the same to be his will, or to make any disposition of his property therein contained, by the, or any, fraud practiced upon him, the said James McGinn, or committed by said Johanna McGinn, and Ellen Frances McGinn, and Joseph S. McGinn, or by any of them?

Actual fraud has been defined in our code, section 1572 of the Civil Code, as consisting in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion as a fact of that which is not true, by one who does not believe it is true;

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believed it to be true;

3. The suppression of that which is true by one having knowledge of the fact;

4. A promise made without any intention of performing it; or

5. Any other act fitted to deceive.

Fraud is never presumed; it must always be proved, and it can be established only by proving the facts constituting the fraud; and, in this case, you should find that no fraud was practiced upon the testator, James McGinn, by any of the parties named, unless the contestants have proved to your satisfaction, by a preponderance of evidence:

1. That a fraud was committed;

2. The facts constituting that fraud, and showing of what it consisted;

3. That it influenced the testator, James McGinn, and caused him to make the will in question, and that he would have made a different will but for the perpetration of such fraud.

The fraud must consist of the fraud alleged in contestants' petition; no other should be regarded by you.

XLI. The Fifteenth Issue is: Was the said James McGinn, at the time when the said instrument was signed by him, and by said James F. Tevlin, and James F. Smith, and prior and subsequent thereto, laboring under or affected with or by any delusion or illusion as to Mary Clements, Emma Burns, P. H. McGinn, James McGinn, John McGinn, or Thomas McGinn, or as to any of them, or as to the filial affection of them, or any of them, towards him?

As to insane delusions: A sound mind is one wholly free from delusions. Weak minds differ from strong minds only in the extent and power of their faculties; unless they betray symptoms of delusions, 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 and 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 one 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 of the existence of which the testator had no evidence, 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.

XLII. 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.

XLIII. Delusion rests upon no evidence whatever; it is based on mere surmise.

XLIV. It is alleged in the contestants' petition, paragraph XIII, that said supposed or pretended will was made under the false and insane delusion that he, said James McGinn, had, during his lifetime, made provisions for and advances to these contestants, and to each of them, and that he had advanced to them, and to each of them, a just and equitable share of his property and estate.

This is the delusion, and the only delusion, alleged in contestants' petition; and, unless the contestants have proved to your satisfaction, by a preponderance of evidence, that said James McGinn labored under that particular delusion at the time of the execution of said will, your answer to and verdict on the Fifteenth Issue should be "No."

XLV. Medical witnesses have been examined in this contest, and, so far as their testimony is dependent upon hypothetical questions, the court instructs you that:

The testimony of experts is frequently unsatisfactory, and many times unreliable. It is unsatisfactory, because it cannot convey to our minds the precise reasons why the conclusions are reached; and it is unreliable, because it is frequently based upon speculations instead of facts. Experts in the exact sciences and in mechanics, who base their opinions upon the laws of nature and of the exact sciences, and their own experience with those laws, have tangible facts before them; but where the opinions are based upon speculation, where the subject of the inquiry, namely, the operation and condition of the human mind, is beyond the possibility of human knowledge, we should receive those opinions as at least uncertain. So, when we see a person perform such or such an act, we can form an opinion whether the act is rational or irrational, whether it is consistent with the standard or average human intelligence and reasonableness; but when we advance to speculations upon what would or would not follow upon some supposed existence of mental conditions, we go beyond the scope of knowledge and tread upon the realm of imagination or conjecture.

You are instructed, therefore, that while we receive and you will take into consideration the opinion of experts, such opinions are not entitled to as much weight as facts, especially where there is a conflict between an opinion and a fact. When a fact is established, it is a fact and cannot be overcome; while an opinion is but an opinion, and it may be true and it may be untrue. Opinions of different experts are often diametrically opposed to each other, even when based upon the same supposed conditions.*

XLVI. If the jury believes from the evidence that any witness examined in this proceeding has willfully sworn falsely as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his entire testimony, excepting in so far as it may have been corroborated by other credible evidence or facts and circumstances proved on the trial.

XLVII. You are instructed that while our statute renders parties to a suit or proceeding of this character competent witnesses, and allows them to testify, still the jury are the judges of the credibility and weight of such testimony, and, in determining such weight or credibility, the fact that such witnesses are interested in the result of the suit may be taken into account by the jury, and they may give such testimony only such weight as they think it is entitled to under all the circumstances of the case, and in view of the interest of such witnesses.

The jury have the right to take into consideration the situation and interest in the result of your verdict and all the circumstances which surround such witnesses, and give to their testimony only such weight as in your judgment it is fairly entitled to.

XLVIII. The court instructs the jury as a matter of law that, while the statute of this state authorizes a party to a suit to go upon the stand and testify in his own favor, he is under no obligation to do so, and if he fails to do so, the jury have no right to infer, from this fact alone, anything for or against such party.

There is no presumption or inference of law that such witnesses were not called to testify because of a consciousness

*But see Estate of Blake, 136 Cal. 307, 70 Pac. 171.

that their knowledge, if disclosed, would make against their side of the case, and in favor of the contestants.

A party is not bound to become a witness in his own behalf in order to avoid unfavorable legal inferences against him.

The instruction heretofore given you by the court, and to which reference is now made, refers to the character of the evidence as weaker or stronger, or satisfactory or unsatisfactory, and does not apply to the amount or sum total of the evidence offered.

XLIX. The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence adduced or circumstances proved on the trial, and from all the circumstances determine upon which side is the weight or preponderance of the evidence.

L. The court instructs you that it is not at all necessary to the validity or due execution and publication of a will, that the subscribing witnesses, or any of them, should be informed of or have any knowledge whatever of the contents of the document purporting to be the last will of the testator. It is sufficient, so far as the execution of the will is concerned, if the testator signs in their presence, and declares the instrument to be his last will and testament, and they subscribe their names thereto, in his presence, at his request.

Allowed and Given on the Part of Contestants.

1. Whenever nine of your number agree on an answer to an issue, it becomes your verdict on that issue. Your verdict must be in writing, signed by your foreman, and nine of you must agree on that verdict.

2. You are the sole and exclusive judges of the value or effect of the evidence. Your power of judging of the effect

of the evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

3. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce a conviction in your minds against a less number, or even against a presumption from their evidence satisfying your minds. Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other side to contradict; therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. A witness is presumed to speak the truth, but this presumption may be repelled by the manner in which he testified or by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or by contradictory evidence; and you, the jury, are the exclusive judges of the credibility of each and every witness, and as to every part of the testimony and evidence of each and every witness.

4. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption. Indirect evidence is that which tends to establish the fact in dispute by proving another fact, and which, though true, does not itself conclusively establish that fact, but which affords an inference or presumption of the existence of that fact. Indirect evidence is of two kinds, inference and presumption. Inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect. A presumption is a deduction which the law expressly directs to be made from particular facts. The inference must be founded on a fact legally proved, and on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature: Code Civ. Proc., 1958-1960.

5. A will or a part of a will, procured to be made by duress, menace, fraud or undue influence, is invalid.

6. Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic will and a nuncupative will, must be executed and attested as follows: Civ. Code, sec. 1276:

First. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto.

Second. The subscription must be made in the presence of the attesting witnesses, or acknowledged by the testator to them to have been made by him or by his authority.

Third. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

Fourth. 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.

7. A will can be revoked or altered: 1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or 2. By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction: Civ. Code, sec. 1292.

8. A person is of sound and disposing mind who is in full possession of his mental faculties, free from delusion and capable of rationally thinking, acting and determining for himself. Weakness of mind is not the opposite of soundness, but is the opposite of strength of mind, and unsoundness is the opposite of soundness. A weak mind may be a sound mind, and a strong mind may be unsound. The strong mind of a man possessed of superior talents and of a determined will may be so wrought upon or affected by some delusion as to be unsound; and a weak mind—that is, a mind of what we call a lower grade of intellect—may be so evenly balanced as to be sound. It is not the weakness or strength of mind which determines its testamentary capacity; it is its soundness; that is, its healthy condition and healthy action. It frequently occurs that there is partial insanity, or monomania—insanity as to one or more persons, or upon

one or more subjects, and soundness as to all others; and in such cases the testamentary capacity is affected as to a person or subject in regard to which the unsoundness exists.

9. Monomania consists in a mental or moral perversion, or both, in regard to some particular subject, or class of subjects, while in regard to others the person seems to have no such morbid affection. The degrees of monomania are various. In many cases the person is entirely capable of transacting any matters of business out of the range of his peculiar infirmity; and, as to those matters out of that range, he may be entirely sound; while, as to matters within the range of the infirmity, he may be quite unsound: 1 Redfield on Wills, 72 et seq.

Whenever it appears that a will is the direct offspring of partial insanity, or monomania, it should be regarded as invalid, though the general capacity be unimpeached.

10. Unsoundness of mind may be the result of disease, drunkenness, or of one of many other causes. In case of drunkenness there are two conditions. a will made under either of which is invalid, viz.: Where the will is made during the period while the person is overcome by the delirium of intoxication, or where the use of intoxicating drinks has been so extensive and so excessive as to permanently disable the mind. But, in either case, the effect must be to have either temporarily or permanently overcome the judgment and unseated the reason.

11. Undue influence consists in the use, by one in whom a confidence is reposed by another who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him, or in taking an unfair advantage of another's weakness of mind, or in taking a grossly oppressive or unfair advantage of another's necessities or distress: Civ. Code, sec. 1575.

12. The issue of undue influence and the principles governing it are entirely different from the principles applicable to unsoundness of mind. Undue influence is entirely distinct from unsoundness. A person may be of sound and disposing mind and yet be the victim of undue influence, and he may also be a victim of such undue influence when of unsound mind. If James McGinn was of unsound mind on

September 26, 1887, when said instrument was signed and published by him—if it was ever signed and published by him—it is entirely immaterial whether or not any person exercised any undue influence over him in the matter of the making and execution of said instrument, because unsoundness of mind, of itself, incapacitates from making a will, influence or no influence. The question to determine here is, whether at the time of executing this alleged will—if it was ever executed—James McGinn was free to do as he pleased, or whether he was then so far under the influence of Johanna McGinn, Nellie Frances McGinn and Joseph McGinn, or any or either of them, that the will is not his will, but the will of said persons, or of one or more of them. Of course, persons who intend to control another's actions, especially in regard to making a will, do not proclaim that intent. Very seldom does it occur that a direct act of influence is patent; the existence of the influence must generally be gathered from circumstances. Such as, whether he had formerly intended a different disposition of his property; whether he was surrounded by those who had 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 is such a paper as would probably be urged upon him by the persons surrounding him; whether they were benefited thereby to the exclusion of formerly intended beneficiaries. The question for you to determine is, Was James McGinn, from infirmity of age, or from disease or other cause, constrained to act against his will, and to do that which he was unable to refuse by importunity or threats, or by any other means, or in any other way, by which one person acquires and exercises dominion and control over another? 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 of the case.

13. In order that the will should have been executed under fraudulent misrepresentations, it is not necessary to consider the question of delusion or insanity. A person may be of

perfectly sound mind, and yet be influenced by fraudulent misrepresentations. You will, therefore, inquire whether the will contains any provision which was the product of such fraudulent misrepresentations as are alleged in contestants' petition, which were made to the testator, or by any or either or all of the persons named, to wit: Johanna McGinn, Nellie Frances McGinn and Joseph McGinn, for the purpose of inducing him, and which did induce him, to disinherit any one. You will inquire whether James McGinn was induced to sign, or to acknowledge, or to publish, the document propounded to be his will, or to make any of the dispositions of his property, or any of the propositions therein contained, by or under fraudulent misrepresentations made by Johanna McGinn, Nellie Frances McGinn and Joseph McGinn, or by either or any of them, or by any statements made to him by them, that certain things existed which did not in truth exist, and which caused him to make a will different from what he would otherwise have made.

14. Circumvention by means of fraud will be considered in the same light as constraint by force, and will have the same effect in setting aside a will as such constraint has.

If the testator be compelled by violence or urged by threatenings to make his testament, the testament, being made by fear, is ineffectual.

Likewise, if he be circumvented by fraud, the testament loses its force; for, although honest intercession or request is not prohibited, yet those fraudulent and malicious means, whereby men are secretly induced to make their testaments, are no less detestable than open force.

Actual fraud has been defined in our code (Civil Code, section 1572) as consisting in any of the following acts committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestions of that which is not true by one who does not believe it is true;

2. The positive assertion, in a manner not warranted by information of the person making it, of that which is not true, though he believes it to be true;

3. The suppression of that which is true by one having knowledge of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

15. An insane delusion is the pertinacious belief of the existence of something which does not exist, and the acting upon that belief. Belief of things which are entirely without foundation in fact, and which no sane person would believe, is insane delusion. If a person 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.

17. In arriving at your verdict, you are to determine the different questions of fact, and each of the issues submitted to you, in accordance with the preponderance of evidence.

18. If you believe and are satisfied, by and from the evidence, that the respondents have not established and proved, by a preponderance of evidence, that the said instrument, claimed to be the last will and testament of James McGinn, deceased, was subscribed at the end thereof by said James McGinn, himself, or by some person in his presence, by his direction, then you will find as your answer to the First Issue, "No."

31. If you believe and are satisfied, from and by the evidence, that said James McGinn, deceased, was not of sound mind at the time the said instrument was subscribed by him. and when said James F. Smith and J. F. Tevlin signed their names to the same, then you will find, as your answer to and your verdict upon Special Issue No. 11, the word "No."

33. If you believe and are satisfied, from and by the evidence, that the mind and memory of said James McGinn had become so weakened and impaired, or deranged, from excessive indulgence in intoxicating liquors, or from any other cause, that he did not have or possess a sound and disposing mind and memory sufficient, or such a mind and memory as would enable him to recollect, discern and tell the relations, connection and obligations of family and blood, then it will be your duty to find, as your answer to and verdict upon Special Issue No. 11, the word "No."

34. If you believe and are satisfied, from and by the evidence, that the said James McGinn, at the time when said instrument was signed and attested, was laboring or suffering under any mental delusion in relation to his children, or in relation to their affection, or want of affection for him, and that such delusion incapacitated him mentally from considering and weighing the relations and claims of his children upon him, then it will be your duty to find, as your answer to and verdict upon Special Issue No. 11, the word "No."

35. If you believe and are satisfied, from and by the evidence, that said James McGinn, at the time when said instrument was signed by him and attested by James F. Smith and J. F. Tevlin, was laboring under or suffering from any mental delusion as to his daughters, Mary A. Clements and Emma Burns, or as to either of them, and that such delusion so far affected his mind toward his said daughters, or either of them, as to make him mentally incapable of duly weighing and considering their claims upon him as his children, or the claims of either of them upon him as his child, then it is your duty to find, as your answer to and verdict upon Special Issue No. 11, the word "No."

36. If you believe and are satisfied, from and by the evidence, that said James McGinn, at the time when said instrument was signed and attested, had become and was by reason of excessive indulgence in intoxicating liquors, or by or through apoplexy, paralysis, or other diseases, idiotic or imbecile, to such a degree as to render him incapable of remembering and weighing the relations, connections and obligations of family and blood, and the claims of his children upon him, then it will be your duty to find, as your answer and verdict upon Special Issue No. 11, the word "No."

37. If you believe and are satisfied, from and by the evidence, that the deceased, James McGinn, at the time when said instrument was signed and attested, was laboring under or suffering from a delusion in respect to his children, or in respect to any of his children who might have been the objects of his testamentary bounty, and that the disposing provisions of said instrument were caused or affected by such delusion, then you will find, as your answer to and verdict upon Special Issue No. 11, the word "No."

38. If you believe and are satisfied, from and by the evidence, that said James McGinn, deceased, believed and supposed facts to exist which had no real existence, and against all evidence and probability, and conducted himself, however logically, upon the assumption of their existence, then he was, so far as such matters are concerned, under a morbid delusion, a delusion in the sense of insanity, and was a person essentially mad or insane on those subjects, though on other subjects he might have had reason, or have acted or spoken like a sensible man.

39. A person may have upon some subjects, and even generally, mind, memory and sense sufficient to know and comprehend ordinary transactions and sufficient to enable him to attend to business, and yet upon the subject of his children, or upon the subject of some of his children, who would naturally be the objects of his care and bounty, he might be of unsound mind.

40. If you believe and are satisfied, from and by the evidence, that the deceased James McGinn, was, at the time when said instrument was signed and attested, laboring under a delusion in respect to his daughters, Mary A. Clements and Emma Burns, or either of them, and that this delusion influenced the making of said instrument, as to them, or either of them, then the instrument proposed is not the expression of the will of a testator of sound and disposing mind, and cannot be regarded as the will of James McGinn, and you will find, in answer to Special Issue No. 11, the word "No."

41. If you believe and are satisfied, from and by the evidence, that James McGinn was, at the time when said instrument was signed and attested, laboring under the delusions alleged in contestants' petition, with respect to his children, or any of them, then he cannot be regarded as, or accounted as, mentally sane in making said alleged will, so far as his said children or any of them are concerned, though he might be mentally sane as to the rest of the world.

42. If you believe and are satisfied, from the evidence, that said James McGinn, at the time of signing and attestation of said instrument, had conceived or believed that his daughters, Mary A. Clements and Emma Burns, or either of them, had no affection for him, and that there was no

foundation for any such belief, and that he was incapable of being permanently reasoned out of that belief, then you will be warranted in concluding that said James McGinn was laboring under an insane delusion, and it will be your duty to find, as your answer to and verdict upon Special Issue No. 11, the word "No."

46. Unsoundness of mind, in the sense of Special Issue No. 11, embraces every species of mental incapacity, from raging mania to that debility and extreme feebleness of mind which approaches near to and even degenerates into idiocy.

55. In determining whether or not said James McGinn was of sound or unsound mind at the time of the making, signing and attestation of said instrument, you can take into consideration the disposition of property and the provisions made and contained in said instrument, as well as the manner in which the same is written and signed.

58. If you believe and are satisfied, from and by the evidence, that James McGinn was of unsound mind at the time of making, signing and attestation of said instrument, then no subsequent act or declaration of his could make said instrument valid as a will, and if you so believe, [then] any and all evidence of the soundness of mind of James McGinn, at a period subsequent to the making of said will, will be disregarded by you in finding your verdict upon Special Issue No. 11.

60. If you believe and are satisfied, from and by the evidence, that all the property of James McGinn was acquired after his second marriage, then said property is community property, and Johanna McGinn is entitled as his surviving wife to one-half of said property, and can claim the same though the said instrument is admitted to probate.

61. In deciding the issues raised by the pleading in this contest and submitted to you, you are instructed that the decree which admitted the alleged will to probate is not evidence as to any of the said issues, or as to any of the facts contained in said issues.

62. The decree of this court admitting said alleged will to probate, which has been admitted in evidence, does not raise or create any presumption of law that James McGinn was of sound and disposing mind or competent to make a will

at the time when said alleged will was executed, if the same was ever executed by him.

The court, then, of its own motion, further charged the jury as follows:

A. On one point in this connection it may perhaps be advisable for the court to caution the jury. It frequently happens that, in the course of a trial before a jury, counsel desire under their theory of the case to introduce evidence which, according to their antagonists, may seem improper, and it becomes the province of the judge to decide touching the admissibility of such evidence. In arguing and presenting a question, it often becomes necessary for counsel to state what is sought to be proved, or to ask some question of the witness which will disclose the fact or line of testimony, sometimes even the answer of the witness improvidently made aiding in the matter.

If the answer has not been made and objection has been sustained with or without exception saved, it is the duty of the jurors to banish from their minds, in considering their verdict, any suggestion of a fact or line of testimony introduced by such question to witness or offer of proof.

B. It frequently happens, however, that while the question is in itself unobjectionable, yet the witness in his answer fails to be responsive to the question, and either states matters which are inadmissible as evidence or irrelevant to the issue, or are for any other cause objectionable. A motion is thereupon made by the aggrieved party to strike out such answer or answers.

Such motion granted is notice to the jury that they are not to consider that particular testimony as offered, and if any essential fact depends for its proof upon such testimony so stricken out, and such proof is not supplied in some other way free from objection, such material fact is to be considered by the jury as not proved. Inasmuch, as before stated, the power of juries and judges as to the effect to be given to evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

C. It sometimes occurs that the judge, in the course of passing upon the admissibility of particular evidence or some

particular question, either misapprehends or misstates the fact sought to be proved, or expresses a doubt either as to the competency, the effect, or weight to be given to the evidence in discussion.

Any such statement by the court affecting the weight of testimony, the credibility of a witness, or any matter whatever, within the province of the jury, would, if adopted by the jury, or permitted in any manner to bias their minds in reaching a verdict, be error. It is therefore the duty of the court to charge the jury to utterly disregard and banish from their minds any chance expression of the judge before finally determining any question of admissibility which may concern either the weight of the testimony or the credibility or the want of credibility of any witness or statement made, and which may incautiously or unadvisedly have crept into the trial, and you are so cautioned.

D. I believe, gentlemen of the jury, that these instructions cover all the propositions of law upon which it is necessary for me to give you instructions. You may take with you the form of special verdict, in which blanks have been left for your foreman to attach the result of the jury's deliberations. In this form you will answer in the appropriate blanks, yes or no, to each issue, as you may determine it. If you desire, you can take with you the instrument here in dispute.

E. You may decide in court without retiring, or you may retire for deliberation.

If you retire, you must be kept together in some convenient place, under charge of an officer, until at least three-fourths of your number may agree on a verdict. Whenever nine of your number agree on an answer to an issue, it becomes your verdict on that issue.

If, after you retire, there be any disagreement between you as to any part of the testimony, or if you desire to be informed on any point of law arising in the case, you may require the officer to conduct you into court, and, upon your being brought into court, the information required must be given you in the presence of, after notice to, the parties or counsel.

F. Whenever three-fourths of you have agreed on a verdict, you must be conducted into court, your names called by the clerk, and the verdict rendered by your foreman.

Your verdict must be in writing, signed by your foreman, and must be read by the clerk to the jury, and the inquiry made whether it is your verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is his verdict; and if, upon such inquiry or polling, more than one-fourth the jurors disagree thereto, the jury must be sent out again; but if no such disagreement is expressed, the verdict is complete, and you will be discharged from the case.

The case is now with you.

THE SPECIAL ISSUES SUBMITTED.

The court then submitted the following special issues to the jury for their special verdict and answer to each of said issues, to wit:

First Issue. Was the instrument in evidence in this case, and dated September 26, 1887, purporting to be the last will and testament of James McGinn, deceased, subscribed at the end thereof by said James McGinn?

Second Issue. Was said instrument subscribed at the end thereof by said James McGinn, in the presence of James Tevlin and James F. Smith, as attesting witnesses thereto?

Third Issue. If said instrument was ever subscribed at the end thereof by said James McGinn, deceased, did said James McGinn acknowledge to said James F. Tevlin and said James F. Smith that said instrument had been made and subscribed by him?

Fourth Issue. Did said James McGinn, at the time of subscribing said instrument at the end thereof, in the presence of attesting witnesses, declare to said James F. Tevlin and said James F. Smith as attesting witnesses to said instrument, that the said instrument was his will?

Fifth Issue. Was James F. Tevlin requested by said James McGinn to sign his name as witness to said instrument as the last will of said James McGinn?

Sixth Issue. Was James F. Smith requested by said James McGinn to sign his name as a witness to said instrument as the last will of said James McGinn?

Seventh Issue. Did James F. Tevlin and James F. Smith each sign his name to said instrument at the end thereof as a witness to the same as a will of said James McGinn, and so sign as a witness at said James McGinn's request, and in the presence of said James McGinn?

Eighth Issue. Was said instrument witnessed as a will of said James McGinn by two competent witnesses, each signing his name as a witness thereto at the end thereof, in the presence of said James McGinn, and at the said James McGinn's request?

Ninth Issue. If the said instrument was signed by the said James McGinn, did he publish and declare the same to James F. Tevlin and James F. Smith, and to each of them, and in the presence and hearing of both of them, to be his last will and testament?

Tenth Issue. If you shall find that said instrument was ever signed by said James McGinn, in what year and month, and on what date was the same so signed by him?

Eleventh Issue. Was the said James McGinn of sound mind at the time the said instrument was subscribed by him, and when the said James F. Tevlin and said James F. Smith signed their names to the same?

Twelfth Issue. Was the signing or subscribing, or publication or acknowledgment of said instrument, or any part thereof or therein, or any one or more of the dispositions of property in said instrument contained, made under or procured by, or made by or under any undue influence exerted by Johanna McGinn, the surviving wife of said James McGinn, and Ellen Frances McGinn, the daughter of said James McGinn, and Joseph S. McGinn, son of James McGinn, or by either of them?

Thirteenth Issue. Was said James McGinn induced to sign said instrument, or to acknowledge or publish or declare the same to be his will, or to make any disposition of his property, or any provisions therein contained, by the, or any, fraudulent misrepresentations or statements made to him,

said James McGinn, by Johanna McGinn, the surviving wife of said James McGinn, and Ellen Frances McGinn, the daughter of said James McGinn, and Joseph McGinn, or by either of them?

Fourteenth Issue. Was said James McGinn induced to sign said instrument, or to acknowledge or publish or to declare the same to be his will, or to make any dispositions of his property therein contained, by the, or any, fraud practiced upon him, the said James McGinn, or committed by said Johanna McGinn and Ellen Frances McGinn and Joseph S. McGinn, or by either of them?

Fifteenth Issue. Was the said James McGinn, at the time when the said instrument was signed by him, and by said James F. Tevlin and James F. Smith, and prior and subsequent thereto, laboring under or affected with or by any delusion or illusion as to Mary Clements, Emma Burns, P. H. McGinn, James McGinn, John McGinn or Thomas McGinn, or as to any one of them, or as to the filial affection of them, or any one of them, towards him?

Sixteenth Issue. Did said James McGinn, subsequent to the signing of said instrument by said James F. Tevlin and James F. Smith, duly make, publish and declare another instrument in writing as his last will and testament, wherein and whereby he revoked and annulled any and all former wills made, signed and executed or published by him?

Seventeenth Issue. Did said James McGinn, subsequent to the said time when said instrument was signed by him and by said James F. Tevlin and said James F. Smith, revoke the said instrument?

ESTATE OF BRIDGET BYRNE, DECEASED.

[No. 9,383; decided December 14, 1889.]

Account.—Sections 1632 and 1633 of the Code of Civil Procedure, as to the settlement of accounts of administrators, do not apply to an exhibit filed pursuant to section 1622, but to an account filed under section 1628.

Account.—An Order Settling an Annual Account is Final and Conclusive as to all parties in interest, subject only to appeal, and cannot, after the time for appeal has passed, be placed again in a position for appeal by motion to set it aside.

Account—Setting Aside for Fraud.—Allegations of fraud give the superior court, sitting in probate, no jurisdiction to vacate an order settling an account on motion, but such charges of fraud are the subject of an independent proceeding in equity.

This was an application, filed September 12, 1889, to set aside an order, made on August 14, 1885, settling an account of the administrator.

King & Saufley and W. F. Sawyer, for the Petitioner.

Thos. F. Barry, contra.

COFFEY, J. I have made a careful examination of the briefs of the respective counsel for applicant and respondent in this matter, and have come to the conclusion that the order settling the account is final and appealable and conclusive as to all parties in interest: Code Civ. Proc., secs. 1637, 1908; Reynolds v. Brumagim, 54 Cal. 257.

The counsel for the petitioner say, on page 7 of their reply brief, that they can see no difference between an order settling an administrator's account required under Code of Civil Procedure, sections 1622 to 1624, and an order settling an annual account under Code of Civil Procedure, section 1628. This court has decided frequently that an order settling the account or exhibit under section 1622, Code of Civil Procedure, does not signify, as there is no provision made for a judgment of the court upon any such exhibit, it being simply for the information of the court, and, therefore, the provisions of the Code of Civil Procedure, sections 1632 and

1633, as to the settlement of accounts of an administrator, do not apply to an account or exhibit under Code of Civil Procedure, section 1622, which is to be made six months after the appointment of an administrator. The decision of this court in the Estate of Caroline Fisher has no application to the matter now before the court, as the "experimental account," so called, in that case was presented merely to raise certain issues for the purpose of obtaining from the court directions to the executors as to their duties in the premises.

The order settling the annual account in this case was the subject of appeal to the supreme court (Code Civ. Proc., sec. 963), and cannot be placed again in position for appeal by a motion to set it aside: Coombs v. Hibbard, 43 Cal. 453; Dorland v. Cunningham, 66 Cal. 484, 6 Pac. 135; Tripp v. Santa Rosa St. R. R. Co., 69 Cal. 631, 11 Pac. 219.

The allegations of pretended fraud give this court no jurisdiction to vacate said order settling the account. They are, if true and sufficient, the subject of an independent proceeding in a court of equity: Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, 63 Cal. 474; affirmed, In re Cahalan, 70 Cal. 605, 12 Pac. 427; Estate of Maxwell, 74 Cal. 384, 16 Pac. 206. These cases are conclusive on the point that the order settling the account of the administrator is not assailable in this court in the manner attempted, and that if this court should set aside the order its action would be a nullity.

As to so much of the application as attacks the validity of the order settling the annual account this proceeding cannot be sustained, as the court concludes it has not the power or jurisdiction to set aside the order made heretofore settling the first annual account; but, with respect to so much of the petition as requires the administrator to file his final account, the court is of opinion that the petition is sufficient; and the demurrer as to that part is overruled, and counsel are instructed to draw an order upon the administrator to show cause why he should not file his final account.

The Settlement and Allowance of the Account of an Executor or Administrator, if not appealed from, is conclusive as to all matters and items contained in it and upon all persons interested, saving to persons under disability the right to reopen the account or proceed against the executor or administrator at any time before final dis-

tribution. In this respect there is, in general, no difference between a final and any other account. Once settled and approved, accounts can be questioned only on direct attack by motion to open, or other like remedy in the superior court, or on appeal. They are not subject to collateral attack: 1 Ross on Probate Law and Practice, 793. Courts of equity, however, not infrequently review the accounts of administrators and guardians, on the ground of fraud or mistake, after the time for relief on motion or by appeal has passed: See the note to Estate of McLaughlin, 1 Cof. Pro. Dec. 263.

ESTATE OF ALEXANDER BLANC, DECEASED.

[No. 11,082; decided May 5, 1892.]

Wills—Testamentary Capacity.—A person is of sound and disposing mind who is in the full possession of his mental faculties, free from delusion, and capable of rationally thinking, acting and determining for himself. Weakness of mind is not the opposite of soundness, but is the opposite of strength of mind, and unsoundness is the opposite of soundness. A weak mind may be a sound mind and a strong mind may be unsound.

Wills.—Undue Influence Consists in the Use, by one in whom a confidence is reposed by another, who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him, or in taking an unfair advantage of another's weakness of mind, or in taking a grossly oppressive or unfair advantage of another's necessities or distress.

Wills.—Lawful or Unlawful Influence, in procuring the execution of a will, discussed and distinguished.

Wills—Undue Influence, What Constitutes.—The influence exerted over a testator to avoid his will must be of such a nature as to deprive him of free agency, and render his act obviously more the offspring of the will of others than his own; and it must be specially directed toward the object of procuring a will in favor of particular parties and must be still operating at the time the will is made.

Wills—Undue Influence, What Constitutes.—Influence and persuasion may be fairly used on a testator; and a will procured by honest means, by acts of kindness, attention and persuasion which delicate minds would shrink from, will not be set aside on that ground alone. The influence to vitiate a will must not be the influence of affection or attachment.

Wills—Undue Influence, What Constitutes.—In order to avoid a will on the ground of undue influence, it must be shown that the in-

fluence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity that could not be resisted, constrained the testator to do that which was against his free will and desire, but which he 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 kindly acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear.

Alexander Blanc died on June 14, 1891, leaving a widow, a sister, the children of a deceased brother and the children of a deceased sister.

On June 22, 1891, the widow filed a petition for probate of the will of decedent, which was dated June 12, 1891. The will was admitted to probate on July 6, 1891. In this will the widow and one of the nephews were named as the principal legatees and devisees.

In February, 1892, the sister and several of the nieces and nephews of the decedent filed petitions for the revocation of the probate of the will, and alleged, as grounds of contest, that the testator was of unsound mind, and that the will was made by undue influence of the widow, and of the nephew who was named in the will as a devisee.

These contests were tried before a jury, and on May 5, 1892, the court instructed the jury and the latter rendered a verdict sustaining the will.

Henry H. Davis, for certain of the contestants.

Dunne & McPike, of counsel.

Jones & O'Donnell, for the other contestants.

W. M. Cannon, for respondents.

H. N. Clement, of counsel.

COFFEY, J. (Addressing the Jury.) 1. Whenever nine of your number agree on an answer to an issue, it becomes your verdict on that issue. Your verdict must be in writ-

ing, signed by your foreman, and nine of you must agree on that verdict.

2. You are the sole and exclusive judges of the value or effect of the evidence; your power of judging of the effect of the evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

3. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number, or even against a presumption from the evidence satisfying your minds. Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other side to contradict. A witness is presumed to speak the truth; but this presumption may be repelled by the manner in which he testifies or by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or by contradictory evidence; and you, the jury, are the exclusive judges of the credibility of each and every witness, and as to every part of the testimony and evidence of each and every witness.

4. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption. Indirect evidence is that which tends to establish the fact in dispute, and which, though true, does not itself conclusively establish that fact, but which affords an inference or presumption of the existence of that fact. Indirect evidence is of two kinds—inference and presumption. Inference is a deduction which the reason of the jury makes from the facts proved without an express direction of law to that effect. A presumption is a deduction which the law expressly directs to be made from particular facts. The inference must be founded on a fact legally proved, and on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature: Code Civ. Proc., secs. 1958-1960.

5. A will or a part of a will procured to be made by undue influence is invalid.

6. A person is of sound and disposing mind who is in the full possession of his mental faculties, free from delusion, and capable of rationally thinking, acting and determining for himself. Weakness of mind is not the opposite of soundness, but is the opposite of strength of mind, and unsoundness is the opposite of soundness. A weak mind may be a sound mind, and a strong mind may be unsound. The strong mind of a man possessed of superior talents, and of a determined will, may be so wrought upon or affected by some delusion as to be unsound; and a weak mind—that is, a mind of what we call a lower grade of intellect—may be so evenly balanced as to be sound. It is not the weakness or strength of mind which determines its testamentary capacity; it is its soundness—that is, its healthy condition and healthy action.

7. Unsoundness of mind may be the result of disease, drunkenness, or of one of many other causes. In case of drunkenness there are two conditions, a will made under either of which is invalid, viz.: Where the will is made during the period while the person is overcome by the delirium of intoxication, or, where the use of intoxicating drinks has been so extended and so excessive as to permanently disable the mind.

8. Undue influence consists in the use, by one in whom a confidence is reposed by another, who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him, or in taking an unfair advantage of another's weakness of mind, or in taking a grossly oppressive or unfair advantage of another's necessities or distress.

9. The issue of undue influence and the principles governing it are entirely different from the principles applicable to unsoundness of mind. Undue influence is entirely distinct from unsoundness. A person may be of sound and disposing mind and yet be the victim of undue influence, and he may also be the victim of such influence when of unsound mind. If Alexander Blanc was of unsound mind on June 12, 1891, when said instrument was signed and published by him—if you find that it was signed and published by him—it is entirely immaterial whether or not any person exercised any undue influence over him in the matter of the making and

execution of said instrument, because unsoundness of mind of itself incapacitates from making a will, influence or no influence. The question to determine here is whether at the time of executing this alleged will—if you find that it was executed—Alexander Blanc was free to do as he pleased, or whether he was then under the influence of Susan Blanc and Stewart Blanc; and, if so, whether he was so far under the influence of Susan Blanc and Stewart Blanc, or either of them, that the will is not his will, but the will of said persons, or of one of them. Of course, persons who intend to control another's actions, especially in regard to making a will, do not proclaim that intent. Very seldom does it occur that a direct act of influence is patent; the existence of the influence must generally be gathered from circumstances—such as, whether he had formerly intended a different disposition of his property; whether he was surrounded by those who had 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 is such a paper as would probably be urged upon him by the persons surrounding him; whether they were benefited thereby to the exclusion of formerly intended beneficiaries. The question for you to determine is, Was Alexander Blanc, from infirmity of age or from disease or other cause, constrained to act against his will and to do that which he was unable to refuse by importunity or threats, or by any other means, or in any other way by which one person acquires and exercises dominion and control over another? 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 of the case.

10. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds.

11. A witness false in one part of his testimony is to be distrusted in others.

12. In deciding the issues raised by the pleadings in this contest, and submitted to you, you are instructed that the decree which admitted the alleged will to probate is not evidence as to any of the issues involved in this matter, or as to any fact involved in said issues.

13. The decree of this court admitting said alleged will to probate does not raise or create any presumption of law that Alexander Blanc was of sound and disposing mind, or competent to make a will at the time when said alleged will was executed—if the same was ever executed by him.

If you find from the evidence that the deceased, Alexander Blanc, was very strongly attached to his wife, Susan Blanc, and to his nephew, Stewart Blanc; that they were both of them kind, faithful and devoted to him, and that by reason thereof he reposed the greatest confidence in them; and you further find that the said Susan Blanc and Stewart Blanc, or either of them, did use honest intercession, request and argument, and persuasion, to induce said deceased to make said will in their favor, to the exclusion of other of his relatives, and that he voluntarily, and as a result of such honest intercession, request, argument and persuasion, executed said will in their favor, I charge you that such influence so exerted is not an unlawful or undue influence, within the meaning of the law. A 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, 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 upon the testator's mind as a reason for his testamentary dispositions.

The influence exerted over the testator to avoid his will must be of such a nature as to deprive him of free agency, and render his act obviously more the offspring of the will of others than his own; and it must be specially directed toward the object of procuring a will in favor of particular parties and must be still operating at the time the will is made.

Influence and persuasion may be fairly used; and a will procured by honest means, by acts of kindness, attention and persuasion which delicate minds would shrink from, will not

be set aside on that ground alone. The influence to vitiate a will must not be the influence of affection or attachment.

The fact that the beneficiaries of a will are those by whom the testator was surrounded, and with whom he stood in confidential relations at the time of its execution, is no ground for inferring undue influence.

Influence gained by kindness and affection will not be regarded as undue, if the will induced to be made through its exercise is voluntarily made.

In order to avoid a will on the ground of undue influence, 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 testator to do that which was against his free will and desire, but which he 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 kindly acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear.

I instruct you that undue influence cannot be presumed, but must be proved, and the burden of proving it lies on the party alleging it; and, although the evidence of undue influence must often be indirect and circumstantial, such evidence must be so clear and strong as to bring conviction to your minds that the respondents did actually use unlawful influence upon the direct act of making the will, and at the time it was made, and that such influence was not such as a wife or other lawful relation is permitted by law to use. The undue influence must be proved to exist as a fact—you are not justified in finding it upon a suspicion.

I instruct you that the words "undue advantage," as used in the special issues to be submitted to you, mean not such an advantage or influence as a wife or lawful relations may use over the testator, but it must be such an advantage as causes him to make a will essentially contrary to his desire, against the dictates of his affections, and not in accordance

with his intentions; for no matter how great may be the advantage used over a testator by one in a lawful relation to him, such advantage is not undue, and cannot invalidate his will, unless it had the effect of causing him to make such a disposition of his property as was against his will and desire, and against his intentions.

The Undue Influence Which will Vitiate a Will is considered in Estate of Casey, 2 Cof. Pro. Dec. 68, and note; Estate of Ingram, 1 Cof. Pro. Dec. 222, and note. This question is further considered with special reference to the lawful or unlawful relations between the parties in Estate of Tiffany, 1 Cof. Pro. Dec. 478. The supreme court appears to take the view, that the real issue is the effect of the influence upon the mind of the testator, and not its source or moral attributes: Estate of Cahill, 74 Cal. 52, 15 Pac. 364; Estate of Ruffino, 116 Cal. 304, 48 Pac. 127.

ESTATE OF CLARA CECILIA BEDELL, DECEASED.

[No. 11,494; decided March 25, 1892.]

Administrators—Order of Persons Entitled to Letters.—Section 1365 of the Code of Civil Procedure specifies ten classes of persons to whom letters of administration may be granted, who are entitled to letters in the order of enumeration. The parents constitute the third class; the public administrator the eighth class; and any person legally competent the tenth class.

Administrators—Nominee of Parents.—Section 1379 of the Code of Civil Procedure provides that administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in court. A nominee of the parents, although in his own right belonging to the tenth class, is, by virtue of the written request of the parents, entitled to precedence over the public administrator.

Administrator—Nomination by Surviving Spouse.—A surviving husband or wife, though not competent to serve on account of nonresidence, may nevertheless nominate a suitable person for administrator.

Administrator—Nomination by Nonresident.—A nonresident, not being entitled to letters of administration, cannot, as a general rule, under section 1379, make a valid request for the appointment of another person.

Administration—Right to Nominate.—Section 1379 is limited in its operation by subdivision 1 of section 1365 to the particular instance of the surviving husband or wife only.

Administration—Estoppel to Retract Nomination.—Where the father of the decedent requested the appointment of a competent person as administrator, and his nominee applied for letters and thus went to expense and trouble, the father is estopped from withdrawing his waiver or retracting his renunciation.

Clara Cecilia Bedell died on October 16, 1891, leaving a will dated June 20, 1891, in which Richard V. Dey was named as executor.

On November 3, 1891, Edward W. Gunther filed a petition for letters of administration with the will annexed, alleging that Dey had renounced his right to act as executor, and that the mother of the decedent requested his, Gunther's, appointment as administrator. Annexed to the petition was the request of the mother.

On November 14, 1891, A. C. Freese, public administrator, filed a petition praying that letters be issued to him.

On December 7, 1891, Gunther filed an amended petition in which he stated that the father of the decedent also requested his appointment, and annexed to this amended petition was the request of the father.

On January 11, 1892, there was filed another paper signed by the father, dated January 9, 1892, and requesting that the public administrator be appointed administrator of the estate.

W. F. Herrin and Arthur Rodgers, for E. W. Gunther, nominee of parents.

J. D. Sullivan and James G. Maguire, for A. C. Freese, Public Administrator.

COFFEY, J. Testatrix died leaving a will nominating one Richard V. Dey as executor. Dey renounced and Gunther applied for letters of administration, with the will annexed, upon request preferred in writing of the father and mother. The father expressly waived and relinquished his right to be appointed, and requested the appointment of Gunther. Subsequently, and after the case was submitted for consideration,

he undertook to retract this relinquishment and requested the appointment of the public administrator.

The first brief was filed January 5th, the last brief February 6, 1892; the first requested of the father, in favor of Gunther, December 7, 1891, and the second request (the last up to date) January 9, 1892. I shall treat the case, first, as it stood at the submission, and, secondly, as it is claimed to have been modified by the second request of the father.

Section 1365 of the Code of Civil Procedure specifies ten classes of persons to whom letters of administration may be granted, who are entitled to letters in the order of enumeration. The father and mother constitute the third class, the public administrator the eighth class, and the last or tenth class includes the applicant, Gunther.

Section 1379 of the Code of Civil Procedure provides: "Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court."

The public administrator contends that the written request of the father and mother, in favor of a person within the tenth class, cannot supersede his right to letters, as under section 1365 he is entitled before a person of the tenth class.

This construction of the law denies to section 1379 any effect or force whatever, because, if the priority of right to letters specified in section 1365 must always prevail, then it is idle to make a written request for the appointment of any person except he be the one next entitled to letters of administration after the person making the request. In such case the person entitled could simply decline to apply for letters, and would thus accomplish his object fully without making any written request. But section 1379 expressly provides that letters of administration may be granted to a "competent person," "not otherwise entitled to the same, at the written request of the person entitled." If the legislature intended that the right of the person next in order could not be superseded by the written request of the person entitled, it certainly would have indicated such intention by appropriate language. But the statute does not say that only the person next entitled to letters may be appointed at the request of the person entitled; on the contrary, it says that a "competent person," "although not other-

wise entitled," may be apointed at the request of the person entitled. A "competent person" may be included in the tenth class of section 1365, and may be appointed at the request of the person entitled, whichever class he may be within, whether the class immediately preceding or not.

It is argued that this construction of these sections denies any effect to that portion of subdivision 1 of section 1365 which provides that the surviving husband or wife may request to have appointed any competent person, such person being entitled first in order to letters. But it is obvious that this provision of subdivision 1 has application to cases other than those governed by section 1379, as under section 1379 only persons who are themselves entitled to letters can make a written request for the appointment of another person; but, under subdivision 1 of section 1365, a surviving husband or wife can make such request, although he or she may not be personally entitled to letters.

That a surviving husband or wife, though not competent to serve on account of nonresidence, may, nevertheless, nominate a suitable person for administrator is decided in the following named cases: Estate of Cotter, 54 Cal. 215; Estate of Stevenson, 72 Cal. 164, 13 Pac. 404; Estate of Dorris, 93 Cal. 611, 29 Pac. 244.

On the other hand, it is held that a nonresident, not being entitled to letters of administration, cannot, under section 1379, make a valid request for the appointment of another person: Estate of Beech, 63 Cal. 458; Estate of Hyde, 64 Cal. 228, 30 Pac. 804.

As is said in the Stevenson case (72 Cal. 166, 13 Pac. 404): "Section 1379 accords to persons other than the surviving husband or wife the right of nominating an administrator, but has no reference to such husband or wife and their rights in that matter, which are fixed and determined by section 1365."

Therefore, the construction adopted by this court gives force and effect to all the provisions of the sections of the code in question, while the contrary construction denies to section 1379 any force or effect whatever.

Now, what is the effect of the second request of the father filed after the submission of the applications? Does it mate-

rially modify the situation, or change the legal relation or circumstances of the parties to this controversy?

Section 1379 is limited in its operation by subdivision 1 of section 1365 to the particular instance of the surviving husband or wife only. By this construction both sections can be given effect. "They should be so construed as to maintain both, if possible": Camp v. Grider, 62 Cal. 26.

"Such a construction must therefore be given to those provisions of the codes that both may, if possible, have effect": Gonzales v. Wasson, 51 Cal. 297.

The present being an instance of the request by the mother and father, and not embraced in the exceptional case of subdivision 1 of 1365, is therefore covered by 1379, and the requests and petition on behalf of petitioner Gunther should be granted as matter of right: Estate of Allen, 78 Cal. 585, 21 Pac. 426; Estate of McDougall, 1 Cof. Pro. Dec. 109; Estate of Lane, 1 Cof. Pro. Dec. 88; Estate of Keenan, Myr. Pro. 186.

The father's second request, filed January 9, 1892, should be disregarded, because he had already exercised his statutory right by his written request attached to Gunther's petition, filed December 7, 1891, wherein he states: "I . . . . do hereby waive and relinquish my right to be appointed such administrator and to such letters of administration, and do hereby request and ask said court to appoint Edw. W. Gunther . . . . administrator, with the will annexed, of the estate of said Clara Cecilia Bedell, deceased, and to issue such letters of administration to him," and he cannot revive his privilege, nor retract his waiver and request, as against the petitioner Gunther, who acted upon the same.

". . . . the appellant, having renounced her right to administer in favor of the respondent, cannot now retract her renunciation, and her petition for letters was properly denied": Estate of Moore, 68 Cal. 283, 9 Pac. 164; Estate of Arguello Minors, No. 4170, Coffey, J.

He is, "upon familiar principles, estopped now from withdrawing his assent and waiver or renunciation": Estate of Kirtlan, 16 Cal. 165; Estate of Keane, 56 Cal. 410.

I think that it may be said that the father "encouraged Gunther to go to expense and trouble in applying for this office," and that, hence, he was estopped at the date of the sec-

ond request from withdrawing his waiver or retracting his renunciation.

I do not think that the Estate of Morgan, upon which counsel for the public administrator so strongly relies, can be properly applied to the case at bar. Certainly not as to the first reason assigned by the supreme court (see 53 Cal. 243), and the second reason seems to have been hypothesis purely. In that case the supreme court said that the fact that "Croly had been recommended to the probate court by the next of kin as being a suitable person to administer upon the estate (under the Code of Civil Procedure, section 1379, as amended in 1878), did not give him any preference over the public administrator in claiming the administration of the estate, and this for two reasons:

"1. The distributees and next of kin in this case are married women, and incapable, therefore, themselves, of administering upon the estate, and their expressed preferences for the appointment of Croly, as set forth in their petition filed in the probate court, were of no legal consequence whatever.

"2. But had it been otherwise in this respect, and had the next of kin been laboring under no such disability, their petition requesting the appointment of Croly was addressed to the mere discretion of the probate judge; it did not operate to supersede the claim of the public administrator, otherwise established under the statute, to receive letters of administration."

Application of Gunther granted.

The Principal Case was Affirmed by the supreme court in 97 Cal. 339, 32 Pac. 323.

A Person Nominating Another for Appointment as Administrator must himself be competent to fill the office, except that a surviving husband or wife has an absolute right to nominate a fit person to serve in his or her stead. It follows that a nonresident father or brother of a decedent is not entitled to nominate an administrator of his estate; but that a surviving spouse, though incompetent to act as administrator because of nonresidence, is entitled to nominate some person competent for the position: Estate of McDougal, 1 Cof. Pro Dec. 109, and note; 1 Ross on Probate Law and Practice, 341.

ESTATE OF SHERWOOD CALLAGHAN, DECEASED.

[No. 11,405; decided November 25, 1892.]

Accounts.—**The Statutes do not Require that Any Particular Designation** should be given by executors to any account which they may file; the code leaves the nature of the account to be determined by its intrinsic qualities and contents, and not by any title or heading which may irrelevantly be placed upon it.

Final Account and Final Settlement Defined.—A final account, except as the term is used in Code of Civil Procedure, sections 1652, 1653, merely means a complete account of all matters necessary for the complete administration of the estate, and a "final settlement" means such a settlement as completes all matters which the court should act upon to cover all the true functions of administration, namely, which provides for the payment of all presented debts, which passes upon all receipts and disbursements up to the date of the payment of the debts and the expiration of the normal period of administration, and puts the court in possession of data sufficient to determine and ascertain the distributable assets.

Final Account.—The Account of an Executor may be regarded as final, although it does not set forth the amount of his commissions or the amount of the attorney's fees, and although there have other sums accrued to the estate since the filing of the account.

Account—Only One is Necessary.—In ordinary estates there is no necessity for more than one account, which is a final or complete account.

Account.—The "Finality" of the Account of an Executor is to be determined by reference to its completeness and to the circumstances of the estate, and not by reference to the title which the executors choose to apply to it.

Account.—A "Final" or Second Account is not contemplated by the code, except in the single case where the court, on settling the original or general account, determines that the estate is not ready for closing, and fixes a limit for the rendering of another account.

Account.—The Term "Final Account," as used in Code of Civil Procedure, section 1652, applies only to the cases mentioned in the last half of section 1651; and the term "final settlement," as used in section 1665, applies not specially to the settlement of a "final account" (in the sense of a second account, as prescribed by section 1652), but to any settlement of account which completes the payment of the debts and determines the distributable assets.

Accounts.—Three Classes of Notices of the Hearing of Accounts are provided by the code: 1. Where the account is filed by itself, notice must be given as prescribed by Code of Civil Procedure, section 1633; 2. Where the petition for distribution is filed by itself, notice must be given as prescribed in Code of Civil Procedure, section 1638;

3. Where the account and distribution are filed together, the notice must be given as prescribed in Code of Civil Procedure, section 1634.

Sherwood Callaghan died on September 14, 1891, leaving a will dated January 27, 1891, in which he named his mother, Annie Callaghan, executrix, and his brother, Daniel T. Callaghan, executor. On petition filed on September 22, 1891, letters testamentary were issued to the executor and executrix on October 20, 1891.

On October 19, 1892, the executor and executrix filed an account which they denominated a "First Annual Account." A day was fixed for the hearing of the account, and notice given of such hearing. On October 24, 1892, the devisees and legatees named in the will filed a petition for distribution, and this petition was set for hearing at the time fixed for the settlement of the account, and notice thereof was given. The account was settled on November 4, 1892. The hearing of the petition for distribution was postponed to a later day, and, upon such hearing, counsel for the executor and executrix objected thereto on the grounds that the application was premature and that the notice of the hearing was not in compliance with the provision of the code on the subject.

Chas. F. Hanlon, for the executor and executrix.

Harold Wheeler, for the devisees and legatees.

COFFEY, J. The questions to be determined are whether there has been a "Final Settlement of the Accounts of the Executor" within the meaning of section 1665, Code of Civil Procedure, so as to entitle the legatees to distribution, and whether notice of the settlement and of the distribution has been given in such a way as to make regular a degree of distribution at the present time.

1. What is a "final" account?

The first question resolves itself into a question as to what is meant by "Final Settlement of the Accounts" in section 1665. A comparison of the different sections of the code will make it clear that such a "final settlement" has now occurred.

The account filed herein was designated by the executors as their "First Annual Account." There is nothing in the code

to warrant such a title being given to this, or, indeed, to any account. No reference is made in the code to an "annual account"; nor is there any requirement anywhere that a particular designation should be given by the executors to any account which they may file. The code leaves the nature of the account to be determined by its intrinsic qualities and contents, and not by any title or heading which may irrelevantly be placed upon it.

We find no decision of our own supreme court particularly defining the phrase "final settlement." Looking into the use of the phrase in other states than our own, we find that it has two meanings, according to the procedure in vogue where it is employed. For instance, in the American and English Encyclopedia of Law, title "Executors and Administrators," subtitle "Account" (volume 7, page 442, first edition), we find the following statement, accompanied by references to many cases outside of California, to wit: "A partial or annual account is only a judgment de bene esse, often rendered ex parte, and only prima facie correct. On final settlement it may be opened to correct errors due to fraud or mistake, although the error was not excepted to or appealed from when the partial account was rendered. After the final balance has been ascertained by the accounting, a decree of distribution is regularly in order." Evidently it is not in this sense that the phrase "final account" or "final settlement" is used in our own code; for the settlement of any account filed by an executor in our state is final and conclusive in the sense referred to in the above quotation: Code Civ. Proc., sec. 1637. The above quotation and the definition therein contained applies, therefore, only to those states in which an ex parte rendering of an account without citation or notice to the parties interested is permitted. For instance, in New York, accounts are habitually rendered and accepted by the surrogate without notice and subjected to scrutiny only at a later date when "final settlement" of that or of all of the accounts is asked for and notice is given. Dayton on Surrogates, page 463: "The finality intended by the term 'final settlement' refers to the conclusive character of the accounting, which, being made on citation to all parties in interest, is a final and conclusive adjustment up to that period."

The foregoing references help us only by showing what the phrase "final settlement," as used in our code, does not mean. In another quarter we find an apt definition applying directly to the use of this phrase in our own code. In Anderson's Dictionary of Law, title "Account," we find: "First Account; Partial Account; Final Account. Designate the number or completeness of accounts presented to the court for confirmation." The examination of the different sections of our code makes it clear that it is in this sense that the term is used by us, and that a "final account" (except as used in sections 1652 and 1653, of which we will speak later), merely means a complete account of all matters necessary for the complete administration of the estate, and that a "final settlement" means such a settlement as completes all matters which the court should act upon to cover all the true functions of administration, namely: which provides for the payment of all presented debts, which passes upon all the receipts and disbursements up to the date of the payment of the debts and the expiration of the normal period of administration, and puts the court in possession of data sufficient to determine and ascertain the distributable assets. If this is the meaning of the term "final settlement," as used in our code, it is evident that the recent settlement of the account filed herein on October 19th was a "final settlement," and that the estate is therefore ready for distribution.

It is admitted, or, at any rate, clear from the record herein, that when this account was filed, on October 19th, the estate was ready for a "final account," or for a "final settlement" of the accounts. All of the property had been administered and reduced to possession by the executors; all claims presented had been paid; the time for presentation of claims had expired sixty days previously; there was nothing further to be done by the executors by way of completing their administration, except to render their account. Suppose, now, that the executors had, on October 19th, actually desired to close up the estate and to render a "final account" in the manner required of them by the statute. Suppose that they had, on October 19th, rendered an account which they designated a "final account." In what respect would that account have differed from the account which they actually did render?

Evidently it would not have differed in a single line or item, but solely in the title. The account which they did render covered all their receipts and disbursements up to the day of rendition; showed by references to the inventory the full amount of the property in their hands; showed the payment of all presented claims, and gave the court all the data necessary for the due settlement and distribution of the estate. In other words, the account was a "final or complete account" as far as any account possibly could be such; and the court should treat it as such and proceed with the distribution asked for.

Counsel for the executors has urged that the account should not be considered final, because it does not set forth the amount of the executors' commissions or of the attorney's fees, and because there have been sums accruing to the estate and received by it since the account was filed; but the matter of fees and commissions is fixed by the court at the time of the final settlement or distribution; and, as to the items accruing after the making of the account, they could not have been included in it. In any estate which has a current income there are items which must accrue after the rendering of the final account and prior to its settlement. Section 1665 distinctly provides for this in setting forth that a supplementary statement of receipts and disbursements must be filed by the executors at the time the distribution is made.

Section 1622, Code of Civil Procedure, provides for "an exhibit" by the executor within six months after his appointment; and there is nothing else whatsoever in the code (except in section 1651 and the sections supplementary to it) to suggest that in any ordinary estate there is to be any account but the one, and that, a final or complete account. The whole spirit of the code is to provide for the winding up of the estate within the year. Section 1453, for instance, provides for the delivery of the state to the heirs at the end of the period of notice to creditors, whether the accounts be then settled or not. Section 1628 provides for the rendering of a full account within thirty days after the notice to creditors has expired. Section 1647 provides for orders for payment of claims—to be made when the accounts (that is, the account required by section 1628) are settled. The same section expressly provides that if the assets of the estate are exhausted by such order of

payment, "the account must be considered as a final account," and the estate must be wound up accordingly. This last section clearly shows that the "finality" of the account is to be determined by reference to its completeness and to the circumstances of the estate, and not by reference to the title which the executors choose to apply to it.

There is no suggestion of a second or later account until we come to section 1651, and that section fully establishes the position here assumed: "If the whole of the debts have been paid by the first distribution (that is, first order for payment of debts), the court must direct the payment of legacies and the distribution of the estate . . . . as provided in the next chapter." And the distribution provided in the next chapter is "distribution on final settlement," such as is now demanded. Evidently, then, an ordinary settlement of account and distribution, as provided in section 1651, is a distribution after "final settlement," no matter what the account may have been termed.

The second portion of section 1651 shows that distribution is to be postponed, and a second and "final account" to be rendered, only where there are special reasons for it, and where the court makes a special order to that effect; and, as there are no such reasons in the present case, that latter portion of the section has no effect. The language is: "If there be debts remaining unpaid, or if for other reasons the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate." And the next two sections, providing for the filing of a "Final Account," require it to be filed within the time designated by the court's extension. Is it not clear, then, that there is no such thing contemplated as a "final" or second account, by the code as a whole, except in the single case where the court, on settling the original or general account, determines that the estate is not ready for closing, and fixes a limit for the rendering of another account?

The term "final account," then, as used in section 1652, applies only to the cases mentioned in the last half of section 1651, and not to the case at bar; and the term "final settlement," as used in section 1665, applies not specially to the settlement of a "final account" (in the sense of a second ac-

count, as prescribed by section 1652), but to any settlement of account which completes the payment of the debts and determines the distributable assets.

2. As to the notice of the hearings:

Three classes of notice are provided for by the code: 1. Where the account is filed by itself, notice of settlement must be given as prescribed by section 1633; 2. Where the petition for distribution is filed by itself, notice of the hearing must be given as prescribed by section 1668; 3. Where the account and the distribution are filed together, the notice must be given as prescribed by section 1634.

In the present case the account was filed on October 19th, and the petition for distribution on October 24th. Notice was, therefore, given of each as prescribed by sections 1633 and 1668; and section 1634 has no application. That section only applies where the account and petition are filed together; and the requirement that the "notice should state those facts" only applies where "those facts" exist—that is, where the account is for final settlement, and a petition for distribution is filed therewith.

The foregoing are the views which the court accepts as entitling the applicants to distribution, which is decreed accordingly.

ESTATE OF THERESA FAIR, DECEASED.

[No. 11,390; decided November 19, 1892.]

Wills—Rules of Interpretation.—The interpretation of a will depends upon the intention of the testator, to be ascertained from a full view of everything contained within the four corners of the instrument.

Wills—Rules of Interpretation.—The intention of the testator, as gathered from the whole scheme of the will and all its provisions, must prevail.

Wills—Interpretation of Trusts.—Such a construction must be put upon a will as will uphold all its provisions and enable the trustees therein named to perform each and all of the trusts imposed upon them.

Wills.—The Intendment is that a Will as Written correctly manifests the intention of the testator, and the whole thereof.

Wills.—Effect to Every Part of a Will must be given, if possible.

Wills.—All Parts of a Will are to be Construed in relation to each other so as to form one consistent whole, if possible.

Wills—Modification of One Clause by Another.—An intent inferable from the language of a particular clause may be qualified or changed by other portions of the will evincing a different intent.

Wills.—The Intention of the Testator is the First and great object of inquiry in the interpretation of a will, and to this object technical rules must yield.

Wills—Construction.—Where a Testatrix Makes a Bequest of Money to one son to be paid when he attains the age of thirty-five years, and a bequest to another son to be paid when he attains the age of thirty years, and where she further provides that if either son dies the portion allotted him shall be paid to the other, and the first son dies without attaining the specified age and before the second attained the age of thirty years, an application by the surviving son before reaching thirty years of age for the portion allotted to the deceased son is premature and must be denied.

Theresa Fair died on September 13, 1891. The will, set forth in the opinion below, was admitted to probate on October 5, 1891.

On May 11, 1892, Charles L. Fair filed a petition wherein he alleged that his brother, James G. Fair, Jr., had died on February 12, 1892, under the age of thirty years, and without wife or lawful issue surviving him. He further alleged that by the terms of the will the testatrix bequeathed the sum of $500,000 to James G. Fair, Jr., and directed that the same be paid to him when he shall have attained the age of thirty-five years, and that, in case he should die without wife or lawful issue surviving him, the portion by said will so allotted to him should be paid to petitioner, and that petitioner is entitled to receive said sum of $500,000, and he prayed for distribution thereof to him.

At the time this petition was filed Charles L. Fair was twenty-five years of age.

In the answer to the petition the executors alleged that it was the intention of the testatrix, by her will, to prohibit petitioner from receiving any portion of her estate, and the executors from paying to him any portion of her estate, prior to his attaining the age of thirty years, except the monthly allowance of $500 specified in the will.

W. S. Goodfellow, for the petitioner.

R. S. Mesick, for the executors and trustees.

COFFEY, J. The question presented in this case for decision by the court is, When should the trustee appointed by the will pay to the petitioner under its terms the $500,000 therein primarily allotted to his brother, James G. Fair, Jr., as his portion of the estate of Theresa Fair, deceased, their mother, the said James having died long before his portion or that of Charles could by the terms of the will become due and payable had James lived?

The petitioner claims that under the will the portion allotted to James should be paid at once to him, while the respondents contend that immediate payment thereof is forbidden by its terms, and that the trustees cannot comply with the demands of the petitioner without violating their trust as defined by the testatrix in her will.

The petitioner, Charles L. Fair, bases his claim of the right to have paid to him without delay the share primarily allotted to James upon two clauses of the will as follows:

"I give and bequeath to my son, James Graham Fair, Jr., the sum of $500,000, and direct the same to be paid to him when he shall have attained the age of thirty-five years, but not before then, and that meantime there shall be paid to him monthly the sum of $500.

"In case my said son, James Graham Fair, Jr., die without wife or lawful issue surviving him, the portion hereby allotted to him shall be paid to my said son, Charles Lewis Fair, if living, and, if not living, then to his surviving wife or lawful issue, if any there be."

The will of the testatrix reads in full as follows:

"In the name of God, Amen.

"I, Theresa Fair, of the City and County of San Francisco, and State of California, of the age of forty years and upwards, and being of sound mind and memory, do make, publish and declare this my last will and testament in manner following, that is to say:

"I hereby give, bequeath and devise all my real and personal estate, of what nature or kind soever and wheresoever situated, to John W. Mackay and Richard V. Dey, the executors of my last will and testament hereinafter nominated and appointed, in trust, for the payment of my just debts and the legacies and charges upon the said estate hereinafter specified, to be held and possessed by them, with power to sell and dispose of the same, or any part thereof, at public or private sale, at such time or times, and upon such terms and in such manner as to them shall seem meet, and to re-invest any surplus proceeds of such sales for the best interest of said estate until the full and complete disposition of said estate by them, which I hereby direct shall by them be made in compliance with the following:

"I give and bequeath to my daughter, Theresa Alice Fair, the sum of one million five hundred thousand dollars, and direct the same to be paid to her upon her attaining the age of twenty-five years, but not before then, and that meantime there shall be paid to her monthly the sum of twenty-five hundred dollars.

"I give and bequeath to my daughter, Virginia Fair, the sum of one million five hundred thousand dollars, and direct the same to be paid to her upon her attaining the age of twenty-five years, but not before then, and that meantime there shall be paid to her monthly the sum of twenty-five hundred dollars.

"I give and bequeath to my son, James Graham Fair, Jr., the sum of five hundred thousand dollars, and direct the same to be paid to him when he shall have attained the age of thirty-five years, but not before then, and that meantime there shall be paid to him monthly the sum of five hundred dollars.

"I give and bequeath to my son, Charles Lewis Fair, the sum of five hundred thousand dollars, and direct the same to be paid to him when he shall have attained the age of thirty years, but not before then, and that meantime there shall be paid to him monthly the sum of five hundred dollars.

"The rest and residue of my estate I give and bequeath to my two daughters, above named, to be divided between them

equally, share and share alike, and to be paid to them when my said daughter Virginia shall have attained the age of twenty-five years.

"In case my said son, James Graham Fair, Jr., shall die without wife or lawful issue surviving him, the portion allotted to him shall be paid to my said son, Charles Lewis Fair, if living, and, if not living, then to his surviving wife or lawful issue, if any there be.

"In case my said son, Charles Lewis Fair, shall die without wife or lawful issue surviving him, the portion allotted to him shall be paid to the said James Graham Fair, Jr., if living, and, if not living, then to his surviving wife or lawful issue, if any there be.

"In case both the said James Graham Fair, Jr., and Charles Lewis Fair shall die without wife or lawful issue surviving them, then the portions allotted them shall be paid to my said daughters, Theresa Alice Fair and Virginia Fair, share and share alike.

"In case of the death of my said daughter, Theresa Alice Fair, without husband or child surviving her, the portion allotted to her shall be paid, one-half to my daughter, Virginia Fair, and the other half in equal portions to the said James Graham Fair, Jr., and Charles Lewis Fair.

"And in case of the death of my said daughter, Virginia Fair, without husband or child surviving her, the portion allotted to her shall be paid, one-half to my daughter, Theresa Alice Fair, and the other half in equal portions to my sons, James Graham Fair, Jr., and Charles Lewis Fair, aforesaid.

"I hereby nominate and appoint my daughter, Theresa Alice Fair, to be sole guardian of the person and estate of my said daughter, Virginia Fair, during the period of her minority.

"I hereby nominate and appoint the aforesaid John W. Mackay and Richard V. Dey to be the executors of this my last will and testament, hereby revoking all former wills by me made; and I do further direct that no bonds be required of my said executors.

"It is my special wish and I request and direct that R. S. Mesick, Esq., act as the legal adviser of the executors of my will in the settlement and distribution of my estate.

"In witness whereof, I have hereunto set my hand and seal, this eighteenth day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

"THERESA FAIR. (Seal.)"

Attestation clause and witnesses' subscription follow in due form of law.

The intention of the testatrix, as gathered from the whole scheme of the will and all its provisions, must prevail; and such a construction must be put upon that instrument as will uphold all its provisions and enable the trustees to perform each and all of the trusts imposed upon them thereby.

The scheme of the testatrix was to make provision for each of the children in the form of a temporary monthly allowance, and to give them full possession of the principal sum bequeathed to them when they should attain a certain prescribed age. The one purpose of the testatrix appears to have been to make adequate provision for the children and their maintenance in life. The postponement of possession of their legacies was a precautionary measure to guard against the principal sum being lost or wasted, and the legatees being left without provision for their maintenance. This purpose is manifested in the will, and forms its prominent feature; but although the attention of the testatrix was bent upon this subject, petitioner's counsel contends that she did not think proper to continue to apply the same protective measures to legacies payable over to a survivor, and counsel conjectures that her reason may have been that such measures were not necessary, inasmuch as such survivor had already been protected to the extent of his original legacy, which would be preserved in any event, and so no disastrous consequence would ensue, even if the original legacy should be lost or wasted.

This will is in writing, and is required by law so to be. Its phraseology, as well as extrinsic evidence, shows that it was prepared by an attorney. The intendment must be that the will, as written, correctly manifests the intention of the testatrix, and the whole thereof. The express words of the will are that in case of the death of James "the portion allotted to him shall be paid to my son, Charles Lewis Fair, if living," and counsel for petitioner claims that to annex

the further condition—"and if he be then of the age of thirty years"—would be manifestly to add to and vary the terms of the will. This cannot be done, says the counsel, even if it were conceded or absolutely demonstrated as an extrinsic fact that the testatrix intended the gift to be so conditioned or limited. It is not the intention simply, but the expressed intention, of the testatrix to which effect must be given.

There are here two separate legacies: one is given to James directly, the other is given to Charles directly. By virtue of subsequent clauses of the will, in the case of death, the one succeeds to the other's legacy. Charles claims this $500,000, not under the clause making original provision for him, but under the subsequent clause substituting him for his brother as to the latter's legacy. By what authority, asks the counsel for petitioner, can a limitation annexed to the first legacy only be engrafted upon the second also? Such, the counsel asserts, is not the expressed will of the testatrix—to say that she so intended, or that such would be in harmony with her general purpose, is to indulge in mere conjecture. It may or may not have been so; the actual intent cannot now be positively ascertained. The court is confined to the will as it is written.

The court cannot agree with counsel for petitioner in his contention that the actual intent of the testatrix cannot be ascertained from the will as it is written. On the contrary, the design and scheme of the testatrix are ascertainable and expressed with sufficient clearness, if not with absolute accuracy of verbal expression. The design and scheme were, without doubt, as gathered from the entire instrument, to secure to the children, upon attaining a certain age, the full possession and enjoyment of the portion of the estate allotted to them, and meanwhile to secure to them an income sufficient to support their station in society.

It is clear to the court, from the study of the whole will, that James was not to enter into the enjoyment of his portion until he should have reached the age of thirty-five years, nor Charles until thirty years, and that neither was to have more than a monthly allowance until the expiration of either period. To give to either before that point of time any por-

tion of the capital would be to violate the intention of the testatrix. In carrying this intention into effect it is permissible to resort to any reasonable intendment.

It should seem unnecessary to quote the commonplaces of construction in this connection, as, for example, that the interpretation of a will must depend upon the intention of the testator, to be ascertained from a full view of everything contained within the "four corners" of the instrument; or, that 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; or, that an intent inferable from the language of a particular clause may be qualified or changed by other portions of the will evincing a different intent, for the substance and intent, rather than words, are to control.

The intention of the testatrix is the first and great object of inquiry, and to this object technical rules to a certain extent are made subservient.

It is a cardinal rule of construction that effect must be given, if possible, to every part of a will.

There is, perhaps, no rule of construction of wider application of wills, or which oftener requires to be acted upon, than that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.

Applying these familiar principles and rules to this will, it is manifest that the testatrix imposed upon each of the legatees a period of waiting for the enjoyment of their legacies, except the monthly allowances, which is not only binding upon the legatees, but also upon the trustees whose duties under the will are therein defined with as much precision as the rights of the legatees.

No reason can be imagined why the testatrix should have been less solicitous concerning the $500,000 in question than concerning the $500,000 primarily given by her to the petitioner, or why she should intend to make any distinction between the two sums as to the term of waiting. It seems to the court that in order to set aside or modify the rule of waiting imposed by the will, plain and specific language should be discovered in that instrument manifesting an intention on the part of the testatrix so to do.

The clause in the will upon which the petitioner relies for immediate payment of the legacy in question contains no word indicating when the trustees shall pay the amount. Nor does that clause define the time when the death of the legatee, James, must occur in order that his share may become payable to Charles. The clause is elliptical both in respect of when the death of James must occur and when the share upon the occurrence of his death must be paid by the trustees to the petitioner.

It is certain that the testatrix did not intend that in case James died after having attained the age of thirty-five years, and after having been put in possession of the legacy by the trustees, it should ever revert to the petitioner or be called back into the hands of the trustees. The time when the death of James must occur to entitle Charles to be paid this share becomes necessarily a matter of construction and interpretation upon the reading and consideration of every other clause in the will. So, it may be said of the time when the trustees should pay to the petitioner the share allotted to James, it is a matter to be gathered from all the provisions contained in the will, and its general purport and purpose.

It seems to the court that no one can read the clauses of the will preceding that upon which the petitioner relies without being convinced that the testatrix had no intention of authorizing the payment to Charles of anything mentioned in the will, except the monthly allowance, prior to his attaining the age of thirty (30) years; and that the will must be read as an entirety, and the conditions and limitations which precede the clause relied upon must be applied thereto, and, when so read, the will is destructive of the claim of petitioner.

It is the opinion of the court that the clause relied upon by the petitioner cannot be isolated from the context and construed as a separable section of the testament, but that it must be read and construed as an integral portion of that instrument, to be interpreted with the other constituents of the will.

It follows that the petition for partial distribution filed herein is prematurely presented, and should be and it is denied.

The Principal Case was Affirmed in 103 Cal. 342, 37 Pac. 406.

In Construing a Will the Intention of the Testator should govern, and that intention should be ascertained from the words of the will itself: Estate of Hale, 2 Cof. Pro. Dec. 191; Estate of Pearsons, 2 Cof. Pro. Dec. 250; Estate of Berton, 2 Cof. Pro. Dec. 319.

All Parts of a Will Should be Considered in relation to each other, so as to form one consistent whole. Every portion of the instrument should be made to have its just operation, if possible: Estate of Maxwell, 1 Cof. Pro. Dec. 145; Estate of Behrmann, 2 Cof. Pro. Dec. 513; Estate of Berton, 2 Cof. Pro. Dec. 319.

ESTATE OF ERNST MIEHLE, DECEASED.

[No. 13,071; decided January 24, 1893.]

Will—Right to Withdraw from Files.—Where a will has been filed for probate but the evidence adduced is insufficient to prove its execution, the court has no authority to order the withdrawal of the will from the files and direct a commission to be issued to take the testimony of the subscribing witnesses in a foreign land, the will to accompany the commission and be returned with it to the court.

Carl T. Graef, for the applicant.

Gustav Gutsch, contra.

COFFEY, J. On December 30, 1892, an instrument purporting to be the last will of George E. Miller was filed in this court: Code Civ. Proc., sec. 1298.

On January 9, 1893, George Ross, the person named in said instrument as the sole devisee thereunder and as the sole executor thereof, was, upon his application, by this court, appointed special administrator of the estate of said George E. Miller, who is alleged to have died on the twenty-fourth day of August, 1892, at Penang, Straits Settlements, and to have been a resident of the city and county of San Francisco, state of California, at the time of his death. It is further alleged that the true name of the testator was Ernst Miehle.

The instrument filed as aforesaid bears date on the twenty-third day of August, 1892.

Application having been made to the court for the admission of the alleged will to probate, the genuineness of the testator's signature was proved on the hearing. It was further shown that the persons who appear to have signed the instrument as subscribing witnesses are the commander, purser and chief mate of the steamship "Lightning," which plies between ports of the Chinese and Indian Seas, and that none of them can be brought within the jurisdiction of this court for the purpose of examination.

The evidence so far presented is insufficient to prove the will, and the applicants for probate desire now to take the depositions of the subscribing witnesses at Penang, Straits Settlements, where they can be most conveniently examined, and to exhibit to them the original document.

The court is accordingly asked for an order authorizing the withdrawal of the alleged will from the files and directing a commission to be issued to the Consular Agent of the United States at Penang to take said depositions; the will to accompany the commission, and to be returned with the same to the court.

Questions arise, first, whether the court has the power to make the order; and, second, if so, whether it should make the order in the present case.

Under our law it is the duty of the clerk to "take charge of and safely keep or dispose of, according to law, all books, papers and records which may be filed or deposited in his office" (section 4204, Political Code, and section 111, County Government Act of March 14, 1883: Stats. 1883, p. 299). A distinction is thus drawn between "books," "papers" and "records." Section 1855, subdivision 3, Code of Civil Procedure, mentions "records" and "other documents" in the custody of public officers. To which of these classes does the instrument under consideration belong?

The mere filing of an instrument purporting to be a last will does not make it a record. Nor does it seem that proceedings resulting in the granting of special letters of administration to the person named as executor would have that effect: See the definitions of "record" in Webster's Dictionary; also, Code Civ. Proc., sec. 1904. For the court, which, in making the appointment of a special administrator, must

give preference to the person entitled to letters testamentary (Code Civ. Proc., sec. 1413), cannot, in strictness of law, use an instrument, not yet admitted to probate, as evidence. In Castro v. Richardson, 18 Cal. 480, it was held: "That the record of probate is the only proof upon which a party relying on the will can offer it in evidence."

If the last-mentioned decision correctly defines the law, then it is not only immaterial whether an instrument filed as a will, but not yet probated, may be designated as a record or not, but it is also clear that section 1950, Code of Civil Procedure, does not support the application at bar. According to that section a record, "a transcript of which is admissible in evidence," may, in certain cases, be removed from the custody of its legal keeper upon an order of the court; but if the original itself cannot be admitted as evidence, a transcript is likewise inadmissible.

All other cases of (intentional) removal are covered by sections 113 and 114 of the Penal Code, which make the removal a criminal offense: See section 7, Penal Code, as to "willful."

In Houston v. Williams, 13 Cal. 27, 73 Am. Dec. 565, much is said about the inherent right of a court to control its records and papers on file, but the reasoning does not apply to the present case nor enlarge the scope of section 1950, Code of Civil Procedure.

The court, consequently, lacks the power to authorize the withdrawal. If it were otherwise, the present necessity of such an exceptional measure might, in the second place, be seriously questioned. The execution of the instrument is alleged to have taken place about five months ago, and the remembrance of the facts on the part of the subscribing witnesses must be fresh and distinct; if they swear that they never witnessed but one last will of the testator, and that this occurred on the day preceding his death, their testimony, in connection with other facts to be elicited by the examination, will go far toward establishing the identity of the instrument; and if more than a reference, in the interrogatories, to dates and surrounding circumstances were needed, either a simple or a photographic copy of the paper, which covers only one page, would, in all likelihood, answer the purpose.

Counsel for applicant seems to attach importance to the claim that if the petition were granted and the alleged will, with the commission, forwarded by the clerk of the court, through the United States mail, to the Consular Agent of the United States at Penang, who, by reason of his appointment as commissioner and of his acceptance thereof, would be an officer of the court, the document might be deemed at all times to have remained in the custody of the court, or at least, of the United States. But the control of the court and its right to compel the performance of duties by its officers do not extend beyond the territorial limits of the state. If the commissioner, whether an officer of the United States or any other person, residing on foreign soil, should fail to use and return the paper as directed by the court, the latter, in its judicial capacity, could do nothing to enforce obedience. The aid of the federal government, and probably diplomatic intercession, would have to be invoked for that purpose. In view of these and of other risks, incidental to the proposed removal, and of possible interests which parties who may hereafter appear in the matter of said estate may have in the original instrument, the court cannot properly deprive itself and the clerk of the actual control over the document, unless by law expressly and distinctly authorized so to do. Compare, in this connection, the "limitations" referred to in Houston v. Williams, 13 Cal. 24, 28, 73 Am. Dec. 565.

These views, if sound, render it unnecessary to examine the question whether, if the court should grant the request, and the original document should not be afterward produced, either a simple or a certified copy of it could be admitted as evidence. And it would be difficult, if not impossible, to anticipate the causes of such nonproduction, and the various grounds upon which, under our statutes and decisions—as, e. g., sections 1299, 1937 and 1855, subdivisions 1 and 3, Code of Civil Procedure, and Gordon v. Searing, 8 Cal. 49—the court might be asked to admit the copy in the place of the original.

It follows that the application for removal should be denied.

GUARDIANSHIP OF JOHN H. MURPHY ET AL., MINORS.

[No. 6,435; decided June 16, 1893.]

Change of Venue—Guardianship Proceedings.—The probate court has power to order the place of trial of guardianship proceedings to be changed, notwithstanding there is no express authority therefor in the statute.

On July 15, 1887, letters of guardianship of the persons and estates of John H. Murphy, Mary A. Murphy, James F. Murphy, Albert E. Murphy and George Murphy, minor children of Patrick S. Murphy, deceased, and Margaret A. Murphy, were issued to their mother by the superior court of the city and county of San Francisco. At the time of the issuance of the letters the minors resided with their mother in said city and county.

On June 13, 1893, the guardian made an application, supported by affidavit, for a change of venue to Nevada county.

J. F. Riley, for the guardian.

COFFEY, J. This is a motion to change place of proceedings in the above-entitled matter from the superior court of the city and county of San Francisco to the superior court of Nevada county.

Section 1713 of the Code of Civil Procedure provides that, "Except as otherwise provided in this title (title XI), the provisions of part II of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." "This title" embraces proceedings in probate courts, including guardianship of minors. Section 397 of the Code of Civil Procedure provides that "The court may, on motion, change the place of trial in the following cases: . . . . 3. When the convenience of witnesses and the ends of justice would be promoted by the change." There can be no doubt that the convenience of witnesses and the ends of justice would be promoted by the change in this case, as the guardian and all the minors reside in the county of Nevada and all the property of the estate is situated in said county, as appears by the affidavit on file herein. This section—397—is a portion of part II, referred to in section 1713.

The question arises, Is it anywhere provided in title XI that the rules of transfer of proceedings in ordinary civil actions, as stated in section 397, do not or shall not apply to the removal or transfer of probate proceedings? A careful examination of all the sections of this title shows no such provision. But there is no express provision of the statute authorizing the place of trial to be changed in such cases, and this might be used as an argument against the change, and prior to the decision of People v. Almy, 46 Cal. 246, such contention was made. In that case the probate court of Marin county, after three juries had failed to agree (in the matter of the Estate of James Black, deceased), entered an order changing the place of trial to the probate court of the city and county of San Francisco. The opponents of the will claimed that the probate court of Marin county had no jurisdiction to change the place of trial and that the order was void, and moved the said probate court of Marin county to proceed with the trial. The court refused, and the opponents of the will applied to the supreme court for a writ of mandate to compel it to proceed with the trial. That court said: "The only question raised by the application for the writ is whether the court had the authority and jurisdiction to enter the order changing the place of trial. There is no express provision of the statute authorizing the place of trial to be changed in such cases." The court then proceeded to examine the sections of the practice act and probate act corresponding to the above-quoted sections, and which are practically identical with them, and some other sections of the probate and practice acts, and concluded: "We entertain no doubt whatever that in a case like this it is competent for the probate court to order the place of trial to be changed." The court has squarely decided that although there is no express provision of the statute authorizing the change of place of trial, yet the court has the undoubted power under the law to order the place of trial to be changed.

Motion granted.

GUARDIANSHIP OF FRANK B. TAYLOR, A MINOR.

[No. 1,946; decided July 22, 1886.]

Guardian—Considerations in Appointing.—In the appointment of guardians of minors the court is to be guided by the considerations specified in section 246 of the Civil Code.

Guardian—Relatives and Strangers.—When two persons, one a relative and the other not, apply for guardianship of a person, all other things being equal, the relative should be appointed.

Guardian.—After the Mother the Next of Kin of an infant under fourteen years is entitled to be appointed guardian.

Guardian.—Where a Stranger has been Appointed Guardian of a minor, the father being deceased and the mother unfit, and thereafter the mother dies having indicated a wish that a relative be appointed guardian, the appointment of the stranger may be revoked and the relative appointed if it appears for the best interests of the child.

Guardian—Grounds for Removal.—Section 253 of the Civil Code, which specifies the causes for which a guardian may be removed, must be read in connection with the other provisions of the codes on the subject of guardianship.

Guardian—Appointment of Stranger, Whether Estops Relative.—The appointment of a stranger as guardian of a minor does not estop a relative, who had no notice, to petition for a revocation of the stranger's letters and for his own appointment.

Guardian.—It is the Duty of a Guardian to Supply the place of a judicious parent. He stands in the place of a parent, and supplies that watchfulness, care and discipline which are essential to the young in the formation of their habits.

On December 8, 1882, Nathaniel Hunter, secretary of the California Society for the Prevention of Cruelty to Children, was appointed guardian of Frank B. Taylor, a minor, whose father was dead at the time and whose mother had been guilty of cruelty and neglect toward him.

Thereafter the mother died, and on February 9, 1886, John Tucker, a cousin of the minor's mother, applied for the revocation of the letters theretofore issued to Hunter, and for his own appointment as guardian. In his petition Tucker alleged that he had no knowledge of Hunter's application until long after his appointment.

J. E. Jarrett and Charles W. Bryant, for the applicant.

James I. Boland, for Nathaniel Hunter, opposed.

COFFEY, J. John Tucker bases his application for letters of guardianship upon three grounds:

1. He is a relative, and as such is entitled to the letters: Civ. Code, sec. 246, subd. 3, par. 4.

2. He is one who was clearly indicated by the wishes of the minor's deceased mother, as her choice of guardian in case of her death: Civ. Code, sec. 246, subd. 3, par. 2.

3. He is one of the next of kin of minor, and as such has a natural right to the guardianship, at common law: Reeves' Domestic Relations, 315.

The testimony shows that Tucker is competent to act as guardian, and that it is for the best interest of the ward that he be appointed. He has not surrendered his right, and it has not been taken away from him by the judgment or order of any court.

Counsel opposing Tucker's application has referred to a previous order of this court appointing Nathaniel Hunter guardian. He has not expressly urged the proposition that a stranger to a record in judicial proceedings can have his future rights taken away from him; nor has he contended that Tucker was estopped by proceedings of which he had no notice.

He has referred to section 253, Civil Code, and asserts that Hunter could not be removed except for the causes therein mentioned. It is unnecessary to cite authorities that all sections of the code must be read together, and that all must stand if possible.

By the construction contended for, if parents should be absent from the state temporarily and leave their children with friends, and such friends should procure letters of guardianship, the letters could not be revoked on the ground of the superior rights of the parents. The parents would be bound by a record to which they were not parties, and would be compelled to show the incompetency of the guardian who claimed that their rights were taken away from them "without due process of law."

Tucker's right has not been taken away from him by due or any process of law. He has not relinquished it, and now for the first time he appears in this court on equal terms with Hunter, and the previous order, as to Tucker, is as if it had not been.

The parents may or may not have been estopped by it, but there is no more estoppel as to Tucker than if the records were blank.

We have searched the books, and we cannot find a single case where counsel have urged the proposition that a person is bound by a record to which he is a stranger, when such record purports to devest him of a right, or where a text-writer or court have ever considered such a question.

The courts in New York, where the law of guardianship is similar to ours, and where a section of their code exists similar to section 253, Civil Code, have uniformly disregarded orders appointing guardians where notice is not given to relatives, if the orders are attacked by the persons not notified and who have a right to the appointment.

Their code is broader in its language than ours as to the discretion of the court in ordering notices to be given; yet it is said that it is a legal and not an arbitrary discretion.

We cannot find an instance where the position urged here was ever presented before the New York courts: Matter of Feeley, 4 Redf. 306; Underhill v. Dennis, 9 Paige, 208; Moorehouse v. Cooke, Hopk. Ch. 258; Rickards' Case, 15 Abb. Pr., N. S., 7.

Testamentary guardians are held by our supreme court to be on the same footing as probate guardians.

In Lord v. Hough, 37 Cal. 657, the mother had notice of the appointment of the testamentary guardian, yet the supreme court did not consider the question here urged, but in substance followed the reasoning of the New York courts and other courts of last resort throughout the United States.

Tucker's right accrued on the death of Mrs. Taylor, and whether Tucker had or had not notice at the time Hunter was appointed is alike immaterial.

In Lord v. Hough, 37 Cal. 657, on the application by the mother for guardianship, the same position was taken by the guardian already appointed as is here taken by Mr. Hunter, but the court decided, in substance, that the mother was entitled to the trust; being competent she could not be devested of this right, and the precedents of a semi-barbarous civilization were scouted by the court, and the position taken by counsel here was declared to be not the law.

It is urged, however, that Tucker was requested by the mother of this child in 1880, and also after the seizure of the minor by Hunter, to assume the guardianship, and that he did not do so. Counsel for Hunter has given a good reason why he did not do so. The father was living at this time.

The request of the mother while the father was living was of no legal effect under section 197, Civil Code, and conferred no rights whatever and imposed no duties upon him, as counsel correctly urged, any more than the request of the father in that respect in relation to Hunter.

The request of the mother at that time in relation to Tucker, and that of the father relative to Hunter, are absolutely void, except as circumstances showing the mother's continued and long entertained desire.

If, morally, any duty was imposed on Tucker during these years, he explained his action consistently with the highest principles of honor and right feeling.

This court had adjudged the parents unfit to care for the child.

If Tucker, as a relative of the deceased mother and also her friend and the friend of its father, had secured letters of guardianship, could he have resisted the longing and importunities of the child's mother to have the care of her offspring?

The responsibility would have been a divided one, and he would have been in a perpetual war between the kindliest feelings of his nature and the orders of this court.

Tucker was of opinion that after her husband's death the mother was conquering her disposition to drink, taught her and forced on her by Taylor, and that the child was better with her; as a gentleman he could not place himself in antagonism with either the court or his better nature. Had he accepted the guardianship and refused the care of the child to its mother, his relative and friend, it would have shown in him a hardness of heart which would have been conclusive evidence of his unfitness for this trust.

Another portion of the testimony might be here referred to: Tucker has testified that he is the owner of income bearing property sufficient for all his needs, and that he is in such a financial position that he does not seek contracts in his line of business other than those in which there is ample remunera-

tion for the exercise of his highest skill. That on his own account he cares nothing for the guardianship, and that he is making the contest solely in compliance with the request of his dying relative—his promise to her, and for the good of the child.

This motive, from the argument of counsel, is not understood by Mr. Hunter. Because Tucker is actuated by purer motives than men frequently are in such matters is no reason why his rights should be disregarded, or that he is the less in earnest concerning them.

Gain is not Mr. Tucker's motive for appearing before this court; the good of the minor is his motive.

Another circumstance appearing in the testimony might be noticed here: It was proved, and there is no contradiction, that Mr. Taylor in his lifetime induced Mrs. Taylor to drink. Mr. Taylor's own sister testified that he was addicted to drink and that it brought about the ruin of his family.

There is another broad proposition underlying the application of Tucker. He is of the blood of the ward, and Hunter is a stranger, and no court has yet decided that a stranger has a better right than the relative. Even if one parent should request the appointment of a stranger it would be disregarded when next of kin equally competent will take the trust.

When two persons, one a relative and the other not, apply for guardianship of a person, all other things being equal, the relative should be appointed: Johnsen v. Kelly, 44 Ga. 485.

Preference shall be given in all cases to the next of kin: Allen v. Peete, 25 Miss. 29.

The American rule is clearly stated to be that after the mother the next of kin of an infant under fourteen years is entitled to be appointed guardian, and that such claim cannot be disregarded unless for some satisfactory reason: Lord v. Hough, 37 Cal. 657-669.

Tucker has a natural right and a right by statute to receive this trust.

When Mr. Taylor, the father, died, the mother succeeded to the sole right of designating a guardian for the minor. Before that time it was a divided right, and it could only have been exercised by a joint request. No such joint desig-

nation was made, but the mother did designate a guardian who was of next of kin and in every respect competent.

No point can be urged about the mother's unfitness to designate a person for guardian, because she has used her statutory right wisely. There is a clear legal right given this mother to designate, just as much so as is given the surviving husband or wife to designate an administrator. Her designation should not be disregarded unless unwisely exercised, and here the evidence shows the greatest wisdom in her selection.

If her wishes and instructions to Mr. Kelly had been carried out by Mr. Kelly, a will would have been presented for probate making Mr. Tucker a testamentary guardian and executor of her estate. Could this court have refused the probate of the will and have then refused letters to Mr. Tucker? If not, then can this court refuse letters to Mr. Tucker upon her designation?

Mr. Hunter has testified that he has never collected pay for the maintenance of this ward, although the mother had ample means in this city to pay for the child. His duties are such, by reason of the position he holds, that he could not easily have done so, and no one expected him to do so.

It is the duty of a guardian to supply the place of a judicious parent. He stands in the place of a parent, and supplies that watchfulness, care and discipline which are essential to the young in the formation of their habits, and of which, being deprived altogether, they would better die than live: Schouler's Domestic Relations. Any stranger in blood who would perform these duties would be entitled to the letters against Mr. Hunter. This is not to his disparagement, but rather to his credit, for he does not intend to give up the onerous duties imposed upon him by the useful society of which he is secretary.

Mr. Tucker has no direct heirs. He is a man of means and leisure. He is a master of useful callings, and well informed. The minor would receive from him the benefit of his experience, and in the course of nature, if his ward, would be likely to receive more property from his guardian than the amount of his present estate. There is no such prospect with Mr. Hunter as guardian.

The desire of this mother that Mr. Tucker, friend of the family, and her relative, should be the guardian of her child and administrator of her estate was evidently uppermost in her mind continuously, for one of Mr. Hunter's witnesses, Mrs. Silver, the woman who lived at Mrs. Taylor's, and who unconsciously reflects Mrs. Taylor's oft-expressed wishes, is sufficient to impress the court with Mrs. Taylor's desire that Mr. Tucker should be appointed.

One of Mrs. Taylor's last acts was to solemnly petition the court to remove Mr. Hunter. To disregard this wish of the mother and deny the application of Mr. Tucker would imperil the future prospects of this minor, in the opinion of this court.

Mr. Hunter by law is not entitled to the guardianship as against Mr. Tucker. He is legally disqualified, and it is not for the best interest of the ward that he should continue in his office.

Mr. Tucker is by law entitled to the letters; he is legally qualified and it is for the best interests of the ward that he should be appointed, and the prayer of his petition is granted.

The Considerations Governing the Court in Selecting a Guardian for a Minor are considered at length in Estate of Smith, 1 Cof. Pro. Dec. 169; Estate of Hansen, 1 Cof. Pro. Dec. 182. By reference to these authorities it will be found that while the rights of relatives to the custody of a child will not lightly be disregarded, nevertheless the welfare of the child is the controlling consideration, and a stranger may be preferred even to the mother if she is unfit for the trust. The court must regard the wishes of the deceased mother, expressed in her lifetime, if not inconsistent with the welfare of the child: Guardianship of McGarrity, 1 Cof. Pro. Dec. 200.

ESTATE OF JOHN SYLVESTER, DECEASED.

[No. 1,291; decided August 16, 1893.]

Accounts of Executor—Delay in Rendering.—When an executor fails to render an account and delays closing the administration for a number of years, he cannot, when he at last files an account in obedience to a citation, urge that objections to the account come too late.

Accounts of Executor—Delay in Contesting.—An heir or legatee who contests an executor's account when it comes up for settlement is not chargeable with laches in not having exercised his right to compel the executor to file his account sooner than he did.

Accounts of Executor—Estoppel Against Executor.—Where an Executor shortly after his appointment files an account wherein he charges himself with certain money and property received as executor, and ten years after, in obedience to a citation, files a second account not charging himself with such money and property, but claiming that they belonged to a partnership composed of himself and the testator, his claim comes too late.

Executor—When Chargeable with Interest on Money Used as His Own.—Where an executor uses money of the estate as his own, he is chargeable with interest thereon; in this case, however, it appearing that the executor did not use the money with any intent to defraud the estate thereof, it is held that justice will be subserved by charging him with simple interest only.

J. D. Sullivan, for the executor.

Blake, Williams & Harrison, for the contestant.

COFFEY, J. John Sylvester died November 13, 1881, in the city and county of San Francisco, of which he was a resident, and in which he left estate, disposed of by a will admitted to probate December 12, 1881, upon a petition filed by the executor named therein, his brother, Daniel Sylvester, to whom letters testamentary were issued the same day, and under which letters the said executor entered upon his trust and took possession of the property of the estate, and has ever since remained in possession as such executor.

The property, as described in the petition for probate, consisted of $8,259 on deposit in the Bank of California, outstanding debts amounting to about $2,000, three horses and two wagons and harness of the value of $500, and $32.82 on deposit in a savings bank; in all, about $10,791.82.

The will gave all his property to his brother, Daniel Sylvester, in trust to pay to testator's son, Louis, then a minor, $100; to testator's brothers, Balsar, Conrad, William and Henry, one dollar each; after the payment of all testator's debts and bequests, the residue to be divided equally between his wife, Susannah Sylvester, and Maria Sylvester, the wife of his brother Daniel, the executor and trustee; in case of the death of his wife, the son, Louis, should succeed to her share; the executor to act without bonds. The witnesses to the will were J. D. Sullivan (subsequently, and since, and now the attorney for the executor), and W. F. Empey. Mr. Sullivan, as subscribing witness, testified upon the probate of the will; and upon the same occasion the executor named in the will, Daniel Sylvester, testified that the decedent testator left personal property valued at $11,275 within the jurisdiction of the court, and the order admitting the will to probate so found.

On December 28, 1881, it was ordered that notice to the creditors of said decedent, "pursuant to section 1490 of the Code of Civil Procedure," be published once a week for ten weeks. This order was made, entered and filed on the day of its date. It does not appear from the record that any notice was ever published; nor does it appear that any claims were ever presented to or allowed by the court, or that any order of the court was ever made for the payment of any claims, debts or bequests.

On May 29, 1882, there was filed a paper indorsed "Inventory," and signed "Daniel Sylvester, Administrator of the Estate of John Sylvester, Deceased," which, after the title of the court and the estate, was in the following words and figures:

"Inventory of property belonging to the estate of said John Sylvester, deceased, which has come into the hands of the administrator:

"Cash on deposit in the Bank of California.....	$11,521.75
Three horses, value of two estimated at $150 each	300.00
One of the value of.....	25.00
Two wagons and harness for the same, valued at $100	100.00
And one valued at.....	75.00
	$12,021.75"

It does not appear that any appraisement was ever made as required by law: Code Civ. Proc., 1444 et seq.

On June 12, 1882, a paper indorsed "Administrator's Account" was filed, and its contents were as follows:

After the title of court and estate:

"Daniel Sylvester, administrator of the estate of John Sylvester, deceased:

"1881. To cash received as follows, to wit:

		Dr.
December 1st.	To cash in bank.....	$11,245.00
	To cash collected since the above date	276.75
	To personal property on hand..	500.00
		$12,021.75

1881. By cash paid as follows, to wit:	Cr.
1. Paid to J. D. Sullivan, attorney.....	$ 150.00
2. Expenses of administration.....	25.00
3. Cash paid to Geo. Metzger.....	1,100.00
4. Cash paid J. Burns.....	6.50
5. Cash to physician, Dr.....	200.00
6. Cash to Norman Graves.....	12.50
7. Funeral expenses, James McGinn....	250.00
	$1,744.00
8. Jas. Henderson	200.00
	$ 1,944.00

"DANIEL SYLVESTER,

"Administrator of the Estate of John Sylvester, Deceased."

On June 16, 1882, an order was made, entered and filed, appointing Friday, June 30, 1882, for the settlement of the account above transcribed.

It does not appear that said account was settled on said day so appointed, but there is found among the papers a blank form, partly filled in, dated July 17, 1882, which recites that Daniel Sylvester, administrator, having on the thirtieth day of June, 1882, rendered for settlement his account, and it coming up for settlement, it is ordered that the account be and is settled and allowed and approved. This form of order lacks the signature of the judge. The written part is in the same handwriting as the account, and was evidently prepared by the same person for the judge's signature.

No further proceedings appear to have been had in said estate until the sixth day of April, 1892, when Susannah Sylvester, widow of the decedent testator, and one of the residuary legatees named in the will, and as such interested therein, prayed this court for a citation compelling said executor forthwith to file a full and final account of his administration of said estate, whereupon the court ordered citation to issue, and the same did issue upon the same day.

In apparent obedience to this citation, there was filed on April 18, 1892, a paper indorsed "Second Account of Executor," which recited that "the whole estate which has come to hands of executor, to wit:

"An interest in the partnership existing between the said deceased and the undersigned executor as per inventory this day filed herein.

"1881.	Cr.	
Dec. 15.	By cash paid J. D. Sullivan.....$	150.00
	Cash expenses of administration.....	25.00
Nov. 15.	To Odd Fellows' Cemetery Association	200.00
Dec. 12.	To Daily Report, advertising.....	10.00
Nov. 21.	To Dr. Scott, medical attendance....	80.00
Nov. 3.	To Dr. Chismore, medical attendance.	130.00
1882.		
June 12.	To J. Henderson	12.50
	To Jas. McGinn, funeral.....	275.00

To cash paid to Susannah Sylvester, the widow, and Louis Sylvester, the only son ..... 3,000.00"

On the same day, April 18, 1892, there was filed what purported to be a "Report of Administration by Executor," which recited that at the time of the death of said deceased, and for some time prior thereto, said deceased was engaged in the cattle butchering business in said city and county as a partner of this affiant; that the only property left by said deceased consisted of an interest in said business; that the only property belonging to the said partnership is described in the inventory this day filed herein; that after the death of the said deceased the executor, as surviving partner, continued for some time to conduct the said business, and, in conducting the same, paid a number of claims contracted by the said partnership before the death of said deceased, including the claim of James Duncan for the sum of $900. and the claim of George Metzger for the sum of $1,100, and also other claims against the said partnership; that the claims of the Odd Fellows' Association for the sum of $350, and the claim of G. V. Metzger for the sum of $1,100, have been presented to the executor and allowed by him, and filed herein on the twentieth day of July, 1882.

It is not stated, and it does not appear, that the claims mentioned were ever presented to the court, and it is the fact that they were not approved by the court.

On the same day, April 18, 1892, there was filed a paper entitled "Amended Inventory of Estate of said Deceased," which stated that "the whole of the estate of said deceased at the time of his death consisted of an interest as partner in a cattle butchering business conducted by said deceased and the executor as partners. The said John Sylvester invested in said business the sum of $1,100, and the executor the sum of $8,000. There was no time mentioned during which the said partnership should continue; but the profits thereof were to be divided between the partners in proportion to the amount invested by each. At the time of the death of said deceased the said partnership was the owner of the following property:

"Cash on deposit in the Bank of California.....$11,521.75
Three horses; two horses; harness."

This "Amended Inventory" was verified in usual form.

On April 30, 1892, Susannah Sylvester, the widow, and one of the heirs at law and residuary legatees as aforesaid of deceased, filed a contest and exceptions to the account filed April 18, 1892, upon the following grounds:

1. That the executor did not charge himself with the cash sum of $11,521.75, received by him, belonging to said estate, as shown by the inventory of said estate filed herein on the twenty-ninth day of May, 1882, or with any of the other property of the said estate mentioned in said inventory.

2. That the executor did not in said account—"Second Account"—charge himself with the sum of $10,077.75, the balance of cash in his hands belonging to said estate on June 12, 1882, as shown by the account filed by him on that day.

3. That the executor did not, in said "Second Account," charge himself with the proceeds of any settlement or liquidation of the partnership interest therein mentioned.

4. That the executor did not, in said account, charge himself with any interest upon any of the money received by him belonging to said estate, whereas all of such money so received by him, except such portion, if any, as may have been expended by him in the payment of proper charges against said estate, was, as believed and alleged, appropriated by him to his own use, and he is chargeable with interest thereon, at legal rate, compounded annually.

5. That the executor, in said "Second Account," improperly claimed credit for disbursements for which he produced no voucher.

6. The contestant further objected to the item of $3,000, for which credit is claimed in said account, as cash paid to contestants Susannah and Louis Sylvester, upon the ground that, so far as the same was made up of money paid to Louis, it was not a proper charge against the estate, and upon the further ground that no such sum of money, and no sum of money whatever in excess of the sum of $710, has ever been paid to said contestant.

7. Contestant finally contested the item of the claim of the Odd Fellows' Association, $350, and G. V. Metzger for

the sum of $1,100, as mentioned in the report accompanying said "Second Account," as not proper charges against the said estate.

After many days of trial upon the said "Second Account" and the exceptions, the same were submitted for the court's judgment.

Each of the respective counsel—Edward C. Harrison, Esq., for contestant, and Jeremiah D. Sullivan, Esq., for executor —presented his view in writing of what he considered the result of the evidence and proof. These views are widely variant and impossible of reconcilement. The executor claims that the estate is in debt to him, and that he, a man of acknowledged integrity and standing in the community, is the victim of a good heart, of unbounded confidence in his own kindred, giving them money when they needed it, and now, that he has refused to pay any further, they have brought this proceeding. To "pay" implies obligation and indebtedness, and if the executor owed nothing to contestant he has used an inapt term.

Executor's counsel asserts that "the staleness of this claim of contestant is an argument against it," and the counsel exclaims that "it is inconceivable how she should have allowed this matter to go for ten years without a settlement." This is a curious contention for so competent a counsel in this forum, and one who has been, from the inception of the administration of this estate, continuously the attorney of record for the executor. The record discloses that, so far from culpability attaching to contestant, the executor fell far short of his duty in not closing up the estate within a reasonable period and liquidating the affairs of the partnership alleged to have subsisted between him and the deceased. At any rate, staleness of claim of contestant is a novel plea in defense of a delinquent executor.

It might be said, rather, that his allegation that the estate is partnership assets savors of staleness, coming ten years after his petition for probate, proof upon probate, first "Inventory," and first account, in all of which the property is treated as the personal property and assets of the deceased, John Sylvester, and no suggestion of partnership interest is made. It is too late now, it seems to me, when his adminis-

tration is challenged, and when he is by compulsory process brought into court, to set up a claim of partnership as to the assets returned in his first inventory and first account. I am convinced that he was correct when he made his first inventory and account, which, if it had received the approval of the judge, would have concluded him at this time, and that his present plea is an afterthought designed to defeat contestant's claim.

It was the duty of the executor to proceed promptly to administer the estate, and he has shown no valid legal excuse for his dilatoriness, nor can he escape censure for his own laches by accusing contestant of negligence in prosecuting her right to a settlement, for manifestly she must have relied upon him to discharge his duty according to law. But, nevertheless, as there is so much that is obscure to the investigator in this class of cases, I am disposed to view as leniently as possible the conduct of the executor, and to give him the benefit of any and every doubt that may arise upon the evidence, as I do not wish to inflict a penalty, but to secure, if possible, what is justly due to the heirs and legatees.

As a conclusion, from my examination, I find that the total amount of money received by the executor belonging to the estate was $12,021.75; that he should be allowed as paid out, according to the statement in contestant's statement of account, including payment to widow of $710, as proved, $3,692.50; that he should be allowed one-half judgment in Cockburn v. Sylvester (and of this, although I allow it, I have had very serious doubts, and still retain them, but conclude in favor of the allowance), $1,956.15.

As to interest upon the balance to be computed, I think, all things considered, justice would be served in this case by the allowance of simple interest, and the account when so stated may be settled.

The Principal Case was Affirmed in 105 Cal. 189, 38 Pac. 648.

An Administrator Who Accounts for Money as the property of the estate of his intestate cannot afterward be heard to say that it was held by another in trust for certain of the heirs, and that he collected it under a power of attorney for them: Estate of Edward Ford, 2 Cof. Pro. Dec. 342.

ESTATE OF WILLIAM RENTON, DECEASED.

[No. 11,203; decided September 4, 1893.]

Probate of Will—When Becomes Final.—No probate of a will is final until the year has expired which is prescribed by statute within which a contest may be had.

Foreign Will—Whether Subject to Contest in this State.—A will which has been proved in another state where the probate has not yet become final is subject to contest when offered for probate in this state as a domestic will.

Wills—Interpretation—Conflict of Law.—The validity and interpretation of wills, wherever made, are governed by the laws of this state so far as they affect property here situated.

On June 1, 1892, a demurrer to the opposition to the probate of the will of the above-named decedent, dated December 12, 1876, was sustained, with leave to amend, and on July 7, 1892, an amended opposition was filed by the contestants. Thereafter the executor filed a demurrer to the amended opposition. It was alleged in the amended opposition that the order admitting the will to probate in the state of Washington was not final, and that under the laws of that state the will might be contested at any time within one year after its admission to probate.

Blake, Williams & Harrison, for the executors.

Crittenden, Foote & Van Wyck, for the contestants.

COFFEY, J. The proponent executor, after formally probating in the state of Washington the instrument in contest, and before the order admitting said instrument there was final, presented said instrument to this court and in this jurisdiction for probate. The contest of said instrument is now pending in both jurisdictions.

The proponent, having elected as actor to proceed with the probate of said instrument in this jurisdiction before any final order, judgment or decree admitting said instrument to probate in Washington was secured, cannot now object to a contest proceeding here.

Formal admission to probate in Washington, a contest having been filed, is not in any sense a final order, judgment or decree. It has been held by this very court in several cases that the order, judgment and decree admitting a will to probate was not final in any sense, and was not admissible even as evidence on the trial of a contest of such instrument: Estate of McGinn, post, p. 127; Clements v. McGinn (Cal.), 33 Pac. 920.

The counsel for the proponent is mistaken in his premises in assuming that there has been any probate in the state of Washington, for the very instrument has not yet finally been admitted to probate and the contest is now pending in the state of Washington.

The authorities cited by counsel for the proponent relate to a final judgment, order or decree admitting the instrument to probate, not to an order, judgment or decree that is not final.

The statutes of this state and the state of Washington not only authorize a contest of the instrument itself, but the very order, judgment or decree formally admitting to probate. If the very order, judgment or decree can be assailed and evidence offered and it can be set aside, it certainly is not in any sense a final order, judgment or decree; and if the very instrument itself can be assailed on any and every ground and can be held to be invalid, it is certainly not finally admitted to be or established to be a will.

Again, in this state this instrument would dispose of real estate, and is open to attack under the provisions of the code: Civ. Code, sec. 1376.

The proponent, having elected to come into this jurisdiction and initiate a contest here, when he knew that the instrument would be contested in Washington, and when he knew that the instrument was not finally established as a will, and the order admitting it was not final, cannot say to the contestants, "You must remain silent; you cannot object; you must allow this instrument to be admitted here although you are contesting it or intend to contest it in the state of Washington, and although you are not finally bound in the state of Washington, and although the order admitting said instrument in the state of Washington is merely in the nature of an inter-

locutory order." The proposition substantially contended for here by proponent is that parties can avail themselves of an interlocutory order in another state as a means of preventing any defense to the same action or proceeding in this state, although the interlocutory order is being assailed and may be set aside, and although the right to said interlocutory order in said foreign jurisdiction is not yet determined.

The law is well settled that only a real, true and final order, judgment or decree can be used in any other jurisdiction or for any purpose. Surely the proponent could not sue on a judgment rendered in another state, though that judgment was final in the nisi prius court after an appeal had been taken, and while the action was pending on appeal. Here in the present case the order, judgment or decree is not final even in the nisi prius court, and is pending and has not even reached an issue for trial: Estate of Blythe, 99 Cal. 472, 34 Pac. 108.

"There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered and finally determines the rights of the parties in relation to the matter in controversy": Elliott's Appellate Procedure, secs. 90, 91; Western Union Tel. Co. v. Locke, 107 Ind. 9, 7 N. E. 579; Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

There are several decisions in Myrick's Reports which seem to take this view of the matter—that is, that no probate of a will is final until the year has expired which is prescribed by the statute within which a contest may be had: Estate of Adsit, Myr. Rep. 268; Estate of Cunningham, Myr. Rep. 214. To the same effect is the decision in Martin v. Perkins, 56 Miss. 204.

The contest here is a direct proceeding to test the validity of the will offered for probate here.

While the probate of a will does establish in rem a status, yet that status is subject to be avoided by a direct proceeding provided by the affirmative law of this state: Kearney v. Kearney, 72 Cal. 594, 15 Pac. 769; Code Civ. Proc., sec. 1327.

In this connection it will be seen from the language of sections 1323 and 1324, Code of Civil Procedure, that upon the probate of a foreign will by the production of a copy thereof

and a probate thereof, the proceeding is placed upon the same basis "as a will first admitted to probate in this State"—that is, that it can be contested in the same way, and is no more conclusive than a domestic will. But in any event, even if there were here a probate such as is claimed, it could only affect at the most the distribution of personal property in this jurisdiction according to the law of the place where the testator was domiciled, and this would only come up upon an application for distribution.

Our Civil Code expressly reserves to the courts of this state the right to determine the validity and interpretation of wills, wherever made, when relating to property within this state, by the law of this state: Civ. Code, sec. 1376.

The conclusion, therefore, is that there has been no conclusive probate at all, even in Washington, of this will; and, if there had been a probate of such will, it cannot affect the right of the probate court here, as respects property in this state, to determine the "validity" of the will according to the law of this state, leaving the question of distribution to be determined as to personalty by the law of the domicile of the testator, and of the realty by the law of this state.

The contention of the proponent would be to place the probate of a will in another state upon a higher plane than a domestic will. When we come to consider that this request for foreign probates is founded on the principle of comity only, and when we read our statutes, it is plain that the contention made is entirely unfounded. In this connection it is instructive to read the following extracts from a decision of the supreme court of Rhode Island:

"The effect of a decree proving a will, like that of a decree granting administration, is confined de jure to the territory and things within the territory of the state setting up the court. . . . .

"The legislation of nearly all the states, and certainly of our own, proceeds upon the supposition that such is the limited operation of the probate of a will had in a foreign country or in another state, and provides some mode in general analogous to that pursued in England with regard to a will which has received a Scotch probate, by which conclusive operation may be given to such a will within the state, full

notice being given to all persons interested in order that they may appear and contest the same": Olney v. Angell, 5 R. I. 203, 204, 73 Am. Dec. 62, and cases cited.

Our statutes proceed upon this theory, and, even if a will has been probated in another state, it is just as subject to a contest here when offered for probate as a domestic will. There is no reason whatever why our statutes should be twisted so as to announce a different rule from that which is prevalent in England as regards a Scottish probate in view of the plain provisions of section 1376, Civil Code.

What the rule of distribution may be is one thing; the determination of the "validity" and "interpretation" of a will affecting property in this state is another and a different thing.

Sections 872, 873 and 874 of Hill's Statutes, second volume, of the state of Washington, read:

"872. If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the Superior Court having jurisdiction, contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issues shall be made up, tried and determined in said Court respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will.

"873. Upon the filing of the petition referred to in the next preceding section, a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the State, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the Court on a day therein specified, to show cause why the petition should not be granted.

"874. If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, saving to infants, married women, persons absent from the

United States, or of unsound mind, a period of one year after their respective disabilities are removed."

The laws of this state furnish the rule in regard to inheritance and distribution, and the laws of foreign countries will be disregarded, unless part of a contract: Civ. Code, sec. 1376; Estate of Baubichon, 49 Cal. 18; Estate of Baubichon, Myr. Rep. 55.

For the reasons above set forth the demurrer interposed by proponent executor to the contest herein filed is overruled, with leave to plead thereto within ten days.

On the Contest of Foreign Wills, see Estate of Kershow, 2 Cof. Pro. Dec. 213, and note.

ESTATE OF PATRICK MALLON, DECEASED.

[No. 9,378; decided June 2, 1893.]

Claims Against Estate—Whether Draw Interest.—All interest-bearing obligations continue to bear interest after the obligor's death; even those that were not originally interest bearing become so after presentation and allowance.

Claims Against Estate—Computation of Interest.—To ascertain the amount of a claim against a decedent's estate at any particular time, there should be added to its face the accrued interest to that date, limiting the rate to seven per cent when the estate is insolvent.

Claims Against Estate.—The Preference Given to Judgments rendered against a decedent in his lifetime includes the interest due thereon at the time of payment.

On January 11, 1890, Mathew McGowan and Thomas Butler, partners under the firm name of McGowan & Butler, obtained judgment in the superior court against Patrick Mallon for $760.56 principal, $30.50 costs, and interest. The judgment debtor died on January 26, 1890, leaving a will, and on February 26, 1890, letters testamentary were issued to Ellen Mallon, his widow.

On November 11, 1890, the judgment creditors filed their claim on the judgment, which claim had theretofore been duly presented, allowed and approved.

On May 29, 1893, the judgment creditors filed a petition for an order requiring the executrix to pay their claim with interest, alleging that the claim was unpaid, and that she had sufficient money of the estate in her hands to pay the same, and that it is a preferred claim. After a hearing the claim was established as a preferred claim, and the executrix was ordered to pay the same, with interest from January 11, 1890.

Roger Johnson, for the petitioners.

M. C. Hassett, for the executrix.

COFFEY, J. When judgment is given against defendant in his lifetime, and after his death is duly presented, allowed and approved as a claim against his estate, and said estate appears to be insolvent, does the preference given by Code of Civil Procedure, section 1643, extend to the interest on said judgment at time of payment?

The question of preference among claims only becomes material when the estate is insolvent, and section 1643, Code of Civil Procedure, places in the fourth class "judgments rendered against decedent in his life, and mortgages, in the order of their date." The executrix has already paid a mortgage with interest, which is in the same class with this judgment, and we think no one could distinguish between an obligation to pay interest, arising from the contract of parties, as in case of a mortgage, and an obligation to pay it arising by operation of law, as in case of a judgment.

The correct view seems to be that while all interest-bearing obligations continue to bear interest after the obligor's death, even those that were not originally interest bearing become so after presentation and allowance: Estate of Olvera, 70 Cal. 184, 11 Pac. 624; Quivey v. Hall, 19 Cal. 98; Estate of Glenn, 74 Cal. 567, 16 Pac. 396.

So that, in order to ascertain the amount of a claim at any particular date, we add to its face the accrued interest to the desired date, limiting that interest to seven per cent when the estate is insolvent: Code Civ. Proc., sec. 1494.

In consequence of this the "debt" which is preferred by section 1643 is the judgment or mortgage plus interest to the

date of payment. And this "debt" must be paid in full, if it is preferred, before any "debt" of a lower class is paid either partially or at all: Code Civ. Proc., sec. 1645.

The word "debt" used in those two sections has a settled meaning, and always includes interest on interest-bearing obligations: Brown v. Lamb, 6 Met. 203; Gray v. Bennett, 3 Met. 522, 526.

In Quivey v. Hall, 19 Cal. 98, it was held, where a judgment rendered against decedent in his lifetime was presented as a claim against his estate and rejected and suit brought on it, the judgment against the administrator was properly given for the amount of the judgment and interest to date of rendition of judgment as administrator.

So that if this claim had been rejected, and claimant had sued the executrix, he would have recovered what he claims now, with the right to priority over the general debts of the estate.

It will be conceded that claimant would be entitled to this accrued interest if the estate was solvent, and it seems that the burden devolves on the executrix to show a different rule, if there be one, regarding an alleged insolvent estate—the only distinction appearing from the statute to be that debts of all classes shall bear but seven per cent interest if the estate is insolvent: Code Civ. Proc., sec. 1494.

ESTATE OF JAMES MCGINN, DECEASED.

[No. 7,054; decided December 1, 1893.]

Revocation of Probate—Appeal and Undertaking Thereon.—A decree revoking the probate of a will and awarding costs to the contestants is not "a judgment or order directing the payment of money," and on appeal therefrom no undertaking in double the amount of the costs is required to stay execution of the judgment.

Undertaking on Appeal.—An Undertaking in Double the Amount of Costs, taxed in a case where no undertaking is required to stay execution, is without validity either as a statutory or common-law bond, and cannot be enforced against the sureties.

James L. Crittenden, for the motion, on behalf of the successful contestants.

Reddy, Campbell & Metson, opposed.

COFFEY, J. The appeal was from the judgment and decree revoking probate of will and from an order denying defendant's motion for a new trial.

An undertaking on appeal in the sum of $300 was given in this case. An additional undertaking was also given in double the amount of the costs taxed in the case.

The appeal is not from a judgment or order directing the payment of money. The character of the appeal is already given. The fact that costs were allowed does not characterize the judgment. The court might have, in the same judgment, ordered costs to be paid out of the estate. Costs are an incident to nearly every judgment; but the fact that costs are allowed does not bring the appeal within section 942 of the Code of Civil Procedure.

The appeal is not a case provided for in sections 942, 943, 944 or 945.

"In cases not provided for in sections 942, 943, 944 and 945, the perfecting of an appeal by giving the undertaking mentioned in section 941 stays proceedings in the court below upon the judgment or order appealed from": In re Schedel, 69 Cal. 242, 243, 10 Pac. 334.

" 'Sections 942 to 945, inclusive, apply to appellants who are required to perform the directions of the judgment or order appealed from. This is manifest from their language. But the appellant in the present case is not required to do anything. It feels aggrieved by the decree, however, and has the right to appeal. The case is one not provided for in sections 942, 943, 944 and 945, and, consequently, by the terms of section 949, the perfecting of the appeal, by giving the undertaking mentioned in section 941, stays proceedings in the court below upon the judgment appealed from.' . . . . The general rule, as declared in section 949, is that the $300 undertaking mentioned in section 941 'stays proceedings in the court below upon the judgment or order appealed from.' The exceptions are contained in sections 942-945, inclusive;

and those sections apply to cases where the appellant has money or other property in his possession which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of respondent, and where it would be unjust to allow the appellant to retain the possession of the property, and perhaps dissipate it or put it out of his power to perform the act required, without securing respondent by a bond": Pennie v. Superior Court, 89 Cal. 33, 34, 26 Pac. 617; Ex parte Clancy, 90 Cal. 553, 27 Pac. 411.

"Upon an appeal from an order appointing an administrator, an undertaking on appeal in the sum of $300, as provided for in section 941 of the Code of Civil Procedure, stays all proceedings upon the order appealed from, and prevents the doing of any act by the appointee as administrator of the estate during the pendency of the appeal": In re Woods, 94 Cal. 566, 29 Pac. 1108.

"The statutory undertaking of $300 given on an appeal from a judgment for the foreclosure of a chattel mortgage operates as a stay of execution, and, if a further undertaking be given to stay execution, it cannot be enforced against the sureties therein for want of consideration": Powers v. Crane, 67 Cal. 65, 7 Pac. 135.

"It is settled that a statutory undertaking beyond what is required by the statute is to that extent without consideration and inoperative": Lambert v. Haskell, 80 Cal. 620, 22 Pac. 327, citing Powers v. Crane, supra.

"No bond being required to stay execution in addition to the usual bond for costs on appeal from a judgment foreclosing a chattel mortgage, a bond given upon such appeal, to secure a judgment for deficiency, is not a statutory bond, and is without consideration and void": Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070.

"A motion for a judgment against the sureties on a bond given to stay execution pending an appeal is authorized only on statutory undertakings, and when the bond has no validity as a statutory bond the motion should be denied, even if the bond could be shown to be supported by a consideration, and to be good as a common-law bond": Id.

"The fact that the respondent was induced to forbear having a sale of the mortgaged property as perishable, by reason of a stay bond for deficiency given upon appeal from a judgment foreclosing a chattel mortgage, does not constitute any consideration for the bond. The bond, not having been given in pursuance of any agreement between the parties, but simply to secure a statutory privilege which was not gained by it, was wholly without consideration, and could not be valid as a common-law undertaking": Id.

Motion denied.

The Principal Case was Affirmed in Clements v. McGinn (Cal.), 33 Pac. 920.

ESTATE OF CHARLES A. JAMES, DECEASED.

[No. 151,588; decided June 12, 1897.]

Evidence—Weight and Credibility.—The court is not bound to decide in conformity with the declarations of any number of witnesses against a less number or a presumption of other evidence satisfying the judicial mind.

Marriage—Sufficient Marriage Contract.—The following contract signed by the parties, but not witnessed, is not legal in form: "San Francisco, Cal., January 6th, 1895. We, the undersigned, Charles A. James, aged 60, and Laura Milen, aged 19, do hereby mutually bind ourselves unto each other as husband and wife. This agreement or contract to be authority for same before God and man."

Marriage—Assumption of Marital Rights and Duties.—In this case where a woman claimed to be the widow of the decedent by virtue of a contract entered into with him followed by an assumption of the marriage relation, the court holds, after an extended review of the evidence, that there was no mutual assumption of rights, duties or obligations marital, and that they never lived together as husband and wife.

Parent and Child—Evidence of Paternity.—In this case, where it is contended that a woman is the widow of the decedent by virtue of a contract marriage followed by an assumption of conjugal relations, and that a child was born of the union, the court holds that there was not an assumption of the relation of husband and wife, and that the child is not the offspring of the decedent.

Forged Marriage Contract—Expert and Other Evidence.—An alleged contract of marriage produced in this case is, in the light of expert and other evidence, held a forgery.

George D. Shadburne, for the absent heirs.

W. H. H. Hart, George W. Fox and Aylett R. Cotton, for Laura Milen James and Theodore Milen James.

COFFEY, J. On the 29th of January, 1895, there was filed in this court by A. C. Freese, public administrator, a petition alleging that one Charles A. James died in this city and county on the twenty-eighth day of January, 1895, being a resident herein and hereof, and leaving estate consisting of real and personal property of value unknown to the petitioner; that said James died intestate and left, so far as known to petitioner, as heir at law a nonresident niece; and that to collect and preserve the estate a special administrator was needed.

Upon the petition thus presented the special letters were granted and issued to the public administrator, and he thereupon immediately entered upon the premises and took possession of the property, real and personal, no one appearing to oppose or obstruct him in the exercise of the duties of his office or claiming paramount right or authority by virtue of relation to decedent or in any other manner.

Thereafter, and on the 31st of January, 1895, the said public administrator filed a petition for letters of administration, reciting the day and date of death of the said decedent, the place of death and of residence, as stated in the petition for letters of special administration; and that the said decedent left real and personal estate exceeding $10,000 in value, not exactly how much in excess was known to petitioner.

Thereafter, and on the 8th of February, 1895, a petition was filed in this court signed "Mattie E. James by M. C. Hassett and George Hudson, attorneys for petitioner," reciting the facts of death and residence as in the preceding petitions and laying the value of the estate at about forty-five thousand dollars, and alleging that the next of kin and heir at law of the decedent "is Mattie E. James, of legal age, residing in said city and county, a niece of said" decedent; that diligent search and inquiry for a will developed no such document; that deceased died intestate; and that as niece, next of kin, and heir at law said Mattie E. James was entitled to

letters of administration. On February 21, 1895, this petition was withdrawn and letters issued to the public administrator.

On January 29, 1895, as appears by the record, when the special letters were granted to the public administrator there was present in court and sworn and examined but one witness, Mr. R. F. Mogan, who also acted as attorney on that occasion for the applicant.

On February 21, 1895, as appears by the same record, when the petition of Mattie E. James was withdrawn in open court and the petition of the public administrator for general letters was granted, there were present and sworn and examined as witnesses upon the hearing the said Mr. R. F. Mogan, Mrs. Laura Milen James, and Mr. George D. Shadburne. Mr. Shadburne had been appointed attorney to represent absent heirs, minors, and others generally under the statute in such case made and provided, by an order of the court dated January 31, 1895; the heirs or persons for whom he was to appear were in that order described as "at present unknown"; he served his notice of appearance the same day. On February 26, 1895, one Annie B. Moss, formerly Annie B. James, a widow, entered an appearance by Isaac Joseph, attorney, of Sacramento, California.

On April 15, 1895, the official appraisement of the property was filed, by and from which it appeared that the total value of the property was $46,617.86.

The real property, 925 Howard street, valued at	$15,000.00
Cash on term deposit in savings union.....	28,750.88
Other cash, in hands of administrator.....	2,128.18
Furniture and other mixed personal property..	738.80
	$46,617.86

On April 22, 1896, a petition for distribution was filed by George D. Shadburne, as attorney for P. M. James, Charles T. James, Nathan W. James, Francis T. Broughton, Lucy A. Nichols, William J. Clark, Lydia E. Hoxie, George W. Clark, Hannah A. Wadsworth, Amy A. Reisch, William Henry Barber, Mattie E. James, Daniel M. James, Elizabeth E. Barber, Lydia L. Hopkins and Willard B. James, claiming to be next of kin and heirs collateral of the deceased Charles A. James,

who died intestate, and as such heirs entitled to the whole of said estate in the proportions set forth in the said petition, being brothers and sisters and nephews and nieces.

On May 5, 1896, a petition signed "Laura Milen James, petitioner, W. H. H. Hart, George W. Fox, attorneys for petitioner, Aylett R. Cotton, of counsel for petitioner," was filed, in which petition, after the necessary formal allegations in reference to the condition of the estate and its readiness for settlement and distribution, petitioner averred that she was the wife of the decedent intestate at and before the time of his death, and thereafter and thereby became his widow; that she was over the age of eighteen years; that Milen James, an infant under the age of one year, is the only child of deceased, and that she and the said Milen James are the only heirs at law of said decedent, and that they are entitled to distribution in equal shares. To each of these petitioners' claims, answers and denials were presented in due season and proper form by the respective parties and issue was joined.

The petitioner Laura claims that she intermarried with the decedent, Charles A. James, on the sixth day of January, 1895, by a contract in writing signed by both parties; the body of it is written by her at his dictation, and the whole of it being in words and figures as follows:

> "SAN FRANCISCO, Cal., January 6th, 1895.
>
> "We the undersigned, Charles A. James aged 60 and Laura Milen aged 19 do hereby mutually bind ourselves unto each other as husband and wife. This agreement or contract to be authority for same before God and man.
>
> "CHAS. A. JAMES.
> "LAURA MILEN."

According to the testimony of the petitioner this contract was consummated on the evening of the day of its date and the conjugal relations were continued and repeated every night until the decedent expired on the 28th of January, 1895.

Assuming for the nonce the formal and verbal efficiency of this exhibit, such a document was at that time valid under the statutes of this state, but happily for the concord of the community, the sanctity of the domestic relation, and the security

of the right of property from covert assault, the statute was modified by abolishing this mischievous clause of the code in the session of the legislature embracing the inception of this alleged agreement: Stats. 1895, p. 121, act approved March 26, 1895.

The document in dispute, however, is not within the purview of this amendment, having antedated the approval of the amendatory act: Civ. Code, secs. 55, 57, 68.

If the allegations of the petitioner Laura be established as facts, and if the contentions of her counsel be correct as law, she is entitled to one-half of this estate and the minor is entitled to the remainder.

It is contended by counsel for claimant Laura that as no particular form is prescribed by section 55 of the Civil Code, and as no written form is necessary when the intent of the parties to become husband and wife is apparent from their subsequent acts, therefore the language of the alleged contract should be construed in the light of the evidence produced on the trial in this case.

Accepting this contention as the true theory, what is the evidence to support the allegations and claim of petitioner Laura?

It is argued by counsel for her that the consent to marriage and the fact of marriage are proved by the testimony of Laura, who had actual knowledge thereof, by Dr. Milen and by Mrs. Milen, who saw the written consent and heard the admission of Dr. James, also by Dr. Terry and son, to whom Dr. James admitted the marriage, and by George Williams and John Bigley and by Mrs. Lulu Dickman, sister of claimant.

The petitioner Laura at the time of the taking of her testimony upon the hearing of this application, December 10, 1896, testified that she was twenty years of age, having been born on the 2d of April, 1876, in Cleveland, Ohio; her father was Theodore Milen, her mother died about 1890; the present Mrs. Milen was her stepmother; about six years ago the family, consisting of her father, her stepmother, her sister and herself came to California and went to reside at 321 Ellis street; Laura went to school at Blake's Seminary in Oakland; she has been a little deaf in her left ear since infancy; she

went for a short space to a convent in this city near to her home on Ellis street; she first met the deceased, Dr. Charles A. James, on December 13, 1894; the meeting took place at 925 Howard street; her stepmother and herself had taken rooms there on the day preceding; met Dr. James in the hall, Mrs. Milen being present; the latter said to Dr. James: "Doctor, this is Miss Milen"; she had catarrh and took treatment therefor from the doctor every day from the 14th until the close of December, 1894; the doctor knew of her deafness and said it was caused from the catarrh; Dr. James had no regular office hours; she practiced on the pianoforte on an average about three or four hours a day, and when she was playing Dr. James would come into the front parlor, which they had the privilege of using on account of the smallness of their own apartment; the first time he came into the parlor while she was playing he complimented her on her execution, saying that she played beautifully, and engaged in conversation with her, inquiring how long she had been in California and making other inquiries evincing interest in her personal history; the front and rear parlors were divided by folding doors; the rear room was used by Dr. James as an office—the doors intervening were sliding with ground glass upper panels; back of the rear parlor was a chamber separated by solid frame doors; she took her treatment for catarrh in the rear parlor; it was always the same treatment—spray; on the 14th of December, 1894, in the evening, a lunch was provided for the ladies by the doctor, consisting of cream cheese, crackers, pickles and sour wine; they sat together until quite late in that room; he had a fire there and he often came in and said, "You have no fire in your room, come into my office"; she and the deceased had conversations in his office and in the front parlor between the 14th and Christmas, 1894, every day; he even went into her room; he said to her in exact phrase, "You are a fine pianist"; he preferred to hear selections from Faust; he said that was the sweetest he ever heard; other pieces were played; "Longing" was one—quite a dreamy piece, soft and sweet in the major key; he did not like classical music; Faust was his favorite; one piece, "Love's Sorrow," was his especial favorite; it comprised about four pages of music, two verses, sad and sweet; she sang it three or four

times, a very sweet little song—he liked it so much; they were alone, she and Dr. James; he said that she sang that beautifully and he picked up the music and kissed it; on December 24, 1894, she went into his back parlor at about half-past 9 o'clock in the evening; he had a fire, she sat beside it; he said, "Little one, I did not think I was capable of loving as I love you; will you marry me?" "I said that I had never thought of marriage; he kissed me." She said she had never thought of marriage; he had kissed her on the forehead and he said when she gave this evasive response to his proposal that "if his devotion—if his life's devotion would make her happy he would do so"; he knew that he was an old man but he had a young heart; she made no reply to this except that she would consider it and talk with Mrs. Milen; she saw him again the next day, Christmas, at about 10 o'clock in his office, where she went to take treatment, but she did not take treatment; he took out of a drawer a beautiful gauze fan and said, "There's your Christmas present"; she said, "Thank you, Doctor"; some one then came in and she left the room; at about half past 12 o'clock on the same day, at about the hour of noon, Dr. James came into the room of the Milens and asked if they had any engagement for dinner; they said that they had not, whereupon he invited them to join him, and Mrs. Milen responded, "Certainly, with pleasure"; the three—the two ladies and the doctor—dined in his room at 3 o'clock; afterward she played and sang in the parlor; they sometimes went to the theater escorted by him; he asked her continually to answer his question about marriage; she said that she would write to papa—Dr. Milen—about it; her father was then in the mountains; finally Laura answered her persistent wooer on Sunday, January 6, 1895, in his office in the afternoon, about 2 o'clock; she was at the piano and he opened the folding parlor doors and asked her to come into the office as he wished to speak to her, and she went in; he asked her if now that they—she and Mrs. Milen—had heard from papa if she would not answer his question; she said that having thought of it she would marry him. Dr. James then said to her, "Will you marry me at once?" and she asked him how that could be; he said, "By contract"; she inquired of him as to the nature of a contract marriage, and he explained that

it was according to law, it was the legal way, and he was opposed to ministers as they were all frauds and he did not wish to be married by one of them; he said that the contract was legal in this state of California, and she asked him how it was done, and he said by writing some words and signing the names to it and the contract bound the two together; she said to him, "Well, if you say so I will"; then he said, "Well, we will write it at once, and I want you to write it"; she asked him, "Why?" and he answered, "Because I want it in your handwriting so I can carry it myself"; she went over to the desk then and sat down and he produced the pen and paper and ink; he dipped the pen in the ink himself and he handed it to her and she wrote at his dictation the memorable memorandum of matrimony; at the time of testifying she could not remember what he said; she testified on December 10, 1896, but she wrote the contract on January 6, 1895; he signed his name and she signed her name; he had the paper in his desk; when the writing was completed and signed, he said that she was now his wife; he then took the paper and tore it off the tablet and put it in his pocket and said that he was going to carry that next to his heart; he placed it in his pocket on the left-hand side; she did not know whether it was in his vest or coat pocket, but thought it must have been in his vest pocket; when he proposed to her he drew her to his lap and kissed her; she weighed then one hundred and ten pounds—he was taller and heavier; at that time her stepmother, Mrs. Milen, was at the matinee; after the proposal they went to dinner; Dr. James and she went to dinner at the Creamerie on Market street, opposite Grant avenue; they returned in about an hour; Mrs. Milen came in about one hour afterward and the three had a conversation in his back parlor between 6 and 7 o'clock; this was after the acceptance of the proposal; she told the doctor that she had informed Mrs. Milen of the fact that they were married by contract and her stepmother expressed herself satisfied if she was; afterward on that night, at about 10 o'clock, she retired first to the chamber in the rear of the back parlor and went to bed; into the same came the doctor and slept with her that night, January 6, 1895, and every night until that preceding the day of his death; on the morning of that day, January 28,

1895, at about 4 o'clock she was awakened by him; he complained of a pain in the shoulder; he said he had a like attack a year previous and he did not think this one serious; he took some of his own medicine and would not let her go for a physician; she arose and heated some water in a teakettle at the fire in the grate in the back parlor and got some hot cloths; on the evening of that day she and Mrs. Milen went to dinner at the Creamerie at about half-past 8 o'clock and returned in about an hour, or at half-past 9 o'clock; before they went out she asked him if they should bring him anything and he said, "No," that he could not eat; when they returned she asked him how he felt and he replied that he felt much better; she asked him if he wanted anything to eat and he said "No"; he died at about 11 o'clock that evening while sitting in his chair in the back parlor; he just gave a gasp and died; could not find a doctor; a doctor came in afterward and the undertaker was sent for; she did not embrace the dead body; the body was laid out in the front parlor after embalmment; he was buried about the third day after death, Wednesday or Thursday; she attended the funeral with Mrs. Milen and wore a mourning dress, rode in the carriage next to the hearse, threw a flower into the grave; after the burial returned to the house and remained in their room—Mrs. Milen's room—stayed in the house all day; her father was in San Jose, he came back next day, remained over night and then returned to San Jose; she slept with them that night; Dr. James presented her with several articles of apparel from the 6th of January, 1895—a pair of shoes, dresses, chemises, and some skirts from a trunk; this was after marriage; he gave her a ring, band ring, gold, heavy—too large and heavy, for her; this was just after the contract was signed; she wore it a few days and then told him it was too large and heavy; he said he would take it and have it fixed; he then handed her a small ring, about a week after; he gave her another ring with a blue stone; she never wore the ring because she did not like it; after the marriage by contract on the 6th of January, 1895, had intercourse with him on the first night and three subsequent nights, so far as she could remember, and slept with him every night until the night preceding his death; she first had menses when she was twelve or thirteen years old; menses became ir-

regular in or about January, 1895, and at that time Dr. Terry came in first to see her and Dr. James told him that she seemed uneasy because she had not had her menses; Dr. Terry felt her pulse and said it was nothing but a cold; Dr. James said in so many words, "My wife seems uneasy because she has not had her menses"; she was introduced to Dr. Terry and others by Dr. James as his wife; when he was about to be buried the undertaker wanted to bury him in his clothes, but she insisted on a shroud; she attended his funeral and was accompanied by her sister and their stepmother, Mrs. Milen; she wore mourning and continued so to dress for over a year; the baby was born on the 16th of September, 1895, she was unconscious at the time of the birth; she noticed the baby; it seemed to be sleeping all the time; the finger-nails did not seem to be fully developed; after she got up, in about three weeks, the child seemed to be more wakeful; Dr. James was the father of that child; during the period of their marriage he had no office hours; he remained at 925 Howard street; he passed his time with her; he passed his evenings with her always; when the rooms were locked up immediately after the death of Dr. James the keys were given to Maria Mangan; she did not know when the piano was taken away—it was a rented piano, an upright, upon which she used to practice three or four hours a day; she told Mrs. Milen she was married by contract; they went to dinner at the Creamerie "because they wanted to"; she knew he had a cook in the house, Maria Mangan; he had no regular hour for dining; she did not remember when they retired on the evening of the 7th of January, 1895; he arose earlier than she did on that morning and brought her breakfast to her bedside; Maria Mangan made up the rooms; she cooked the breakfast in the kitchen—Maria did the cooking, same on the 8th; after she arose she went into the offices; she never told Maria that she was married nor did she know that the doctor communicated that fact to his cook, housekeeper, and maid of all work, Maria Mangan; "Maria did all the work"; the bride remained at home all day each day; she did not stir abroad during these days; when her husband was taken ill he was in bed with her; she arose and built a fire in the back parlor and prepared and applied hot cloths to his shoulder where he complained of pain and she waited upon

him all day; she did not go to the theater that day nor did any member of her family; she went to dinner at the Creamerie that day because she wanted to go out to dinner that day; she first learned that she was pregnant when she missed her menses; her father was informed by telegram by Mrs. Milen; she afterward entered the rooms of Dr. James; she took possession of the rooms in March by advice of Mrs. Milen and General Hart.

This is in brief the story of Laura as to the courtship and marriage, the consent and the contract, the consummation and the cohabitation—all covering from the inception to the temporal termination, little more than a month; the first meeting on the 13th or 14th of December, 1894; the catarrhal treatment daily thereafter, and the tentative tenderness and increasing interest in her exhibited by him until his proposal in his office by the fireside on the eve of Christmas, 1894; her discreet evasion of an immediate response to his ardent avowal of affection and continuance of the case until she had opportunity of consultation with her absent father and her present stepmother; the result of advice and deliberation; the culmination of the courtship in the contract on January 6, 1895; the marital assumption immediate and continuous thenceforward; the end—January 28, 1895. If this outline express or indicate the facts in proof, marriage is established as alleged.

It is claimed that the contractual relation has been proved, and that under it the decedent and his surviving spouse (1) lived together in the same house, (2) ate together at the same table, (3) slept together in the same bed, and (4) introduced and recognized each other as husband and wife. Proof of these facts is prima facie evidence of the assumption of the marital rights, duties and obligations, and is the grand total of marital relations expressed in the term "cohabitation" from which marriage may be presumed.

How have these facts been proved? It is said (1) by the positive testimony of witnesses as to seeing the contract on January 6, 1895, and (2) by the testimony of the admissions made by deceased to certain persons at different times.

We have outlined the testimony of the surviving principal to this agreement, and she is supported primarily by her stepmother, Mrs. Milen, whose name in full as given by her under

oath is Jessie Luella Orrell Milen; she first saw the deceased, Dr. James, on December 12, 1894; the next morning she introdueed her stepdaughter Laura to him—that was on December 13, 1894; the terms of the introduction were, "Dr. James, this is Miss Milen"; the stepmother first ascertained the business of Dr. James the night they went there; she heard Dr. James talking to her husband; the deceased said that he was a specialist in catarrh and eough trouble; after the introduction Dr. James beeame very attentive to Laura; he was always following them around; he gave them no peace—in faet, he beeame to the stepmother almost intolerable as a nuisance, so persistent was he in his eupidous chase; he would eome to the door of their room and make some excuse for calling—ask them to play some musie; ask if they did not want to go to dinner or to the theater, or to visit and keep him company as he was lonely:

"Right thro' his manful breast darted the pang
That makes a man, in the sweet face of her
Whom he loves most, lonely and miserable."

Dr. James was especially fond of musie, seemed to dote on the renditions of Laura; his favorite was "Love's Sorrow"—he liked a dreamy pieee, soft, sad and sweet; he made her sing the same love song several successive times, he liked it so much, and she sang and played on, and still he seemed not surfeited with this food of love, and for him it seemed as he listened to the melody and contemplated the "happy melodist, unwearied, forever singing songs forever new," that

"Love took up the harp, and smote on all
the chords with might;
Smote the chord of self, that, trembling, passed
in music out of sight"

into the heart of this ancient and ardent lover, whose rheumy eyes were moist with emotion as he picked up the sheets of musie and passionately kissed them, complimenting Laura on her beautiful vocal and instrumental exeeution, and, verily, she did exeeution upon her admirer when she ehanted for him again and again his favorite selection that seemed to give "a very eeho to the seat where love is throned" and dallied with the innoeence thereof in his old age.

Mrs. Milen had several conversations with Dr. James with reference to Laura, one on December 26, 1894, in the front parlor, Laura being present; he said, "I want to marry Laura." Mrs. Milen told him she would not consent because Laura was such a frail girl physically that the stepmother did not think she ought to marry; Dr. James then asked Mrs. Milen if she would write to her husband, Dr. Milen, and intercede for him; she would and she did, and she received a response in these terms ("Mrs. James' Exhibit 7A"):

"GOLDEN EAGLE HOTEL.

"Spelman & Son Proprietors.

"REDDING, Cal., 12. 30. 1894.

"DEAR WIFE: Your surprise letter of Saturday noon is just here. Pet I wish I knew what to do for your leg but I do not. The trouble is with the ovary certainly, just keep on trying is all I can advise. Well I don't know what to think of Dr. and LAURA. I can easily understand the Doctor, for any one could love her and could not help being kind to her. and there is no question about her doing her part as a faithful wife, but Pet what does she get in return, money is all very nice but money without love and respect on her part. I am afraid will not bring happiness and again JESSIE, you know a wife expects certain duties from a Husband and if he is unable to perform those duties (or only in a way) the wife is soon dispondent. LAURA is not amorus and never will be yet she will have her passions and if not satisfied she will soon disslike her husband, you two must talk over this matter plainly, use plain language, reason every way. LAURA is of age and can do just what she pleases, but be sure she understands well, JESSIE, what married life means. One great advantage to a young Girl in marrying an Old Gentleman such as he is. She would be treated kindly she would be cared for. Well, you two must do as you think best. I dont know what to think is best.

"Pet, if your leg is no better and you have told the Doctor the Ovarian Cause of it and he cant relieve it send for Doctor PRESTON or GIBERSON dont wait any longer. I am free to acknowledge that I am not sure what will stop it, and I will be glad to find some one that does know what to do for it.

"Well, I got an other beautiful nose didy last evening in a handsome didy box nicely inscribed in some foreign Language so it must be imported (the box) I think from EGYPT for it speaks of Corn on the box, and then it says Plasters, I suppose that is some City in EGYPT. Well I have so many silk handcherchiefs now that I have to count them two or three times per day to see that they are all here. I will soon have to carry an extry man to look after my baggage for its has increased wonderfully, when I come here I only had one pair of socks, now I counted them and there is three pair and four silk handerchiefs besides my big black one, but since I have a box to put them in they will be easier to look after.

"You ask why we did not stop at the Temple? on account of those exposed stairs persons would hesitate about coming to see us when all the loafers could see just who did come, here the stairs is not so long and don't pass through the Office, the People here are very nice and kind. I don't believe I told you yet that I am well I feel just splendid and am getting to eat quite natural again.

"We expect to remain here until about Jan. 7. I do hope my Pet is well by this time, I will not send you any money again until perhaps Thursday. I will try to get some to you by the time the scraps of your last purchase is used up.

"Lovingly yours,

"THEO."

On the afternoon when she received this letter from her husband, who was then in Redding, California, she saw Dr. James and showed him the letter and he read it; in about an hour and a half afterward Mrs. Milen saw him in his office in the back parlor and they had a conversation upon the topic of the letter; he said, "I love Laura and want her to marry me, and I wish you would intercede for me." Mrs. Milen told him to do his own courting; he was very gallant toward Laura; Mrs. Milen remembered the 6th of January, 1895, when Dr. James came to her room and said, "Here's a dollar and a half; you and Mrs. Dickman go to the matinee at Morosco's and afterward to the Creamerie; the matinee is very good—Laura and I were there yesterday." Mrs. Dickman and Mrs. Milen went to the matinee and returned at about 6 o'clock; on the same evening, in the front parlor,

Laura told her stepmother that she was married by contract to Dr. James; Mrs. Milen said, "Is that possible?" and opened the folding doors to the back parlor and saw Dr. James and had a conversation with him about 7 or half-past 7 o'clock; Mrs. Milen said, "What about this contract? I do not understand it"; Dr. James said that it was just as good as though a dozen ministers or priests had performed it. Mrs. Milen then took the paper and read it thrice to herself and became convinced. Laura slept with the doctor that night; they retired at about 10 o'clock; before retiring they had some lunch in the back parlor; Dr. James said that he never believed he could be so happy; Mrs. Milen slept on a sofa in the back parlor; from that night on until he died Dr. James slept with Laura; although she did not see them actually sleeping together, but she saw Laura in the same room and in the bed in that room. Dr. James appeared perfectly well until just before his death; he first complained of feeling ill at about 8 o'clock on the morning of the 28th of January, 1895; Mrs Milen was with him when he died and Laura was there also; there came in also Mr. and Mrs. Dickman, Maria Mangan, and a Miss Coon; others also; the death occurred at near 11 o'clock in the evening of January 28, 1895; Laura insisted that he should be buried in a shroud; Mrs. Milen told the undertaker that herself and her stepdaughter, "Mrs. James," would be responsible for the shroud; the undertaker said that the administrator wanted the doctor buried in his clothes, but Mrs. Milen and "Mrs. James" insisted that he should have a shroud, and it was so done; Mrs. Milen first saw the marriage contract after the death of Dr. James when Mr. Shadburne, the attorney for the absent heirs, and Mr. Cluin, clerk for the administrator, and Mrs. James were present, and General Hart finding the contract in the desk took it out and handed it to Mrs. James and she took it and grabbed it to her bosom, and then Mrs. Milen took it out of her hand; this occurred on the 25th of February, 1895; the desk had been sealed and the room locked; neither Mrs. James nor Mrs. Milen had a key to the room, nor had access to it from the time the administrator took possession until the day of this discovery in the desk, February 25, 1895; Dr. James was very devoted to Laura—kissed her, called her pet names, "my love," "my

darling," "my little wifey," and "little one"; he called her by these endearing epithets continually. Mrs. Milen did not know the height of Dr. James; he had blue eyes, white hair and mustache, face white, beautiful complexion, perfectly clear; baby's blue; forehead high, light brown hair with a reddish tinge, quite full under the eyes, heavy crescent line under the eye; round face, chin with slight dimple, short round arm, little fat hands; long body and short limbs; hair rebellious; Dr. James had a high, broad forehead, blue eyes, heavy line under eyes very full; very deep line running from the nose toward the temple; large mouth, round chin with a slight dimple; rather a short, fat man; the baby was born on the 16th of September, 1895, in the back parlor; Mrs. Milen saw the baby five minutes after the birth; Dr. Walton Preston was the doctor; Dr. Milen was there also; Mrs. Milen noticed that the child's finger and toe nails were not fully developed and the legs from the knees down were not fully developed; understood that the undeveloped condition of the child's nails signified premature birth; it was three weeks short of the full time; at the time Dr. James became ill he complained of pain in his shoulder and in his heart; Dr. James died at about 11 in the evening and Mrs. Milen was present at the time; she had been in the room at about 7 o'clock; she dined that day at the New Creamerie with Laura; they were gone to dinner nearly two hours; Maria Mangan was in the house; when Mrs. Milen and Laura returned Dr. James was in his room alone; at the time of his death the so-called "Indian Doctor" was there; Mrs. Milen did not know by whom this "Indian Doctor" was called in; he lived hard by the house of the deceased; it was not Maria Mangan that suggested a shroud—it was Laura, "Mrs. James"; the undertaker called at the house after the death and said that his bill had not been paid; although she had told the undertaker that herself and her stepdaughter would be responsible for the burial bill, they did not discharge that debt; the administrator paid it and the bill was rendered to the estate of deceased; Mrs. Milen was present when her husband met Dr. James after her husband had returned to town; Dr. Milen shook Dr. James by the hand and congratulated him, saying, "I believe you are my son now," and Dr. James

made appropriate acknowledgment and response affirmatively; Dr. Milen had learned of the marriage from his wife's letter to him; Mrs. Milen sent a telegram to her husband in San Jose about the 13th of February, 1895, in which she said, "Laura is pregnant; what shall I do?" Dr. James had made many presents to Laura—articles of apparel, rings, silk chemises, handkerchiefs, skirts, green silk, black silk and white, and on New Year's Day, 1895, he knocked at their door and he said to Mrs. Milen, "Here is your New Year presents," handing to Laura a dress, which subsequently she had made up, and to Mrs. Milen he gave a black silk dress.

It is claimed by counsel that these recited attentions paid to Laura prior to January 6, 1895, and the gifts bestowed upon her and her stepmother indicate that he intended to marry her, and especially when his attentions to her were exclusive, and it was not his habit to make presents, for Dr. James, even when he listened to the joyous "melodies of love," and though on marriage he "was bent he had a frugal mind" and did not care to spend a cent. This point is relied upon to show the probability of petitioner's pretensions, for this close and penurious man who, according to a witness, Maria Mangan, adverse to this claimant, was willing to sell his deceased wife's clothes, who gave no presents to anyone, presented Laura with valuable garments to be worn next her person, a certain token of affection, and he placated his prospective mother in law, Mrs. Milen, with a rich silk dress; he was exceptional in his attentions to this attractive little woman, showing extreme devotion to her, giving to her and her stepmother dainty luncheons of cheese, crackers, pickles, and sour wines; taking them to dinner and the theater. These marks and manifestations of fondness showed that he must have contemplated marriage prior to January 6, 1895—contemplation culminating in consummation on the evening of that day. So the counsel for claimant considered that they started out in this case with circumstances constituting a hypothesis perfect in its proportions and paragonal in its probability, supported by proof positive and plenary of the existence of the contract and of the declarations made by the deceased, Dr. James, that he was married to Laura Milen, and, the counsel claims, this evidence came from unimpeached

sources through unpolluted channels. One of the sources is Dr. Theodore Milen, the father of the petitioner Laura, a peripatetic physician earning a scanty subsistence out of a precarious practice, "on the road," as he testified, sometimes utilizing the natural gifts of his young family in vaudeville entertainments or interludes, while he lectured on diseases peculiar to the sexes, and treated cases chronic in their nature arising from excesses and vended nostrums calculated for their cure. In 1894 the family of Dr. Milen changed their abode several times, and in December of that year he was engaged in his itinerant occupation at Oroville, Red Bluff and Redding, in the northern part of California; at Redding he received a communication from his wife and also from Dr. James; the purport of Dr. James' letter was that he asked for Laura in marriage. Dr. Milen did not answer the letter of Dr. James but he did answer that of his wife to the same purport; Dr. Milen spent hours in writing that letter, which, by the way, consists of less than three pages of ordinary letter-cap and contains about four hundred and seventy words; Dr. Milen left Redding January 11, 1895, for San Francisco, and went to 925 Howard street, and met his wife and "Mrs. James," and he met Dr. James that same evening in their room—that is, the room of the Milens; at about half-past 7 o'clock in that evening the decedent came into the room; Mrs. Milen had a lunch prepared—tamales and beer or wine, crackers and pickles; when Dr. James came in Dr. Milen said to him, "Doctor, I suppose this is my son," to which Dr. James answered, "Yes, if this is your daughter, for she is my wife"; then they partook of the lunch; they remained about one hour and a half—that was the evening of January 12, 1895; Dr. Milen met Dr. James the next evening, Sunday, the 13th of January, 1895, in the back parlor, Dr. Milen's wife and daughter present; Dr. Milen asked Dr. James, "Doctor, how about this marriage contract? My people are old-fashioned Methodists and won't understand it, and I understand this is not legal outside of California"; he had previously requested Laura to leave the room and she did so; Dr. James pulled out a paper, this contract, and Dr. Milen read it twice over himself; Dr. James said he would provide for "the little one," as he

called her; the next morning Dr. Milen took to the road to practice medicine at San Jose; at that time Dr. Milen received a paper known in this record as "Mrs. James' Exhibit 8 and 8A," envelope containing letter inclosing a Wells-Fargo money order for $25; the letter was dated January 16, 1895, and signed "Chas. A. James"; the envelope was addressed "Theodore Milen, care St. James Hotel, San Jose"; Dr. Milen did not answer this letter, but he preserved it; it may be remarked that he did not preserve the letters he received at Redding; on the same evening of the receipt of the letter and money order at San Jose he came to San Francisco and went to 925 Howard street, returning to San Jose the next morning, and remained there until he heard of the death of Dr. James, on the evening of the 29th, when he "immediately came home." Dr. Milen did not remain for the funeral because of his business in San Jose, which, though not lucrative, necessitated his personal attention; after he received the telegram announcing Dr. James' death Dr. Milen came to San Francisco and remained that night, 29th of January, 1895, and slept in the same room and in the same bed with his wife and daughter Laura; returned next morning to San Jose and remained there until February 8, 1895, when he came back to San Francisco and learned that the public administrator had taken possession of the estate of Dr. James.

Dr. Milen bestowed all the care that he could over the books and education of Laura; he never gave his wife any special instructions about the moral culture of his children; he considered that his wife was competent to care for them in that respect, and he did not think it necessary to dictate to her in the matter of their intellectual and ethical training; in 1894 Laura was past eighteen years of age, Lulu was sixteen years of age, Mrs. Jessie Milen, their stepmother, wife of Dr. Milen, twenty-five years of age; Dr. Milen's first wife died in 1887; he married again in 1890; his second wife, the present Mrs. Jessie Milen, had been previously married to one Milo Harris, when she was sixteen years old, with whom she lived for a year or more and of whose current existence she entertains dubiety; both Dr. Milen and his wife Jessie regarded with aversion the form of marriage by

contract, as they believed in a marriage by a priest or minister—although Mrs. Milen did not belong to the same faith as her husband's people, she was not an old-fashioned Methodist, and she had never heard of a marriage contract before, and had an antipathy for such a connubial contrivance, yet they accepted implicitly the assurance of Dr. James that it was all right and that even an oral agreement would suffice; Dr. Milen had sentiments of repugnance to this kind of marriage, and thought it was not proper, although he was informed it was legal in California, and so he acquiesced; at the time of his second marriage in St. Charles, Missouri, on February 1, 1890, Laura was about fourteen or fifteen years of age, Lulu about three years younger, his wife about twenty or twenty-one, himself about thirty-six years of age; that constituted his family. Shortly after that marriage his wife took charge of the children and she says she cared for them and guarded them as if they were her own children; she made companions of these two children rather than daughters. To the best of his ability Dr. Milen had used every effort in the education of his daughters for their moral and mental culture; he had tried to throw around them every influence for good, and he had never known of any evil environment about Laura during all the time up to what he claimed to be her marriage; he knew that his wife was the author of a book which he had seen but not read, the title of which was and is, "Was He to Blame, The Temptress, by Orrell," "a story of love and passion," and containing on the title page a supposed representation of an artist painting a female human figure standing upon a studio platform and entirely undraped, with the right arm holding back a curtain and the left covering with its hand the eyes of the model; this feminine form is altogether nude; this pictorial representation constitutes the frontispiece of the book, directly presenting itself to the eye of the observer; on page 40 of the same volume the picture is repeated; other pictures appealing to a concupiscent imagination, without any excuse in the abused name of art, are interspersed in this paper covered and bound collection of printed sheets numbering one hundred and sixty-eight pages, and supplemented by an advertisement of "a sure, safe and speedy cure for all

monthly irregularities (from whatever cause), no instruments used," and so on, by "a true friend of her sex," one "Mrs. Dr. Gwyer, 311½ Hyde street, San Francisco, Cal."; added to this on the next page is another advertisement of Dr. Santé's Grains of Strength French Cure "for certain specified sexual ailments," winding up with an injunction to "Use Dr. Foulet's Prophylactic Powder" for female complaints. Dr. Milen did not know whether this book or its manuscript was open to the inspection of his daughter while his wife was engaged in its composition; Mrs. Milen was a long time writing it; she was writing nearly all the time; there was no secrecy about the writing of this volume; his daughter might have seen it. Mrs. Milen testified concerning the publication of this work that she sold the manuscript to the Bancroft Company for $100 to their agent, a Mr. Packer, in their printing house on First street in presence of a Mr. Shahan, who took the written matter and Packer paid her at her house on Valencia street; Shahan was the manager of the printing department of the Bancroft Company, and he says he was present when Mrs. Milen sold the manuscript to Mark M. Packer, and that the name "M. M. Caine" in the copyright was put in by Packer, the initials "M. M." standing for his own initials and "Caine" being his mother's maiden name—a rare mark of respect for the memory of one's mother! Since the time of the mother of the first Cain it may doubted that any such mark of filial veneration has been bestowed upon a descendant of Eve; but the reason for this was assigned clearly and cleverly by Mr. Shahan; it was to elude the vigilance of the Society for the Prevention of Vice, whose agents were on the trail of such publications, and by the direction of Thos. A. C. Dorland, now deceased, then general manager of the Bancroft Company, false entries were made in the books of that concern, in presence of Shahan, and Packer purchased the pictures for the book, with the publishing of which Mrs. Milen had nothing to do. Dorland is dead and Packer was not produced at the trial, and Shahan has not been with the company since 1894. Dorland being dead and Packer not produced, we have on one side statements as to this transaction by Mrs. Jessie Milen and Shahan, the latter corroborating her as to the sale of the

manuscripts but not as to the actual payment of the price, and, on the other side, we have testimony from the engraver. Andrew C. Cunningham, who says that he reproduced for Mrs. Jessie Milen from a photograph the engravings in the book, and that he understood that it was a picture of her stepdaughter Laura; Mrs. Jessie Milen gave to Cunningham the order for the photographic reproduction; the figure was nude and represented the form of Laura Milen; the engraver was given the order by Mrs. Jessie Milen to make those licentious pictures to illustrate this book; she told this engraver that the form in the photograph was that of her stepdaughter Laura; the features of the face in the pictures are covered by a hand, thus partially concealing the countenance; Mrs. Jessie Milen denies that she furnished the photographs, and denounces Cunningham's testimony as totally false, and she similarly stigmatizes the entries in the books of the Bancroft Company, produced and identified by Mr. Weir, the bookkeeper for the incorporation, which show that on August 3, 1893, she was debited with one thousand novels, $100, and credited with four payments on account, $50+20+10+10= $90, leaving a balance due to the printing company of $10, still due and unpaid. This book was considered so obnoxious, morally, that Francis Joseph Kane, agent of the Society for the Suppression of Vice, confiscated all that he could find in the book stores because of the salacious character of the contents. Laura denies that any photograph of herself was furnished for the preparation of the engraving in this book, and says that she first saw the volume in Dr. James' back parlor, when she was in there with Mrs. Milen; Dr. James took it from a drawer and asked Mrs. Milen if she had ever seen it and the answer was "Yes, I am the author"; Laura had never seen it prior to that time nor had she up to date read it; she never read the proofs nor manuscript of her stepmother's novels; her stepmother was always writing; but Laura never took any interest in what she was writing nor evinced any inquisitiveness about it, and her stepmother was very particular about keeping it to herself; she kept her own counsel as to her literary compositions and did not employ Laura as an amanuensis or corrector of proofs. Mrs. Milen says that the illustrations for the book were obtained by Dr.

Milen from an artist named Cunningham; Shahan says the pictures were purchased by Packer; Dr. Milen never read the book but says there was no secrecy about it; Mrs. Milen says she always observed secrecy as to her manuscripts, and carefully concealed them in a drawer of her desk and locked it, and that her stepdaughter had no opportunity of seeing any portion of her manuscripts, and that they heeded her behest not to read her writings; there is testimony of George Hudson and Miss Charlotte K. Clark at variance with this suggestion of secrecy, but apart from their evidence there is in the Milen-Shahan statements a medley of contradictions hard to reconcile; the whole circumstance, however, in the opinion of counsel for petitioner Laura, is sheer hearsay, and should not have been admitted in evidence; it is immaterial and, moreover, the groundwork of the book is not immoral. It may have a profound moral purpose for the propagation of purity of thought and action, but if that be its intent it is too deep and obscure for the carnal sense to penetrate; it is essentially a bad book, a bawdy book; the letter-press written up to the lascivious engravings; the tenor of the text turgid and tawdry; the composition execrable in every respect—cheap, course, ungrammatical; and, assuming it to be original in conception, it is ineffably vile in matter, manner and execution; and this book, which she and her stepdaughter say was guarded while in process of construction under lock and key and which Dr. Milen says there was no secrecy about, was written by a woman to whose care was committed the mental and moral culture of two young girls, and in whom their father had complete confidence as to her competency to rear them and who suffered no evil environment to encompass them. All this is asserted to be immaterial by counsel for the claimant Laura, but it must be remembered that it was drawn out by him in his endeavor to show from the mouth of his own witness, Dr. Milen, that the domestic training of his children in the family of which Mrs. Jessie Milen, their stepmother, was the head was in the highest degree moral, and that, while he was engaged in his doctoral divagations up and down and around about the country, Laura and Lulu were committed to the care of his wife, who guarded them as if they were her own children. It is claimed by

counsel for petitioner that the contract writing itself is established as existing on January 6, 1895, by direct and positive testimony of the three witnesses, Laura, Mrs. Jessie Milen, and Dr. Milen, and that their evidence is corroborated by admissions made by decedent to Dr. Parshall Adam Terry on the 13th of January, 1895, that he was married in this manner. Dr. Terry testifies that he saw Dr. James on the 23d of December, 1894, at the decedent's house, 925 Howard street, where he went to buy medicine of him. Dr. James introduced him to Mrs. Jessie Milen and Miss Laura Milen, now Mrs. James; on January 13, 1895, Dr. James called at the office of Dr. Terry, then at 788 Harrison street, and told Terry that he was married to that young lady by contract. Dr. Terry called at 925 Howard street that same day and met Dr. James there and he called this lady into his office and he said, "Dr. Terry this is my wife, Mrs. James," and he said to her, "My little one, this is my old friend that you have heard me speak of, Dr. Terry." This might be considered a somewhat superfluous formula, if it be taken as true, as testified almost in the same breath by Terry, that at the same place just three weeks before, precisely twenty-one days, he was introduced to Laura by Dr. James. To that extent the introduction should seem to be unnecessary, except, perhaps, for the purpose of this case it might have been deemed essential for the sake of emphasis; but however that may be, Dr. Terry wished her joy and congratulated her on having so good a husband. Dr. Terry saw Dr. James again on January 20th. On January 20, 1895, Dr. James called on Dr. Terry at his office, 788 Harrison street, and asked him to call and see his wife as she was ill. Dr. James did not suppose much was the matter with her but she was "grunting" and he wanted Dr. Terry to visit her. Dr. James said he was in hopes that she was in the family way as that was the reason he married a young wife, that he might have an heir. Dr. Terry went to see her. Dr. James had admonished him not to give her any medicine or anything to cause any derangement of her system. Dr. Terry saw her in the bedroom in bed in her night clothes, under the bedclothes; felt her pulse, looked at her tongue, and said to Dr. James, "Doctor your wife has only a little cold, and a little quinine is all

she needs, and, now, that you have such faith in your remedy, is a good time to apply it." After that incident Dr. Terry never saw Dr. James again. On the 16th of September, 1895, Dr. Terry had occasion to call at the house, 925 Howard street, to see Dr. Milen about manufacturing the medicine that Dr. James used to make, and there saw a babe that had the appearance of a child just born; its nails were not fully developed; the nurse took the babe out of the bed and by Dr. Milen's request exhibited it to Dr. Terry; the mother was lying in bed; the nails were four-fifths long, all the way to the end of the fingers; Dr. Terry had never seen a fully developed child with nails like that before since the beginning of his medical studies in 1841; with the exception of this child, he could not recall any infant with short, undeveloped nails who lived; this child looked healthy; Dr. Terry never dined with Dr. James nor took a meal with him; he usually visited Dr. James on Sunday and went to buy medicine for his asthmatic trouble; Dr. James was in excellent health and spirits at the time he visited Terry January 13, 1895.

As to the visit of Dr. James to Dr. Terry on Sunday, January 13, 1895, testimony comes from George Elisha Terry, son of the latter, who appears to have been providentially present when the visitor came in and said to father, Dr. Terry, "I have good news to tell you; I have been married." The elder Terry said, "Well, I have seen nothing about it in the papers," to which Dr. James made answer, "I was married by contract, which I consider better than a marriage by a notary or minister, as I don't want publicity in my affairs." Dr. Terry inquired, "Who is the fortunate lady?" Dr. James replied, "Miss Laura Milen, the young lady to whom I introduced you." Dr. Terry responded, "I congratulate you on marrying a young lady who will take care of you," to which Dr. James retorted, "Oh, no! I don't need anybody to take care of me; I can take care of her." So the Terrys chimed in with each other as to the eventful interview of January 13, 1895.

In further fortification of the case of petitioner, and to clinch, as it were, the demonstration of the declarations of decedent, two witnesses are presented, George Williams and John Bigby, the first of whom testified he knew the deceased

for about twenty-five years back, and that he met him a week or two before he died on Howard street, near Fifth. Williams was with his friend Bigby, and the two met Dr. James, to whom he introduced them as Mrs. James; the incident of this introduction was testified to by Bigby, who put it, however, "as the forepart of January, 1895." The deceased said, "Mr. Bigby, this is my wife, Mrs. James." The claimant here differs somewhat in her relation of this imputed introduction; she speaks of two young men as the persons. Both Mr. Williams and Mr. Bigby are old-timers; one came here in 1855 and the other crossed the Isthmus of Darien hither bound in 1850 or 1851; the latter described Dr. James at the time of the introduction, "forepart of January, 1895," between 12th and 15th, as pretty gray—in fact, he was pretty gray in 1887 or 1888, when they first met; gray mustache "like mine now"; light brownish complexion, hair perfectly white, in 1887 or 1888; the same man that he was then introduced to he met as related in January, 1895; neither Williams nor Bigby could be accused of being young men at that time; indeed, they were well along in years.

These items of evidence with the statement of Mrs. Lulu Blanche Dickman that Dr. James asked her about a week before his death, "Has Laura told you of our marriage?" to which she answered "Yes," constitute the sum total of affirmative declarations of the decedent; and it is stoutly contended by counsel for claimant that they afford irrefragable proof of the marital relation, in conjunction with the contract and its concomitant and consequent circumstances; they cannot be overcome by contrary conduct and by negative declarations; the status once established is forever fixed, and cannot be gainsaid by any quantity of declarations or any amount of acts of decedent that are inconsistent therewith. He told Dr. Terry on the 13th of January, 1895, that he did not put the notice of the marriage in the papers nor have it celebrated by a notary or minister, because he did not want publicity in his affairs, and then, within a day or two, "the forepart of January, 1895," between the 12th and 15th, he introduces her publicly on a main thoroughfare to Bigby and Williams. Counsel for claimant concede that contradictions have arisen in this case, but insist that the court must esti-

mate the evidence by its own intrinsic weight, and consider the character of the witnesses, their means of knowledge and the possibility of their interest or bias. This is the code rule of evidence; it is also common law and common sense; and is the touchstone of truth in this controversy. Her counsel claim that the case of petitioner is so strong and straight that nothing can move it from its firm base of integrity, and that the defense here is purely mechanical; it is an unsubstantial fabric that falls of its own falsity and fails to shake the solid structure of claimant's case. This metaphor is somewhat mixed and a little rocky, it must be confessed, but, as the same counsel say, there need be no fear that this mechanical defense so founded on false theories fabricated to deceive will effect its object, "for the practical eye of the experienced judge will penetrate this superficial structure and reveal the fact," and, following the precedents made by "the decisions of this court, which are uniformly in favor of justice and humanity," the conclusion of this will be based solely on the facts and the law flowing therefrom. The court accepts the compliment of counsel with customary complacency, conscious that the record will bear it out and that the decision in this particular issue will be no departure from the patterns of the past.

Mrs. Lulu Blanche Dickman tells a long story of the incidents connected with the courtship and circumstances of the marriage, but her husband, Henry Dickman, cuts another facet upon the brilliant tale told by his wife; although Dr. Milen introduced him to his sister in law Laura as "Mrs. Dr. James," Dickman did not take it seriously, thought it was a "josh," to use his own elegant and expressive vernacular. That he took no stock in the combination is quite clear from the telegram he sent to the niece of deceased on the 31st of January, 1895, addressed to "Mattie James, Fort Madison, Iowa," in these words: "Your uncle Dr. James died yesterday at my house. Letter mailed to-day with full particulars. You need an attorney at once to represent you, and I recommend you to telegraph at once to Judge Levy, Nevada Block, to represent you in the meantime. Henry G. Dickman." He also sent letters to Mattie James and a form of a full power of attorney to her, constituting him her agent to do "every

and all things" in connection with the estate of her deceased uncle, as whose heir he assumed she was entitled to succeed. Counsel for claimant insist that the "facts are proved by those having knowledge thereof," and yet it should seem that this young husband, aged thirty, living continuously in this house during the period from the middle of December, 1894, with his wife, Lulu Blanche, to the date of the death of Dr. James, and ever since abiding therein, did not know that his sister in law Laura was married and never learned it from any source except a casual introduction by Dr. Milen to her, which he treated as a "josh," and that after the death of Dr. James he endeavored to capture the works for Mattie James. It was a very serious situation in that house on the evening of the 31st of January, 1895, the date of the telegram and letter from young husband Dickman to niece Mattie James, in which she was advised that her uncle, Dr. James, had died on the preceding Monday night. According to every other member of the Milen family, there was there a sorrow-stricken widow, in due time, or perhaps prematurely, to become a mother, her sister Lulu, the young wife of Henry Dickman, the stepmother, Mrs. Jessie Milen, all of whom were profoundly moved by the sudden bereavement, and yet Henry Dickman, a member of that household, who had a right to know all that his wife knew of the domestic affairs, and who presumably was one of those persons described by counsel for claimant when he says "facts are proved by those having knowledge thereof," wrote this carefully considered letter in typewritten characters:

"SAN FRANCISCO, January 31st, 1895.

"Mattie James, Fort Madison, Iowa:

"On last Monday night your Uncle Dr. Charles James died at the place in which myself and wife reside. Myself and wife being his nearest friends in the City and County of San Francisco, I thought it would be no more than right to immediately advise you of the status of the matter. I understand that you are his only relative and it becomes therefore necessary that you act immediately. Your uncle died leaving considerable money and as you are his only relative as I understand it becomes necessary that you should have a representative out here to look after your interests. As you

understand the public administrator is already after the estate, so that I have been advised after consulting my attorneys been advised to send the enclosed power of attorney to you, and if you will sign it and acknowledge and send it to me I can protect your interests and save you a great deal of expenses. If you decide upon doing this please sign the said power of attorney and acknowledge it before a commissioner of the State of California and return it immediately, and as I said before being the nearest friend of the Doctors out here I am better acquainted with his desires than any other person. Please let me hear from you immediately.

"Respectfully,

"H. G. DICKMAN,

"925 Howard St.

"San Francisco.

"Received Feb. 4, 1895,

"M. E. JAMES."

The able and learned counsel for claimant contend that "Dr. James and she who was Laura Milen assumed marital rights, duties and obligations, and these were well evidenced for the short period between the time of marriage and his death. *Her relatives knew of the marriage.*" Now, here is Henry Dickman, the husband of the only sister of Laura, living in the same house, on the very day of the burial of deceased, sending the telegram quoted and this eloquent epistolary exposition of their domestic understanding that the niece, Mattie James, was the "only relative" of the deceased, and advising her of the predatory purpose and pursuit of the public administrator!

The relatives of Laura knew of the marriage, say the counsel, and yet, according to this letter, Dickman and his wife were the "nearest friends" of the deceased and the "better acquainted with his desires than any other person"; they wanted to be empowered to "protect the interests of the only living relative," the niece Mattie James, although there was then in the house whence this document was dated the widow of the "father of the prospective offspring."

"Others knew of the marriage," say the counsel for the claimant. We have considered seriatim Dr. Theodore Milen, Mrs. Jessie Milen, the Terrys, George Williams, John Bigby,

Mrs. Laura Milen James, Mrs. Lulu Blanche Dickman and her husband Henry G. Dickman, and we have remaining upon this point to establish by circumstance the more positive and direct proof three witnesses, the first of whom, John Thomas Currey, testifies that he knew the late Dr. Charles A. James; Mr. James' photograph was recognized by him; Mr. Curry was an acquaintance of Mr. Dickman, the husband of the sister of Mrs. Laura Milen James, to whom Currey was first introduced in January, 1893, at the Girard House in Oakland when she was Miss Laura Milen; Currey had known Henry Dickman in St. Paul, Minnesota; subsequently Currey saw "Mrs. James," Dr. James, Mrs. Milen and Mrs. Dickman in the parlor of 925 Howard street on the 1st of December, 1894; saw them together on the 25th of December, 1894, at dinner in the dining-room as he was passing through the hall on his way upstairs to see Dickman; two or three weeks afterward, between the 10th and the 15th of January, 1895, he saw Dr. James, Mrs. Milen and "Miss Milen" in the same dining-room. Currey did not know her then—between the 10th and 15th of January, 1895—as "Mrs. James," nor was he ever introduced to her as Mrs. James; he learned of that from the newspapers; and yet Currey is relied upon to support the contention of cohabitation, introduction and recognition of the decedent and Laura by each other as husband and wife. This is rather thin gruel upon which to support so vital a proposition.

Next we have, as the completing links in the chain of circumstances bringing us down to the last scene of all, the testimony of Patrick Kelly and his pal, Richard Edmund Saunders. Kelly testifies that he was undertaker's assistant for Joseph Hagan, the funeral director and embalmer who buried the body of Dr. James. When Kelly went to the house of mourning he heard a childish voice say, "Oh, my poor husband!" and he turned and saw the young lady whom he identified at the trial as the claimant, and Mr. Saunders, who went to the same place with his friend, Mr. Kelly, testified that he was working at that time for Hagan, the undertaker, and that he was a pall-bearer at the funeral; that he saw Hagan embalming the body; he and Hagan and a man named Williamson, and another man whose name he

could not recall, acted as pall-bearers at the funeral. Mrs. James was weeping; she rode in a carriage behind the hearse; she said, "Be careful, that is my poor husband"; she was weeping very much; this young lady was crying and threw her hands up to her eyes and said. "Be careful, that is my poor husband!" The other two ladies, whom Saunders identified as Mrs. Jessie Milen and Mrs. Dickman, were present.

In connection with this testimony as to what took place at the time of the laying out of the corpse and the funeral, we have the statement in evidence of the funeral director who embalmed the body and who went to the house 925 Howard street upon request and inquired for relatives and was told that there were none. There were four ladies present; he went about the task of preparing the remains; this was on the 29th of January, 1895. At the time of the funeral Mrs. Milen asked him who was to ride in the mourners' carriage. Hagan said that in the absence of relatives the housekeeper would be the proper person. Mrs. Milen said that she did not know who was better entitled than the lady to whom the deceased was engaged to be married. That was the first Hagan had heard of any such person, and he assented to the proposition. This seems to account, in a measure, for the claimant's riding in the carriage next the hearse—a fact by which her counsel sets some store. Hagan saw no signs of sorrow or any wailings or manifestations of woe. No one said, "Oh, this is my poor husband!" This did not occur at any time, Kelly and Saunders to the contrary notwithstanding. These two men assisted Hagan at the time. There was no emotion at all displayed. A short Episcopal service was read by a clergyman, but there was no tear shedding; the ceremony was brief, with no signs of sorrow:

> "Few and short were the prayers that were said,
> And they spoke not a word of sorrow,
> Not a tear was shed, not a funeral note
> As his corse to the graveyard they hurried."

At the time of the funeral George Hudson testifies that he was present; a minister was there who read the service; there were also a Miss Weygant and her mother, Mrs. Weygant, the widow of an old friend and early employer of the deceased; also a Mrs. Sarah Williams, an old friend of Dr.

James and a member of the Hudson household; there were also Miss Maria Mangan and a cousin of hers, and several roomers in the house. Mrs. Jessie Milen, Miss Laura Milen, and Mrs. Dickman were there. Mr. Newell Winants and Mr. George Hudson were the only male friends of the deceased present. Hudson came very early, while they were gathering there, and remained until the body was taken downstairs. There were no manifestations of mourning. When the corpse was being removed from the room Hudson did not hear any ejaculations of any kind; he did not hear claimant say, "Oh, that is my poor husband; be careful!" No such exclamation was made; there were no pall-bearers; the funeral was in charge of the public administrator and the undertaker. At the time of the funeral the ladies, or most of them, were in the front room; at the time of the funeral the ladies, or most of them, were there and the three ladies of the Milen family sat together on the east side of the room, and after the ceremony they retired into their own room, hall bedroom off the parlor; they were not present when the coffin was removed, although they may have been present when it was closed. When the funeral procession was about to form the Milens were standing on the sidewalk and after a short time they took the carriage that followed the hearse. We shall have occasion presently to try the evidence of Mr. Hudson as to what preceded the incidents of the funeral, and now pass to the consideration of other witnesses.

Mrs. Vica Mabel Fitzgerald, a young lady formerly Miss Vica Coon, was one of the roomers in the house at the time of the death of Dr. James. Miss Coon was a working girl, a shoe-fitter by trade, steady and diligent at her calling. She lived in a front room on the third floor, occupying an apartment adjoining that of Miss Maria Mangan, separated by doors usually kept open, and Miss Maria Mangan and she were companions in the evening and usually kept pretty close to their rooms. Miss Coon was out of work when the Milens came to 925 Howard street in the middle of December, 1894; she did not meet them, however, until the 28th of January, 1895. Miss Coon was acquainted with the deceased, Dr. James, from June, 1894, until he died; she was there a few minutes after he died; she had lived in that house from June 17, 1894. There were liv-

ing in the James house, in addition to Miss Coon, Mamie and Kate Dalton, Maria Mangan, the housekeeper, Mrs. Biro, Mr. O'Neill, Mr. Ott and the Milen family. Miss Coon usually left the house at 7 o'clock in the morning and returned at 6 in the evening. She first met the Milen family after the death of Dr. James. When Miss Coon went into the room Mrs. Milen was standing rubbing Dr. James' head and Laura and Lulu and the "Indian Doctor" were there; Maria Mangan was there, and some people from the street. Dr. James was sitting by the fire in the back parlor on the right-hand side as one went in from the front, in an armchair. There was in the room a sofa, an armchair, a settee, a bed, his desk and a bureau. He was sitting with his legs crossed and was lying back dead; he had a wrap around him. Mrs. Milen said that she and Laura had been at the Orpheum and when they returned they thought they would go in and have a chat with the doctor, he was feeling better, and they were going to go to bed and he said he would take some more medicine. Mrs. Milen went to fix his medicine but he refused to permit her; he said he knew better how to fix the medicine, and the Milens said to him that if he wanted anything in the night to call them, and he replied, "No," that if he needed anything he would ring the bell for Maria. There was a small bell on the mantel which Laura picked up and rang it and asked him if he meant that bell; he answered, "No, the bell in the hallway." Dr. James died at about half-past 11 and his body remained in the position described until 1 o'clock. A doctor came in and promised to send an undertaker. Somebody passed the remark that the undertaker was very slow in coming and Mrs. Milen thereupon said, "*We can't do anything—we are only strangers in the house,*" but afterward she sent Lulu to call another undertaker and he came after the one the doctor had sent. The undertaker that came first laid the corpse out in the front room and he sent all of the ladies into the bedroom. He removed the purses and what personal effects the deceased had in his pockets. There were three or four purses; there was a diamond ring, a pocket-knife, and a few small articles. The undertaker passed those articles to Miss Maria Mangan and she tied them up in a handkerchief and gave them to Miss Coon to hold while Maria locked up the

desk. Miss Coon kept them for the night and returned them to Maria the next morning when she was going to work. While the ladies were in the bedroom Mrs. Milen sent Lulu to send a telegram to Dr. Milen that Dr. James was dead. Lulu went and returned and said that she had written, "Papa, Dr. James is dead. Come." Mrs. Milen wanted to know why she said "Come," since he would know best what to do—*maybe he would want them to come down there.* Lulu said that the telegram would not go until 8 o'clock next morning and she went back that night and changed the telegram to, "Papa, Dr. James is dead." When Lulu came back Miss Coon heard her tell what she had done. On that night the ladies talked a good deal about Dr. James; Laura said nothing about him; her sister, Mrs. Lulu Dickman, was talking about what a dear friend the doctor was to them and how much he thought of Jessie and Laura. There was no shedding tears. Miss Coon was not present at the funeral nor when the body was removed from the house to the hearse; she was at her work; she left the house on the 26th of February, 1895; she never saw Dr. James and Laura together.

Miss Maria Mangan, at the time of the trial and of taking her deposition Mrs. Davis, having become a married woman since the death of Dr. James, lived in his house, 925 Howard street, on the 28th of January, 1895, and had been his housekeeper for two years and three months prior to his death, and had been intimately acquainted with him. On the date specified there were living in that house Mr. and Mrs. Biro, Mr. O'Neill, Mr. Ott, Mamie Dalton, Katie Dalton, Vica Coon, the Milen family and Mr. Dickman. The Milens came about the 13th or 14th of December, 1894. The members of the Milen family were Dr. and Mrs. Milen, Miss Laura Milen, and Mrs. Lulu Dickman. Miss Maria Mangan conversed with Dr. James every day about business and family matters; he spoke of the Milen family to her on several occasions; he spoke to her the Sunday before he died; he said that Laura Milen had gone up to Market street and he had invited them to dinner, and he told Maria to wait and put the dinner in the oven until Laura returned. Maria had prepared the dinner and he told her to wait until Laura's return. Dr. James did not tell Maria if anyone but Laura was to be his guest on that occasion. She

did not know of his ever having made presents to any of the Milen family. She heard him speak of Laura on several occasions; he said he was treating her for catarrh. Dr. James was a close man; Maria thought him a close man because he sold some of his deceased wife's clothes to a Mrs. Bissen and he wanted to sell Maria herself some of those clothes. He spoke of Miss Laura Milen as "Laura"—"just Laura." Maria Mangan never knew of Laura and Dr. James occupying the same room together. Maria took care of the rooms and was housekeeper and cook—general utility. She never heard Dr. James introduce Laura to anybody. The Milens occupied a front room on the first floor. Dr. James occupied all the lower floor but this room. He dined in the dining-room; that was between the kitchen and the bedroom on the first floor. On that floor were the kitchen, the dining-room, his bedroom, office, parlor and the room occupied by the Milens. His office was the back parlor. He usually dined alone. Maria cooked for him all the time for two years and three months until he died. Maria Mangan knew Dr. Terry. She saw him come to Dr. James' house sometime before the latter's death. She saw Dr. Terry also after that event. Dr. Terry said that Laura Milen was Mrs. James and of course Maria would be a witness in the case and Laura would see to her yet. Dr. Terry said to Maria, "She will see that you will be all right." Dr. James died in his office on the 28th of January, 1895. He had been sick since the morning before he died. He was attended in his last sickness by Maria and Judge Hudson. When Dr. James died there were present Mrs. Milen, Laura Milen and Maria Mangan. In the morning of that day, at about 7 o'clock, Maria came downstairs to prepare breakfast and she knocked at his door and Dr. James opened it. Dr. James had a blanket around him and Maria asked him what was the matter, and he told her that he was sick since 3 or 4 o'clock in the morning; he had been taken ill in the nighttime; no one was with him; he was all alone. He told Maria that when he was taken sick he went out himself and got a bucket of coal and made a fire in his office. Dr. James was quite sick; he walked around the floor all day; he ate some toast, and in his office about 5 o'clock he ate some rice and milk. Maria was with him occasionally and Judge Hudson

was with him two or three times. He died between 11 and 12 o'clock that night. Maria sat up with the corpse that night. Mrs. Milen, Miss Laura Milen, Miss Mamie Dalton, and Miss Vica Coon sat up until 3 o'clock in the morning; Mrs. Dickman was there also. Maria never noticed what condition or frame of mind Laura Milen seemed to be in while sitting up with the dead. There was no lamentation from anyone. Nothing was said that night about the relations between Laura and James, but the next day Maria heard Mrs. Dickman say in presence of Laura that the latter was engaged to Dr. James and that it was too bad he died as he would soon have been married to Laura. On the morning before Dr. James was buried Mrs. Milen said in the presence of Laura that Laura was engaged to Dr. James and that she was wearing her engagement ring; this remark was made in Mrs. Milen's bedroom. Maria Mangan never heard Laura say aught about her relations with Dr. James. After the death of Dr. James the public administrator took possession of the place the next morning and opened the desk of the deceased. He looked over the private papers and took away a bankbook and some jewelry that was there. The corpse remained in the house from Monday night until Thursday. Dr. James' body was laid out in the front parlor. People were in and out all the time. Two men came from the undertaker's and remained with the corpse two nights. Dr. James kept his letters and private papers in his desk in his office or back parlor. While the body was laid out the intervening doors were open; anyone could pass in and out. After the funeral Maria Mangan took possession of the house at the instance of the administrator. The connecting doors and other doors were then locked and the keys given to her. There was a piano in the front parlor; it belonged to the Milens. Sometime after the death of Dr. James—how long Maria could not remember—Mrs. Milen entered the parlors. She had a trunk in there and asked Maria for the keys; this was before the twenty-fifth day of March, 1895; it was before Mr. Shadburne went there with General Hart to examine the papers. Maria Mangan made up the beds every morning for Dr. James, and during the last two months of his life did not know of anyone sleeping with him. He always took his dinners at home. He never dined out but once; he ate alone

every morning. Maria never cooked any breakfast that Dr. James and Laura ate together, and Maria cooked every breakfast during the two years and three months she was with him. If anybody in that household was in a position to know the facts of the occurrences therein, it should seem that person was this faithful servant, Maria, who made the beds, prepared the meals, cleaned the rooms, built the fires, and performed all the domestic drudgery of the establishment, and was also the recipient of his confidences as to business and family affairs. She was his housekeeper and maid of all work, and intimately acquainted with him; conversed with him every day; had control of his ménage and never heard of this marriage.

The local life history of the deceased is perhaps best epitomized from the testimony of George Hudson, a somewhat venerable attorney at law, who once occupied a judicial position in the early times of San Francisco, and has been since, accustomed as the citizens and natives are to such honorary titles, commonly called "Judge" Hudson. This gentlemen so titularly distinguished had the longest continuous acquaintance with the deceased of anyone who appeared as a witness in this contest. We have already referred to his testimony as to what occurred before his eyes at the time of the funeral and immediately preceding, and we shall now revert to his narrative to make the connection complete; Judge Hudson first made the acquaintance of Charles A. James in 1854; Hudson was then about thirty years of age and James a youth of about nineteen years and a clerk at the Crescent City Hotel on Sansome street, and continued in that capacity at the Tremont and International. Afterward James went into the real estate business for several years. Hudson has lived at 226 Fifth street, corner of Clementina, for quarter of a century; he and James were intimate. Hudson knew the first wife of James; she died in 1891. He conversed with James often about his condition in life; they exchanged confidences. After an interview he had with Dr. James in the latter part of December, 1894, Hudson used to see him very frequently. James visited Hudson up to the 20th of January, 1895, almost daily. The next time when he talked with him about his condition in life and the subject of marriage was a week before Dr. James died, on Monday or Tuesday, January 20 or 21, 1895. Hudson had

occasion to call to see James at his house, 925 Howard street, as he wanted to call upon Dr. Nusbaum, a physician, who had attended Hudson in his illness, to try to settle a disputed bill. It appears that Dr. Nusbaum had presented Hudson with a large bill for medical attendance and Hudson wanted James to negotiate a settlement; hence the visit of Hudson to Dr. James to act as an amicable intermediary. Hudson found Dr. James in his rear parlor as usual. Hudson had been there but a few minutes when he heard some one playing a piano in the front room and he asked who was playing. James told him that it was a Miss Laura Milen; the intervening doors were closed. Hudson said to James, "Why, I know a Miss Laura Milen!" James said, "Do you?" Hudson answered, "Yes, I have known her for some time; if you will speak to her, I should like to see her." He had no objections, and, opening the folding doors, brought Miss Milen out and said, "Judge, this is Miss Laura Milen." Hudson said, "Yes, I know Miss Laura Milen very well." *This was on the Monday or Tuesday before Dr. James died;* that would be the 21st or 22d of January, 1895. Hudson shook hands with Laura and asked her about her family and had a few moments' conversation with her. When she retired from the room Dr. James told Hudson that the Milen family consisted of Dr. Milen and Mrs. Milen and two daughters; that they came to his house and engaged rooms about the 13th or 14th of December, 1894; that Dr. Milen was an itinerant physician, traveling about the country; that Lulu was married to a man named Dickman, who was worthless. Dr. James said that he had rented the Dickmans rooms on the third floor at six dollars a month, and that he had rented the hall bedroom to Dr. Milen, and Mrs. Milen and Laura occupied it when Dr. Milen was absent; it was rented at $10 per month. Dr. James feared they would not pay him his rent; he said they were very poor; he said they were strangers to him and had been there a month at that time. Hudson had met the whole Milen family the first year that they were living in San Francisco on Ellis street—321. By reason of an advertisement Hudson was attracted to Dr. Milen. Milen advertised that he could cure the opium and liquor habit. Hudson had a lady friend whom he wanted cured and arranged with Milen to treat her. During that

time Hudson met Mrs. Milen and had a conversation about a book she was then writing entitled, "Was He to Blame?" Mrs. Milen told Hudson that she was writing this book and she wanted his lady friend to assist in copying the manuscript, as his friend wrote a better hand than Miss Laura Milen did. Hudson had his friend so engaged for two days and nights while she was absent from his home where she was staying; this lady friend was sojourning at Hudson's home. After the Monday or Tuesday preceding Dr. James' death, when Miss Laura Milen was presented to him as related, Hudson next saw James the same week, either on Thursday or Friday night. James came to Hudson's house in the evening and informed him that he had seen Dr. Nusbaum, but no definite arrangement had been made; that he was to see him again the next day. Hudson went to James' house the next day or on Saturday but did not see him. Hudson saw Miss Mangan but Dr. James was not at home. Hudson next saw Dr. James on the following Monday morning, January 28, 1895, the day he died. Hudson found Dr. James in his rear parlor sitting in his large armchair in his shirt sleeves or with a white night shirt or white coat, with a buggy robe thrown around him, around his shoulders, sitting near the grate on the right-hand side as one entered from the front. Dr. James was very ill; it was about 8 o'clock in the morning. Dr. James then told Hudson that on that morning, at about 4 o'clock, he was seized with a violent chill; that he was obliged to get up alone and make a fire in the grate to heat water to treat himself with; that he had been very ill but at the time he was talking he felt somewhat better sitting in his chair. Dr. James was very much troubled to talk or to breathe. Hudson reproved Dr. James for being alone and having no one to attend to him. Dr. James said to Hudson, "I don't believe there is a doctor in San Francisco that is as sick as I, who would not have sent for a physician," to which Hudson assented, but Dr. James said, "I am going to rely upon my medicine." Hudson told him that he must certainly get some one to look after him. The coalscuttle was empty; the embers were dying in the grate; only the smoldering remains of a fire were there; not out entirely but needed replenishing—altogether a cheerless scene on that winter's morning. No nurse about, no woman in sight,

nor anyone to attend to the wants of this sick and solitary old man. At that moment when most needed there was certainly a lack of woman's nursing and a dearth of woman's angelic ministrations. Then and there was the time and the place for the young wife to appear and to aid in appeasing the anguish and pain of her spouse; but, if Hudson is to be believed, there was no such appeaser about. Dr. James said to Hudson that his servant, Maria Mangan, would be in the room from time to time and he did not think he really needed anybody to be there to wait upon him all the time. Hudson remained for an hour or more. James told him that he had not concluded any positive arrangement with Dr. Nusbaum and had not seen him since. During the hour Hudson was with James no one came into the room. There was a sofa or lounge on the east side of the room; north of the door that entered the room from the hall, James had his armchair that he was sitting in; there were one or two chairs in the room. Dr. James' secretary desk was on the left of the mantel near the window. Dr. James begged Hudson to come around and see him again in the evening. Maria Mangan let Hudson into the house on that morning. Dr. James told Hudson that Maria was his only servant. In the evening Hudson went back to see Dr. James about half-past 7 and James was sitting in the same place in the same chair, with his robe thrown around him, without any coat on him and he was breathing very hard and was very ill. Hudson was there but a short time before Mrs. Jessie Milen came into that room from the hall, passed through the room; as she was passing she said, "Miss Laura and I have had tickets presented to us for the theater and we are going to the theater." She said never another word, but opened the folding doors and went into her own room; this was about quarter to 8 o'clock. Dr. James then remarked to Hudson, "They are going to the theater and will be home about 11 o'clock," and presently was heard the sound of two persons going out of their room and downstairs. Dr. James then said, "They have gone to the theater." Hudson found Dr. James very ill and said to him, "Don't you try to talk; I will talk to you"—trying to amuse him. Dr. James said to Hudson during that interview, "Judge, if anything should happen to me would my stepdaughter have anything to do with my estate?" Hudson

replied, "No, Dr. James, you have had two settlements with that woman and nobody will have anything to do with that estate but the executors of your will." Hudson was not his attorney and never had been. At this time nobody but the two men were present in the room, nor had there been during the hour except Mrs. Jessie Milen, who passed through prior to her going to the theater as stated. At the interview early in the week before he died nothing was said about marriage directly, but after Laura left the room Hudson remarked to Dr. James, "These young women are sometimes dangerous," to which James answered that he had been proof against that for a long while. When Hudson was leaving Dr. James on the night of the 28th of January, 1895, he talked with him about being alone and told him that he thought it was very imprudent; that there should be somebody with him. Dr. James replied, "I am not going to sleep to-night; I shall not lie down; I can't lie down. I shall sit in this chair all night." Hudson said to him, "I will get somebody to stay with you; you have no coal in your scuttle again and your fire is low." James responded, "Maria will come into my room at 10 o'clock, before she goes to bed, and will see to me." Hudson left at about 9 o'clock and never saw James again. The next morning he heard of Dr. James' death and went around to 925 Howard street quite early. He had not heard of the death until he went to the house at about 8 o'clock, and was horrified to see crape on the door. Hudson rushed upstairs and found Miss Maria Mangan, the clerk for the public administrator, a Mr. Cluen, and several other persons, at the secretary in Dr. James' office or back parlor. They told him that Dr. James had died at 11 o'clock in the night before. The public administrator's clerk was there receiving the personal effects of the deceased. Miss Maria Mangan was handing the effects to the clerk and he was taking account of what was found upon his person or in the secretary or desk of Dr. James. There were present Maria Mangan, Cluen, the clerk, and Hudson, and some women in the house. Laura Milen, Mrs. Milen, Mrs. Dickman, and Mr. Dickman were not there, no one nor any of them was there. The effects found were some thirty or forty dollars in money, bank bills and gold, some purses, a diamond ring, and some other articles found upon his person.

Maria Mangan delivered these in the presence of Hudson to Cluen, who was acting for the administrator. Hudson had a conversation on that morning with Mrs. Jessie Milen in her room, the hall bedroom; Laura was present. They said it was too bad poor Dr. James had died so suddenly. Mrs. Milen said to Hudson at that time and place, and in presence of Laura, that Dr. James had proposed marriage to Laura; the latter said nothing. After the funeral on Thursday Hudson saw Mrs. Jessie Milen at his own residence 226 Fifth street, on Saturday afternoon. Mrs. Milen called upon Hudson and told him that the diamond which was found upon the person of the deceased had been given to her by him a short time before he died. She told Hudson that she had been admiring the ring very much and remarked how happy she would be if she had such a ring, and he said, "If this will make you happy, I don't care for the ring, I will give it to you," and then he took it off of his finger and gave it to her. She wore the ring for a short time, but on the Saturday before he died, when he took her and Laura to the matinee, Mrs. Milen said that she could not wear her glove with that ring on and she took it off and gave it to him, and he put it in his pocket and never returned it. Mrs. Milen wanted to know from Hudson how she could obtain that ring from the administrator. He gave her some advice as to the mode of proving the fact of the present. Hudson saw Mrs. Milen again two or three days after that Saturday. He called at the James residence to see Maria Mangan to find out what was going on. He went into Mrs. Milen's room and inquired of her if she had found anybody to sustain her story about the ring. She then told him that a doctor and his wife had called to see the deceased just before he died and James had told them that he presented this ring to Mrs. Milen. Laura was present when Mrs. Milen made this statement, and at the same time Mrs. Milen told Hudson that Laura was engaged to be married to Dr. James before he died; she said they were engaged. Hudson frequently thereafter called at that house. On or about the 12th or 13th of February, 1895, at the same place he had an interview with Mrs. Milen, and she said that the administrator was going to allow them to remain in their rooms and that Laura was married to Dr. James before he died. That was the first intelligence Hud-

son had received of that interesting fact; up to that communication as made by Mrs. Milen he had no information or intimation of anything of the kind.

Mrs. Mary Gallagher, formerly Mamie Dalton, roomed in Dr. James' house, 925 Howard street, at the date of his death and for some time previous to that event. She was not in the room at the moment he expired but shortly after. Mamie Dalton, Vica Coon and Maria Mangan were upstairs in their beds when the bell rang, and in response they all came down together and found the doctor dead, and Mrs. Milen, Laura and Mrs. Dickman were there in the room. Mrs. Milen said that she and Laura had just returned from the theater and asked the doctor if there was anything he wanted and he said, "No," that if he wanted anything he had told Maria he would ring the bell, and with that Laura took a small bell from the mantel and rang and the three girls came down. Mrs. Milen told the undertaker that they were perfect strangers and that the doctor had no relatives here. Mrs. Dickman told Mamie Dalton, this witness, that it was too bad the doctor had died as he was engaged to her sister; Laura was not present at this remark.

Mrs. Annie Carter saw Dr. James three days before he died; she called at his house to see her sister, Mamie Dalton. Dr. James opened the door and as she entered she heard a piano playing in the parlor and said, "Doctor, I thought you had sold your piano." He said that he had but that it was Laura Milen who was playing; that as Laura had not space enough in her room for the piano he allowed her to move it into the parlor. Mrs. Carter was formerly a roomer in the James house but left on October 9, 1894, and was married from there October 10, 1894. Mrs. Carter had seen Laura Milen on a previous occasion to that testified to as to the incident of the piano playing. About nine days before the doctor died she had seen Laura passing through the hall in a low-necked dress and she remarked that the girl was finely dressed for a person who occupied but one room; he said, "Yes, and could not pay their rent at that."

Among those present at the time of the funeral of Dr. James was Newell Winants, an old friend, who had been acquainted with him since about 1865, when James was clerk for F. E. Weygant, proprietor of the Tremont House, on Jackson

street east of Montgomery; from 1889 Winants was very intimate with James. For a time James had a real estate office on the northeast corner of Montgomery and California streets. In 1889 he had a catarrh medicine, and manufacturing and vending that article and trading in real estate was about all his occupation. Dr. James and Winants were very intimate from that year until the end of the doctor's life. Dr. James was at the house of Winants on the second or third Sunday before his death at 2 or 3 o'clock in the afternoon. Winants and James had a general conversation for an hour or two on that occasion in which he put the question to James, "Why don't you get married?" James answered that he would not marry the best woman in the world, that he had no use for a wife, that his time was taken up with the study of medicine, and that he had passed the period of procreation for a long time. Winants asked Dr. James if he had his house full, and he said he had rented some rooms to a family about whom he did not know much. James did not mention their names. Winants was present at the funeral and saw there Maria Mangan and Judge Hudson and a lady in the back room with two children and two other ladies. Winants asked Maria who these two ladies were, and she said they were the people upstairs, and that the woman with the two children was not a tenant but was a friend of the deceased doctor. If Winants tells the truth, Dr. James was a dissimulator without apparent motive; there was no appreciable reason for lying.

Why James should have been so effusively communicative to the Terrys about his marriage and prospective paternity and about the same time conceal from old and confidential friends of more than thirty years' acquaintance these facts, and go further and give as a reason why he did not marry his impotency, is a proposition that is sought to be answered by the result of a solution of sophistry that attempts on the one hand to prove this marriage by circumstances of publicity, such as street introductions and the like, and on the other hand endeavors to destroy the effect of the doctor's denial by claiming that the "time, disposition, and circumstances of this case did not permit, nor was it necessary for Charles A. James to proclaim his marriage from the housetops, at the corners of the streets, or in the newspapers; the laws did not require it nor

did the good of society demand it." This is an extract from the very able argument of Mr. George W. Fox, whose adroit presentation of his case may be alluded to without invidious comparison to his associates, to whose views we have given adequate attention in the course of this opinion. Mr. Fox, in the passage quoted, says it was not necessary for the decedent to proclaim his marriage "at the corners of the streets," and yet he sturdily and strenuously insists on, as proof of a public proclamation, an introduction by Charles A. James of claimant as his wife to George Williams and John Bigley near the "corner of the street," on Howard street, near Fifth, in January, 1895! Public introduction and recognition! Miss Mary Vinnott was a dressmaker at 440 Clementina street, where she lived; she did some work in her line for Mrs. Milen; she had known Miss Milen and Mrs. Dickman since New Year's Day, 1895, and Mrs. Milen since a week after that day. Miss Vinnott was in the house at 925 Howard street on the night that Dr. James died; as to how she came to be there she relates that she was in the drugstore when Mr. Dickman came in and announced the fact and she went up there. Mrs. Milen and Miss Milen were there. Laura said, with a smile, that she would never forget the face that the doctor made as he died. Mrs. Milen said as she got up and walked toward the closet, "Laura, it would have been all right if you had married him; you would have all the property." Mrs. Milen told Miss Vinnott once that Laura might have married Dr. James but she preferred a strolling actor. On the night of the death of Dr. James, when Miss Vinnott was there, there were four ladies present—Miss Maria Mangan, Mrs. Dickman, Miss Laura Milen, and Mrs. Milen. Miss Vinnott sat on a lounge near the fireplace. When Mrs. Milen made the remark Laura was present; it was in the back parlor after the undertaker had gone away; it was about 2 o'clock in the morning. Miss Vinnott remained until 5 o'clock in the morning. Laura once said to Miss Vinnott at her house, while Mrs. Milen was present, that she could marry Dr. James but she did not care to as she only wanted the things. She had made a wine-colored dress for Laura and a couple of wrappers for Mrs. Milen. At the time of these conversations at her place Miss Vinnott was making a black silk dress for Mrs. Milen. There was in Miss Vinnott's establish-

ment at this time a young lady operative, Miss Ella Sullivan. The rooms of Miss Vinnott were then at 931 Howard street, near the James house. Miss Sullivan was there engaged in her occupation about a week before Dr. James died and a conversation occurred in which the participants were Mrs. Milen, Laura Milen, Miss Vinnott, and Miss Sullivan; the latter two ladies were then engaged in making over a wine-colored dress for Laura Milen. While the four were talking, looking out of the window, Dr. James was observed passing by, and Mrs. Milen remarked, "There goes Dr. James. Laura might easily marry him, but she prefers a strolling actor. I would 'pull his leg,' but Laura will not work with me." The expression "pulling his leg," Miss Sullivan explained as meaning to coax or wheedle his wealth out of him. About three days before the death of Dr. James—which would be about the 24th or 25th of January, 1895, on a Thursday or Friday—Miss Sullivan went to Mrs. Milen's room to hook on a dress, at about half-past 5 o'clock, as she was going to dinner with Dr. James. While Miss Sullivan was engaged in the hooking Laura came in and Mrs. Milen said to her, "Let us blow the old man in for theater tickets and a supper," and Laura said she would try. It is proper, in this connection, to observe that Mrs. Milen denies the accuracy of this detail and testifies in rebuttal that she received the black silk dress which Miss Vinnott made on January 5, 1895, and that Miss Sullivan fitted or buttoned that dress upon her about 5 o'clock on that day. Mrs. Milen was positive that it was that day, because Dr. James and Laura went to the matinee on that day, and Mrs. Milen did not go because Laura had her new dress finished and as Mrs. Milen did not have her dress ready she would not go. Claimant's counsel think that Miss Sullivan must have mistaken Mrs. Dickman for Laura.

John O'Neill was a roomer in the house of Dr. James. He was very familiar with the deceased and they conversed frequently in the evenings, sometimes from 7 to 10 o'clock in the evening. Two weeks before James died O'Neill had a conversation with him and remarked that he must be lonely since he had lost his wife, whom O'Neill had known. Dr. James replied that he was going to sell out there and move down town into a private hotel. O'Neill was in the house when Dr

James' wife died and he was there when the doctor himself died. He was there when the body was laid out by the undertaker. O'Neill was aroused by Maria Mangan at about 9 o'clock in the morning and told that Dr. James was dead. O'Neill arose and after attiring himself descended the stairs to the rooms of Dr. James, and there observed the undertaker proceeding to prepare the body for sepulture and heard him direct the ladies to retire into the rear apartment, whither they went accompanied by O'Neill, although the undertaker requested him to remain, but he declined to accede to this request. One of the ladies was Mrs. Milen, he could not remember whether Laura was one, Maria Mangan and Miss Coon were two of them, and perhaps one or two others. He did not hear anyone say, "Oh, my poor husband!" O'Neill never heard that the young lady claimant here was married until after the death of Dr. James, when Maria told him that Laura claimed to be his widow. There had been a piano in the rear parlor during the lifetime of Mrs. Susan K. James but after her death it was removed into the front room. O'Neill did not know whether it was the same piano. The date of the death of Dr. James was the 28th of January, 1895. O'Neill is a painter by trade—industrious, intelligent, uninterested.

Alphonse Astorg, a butcher at 108 Fifth street knew the deceased for about fifteen years before his death. Dr. James was a customer and used frequently to talk with Astorg, when the butcher was not busy, for fifteen or twenty minutes at a time. Astorg used to sell his medicine by the bottle; he never visited the house of Dr. James. Astorg was not dealing in mineral waters at that time. Astorg had a talk with Dr. James on the Saturday prior to his death, which would have been January 26, 1895, at about 9 or 10 o'clock in the evening. Astorg asked James why he did not get married. James said, "No marriage for me." Dr. James said that he was sick, had kidney disease, bladder trouble, dropsy. Dr. James had come into the shop of the butcher to buy meat and Astorg joked with him because he had seen him walking with a lady that afternoon, and remarked to Dr. James that he was quite a young man, and the doctor said that he had been at the matinee with the lady.

Mrs. Sarah Jane Williams knew the deceased since 1870; saw him very often in the latter years of his life. Dr. James used to call at Judge Hudson's house, where she was sojourning, and she used to open the door for him and let him in. She conversed with him frequently and freely. The last time he called she alluded to his long absence and she said to him. "The judge and I have been talking about you; we did not know whether you were sick or off getting married as young boys of your age are apt to do." Dr. James answered that he was not sick and had not been getting married, as he had had enough of that. The next time she saw him he was dead. She was at the house and heard no exclamation of mourning there at time of funeral or at the grave. Dr. James had told Mrs. Williams that he had dropsy, bladder trouble, and Bright's disease.

That Dr. James was and had been for some time in poor physical condition is clear from this testimony, if it be truthful. He had several ailments—dropsy, asthma, catarrh, bladder affection, kidney trouble, Bright's disease; many maladies conspiring to the collapse that occurred. He told Dr. A. Nusbaum on Thursday of the week before he died that he had anasarca, which is defined as a dropsical affection of the cellular tissue, and Bright's disease, an organic affection of the kidneys which does its work of destruction by inducing other diseases, and the effect of this disease is impotency in such a case as that of Dr. James, according to Dr. Nusbaum.

Patrick Lawlor, a grocer on the same block, saw Dr. James at 8 o'clock on the morning of the day of his death. Lawlor was accustomed to buy medicine of Dr. James, and on that day, at the hour indicated, he went to the doctor's office apartment and found him sitting in front of the fireplace alone; no one was with him. Dr. James said that he was deathly sick; he had been sick all night. He thought he had eaten too much on the night before. The last previous occasion on which Lawlor conversed with Dr. James was the Thursday prior, when he told him he had a young lady under treatment. Joseph McGrath kept a store for groceries and varieties at 921½ Howard street at and before the time of the death of Dr. James, and he was acquainted with the

members of the Milen family. They were all customers; he did not visit them in a social way, but he called at the house on business account. He knew Dr. James for about six months before he died; he was acquainted with him in the same manner as with the Milens. Mr. McGrath knew Dr. James longer than he did the Milens. James died about the 28th of January, 1895. His death was sudden. In talking to Mr. McGrath the day after the funeral concerning the accounts of Mrs. Dickman and Miss Laura Milen, Mrs. Milen advised him to be careful about these two accounts, not to get them mixed up. Mrs. Milen told McGrath that she had two daughters; that one was single and one was married—Miss Laura Milen and Mrs. Dickman—and that the latter's husband would have to be liable for his wife's account and that she, Mrs. Milen, would be answerable for Laura's account. On several different occasions for two weeks thereafter Mrs. Milen told Mr. McGrath at his store that Laura had been engaged to James, and that it was too bad that he did not live a while longer and she would have got his estate. After the funeral, when Laura came to the store of McGrath, she also mentioned that she was engaged to Dr. James. Mrs. Dickman several times said the same to him. Edward F. Cluen testified that in his capacity as clerk for the public administrator he went to the house of deceased immediately upon hearing of the event, and sealed the desk and put the official seal over the keyhole. Mr. Cluen examined the desk thoroughly, looking for a will. He did not remember seeing any loose sheets of writing paper nor the envelope marked in print "P. M. James." After examining the contents of the desk he shut it up and put his official seal thereon. Subsequently, on a second visit, in the presence of General Hart, Mr. Shadburne, Mrs. Milen, and the petitioner Laura, the desk was opened and the document here in question discovered. General Hart searched the desk on the second visit and found the envelope marked "P. M. James," and took out of it the contract. Evidently the superficial search was superior to the thorough examination.

William J. Herrin, an attorney at law and until lately a partner in the firm of Shadburne & Herrin, visited the house, 925 Howard street, on the second day of February,

1895, at the request of Mr. Shadburne, to ascertain if deceased left a will and also to secure information as to the existence and whereabouts of heirs. Mr. Herrin went with Cluen, the clerk for the administrator. He examined all the letters in the desk and found no will there or in the bureau or chiffonier. Mr. Herrin found some letters from P. M. James and Mattie. He found no paper purporting to be a marriage contract; but afterward, when General Hart examined the same desk, he had no difficulty in discovering the identical document in an envelope marked "P. M. James"; although Mr. Herrin swears that he examined all the letters in that receptacle. It is a common experience in life that the ability to find anything depends upon the knowledge of what one is looking for, and so it is illustrated in this item of comparative evidence; General Hart knew what he wanted and where it ought to be deposited and found it right there, while Mr. Herrin had upon his visit been prospecting for a will in utter ignorance of the claim of a marriage contract, of which there were at that time—February 2, 1895—no outcroppings. It was a hidden treasure, but "man's industry searcheth out many things," and it is recorded in the Book of Job, with which counsel are familiar, that "there is a vein for the silver; and a place for the gold where they fine it," and so the industry of man and his power of penetration may find a vein of marriage contracts undiscernible to others.

On February 21, 1895, when the petition of the public administrator for letters of general administration was heard and granted, the claimant here was present in court but made no application for letters on her own behalf and made no opposition to the claim of the public officer. She was sworn and examined as a witness on that occasion, and testified that the contract was drawn up and both signed it in the presence of each other, and then Dr. James took the document and placed it in his desk; that transaction took place on the 6th of January, 1895, and subsequently she had not seen the paper. This was the story she told in this court on the 21st of February, 1895, but on the 9th of March, 1897, although she says she cannot recall exactly what she testified on the first date, she distinctly denies that she made the sworn statement imputed to her; and yet again, after further examination, upon

the last date, March 9, 1897, in answer to cross-question, she qualifies her distinct and downright denial by saying that when she was asked if she remembered and answered as she had done to her own counsel she meant that she could not recall exactly but that she does know at the present time what she knew on the 21st of February, 1895, to this extent. What was done with the contract she does not know, but after the paper was signed Dr. James took it up and put it in his pocket and said he would wear it next to his heart, and when Mrs. Milen came home he showed it to her. The contract was not put there in the drawers of his desk until after Mrs. Milen had come home; she will not say positively that he put it back in his pocket. With this qualification made upon her final cross-examination claimant said the statement of February 21, 1895, was correct.

In view of this testimony it may well be asked, When and how came into the desk of the deceased this document? The claimant swore with the utmost particularity and precision on the 10th of December, 1896, in the trial of this cause, that on the sixth day of January, 1895, after the paper-writing was completed and signed, James said to her that she was now his wife, and "then he took the paper and tore it off the tablet and put it in his pocket, and said that he was going to carry that next to his heart; he placed it in his pocket on the left-hand side," she did not remember whether it was his vest or coat pocket, but "he must have put it in his vest pocket." This is straight, direct, positive and absolutely at variance with the testimony given by her on February 21, 1895, when she swore that when the contract was drawn up and signed, "then Dr. James took the document and placed it in his desk." When this contrariety of statement is brought home to her and established on the ninth day of March, 1897, she makes a lame and impotent attempt to reconcile the conflicting elements of her evidence. Plainly, there is a screw loose somewhere. On the 21st of February, 1895, about forty-five days after the making of this alleged contract, when the facts must have been fresh in her memory, she solemnly swears that the deceased spouse placed this precious paper in his desk. She had known nothing of such contracts before, neither had her father nor her stepmother. Such an anomalous sort of

ceremony was repugnant to the old-fashioned Methodistical ideas which came down from her ancestors, who would have rigidly insisted upon a parson and a certificate, and have taken care that the certificate was placed where it would be preserved for the protection of the honor and rights of the wife in the event of any question such as has arisen in this case. But bating any allusion to the facility with which this young woman agreed to this manner of marriage, it is more than passing strange that she should have so easily yielded up this sole muniment of her title to the sacred name of wife. It has been finely said that in the conduct of life, "we cannot spare the coarsest muniment of virtue," but we have a document here that constitutes the very highest and most valuable possession that a woman can hold to prove that she is a virtuous wife and her child pure progeny, and yet, instead of retaining it to protect herself and the possible issue of the marriage, she surrenders it to him, who may, if he choose, destroy it, or whose heirs may come and, through its loss or disproof, cancel her claims to honest wifehood and righteous maternity. "It is to be presumed that such contracts are made for the woman's protection; but here the order seems to have been reversed and the man procured the evidence of marriage and securely locked it in his desk for his own protection." If she told the truth on February 21, 1895, this is what Dr. James did; but if we are to believe her now, he placed it in his vest pocket, left-hand side, where he was going to carry it next to his heart, and with this safe deposit she seems to have been content.

Counsel for claimant argue that the marriage by contract and consummation and circumstances having been established, the child is presumed to be legitimate, the husband's potency having been demonstrated; "but if for any reason this court should hold that the alleged marriage contract is invalid or not proved, nevertheless the child is entitled to inherit under the code": Civ. Code, sec. 1387; Graham v. Bennett, 2 Cal. 503.

The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate: Code Civ. Proc., sec. 1962, subd. 5. Counsel claim that the infant Theodore is the son of Charles A. James, born in lawful

wedlock; but if the court find the marriage contract null and void, then the infant is entitled to inherit the whole of the estate under the provision of the Civil Code, which declares that "the issue of all marriages null and void at law are legitimate." Clearly, the counsel deserve commendation for their cleverness, for they have provided two strings for their bow. If marriage be not proved, and they ingenuously cast the burden of disproof upon the respondent, at all events they have shown that the claimant gave birth to a child who, like the early rose in the poem, "antedated its mission in an unprepared season"; and, by presumption of law and medical opinions and direct evidence, they make of this unseasoned babe the spine and marrow, the very pith and sinew, of their case.

It is claimed that Dr. James was the father of this child, because claimant testifies that he was its carnal cause and her testimony is truthful; but if the infant was not delivered in normal time, if the birth occurred in advance of the usual period of gestation, which is nine months or from two hundred and seventy-five to two hundred and eighty days, then if James was the father, the conception having been on the 6th of January and the birth on the 16th of September, 1895, the babe was brought forth prematurely, in eight months and a third instead of nine calendar months, according to the highest authorities, the proper term; and to support this theory Dr. Walton Preston testified that he attended the lady and delivered her, with instruments, of a seven pounds child, and that he noticed that the infant had undeveloped finger and toe nails, abbreviated and attenuated nails, which indicated that the complete limit had not elapsed. This item of the shortened nails signified that the babe had been sent "unfinished before its time into this breathing world." In no other respect was it curtailed of nature's fair proportions; the child was as healthy as the average child, and the trained nurse, Miss Mary Adelaide Waterman, a very intelligent woman, one who observes facts and reports them to the attending physician, saw nothing beyond these slightly undeveloped nails to indicate a premature birth. Miss Waterman said, "The nails indicated a slightly premature birth"; it was her duty as nurse and she did observe such details and call them

to the doctor's notice. The babe was born at 10:45 o'clock in the morning of the 16th of September, 1895, and weighed seven and three-quarter pounds; the child still lives.

The child still lives, and upon this question of the vitality and continued health of this infant, as affecting the proposition of its being born in full time, we have some medical testimony. Dr. Preston says that the idea that an eight months' child is less likely to live than one born in seven months is exploded. Dr. Frederick Walter Harris says that the consequence of conception immediately after menstruation is premature birth. A seven months' child has no advantage over an eight months. When we find a fact we generally look for a cause, and medical men when they can find no other assignable cause would accept the lack of development of nails as a sign of premature birth. Doctor Harris has known eight months' children who lived. The usual period of gestation is forty weeks; the ordinary period is two hundred and seventy days, according to this doctor's experience of twenty years, in which he has had four instances of actual observation of gestation and has devoted much time to the study of the theory. In the case put to him Dr. Harris said the child would be a weakling from the beginning. Dr. John Leffler, "a physician of the old and only school," allopathy, performed an operation on the claimant on May 24, 1896, at 925 Howard street, in presence of Dr. Preston, Dr. Cox, and another doctor. Dr. Leffler was called in by Dr. Preston to assist him; it was a case of laceration of perineum. The German calculation of the period of gestation is two hundred and seventy-six or two hundred and seventy-eight days. No reason is assigned why German gestation should differ from any other, and it may safely be assumed that nature develops her processes alike here and there.

Dr. John F. Dillon practices in a fertile district, as appears from his testimony, for in the course of three years he has had about one thousand cases in obstetrics, averaging more than one case a day, excluding Sundays, for it is supposable that this bright and energetic young doctor (who belongs also to "the old and only school") had an occasional Sunday off from his general delivery business at the corner of Fourth and Harrison streets. Doctor Dillon gave his opinion that attenu-

ated and abbreviated nails indicate premature birth; he also said that two hundred and eighty days is the average period of gestation; he meant ten lunar or nine calendar months. Dr. Walton Preston had testified that in his twenty-three years of practice in various places he had delivered from six hundred to eight hundred children.

Dr. Washington Ayer may be considered as a patriarch among the physicians of the regular old school, for fifty years engaged in active practice of medicine and surgery, modest withal in his enumeration of achievements in his art, for he simply says that although in a general family practice for half a century he has "had many accouchments during that time"; he says that the usual period of gestation is nine months or two hundred and seventy-five to two hundred and eighty days. The signs of premature birth are lack of development, the general appearance of the child without noting any particular marks upon it; there is no infallible sign. If it is seven or eight months there would be an arrest of development of nails; as it approached toward the full period, eight months say, there would be nothing that would be reliable whatever, except the general appearance of the child would indicate the period of maturity, the term of gestation. A seven months' child has been generally considered more likely to live than an eight months' child. Where an eight months' child is born, it is usually almost invariably where women have borne children and the womb becomes enfeebled, the appendages changing place in the structure of the membranes of the womb, producing fatty degeneration or calcareous formation—this would bring about a condition of malnutrition, with the consequence of premature birth, and the child would carry that feebleness with it and would die of inanition. Dr. Ayer says that so far as his observation has extended in the course of his fifty years of experience, children born at a period of eight months' gestation survive but a short time, about nineteen out of twenty perish; hardly five per cent of survivals. The first child is less likely to be eight months than the afterborn children. Assuming that a man and woman are married on January 6, 1895; the man dies on January 28, 1895; there is a child born to the woman on September 16, 1895; a period of gestation of two hundred and fifty-three days,

if the child was a strong, healthy child, "as healthy as the average child," no defects in its development, Dr. Ayer thinks that his judgment on such hypothesis would be erroneous. In such a case this expert physician thinks that it was within the period of gestation, or that gestation must extend beyond the time stated—that is to say, that conception must have preceded marriage. If a child was born in two hundred and fifty-three days after conception and was perfect in every way except its finger and toe nails were shorter than they should be, Doctor Ayer would not attach any importance to the lack of nail development, and he would not say that a seven and three-quarters pound child, eating regularly and healthy in every respect, was a premature child. A healthy child during the first few days after birth sleeps all the time except when nursing. As the result of his own observation comprehending more than a generation, including attendance on over two thousand births, Dr. Ayer cannot call to mind any case where an eight months' child survived. The period or liability of life in such case is very brief; very short, indeed. After a series of definitions of anasarca, cystitis or inflammation of the bladder, Bright's disease, and kindred ailments, the hypothetical question was addressed to this doctor: Assume a man sixty-three years of age; well built; about five feet and five inches in height; weighing about one hundred and fifty pounds; suffering from Bright's disease and anasarca to such an extent that he died on the twenty-eighth day of January, 1895—would it have been possible for him to have had sexual intercourse on the 6th of January, 1895? To which question Dr. Ayer made answer that he did not think it would be possible; it would not have been probable. Where there is anasarca, any dropsical affection, the corpuscles of the blood lose tone; they lack stimulant to muscular fiber, and consequently would not stimulate the erecticle tissue enough for the performance of the marital rite of coition; there could be no coition. It would not be possible in the assumed case for him to have had sexual intercourse every night from January 6th to January 28th, or at all. Usually death is sudden in case of Bright's disease; at the end some premonition of death for a few days prior thereto is shown, but usually it comes very sudden at last. The constitutional

condition and habits of life being average throughout, the patient's period of life might be protracted a year.

There is a somewhat musty proverb as to the effect of the disagreement of doctors; in this case the court must decide upon the apparent conflict of evidence. There are three physicians who testify one way, one who expresses a contrary opinion—three to one; no difficulty if numbers count. But the law says that numerical force must yield to superior quality; hence, we have undertaken a sort of analysis qualitative and quantitative of the doctors' dicta. Dr. Preston says that it is an exploded idea that an eight months' child is less likely to live than one born in seven months. Dr. Harris considers the chances equal; Dr. Dillon thinks the eight months' child has a vital advantage. Dr. Preston has practiced twenty-three years, Harris twenty, Dillon three; the sum of the experience in years of these three medical gentlemen is forty-six; the extreme estimate of the number of cases attended by them is eighteen hundred. Dr. Ayer, opposed in opinion to these three, has been fifty years in active practice as a general family physician, forty-eight years continuously in San Francisco, and has attended over two thousand births. All other things being equal, credit, character, capacity, what principle of evidence turns the scale? It is that which is expressed in the statute, that the court is not bound to decide in conformity with the declarations of any number of witnesses against a less number or against a presumption or other evidence satisfying the judicial mind; and the application of this principle gives greater force to the opinion of Dr. Ayer than that of the three learned doctors who differ from him.

Doctor Ayer has spent more years in the practice of his profession and has had more experience in the obstetric art than all the others combined, and he is certainly their professional peer. In endowment of education and character he is, on this record, at least equal to his younger brethren who have testified and outranks them in the duration and area of his practice, and he declares that he has never known a case of an eight months' child that has survived more than a short time; out of two thousand cases in the course of fifty years he could not recall a single case of such survival; and the shortness of nails is in itself a matter of no importance.

Relatively Dr. Ayer's testimony seems most trustworthy. From the medical testimony herein collated no other conclusion can be reached by the court than that the infant came forth in the natural order and in due season—that is to say, that the period of gestation was nine calendar months, or approximately two hundred and eighty days; and that, consequently, the child must have been conceived prior to the sixth day of January, 1895, the date of the alleged contract marriage; and from all the evidence, medical and other, that deserves credence, the court deduces the conclusion that the decedent was so far the victim of diseases that impaired his generative power that he was incapable of procreation and, hence, was not, and could not have been, the father of the child or any other child. He was destitute entirely of propagative faculty.

It is claimed by counsel for the claimants that the genuineness of the signature of Dr. James to the written consent is proved by the testimony of Laura, who saw him sign it; by his admission of the writing to Dr. and Mrs. Milen; by the admission of the marriage by Dr. James to Mrs. Dickman and to Dr. Terry and son, as this admission comprehended the signing of the written consent to marriage, and by the introduction to Williams and Bigley of his wife, which also involved an admission of the marriage and of the written consent connected therewith; by the written consent having been found in the desk of Dr. James, which desk was locked and sealed the day after his death, and by the testimony of Rufus C. Hopkins, an eminent expert and respected octogenarian and pioneer, a man of half a century's experience in the examination of handwriting, well known to the court and to the community for his exalted character and prime capacity in his specialty.

Against the opinion evidence of Mr. Hopkins is the testimony of Mr. Gustav Folté and Mr. Albert M. Whittle, connected as paying teller with two savings banks in which the decedent was a depositor, each of whom knew Charles A. James and saw him often sign his name for many years in the books of their banks, and both of whom from that knowledge and comparison with admittedly authentic signatures pronounce the signature "Chas. A. James" on the alleged marriage con-

tract to be a forgery and a simulation of the signature to the paper marked in evidence "Mrs. James' Exhibit 8A," which is here transcribed.

Written on a printed heading:

"(16) ☞Please send answer by
Wells, Fargo & Co.'s Express.

"San Francisco, Jany. 16th, 1895.

"Theo. Milen, M. D.

"Inclose I send you money order on W. F. & Co., San Jose, for Twenty-five dollars at your and wife's request. Please return at your earliest convenience and oblige

"CHAS. A. JAMES,
"925 Howard St.,
"San Francisco.

"(Mem. The original was written in black ink on yellow paper. This is here inscribed in red ink to indicate it as an exhibit.)"

Mr. Folté, of the German Bank, examined both papers and came to the conclusion that the signature to the alleged marriage contract is not genuine, but a copy of the signature to the authentic document herein immediately above transcribed; "there are scarcely two millimeters difference," an almost infinitesimal appreciation of space. One twenty-fifth part of an inch of our English measurement is equal to one millimeter. Mr. Folté does not think the signature on the contract is a tracing but a copy. The general character of the signature on Exhibit 8A, the letter to Dr. Milen, is that of freedom, regularity and lack of hesitation; in the subscription to the alleged contract there is an absence of regularity and marks of hesitation. No man writes a signature twice alike.

Mr. Whittle, of the Savings Union, familiar for nineteen years with the signature of Chas. A. James as a depositor in that institution, was of the opinion that the signature to the alleged marriage contract was a copy of the signature to the paper "Mrs. James' Exhibit 8A." It was not a tracing but an imitation and a very close one. Mr. Rufus Clement Hopkins, to whom, as an expert, counsel and court have paid

merited tribute, scrutinized several documents said to be authentic signatures of decedent and after comparison with the disputed signature pronounced the latter genuine. Mr. Hopkins examined and made tracings of the signatures of twelve admittedly authentic papers in evidence, and compared them with the signature to the disputed contract, concluding from the comparison that the contract signature was authentic. General Hart, of counsel for claimant, considers these tracings, which were given for the purpose of showing approximately the character of the signature of decedent with respect to uniformity and other features that give expression to handwriting and indicate the authorship of the script, and the counsel thinks these tracings are sufficiently exact as compared with the original to serve that purpose, and claims from these tracings that it is clear that decedent had no fixed or stereotyped habit or form in signing his name, and that while all of his signatures bear a characteristic family resemblance, they differ in features as much as the children of the same parents differ from each other; but it may be added to this argument, that there are sometimes twins in a family group, and the subscriptions to the two papers, "Mrs. James' Exhibit 3" and "Mrs. James' Exhibit 8A," may be categorized as twin signatures. General Hart exclaims interrogatively, "If this marriage contract be a forgery, where did the forger find the model or exemplar?" The answer is made by the adverse counsel that it was found in the paper coming from the claimants' side marked "Mrs. James' Exhibit 8A," and the counsel so answering, Mr. George D. Shadburne, is impressed with the idea that the contract signature is a tracing the signature on that exemplar, the letter to Dr. Milen. and Mr. Shadburne thinks that an examination of the paper "Mrs. James Exhibit 8A" will demonstrate this idea indubitably; mark the condition of the yellow paper, pinholes and creasings and other indicia of fabrication. All this may be so—there are certainly symptoms of tracing—but the evidence does not favor this theory so much as it does that of copying or imitation, and the very discrepancies between the two signatures fortify the opinion that the final form of forgery adopted was the latter, although tracings may also have been tried. "No man writes his signature twice alike,"

say the experts; even twins are in some details discrepant to the sharp scrutineer; and applying this general philosophy to the particular proposition, there may be found in these twin signatures the following discrepancies:

In the entire length of the name from the beginning of the point in the capital letter "C" to the end of the point in the letter "s" in "James" there is a difference of one-sixteenth of an inch.

Exhibit 8A being one-sixteenth of an inch longer than that of Exhibit 3. The cause being that the tail in the "s" is longer in 8A than in 3.

The length of the capital "C" in Exhibit 3 is one-sixteenth of an inch longer than in Exhibit 8A.

The length of the loop of the capital "C" is one thirty-second of an inch longer than in Exhibit 8A.

There is a slight difference in the ending of the capital "C," the one in Exhibit 8A ending with a sort of a curve.

The "s" in "Chas." in Exhibit 3 is one thirty-second of an inch longer than in Exhibit 8A.

The capital "A" is one thirty-second of an inch longer in Exhibit 8A than in Exhibit 3.

The upper loop in the letter "J" in the Exhibit 3 is somewhat flat in comparison with that of Exhibit 8A.

The lower loop in the capital "J" in the Exhibit 8A is one-sixteenth of an inch longer than in the Exhibit 3.

In the word "James" the letters "a" and "e" in Exhibit 8A are more in a direct line than in Exhibit 3.

In Exhibit 3 it will be observed that these two letters are somewhat elevated above the line.

It is also noticeable that the "s" in "Chas." in Exhibit 3 ends with a tail thus, "Chas.," while there is scarcely any caudal appendage in the terminal "s" in Exhibit 8A: "Chas."

A remarkable feature of the two signatures is that the angles of the different letters are identical. This can be more readily observed by measuring the distance from the edge of both documents to the beginning of the name, or any part thereof, and it will be noticed that there is not the slightest difference in any part of the name.

These comparisons suggest the counterfeit. The trivial discrepancies indicate imitation—here is where the work of the forger is found out; some small slip in simulation leads to detection, where all else is identity in form. There is always a clue to crime even though the criminal be not caught.

This alleged contract is a forgery beyond any shadow of doubt; there is no escape from this conclusion upon the evidence as presented and herein examined and analyzed. But how, asks counsel for claimants, did that contract get into the desk of the deceased? It is patent from the circumstances that it was put into that desk between the 2d and 22d of February, 1895. The testimony of Cluen and Herrin shows that it was not there when the desk was first examined after the death of Dr. James, on the 2d of February, 1895, when a thorough examination was made of the contents. Then the desk was locked by the public administrator's clerk and he put his official seal, a common stamped circular paper seal, over the keyhole. Afterward, on February 25, 1895, there was another examination and an exhibition in which there was dramatically developed from that self-same secretary the desired document. Claimant knew of its existence and whereabouts on the 2d of February, 1895. She knew when the public administrator presumed to take possession of her premises that the paper attesting her right was in that receptacle, and once produced no one would dare to trespass upon her domain. She saw her husband after the contract was executed place it in that repository, so she testified on February 21, 1895, and it was either there or next his heart in his vest pocket, yet it was sought out in neither place; nor was its existence proclaimed either from housetops or in the silent sanctuary wherein lay the enshrouded body of her departed husband and father of her prospective child. Neither at the wake nor at the funeral from the house nor at the interment in the cemetery was there aught to indicate that claimant was wife or widow. She was present when Dr. James died, say her counsel, but the evidence is uncontradicted that she made no sign of mourning such as a suddenly bereaved wife would naturally exhibit. Unless she were a very clod, instead of a young and tender woman, made widow without warning, she would have given vent to uncontrollable

emotion of grief at such a domestic catastrophe. "She manifested her affection by dropping a rose in his grave," say her advocates, and then in company with her chaperon, Mrs. Jessie Milen, she leaves the cemetery and returns to their lodgings, without the slightest allusion to her rights as widow.

The condition of the desk and the appearance of the seal indicate that they were tampered with. The seal could easily have been removed and replaced, and no such flimsy affair should be employed by a public officer for so important a purpose. The inference from the evidence is irresistible that this forged paper was inserted in that desk and the seal taken off and, when the purpose was accomplished, reattached; the whole scheme is artificial and apparent. Meanwhile the story of the marriage was concocted, "a story of love and passion"; fatuous old December engaged in dalliance futile, perhaps fertile, with blithe young May; the antique tale of Winter lingering in the lap of Spring—all very romantic, but quite untrue; mere material for a new novel in which may be inwrought the letters so carefully contrived to support claimant's case and put up the same as any other prescription by the doctor in this drama. This claimant never asserted herself as widow until about February 13, 1895, when the telegram was sent to Dr. Milen in San Jose that she was pregnant. Prior to that time no such pretension was put forth; even in her own household her brother in law Dickman ridiculed the idea, as his testimony shows. He never believed the story, and knew it was an invention. As his telegram and letter to Miss Mattie James in the east clearly establish, he had no faith in any such preposterous pretensions, and he clearly wanted to corner the heirs by obtaining a power of attorney carefully prepared for that purpose and in evidence here.

The testimony on both sides of this case has been reviewed with care, and I think the abstract given in this opinion omits no matter essential to a correct conclusion, and contains nothing irrelevant or immaterial. It has not been deemed necessary to condense character evidence or to allude to it; the facts of the case are here. The claimant and her stepmother have in about every instance where the respondents intro-

duced witnesses against them met such statements with prompt and point blank denials; everything contrary to their stories was absolutely and totally false, no matter how strong the inherent probability of those witnesses nor how compact the circumstances nor how reputable and uninterested such persons so testifying might be—they were all utterers of untruth; but this controversy must be determined by the whole record, and by that record the claimants must stand or fall.

Upon the record here presented, this court pronounces judgment: 1. That the alleged contract is not legal in form, according to the decisions of the supreme court; 2. That the alleged contract is a forgery; 3. That there was no mutual assumption of rights, duties or obligations marital, and that they never lived together as husband and wife; 4. That the child claimant is not the child of the decedent, Charles A. James.

Application denied as to Laura Milen James and Theodore Milen James; granted as to absent heirs.

FINDINGS.

The applications for distribution herein came on regularly for hearing before the court sitting without a jury, a jury trial thereof having been duly waived, Messrs. W. H. H. Hart, Geo. W. Fox and Aylett R. Cotton representing Laura Milen James (so called) and Theodore Milen James (so called), and Geo. D. Shadburne, Esq., representing the absent heirs of said deceased, on the ninth day of December, 1896, and was on hearing from day to day until the twelfth day of March, 1897, during which time the evidence, oral and documentary, of the contestants was educed and presented, whereupon after the argument of counsel said applications were duly submitted to the court for its decision, and now after mature deliberations the court finds the following:

FACTS.

I. That Charles A. James died intestate in the city and county of San Francisco, state of California, on the twenty-eighth day of January, 1895, leaving him surviving: 1. P. M. James; 2. Chas. T. James; 3. Nathan W. James; 4. Francis

T. Broughton; 5. Lucy A. Nichols; 6. William J. Clark; 7. Lydia E. Hoxie; 8. Geo. W. Clark; 9. Hannah A. Wadsworth; 10. Amy A. Reisch; 11. William Henry Barber; 12. Mattie E. James; 13. Daniel M. James; 14. Elizabeth E. Barber; 15. Lydia L. Hopkins; and 16. Willard B. James, who are of the following degrees of relationship to said deceased, to wit:

1. P. M. James, Chas. T. James, Nathan W. James, Francis T. Broughton, and Lucy A. Nichols, who are the issue of Peleg W. James, a deceased brother of said Charles A. James, deceased.

2. William J. Clark, Lydia E. Hoxie, Geo. W. Clark, Hannah A. Wadsworth and Amy A. Reisch, who are the issue of Rocellany E. Clark (née James), a deceased sister of said Charles A. James, deceased.

3. William Henry Barber, who is the issue of Mary A. Barber (née James), a deceased sister of said Charles A. James, deceased.

4. Mattie E. James, who is the issue of Thomas A. James, a deceased brother of said Charles A. James, deceased.

5. Daniel M. James, who is a brother of said Charles A. James, deceased.

6. Elizabeth E. Barber (née James), who is a sister of said Charles A. James, deceased.

7. Lydia L. Hopkins (née James), who is a sister of said Charles A. James, deceased. And

8. Willard B. James, who is a brother of said Charles A. James, deceased.

II. That all the above-named nephews and nieces, brothers and sisters of said Charles A. James, deceased, are and at all times mentioned in their petition herein were nonresidents, to wit, residing out of the state of California.

III. That on the twenty-first day of February, 1895, Andrew C. Freeze, Esq., was, by the order of said Superior Court, duly entered and made, duly appointed the administrator of the Estate of said Charles A. James, deceased, and his powers as such administrator have never been revoked.

IV. That thereafter, to wit, on the twenty-first day of February, 1895, notice to creditors to present their claims against said estate were duly published.

V. That thereafter, to wit, on the fourth day of March, 1896, said administrator presented his account of his administration to said court for allowance, and the same was duly allowed and settled on the twentieth day of March, 1896.

VI. That all the claims against said deceased presented to said administrator and all the taxes against said estate have been and were at the time of filing said applications for distribution herein paid and discharged, and said estate was then and is now ready for distribution.

VII. That the residue of said estate now remaining in the hands of said administrator is that certain real estate situate in said city and county, bounded and described as follows, to wit: Commencing at a point on the southeasterly line of Howard street, distant thereon 75 feet southwesterly from the southerly corner of 5th and Howard streets; thence southwesterly along the southeasterly line of Howard street 25 feet; thence at right angles southeasterly 80 feet; thence at right angles northeasterly 25 feet and parallel with Howard street, and thence at right angles northwesterly 80 feet to the point of commencement, together with the improvements, consisting of a three-story frame building and the appurtenances appraised at $15,000; also, personal property consisting of cash on hand about $31,000; and the following jewelry, to wit: One small gold ring; one large gold ring; one gold ring with five diamonds; one amethyst set consisting of brooch and earrings; one diamond stud; three yellow metal collar buttons; one gold watch No. 10095, J. W. Tucker, maker; one gold chain; one pair of diamond earrings containing six stones each; one pair gold bracelets, containing nine diamonds each, and one gold cross containing sixteen diamonds.

The furniture has hitherto been sold by the administrator under the order of the court.

The wearing apparel of Chas. A. James, deceased, and of his deceased wife, Susan K. James, have not been accounted for by said administrator. The above residue of property is subject to expenses of administration and counsel fees for absent heirs, which have not been settled or allowed.

VIII. That Laura Milen James (so called) never was at any time the wife or widow of said Charles A. James, either by contract or otherwise.

IX. That Theodore Milen James (so called) is not the child of said Charles A. James, legitimate or illegitimate, or otherwise.

X. That said Charles A. James left him surviving neither issue, surviving wife, father nor mother.

XI. That all of the property aforesaid was the separate property of said Charles A. James, deceased.

From the foregoing facts the court finds the following

CONCLUSIONS OF LAW.

That P. M. James, Chas. T. James, Nathan W. James, Francis T. Broughton, Lucy A. Nichols, William J. Clark, Lydia E. Hoxie, Geo. W. Clark, Hannah A. Wadsworth, Amy A. Reisch, William Henry Barber, Mattie E. James, Daniel M. James, Elizabeth E. Barber, Lydia L. Hopkins and Willard B. James, are the next of kin and heirs at law of said Charles A. James, deceased, and as such are entitled to inherit his estate—to the brothers and sisters in equal degree, and the nephews and nieces by right of representation.

Let a decree of distribution be entered accordingly.

The Principle Case Was Appealed to the supreme court and reversed on questions of evidence. No new trial of the case was had, however, and the judgment of the trial court stands as originally rendered. Hence it may well be doubted whether the action of the appellate tribunal materially affects the decision of the lower court as an authority.

COMMON-LAW MARRIAGES.

Marriage as a Civil Contract.—Marriage is a civil contract, depending for its validity upon the free consent of parties not laboring under any legal disability, and upon nothing else in the absence of positive statutory declarations to the contrary: Brisbin v. Huntington, 128 Iowa, 166, 103 N. W. 144; Floyd County v. Wolfe (Iowa), 117 N. W. 32; Hulett v. Carey, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384; Keen v. Keen, 184 Mo. 358, 83 S. W. 526; Voorhees v. Voorhees' Exrs., 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 95 Am. St. Rep. 609, 67 N. E. 63, 63 L. R. A. 92; Commonwealth v. Haylow, 17 Pa. Super. Ct. 541. To quote from Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737: "A marriage is a civil contract, made in due form, by which a man and woman agree to take each other for husband and wife, during their joint lives, unless it is annulled by law, and to discharge toward each other the duties

imposed by law upon such relation. Each must be capable of assenting, and must in fact, consent, to form this new relation."

Marriage as a Status.—But while the law defines marriage as a civil contract, and such indeed it is, it is something more than a mere contract, for it creates a status or relation as much as that of parent and child, which the parties of themselves cannot dissolve: Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A., N. S., 767; Hilton v. Roylance, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723; Holmes v. Holmes, Fed. Cas. No. 6638, 1 Saw. 99. "Marriage is more than a mere civil contract for the establishment and maintenance by the parties to it of certain relations to each other. It involves, except in so far as it has been modified by statute, an intimate personal union of those participating in it of a character unknown to any other human relation, and it creates a civil status, the maintenance of which in its full integrity is vital to the moral welfare of society": Taylor v. Taylor (Md.), 69 Atl. 632. Said the supreme court of Missouri: "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential. While it is here declared to be a civil contract, it is almost universally held to be something more than an ordinary contract. Marriage is a status, created by contract, and we formulate the definition of it as follows: Marriage is the civil status of one man and one woman, capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of sex": State v. Bittick, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325, 11 L. R. A. 587. "What persons establish by entering into matrimony is not a contractual relation, but a social status; and the only essential features of the transaction are that the participants are of legal capacity to assume that status, and freely consent to do so": University of Michigan v. McGuckin, 64 Neb. 300, 89 N. W. 778, 57 L. R. A. 917.

Essentials of Common-law Marriage.—The mutual agreement to be husband and wife in praesenti by a man and woman capable of assuming that relation, especially if followed by matrimonial cohabitation, constitutes a common-law marriage, without any necessity for a solemnization or formal ceremony of any kind: Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; Smith v. Fuller (Iowa), 108 N. W. 765; Laurence v. Laurence, 164 Ill. 367, 45 N. E. 1071; McKenna v. McKenna, 73 Ill. App. 64; Hutchinson v. Hutchinson, 96 Ill. App. 52, 196 Ill. 432, 63 N. E. 1023; Porter v. United States (Ind. Ter.), 104 S. W. 855; State v. Walker, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac. 279; Matney v. Linn, 59 Kan. 613, 54 Pac. 668; Williams v. Kilburn, 88 Mich. 279, 50 N. W. 293; State v. Worthingham, 23 Minn. 528; Dickerson v. Brown, 49 Miss. 357; Floyd v. Calvert, 53 Miss. 37; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; Voorhees v. Voorhees'

Exrs., 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; Carmichael v. State, 12 Ohio St. 553; Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56; Overseers of Poor of Town of Newbury v. Overseers of Poor of Town of Brunswick, 2 Vt. 151, 19 Am. Dec. 703; Mathewson v. Phoenix Iron Foundry, 20 Fed. 281; United States v. Route, 33 Fed. 246; Holabird v. Atlantic Mut. Life Ins. Co., Fed. Cas. No. 6587, 2 Dill. 166.

Proof of Contract.—A marriage contract may, like other contracts, be proved by the signature of the parties or by witnesses who were present when it was made: In re Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263; Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198. If such evidence is wanting, then marriage may be proved from cohabitation, reputation, conduct and other circumstances (Smith v. Fuller (Iowa), 108 N. W. 765; Pourier v. McKenzie, 147 Fed. 287), of which more will be said hereafter. While the evidence to establish a common-law marriage should be clear, consistent and convincing (In re Rossiquot's Will, 112 N. Y. Supp. 353), still each fact and circumstance relied upon need not be so conclusively proved that no other reasonable conclusion from the evidence can be drawn; it is enough that all the facts and circumstances are fairly sufficient to justify a finding in favor of the marriage: Edelstein v. Brown (Tex. Civ. App.), 95 S. W. 1126.

Conflict of Laws.—The rule that a marriage, valid in the state or country where entered into, is valid in every other state or country, unless there prohibited by some positive rule of law or public policy (Succession of Gabisso, 119 La. 704, 121 Am. St. Rep. 529, 44 South. 438, 11 L. R. A., N. S., 1082; Commonwealth v. Graham, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. 706, 16 L. R. A. 578; Pennegar & Haney v. State, 87 Tenn. 244, 10 Am. St. Rep. 648; State v. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81, 40 L. R. A. 428; Willey v. Willey, 22 Wash. 115, 79 Am. St. Rep. 923, 60 Pac. 145), applies to common-law marriages: Darling v. Dent, 82 Ark. 76, 100 S. W. 747; Smith v. Smith, 52 N. J. L. 207, 19 Atl. 255; Estate of McCausland, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780. Hence, a common-law marriage contracted in a state where such marriages are valid may be recognized in another state where such marriages cannot be entered into: Nelson v. Carlson (Wash.), 94 Pac. 477.

A marriage by contract in one state, followed by cohabitation in another state, was held valid in Gibson v. Gibson, 24 Neb. 294, 39 N. W. 450. And where the question as to the validity of a common-law marriage arose in Alabama after there had been cohabitation in Kentucky and in Ohio, the supreme court of Alabama said: "Although the statutes of Kentucky declare every marriage void unless solemnized in the manner provided therein, and a common-law marriage cannot be contracted in that state, yet evidence was properly admitted to show that the cohabitation, which began and continued for ten years in Ohio, where the common law is presumed to prevail, and where a common-law marriage is valid, in the absence of a

statute expressly prohibiting such marriage, was continued for two years longer in Kentucky. Such evidence was not admissible to prove that the marriage relation grew out of the cohabitation in Kentucky, or that the cohabitation became lawful in Kentucky by the parties agreeing in that state to be man and wife; but it was clearly admissible to strengthen the presumption that the cohabitation in Ohio was lawful. It is always competent, on an issue of marriage vel non, to show the duration of the cohabitation": Moore v. Heineke, 119 Ala. 627, 24 South. 374.

Effect of Common-law Marriage.—A common-law marriage confers upon the parties all the rights and subjects them to all the duties and obligations usually incident to the marriage relation when entered into in accordance with the written law: Steves v. Smith (Tex. Civ. App.), 107 S. W. 141; Davis v. Pryor, 112 Fed. 274, 50 C. C. A. 579. If the father and mother of a child, soon after its birth, agreed with each other in one state to become, and live together as, husband and wife until parted by death, thereafter continuing to live together as, and holding themselves out to the world to be, husband and wife, such contract of marriage legitimates their child, not only in that state, but also in another state where a common-law marriage is recognized as valid: McCausland's Estate, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780. And in case of the wrongful death of a man, his wife and children by a common-law marriage may recover damages therefor: Galveston, H. & S. A. Ry. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135.

Necessity for Agreement.—It is essential to a common-law marriage that there shall be a mutual agreement between the parties to assume toward each other the relation of husband and wife. Cohabitation without such an agreement does not constitute marriage: Compton v. Benham (Ind. App.), 85 N. E. 365; Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33; and an agreement to live together is not marriage, if there is no agreement to live as husband and wife: Soper v. Halsey, 85 Hun, 464, 33 N. Y. Supp. 105.

Form of Agreement.—No particular words, however, are necessary to constitute a valid marriage by mutual agreement; if enough is said and done to evidence an intention by the parties to assume a marital relation, this is sufficient whatever may be the form of expression employed. But enough must be said and done to show such intention: Mickle v. State (Ala.), 21 South. 66; Heymann v. Heymann, 218 Ill. 636, 75 N. E. 1079; Bowman v. Bowman, 24 Ill. App. 165; Marks v. Marks, 108 Ill. App. 371; Clancy v. Clancy, 66 Mich. 202, 33 N. W. 889; State v. Hansbrough, 181 Mo. 348, 80 S. W. 900; In re Hines' Estate, 7 Pa. Dist. Ct. 89. The intention of the parties is to be gathered from the circumstances attending the contract, rather than from mutual reservations or secret intentions of either party: In re Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263. If there is an agreement, followed by cohabitation, a marriage

is established, regardless of what the parties consider the legal effect of the contract: Tarrt v. Negus, 127 Ala. 301, 28 South. 713.

Implied Contracts.—While some doubt has been expressed on the question, still it would seem clear that to constitute a common-law marriage, an express agreement is not essential, but a contract to live together as husband and wife may be implied from the acts and conduct of the parties; and that a contract so implied has all the force and effect of a contract expressed in written or spoken words: Hilton v. Roylance, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568. "If a marriage contract need not be evidenced by writing, and of course it need not be, we can conceive of no reason why it may not, like many other civil contracts, be evidenced by acts and conduct from which its making ore tenus may be presumed": Renfrow v. Renfrow, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534. "We must start, therefore, in the examination of this case," said the New York court, "with the fact that the living together of these two people, so far as they did live together, was not preceded by any ceremonial marriage, or by any express agreement that they should live together as man and wife. No ceremony is necessary to create the relation of man and wife in this state. The contract of marriage, so far as its inception goes, is regarded as is any other contract, and it may be begun by an agreement between the two interested parties that they assume toward each other the relation of husband and wife. That agreement, if it is not proven in express terms by competent evidence, may be established by the facts of cohabitation and reputation among their friends and neighbors, and of recognition of each other as holding that relation: Gall v. Gall, 114 N. Y. 109, 21 N. E. 106; Hynes v. McDermott, 10 Daly, 423, affirmed 91 N. Y. 451, 43 Am. Rep. 677. But these facts, of themselves, do not constitute a marriage. They are simply evidence from which, if sufficiently strong, the courts are at liberty to infer that the cohabitation was the result of a previous agreement to become man and wife, and from that fact to infer further that a marriage actually existed between the parties: Gall v. Gall, 114 N. Y. 109, 21 N. E. 106. It is quite true that it has been said that the presumption of marriage arising from cohabitation, apparently matrimonial, is one of the strongest known to the law. In many cases this is undoubtedly the fact. But this presumption is indulged in in the interest of decency and clean living, and because of the preference which the law has for orderly and decent conduct as against licentiousness. The inference is not made for the benefit of either party to the alleged contract": In re Brush, 25 App. Div. 610, 49 N. Y. Supp. 803.

Agreement in Words of Present Tense.—There is no doubt, in the absence of a positive statutory declaration to the contrary, that where a man and woman agree in words of the present tense to take each other as husband and wife, and then in pursuance of the agree-

ment assume marital relations, a valid marriage is accomplished. This is the usual form of a common-law marriage, and technically is styled marriage per verba de praesenti: Hutchinson v. Hutchinson, 196 Ill. 432, 63 N. E. 1023; Shorten v. Judd, 60 Kan. 73, 55 Pac. 286; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359; Atlantic City R. Co. v. Goodin, 62 N. J. L. 394, 72 Am. St. Rep. 652, 42 Atl. 333, 45 L. R. A. 671; Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865.

Agreement to Marry in Future.—An agreement to marry in the future, followed by cohabitation, does not constitute marriage. In other words, a man and woman, engaged to be married in the future, who live together as husband and wife when they do not understand themselves to be such, and are looking forward to a marriage in the future, are not husband and wife in the eye of the law: Robertson v. State, 42 Ala. 509; Farley v. Farley, 94 Ala. 501, 33 Am. St. Rep. 141, 10 South. 646; Port v. Port, 70 Ill. 484; Hebblethwaite v. Hepworth, 98 Ill. 126; Stoltz v. Doering, 112 Ill. 234; Judson v. Judson, 147 Mich. 518, 111 N. W. 78; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609, and note; Duncan v. Duncan, 10 Ohio St. 181; Estate of Grimm, 131 Pa. 199, 17 Am. St. Rep. 796, 18 Atl. 1061, 6 L. R. A. 717; Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702. Nevertheless, when cohabitation follows an agreement to marry in the future, it is presumed to be in fulfillment of such agreement and in consummation of actual marriage. A matrimonial union thus effected is a valid common-law marriage, and is denominated a marriage per verba futuro cum copula. But this rule that the copula or cohabitation is presumed to be in fulfillment of the previous promise to marry and hence to convert the executory agreement into an actual present marriage, is merely a rule of convenience, and may always be overthrown by evidence that the fact is otherwise: Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Hiler v. People, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641; Marks v. Marks, 108 Ill. App. 371; Hulett v. Carey, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384; Topper v. Perry, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203. "To constitute a marriage legal at common law the contract and consent must be per verba de praesenti, or if made per verba de futuro cum copula, the copula is presumed to have been allowed on the faith of the marriage promise, and that so the parties, at the time of the copula, accepted of each other as man and wife. It is not sufficient to agree to present cohabitation and a future marriage when more convenient. Where parties have contracted a common-law marriage, without any solemnization or other formality apart from the agreement itself, it is not requisite that the agreement should be made before witnesses. But such a marriage is to be distinguished from cases of seduction or sexual intercourse followed by a promise of marriage, and cases where

the intercourse in its inception is illicit and is known to be such by both parties": In re Maher's Estate, 204 Ill. 25, 68 N. E. 159.

Said the supreme court of Nebraska in a recent decision: "In states where no marriage celebration is necessary, and when such contract is followed by sexual intercourse between the parties, the law, so as not to presume fornication, presumes that parties who have promised to marry mean sexual intercourse following such promise to be the consummation of such agreement. But this presumption may be rebutted by any facts which show that the parties knew or intended their intercourse to be illicit, as where at the time they were looking forward to being married with a ceremony: Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702; Fryer v. Fryer, Rich. Eq. Cas. 85. In Stoltz v. Doering, 112 Ill. 234, it is said: 'At common law the fact of sexual intercourse after an agreement to marry at a future day does not constitute marriage. The copula must have been in fulfillment of the agreement to marry. From these authorities it appears that the law, in the absence of evidence, raises the presumption that by the act of copula the parties then and there intended to consummate their existing agreement to marry—i. e., to convert the future agreement into a present consummation. This is the whole doctrine of marriages de futuro cum copula. There is no difference in the basic principles of the marriage contract from any other. The minds of the parties must meet, and the agreement to marry must be made. The time when the marriage shall take place may be the present, or may be in the future. If in the future, there is not a present marriage, but an agreement to marry, and the mere act of copula does not change the agreement. The law presumes, in the absence of evidence, that the parties themselves changed the terms of the contract from the future to the then present. When, however, the evidence establishes, as in this case, that during the period of the sexual intercourse between the parties they had set the day in the future, and were making preparations for and intending to solemnize their marriage rites in accordance with the statute of this state, there is no ground for this presumption, and the law will not indulge it' ": Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

Consent of Parties.—There can be no such thing as marriage without the consent of the parties. Contracts of marriage do not differ from other contracts in this respect; the first essential to their validity is the mutual assent of the parties: McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641; Hooper v. McCaffery, 83 Ill. App. 341; Roszel v. Roszel, 73 Mich. 133, 16 Am. St. Rep. 569, 40 N. W. 858; University of Michigan v. McGuckin, 64 Neb. 300, 89 N. W. 778, 57 L. R. A. 917; Keyes v. Keyes, 22 N. H. 553; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Jaques v. Public Admr., 1 Bradf. Sur. 499; Town of Mountholly v. Town of Andover, 11 Vt. 226, 34 Am. Dec. 685. "It is well established in this state," remarks the supreme court of Missouri, "that a marriage without observing the statutory regulations, if made

according to the common law, is a valid marriage, and that, by the common law, if the contract be made verba de praesenti, it is sufficient evidence of a marriage, or if made per verba de futuro cum copula, the cohabitation is presumed to be on the faith of the marriage promise. That is, however, merely a rule of evidence, and it is always competent, in such cases, to show by proof that the facts are otherwise. Under our law marriage is a civil contract, by which a man and a woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge toward each other the duties imposed by law upon such relation. Each must be capable of assenting and must, in fact, consent to form this new relation": Topper v. Perry, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203.

Necessity of Cohabitation.—The statement is sometimes met with that an assumption of the marriage status is essential to a common-law marriage; that an agreement presently to be husband and wife is not sufficient to constitute marriage until it is acted upon by the parties: McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641; Robinson v. Robinson, 188 Ill. 371, 58 N. E. 906; Lorimer v. Lorimer, 124 Mich. 631, 83 N. W. 609; Topper v. Perry, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455. See, too, Hawkins v. Hawkins, 142 Ala. 571, 110 Am. St. Rep. 53, 38 South. 640. The statutes of California declare that "consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations." This assumption of the marital relation means cohabitation as husband and wife; mere copulation without such cohabitation is not enough: Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; People v. Lehmann, 104 Cal. 631, 38 Pac. 422. Some of the decisions state that a present assumption of marital relations is necessary: McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641; Topper v. Perry, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203. But in California, if any length of time thereafter they assume the rights and duties of the marital relation, both understanding thereby to consummate the marriage covenant, a lawful marriage will result under the statute: In re Ruffino's Estate, 116 Cal. 304, 48 Pac. 127.

The true rule, however, is that a marriage is complete when the parties agree, in words of the present tense, to take each other as husband and wife. Cohabitation or copulation following such agreement may be evidence of the existence of the agreement, but it adds nothing to the agreement and is not essential to the validity of the marriage: Dumaresly v. Fishly, 10 Ky. (3 A. K. Marsh.) 368; Jackson v. Winne, 7 Wend. 47, 22 Am. Dec. 563. Said the supreme court of Minnesota in the leading case of Hulett v. Carey, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384: "Upon this state of facts the contention of the appellants is, that there was no marriage, notwithstanding the execution by them of the written contract;

that, in order to constitute a valid common-law marriage, the contract, although per verba de praesenti, must be followed by habit or reputation of marriage—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law. The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract jure gentium, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made per verba de praesenti, and remains, without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. The maxim of the civil law was, 'Consensus non concubitus facit matrimonium.' The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage: 1 Bishop on Marriage, Divorce and Separation, secs. 239, 313, 315, 317. See, also, the leading case of Dalrymple v. Dalrymple, 2 Hagg. Const. 54, which is the foundation of much of the law on the subject." To the same effect is the recent case of Davis v. Stouffer (Mo. App.), 112 S. W. 282.

A mere agreement to be husband and wife, said the supreme court of Iowa, in Pegg v. Pegg (Iowa), 115 N. W. 1027, without a present intention to assume that relation, does not constitute marriage.

Cohabitation Without Agreement.—While marriage may be consummated without cohabitation, there can be no marriage without an agreement between the parties to be husband and wife. Cohabitation, in the absence of such agreement, does not amount to marriage. Cohabitation is evidence of marriage, but it does not of itself constitute marriage: Hawkins v. Hawkins, 142 Ala. 571, 110 Am. St. Rep. 53, 38 South. 640; Kilburn v. Kilburn, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; Compton v. Benham (Ind. App.), 85 N. E. 365; Randlett v. Rice, 141 Mass. 385, 6 N. E. 238; Norcross v. Norcross, 155 Mass. 425, 29 N. E. 506; Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33; State v. Kennedy, 207 Mo. 528, 106 S. W. 57; Goldbeck v. Goldbeck, 18 N. J. Eq. 42; Voorhees v. Voorhees' Exrs., 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; Dunbarton v. Franklin, 19 N. H. 257; Riddle v. Riddle, 26 Utah, 268, 72 Pac. 1081; Holmes v. Holmes, 1 Saw. 99, Fed. Cas. No. 6638.

Cohabitation not Matrimonial in Character.—Cohabitation which will sustain a common-law marriage must be matrimonial in its char-

acter; and a matrimonial cohabitation is the living together of a man and a woman, ostensibly as husband and wife, with or without sexual intercourse between them. Cohabitation consists of a living or dwelling together in the same habitation as husband and wife, and not merely sojourning or visiting or remaining together for a time. Sexual intimacy or illicit living together is not enough: Cox v. State, 117 Ala. 103, 67 Am. St. Rep. 166, 23 South. 806, 41 L. R. A. 760; Letters v. Cady, 10 Cal. 533; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Kilburn v. Kilburn, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; Taylor v. Taylor, 10 Colo. App. 303, 50 Pac. 1049; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; McKenna v. McKenna, 73 Ill. App. 64; In re Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263; Voorhees v. Voorhees' Exrs., 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; Haley v. Goodheart, 58 N. J. Eq. 368, 44 Atl. 193; In re Brush, 25 App. Div. 610, 49 N. Y. Supp. 803; Lee v. State, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904; Eldred v. Eldred, 97 Va. 606, 34 S. E. 477; Spencer v. Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848. The essentials of cohabitation are well stated by the Colorado court in Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26.

To quote from In re Wallace, 49 N. J. Eq. 530, 25 Atl. 260: "Where a man and woman constantly live together, ostensibly as man and wife, demeaning themselves toward each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. Such cohabitation and repute is said to be matrimonial, in distinction from that occasional, hidden and limited cohabitation and repute which marks the meretricious relation. It is always a question whether the cohabitation proved is of the character which will raise a presumption and make prima facie proof of marriage. At best it can do no more, for the presumption may be rebutted."

Cohabitation Illicit in Its Inception.—A cohabitation between a man and woman, illicit in its inception, and so understood by them, is presumed to continue illicit until some proof is made of its change to a matrimonial cohabitation; therefore no presumption of marriage arises from it: Clark v. Cassidy, 64 Ga. 662; Marks v. Marks, 108 Ill. App. 371; Pike v. Pike, 112 Ill. App. 243; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Cram v. Burnham, 5 Me. 213, 17 Am. Dec. 218; Cargile v. Wood, 63 Mo. 501; Clayton v. Wardell, 4 N. Y. 230; Harbeck v. Harbeck, 102 N. Y. 714, 7 N. E. 408; Ahlberg v. Ahlberg, 24 N. Y. Supp. 919; Bates v. Bates, 7 Misc. Rep. 547, 27 N. Y. Supp. 872; United States Trust Co. v. Maxwell, 26 Misc. Rep. 276, 57 N. Y. Supp. 53; Bell v. Clarke, 45 Misc. Rep. 272, 92 N. Y. Supp. 163; McBean v. McBean, 37 Or. 195, 61 Pac. 418; Appeal of Hunt, 86 Pa. 294; Appeal of Reading Fire etc. Ins. Co., 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60; Henry v. Taylor, 16 S. D. 424, 93 N. W. 641; Cuneo v. De Cuneo, 24 Tex. Civ. App. 436, 59 S. W.

284; Town of Northfield v. Town of Plymouth, 20 Vt. 582; Eldred v. Eldred, 97 Va. 606, 34 S. E. 477; Spencer v. Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848; Weidenhoft v. Primm (Wyo.), 94 Pac. 453.

Of course the fact that a cohabitation is meretricious in its inception does not preclude the parties from subsequently entering into a valid marriage contract and effecting a lawful marriage union: Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717; Foss v. Brown, 151 Mich. 119, 114 N. W. 873; Swartz v. State, 7 Ohio Dec. 43, 13 Ohio C. C. 62; Travers v. Reinhardt, 25 App. D. C. 567. That their relations were originally illicit is immaterial so long as their minds subsequently meet in the formation of an actual marriage contract: University of Mich. v. McGockin, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917. In other words, the presumption that a cohabitation adulterous in its origin continues to be of that character may be rebutted and proved to have become matrimonial, and a lawful common-law marriage established; this fact, that the evil intent of the parties has changed and become matrimonial, may be established by direct or circumstantial evidence: Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A., N. S., 190; Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Roberson v. McCauley, 61 S. C. 411, 39 S. E. 570; Edelstein v. Brown (Tex. Civ. App.), 95 S. W. 1126. And inasmuch as the law itself and all its presumptions deprecate illegal and favor lawful relations, slight circumstances may be sufficient to establish a change from an illicit to a legal relation; and no proof of its time or place is indispensable: Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568. Evidence of marriage is strengthened, however, by the fact that previously the parties had no illicit relations: Heymann v. Heymann, 218 Ill. 636, 75 N. E. 1079.

Said the court in Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263: "The rule that a connection, confessedly illicit in its origin, or shown to have been such, will be presumed to retain that character until some change is established, is both logical and just. The force and effect of such a fact is always very great, and we are not disposed in the least degree to weaken or disregard it: Brinkley v. Brinkley, 50 N. Y. 198, 10 Am. Rep. 460. Very often the changed character of the cohabitation is indicated by facts and circumstances which explain the cause and locate the period of the change, so that in spite of the illicit origin the subsequent intercourse is deemed matrimonial: Fenton v. Reed, 4 Johns. 52, 4 Am. Dec. 244; Rose v. Clark, 8 Paige, 574; Starr v. Peck, 1 Hill, 270; Jackson v. Claw, 18 Johns. 346. But a change may occur, and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained. If the facts show that there was or must have been a change, that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say precisely when or exactly why the change occurred: Caujolle v. Ferrie, 23 N. Y. 90. While we have no hesitation about the rule, and shall be prompt to apply it in a case which demands such appli-

cation, we do not see that the facts before us require it, since they fail to establish an illicit origin of the cohabitation as a separate and independent fact."

And in Darling v. Dent, 82 Ark. 76, 100 S. W. 747, it is said: "While it is true that, if it be shown that the relations between Darling and Mrs. Williams were illicit in the beginning, the burden is upon those asserting a valid marriage agreement to show that such an agreement was afterward entered into, still there is no presumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit, or whether it was changed to a legal and moral status. Whatever presumptions are indulged are in favor of the legitimacy of such relationship."

A somewhat stricter rule may be inferred from the following extract: "The general rule upon the question of proof of marriage by proof of cohabitation, conduct and declaration of the parties is stated by a learned judge as follows: The general and ordinary presumption of the law is in favor of innocence, in questions of marriage, and of legitimacy where children are concerned. Cohabitation is presumed to be lawful till the contrary appears. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage: 2 Kent, 87; Jackson v. Claw, 18 Johns. 346; 2 Greenleaf on Evidence, sec. 464; Physick's Estate, 2 Phila. 278. The presumption against marriage, where the connection between the parties is shown to have been illicit in origin, may, however, be overcome by proofs showing that the original connection has changed in its character, and a subsequent marriage may be established by circumstances, without actual proof of a marriage in fact. The cases cited by the learned counsel for the respondent in their brief in this case fully establish this point. The following cases also illustrate the same subject: Starr v. Peck, 1 Hill, 270; Clayton v. Wardell, 4 N. Y. 230; Caujolle v. Ferrie, 23 N. Y. 90; O'Gara v. Eisenlohr, 38 N. Y. 296; Foster v. Hawley, 8 Hun, 68. The rule laid down in the last case cited is stated as follows: A cohabitation illicit in its origin is presumed to be of that character, unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent": Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98.

Removal of Impediment to Marriage, Followed by Cohabitation.—Some authorities take the view that where a man and woman commence cohabitation when there is a known impediment to their legal marriage, such as the existence of a prior undissolved marriage of one of them, that their continued cohabitation after the removal of

the impediment raises no presumption of a subsequent marriage: Edelstein v. Brown, 35 Tex. Civ. App. 625, 80 S. W. 1027. Thus, it has been affirmed that a valid marriage will not be presumed to have taken place between parties who lived together as husband and wife under a ceremony of marriage, when the man intended to deceive the wife by a pretended marriage, and knew that he was not competent to marry, because the decree purporting to divorce him from his wife was a nullity, although the parties to the second marriage continued to live together as husband and wife after the first wife had procured a valid divorce from the husband, and therefore after he had capacity to contract a valid marriage: Collins v. Voorhees, 47 N. J. Eq. 315, 555, 24 Am. St. Rep. 412, 20 Atl. 676, 22 Atl. 1054, 14 L. R. A. 364. The fact that a negro woman continues to cohabit with a white man after her emancipation from slavery, as she had done before, raises no presumption of marriage if they subsequently separate and if their marriage would offend the criminal statutes: Keen v. Keen, 184 Mo. 358, 83 S. W. 526.

Some authorities declare that where an attempted marriage is void by reason of the disability of one of the parties, a subsequent marriage will be presumed after the disability has been removed, where the matrimonial relationship is continued, and the parties hold themselves out, and are regarded and treated by their relatives and friends, as husband and wife: Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; Barker v. Valentine, 125 Mich. 336, 84 Am. St. Rep. 578, 84 N W. 297, 51 N. W. 787; Bechtel v. Barton, 147 Mich. 318, 110 N. W. 935.

There appears to be no doubt that if parties in good faith marry when in fact a legal impediment exists to their marriage, and they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law presumes a common-law marriage: Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Land v. Land, 206 Ill. 288, 99 Am. St. Rep. 171, 68 N. E. 1109; Teter v. Teter, 88 Ind. 494; Busch v. Supreme Tent of Knights of Maccabees of the World, 81 Mo. App. 562; Bull v. Bull, 29 Tex. Civ. App. 364, 68 S. W. 727; United States v. Hays, 20 Fed. 710. The presumption arises immediately after the obstacle is removed: Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568. And even though the removal is unknown, continued cohabitation thereafter evidences consent to live in wedlock: Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605.

In other words, when a man and woman in good faith do what they can to render their union matrimonial, but the marriage is ineffectual because one of them is under a legal disability on account of a prior marriage supposed to be (but not) dissolved; and they live together as husband and wife after the disability is removed, supposing and intending themselves to be such, they are husband and wife from the date of the removal of the disability: Poole v. People, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; Manning v. Spurck, 199 Ill. 447,

65 N. E. 342; Schuchart v. Schuchart, 61 Kan. 597, 78 Am. St. Rep. 342, 60 Pac. 311, 50 L. R. A. 180; Chamberlain v. Chamberlain, 68 N. J. Eq. 414, 736, 111 Am. St. Rep. 658, 59 Atl. 813, 62 Atl. 680, 3 L. R. A., N. S., 244; Taylor v. Taylor, 71 N. Y. Supp. 411, 63 App. Div. 231.

If the woman is in good faith, while the man conceals an impediment to his marriage, then it would seem that a marriage will be presumed in her favor from cohabitation after the removal of the impediment: Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Flanagan v. Flanagan, 122 Mich. 386, 81 N. W. 258; Barker v. Valentine, 125 Mich. 336, 84 Am. St. Rep. 578, 84 N. W. 297, 51 L. R. A. 787. "There is a well-defined distinction between illicit relations, forbidden because of an undisclosed disability on the part of one of the parties thereto, and such relations as are mutually meretricious, involving on the part of the woman knowledge that its character is not, and is not intended to be, matrimonial": In re Schmidt, 42 Misc. Rep. 463, 87 N. Y. Supp. 428. "The rule ought to be that where one person is free to enter into the matrimonial relation and does so in good faith, but the other party is incapable of entering into such relation because of a former wife or husband living, or other impediment, when such impediment is removed, if the parties continue matrimonial cohabitation, continue to introduce and recognize each other as husband and wife, and are so recognized by their relatives, friends, and by society, it ought to be held that from such moment they are actually husband and wife, and that, under such circumstances, it is of no importance that a formal agreement to live together as husband and wife was not entered into, or that either did not know that the impediment to such an agreement had been removed, when, in fact, it had been so removed, and both parties were competent to enter into the matrimonial state": In re Wells' Estate, 108 N. Y. Supp. 164, 123 App. Div. 79.

Manifestly, an express agreement to marry, followed by cohabitation in pursuance thereof, does not constitute a common-law marriage so long as there exists a prior valid marriage between one of the parties and a third person: Blanks v. Southern Ry. Co., 82 Miss. 703, 35 South. 570.

Cohabitation not Exclusive in Its Character.—Cohabitation, in order to form the basis of marriage, must be exclusive in its character. It is one of the essential obligations of a valid marriage contract that it binds the parties to keep themselves separate and apart from all others and cleave to each other during their joint lives. Where the evidence shows that a man cohabited with two women, the presumed innocence of either cohabitation must fall, for it is impossible for two marriages to exist together, and neither is by such evidence established: Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26; Riddle v. Riddle, 26 Utah, 268, 72 Pac. 1081.

Reputation of Marriage as Evidence.—Where a man and woman have held themselves out to the world as husband and wife, this is strong, persuasive evidence that they are married: Drawdy v. Hesters,

130 Ga. 161, 60 S. E. 451, 15 L. R. A., N. S., 190; Alden v. Church, 106 Ill. App. 347; Pegg v. Pegg (Iowa), 115 N. W. 1027; Hoffman v. Simpson, 110 Mich. 133, 67 N. W. 1107; State of Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568. Indeed, the reputation of the parties as married in the community in which they live may be one of the essentials of a common-law marriage, for cohabitation without a contract of marriage or without a general reputation of marriage can hardly amount to a common-law marriage: Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; In re Terry's Estate, 58 Minn. 268, 59 N. W. 1013; Hulett v. Carey, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384; Hemingway v. Miller, 87 Minn. 123, 91 N. W. 428. "Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. Indeed, the most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation and acknowledgment": Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865.

What Constitutes Reputation.—When a marriage contract is kept secret, this does not invalidate it; there may be an assumption of marital relations without their being made public. But secrecy in an alleged marriage is a circumstance to be considered in determining whether such a marriage in fact exists: Cargile v. Wood, 63 Mo. 501; Rose v. Clark, 8 Paige, 574; Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Stans v. Baitey, 9 Wash. 115, 37 Pac. 316.

"In order to constitute evidence from which a marriage may be inferred, the origin of the cohabitation must have been consistent with a matrimonial intent, and the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed, and thereby to create the reputation of a marriage": Williams v. Herrick, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036. "A marriage is a civil contract, and may be made per verba de praesenti—that is, by words in the present tense, without attending ceremonies, religious or civil. Such is the law of many states in the absence of statutory regulation. It is the doctrine of the common law. But, where no such ceremonies are required and no record is made to attest the marriage, some public recognition of it is necessary as evidence of its existence. The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them

whilst living together, such as deeds, wills and other formal instruments. From such recognition the reputation of being married will obtain among friends, associates and acquaintances, which is of itself evidence of a persuasive character": Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822.

But reputation to prove marriage must be general and uniform in the community where the parties live: it cannot be founded on divided or singular opinion: Powers v. Charbmury's Exrs., 35 La. Ann. 630; Ashford v. Metropolitan Life Ins. Co., 80 Mo. App. 638; In re Yardley's Estate, 75 Pa. 207; Williams v. Herrick, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036; Eldred v. Eldred, 97 Va. 606, 34 S. E. 477. To quote from the supreme court of Wyoming: "The general reputation in the community where the parties reside as to whether or not they are husband and wife is competent evidence as tending to prove marriage. It is in the nature of a verdict of the community upon their relations, arrived at from observing their conduct, their manner of life, their deportment toward each other and the community, and their declarations. It is the general impression or belief created in the minds of the people from these things which constitutes the general reputation, which may be shown in evidence as tending to raise the presumption of marriage or the contrary. To be of any value as evidence such reputation must be general and uniform": Weidenhoft v. Primm (Wyo.), 94 Pac. 453, citing White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Jackson v. Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Arnold v. Chesebrough, 46 Fed. 700.

"Reputation consists of the belief and speech of the people who have an opportunity to know the parties and have heard of and observed their manner of living": Cargyle v. Wood, 63 Mo. 501. "By general reputation and repute is meant the understanding among the neighbors and acquaintances with whom the parties associate in their daily life, that they are living together as husband and wife and not in meretricious intercourse. In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation": Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263.

Presumption from Cohabitation and Reputation.—Where a man and woman live together as husband and wife, and so acknowledge themselves to, and are so reputed among, relatives and acquaintances, these facts are sufficient prima facie to establish a marriage, although there is an entire failure of evidence of a formal ceremony. In other words, a presumption of marriage arises from cohabitation as husband and wife and reputation of marriage in the community: Bynon v. State, 117 Ala. 80, 67 Am. St. Rep. 163, 23 South. 640; Moore v. Heineke, 119 Ala. 627, 24 South. 374; Tarrt v. Negus, 127 Ala. 301, 28 South. 713; Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26; State v. Wilson, 5 Penne. (Del.) 77, 62 Atl. 227; Myatt v. Myatt, 44

Ill. 473; Nossaman v. Nossaman, 4 Ind. 648; Smith v. Fuller (Iowa), 108 N. W. 765; Bartee v. Edmunds, 29 Ky. Law Rep. 872, 96 S. W. 535; Holmes v. Holmes, 6 La. 463, 26 Am. Dec. 482; Jones v. Jones, 45 Md. 144; Inhabitants of Newburyport v. Inhabitants of Boothbay, 9 Mass. 414; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Cramsey v. Sterling, 97 N. Y. Supp. 1082, 111 App. Div. 568; Thompson v. Nims, 83 Wis. 2, 53 N. W. 502, 17 L. R. A. 847. And this presumption is one of the strongest known to the law; it can be overcome only by cogent proof: Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Stevens v. Stevens, 56 N. J. Eq. 488, 38 Atl. 460; note to Pittinger v. Pittinger, 89 Am. St. Rep. 198.

Nevertheless cohabitation and reputation do not constitute marriage, but simply are evidence thereof. The presumption of marriage which arises from them, however strongly favored by the law, is rebuttable: Myatt v. Myatt, 44 Ill. 473; Marks v. Marks, 108 Ill. App. 371; Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713; Adair v. Mette, 156 Mo. 496, 57 S. W. 551; State v. St. John, 94 Mo. App. 158, 68 S. W. 374; Olsen v. Peterson, 33 Neb. 358, 50 N. W. 155; Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702; Allen v. Hall, 2 Nott. & McC. 114, 10 Am. Dec. 578; Eldred v. Eldred, 97 Va. 606, 34 S. E. 477.

Separation of Parties.—The presumption of marriage which arises from cohabitation and reputation is rebutted where the parties separate and one of them, while the other is known to be alive, marries or cohabits with a third person: Weatherford v. Weatherford, 20 Ala. 548, 56 Am. Dec. 206; Moore v. Heineke, 119 Ga. 627, 24 South. 374; In re Beverson's Estate, 47 Cal. 621; In re Maher's Estate, 183 Ill. 61, 56 N. E. 124; Jones v. Jones, 45 Md. 144; Jones v. Jones, 48 Md. 391, 30 Am. Rep. 466. But where a common-law marriage is almost conclusively established by the evidence, the fact that subsequently both parties again marry without having obtained a divorce, the marriage of the woman being after the man had been absent and unheard of for over seven years, is not conclusive against the common-law marriage: Smith v. Fuller (Iowa), 108 N. W. 765.

Subsequent Ceremonial Marriage.—A subsequent ceremonial marriage between the parties is not inconsistent with a prior common-law marriage between them, and does not necessarily overcome the presumption thereof from matrimonial cohabitation, repute, and the declarations and acts of the parties: Simmons v. Simmons (Tex. Civ. App.), 39 S. W. 639; Shank v. Wilson, 33 Wash. 612, 74 Pac. 812; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568. But the fact that a ceremonial marriage is performed, after many years of cohabitation, on the advice of a friend who deems it necessary, is evidence that a general and uniform reputation of marriage is lacking: Williams v. Herrick, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036.

Statutes Prescribing Formalities of Marriage.—Statutes prescribing the procurement of a license and other formalities to be observed in the solemnization of marriage do not render invalid a marriage entered into according to the common law, but not in conformity with the statutory formalities, unless the statutes themselves expressly declare such marriages invalid, and this although the statutes prescribe penalties for ignoring their provisions. Such statutes have uniformly been held directory only: See the note to State v. Lowell, 79 Am. St. Rep. 361; Campbell's Admr. v. Gullatt, 43 Ala. 57; Askew v. Dupree, 30 Ga. 173; Renfrow v. Renfrow, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534; Dumaresly v. Fishly, 10 Ky. (3 A. K. Marsh.) 368; State v. Bittick, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325, 11 L. R. A. 587; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983; State v. Zichfeld, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802, 34 L. R. A. 784; Reaves v. Reaves, 15 Okl. 240, 82 Pac. 490, 2 L. R. A., N. S., 353; Rodebaugh v. Sanks, 2 Watts, 9; Burnett v. Burnett (Tex. Civ. App.), 83 S. W. 238; Burks v. State (Tex. Civ. App.), 94 S. W. 1040; Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826; Mathewson v. Phoenix Iron Foundry, 20 Fed. 281.

In some states, however, the statutes have expressly taken away the right to contract a common-law marriage, and have made a substantial compliance with the statutory formalities essential to a valid marriage: See the authorities cited in the second succeeding paragraph.

Jurisdictions Where Common-law Marriages Recognized.—The validity of common-law marriages has been recognized in the jurisdictions indicated by the following citations: Tarrt v. Negus, 127 Ala. 301, 28 South. 713; Darling v. Dent, 82 Ark. 76, 100 S. W. 747; Klipfel v. Klipfel, 41 Colo. 40, 124 Am. St. Rep. 96, 92 Pac. 26; Askew v. Dupree, 30 Ga. 173; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A., N. S., 193; Hiler v. People, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78; Davis v. Pryor, 3 Ind. Ter. 396, 58 S. W. 660; Porter v. United States (Ind. Ter.), 104 S. W. 105; Smith v. Fuller (Iowa), 108 N. W. 765; People v. Mendenhall, 119 Mich. 404, 75 Am. St. Rep. 408, 78 N. W. 325; Supreme Tent etc. v. McAllister, 132 Mich. 69, 102 Am. St. Rep. 382, 92 N. W. 770; Hulett v. Carey, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384; Hargroves v. Thompson, 31 Miss. 211; Floyd v. Calvert, 53 Miss. 37; In re Imboden's Estate, 128 Mo. App. 555, 107 S. W. 400; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; State v. Zichfeld, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802, 34 L. R. A. 784; Town of Londonderry v. Town of Chester, 2 N. H. 268, 9 Am. Dec. 61; Voorhees v. Voorhees' Exrs., 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; Clark v. Clark, 52 N. J. Eq. 650, 30 Atl. 81; Mullaney v. Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086; Atlantic City R. R. Co. v. Goodin, 62 N. J. L. 394, 72 Am. St. Rep. 652, 42 Atl. 333, 45 L. R. A. 671; Tummalty v. Tummalty, 3 Bradf. Sur. 369; Hicks v. Cochran, 4 Edw. Ch. 107; Geiger v. Ryan, 108 N. Y. Supp. 13, 123 App. Div. 722; In re Wells' Estate,

108 N. Y. Supp. 164, 123 App. Div. 79; Carmichael v. State, 12 Ohio St. 553; Reaves v. Reaves, 15 Okl. 240, 82 Pac. 490, 2 L. R. A., N. S., 353; Estate of McCausland, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780; Williams v. Herrick, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036; Ex parte Romans, 78 S. C. 210, 58 S. E. 614; Jackson v. Banister (Tex. Civ. App.), 105 S. W. 66; Burks v. State (Tex. Civ. App.), 94 S. W. 1040; Riddle v. Riddle, 26 Utah, 268, 72 Pac. 1081; Hilton v. Roylance, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723; Travers v. Reinhardt, 25 App. D. C. 567.

Jurisdictions Where not Recognized.—The validity of common-law marriages has been denied in the jurisdictions indicated by the following citations: Norman v. Norman, 121 Cal. 620, 66 Am. St. Rep. 74, 54 Pac. 143, 42 L. R. A. 343; Estill v. Rogers, 64 Ky. (1 Bush) 62; Robinson v. Redd's Admr. (Ky.), 43 S. W. 435; Johnson's Heirs v. Raphael, 117 La. 967, 42 South. 470; Denison v. Denison, 35 Md. 361; Norcross v. Norcross, 155 Mass. 425, 29 N. E. 506; Dunbarton v. Franklin, 19 N. H. 257; Holmes v. Holmes, 1 Saw. 99, Fed. Cas. No. 6638; Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S. W. 392; Offield v. Davis, 100 Va. 250, 40 S. E. 910; Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; In re McLaughlin's Estate, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; Nelson v. Carlson, 48 Wash. 651, 94 Pac. 477; Beverlin v. Beverlin, 29 W. Va. 732, 3 S. E. 36.

IN THE MATTER OF THE ESTATE OF MARTIN CLARK, DECEASED.

[No. 6,203; decided 1908.]

Executors—Computation of Commissions.—Under section 1618 of the Code of Civil Procedure, when part of the estate over $20,000 comes under the provision as to labor involved, commissions should be computed on it at the one-half rate, and on the balance at full rates. For the property not distributed in kind, and for property involving more "labor than the custody and distribution of the same," full commissions are allowed; for that distributed in kind, and involving no labor beyond its custody and distribution, half commissions on the excess over $20,000 is ample compensation.

Executors—Commissions When No Labor Beyond "Custody and Distribution."—Property consisting of money deposited in bank or of unimproved land "involves no labor beyond the custody and distribution of the same"; there must be active management and attention to constitute "more than mere custody and distribution."

COFFEY, J. In the above-entitled matter the following property is distributed in kind:

Money in bank	$28,606.15
Money collected from rents	2,870.57
Personal property	50.00
Real estate, improved	4,000.00
Real estate, improved	18,000.00
Real estate, unimproved	3,000.00
	$56,526.72

It will be observed that the money in bank and the unimproved real estate amount to the sum of $31,606.15, while the improved real estate, rents collected and personal property amount to the sum of $24,920.57.

The question then arises whether the commissions on the $31,606.15 shall be computed at full rates, or at one-half of the rate under section 1618, Code of Civil Procedure.

The section referred to provides a scheme for the allowance of commissions to executors or administrators. An allowance of seven per cent is made on the first $1,000; four per cent on the next $9,000; three per cent on the next $10,000; two per cent on the next $30,000; one per cent on the next $50,000, and one-half of one per cent on all over $100,000.

In the construction of a statute the object of the lawmaker must be steadily borne in mind. A glance at the various amendments to section 1618, Code of Civil Procedure, will show that the object of legislation in amending the act has been to lower the rate of commissions especially in large estates, so as to protect estates against excessive costs of administration. It is well known that under former laws the "commissions" in large estates were far beyond the value of the services rendered, and amounted frequently to almost small fortunes; and for that reason a sliding scale, so to speak, was established by law. Yet, under the present system (the court being authorized to allow extra compensation in proper cases), executors are well compensated, as a general rule, and judges eminent for their ability and experience are of the opinion that the present rate is, at least, exceedingly liberal, if not excessive.

Section 1618, after fixing certain rates of computation for commissions, contains the following provision, inserted in 1881:

"Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed on all the estate above the value $20,000, at one-half of the rates fixed in this section."

The legislature recognized the difference between the value of services where the estate involved labor beyond the custody and distribution of property distributed in kind, and where no such labor was involved. It allowed full commissions in the latter case up to $20,000—thus preventing any hardship on the executor or administrator—and only one-half commissions on all over $20,000. This amendment to the section was made in furtherance of the object of making the expenses of administration more reasonable, and at the same time preserving the rights of the executor or administrator to a fair compensation for his services.

When the legislature provided that "where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same," commissions on all over $20,000 should be computed at one-half of the rates, etc., did it mean that the whole estate, and every part and parcel thereof, should be distributed in kind, and also involve no labor beyond the custody and distribution of the same, to come under the reduction; or did it mean that the reduction should be made as to that part which is distributed in kind, and involves no labor beyond the custody and distribution of the same? (Of course, the excess over $20,000 is referred to.)

To illustrate: Suppose the estate is valued at $100,000, and consists of money in bank and bonds to be distributed in kind, to the value of $99,000, and real estate valued at $1,000. The real estate involved more labor than "the custody and distribution of the same," but the $99,000 in money and bonds did not. If full commissions should be allowed on $80,000 (the excess over $20,000), in the case supposed, because of the real estate valued at $1,000, the amendment is practically a dead letter. There is not one estate in five hun-

dred, but what some small part involves more labor than the custody and distribution of the same. Bearing in mind the policy of the legislature in reducing commissions, the fair construction of the statute is, that when part of the estate over $20,000 comes under the provision as to labor involved, commissions should be computed on it at the one-half rate, and on the balance at full rates. For the property not distributed in kind, and for property involving more "labor than the custody and distribution of the same" full commissions are allowed; for that distributed in kind, and involving no labor beyond its custody and distribution, half commissions on the excess over $20,000 is ample compensation.

In the Estate of Cudworth, 133 Cal. 462, 65 Pac. 1041, the supreme court, in affirming the decree of this court, quotes from the findings (italics ours): "That the property of the estate of said decedent, and the care, management and administration thereof by said executor, has *necessarily involved,* and the said executor has properly bestowed and expended thereon, labor *beyond the mere custody and distribution* of the same"; and held that the finding was supported by the evidence.

But in the case in hand there is no such finding as yet.

The Estate of Towne, 143 Cal. 508, 77 Pac. 446, was a case in which it became necessary for the executor to obtain a license from the probate court of Essex county, Massachusetts, to collect moneys deposited by the deceased in five different savings banks therein. He also took charge and control of the property in Marin county, where the will was probated, collected rents, paid taxes, insured the buildings, made necessary repairs, cared for the trees, etc., and the court say: "All this involved attention, time and labor on the part of the executor in behalf of the estate; something *more* than mere *custody* and *distribution.* It was *active management.* . . . . It was *management* and *attention,* however, beyond the mere labor of custody and distribution of the estate. . . . ." (Italics ours.)

This case implies that there must be active management and attention, to constitute "more than mere custody and distribution."

In the case at bar, the money in banks (presumed to be savings banks) amounts to $28,606.15. That money required, and can require, no active management and attention. The executor need not go to the banks before drawing the money to pay over on final distribution, except once in each six months to have dividends entered on the passbooks. His only "labor" is keeping the passbooks, and having the dividends entered thereon—the banks "do the rest."

And so it is with the unimproved property, where not rented. There are no rents to collect, no buildings to insure, no repairs to be made—only taxes to pay.

The following computation of commissions is correct:

On $1,000.00 at 7%		$ 70.00
On 9,000.00 at 4%		360.00
On 10,000.00 at 3%		300.00
On 4,920.57 at 2%		98.41
$24,920.57		
On $25,079.43 at 1%	(half rates)	250.79
On 6,526.72 at ½%	(half rates)	32.63
$56,526.72		$1,111.83

The $24,920.57 is made up of the first $20,000.00 and $4,920.57, of the balance of the estate on which the executor is entitled to full commissions.

The $25,079.43 is the balance of "the next $30,000.00" mentioned in section 1618, Code of Civil Procedure, and commissions are computed at only half rate, viz., one per cent.

The remaining $6,526.72 is part of the "next $50,000.00" mentioned in the section, and commissions are computed at half rate, viz., one-half of one per cent.

IN THE MATTER OF THE ESTATE OF JEROME B. FARGO, DECEASED.

[No. 16,881; January 31, 1903.]

Family Allowance.—It Seems that Minor Grandchildren, as well as minor children, may constitute the "family" for whom an allowance may be made from the estate of the deceased ancestor.

Family Allowance—Conclusiveness of Order.—An order for a family allowance, though erroneous, becomes conclusive if not appealed from.

Executors—Payment of Stock Assessments.—The payment by an executor of assessments on speculative shares of stock purchased by his testator is not encouraged by courts, and usually is at his hazard, and justified only by a successful issue of the investment.

William M. Madden, for the plaintiffs.

Eugene W. Levy and Andrew G. Maguire, for the creditors.

COFFEY, J. Objections by defendant to certain expenditures made by deceased executor, Calvin F. Fargo, in the administration of the estate of Jerome B. Fargo (1) to "Mrs. Fish on account of family allowance," and (2) for assessments on shares of stock of the Home Gold Mining Company.

The first item was paid under an order obtained upon a petition preferred by one Jennie F. Fish, which recited that she was a daughter of Jerome B. Fargo, deceased, and was then about forty-one years of age, and that during all of her life and up to and at the time of his death she lived and resided with him, and was entirely supported, maintained and cared for by him; that she was the mother of four minor children, issue of her marriage with Frank Fish, from whom she had been divorced for many years; that the names of the children were Jerome F., Henry K., George K., and Dudley F. Fish, aged respectively nineteen, eighteen, fifteen, and twelve years; that she and her said children, at the time of the death of said Jerome B. Fargo, and from their birth and during all their life, had lived and resided with him as and constituted and were his family, and were entirely supported, cared for, and maintained by him as his family, and were entirely dependent on him; that his estate had been appraised

at the sum of $40,000; that she had not nor had the said minors any money or means whatever wherewith to support or maintain themselves; that during his lifetime the cost and expenses of maintaining and supporting his said family exceeded $500 per month; that the sum of $200 per month would be a reasonable sum to be allowed to said family for their support and maintenance, and she asked that a family allowance to that amount from the date of his death, January 5, 1896, be made and paid out of the funds of the estate by the executor. An order was accordingly made on the seventeenth day of April, 1896, finding the facts as stated in the petition, and concluding that the petitioner and said children constituted the family of decedent, and were his surviving family, and as such entitled to a family allowance. This order was obtained after a hearing in open court and the taking of the oral testimony of the petitioner on the fourteenth day of April, 1896, as appears by the minutes thereof, and the sum allowed was $200 per month, which was ordered to be paid by the executor to said petitioner out of the funds of the estate to be used and applied by her for the maintenance and support of said minors and said surviving family of the decedent.

This order and the payments made thereunder are now assailed by certain creditors intervening, for the reason that the items charged in said account as family allowance paid to Mrs. Fish are not proper or legal charges against said estate, because she is not a widow or minor child of the decedent and not entitled by law to a family allowance out of said estate; and these creditors contend that the order is void upon its face, and the court never had any jurisdiction, as the family allowance can only be for the benefit of the widow or minor children of deceased.

The statute law on this subject is gathered in chapter 5, article 1, title 11, part 3, sections 1464-1470, Code of Civil Procedure, "Of the Provision for the Support of the Family," in which it is provided that when a person dies leaving a widow or children they are entitled to a reasonable provision for their support, to be allowed by the superior court or a judge thereof, and if the amount originally set apart be insufficient, the court or judge must make such reasonable allowance

for the maintenance of the family as shall be necessary, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after the grant of letters.

The order in question, it is claimed by plaintiffs, is valid under section 1466, Code of Civil Procedure, because it was for the maintenance of the family of the decedent, within the meaning of the statute, as rationally interpreted and construed, which would include these minors, and plaintiffs draw on other statutory provisions to enforce their reasoning that the word "children" should be held to include grandchildren. In section 1465, Code of Civil Procedure, the court is authorized to set apart for the use of the surviving husband or wife or, if he or she be dead, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded. Now, among the persons upon whose application a homestead is authorized to be selected, designated and recorded, and such "head of family" is expressly defined by the statute as "including within its meaning," are "every person who has been residing on the premises with him or her, and under his or her care and maintenance, either (1) his or her minor child or minor grandchild": Civ. Code, secs. 1260, 1261. In other words, minor grandchildren, as well as minor children, may in effect constitute the "family" for which one can lawfully claim a homestead, and why not, by parity of reasoning, a family allowance, which is comprehended within the same statutory system? But assuming, what this court might have held as an original proposition, that the word "children," as used in the statute here in question, cannot be construed as embracing "grandchildren," but that it comprises only the immediate "children" of decedent by nature or by adoption, it is claimed by plaintiffs that advantage may not now be taken of any error in that behalf because the order granting this family allowance not having been appealed from or in any way reversed, set aside or modified is now final and conclusive. The order making the family allowance in this case necessarily involved a determination either express or implied as to its subject matter and statutory propriety. It appears that there was a hearing in open court and an oral examina-

tion and a consequent judgment which carries with it all presumptions and intendments in favor of its validity. It must be presumed in its favor that its beneficiaries were within the scope of the statute. The question whether they were the minor children of decedent or not was a question of fact necessarily submitted to the court for determination upon the application for the allowance, and the court had jurisdiction to determine. Moreover, if the order for the allowance was made solely on the ground that, as a matter of law, such allowance was authorized because the word "children" in the statute is to be interpreted as including "grandchildren," or for some other reason, this was a question clearly within the jurisdiction of the court. Whether the question presented was one of fact or law, however, it was necessarily determined in applicant's favor in making the order of allowance, and such order, even though erroneous, being made in the exercise of jurisdiction and being appealable, and not appealed from, is now absolutely conclusive, and, in the absence of any charge of fraud or imposition, and no such allegation is made here, cannot be reviewed or impeached at law or in equity, the time for an appeal having elapsed; certainly it cannot be reviewed or impeached collaterally.

The facts and the law were before the court, and having considered both, the allowance was made. As the supreme court said in Re Stevens, 83 Cal. 326, 17 Am. St. Rep. 252, 23 Pac. 379, why should not this order be held final, unless facts not disclosed to the court when the order was made subsequently are brought to its attention? The order is appealable and now should be regarded as final. On an appeal from the order of allowance, the facts could have been made known to the appellate court, the ruling reviewed, and the error, if any, corrected, but the time for appeal was allowed to pass, and in such circumstances the power of the court over its order is at end. The trial court cannot act as an appellate court to review its own orders. It might be that if it had appeared that the court was imposed upon, a change could be made, but there is no such case here. All the facts on which the court acted were before it when the allowance was granted; if there was error in the judicial conclusion the

remedy was by appeal; all parties were, constructively at least, before the court. It is too late now to complain.

As to the expenditures for assessments on shares of stock in the Home Gold Mining Company: In making these payments plaintiffs claim that the executor was, in substance and effect, simply continuing and protecting an investment already made by his testator; and if, in so doing, he acted in good faith and with ordinary prudence, the expenditures were proper and chargeable in his account, even though the stock may ultimately have turned out to be worthless, and the fact that the investment in such stock was made by the testator and was thus continued by the executor, should go far toward justifying the conduct of the latter.

Equity looks leniently on the conduct of a trustee who has acted in good faith and in the exercise of a sound discretion, although, in the light of subsequent events, the course pursued may turn out to have been unwise; but the payment of assessments on speculative shares is not encouraged by the courts, and is usually at the hazard of the executor and only justified by successful issue of the investment. Even a previous order of the court would afford no protection, except to exculpate the executor from any imputation of bad faith or improvidence. In the circumstances of this case there is much to justify the act of the executor in paying assessments on stock of which testator was the purchaser and which in the inventory was appraised at $27,000, originally, and later at $105,000, and consequently constitutes virtually the entire estate. I think a reservation should be made in the decree enabling plaintiffs to recover these payments out of the proceeds of the property itself.

An Order Granting a Family Allowance is appealable, and if no appeal is taken within the time limited by law, it becomes final and conclusive. Thereafter the probate court cannot review, suspend or vacate its order. Although it finds on a partial distribution that she to whom it has granted an allowance was not the widow of the deceased, the allowance cannot be collaterally attacked. And creditors who have allowed the time for appeal to pass by cannot object to the approval of an executor's account, showing the payment of a monthly allowance, on the ground that the estate was insolvent when the order therefor was made. It is not doubted, however, that the probate court, after having made an allowance, may modify it, should

the condition of the estate or the relation of the family thereto so change as to make such modification expedient, or that a court of equity, when the time for prosecuting an appeal has elapsed, may set aside an order for fraud in its procurement. An appeal from an order directing the payment of an allowance acts as a supersedeas, staying all further proceedings in respect to the matter involved. Hence a subsequent order of the superior court directing the administrator to make payment is beyond its jurisdiction, and subject to annulment on certiorari: 1 Ross on Probate Law and Practice, 489.

IN THE MATTER OF THE ESTATE OF CAROLINE A. ROBINSON, DECEASED.

[No. 11,672; decided March 24, 1904.]

Administrators—Removal for Neglect of Duty.—The administrator in this case was found guilty of negligence of so grave a character as to justify his removal.

Application for removal of administrator on grounds of negligence, fraud and conspiracy.

Tobin & Tobin and George A. Clough, for the applicant, Hibernia Savings and Loan Society.

George D. Collins, for the administrator, Clarence W. Purrington.

COFFEY, J. Counsel have favored the court in this matter with eighty-four typewritten pages of briefs, in which they have exhausted argument and epithet, each in his endeavor to sustain his position at the expense of the other. Eliminating their epithets, I have sought to address myself to the merits of the case, mindful of the caution contained on the third page of the administrator's brief concerning the attitude of probate courts toward administrators, who have rights as well as duties and whose rights are entitled to just as much recognition as their duties. The supreme court has drawn the lines so taut in the matter of amotion of administrators that the trial tribunal is bound to the exercise of the utmost care and circumspection in dealing with such cases.

This court has been in this case so far conservative of the rights of the administrator, and so mindful of the admonition adverted to by counsel, that its tendency has been to treat with the utmost consideration and indulgence his conduct in office and to palliate, as far as possible, the proofs adduced against him; but no matter how tender may be the consideration of the trial court for the accused on the charges of fraud and conspiracy, there can be no escape from the conclusion that he has been guilty of negligence of so grave a character as to justify his removal, and it is the judgment of the court that he be removed on that ground.

IN THE MATTER OF THE ESTATE OF GESINA WERNER, DECEASED.

[No. 2,290; decided August 15, 1907.]

Accumulations.—Provisions of a Will for accumulations beyond the period of majority are in this case held void.

Trusts.—The Power of Alienation is Suspended when trustees, acting within the exact limits of the powers granted them, uniting with the beneficiaries cannot convey the fee. Hence, if the power of alienation is, by the terms of a devise, so suspended that during lives in being at the inception of the trust a fee may not be conveyed by the trustees and the beneficiaries, then the trust must be held void.

Application for partial distribution.

Lloyd & Wood, for the petitioners.

Reed, Black & Reed, for the executors.

COFFEY, J. Gesina Werner died in the year 1906 in San Francisco, leaving a last will and testament, admitted to probate, which contained the following trust provision:

"Eighth: I hereby will, devise and bequeath all of my estate of every name, nature and description, wherever the same may be situate, other than the hereinabove devised, to Edwin

Meese and John Hasshagen, in trust nevertheless and to and for the purposes and uses following, to wit:

"To hold and rent the same, collect the income therefrom and apply the same as herein directed. I will and direct that my said trustees make payment unto my grandchildren Ida Hansen, Alice Brough, Mabel Werner, (being the three children of Louis and Louise Werner) Willie Menne and Walter Menne, (being the two children of Albert H. Menne and the deceased Lizzie Menne) in the manner following, to wit: Unto each of my above-named grandchildren who at the date of my death shall have attained the age of twenty-five (25) years the sum of Five Hundred (500) Dollars each respectively and unto each of my above-named grandchildren who shall thereafter and as they shall respectively attain the age of Twenty-five (25) years, the sum of Five Hundred (500) Dollars respectively, and after payment of such bequests shall have been made to each of my said grandchildren then the rest, residue and remainder of my estate shall be divided between my said five grandchildren share and share alike; provided, however, that if any of my said grandchildren shall die unmarried and without child or children before arrival of time of payment of any of the devises and bequests made to them, then and in that case the devise and bequest of every child so dying shall be divided equally among my said surviving grandchildren. Any surplus moneys that may at any time be in the hands of my said trustees they shall safely invest and keep invested until occasion shall arise for use of the same in performance of any of the trusts and devises hereby created, when they shall apply the same, so far as necessary, in the discharge of such trusts and devises.

"And to carry out and accomplish the purposes herein expressed and declared, I will and desire and hereby authorize my said trustees to have and exercise all such powers as shall, in their judgment, be necessary or proper to accomplish any of said purposes.

"I will and direct that my said trustees make the payments and perform the duties at the time and in the manner hereinbefore directed."

The five grandchildren of the deceased are made the residuary legatees of said estate by reason of said trust clause.

Counsel for Willie Menne and Walter Menne, two of said grandchildren, have attacked the validity of said trust clause on the ground that the power of alienation is suspended beyond the lives of persons in being at the time of the creation of the trust. Should this contention be upheld by the court, Ida Hansen, Alice Brough and Mabel Werner, the other three grandchildren, would be cut off entirely in sharing in said estate, and Willie Menne and Walter Menne would receive between them one-half of said estate, and the other half of said estate would go to the parents of said Ida Hansen, Alice Brough and Mabel Werner.

It is conceded that the provisions of the will providing for accumulations beyond the period of majority are void: Civ. Code, sec. 723.

The accumulations thus derived will be distributed among the heirs at law. In the present case one-half of such accumulations will go to Louis Menne, and the other half to Willie Menne and Walter Menne: Civ. Code, sec. 733.

In the matter of the trust clause the petitioners contend that it is invalid, and should be disregarded: Estate of Walkerley, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772.

It is the accepted rule that the power of alienation is suspended when the trustees, acting within the exact limits of the powers granted to them, uniting with the beneficiaries cannot convey the fee. Hence, if the power of alienation be, by the terms of the devise, so suspended that during lives in being at the inception of the trust a fee may not be conveyed by the trustees and the beneficiaries, then it follows the trust must be held void.

Here we find a trust to hold during certain lives in being, namely, the five grandchildren of the testatrix, and such a trust would be valid if nothing further followed, and it is to that which follows that the objection is pointed.

The will provides that if any of said grandchildren die unmarried and without children before all the grandchildren reach the age of twenty-five years, then the portion of such dying grandchild shall vest in the survivors. It will at once be notice that the vesting of such interest can only take effect upon the death of the party entitled unmarried and without issue, and hence the death of one of the grandchildren mar-

ried or with issue would necessarily result in the holding of the estate by the trustees beyond the lives in being at the inception of the trust. The trust requires the trustees to hold the estate according to the directions of the will, and in view of such a provision the trustees would continue to hold after the death of a married grandchild, or one dying with issue, and such holding would be beyond lives in being, and there could not have been at the inception of the trust any person in being who could have united with the trustees in conveying a fee.

As a further objection to the trust clause in question, it is urged that the payment of $500 to each of the grandchildren is made to await the arrival of such division at the age of twenty-five years, and the estate cannot be divided until "after payment of such bequests shall have been made to each of my said grandchildren." Hence, it follows that the distribution of the estate is postponed until the arrival of the youngest survivor at the age of twenty-five years, and if, in the meantime, one of the older grandchildren should die married, or leaving issue, the trustees would be obliged to withhold from the widow or children the portion coming to her or them until all the survivors reach the age of twenty-five years, or, in other words, the power of alienation granted to the trustees and coming by inheritance to the widow or issue would be restrained until all the surviving grandchildren reached the prescribed limit. The trustees could not convey a fee, and the widow or children uniting with the trustees would be equally powerless, for the reason that no estate could vest in them until the youngest of the surviving grandchildren had reached the age of twenty-five years.

For the foregoing reasons the court is of the opinion that the prayer of the petitioner should be and it is granted.

ESTATE OF ASA R. WELLS, DECEASED.

[No. 31,550; decided July 29, 1905.]

Homestead.—A Widow is Entitled to have a homestead set apart from the estate of her deceased husband, even if the entire estate is thereby consumed, irrespective of the claims of creditors, and notwithstanding there are no minor children.

Homestead—Right of Widow as Against Devisees.—The right of a widow to have a homestead set apart to her is superior to any attempt at testamentary disposition. Heirs and devisees occupy no better position as against her right than do creditors.

Homestead—Value of Property Set Apart.—Where the only premises of a decedent suitable for a homestead are indivisible, they may be set apart to the widow although appraised at $30,000.

C. H. Wilson, for the widow.

Alexander & Church, for the executors.

COFFEY, J. Upon the facts in evidence it must be concluded that the premises sought to be set apart constitute community property.

The property is not susceptible of partition. The authorities cited by executors are not in point in an application of this character. The widow is entitled to a homestead, even if it consumed the entire estate, irrespective of the claims of creditors, and notwithstanding that there are no minor children.

It does not appear here that the estate is insolvent. All the children are adults. The statement of facts in the opening brief of applicants seems to be correct.

Reba E. Wells, the widow of the deceased, makes application for a homestead under the provisions of section 1465, Code of Civil Procedure. It appears from the evidence that neither the deceased nor the petitioner selected a homestead during the lifetime of the decedent; that the only real property belonging to the estate is the piece which the petitioner now asks to have set apart to her as a homestead; that said property is situate on Ellis street in this city and county; that it is an entirety and incapable of division; that there is upon it a dwelling-house, and that the property is appraised at $30,000, and is suitable for a homestead. It further ap-

pears that besides the petitioner the deceased left him surviving five children—two girls and three boys—the issue of a former marriage; that all the children are above thirty years of age, and that the future of the two girls is secured by property deeded to them as in the will mentioned, which property is of the value of sixty or sixty-five thousand dollars. There is no evidence to show that any of the boys labor under disability.

On the hearing, counsel showed debts against the estate amounting to $17,612.48; of this sum $15,115 is due to the Hibernia Bank on account of mortgages placed by the deceased upon the property heretofore mentioned as having been deeded to the girls and also upon a piece of property deeded to the petitioner. None of said mortgaged property is inventoried as a part of the estate of the deceased. The appraised value of the estate is $51,558.67. The petitioner married the deceased June 25, 1885, and lived with him to the time of his death; the property sought to be set aside as a homestead was purchased November 26, 1902, and is community property.

Upon this showing the court has no discretion to deny the application. All the later California cases are in agreement upon this point. The heirs, legatees, and devisees occupy no better position than creditors. The right to a homestead is statutory and superior to any attempt at testamentary disposition. The executors are in error in their contention that the amount of the homestead is limited; the cases cited by them do not apply here. The law as now laid down was declared by the supreme court in Estate of Levy, 141 Cal. 652, 99 Am. St. Rep. 92, 75 Pac. 301, which says, in effect that in the absence of a statutory limitation as to value, the right of the applicant is paramount to all others, even though its assertion should absorb the half or the whole of the estate, where the only premises suitable for a homestead are indivisible, and where to deny such application would be to deprive the widow of her claim under the statute. The proof in this case justifies the court in decreeing that the applicant widow is entitled to an absolute homestead in the Ellis street property, and that the petition of the executors for an order of sale should be denied, and it is so ordered.

An Appeal from the Principal Case was dismissed in 148 Cal. 659, 84 Pac. 37, the supreme court holding that where an appellant has filed no undertaking on appeal from orders setting apart a homestead, and has made no appearance to a motion of the respondent to dismiss the appeals, they should be dismissed.

The Law Places No Limitation on the Value of the Property which may be appropriated for a probate homestead, but leaves it in the discretion of the court to set apart such property as, irrespective of value, may appear just and proper in view of the value and condition of the estate. When the estate is insolvent, the court must take into account the rights of creditors, and since the legislature has fixed the sum of $5,000 as the limit in value which a debtor may claim for his homestead against the demands of his creditors, a wise exercise of judicial discretion will restrict the probate homestead to that amount, at least where a homestead of this value can readily be segregated from the remainder of the estate. Nevertheless, the rights of creditors, heirs, and devisees are subordinate to the right of the family to a home; and where the only premises suitable for a homestead are indivisible, the fact that they greatly exceed $5,000 in value does not preclude the appropriation: 1 Ross on Probate Law and Practice, 475.

ESTATE OF J. C. G. STUART, DECEASED.

Estate of Limited Value—Setting Apart to Widow.—Under section 1469 of the Code of Civil Procedure, as amended in 1897, the court cannot set apart an estate under $1,500 for the joint benefit of the widow and children; the whole of the estate must be assigned "to the widow."

Application to set apart an estate under $1500 to the widow and children of the decedent, under section 1469 of the Code of Civil Procedure.

COFFEY, J. Until 1897, the section provided that the court should assign the estate "for the use and the support of the widow and minor children."

The section was amended in 1897 and that provision eliminated. As it now stands the section provides that the estate shall be assigned "to the widow of the deceased, if there be a widow."

The provision of the former section was as follows: That the court should assign the estate "for the use and support of the widow and minor children if there be a widow and minor children, and if no widow, then for the minor children, if there be any, and if no children, then for the widow."

The corresponding provision of the present section is that the court shall assign the estate "to the widow of the deceased, if there be a widow, if no widow, then to the minor children of the deceased, if there be minor children."

It seems from a consideration of the section before and after the amendment of 1897 that the court cannot now set apart such an estate for the joint benefit of the widow and the children. The express provision of the statute, as it formerly stood, requiring and allowing this to be done, has been stricken out and replaced by plain provisions that the whole of the estate shall be assigned "to the widow of the deceased, if there be a widow."

ESTATE OF BERTHA M. DOLBEER, DECEASED.

Testamentary Capacity.—The Test of Capacity to Make a Will is this: The testatrix must have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which she is about to dispose, the nature of the act which she is about to perform, the names and identity of the persons who are the proper objects of her bounty, and her relation toward them.

Testamentary Capacity.—In Order to have a Sound and Disposing Mind the testatrix must be able to understand the nature of the act she is performing, she must be able to recall those who are the natural objects of her bounty, she must be able to remember the character and extent of her property, she must be able to understand the manner in which she wishes to distribute it, and she must understand the persons to whom she wishes to distribute it. It is not sufficient that she have a mind sufficient to comprehend one of these elements; her mind must be sufficiently clear and strong to perceive the relation of the various elements to one another, and she must have at least a general comprehension of the whole.

Will.—The Right to Leave Property by Will is a right given by the law alone; that is, a person has no natural right to leave his property in any particular way.

Wills—Injustice or Unreasonableness of Disposition.—The competency of the testatrix being shown, the wisdom or folly, justness

or unjustness of the will, can play no part in the question of its validity; but the character of the provisions of the will, as being just or unjust, reasonable or unreasonable, may be considered by the jury as tending to throw light on the capacity of the testatrix.

Testamentary Capacity—Terms of Will and Condition of Estate.—In determining the soundness of mind of a testatrix, the jury should take into consideration the provisions of the will itself, and also the condition and nature of the estate disposed of.

Testamentary Capacity—Condition and Relation of Beneficiaries.—In determining the soundness of mind of a testatrix, the jury should consider the condition of the beneficiaries under the will, the relations between the testatrix and any contestants or excluded relatives, and also their age, condition, circumstances, and their conduct toward the testatrix.

A Witness False in One Part of His Testimony is to be distrusted in other parts.

Jurors are the Sole Judges of the Effect and Value of the Evidence addressed to them; their power is not arbitrary, however, but is to be exercised with legal discretion and in subordination to the rules of evidence.

Testamentary Capacity—Opinion of Acquaintance.—Where the opinion of an intimate acquaintance is given respecting the mental capacity of a testatrix, it is proper for the jurors to consider the degree of intimacy of the acquaintanceship in determining how much weight should be given to the opinion, and they must determine the weight to be given the opinion of each witness from the facts and circumstances upon which he founded his opinion, keeping in view the degree of intimacy existing in each case.

Wills—Unreasonable Provisions — Unfounded Discrimination.—A person has the right by will to bestow her property on whomsoever she pleases; and if there is no testamentary incapacity, the law must give effect to her will, even though the provisions may appear unreasonable, or however great or unfounded may be her likes or dislikes or resentment against those who may be thought to have some claim against her bounty.

Wills—Injustice or Impropriety of Provisions.—The beneficiaries named in a will are as much entitled to protection as any other property owners, and juries should not set aside a will through prejudice or merely on suspicion, or because it does not conform to their ideas as to what is just or proper.

Testamentary Capacity—Discrimination Against Heirs.—It cannot be presumed that a testatrix was of unsound mind because she discriminated against her heirs in the disposition of her estate.

Wills—Right to Dispose of Property.—A person of sound mind may leave his property by will to relatives, or dispose of it otherwise as he pleases. His own wishes and judgment in this regard are sole and supreme.

Wills.—Mere Hatred or Dislike of Relatives which influences a testatrix in making her will, without proof of actual mental unsoundness, will not invalidate the will.

Testamentary Capacity.—The Law Presumes that Every Person possesses a sound and disposing mind, and his devisees and legatees are entitled to this presumption as a matter of evidence.

Testamentary Capacity—Burden of Proof in Will Contest.—Those who contest a will on the ground that the testatrix was of unsound mind have the burden of proof to establish such unsoundness by a preponderance of evidence. If the evidence is equally balanced, the contestants fail to sustain the burden which the law imposes upon them.

Testamentary Capacity—Burden of Proof and Preponderance of Evidence.—Persons who assert the insanity of a testatrix are required to prove their assertions by a preponderance of evidence, by which is meant that amount of evidence which produces conviction in an unprejudiced mind.

Testamentary Capacity.—The Presumption that Every Person is of Sound Mind until the contrary is proved is a legal presumption.

Testamentary Capacity—Perfect Mental Health.—The law does not require that a person, to be competent to make a will, should be in perfect mental health.

Testamentary Capacity—Time When must Exist.—When a will is contested on the ground that the testatrix was of unsound mind, the time when the will was executed is the time to which the jury must look in determining the question of testamentary capacity. What her mental condition was before or after the execution of the will is important only so far as it throws light upon her mental condition when the will was executed.

Testamentary Capacity.—The Will Itself may be Considered in determining whether the author was of sound and disposing mind.

Testamentary Capacity—Bodily Health and Strength.—In determining testamentary capacity it is the soundness of mind, not the state of bodily health, that is considered. The bodily health of a testatrix is important only so far as it may be evidence of the state of her mind. Neither sickness nor physical disability alone will disqualify a person from making a will.

Suicide is Never Presumed by the Law from the mere fact of death.

Testamentary Capacity.—The Fact that a Testatrix Committed Suicide raises no presumption that she was of unsound mind at that time.

Wills.—A Niece is Under No Obligation to Provide for Her Uncles and aunts, either when living or by will, and the failure to name them in her will raises no presumption that they were forgotten.

Will Contest—Relative Wealth or Poverty of Parties.—If a testatrix was of sound and disposing mind when she made her will, the jury cannot consider, in case of a contest of the will, the relative wealth or poverty of the parties to the controversy.

The Opinion of a Witness Founded upon a Hypothetical Question must be brought to the test of facts in order that the jury may judge what weight the opinion is entitled to.

Will Contest.—For the Jury to Go Outside the Evidence and base its decision in a will contest upon anything but a consideration of the evidence is to disregard the law and their oaths.

Will Contest—Province of Court and Jury.—In a will contest the jurors are to find the facts, but they must take the law from the court.

Wills—Unjust Provisions.—A Person of Sound Mind has a Right to make an unjust or even a cruel will, if he chooses, and no court or jury may deprive him of that privilege.

Witnesses—Impeaching Evidence.—A Witness Called by One Party may be impeached by the other party by proof that he has made at other times statements inconsistent with his present testimony; but such evidence is to be considered by the jury only as affecting the credibility of the witness.

Hiram W. Johnson and Albert M. Johnson, for contestant Adolph Schander.

E. S. Pillsbury, for proponent William G. Mugan.

W. F. Williamson, for proponent George D. Gray.

Garrett W. McEnerney, for Etta Marion Warren, legatee.

COFFEY, J. Bertha M. Dolbeer died July 9, 1904, leaving a will dated April 23, 1904, which will was filed herein July 18, 1904, together with the petitions of George D. Gray and William G. Mugan, praying for its admission to probate, and the issuance to them of letters testamentary.

The will is as follows:

"I, Bertha Marion Dolbeer of the City and County of San Francisco, State of California residing therein, being of sound and disposing mind, do hereby make, publish and declare this as and for my last will and testament; that is to say:

"*First*—I hereby revoke all wills and testamentary writings heretofore made by me. I also declare that I have never been married.

"*Second*—I give, devise and bequeath to my devoted friend Etta Marion Warren of San Francisco, California, the sum of Three Hundred Thousand Dollars ($300,000.) I also give devise and bequeath to Etta Marion Warren my house and lot inherited by me from my father and known as 2112 Pacific Ave. and also all my pictures, furniture, jewelry, books, plate and ornaments.

"*Third*—I give, devise and bequeath to my cousin Ellen M. Hall, of Epsom, New Hampshire, the sum of Twenty-five Thousand Dollars ($25,000.)

"*Fourth*—I give, devise and bequeath to my cousin, Elizabeth C. Phillips of San Francisco, California, the sum of Ten Thousand Dollars ($10,000.)

"*Fifth*—I give, devise and bequeath to my cousin, Ralph Chase, of Berkeley, California, the sum of Ten Thousand Dollars ($10,000.)

"*Sixth*—I give, devise and bequeath to my cousin, Ethel F. Roche, of San Francisco, California, the sum of Ten Thousand Dollars ($10,000.)

"*Seventh*—I give, devise and bequeath to William G. Mugan, of San Francisco, California, the sum of twenty Thousand Dollars ($20,000.)

"*Eighth*—I give, devise and bequeath to Percy J. Brown, of Eureka, California, the sum of Ten Thousand Dollars ($10,000.)

"*Ninth*—I give, devise and bequeath to Peter Kyne, of San Francisco, California, the sum of Five Thousand Dollars ($5,000.)

"*Tenth*—I give, devise and bequeath to Helen L. Wagner, of San Francisco, California, the sum of Five Thousand Dollars ($5,000.)

"*Eleventh*—I give, devise and bequeath to Elsie I. Chase, of Holyoke, Mass. the sum of Ten Thousand Dollars ($10,000.)

"*Twelfth*—I give, devise and bequeath to William Carson Tyson, of Alameda, California, the sum of Five Thousand Dollars ($5,000.)

"*Thirteenth*—I give, devise and bequeath to Margaret H. Warren, of San Francisco, California, the sum of twenty-five Thousand Dollars ($25,000.)

"*Fourteenth*—I leave Fifty Thousand Dollars ($50,000) for the purpose of erecting a mausoleum on the plot I own at Cypress Lawn Cemetery as soon as possible after my death.

"*Fifteenth*—I give, devise and bequeath to the 'Boys and Girls Aid Society' of San Francisco, California, the sum of Two Thousand Dollars ($2,000.)

"*Sixteenth*—I give, devise and bequeath to the 'California Woman's Hospital' of San Francisco, California, the sum of Two Thousand Dollars ($2,000.)

"*Seventeenth*—I give, devise and bequeath to the 'Hospital for Children and Training School for Nurses' of San Francisco, California, the sum of Two Thousand Dollars ($2,000.)

"*Eighteenth*—I give, devise and bequeath to the 'Florence Crittenton Home Association for Erring Women and Children' of San Francisco, California, the sum of Two Thousand Dollars ($2,000.)

"*Nineteenth*—I give, devise and bequeath to the 'San Francisco Protestant Orphan Asylum Society' of San Francisco, California, the sum of Two Thousand Dollars ($2,000.)

"*Twentieth*—I give, devise and bequeath to Etta Marion Warren, of San Francisco, California, Four Hundred Thousand Dollars ($400,000) in value of Dolbeer & Carsons Lumber Co.'s stock at par value.

"*Twenty-first*—I give, devise and bequeath to Etta Marion Warren, of San Francisco, California, all the residue of my estate of every kind and character of which I may die seized or possessed and wheresoever situated after the payment of the foregoing legacies and expenses of administration.

"*Twenty-second*—If any of the persons to whom specific legacies are bequeathed in this will shall die before my own death, such legacies to such deceased persons shall lapse, and the amount of such legacies shall become a part of the residue of my estate, to be bequeathed in accordance with the provisions of paragraph twenty-first above contained.

"*Twenty-third*—Should the death of Etta Marion Warren occur before my own death, I give, devise and bequeath my house and lot known as 2112 Pacific Ave. with all my pictures, furniture, jewelry, books and ornaments, to Mai Moody Watson, wife of Douglas Sloane Watson.

"*Twenty-fourth*—Should the death of Etta Marion occur before my own death all the legacies bequeathed to her, with the exception of my house mentioned in paragraph twenty-third, shall lapse and become a part of the residue of my estate, such residue in the event of death of said Etta Marion Warren occurring before my own death, I give, devise and bequeath as follows: One half ½ of such residue to William Wilson Carson of San Francisco, California, son of William Carson of Eureka, California; One fourth ¼ of such residue to William G. Mugan of San Francisco, California; one-eighth ⅛ of such residue to Elsie I. Chase of Holyoke, Mass. and one-eighth ⅛ of such residue to Ellen M. Hall, of Epsom, New Hampshire.

"*Twenty-fifth*—I hereby nominate and appoint George D. Gray and William G. Mugan of San Francisco, Cal. to be the executors of this my last will and testament; and I further direct and request that no bonds or undertakings of any kind shall be required of them as such executors. In the event of the death of either of said above named persons before the close of the administration of my estate I nominate and appoint the 'Mercantile Trust Co.' of San Francisco to act as co-executor with the survivor of the above named persons and in the event of the death of both of said persons above named before the close of the administration of my estate the said Mercantile Trust Co. shall act as my sole executor. And I hereby grant unto and bestow upon my said executors full and complete power to sell any and all of my property of which I may die seized or possessed without any order of the court, but all such sales shall be confirmed by the court having jurisdiction of my estate.

"In witness whereof, I have hereunto set my hand and seal this twenty-third day of April, A. D. nineteen hundred and four.

"BERTHA M. DOLBEER.

"The foregoing instrument consisting of seven pages besides this one, was on the date thereof signed in our presence by Bertha Marion Dolbeer who thereupon in our presence declared the same to be her last will and testament and we at

her request and in her presence and in the presence of each other, have hereunto set our names as witnesses.

"DOUGLAS S. WATSON,
"2732 Vallejo street San Francisco
"ARTHUR B. WATSON,
"2732 Vallejo St San Francisco

"San Francisco, April 23rd, 1904."

Thereafter, and on the second day of August, 1904, Adolph Schander, an uncle of decedent, filed herein his verified contest and opposition to the probate of said will, on the ground that at the time of its execution, and for a long time prior thereto, Bertha M. Dolbeer was not of sound or disposing mind and was not competent to make a will.

The case was tried before a jury on this issue (contestant having demanded a jury trial) and on December 22, 1904, after a hearing of twenty-six days, the jury returned a verdict for proponents.

Upon the jury being polled the verdict was found to be unanimous.

The instructions given the jury were as follows:

I. This proceeding is a contest of a document which has been filed in this court purporting to be the last will of Bertha M. Dolbeer, deceased. The contestant is Adolph Schander, an uncle of deceased, and the proponents of the document are William G. Mugan and George D. Gray, who in said document are named as executors. The principal beneficiary under the document alleged to be the will of said deceased is Etta Marion Warren, and she has appeared during the trial of this case by her counsel. Mr. Schander, the contestant, alleges that at the time of the execution of the document offered for probate, Bertha M. Dolbeer was of unsound mind and incompetent to make a will. The issue presented to you, therefore, for determination is as to the competency or testamentary capacity of Bertha M. Dolbeer, at the time it is asserted this document in question was executed by her. The maker of a will is termed the testator, or, if the maker be a woman, she is termed the testatrix.

II. I instruct you that the real test of capacity to make a will is as follows: The testatrix must have strength and clearness of mind and memory sufficient to know in general,

without prompting, the nature and extent of the property of which she is about to dispose, the nature of the act which she is about to perform, and the names and identity of the persons who are the proper objects of her bounty and her relation toward them.

III. You will observe from the definition of sound and disposing mind that has been given you, that a testatrix's mind must be sufficiently strong at least generally to understand the following matters and things:

1. She must understand the nature of the act she is performing;

2. She must be able to recollect those who are the natural objects of her bounty;

3. She must be able to remember the character and extent of her property;

4. She must be able to understand the manner in which she wishes to distribute her property;

5. She must understand the persons to whom she wishes to distribute it.

The mind of the testatrix must be sufficiently strong generally to comprehend all of these matters and things, or you must find her to be of unsound mind.

IV. I have heretofore instructed you that a person of sound and disposing mind is one who possesses a mind sufficiently strong and clear to enable her to know and understand the nature of the act in which she is engaged when she makes and executes her will, to know and recollect those who are the natural objects of her bounty, to know and remember the character and extent of her property, the manner in which and the persons to whom she wishes to distribute it. All of the matters and elements set forth in this definition enter into it. It is not sufficient that a testatrix should have mind sufficient to comprehend one of these elements. Her mind must be sufficiently clear and strong to perceive the relation of the various elements to one another; and she must have at least a general comprehension of the whole.

V. The right to leave property by will is a right given by the law alone; that is, there is no natural right that a person has to leave his property in any particular way. If a person dies without leaving a will, the law fixes the method in which

his property shall be distributed, and that method is that the property of one dying intestate shall go to his next of kin. In this particular case, if Bertha M. Dolbeer had died and left no will, the law would distribute her property to her relatives by blood, who are her next of kin, and in this instance those relatives are Adolph Schander, Horatio Schander, his brother, and Mrs. Ida J. Moody.

VI. The jury are instructed that every person possessed of testamentary capacity may dispose of his property by will, as he or she may see fit, and the only question is that of the competency of the testator or testatrix, measured by the legal standard. The competency of the testator being shown, the wisdom or folly, justness or unjustness of the will, can play no part in the question of its validity; but the character of the provisions of the will, as being just or unjust, reasonable or unreasonable, may be considered by the jury as tending to throw light on the capacity of the testatrix.

VII. The court instructs the jury that in determining the question of the soundness of mind of the testatrix, Bertha M. Dolbeer, the jury have the right, and it is their duty, to take into consideration the provisions of the will itself, and the condition and nature of the estate disposed of; also, the condition of the beneficiaries under the will, so far as the evidence may show the same, and the relations between the testatrix and any contestant or relatives excluded from any benefit under the will, and, so far as the evidence may show, their age, condition and circumstances, and their conduct toward the testatrix, in connection with all other evidence that has been received on the question as to whether the deceased was or was not of sound mind at the time of the execution of the will in question.

VIII. The court instructs you that a witness false in one part of his or her testimony is to be distrusted in others.

IX. The jury are instructed that they are the sole judges of the effect and value of the evidence addressed to them. Their power of judging of the effect of evidence is not arbitrary, however, but is to be exercised with legal discretion and in subordination to the rules of evidence. They are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their

minds, against a less number or against a presumption or other evidence satisfying their minds.

X. The jury are instructed that the law allows evidence to be offered of the opinion of an intimate acquaintance, respecting the mental capacity of a person, the reason for the opinion being given; and the court must use its discretion in each case in determining whether or not the particular witness is an intimate acquaintance within the meaning of this rule. It is proper for you to consider the degree of intimacy of acquaintanceship established in the case of each witness in determining how much weight shall be given to the opinion of that witness, and you must determine the proper weight to be given to the opinion of each witness from the facts and circumstances upon which he founds his opinion, keeping in view the degree of intimacy existing in each case.

XI. The persons named as executors in the instrument offered here as the last will of Bertha M. Dolbeer have presented that instrument to this court as her last will and testament, and have petitioned the court that it be admitted to probate. Adolph Schander, the uncle of said Bertha M. Dolbeer, has filed written grounds of contest to the probate of the instrument, in which he alleges, as his sole ground of contest, that Bertha M. Dolbeer was of unsound mind at the time said instrument was executed. This presents, therefore, as the only issue to be tried by you, gentlemen, the question whether Bertha M. Dolbeer was of unsound mind at that time.

XII. By the law of this state every person over the age of eighteen years and of sound mind may dispose of all his or her property, real and personal, by last will. If, therefore, Bertha M. Dolbeer was of sound mind at the time when the instrument here offered for probate was executed, she had the absolute right to dispose of her property by will. The right to dispose of one's property by will is most solemnly secured by law, and is a most valuable incident to the ownership of property and is not dependent upon its judicious use. The right of absolute dominion over one's property is sacred and inviolable.

If, therefore, at the time Bertha M. Dolbeer executed this instrument, she was of sound mind, she had the right to dispose of her property as she saw fit. Whatever may be the

motives of the testatrix her right to dispose of her property is paramount. She had the right by will to bestow her property on whomsoever she pleased; and if there be no testamentary incapacity, the law must give effect to her will, even though the provisions may appear unreasonable, or however great or unfounded may be her likes or dislikes or resentment against those who may be thought to have some claim against her bounty. It is the right of everyone to do what one wills with one's own, unless the disposition which is made violates some law. And after the death of a testatrix, neither court nor jury have the power to make for such personal disposition of her property different from the disposition she intended to make, upon any theory that such intended disposition was unjust. The beneficiaries named in a will are as much entitled to protection as any other property owners, and juries should not set aside a will through prejudice or merely on suspicion or because it does not conform to their ideas as to what is just or proper. You have nothing to do with the equity or inequity of the testamentary dispositions of property, provided you believe from the evidence that the testatrix at the time she executed the instrument had sufficient mental capacity to make a will, as explained in these instructions: Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Kohler, 79 Cal. 313, 21 Pac. 758.

XIII. The law having conferred on every person over the age of eighteen years and of sound mind the right to determine how he or she will dispose of his or her estate, it will not be presumed, and you are not to presume, that Bertha M. Dolbeer was insane or of unsound mind because she has exercised that right and discriminated against her heirs in the disposition of her estate: Estate of Mullin, 110 Cal. 252, 42 Pac. 645.

XIV. I instruct you that the heirs of a person have no right, either legal or equitable, which can be asserted against the right of that person to dispose by will of his or her property. The testatrix, if of sound mind at the time she executed the instrument, had the right to bestow her property upon whomsoever she pleased, and her heirs cannot prevent such disposition of her property. A testatrix need not, unless she wishes, consult anyone as to how she shall dispose of

her property. She may leave it to relatives or dispose of it otherwise of she wishes. In that regard her own wishes and judgment are sole and supreme: Estate of Kohler, 79 Cal. 313, 21 Pac. 758; Estate of Carriger, 104 Cal. 81, 37 Pac. 785; Estate of Mullin, 110 Cal. 252, 42 Pac. 645; Estate of Redfield, 116 Cal. 637, 48 Pac. 794.

XV. Mere hatred or dislike of relatives which influences a testatrix in making her will, without proof of actual mental unsoundness, will not invalidate a will: Estate of Carriger, 104 Cal. 81, 37 Pac. 785; Estate of Spences, 96 Cal. 448, 31 Pac. 453.

XVI. I instruct you that in this case if Bertha M. Dolbeer died intestate, that is, without leaving a valid will, her property will go in equal shares to Adolph Schander, the contestant, to his brother Horatio Schander, and Mrs. Ida J. Moody.

XVII. I instruct you that the law presumes, until the contrary is shown, that every person possesses a sound and disposing mind, and that on the trial of the question as to whether Bertha M. Dolbeer was of sound mind at the time she executed the instrument offered for probate, it is a presumption of law that she was of sound mind at that time, and the devisees and legatees are entitled to such presumption as a matter of evidence: Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Keegan, 139 Cal. 123, 72 Pac. 828.

XVIII. Upon this trial the law provides that the contestant is the plaintiff and all other parties to the action are defendants. The burden of proof is upon the contestant in this proceeding; he alleges that Bertha M. Dolbeer was of unsound mind at the time she executed this instrument, and the burden is upon him to show this, and this he must do by a preponderance of evidence in order to be entitled to your verdict. If you believe the evidence to be equally balanced, the contestant has failed to sustain the burden of proof which the law imposes upon him: Estate of Carriger, 104 Cal. 81, 37 Pac. 785; Estate of Redfield, 116 Cal. 637, 48 Pac. 794; Estate of Nelson, 132 Cal. 182, 64 Pac. 294.

XIX. The law requires that the person upon whom the burden of proving the insanity of a testatrix rests—in this case the contestant—shall prove it by a preponderance of evi-

dence. By a preponderance of evidence is meant that amount of evidence which produces conviction in an unprejudiced mind, and only such evidence will justify a verdict that Bertha M. Dolbeer was of unsound mind at the time she executed this instrument: Code Civ. Proc. 1826; Estate of Nelson, 132 Cal. 182, 64 Pac. 294.

XX. The presumption that every person is of sound mind until the contrary is proved is a legal presumption, and I instruct you that you should take it into consideration as a matter of evidence in passing upon the issue submitted to you: Estate of Langford, 108 Cal. 608, 41 Pac. 701.

XXI. I instruct you, gentlemen, that the law does not require that a person, in order to be competent to make a will, should be of perfect mental health. Bertha M. Dolbeer was of sound mind, in the meaning of the law, and was capable of making a will, if at the time she executed the proposed will she had the mental capacity to collect and hold in her mind and to fairly and rationally know and comprehend the nature of the act in which she was then engaged, the character and extent of her property, the persons who were the natural objects of her bounty, and the persons to whom, and the manner and proportions in which, she wished her property to go: Estate of Wilson, 117 Cal. 262, 49 Pac. 172, 711; Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Kohler, 79 Cal. 313, 21 Pac. 758; Estate of Redfield, 116 Cal. 637, 48 Pac. 794.

XXII. The only question submitted to you for decision is whether Bertha M. Dolbeer at the time she executed the proposed will was a woman of sound and disposing mind. You are not called upon to answer whether she was of sound or disposing mind at all times, but only whether she was of sound and disposing mind at a particular time, namely, at the time she executed the instrument in question. What her mental condition was before or after the execution of that instrument is only important so far as it throws light upon her mental condition when the will was executed. The point of time at which the proposed will was executed is the point of time to which you must look when you come to answer the question whether her mind was a sound and disposing one:

Estate of Mullin, 110 Cal. 252; 42 Pac. 645; Estate of Redfield, 116 Cal. 637, 48 Pac. 794.

XXIII. I instruct you that the proposed will of Bertha M. Dolbeer may be considered by you with all the other evidence in the case: Estate of Carriger, 104 Cal. 81, 37 Pac. 785.

XXIV. In deciding upon the capacity of the testatrix to make her will, it is the soundness of mind and not the particular state of bodily health that is to be attended to. The bodily health of a testatrix is important only so far as it may be evidence of the state of her mind. Neither sickness nor physical disability alone will disqualify a person from making a will: Estate of Redfield, 116 Cal. 637, 48 Pac. 794; Estate of Mullin, 110 Cal. 252, 42 Pac. 645.

XXV. I instruct you that suicide is never presumed by the law from the mere fact of death, but that, on the contrary, the law presumes, where the mere fact of death is alone shown, that such death occurred from natural or accidental causes, and not from suicide. I instruct you further that if you find from the evidence that the testatrix did commit suicide, the law does not presume from this fact alone that she was of unsound mind at that time.

XXVI. I instruct you that a niece is under no obligation, ordinarily, to provide for her uncles and aunts, either when living or by will, and that the failure to name them, or any of them, in the will, does not, under the statute, raise a presumption that they were forgotten: Estate of McDevitt, 95 Cal. 31, 30 Pac. 101. Expressly approved in Estate of Keegan, 139 Cal. 127, 72 Pac. 828, as to obligation of uncle to support niece and nephew.

XXVII. If you find that Bertha M. Dolbeer was, at the time of making the proposed will, of sound and disposing mind, you must not consider the relative wealth or poverty of the parties to this controversy: Estate of Redfield, 116 Cal. 637, 48 Pac. 794.

XXVIII. A hypothetical question is a question which assumes a certain condition of things to be true, a certain number of facts proved or to be proved, and calls upon the witness to assume all the material facts stated to be true and express his opinion as to a certain condition. The witness to

whom the hypothetical question is addressed assumes them to be true and bases his answer upon the assumed case. The opinion of the witness must, therefore, be brought to the test of the facts in order that you may judge what weight the opinion is entitled to: Estate of Spencer, 96 Cal. 448, 31 Pac. 453; Estate of Keegan, 139 Cal. 123, 72 Pac. 828.

XXIX. In deciding the issue before you, gentlemen, you must decide from a consideration of the evidence in this case, and nothing else. You are not to consider matters which are not in evidence, or to conjecture what the answers might have been to questions which the court did not permit to be answered. The remarks of counsel not supported by the evidence in the case are not to be regarded by you as facts proved in the case. To go outside of the evidence and base your decision upon anything but a consideration of the evidence would be to disregard the law and your oaths: Estate of Kohler, 79 Cal. 313, 21 Pac. 758.

XXX. Gentlemen, you are the judges of the effect and value of the evidence in this case. It rests with you, upon your sound judgment, under your oaths, and the law as given you by the court, considering all the evidence in the case, to decide upon that evidence whether Bertha M. Dolbeer was of unsound mind at the time she made the will here offered for probate. The court does not decide or intimate to you what is or is not proved, or the weight you are to give any facts proved in this case, further than to say that you must consider all of the evidence. Your power in judging of the effect and value of the evidence is not arbitrary, but is to be exercised in subordination to the rules of evidence. You have no right to substitute different views of the law in place of the rules given you by the court, nor have you the right to say that in your opinion this view or that view would be more just or equitable. You are to find the facts, but you must take the law from the court: Estate of Carriger, 104 Cal. 81, 37 Pac. 785; Estate of Spencer, 96 Cal. 448, 31 Pac. 453.

XXXI. I instruct you, gentlemen, that if from all the evidence you find that Bertha M. Dolbeer was of sound mind at the time the proposed will was executed, it makes no difference whether you believe its provisions to be just or unjust,

equitable or inequitable. A testatrix capable of making a will has a right to make an unjust will or even a cruel will, if she chooses, and no court nor jury have the right to deprive her of that privilege. You are not here to determine whether you would have made a will such as this, but you are to determine only whether the proposed will was made by a person of sound mind: Estate of Nelson, 132 Cal. 182, 64 Pac. 294; Estate of Redfield, 116 Cal. 637, 48 Pac. 794; Estate of Langford, 108 Cal. 608, 41 Pac. 701; Estate of Carriger, 104 Cal. 81, 37 Pac. 785; Estate of Spencer, 96 Cal. 448, 31 Pac. 453; Estate of Kohler, 79 Cal. 313, 21 Pac. 758.

XXXII. Under this law of the state a witness called by one party may be impeached by the other party by proof that such witness has made at other times statements inconsistent with his or her present testimony. Such proof, however, is to be considered by you only as affecting the credibility of such witness. The statements which are proved as contradicting his or her testimony are not evidence of the truth of the facts stated, but such statements are to be considered only in determining the credibility of the witness whom it is sought to impeach: People v. Conkling, 111 Cal. 616, 623, 44 Pac. 314; People v. Collum, 122 Cal. 186, 188, 54 Pac. 289.

XXXIII. Section 1881, Code of Civil Procedure:

"Subd. 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; . . . .

"Subd. 4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

THE ISSUE AND VERDICT.

"Was Bertha M. Dolbeer of sound mind at the time the instrument offered for probate as her last will was subscribed by her and witnessed by Douglas S. and Arthur B. Watson?"

"Answer—Yes.

"PHINEAS F. FERGUSON, Foreman."

Following is a list of the jurors: (Mr. Lundstrom was excused on the 21st of November, 1904, the tenth day of the

hearing, owing to his illness, and the trial was continued and the verdict rendered by the remaining eleven jurors.) 1. Knut A. Lunstrom; 2. Sibbert Petersen; 3. Charles A. Slack; 4. Edgar W. Briggs; 5. Christopher Branagan; 6. William Hencke; 7. Michael Shannon; 8. Edward Convey; 9. John Higgins; 10. Phineas F. Ferguson; 11. Emil Lowenberg; 12. William G. Copeland.

The Principal Case was before the supreme court in 149 Cal. 227, 86 Pac. 695, and in 153 Cal. 652, 96 Pac. 266. It was also before the superior court in Estate of Dolbeer, post, p. 249.

ESTATE OF BERTHA M. DOLBEER, DECEASED.

[No. 48; decided November 8, 1906.]

Insanity of Testator—Burden of Proof.—In the contest of a will on the ground of the insanity of the testatrix, the burden is upon the contestant to establish his contention affirmatively by a preponderance of evidence.

Insanity of Testator.—It is Presumed that a Person is Sane, and proof of insanity at one time carries no presumption of its past existence.

Will Contest—Law of the Case.—The decision by the supreme court rendered upon an appeal taken by a brother of the present contestant from a judgment against him in a contest of the will before probate, establishes the law governing this contest after probate, so far as the facts in evidence are substantially the same as those involved on such appeal.

Insanity of Testator—Opinion of Acquaintance.—Section 1870 of the Code of Civil Procedure permits as evidence the opinion of an intimate acquaintance respecting the mental sanity of a person, but with that opinion must be given the reasons upon which it is based, and the opinion itself can have no weight other than that which the reasons bring to its support.

Wills—Whether Unnatural or Unjust.—The evidence in this case shows that the testatrix did not intend to provide for her next of kin as her estate had been derived from her father, between whom and her contesting kin there seemed to have been nothing in common, and the testatrix had never known or cared for the omitted relatives, and in the drawing of the will she had before her a copy of her father's will, which, as to many of the bequests, she followed

with a fidelity indicating a respect for what she must have conceived would have been his wishes; and the will itself contains nothing irrational or unnatural or opposed to ordinary notions of equity, but, on the contrary, is in accord with the sentiments of affection resulting from the intimacy subsisting between the testatrix and her beneficiary, who had been her companion and confidant from girlhood. Under such circumstances it cannot be contended that the will is at variance with natural instincts or justice.

Testamentary Capacity—When Established.—A review of the evidence as to the habits, characteristics, conduct, manner and testamentary capacity of the decedent, establishes that at the date of the execution of the will the decedent was in full possession of her faculties, and competent to execute a will.

Undue Influence—Presumption and Burden of Proof.—Undue influence cannot be presumed, but must be proved in each case, and the burden of proof lies on the party alleging it.

Undue Influence—When Vitiates Will.—The kind of undue influence that would destroy a will must be such as in effect destroys the free agency of the testatrix and overpowers her volition at the time of the execution of the instrument, and evidence must be produced that pressure was brought to bear directly upon her testamentary act.

Undue Influence—What does not Amount to.—Surmises and suspicions arising from opportunity and propinquity may be indulged in to an illimitable extent, but these do not constitute proof and must be disregarded by the court. The evidence in this case shows that the testatrix, at the time of executing her will, was unconstrained by undue influence, and is entirely in favor of the respondents.

Bart Burke, C. J. Pence and D. C. De Golia, for contestant Horatio Schander.

G. W. McEnerney, for Etta M. Warren.

E. S. Pillsbury, for W. G. Mugan, executor.

J. H. Mayer, for certain legatee respondents.

COFFEY, J. This is an application by Horatio Schander, an uncle and one of the next of kin and heirs at law of decedent, to revoke the probate of an instrument filed in this court on July 18, 1904, purporting to be the last will of Bertha M. Dolbeer, executed on April 23, 1904, and admitted to probate on the 22d of December, 1904.

The issues tendered by the grounds of contest are (1) the incompetency of the decedent to make a last will and testament; and (2) that the decedent was unduly influenced by Etta Marion Warren, the principal beneficiary, to execute the alleged will.

The contest came on for trial on the 29th of August, 1906, and the contestant introduced to support his theory of the case several witnesses, among them the main beneficiary, Miss Warren, Miss Ethyl Hager, Mrs. May Moody Watson, Raymond Hoff Sherman, Mrs. Margaret H. Warren, Miss Frances Stewart, Mrs. Elizabeth C. Phillips, Mrs. Margaret Nelson Bresse, Mrs. Angela Brunson, Mrs. Hilma Carson, George H. Tyson, John Cotter Pelton, Thomas Saywell, William Gordon Mugan; and, under stipulation, the testimony of certain witnesses in New York taken by deposition and ruled out in the former contest of Adolph Schander, which it was agreed would be the same if taken in this trial.

I. As to the first issue, the unsoundness of mind of decedent at the time of making the will dated April 23, 1904, respondent claims that this was disposed of in the contest instituted by Adolph Schander by the decision of the supreme court rendered May 18, 1906, which declared that the evidence then produced was absolutely insufficient to have justified the submission of the issue to a jury.

Upon the issues presented the burden is upon the contestant to establish affirmatively and by a preponderance of evidence the unsoundness of mind of testatrix at the time of making the will, and the evidence is to be considered in view of this burden which the law casts upon him. The presumption always is that a person is sane. Proof of insanity carries no presumption of its past existence. It exists only from the time it is proved to exist. This is the law as declared by the appellate court in the appeal of Adolph Schander; but contestant in this case says that the decision in that contest does not apply here, since every case makes its own law. So far, however, as the facts in evidence are substantially the same, it should seem that the principles stated by the supreme court should control the conclusion of this court, and I cannot discern any material difference in the testimony dealt with in detail by the appellate tribunal and that taken in this

trial. Mrs. Phillips appears to have been the main reliance of contestant, who claims that her testimony is superior to that of a hundred witnesses such as those who testified on the other side; she was in place of a mother to her from decedent's childhood and knew the whole family history, and was most competent to express an opinion, but the supreme court held that this witness' opinion had no probative value in the other contest, and the reasons for that remark are applicable here, since her evidence is not essentially different. Mrs. Phillips thought that Hannah Dolbeer, the mother of Bertha, was of unsound mind when she was carrying the latter; after the death of the mother she took charge of the children immediately and remained in the home on Lombard street for six years; after she left the German nurse took charge, and then Miss Millie Stewart had care of them; subsequently Miss Warren came into the family when Bertha was about eleven years old. Mrs. Phillips describes Bertha Dolbeer as of a quiet, undemonstrative nature; she never made any confidant; she complained of her eyes and of her head about a year before her death; Bertha's manner was so quiet that one could not say she was nervous. Mrs. Phillips noticed that her mind was not concentrated. When John Dolbeer died this witness was sent for and saw Bertha, who spoke of the shock the event gave her; she never acted nervous. After Mrs. Phillips returned from Eureka, Nevada, she saw Bertha frequently and their relations were always intimate; she occasionally said that life was not worth living without health; she was subject to periods of depression, and Mrs. Phillips did not think she was of sound mind in April, 1904, because of her moods, her lack of interest in life; she was unlike her former self. This witness spoke to Bertha about her father's will and the just manner of his disposition and that she ought to be proud of it, and she answered that she was. Witness did not know whether Bertha ever had a love affair or whether she had any sentimental relations with anyone. Attended her funeral, but did not see her remains. Received one letter from her when she went away, did not preserve it; the purport of it was that the writer was not any better. Her letter to Mr. Mugan from Paris was to the same effect; she wanted to come home. Mrs. Phillips saw that letter in

Mr. Mugan's office; remembered it because it made her feel so bad; Bertha's letter to witness was from the steamer; the first she wrote. The last time she met decedent was at her father's house for about fifteen minutes just prior to her departure for Europe; it was about noon; it may have been the day before; generally speaking, Bertha was discreet, reticent, secretive, kind, shy. Mrs. Phillips said that to her knowledge neither Horatio nor Adolph Schander visited the Dolbeer house after a few weeks from the death of Mrs. Dolbeer. Mrs. Phillips' grievance against the instrument seemed to be the comparative smallness of the bequest made to her. She had said to one of the executors that she should have as much as $25,000, the amount bequeathed to Miss Warren's mother, but she denied that she demanded that amount, but the spirit of her remark was, as she testified, that she thought her bequest was small compared with that to a stranger. She had said that all she cared for was money, but that was on account of her circumstances. She thought the case ought to be compromised on account of the family name; she had facts in her possession unknown to contestant sufficient, if revealed, to break the will, but she wanted to save all trouble and to avoid the ignominy of having domestic history exposed on the trial; so she was working for a compromise; she desired that the matter should be adjusted without recourse to the courts.

It is fair to infer from the testimony of this lady that if her legacy was as large as that of the mother of Miss Warren, or if she received $25,000 by way of compromise, her opinion would have been materially modified; but, aside from this, an examination of her evidence discloses no fact justifying a deduction of unsoundness of mind at the date of making the will, nor at any other time, within the knowledge of the witness, and it is apparent, from her own statements, that Mrs. Phillips in her intercourse with decedent always treated her as a rational person, possessed of sound judgment, up to the last time she saw her, just prior to Bertha's departure for Europe. Her own summary of the character and characteristics of the testatrix shows that she exercised discretion, self-control, attention to her own affairs, capacity of considering the disposition of property, knowledge of what her father had done, and appreciation of the quality of his testamentary act;

"she never acted nervous"; she was a secretive girl; did not discuss her affairs with others; was reticent.

It is said by contestant that the respondent was not treated by John Dolbeer as a member of the family, but as an attendant and companion of and for his daughter; she entered into that house in that capacity and she formed the design from the start to obtain the money. As long as the father lived she kept her place, but when he died she became the master of the situation, and on his death in 1902, Bertha was absolutely at her mercy, and she carried out her carefully concocted scheme to control the mind of her charge; and the physical condition of testatrix contributing to her mental malady, the task of the schemer was rendered easier; but opposed to this argument is the will of John Dolbeer, who describes Miss Warren, in leaving her a legacy, as one "who has been for a number of years and is now a member of my family."

In commenting on this clause the supreme court has remarked that John Dolbeer's family at that time consisted in law strictly of himself and his daughter, and this inclusion of Miss Warren as a member of his family is not without its significance. This relation continued after his death and down to the decease of testatrix. The fact that she was a stranger in blood does not impair her standing, for our supreme court has held that circumstances may be such that failure to provide for one in such a position may be inequitable: Estate of McDevitt, 95 Cal. 31, 30 Pac. 101. The will is not at variance with natural instincts; on the contrary, it is in accord with the natural sentiments of affection resulting from the intimacy subsisting between the testatrix and the beneficiary, who had been her companion and confidant from girlhood. The decedent was not bound to bestow her bounty upon her relatives; ordinarily, there is no such obligation. Testatrix obviously did not intend to do so; her own statements show no disposition to favor the contesting kin. Her estate had been derived from her father, between whom and the mother's people there seemed to have been nothing in common, and the testatrix had never known or cared for the omitted relatives, and moreover, as pointed out by the appellate court in the contest of Adolph Schander, in the drawing

of the document in dispute she had before her a copy of her father's will, which, as to many of the bequests, she followed with a fidelity indicating respect for what she must have conceived would have been his wishes.

There is nothing in the instrument itself irrational or unnatural or opposed to ordinary notions of equity; and there can be no other conclusion from the evidence of the witnesses called by contestant than that on the day of the date of the paper—April 23, 1904—she was in full possession of her faculties. About fifteen witnesses were examined for contestant, and the sum of their testimony is that testatrix was a bright and accomplished young woman, fond of outdoor sports, swimming, bicycling, equestrian exercise, an expert manager of automobiles, she was interested in social affairs, entertained her friends frequently, attended parties, indulged in dancing, and enjoyed society generally during the season. By all accounts she was an attractive personality, and an agreeable addition to the company of those with whom she chose to associate.

One of the witnesses called by contestant knew decedent for about ten years and described her as normal. She complained of headaches sometimes and spoke of liver troubles, and had some difficulty with her eyes and bad headaches on that account, but after she procured certain eyeglasses she was relieved and had no further trouble on that score. This witness described decedent as phlegmatic, self-composed, most unexcitable, never saw her excited; she was intelligent and educated, fond of reading; seemed happy; always the same; in all her conversations she appeared to be rational and absolutely of sound mind. She was not destitute of domestic tastes and aptitudes; was a good seamstress and busied herself a great deal with the needle; had fine taste in dress and selected her own apparel after she was sixteen.

It is asserted by contestant that the physical condition of decedent contributed to her mental malady. It does not appear, however, from the evidence that her mind was at all affected by any corporal ailment. It is true that she was treated by Dr. Parson for some trouble of the liver, but during the time she was taking his treatment she appeared to be well—took exercise, long bicycle rides to the park in company

with her young lady friends. This doctor treated her for about two months. She had also some complaint for which Dr. Lewitt prescribed, and she suffered from insomnia beginning in the autumn of 1893, for which she administered some medicaments, but it was nothing very serious; she was not depressed, not restless or nervous; she did suffer from constipation, but during that period she received many visitors at her home in the evening, engaged in social conversation, played pool, and in various ways passed the time in agreeable intercourse with her friends, none of whom detected in her any symptoms of insanity. When she took the rest cure, it seems to have been the result of exhaustion produced by excessive attention to social obligations, and not from any mental disturbance.

Dr. Moffitt, who is described as a diagnostician, visited her at her home about three times a week for a while; but while she was somewhat secluded and resting from the excitements of society life, her intimate acquaintances visited her without hindrance; and for a considerable time prior to making the will she was entirely exempt from the attentions of physician or nurse.

Up to the time of the testamentary transaction and at that time there is no testimony tending to establish the theory of unsoundness of mind. Afterward, on the trip to Europe, it appears that she contracted a cold going over on the steamer, but she had improved by the time of her arrival in Paris. Still she was not feeling very well there and received some medical treatment for nervousness from Dr. Gros, who said she had "neurasthenia," but he did not say it was a severe case. She was nervous on her return in New York, but her companion was not apprehensive about her. As to the cause of her death, whether self-inflicted or accidental, there is no certainty in the record, but it is certain from the evidence that at the time of executing the will she had testamentary capacity.

This conclusion could be reached without examining the evidence for respondents, which is replete with proof as to the integrity of her mind at and about the time of the transaction. Some sixteen witnesses, intimately acquainted with her, testify that testatrix was a woman of strong mental

caliber, of good disposition, calm, quiet, self-possessed, never ruffled, not nervous, very cheerful, expert at exercise, always rational in conduct and conversation. These were not persons who met her casually, but who saw her day in and day out, at home and abroad, and who were her constant companions, some of whom had known her from childhood, and who were in the habit of daily association with her in familiar intercourse; they concur in testimony that she was a person of more than average intellect; one says she had an active brain, an alert eye, a good nerve, and was always pleasant. This is the tenor of their testimony, and it is entitled to great weight as to her general character and capacity. In addition, the evidence of the subscribing witness is uncontradicted and must be accepted.

The instrument, having been entirely written, dated and signed by the hand of the testatrix herself (Civil Code, section 1277), did not need attestation, which she is presumed to have known; but she took the precaution to secure two witnesses, and in their presence executed it with all the formalities required by the statute (Civil Code, section 1276). Besides this she made in her own hand a copy and placed it in a sealed envelope, indorsing it "last will and testament of Bertha M. Dolbeer," and on the Monday after the attestation she deposited it in the office safe of Dolbeer & Carson, taking therefrom another will which she had deposited a year before. The original she left in the California Safe Deposit vaults where it was found after her death, when the envelope containing the copy was opened; the copy had appended to it a memorandum setting forth where the original could be found, all in her handwriting. There is nothing in this to indicate insanity, but everything to demonstrate a well ordered and strongly balanced mind.

II. As to the second issue—undue influence—the argument of counsel for contestant is that the paper was the product of the scheming of Mugan, one of the executors, and the principal beneficiary, Miss Warren, and he undertakes to give the genesis of the document and to show how it was developed from the suggestion of this executor, and, in support of this theory, contestant adverts to the surroundings of testatrix during the last months of her life, and asks,

when, where, and how was this instrument written, seven pages of the original and a copy, almost a facsimile, in her handwriting? Contestant asserts, in answer to his own question, either Etta Marion Warren wrote that or she sat at the bedside of Bertha Dolbeer and controlled her hand in writing it during the night of the 22d of April; for it was impossible that decedent could have written it on the 23d of April; but there is no evidence whatever to justify this extraordinary assumption, and the proof is plenary to establish the contrary. Contestant endeavors to discredit the testimony of the subscribing witnesses, Douglas and Arthur Watson, because the latter added unnecessarily the date of the execution to the will, it having been already inserted by the testatrix, which the witness seemed to have overlooked, and counsel considers this a novel feature, calculated to throw doubt on the authenticity of their account of what occurred, and asks, why did not decedent call his attention to that fact? Clearly, this does not call for comment, in view of all the evidence in favor of the truth of the transaction.

Counsel denounces the whole case as a very carefully concocted plot, and declares that the entire cunning, connived plan shows it to have been devised by a matured legal mind, and that all the circumstances establish a conspiracy in which Mugan and Miss Warren were chief actors, aided by William Wilson Carson and others; but this is asserton and not proof, and the law is that undue influence cannot be presumed, but must be proved in each case, and the burden of proof lies on the party alleging it, and, in this contest, there is no evidence sufficient to warrant the allegation of contestant. The kind of undue influence that would destroy the testament must be such as in effect destroyed the free agency of the testatrix and overpowered her volition at the time of the execution of the instrument, and evidence must be produced that pressure was brought to bear directly upon the testamentary act; and there is no such evidence in this case. Surmises and suspicions arising from opportunity and propinquity may be indulged in to an illimitable extent, but these do not constitute proof, and must be disregarded by the court.

The evidence on each and both of the issues being the same in effect, it is not necessary to repeat what has been said.

The decedent at the date of writing the instrument and of executing it in the presence of witnesses was of sound mind, unconstrained by undue influence, and the evidence being entirely in favor of the respondents, the petition of contestant should be and it is denied.

The Principal Case was before the supreme court on appeal in 149 Cal. 227, 86 Pac. 695, and in 153 Cal. 652, 96 Pac. 266. It was also before the superior court in Estate of Dolbeer, ante, p. 232.

ESTATE OF SINA BERG, DECEASED.

[No. 6,447; decided December 23, 1908.]

Executor According to the Tenor.—Where It Appears from the Terms of a will that it was the intention of the testator to appoint a certain person executor, although not named as such in the will, courts will be guided by the intention so expressed and make the appointment.

Executor According to the Tenor.—Courts do not Look with Favor upon the appointment of an executor "according to the tenor," but will rather appoint an administrator with the will annexed.

Executor According to the Tenor.—Before a Person Who is not Directly named as executor can receive an appointment "according to the tenor," not only must his identity be certain, but the court must be able to conclude from the language of the will itself that there is a testamentary intent that he shall take charge of the estate to perform the duties usual to an executorship.

Executor According to the Tenor.—A Person will not be Appointed executor according to the tenor unless there is some expression in the will clothing him with at least some of the duties and powers of an executor.

Application by Gaston E. Bacon for the probate of a will and for the letters testamentary thereon as executor according to the tenor of the will; and application by the public administrator for letters of administration with the will annexed.

William Penn Humphreys and Herbert Choynski, for the first application.

Cullinan & Hickey and John J. O'Toole, for the second application.

COFFEY, J. Decedent testatrix was a single woman, aged about forty-five, a native of Norway, and died in Sonoma county, California, in August, 1908, leaving estate in San Francisco, and leaving a last will and testament in the Norwegian language, entirely written, dated, and signed by her own hand, which, translated, reads as follows.

"2695 Sacramento St.

"Mrs. Pauline Lyng,

"If there is any money left by me when I die, I wish that you shall have it, also my watch and my clothes. I have no relatives here and this my wish must not be changed.

"This I wrote the 25th day of February, 1904.

"SINA BERG.

"If you should need somebody to assist you in this matter ask Mr. Bacon. Mr. Bacon will help you because Mr. and Mrs. Bacon were always good to me.

"SINA BERG."

Mrs. Lyng filed her renunciation of any rights which she might have had as executrix, and requested that the court appoint "Mr. Bacon," named in said will, as executor.

It will be noticed that in the will no one is directly named as executor. It is claimed in behalf of Dr. Bacon that it appears from the said will that by its terms he was appointed executor according to the tenor of the will.

"Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor"; Civ. Code, sec. 1371.

The argument of Dr. Bacon's counsel is that it was the intention of the deceased to commit the administration of her estate to him, and that this is strengthened by the evidence introduced.

Miss Berg was a hard-working woman of but little worldly experience, while Dr. Bacon is a man of property, accustomed to financial affairs and for many years Dean of the College of Pharmacy of the State University. Miss Berg had worked five years at his house, and her will shows that

she had great confidence in his judgment, kindliness, and integrity.

This estate is so small that the commissions allowed its executor certainly are no great inducement for any business man to give his time and attention to its administration, and it is fair to infer that it is solely because of his relation to the deceased that Dr. Bacon has made his application.

If it be asked why Mrs. Lyng has not also petitioned as executrix, it is replied that she is also a working woman with full confidence in Dr. Bacon, and that the record shows that she has renounced any rights which she may have had as coexecutrix under said will, and has requested that the court appoint Dr. Bacon to act as executor.

The public administrator has petitioned for letters of administration with the will annexed, and the only question before the court is to which of these applicants letters should issue.

The authorities upon this subject are not very numerous.

"Each case is a construction of a particular document": In re Goods of Way, L. R. Prob. D. 1902, 345.

"The appointment of an executor may be express or constructive, and although no executor be expressly nominated in the will by the word 'executor,' yet if, by any word or circumlocution, the testator recommend or commit to one or more the charge and office, or other rights which appertain to an executor, it is tantamount to an express appointment of an executor.

"But it seems not to be essential to constitute an executor according to the tenor of the will, that express authority should be given to him to collect and pay the debts. If the duty imposed and the authority given necessarily imply the right to receive the testator's goods and collect his debts, it will be sufficient": Grant v. Spann (1851), 34 Miss. 302.

"The testator did not in his will nominate an executor in express terms. But as he confided to the persons whom he denominated trustees the execution of his will and conferred upon them the rights which appertain to an executor, it amounts to a constructive appointment of them to the office, and although called trustees by the testator, they were also

his executors according to the tenor of the will": Myers v. Daviess (1850), 10 B. Mon. 396.

"The use of the word 'executor' is not essential to the appointment of a person to execute a will. An executor may be appointed expressly or constructively, and designated by committing to his charge those duties which it is the duty of an executor to perform; by conferring those rights which belong to the office or by any other language from which the intention of the testator to invest him with that character may be inferred": Carpenter v. Cameron (1838), 7 Watts, 51.

"Where a person was charged with the disposition of the estate and authorized and directed to carry out the intention of the testator, though not named as the executor of the will, it made him the executor as fully as if named as such": Stone v. Brown (1856), 16 Tex. 430.

"The appointment of an executor may be express or constructive, and though a person be not appointed executor by that name, yet if the testator commit to his charge duties ordinarily performed by an executor, it is the testator's intention to invest him with that capacity": Ex parte McDonnell (1851), 2 Brad. Sur. (N. Y.) 32; Fleming v. Bolling (1801), 3 Call, 75.

"The testator's declaration that A B shall have his goods to pay his debts and otherwise to dispose at his pleasure and other such like expressions will suffice for such appointment": Henfrey v. Henfrey, 4 Moore P. C. 33.

So, too, the commitment of one's property to the "administration" or to "the disposition" of A B; or the direction that A B shall pay debts and funeral expenses and probate charges: Goods of Fry, 1 Hagg, 80; Schouler on Executors, 3d ed., sec. 36.

A will read: "I do hereby request J. Channon or C. B. Taylor to have my body buried at Laurel Hill. Pay to my niece, etc. Pay all my honest debts." The court said: "No express words are necessary in a will to appoint an executor. The appointment may be made by necessary implication." To the same effect are: Nunn v. Owens, 2 Strob. 101; State v. Rogers, 1 Houst. 569; Goods of Fraser, L. R. 2 P. & D. 183: Hartnett v. Wandell, 60 N. Y. 350, 19 Am. Rep. 194; In re Goods of Cook, L. R. Prob. D. 1902, 114; In re Goods of

Kirby, L. R. Prob. D. 1902, 188; Bayeaux v. Bayeaux, 8 Paige Ch. 333. See Crosswell on Executors, pp. 51, 52; Williams on Executors, 10th ed., pp. 165-168.

It is the statute law of California, and of nearly all the other states of the Union, and a well-defined principle of common law, that where it appears from the terms of the will that it was the intention of the testator to appoint a certain person executor of his will, although not named as executor in the will, that courts will be guided by the intention so expressed and make the appointment. This principle is laid down in section 1361 of the Civil Code of California.

While the foregoing is a well-settled principle of both code and common law, it is equally well settled that courts do not look with favor upon the appointment of an executor "according to the tenor," but will rather appoint an administrator with the will annexed who will administer the estate under the guidance of the court, and make distribution of the property of the decedent in conformity with the terms of the will. See Hartnett v. Wandell, 2 Hun, 552, where the court said: "The appointment of an executor, by construction or implication, is not favored, and in doubtful cases administration with the will annexed must be resorted to."

The courts are a unit on the proposition that before a person who is not directly named as executor can receive an appointment according to the tenor, not only must the identity of the person be certain, but the court must be able to conclude from the language of the will itself, that there is a testamentary intent that the party named should take charge of the estate, collect the assets and liquidate the indebtedness, and perform the duties and possess the powers usual to executorship. See Schouler on Executors, 3d ed., pp. 49, 50; also In re Hill's Estate, 102 Mo. App. 617, 77 S. W. 110, where the court said: "The appointment of an executor may be constructive, no particular form of appointment, nor the use of the word executor is required. Any language adopted in the will, which expressly or by implication clothes a given party with authority and duty of an executor will be held to constitute such appointment; but the court must be able to gather a testamentary intent that the party named should take charge of the estate, collect the assets and liquidate the

indebtedness and perform the duties and possess the powers usual to executorship."

The foregoing language was used by the court in construing the following provision of the will of the decedent. "19th I desire P. H. Brennan to direct anything that may be done about my St. Louis affairs in connection with this will, his address is 816½ Chestnut street, St. Louis, Mo." After an exhaustive opinion on the subject the court denied the application of Brennan to be appointed executor.

Woerner in his "American Law of Administration," volume 2, star pages 503, 504, says: "The test of a constructive appointment as an executor according to the tenor of a will may be found by considering whether the acts to be done, or the power to be executed by the person are such as pertain to the office of an executor."

In Cyclopedia of Law and Procedure, volume 18, page 76, the following rule is stated: "Executorship according to the tenor will not be granted where the will does not import that the person named shall collect dues, pay debts and legacies and settle the estate like an executor. The mere designation to perform some trust or to be guardian is not sufficient."

In State v. Watson, 2 Spears (S. C.), 97, Samuel Mayrant, the brother in law of deceased, and Mrs. Simmons, her sister, were by the will appointed guardians of the children of deceased, and deceased in the concluding paragraph of her will stated: "And it is my desire that this should be carried into effect by my brother in law Samuel Mayrant." After the death of deceased Mayrant contended that by virtue of the concluding paragraph of the will he was entitled to be appointed executor. In denying his application the court said: "To constitute one an executor according to the tenor it is necessary that he should have the charge and office or right of an executor. Does this will cast upon him the right of an executor? There is nothing to show that he is to have control of the property. He is not directed to sell or divide it. He is not directed to pay the debts. Indeed, there is nothing in the will which in the remotest degree can be considered as placing him in the stead of executrix, and conferring on him her rights. To be an executor, his authority must arise from the will, and unless there be a clear intent to constitute the

person claiming to be so regarded the executor, he never ought to be so appointed according to the tenor."

To apply the law as above set forth to the case at bar, the court need only consider the will of the deceased. There is nothing contained in the will from which the court can reason that it was the intention of the testatrix to appoint her friend Dr. Bacon; he is not requested, by either direct words or by inference to take charge of the property of the deceased, to pay her debts, collect moneys due to her, distribute her property, pay her legacies, or to do anything whatsoever regarding her estate; he is not requested, directly or indirectly, to do or perform any act which usually falls to the lot of an executor. We can read nothing into the will, and can only consider the meaning of its words, and certainly, the direction given by the testatrix to the legatee that "If you should need somebody to assist you in this matter ask Mr. Bacon. Mr. Bacon will help you, because Mr. and Mrs. Bacon were always good to me," means nothing more than they directly express, if you as legatee under my will have any trouble in obtaining your legacy, ask Mr. Bacon, and he will assist you in getting it. This is not a direction to Dr. Bacon to carry out the bequests of testatrix; it is not a direction to him to take charge of her estate, to collect dues, to pay debts, or to do anything whatsoever for the deceased. Dr. Bacon is to perform no service for the deceased; any service that he is to render is to the legatee. Dr. Bacon can do nothing in the premises until the estate is ready for distribution, and then if the legatee should need anyone to assist her in obtaining her legacy, she is directed to go to Dr. Bacon, and Bacon will assist her in obtaining it from the person holding the administration of the estate. This is the only construction that can be placed on the words of the will.

There is no doubt that the deceased held Dr. Bacon and his family in high esteem, and that no motive other than a wish to show his appreciation of this esteem prompts the doctor to ask that the administration of this estate should be given into his charge, but still the court can construe the will only as it is written, and no amount of evidence as to the mutual esteem and confidence existing between the parties can swerve the court from this duty. The same words in a will used from

a husband to his wife or from a father to his son would not give the wife or the son the right to the appointment of executrix or executor, and they would be compelled to resort to administration with the will annexed, and this is the principle that must govern the court in deciding this matter, and no matter what the relation was that existed between the parties, it is only the words of the will that can be considered.

It is a well-settled principle that administration of estates must go as the law directs, irrespective of feeling in the premises.

There is no direction to Dr. Bacon to take charge of the property which deceased might leave. Testatrix disposes of her money to Mrs. Lyng, and Mrs. Lyng is told that if she has any trouble in getting this money to go to Dr. Bacon. But there is no direction to Dr. Bacon to give this money to Mrs. Lyng, nor is there any direction to Dr. Bacon to take charge of or dispose of the interest of testatrix in the restaurant or in the schooner; if it was the intention of the testatrix that he should act as executor she would have mentioned these other properties to him.

The court can only conclude that the will of testatrix expressed a wish that Dr. Bacon should befriend Mrs. Lyng, if she needed assistance in obtaining her legacy from the person or persons having charge of the estate, and Dr. Bacon can only come before the court as the representative of Mrs. Lyng and not of the deceased.

Counsel for Dr. Bacon has cited authorities in support of his contention, but they only substantiate the principle laid down in the Civil Code of California that an executor need not be expressly named as such, which is not disputed, but in each of these cases where the court did appoint the executor petitioning, there was some expression in the will which clothed the person named with at least some of the duties and powers of an executor, which expression is lacking in the case at bar.

Application of Dr. Bacon denied.

Application of public administrator granted.

ESTATE OF JOSEPHINE HANSON, DECEASED.

[No. 5,151; decided January 27, 1909.]

Will—Whether Creates Charity or Personal Bequest.—A clause in a will "the residue (if any) I leave to my executor M., to dispose in charities as he think best," creates a personal bequest.

Wills.—Where Absolute Discretion to Dispose of Property is left with a residuary legatee, this is equivalent to a personal legacy.

Trust.—Three Conditions must Concur in order that a power be deemed a trust or that the specified beneficiaries take trust interests by implication in default of appointment: Imperativeness of request that donee execute the power; certainty of subject matter; and certainty of object.

Trust.—No Recommendatory Terms of a Will expressing a will, desire or the like are sufficient to create a trust, unless there is certainty as to the parties to take and what they are to take.

Charities.—A Degree of Vagueness is allowable in charitable bequests.

Thomas E. Haven, for the executor.

COFFEY, J. 1. The bequest in the sixth clause of the will of Josephine Hanson, deceased, is a bequest to William G. Mugan. It reads as follows:

"The residue (if any) I leave to my Executor Wm. G. Mugan to dispose in charities as he thinks best. I hereby name as executor of this my last will and testament William G. Mugan to serve without bonds."

Authority to dispose of property at discretion, there being no bequest over, is taken as evidence of the extent of the interest intended to be given; and it is construed to be an absolute interest, and not a mere power to sell : Kendell v. Kendell, 36 N. J. Eq. 91.

Where absolute discretion is left with the residuary legatee, it is equivalent to a personal legacy.

"In general, a testator may leave his property to whomsoever he pleases, but he may give to any person a power of disposal over all or any part of his property. In the latter case, the donee of the power may exercise it in his own favor, and the gift is almost equivalent to an absolute gift to the donee": Tyssen on Charitable Bequests, 181.

A specific charitable gift followed by a gift of residue of personalty, and the proceeds of realty to executors, "to be disposed of to such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient," held a general power of appointment, exercisable by the executors for their own benefit: Tyssen on Charitable Bequests, 183; Gibbs v. Rumsey, 2 Ves. & B. 294.

By a will, the residue of the testator's estate, after payment of debts and legacies, was given to the executors "to be disposed of as they may think proper," held that the executors took beneficially, discharged of any trust for the next of kin: Ralston v. Telfair, 17 N. C. 225.

A bequest to executors, in their own right, "trusting nevertheless, and believing that with a proper sense of their obligation to their own consciences and their accountability to God, they will pay over and contribute the sum to charitable objects," creates no trust enforceable in a court of equity. The executors took in their own right, amenable only to their own consciences for the distribution of the bequest: Frierson v. General Assembly of the Presbyterian Church, 54 Tenn. 683.

2. Mr. Justice Gray, of the supreme court of the United States, in speaking of charitable uses and trusts, says: "They may and indeed must be for the benefit of an indefinite number of persons, for if all the beneficiaries are personally designated the trust lacks the essential element of indefiniteness which is one characteristic of a legal charity": Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397.

A gift to be applied for the promotion of agricultural or horticultural improvements, or philosophic or philanthropic purposes "has been held a good charitable bequest": Rotch v. Emerson, 105 Mass. 431.

In Snider v. Snider, 70 S. C. 555, 106 Am. St. Rep. 754, 50 S. E. 504, the court says: "The question therefore presented is whether the bequest to these unincorporated societies was void for uncertainty, no trustees being named and no specific purposes being mentioned to which the fund was to be applied. Held, that a degree of vagueness is allowable in charitable bequests and the bequests are valid.

In the case at bar there was no trust attempted to be created. Had the executor been named as the trustee, still the bequest would have been valid under the foregoing rule as to indefiniteness being an essential element of charitable bequests.

The fact that the legatee Mugan was not charged with the duties of a trustee makes the case more clearly one wherein the bequest must be construed valid.

The authorities on indefiniteness of charitable bequests are collated in a note to In re Gibson, 1 Cof. Pro. Dec. 9, Ross' Annotations.

3. Three conditions must concur in order that the power be deemed a trust or that the specified beneficiaries take trust interests by implication in default of appointment: (1) Imperativeness of request that donee execute the power; (2) certainty of subject matter; and (3) certainty of object: Lines v. Darden, 5 Fla. 51; Gilbert v. Chapin, 19 Conn. 342; Briggs v. Penny, 3 Man. & G. 554; Harding v. Glyn, 1 Atk. 469; 2 White and Tudor's Leading Cases in Equity, *946 and note.

The rule laid down by Mr. Justice Story in his Commentaries on Equity Jurisprudence, section 1070, cited by the United States supreme court in Howard v. Carusi, 109 U. S. 732, 3 Sup. Ct. 575, 27 L. Ed. 1089, is as follows: "Whenever the objects of a supposed recommendatory trust are not certain or definite, whenever the property to which it is to attach is not certain or definite, whenever a clear discretion or choice to act or not to act is given, whenever the prior dispositions of property impart absolute and uncontrollable ownership, in all such cases, the courts of equity will not create a trust from words of this character."

No recommendatory terms of a will, expressing a will, desire, or the like, are sufficient to create a trust, unless there be certainty as to the parties to take and what they are to take: Lines v. Darden, 5 Fla. 51; Gilbert v. Chapin, 19 Conn. 342.

4. "A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible": Cal. Civ. Code, sec. 1317.

It was evidently Mrs. Hanson's intention that the residue of the estate should go to Mr. Mugan.

The sixth clause of the will of Josephine Hanson should be construed to be a personal bequest of the residue of the estate of said deceased to the executor, William G. Mugan.

Application for distribution granted in accordance with the foregoing authorities.

ESTATE OF JOHN FAY, DECEASED.

[No. 26,323; decided July 31, 1905.]

Community Property.—The Declarations of a Person Since Deceased are admissible to show that his estate is community property.

Community Property—Intermingling of Funds.—Separate property intermingled with community property so that its identity is lost becomes itself a part of the community estate.

Trust—When Expires—Parol Evidence.—The trust in this case expired twenty-five years after the execution of the will, which bears date May 25, 1859. This being the plain language of the will, it cannot be changed by parol evidence.

Trust—When Void as Creating Perpetuity.—The trust which the testator attempted to create in this case is void as offending the rule against perpetuity.

Will—When Void for Uncertainty.—If the intent of a testator in reference to a particular gift cannot be deduced from the face of the will, the gift fails and there is a partial intestacy as to the subject matter thereof.

Bart Burke, for the petitioner.

Louis S. Beedy, for the opponents.

COFFEY, J. There are two questions to be determined on this application: 1. Is the property of the estate community or separate property? 2. Is the trust clause "6" of the will valid or invalid?

1. Petitioner refers to the testimony of Edward M. Buckley and his wife, Mrs. Buckley, who each testify as to the declarations of John Fay, deceased, made as late as 1900—to the effect that all his estate was community property.

Such was also the testimony of Mary Waller, John Fay and Luke Fay.

The declarations of deceased properly admitted to show the fact, and that property was a gift: Arkle v. Beedie, 141 Cal. 461, 74 Pac. 1033; Higgins v. Higgins, 46 Cal. 263; Read v. Rahm, 65 Cal. 344, 4 Pac. 111; Tillaux v. Tillaux, 115 Cal. 672, 47 Pac. 691; Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272.

The only property owned by John Fay at the time of his marriage was the one-half of lot 693 on Chestnut street upon which the soap factory was located. His marriage occurred on May 7, 1860. On June 19, 1866, he became financially embarrassed and transferred his property to David Fay for ten thousand dollars ($10,000)—deed read in evidence. On the same day, David Fay transferred the same by deed of gift to Bridget M. Fay as her separate property. Thereafter, on March 2, 1870, a deed was made by John Fay and Bridget M. Fay to David Fay for the same property. The same day David Fay conveyed the property to John Fay for $10,000.

When Bridget M. Fay made the deed dated March 2, 1870, it was agreed by all the parties that the property was to be community property. Such also is the presumption of law.

Luke testifies as to the declarations and agreement of the parties when the deeds were made.

The following is the law controlling this state of facts: "All property acquired after marriage by either husband or wife not included in the statutory exceptions is presumed to be community property, and whether it has undergone changed conditions or not, the burden of proof is upon the party claiming it to be separate property, to establish that fact by clear and convincing evidence, and the separate property must be clearly traced and located, by plain and connected channels, and not by way of surmise and probabilities": Civ. Code, sec. 164; Rowe v. Hibernia etc. Loan Soc., 134 Cal. 403, 66 Pac. 569; Fennell v. Drinkhouse, 131 Cal. 448, 82 Am. St. Rep. 361, 63 Pac. 734.

Money deposited in bank by wife after marriage held presumed community property: In re Boody, 113 Cal. 682, 45 Pac. 858.

The declarations of husband and wife may be received when made in the presence of each other to show an agreement between them that the property is separate or community property as the case may be: Hoeck v. Grief, 142 Cal. 119, 75 Pac. 670.

Rule: "When the separate property or funds of either spouse is intermixed or commingled with community property, so that the separate property has lost its identity and cannot clearly be traced or segregated, the community, being the paramount estate, draws the whole mass to it, and it becomes community property": Ballinger on Community Property, secs. 44, 64, 68.

"The general rule laid down is, that such confusion works a forfeiture of the separate character of the property so commingled": Ballinger on Community Property, secs. 44, 64, 68.

Money advanced by a third party for the purchase of land by the husband is community property in the hands of the husband: Perry v. Ross, 104 Cal. 15, 43 Am. St. Rep. 66, 37 Pac. 757.

The evidence fails to trace any separate funds of John Fay into any piece of his property, except the factory lot and that, as we have shown, afterward became community property by the transfers and agreement of the parties above mentioned, so that the testimony produced by deposition, if admissible, which it was not, is ineffective to show the funds therein mentioned to have been invested in any part of the property belonging to the estate, and nearly the whole of the amounts mentioned therein was stated to have been received prior to the deed of gift above referred to, and consequently cannot avail contestants. So that in whatever phase the matter presents itself, the entire estate is shown to be community property.

The trust clause "6" of the will is as follows:

"I will all my separate property and all my share of the community property of every description, name and nature, both real and personal to my brother, David Fay, and my son, John Fay, IN TRUST for the benefit of my three children, Luke Fay, Mary Montealegre and John Fay.

"The said David Fay and John Fay or either of them to hold and manage said property for the space of twenty-five years from this date; they shall keep the property in repair, pay all expenses and divide the *income* from said property monthly or quarterly between my children Luke, May and John or their children if they should have any if either of my children should Die without Lawful children of their body then the survivor shall inherit their share should all of my children die Before the expiration of this trust *without* Lawful children it is my wish that my sister Mary J. Scott or Her children should Inherit or have all of my share of the Estate, David Fay or my son John Fay will Act or Manage the property without giving Bonds.

"JOHN FAY."

The trust, if valid, expired twenty-five years after date of will, and the will bears date May 25, 1859. This is the plain language of the will and cannot be changed by parol evidence: Civ. Code, sec. 1318; Estate of Young, 123 Cal. 337, 55 Pac. 1011; Randolph on Commercial Paper, sec. 77, and cases cited.

2. "It is the duty of the court on distribution to give effect to the legal devises and bequests of the testator, and it could not even with the consent of the parties declare valid trusts such as are opposed to the express mandate and policy of the law": In re Walkerly, 108 Cal. 659, 49 Am. St. Rep. 97, 41 Pac. 772, and cases cited.

As to the intent of the testator, see In re Walkerly, 108 Cal. 652, 659, 660.

Such trust is void as to real and personal property: In re Walkerly, 108 Cal. 656; although in some states held otherwise: In re Walkerly, 108 Cal., see pp. 646 to 651, discussion by the court.

The trusts are void as suspending the absolute power of alienation for a period of years prohibited by the code: Civ. Code, secs. 679, 715, 716, 749, 889; Chaplin on Suspension of Alienation, secs. 64, 123; Hone v. Van Schaick, 20 Wend. 566; Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88; Haynes v. Sherman, 117 N. Y. 433, 439, 22 N. E. 938; Garvey v. McDevitt, 72 N. Y. 562; Henderson v. Henderson, 46 Hun, 509; Underwood v. Curtis, 127 N. Y. 541, 28 N. E. 585;

Rice v. Barrett, 102 N. Y. 164, 6 N. E. 898; Cruickshank v. Horne etc., 113 N. Y. 351, 21 N. E. 64, 4 L. R. A. 140; Hawley v. James, 16 Wend. 123, 134, 172; Schettler v. Smith, 41 N. Y. 328; Coster v. Lorrillard, 14 Wend. 265 (as to alienation); Whitney v. Dodge, 119 Cal. 192, 196, 197, 38 Pac. 636; Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Estate of Cavarly, 119 Cal. 406, 51 Pac. 629.

"When the vesting of an estate devised may be postponed during the life of a person not in being at the death of a testator, such postponement is a violation of the rule against perpetuities, and renders the devise void": Owlsley v. Harrison, 190 Ill. 235, 60 N. E. 89; Eldred v. Meek, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536; Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37.

"No interest subject to a condition precedent is good unless the conditions must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest": Gray on Perpetuities, sec. 201; Lawrence v. Smith, 163 Ill. 149, 45 N. E. 262; Howe v. Howe, 152 Ill. 252, 38 N. E. 1083.

"It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the rule against perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote": See In re Winter, 114 Cal. 186, 45 Pac. 1063; Estate of Steele, 124 Cal. 537, 57 Pac. 564; Gray on Perpetuities, secs. 214, 369.

"It is the duty of courts to give the rule against perpetuities effect, and not destroy its efficacy by adverse construction": See In re Winter, 114 Cal. 186, 45 Pac. 1063; Lawrence v. Smith, 163 Ill. 149, 45 N. E. 262; Coggins' Appeal, 124 Pa. 1036, 10 Am. St. Rep. 565, 16 Atl. 579; Post v. Rohrbock, 142 Ill. 600, 32 N. E. 687; Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37.

"Testator left a son and three grandchildren, sons of the son, and a clause of the will gave the son property until testator's youngest grandson should attain the age of twenty-five, when it was to be divided among the grandchildren. Held, that the will was void for remoteness, as not being clearly limited to the grandchildren then living": Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37. See, also, this case as to when limitation takes effect, page 39, and who are in-

cluded in the class. If particular estate intervenes, etc., then all who answer to the class at termination of such estate are included.

"A trust attempted to be created by will for the use of a man and his children is invalid as contravening the rule against perpetuities, unless it appears from the context that only those children actually in esse at the death of the testator are intended to share in the benefit": Towle v. Doe, 97 Me. 427, 54 Atl. 1072.

The will is void for uncertainty: Civ. Code, sec. 1318; Estate of Young, 123 Cal. 341, 55 Pac. 1011.

"If the intent of the testator in reference to a particular bequest or devise cannot be deduced from the face of the will, the bequest or devise fails, and there is a partial intestacy, as to the subject matter thereof."

If the legal effect of a testator's expressed intent is intestacy, it will be presumed he designed that result.

"It is never at liberty [the court] to supply omissions or to wrest language from its plain import, and give it such a meaning as it may be guessed the testatrix would have intended if she had known that her own efforts to create a legal devise had resulted in failure": In re Walkerly, 108 Cal. 659, 49 Am. St. Rep. 97, 41 Pac. 772; Estate of Young, 123 Cal. 343, 344, 55 Pac. 1011.

Finally, clause "6," if valid, devises a fee to Luke and John in the first part of the clause with merely precatory words expressive of the wishes of the testator that in a certain contingency, "it is my wish" that my sister Mary J. Scott, or her children should inherit or have all my share of the estate: Snodgrass v. Brandenburg, 164 Ind. 59, 71 N. E. 137, 72 N. E. 1030, and cases cited.

The application of the executor is granted.

What is Community Property is the subject of a note to Estate of Foster, 4 Cof. Pro. Dec.

ESTATE OF JOHN DEVENNEY, DECEASED.

[No. 5,238; decided February 23, 1909.]

Destroyed Will.—On an Application to Probate a Will destroyed in the lifetime of the testator by a public calamity, such as the destruction of a city by fire, the proponent must establish such destruction and show that it was without the knowledge of the testator, and also prove the provisions of the will by clear and distinct evidence from at least two credible witnesses.

Destroyed Will.—Where a Testator Leaves His Will in the Office of his attorneys, and thereafter to his knowledge the building in which the office is located is destroyed by fire, the will cannot be probated after his death as a lost or destroyed will.

Application for probate of a burned and destroyed will under section 1339, Code of Civil Procedure.

John B. Carson and Joseph Slye, for proponent Henry M. Donahue.

McElroy & Stetson, J. E. McElroy and John W. Stetson, for Sarah Feeley, opponent.

COFFEY, J. John Devenney died February 3, 1908, in San Francisco, being a resident thereof, and leaving estate therein.

On February 13, 1908, Henry M. Donahue filed an application, through his attorney, John B. Carson, for the probate of an instrument alleged to be the last will of the decedent dated February 21, 1905, in which the applicant was named as executor. The information upon which the petitioner based his belief as to the execution and contents of the will was derived from the attorney who drew the same and one of the subscribing witnesses, Thomas Dillon. The statements of these affiants, who were also witnesses on the hearing, show that the will was written by the attorney at the dictation of decedent in the presence of Carson, Dillon and Michael Flannery, the second subscribing witness, and signed and subscribed according to the requirements of the statute.

Devenney was about seventy years of age, and in all respects competent to make a will. It appears by the verified

statement annexed to the petition and by the testimony of the attorney that the will was left in the office of the said John B. Carson, 433-434 Parrott building, 825 Market street, San Francisco, and remained and was in said office on the eighteenth day of April, 1906, when the said building and all the contents thereof were totally destroyed in the general conflagration occurring at that time, and the will was then and there destroyed by fire and cannot be produced.

Contestant's contention is based mainly upon the claim that the instrument propounded is not a copy nor the substance of the original which was destroyed by the public calamity of April, 1906, in San Francisco, during the lifetime of decedent, with his knowledge, and that he was not at any time committed to nor an inmate of any institution for the insane and there was no will left by him at his death.

The first essential point is, Was this will destroyed without the knowledge of the testator?

Section 1339 of the Code of Civil Procedure says: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently or by public calamity destroyed in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses; provided, however, that if the testator be committed to any state hospital for the insane in this state and after such commitment his last will and testament be destroyed by public calamity, and the testator is never restored to competency, then after the death of the said testator, his said last will may be probated as though it were in existence at the time of the death of the testator."

It is incumbent upon the proponent to establish the destruction by public calamity, in the lifetime of the testator, without his knowledge, of the instrument propounded; and, also, to prove its provisions by clear and distinct evidence from at least two credible witnesses.

Irrespective of contest, these facts must be established. The will cannot be admitted to probate without this proof.

The fire occurred in April, 1906; the decedent died in February, 1908, nearly two years thereafter. Apart from proved

actual knowledge, if any fact could be presumed as within the knowledge of everybody in the city, it was that the Parrott building with its contents was destroyed by fire on April 18, 1906.

No fact could be more notorious or need less evidence as coming within the cognizance of all aware of the circumstances of the conflagration.

The presumption is almost irresistible that decedent knew that the place wherein his will was deposited was destroyed on that occasion. Mr. Carson received the will from the testator immediately upon its execution and placed it in a desk in his office, where it was destroyed by the fire.

There is no escaping the inference that testator knew of this destruction, although he may not have thought it necessary to mention the matter to his attorney; but he did speak of it to the witness Michael Flannery, whose evidence is not assailed as to its essential accuracy. Flannery testified very positively and directly on this point.

Mr. Flannery's testimony was to the effect that he subscribed the will as a witness on February 21, 1905; Devenney died February 3, 1908, three years after the execution of the instrument; this witness saw him frequently during that period; they were friends for forty years. In the course of a conversation between witness and decedent after April 18, 1906, the latter remarked that it was too bad the will was destroyed. Flannery said, "Was it destroyed?" Devenney answered "Yes." That was all that was said between them in reference to the will; decedent did not say when it was destroyed. This talk occurred as the pair were walking up Market street from six to ten months after the fire; no one else was present; Devenney was talking about his property and about rebuilding. Mr. Flannery is conceded to be a fair witness, although the counsel for proponent thinks he acted disingenuously in withholding from him the item of evidence that he communicated to the opposing counsel, but still he had always held Flannery in high esteem. The witness might have been more communicative, yet he may not have understood the import of the statement made by decedent until he was directly interrogated. His reticence may have been the result of want of appreciation of the importance of

the remark of Devenney, but he does not appear to have willfully suppressed the information and he is not accused of falsehood.

Mr. Flannery's testimony seems direct and dispassionate, without partiality, bias or interest in the outcome, and his answers were frank and positive.

It is true that Mr. Dillon, an equally old and intimate friend, had not been told by decedent of the destruction of the will in explicit terms. Dillon testifies that decedent did not say anything about the will being lost, in so many words; but on account of the Parrott building being destroyed, Dillon did not know whether the will was burned or not. He simply did not know of the actual destruction of the paper, although he did know, as everybody else did, that the building was burned and its contents consumed, and that among the contents was the instrument he had witnessed, which was consigned by Devenney to the custody of Mr. Carson, all of whose office papers and effects were lost by the fire. In view of the evidence on this issue, discussion of the second point seems unnecessary, and it also seems immaterial to consider upon whom the burden of proof is imposed in this particular proceeding, as there is a failure of the proof required under section 1339 to establish the will: See Estate of Johnson, 2 Cof. Pro. Dec. 429, Ross' Annotations.

The Probate of Lost or Destroyed Wills will be found discussed in Estate of Johnson, 2 Cof. Pro. Dec. 425, and note.

ESTATE OF HONORA SHARP, DECEASED.

[No. 52; decided May 9, 1907.

Charitable Corporation—Gift to Within Thirty Days of Death.—The Kings Daughters Home for Incurables, a corporation without capital stock, organized to maintain a home for persons afflicted with incurable diseases, is a charitable or benevolent corporation, although it receives pay patients in carrying out the objects of its formation but not for the profit of its members; and a bequest to it is governed by the restrictions imposed by section 1313 of the Civil Code.

Charity—Bequest to Within Thirty Days of Death—Revocation of Prior Bequest.—Where a testatrix executes a codicil in which she

expressly revokes a bequest in her will of $50,000 to the Kings Daughters Home for Incurables, and in place thereof gives $25,000 to the Kings Daughters Home for Incurables, and $25,000 to the Society for the Prevention of Cruelty to Animals, the codicil, notwithstanding it otherwise fails because the testatrix dies within thirty days after its execution, revokes the gift in the will.

J. N. Young, for the applicant.

Charles S. Wheeler, for the trustees, R. H. Lloyd and Adolph B. Spreckels.

COFFEY, J. The will of Honora Sharp dated fourth day of January, 1905, contained the following clause:

"THIRD. I devise and bequeath to the Kings Daughters Home for incurables now located at 317 Francisco Street, San Francisco Fifty thousand Dollars."

On the twenty-first day of January she added a codicil as follows:

"I, Honora Sharp, the testatrix in the foregoing will, of date the 4th day of January, A. D. 1905, do now hereby change the said will in this respect, viz: In & by the third subdivision of said will I devised and bequeathed to the Kings Daughters Home for Incurables, Fifty thousand Dollars: I now cancel and revoke said devise and bequest, &, in the place and stead thereof, I give to the said Kings Daughters Home for Incurables, twenty five thousand Dollars.—I give to the San Francisco Society for the Prevention of Cruelty to Animals, twenty five thousand Dollars. In all other respects I affirm and republish the said will & declare it with this codicil to be my last Will.

"Witness my hand and seal at San Francisco, this twenty first day of January, A. D. 1905.

"HONORA SHARP (Seal)"

She died February 8, 1905.

The Kings Daughters Home applies for the payment of the legacy mentioned in the third clause quoted, alleging that the applicant is now and has been continuously for more than five years last past, a corporation duly incorporated, organized and existing under the laws of the state of California, for the purpose of establishing and maintaining an institution or institutions in the city and county of San Francisco, or

elsewhere in the state of California, as a home for people who are suffering with incurable diseases other than contagious diseases, and for acquiring and holding all such real and personal property as may be necessary to accomplish the objects of the corporation and having its principal place of business at and within the said city and county of San Francisco, where it has been maintaining and is now maintaining such a home, and at the date of said will its home was located at 317 Francisco street, in the city and county of San Francisco, California, and this petitioner is and was the person to whom said legacy was given. Said corporation has no capital stock; that in said home the petitioner has admitted and is still admitting many of such sick and diseased persons who have been and are there treated for their ailments by skillful physicians; that said so-called codicil, at the time of the probate of the will, was filed of record herein and is now on file; and, that in and by said codicil the said Honora Sharp attempted to so modify her will as to reduce the said $50,000 to $25,000 and to give to the San Francisco Society for the Prevention of Cruelty to Animals $25,000, but within thirty days thereafter she died. Wherefore the Kings Daughters Home asks for an order distributing to it the amount of $50,000.

To this petition the trustees make answer, averring that although said instrument dated the fourth day of January, A. D. 1905, contained a paragraph or clause reading in the manner alleged, the said clause never became operative, but was duly canceled and revoked by a written codicil to said will, declaring such revocation, which codicil was duly executed with the same formalities with which a will should be executed by said testatrix pursuant to section 1276 of the Civil Code of the state of California, which is hereby referred to and made a part thereof. The trustees admit that the petitioner is now and has been continuously, for more than five years last past, a corporation duly incorporated, organized and existing under the laws of the state of California, for the purpose of establishing and maintaining an institution or institutions in the city and county of San Francisco, or elsewhere in the state of California, as a home for people who are suffering with incurable diseases other than contagious diseases, and for acquiring and holding all such real and per-

sonal property as may be necessary to accomplish the objects of the corporation, and having its principal place of business at and within the said city and county of San Francisco, where it has been maintaining and is now maintaining such a home, and at the date of said will its home was located at No. 317 Francisco street, in the city and county of San Francisco, California, and the petitioner, the Kings Daughters Home for Incurables, is and was the person to whom said legacy was given; that said corporation has no capital stock; that in said home that the petitioner has admitted, and still is admitting, many of such sick and diseased persons who have been and are there treated for their ailments by skillful physicians, and in this regard the said trustees aver that the said corporation is and was at the time of the execution of said will and codicil and at the time of the death of Honora Sharp, a charitable or benevolent society or corporation, and that the said bequest contained in the said codicil was made by the said deceased within thirty days before the death of the said testatrix; that the said testatrix died as hereinbefore alleged, on the eighth day of February, 1905. The trustees deny that in or by the said so-called codicil the said Honora Sharp attempted to or did so modify her said will of January 4, 1905, as to reduce the said $50,000 so given by said will to the Kings Daughters Home for Incurables, but, on the contrary, allege and aver that in and by the terms of said codicil the said deceased intended to and did on the twenty-first day of January, 1905, cancel and revoke said bequest of $50,000 to the Kings Daughters Home for Incurables as contained in the third paragraph of said will, and the said trustees deny that the said petitioner, the Kings Daughters Home for Incurables, is entitled to the sum of $50,000 or any other sum or any sum at all out of the assets of the said estate.

The petitioner contends that notwithstanding the invalidity of the bequest in the codicil as to the Society for the Prevention of Cruelty to Animals, it would be valid as to the Kings Daughters Home because that institution is a business corporation to whom the thirty days' limitation does not apply; but, petitioner asserts, the codicil having been executed for the sole purpose of bestowing the benefaction to the prevention of cruelty society it fails in its entire purpose and

leaves intact the testamentary bequest of $50,000 to petitioner unaffected. Petitioner further argues that if there had been no provision in the will for it, and the codicil had been executed for the purpose of giving $25,000 to each of such legatees, the Kings Daughters Home would, for the same reason, be entitled to the legacy thereunder and the Home does claim such bequest under the codicil, if the court shall hold it valid, and the other $25,000, under the will; but if the court hold the codicil entirely invalid, then the Home claims the whole $50,000 under the will.

According to this ingenious argument, whichever way the court decides the Home will secure the full amount of the original legacy.

That the will and codicil show an intent to devote $50,000 to good purposes is obvious; and that so far as the codicil designs to bestow the bounty of the testatrix to a benevolent use it is ineffectual, by reason of her death so soon after its execution, is conceded; but the Home insists that it is not a charitable or benevolent institution, within the purview of the statute, but a business concern, to wit, a hospital in which patients are received for a valuable consideration, and it is, therefore, qualified and entitled to take under the codicil $25,000, and $25,000 under the will.

The two sections of the Civil Code affecting this contention are as follows:

"1275. A testamentary disposition may be made to any person capable by law of taking property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary or solely educational or hospital purposes, cannot take under a will, unless expressly authorized by statute; subject, however, to the provisions of section thirteen hundred and thirteen."

"1313. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid; provided, that no such devises or bequests shall collectively exceed one-third of the

estate of the testator leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs, according to law."

The claimant's contention, shortly stated, is that the testatrix first gave $50,000 to the Home, then attempted to reduce the amount to $25,000, by the codicil; that this latter sum was a continuation of what was given in the will; and that it was not a revocation of the original bequest; and the claimant holds that this view follows the trend of the supreme court decisions which expressly hold that the intent of the testator shall prevail.

That a will is to be construed according to the intention of the testator scarcely needs the citation of authorities.

Estate of McCauley, 138 Cal. 436, 71 Pac. 512: "Section 1317 provides that 'A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.' In construing section 1287 we must keep in view the various sections relating to the subject of wills, and must so construe that section as to preserve the letter and spirit of all of the provisions of the statute so far as possible. The section should have such construction, if it is possible in reason to do so, as will carry out the known intention of the testator."

There is no doubt here of the intention of this testatrix. It was charitable and benevolent. It can hardly be maintained that she was intent upon fostering business enterprises. No more can it be successfully contended that the claimant is a business enterprise in the ordinary or in the statutory sense. "Business" is usually understood to be an occupation or employment engaged in for livelihood or gain, according to a definition by Webster, who also defines a "hospital" (quoted by claimant), as (1) "A place for shelter or entertainment"; (2) "A building in which the sick, injured or infirm are received and treated; a public or private institution founded for the reception and cure, or for the refuge, of persons diseased in body or mind, or disabled, infirm or dependent, and in which they are treated either at their own expense, or

more often by charity in whole or in part; a tent building or other place where the sick or wounded of an army are cared for."

Black in his Law Dictionary defines "business" as "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit," and "hospital" as "an institution for the reception and care of sick, wounded, infirm, or aged persons; generally incorporated," and then of the class of corporations called "eleemosynary" or "charitable."

Claimant asserts that it is a business corporation and not a charitable or benevolent institution.

It must accept either horn of this dilemma: It is either a business or a benevolent corporation. If business, the bequest is valid as to whole will; if benevolent, void as to codicil, valid as to prior will. That is the position of claimant.

The authorities relied upon by claimant do not sustain its contention that it is a business corporation, for, according to its own statement, it has no capital stock and enjoys no gain pecuniarily from its pursuit; and it solicits suffrage from the charitably disposed for its maintenance. It is true it accepts pay patients, but its primary purpose is to carry on an organization helpful to mankind, and not to make money out of their misery or misfortune. Pecuniary profit was not its object. It was the humane end and aim of their existence that testatrix evidently had in view, when she made her bequest to the two societies mentioned in the codicil, and she put them both on the same plane, in the same category. Except so far as any and every institution, charitable or benevolent, or commercial, must have a business organization and a methodical conduct of its affairs, in order to attain high efficiency, neither of the societies named, although each incorporated, was in the sense a "business corporation," but was designed to accomplish a humane, charitable, and benevolent purpose.

Page on Wills says that a hospital incorporated without any capital stock, and not for any financial benefit of its members, is a charity in this sense. The evidence shows that this claimant is and has been such an institution, and the conclusion is,

that the testatrix had that fact in mind when she made her will.

But the claimant contends that, if this finding be correct, the Home is entitled to take under the will of January 4, 1905, because section 1313 of the Civil Code recognizes its right to such legacy, even confers the right, as the supreme court has decided that it is expressly declared that a bequest made to any charitable or benevolent society, or corporation, in trust for charitable uses, if made at least thirty days prior to the death of the testator shall be valid, and under section 1275 of the Civil Code claimant says the Home is entitled as a corporation for hospital purposes.

The court finds, therefore, that the claimant is and was at the time of the execution of the will and codicil, and at the time of the death of the decedent, a charitable or benevolent society, or corporation, and that the said bequest contained in the codicil was made within thirty days before the death of the testatrix, and, hence, is void.

In this alternative contention, the whole argument of claimant is based on the assumption that the invalidity of the bequests in the codicil restored or revives the prior testamentary disposition, since the sole purpose of the codicil was to take $25,000 from the Home and to bestow it upon the animals society, thus modifying and dividing the original legacy, and that purpose failed, the entire codicil fails. The manifest intention of the testator is to be carried out, and if not to its full extent, then so far as possible.

Certainly it is the desire, as it should be the duty, of this court to carry out this design of the decedent, if it can legally be accomplished; but it must be done according to legal rules, no matter how deserving the object of testatrix's benevolent intention; that is to say, if her intention is defeated by the law, as determined by the principles of construction and interpreted by authority, the court must decide against the claimant.

Claimant insists, however, that the authorities are in its favor on the proposition that the codiciliary bequest being invalid, by reason of the thirty days' statutory inhibition, although the instrument was executed in strict accordance with

all the forms imposed by statute, nevertheless, the testamentary provision prevails.

To sustain this view, counsel cites Page on Wills, a work which he properly places in the highest rank as a text-book, and also Underhill, a treatise of merit, to show that the codicil in the case at bar does not revoke the provision of the will giving to the Home the specified legacy; but it will appear from an examination of the cases and citations from the volumes named that they depended mainly upon defective execution, and this is not such a case. In this instance there was nothing wanting in the legal requirements of the execution of the codicil (section 1276, Civil Code), but the legacy itself failed for lack of capacity in the legatee to take under section 1313, Civil Code. Two of counsel's quotations are here inserted to illustrate this point. 1 Underhill on Wills, page 340, paragraph 250, says: "If the writing containing a clause expressly revoking former wills is improperly executed as a will, either because improperly attested or subscribed, or because the testator is lacking in testamentary capacity or otherwise, it fails altogether and in toto."

Page on Wills, 263, paragraph 293, says: "The assumption is made that the revocation clause of the codicil is inserted in order to permit of the dispositive provisions therein; and if the codicil is not so executed as to give effect to these provisions, it is treated as entirely void, including the clause of revocation."

Counsel asks the court to observe that Underhill refers to instances where there is a clause "expressly revoking"; but it would appear that here there is an express revocation, and the law has been laid down that in such case "an express revocatory clause will operate as such notwithstanding certain devises or legacies in the subsequent will failed to take effect on account of the incapacity of the devisee or legatee to take or on account of the illegality of the bequest, or on account of indefiniteness."

It is contended that the intention of the testatrix was not to absolutely revoke the testamentary bequest, but simply to modify or reduce the amount; but while it may be true that she intended to reduce the original amount, yet she expressly

canceled and revoked the prior disposition, and in place and stead thereof gave a less sum.

This was, in effect, a new legacy, and as the legatee can claim only by virtue of the codicil executed within the statutory period before the death of the testatrix, the intention of the testatrix must succumb to the emphatic declarations of the statute, which positively declares such a bequest void.

The codicil, therefore, can have no other effect than to revoke the prior legacy and cause the substituted bequest to fall into the residuary estate.

It follows that the petition should be and it is denied.

ESTATE OF DANIEL J. BERGIN, DECEASED.

[No. 13,113; decided April 10, 1893.]

Foreign Will.—The Public Administrator is not Entitled to letters of administration with the will annexed, as against a resident devisee in a foreign will who files an authenticated copy thereof and of its probate in a foreign jurisdiction, with a petition for letters.

Foreign Will—Construction of Code.—Sections 1322-1324 of the Code of Civil Procedure, dealing as they do exclusively with the subject of foreign wills, furnish the exclusive rule as to their subject matter.

T. I. Bergin, applicant, in pro. per.

J. D. Sullivan and Herbert Choynski, for A. C. Freese, public administrator.

COFFEY, J. Daniel J. Bergin, deceased, died in March, 1892, in the city of Dublin, Ireland, leaving a last will, which was duly probated in the proper court of that county. He left some personal property in the city and county of San Francisco, California. By said will certain persons were appointed executors, and the proponent herein, Thomas I. Bergin, who is a citizen and resident of San Francisco, in the state of California, was named as a devisee. The said proponent produced and filed with this superior court an authenticated copy of said will and probate, together with a petition

that the same be admitted to probate here, and that letters of administration with the will annexed be issued to him. Afterward A. C. Freese, public administrator of this city and county, also filed a petition for the probate of said will and for the issue of letters of administration to him with the will annexed.

The question of the right of the public administrator to administer in this case depends upon the various provisions of the Code of Civil Procedure upon the subject.

Under section 1726 he must take charge of the estates of persons dying within his county, as follows: 1. Of the estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for or lost; 2. Of the estates of decedents who have no known heirs; 3. Of the estates ordered into his hands by the court; and 4. Of the estates upon which letters of administration have been issued to him by the court.

In each of these four instances the deceased must have died within his county, and the question of testacy or intestacy is not a determinative element involving the question of his right to administer. The scope of his duties under this section is more in the nature of caring for derelict estates.

Section 1727 is not here material.

Section 1728 indicates the nature of his duties to be as above stated. The remaining sections, 1729 to 1743, describing the duties of the public administrator, have no special bearing on the question. Merely in virtue of his office he is not entitled to administer, but his office, in the prescribed cases, entitles him to letters of administration, which continue in force even after expiration of his term of office: Rogers v. Hoberlein, 11 Cal. 128; Estate of Aveline, 53 Cal. 260.

Recurring, therefore, to other provisions touching administration of the estates of deceased persons, we find, in section 1294, the jurisdiction where wills must be proved and letters testamentary or of administration granted.

Sections 1298 to 1309 prescribe the procedure of admission to probate of original wills.

Sections 1312 to 1318 relate to contest of wills before probate.

Sections 1327 to 1333 prescribe procedure for contesting wills after probate.

Sections 1338 to 1341 provide for the probate of lost or destroyed wills.

Sections 1344 to 1364 provide for probate of nuncupative wills.

But there may be wills not made or originally proved in California, and sections 1322 to 1324 provide in regard to them, and of them we will hereafter speak more at large.

Section 1348 relates to executors or administrators.

But the decedent may have left no will, and sections 1371 to 1379 provide for administration upon the estates of such persons.

While section 1365 prescribes the order in which persons shall be entitled to administer in such cases, it, among other things, provides that "administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, ... 8th. Public administrator."

To this source must the public administrator appeal for authority to entitle him to administer. As seen from the language of the statute itself, it only applies to the estate of a person dying intestate. Where there is a will, although the will omit to name an executor, the public administrator, therefore, is not entitled to administer.

The provisions of 1365 are inapplicable: Estate of Barton, 52 Cal. 540; Estate of Murphy, Myr. Rep. 185; Estate of Nunan, Myr. Rep. 238.

Such was the rule until changed by the amendment of section 1350 in 1878, which provides that, "If the sole executor, or all the executors, are incompetent, or renounce or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued as designated and provided for the grant of letters in cases of intestacy."

The only cases touching the right of the public administrator that we find are: Estate of Morgan, 53 Cal. 243, where the court held that he was entitled in preference to the nominee of a married woman, who was, under the law as it then stood, incapable of acting as administrator (245); the

Estate of Cotter, 54 Cal. 215, where the court held that the nominee of a surviving widow was entitled to preference over the public administrator.

The decision in this case has been affirmed in the Estate of Stevenson, 72 Cal. 164, 13 Pac. 404; Estate of Dorris, 93 Cal. 612, 29 Pac. 244.

In the Estate of Kelly, 57 Cal. 81, it was held that the public administrator was entitled to preference over the nominee of a married woman, daughter of the intestate.

In the Estate of Beech, 63 Cal. 458, the court held that he was entitled to preference over the nominee of a nonresident. Of course, in that case the nonresident executor was not entitled to administer. While the decedent in that case died testate, no compliance was shown with the provisions of sections 1323 and 1324, and, as the nonresident executor was not himself qualified to act, he not appearing to claim letters of administration, the court held that his nominee had no better right, and therefore the public administrator had the superior right.

In the Estate of Hyde, 64 Cal. 228, 30 Pac. 804, the same point was similarly decided. None of these decisions, therefore, touches the question before the court.

As already observed, the code prescribes the procedure for the various kinds of original wills, and provides for cases of intestacy. It also provides for the case of foreign wills, which is the case at bar.

The right to administer is, of course, purely of statutory origin, and, in determining who is entitled to administer, the intention of the legislature, as expressed in the language employed in the statute, is the controlling point.

Sections 1322 to 1324 contain express provision in relation to foreign wills and who shall administer under them.

We must, in considering these sections, bear in mind the rules prescribed in the Political Code:

Section 4481: "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters, and questions arising out of the subject matter of such title."

Section 4482: "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the

same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject matter of such chapter."

Section 4483: "If the provisions of any article conflict with or contravene the provisions of another article of the same chapter, the provisions of each article must prevail as to all matters and questions arising out of the subject matter of such article."

Bearing these rules of construction in mind, let us examine sections 1322 to 1324 of the Code of Civil Procedure.

Dealing, as these sections do, exclusively with the subject of foreign wills, they furnish the exclusive rule as to their subject matter.

Section 1322 defines the class of wills that may be allowed and recorded in the superior court of any county in which the testator shall have left any estate. It ordains two things, viz.: 1. The character of foreign wills that may be admitted to probate; 2. The court in which they may be thus admitted.

Section 1323 provides that "when a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing, notice whereof must be given as hereinbefore provided, for an original petition for the probate of a will."

In this section occur: 1. Authenticated copy of the will; 2. Production of same in the court; 3. Production of the same by the executor; 4. Production of the same by any other person interested in the will, with a petition for letters.

When thus produced, the court must appoint a time for hearing, of which notice shall be given.

Here, therefore, are two classes of persons authorized to produce an authenticated copy of a will, viz.: The executor named in the will, and any other person interested in the will. These persons are thus as definitely ascertained as if they had been enumerated, as is done in section 1365. But, as the article was dealing with an entirely independent subject, viz., foreign wills, it defines the class of those wills that may be admitted to probate, and the person upon whose application

they may be thus admitted, thus giving such persons the right to administer thereunder.

In the Estate of Sanborn, 98 Cal. 103, 32 Pac. 865, the supreme court had occasion to consider who was "a person interested."

Speaking upon the point the court say: "The probate of a will can be contested only upon 'written grounds of opposition' filed by a 'person interested'—that is, interested in the estate, and not in the mere fees of an administration thereof: Code Civ. Proc., secs. 1307-1312. A public administrator has no interest in an estate, or in the probate of a will; that is a matter which concerns only those to whom the estate would otherwise go."

Under section 1324, if on the hearing it appears that the will has been approved and allowed in the foreign country, and that it was executed according to the law of the place in which it was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon.

Of course, letters testamentary can only properly issue to the executor named in the will: Estate of Wood, 36 Cal. 82. Therefore, regardless of all other questions and considerations, the executor named in the will is entitled to letters testamentary. Upon the same principle, an applicant interested in the will is equally entitled to letters of administration. The right of the interested party stands upon precisely the same plane as the right of the executor, as there is no more authority for denial of the right in the one case than in the other.

In this case the applicant is a person interested in the will. The will was properly executed, was properly authenticated, and the only question is as to who is entitled to letters of administration—the public administrator or the petitioner.

The public administrator has no right, and the petitioner is entitled to letters. He comes within the exact letter of the statute. The public administrator as such has no right. The decedent did not die in the city and county of San Francisco; he did not die intestate; the will in question is a

foreign will, duly approved, allowed and authenticated, and under no provision of the Code of Civil Procedure has the public administrator the better right to administer.

Petition of public administrator denied.

Petition of T. I. Bergin granted.

The Principal Case was Affirmed by the Supreme Court in 100 Cal. 376, 34 Pac. 867.

ESTATE OF PHILETUS FINCH, DECEASED.

[No. 12,183; decided December 29, 1893.]

Claims Against Decedent—Whether must be Presented for Allowance.—Only such claims as were incurred by the decedent in his lifetime, or for which he might be held liable, need be presented to the administrator for allowance.

Funeral Expenses—Whether Claim for must be Presented.—The claim of an undertaker for funeral expenses need not be presented for allowance against the estate of the decedent.

Funeral Expenses—Time for Payment.—The funeral expenses of a decedent must be paid by the administrator as soon as he has sufficient funds in his hands.

Claims Against Estate—Payment by Foreign Administrator.—Where an undertaker takes charge of the funeral of a decedent at the request of a person subsequently appointed administrator, and thereafter presents his claim to the administrator, who transmits it to an administrator in a sister state and receives from him the money to pay the claim, the court will order the administrator to make the payment.

Bull & Cleary, for the petitioner.

Roger Johnson, for the administrator.

COFFEY, J. Halsted & Company, undertakers, at the request of Mark Parish, who engaged them so to do, buried deceased, paying all the funeral expenses; subsequently Mark Parish was appointed the administrator of the estate of Philetus Finch, deceased, and duly qualified and entered upon the discharge of his duties as such administrator; at the

request of said administrator Halsted & Company made out their claim for said funeral expenses against the decedent's estate and delivered the same to said Parish, who forwarded the same to Michigan and received the money to pay the same. The claim of Halsted & Company never having been allowed and approved by the judge of this court, are Halsted & Company now entitled to an order directing Mark Parish, administrator of said estate, to pay the said claim?

Section 1490, Code of Civil Procedure, provides that "Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county . . . . a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator. . . . ."

Section 1643, Code of Civil Procedure, provides that "The debts of the estate . . . . must be paid in the following order:

"1. Funeral expenses.

"2. The expenses of the last sickness.

"3. Debts having preference by the laws of the United States.

"4. Judgments rendered against the decedent in his lifetime and mortgages in the order of their date.

"5. All other demands against the estate."

Section 1646, Code of Civil Procedure, provides that "The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses. . . . . He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court."

Section 1467, Code of Civil Procedure, provides that "Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration."

Petitioner contends:

1. The funeral expenses are not a debt of decedent which the law requires shall be presented in a claim verified by

claimant and allowed and approved by the administrator and the court and filed with the clerk.

2. The funeral expenses are a portion of the expenses of administration to be first paid.

3. Admitting that the law requires the claimant to present his claim for funeral expenses in a claim verified, and that the same shall be allowed and approved by the administrator and judge and filed in the clerk's office, this debt of petitioner having been incurred by the administrator of this estate, and the petitioner at the request of said administrator having presented his claim against the estate of decedent in a sister state and delivered the same to the administrator in this state, who has by virtue thereof collected the amount from the estate in a sister state, petitioner is still entitled to an order of payment by the administrator in this state.

1. The funeral expenses are not a debt of decedent which the law requires shall be presented in a claim verified by claimant and allowed and approved by the administrator and the court and filed with the clerk.

The word "claim" is certainly a very broad term, when used in certain connections and in reference to certain matters. Lord Coke says: "The word 'demand' is the largest word known to the law, save, only, 'claim'; and a release of all demands discharges all right of action." Chief Justice Nelson says: "The word 'claim' is of much broader import than the word 'debt,' and embraces rights of action belonging to the debtor, beyond those which may appropriately be called debts": 2 Hill, 223.

But, however broad may be the general meaning of this term, we must look to the statute to ascertain the sense in which it is there used.

The statute to "Regulate the Settlement of the Estates of Deceased Persons" requires the executor or administrator to give "notice to creditors of the decedent, requiring all persons having claims against him, deceased, to exhibit them," etc.: Code Civ. Proc., sec. 1490.

In Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140, Mr. Chief Justice Field, in delivering the opinion of the court, said: "Whatever signification, then, may be attached to the term 'claims,' standing by itself, it is evident that in the probate

act it only has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered": See, also, Estate of McCausland, 52 Cal. 577.

In Hancock v. Whittemore, 50 Cal. 523, the supreme court says:

"An assessment for the improvement of a street is a municipal tax, and the property owner is brought into relations with the proceedings which are initiated by the resolution of intention, only when the tax is levied; that is to say, when the assessment is made and issued.

"The assessment was issued after the death of H. M. Whittemore. The tax thus assessed did not constitute a claim against the estate of H. M. Whittemore which was required to be presented for allowance: People v. Olvera, 43 Cal. 492."

From the sections of the Code of Civil Procedure and the decisions of the supreme court above cited it necessarily follows: That only such claims as were incurred by the decedent in his lifetime, or for which he might be liable, are to be presented, allowed, approved and filed; no one will for a moment contend that decedent incurred the funeral expenses in this case, or that any claim ever existed against decedent therefor; hence they are not a claim against deceased, a claim which is necessary to be presented.

2. The funeral expenses are a portion of the expenses of administration to be first paid.

By referring to sections 1643 and 1467, Code of Civil Procedure, it will be seen that the debts of the estate are to be paid by paying the funeral expenses first.

By section 1646 of the Code of Civil Procedure, the administrator is ordered to pay the funeral expenses as soon as he has sufficient funds in his hands.

These sections of the code are in their intent sanitary; they are intended to provide for the decent burial of the dead without any question as to the payment of the necessary expenses incurred therein, and without compelling the parties who furnished these expenses to satisfy themselves first if the

estate of decedent is insolvent. They are the first expenses of the estate to be paid.

Section 1646, Code of Civil Procedure, is mandatory upon the administrator to pay the same as soon as he shall have received enough money so to do. In this case it is admitted that the administrator has received the money from the east to pay these expenses.

3. Admitting that the law requires the claimant to present his claim for funeral expenses in a claim verified, and that the same shall be allowed and approved by the administrator and judge and filed in the clerk's office, this debt of petitioner having been incurred by the administrator of this estate, and the petitioner at the request of said administrator having presented his claim against the estate of decedent in a sister state and delivered the same to the administrator in this state, who has by virtue thereof collected the amount from the estate in a sister state, petitioner is still entitled to an order of payment by the administrator in this state.

These facts are to be viewed simply in the light of an official of this court receiving money in trust to pay a certain claim, and in declining to do so, or to account for the money he has received.

He certainly received it as administrator of the estate of decedent and by reason of his appointment as such.

What right has he to retain it, or fail to account for it?

In the Estate of Ortiz, 86 Cal. 306, 21 Am. St. Rep. 44, 24 Pac. 1034, it was held by the supreme court "to be the duty of a domiciliary executor to gather in and account for the foreign assets of his testator to the extent of his conscious ability to do so, and the court of the domicile may compel him to account for willful neglect to perform such duty."

The conclusion of the court is that petitioner is entitled to an order directing Mark Parish, administrator of the estate of Philetus Finch, deceased, to pay to Halsted & Company the sum of $145, with interest thereon at seven per cent per annum from March 1, 1893, until paid.

Prayer of petition granted.

That a Claim for Funeral Expenses need not be presented to the administrator of the estate for allowance, see Potter v. Lewin, 123 Cal. 146, 55 Pac. 783.

ESTATE OF GEORGE GRISEL, DECEASED.

[No. 13,821; decided February 19, 1894.]

Homestead.—Premises Consisting of Detached Tracts will not be set aside as a probate homestead, but only the one tract on which a dwelling-house is situated, notwithstanding the value of the tracts in the aggregate does not exceed $5,000.

George Grisel died intestate on August 5, 1893, and on August 28, 1893, letters of administration upon his estate were issued to Louis Grisel, his widow.

The inventory and appraisement was filed on October 17, 1893. In the inventory three parcels of land were separately described and appraised. Lots 1, 2, 3 and 6, and the north half of lot 4 in block 26, as laid down on a certain map of a tract in Oakland township, Alameda county, were appraised at $1,500, and the improvements thereon at $500. Lots 1 and 4, in block 27 of the same tract, were appraised at $1,000. Lot 4, in block 1 of another tract in Oakland township, was appraised at $2,000. There were no improvements on either the second or third parcel.

On November 10, 1893, the widow made application to have the three parcels set apart to her as a homestead. In her petition she alleged that there was a dwelling-house on the lots in block 26, and that the other lots are situate in the immediate vicinity thereof.

Selden S. and Geo. T. Wright, for the petitioner.

Rothchild & Ach, for Eugene and Adelaide Grisel, parents of decedent.

COFFEY, J. Referring to the application of Louise Grisel, widow, there being no minor children having any interest in the property, and no homestead having been selected during the lifetime of the spouses, and further referring to the plat of said property attached to petitioner's brief herein, counsel for the mother and father of said deceased, who are entitled to one-half of said estate upon its distribution, concede that as to lots one (1), two (2), three (3) and six (6), and the one-half of lot four (4), in block No. twenty-six (26),

as delineated on said map, the petitioner is entitled to these particular lots being set apart. It is, however, contended that petitioner is not entitled to lots one (1) and four (4), in block 27, designated as "B" on said plat, and lot No. 4 in block 1, as to which petitioner also makes claim, and that the same should remain in the administratrix subject to distribution.

Counsel for petitioner, in their brief, refer to and seem to depend almost entirely upon the decision in Gregg v. Bostwick, 33 Cal. 227, 91 Am. Dec. 637.

The question of a probate homestead was not in issue in that case, nor were those portions of the opinion quoted by counsel necessary for a determination of the matters under discussion in that case. The court, in Gregg v. Bostwick, 33 Cal. 227, 91 Am. Dec. 637, declined to set apart any of the property claimed as a homestead, excepting those portions which had been specifically claimed as such in the declaration, and upon which the claimants had resided, and that portion of the decision quoted would seem to be obiter dicta. Neither of the other cases referred to by counsel has any application to the question before the court upon this petition.

The question of value, as we understand it, cuts no figure in the setting apart of a probate homestead, the object being to set apart a home, as was decided in the Estate of Walkerly, 81 Cal. 579, 22 Pac. 888, in consonance with the position and condition of those entitled thereto and the value of the estate —due regard being always had to the practicability of the property for the use claimed. It might as well be contended that, because they could be used conveniently, the claimant of a probate or other homestead, under the laws of California, might claim a lot and residence situate on Pacific and Franklin streets, and at the same time, as pasturage for a cow might be required, ask that a lot situate at Jackson and Franklin, not in any way connected with the home, should be set apart as a portion of the same homestead.

A broad avenue, set apart and dedicated as a public street, in the incorporated town of Oakland, separates the blocks designated respectively as "A" and "B," and there is a distance of four or five blocks from these lots to the third parcel of land claimed by the petitioner.

The position of these lots as effectually prevents their being used as a homestead as if the same were situated a portion on the north side and a portion on the south side of Bush, or any other street in San Francisco.

The motion of petitioner, with respect to the setting apart of lots Nos. one (1) and four (4), in block 27, and lot No. four (4) in block No. one (1), is denied.

As to Whether Separate or Detached Parcels of land may be selected as a homestead, see the recent case of Brixius v. Reimringer, 101 Minn. 347, 118 Am. St. Rep. 629, and note, 112 N. W. 273.

ESTATE OF CORNELIUS J. DONAHUE, DECEASED.

[No. 11,598; decided December 27, 1893.]

Inventory—Money Claimed Adversely by Administratrix.—The fact that an administratrix herself makes an adverse claim to moneys deposited in her name and in the name of her decedent, and payable to either, does not lessen her duty to include such deposits in her inventory.

F. W. Van Reynegom, for the minor heirs.

Thomas F. Barry, for the administratrix.

COFFEY, J. On September 26, 1891, Cornelius J. Donahue died intestate at the city and county of San Francisco, leaving him surviving as heirs Annie Donahue, his widow; Maggie Donahue, aged thirteen years, his daughter by a former wife; and Agnes Donahue, aged two years, the child of the deceased and his said widow.

On December 1, 1891, letters of administration were duly issued to said Annie Donahue, and on February 16, 1893, the administratrix filed the inventory and appraisement of said estate.

At the time of his death said intestate had some $4,000 on deposit with the Hibernia Savings and Loan Society, and $900 with the German Savings and Loan Society, two savings banks of San Francisco. Each of said deposits was in an

account entitled "Cornelius J. Donahue or Annie Donahue," and represented the earnings and savings of the deceased and his surviving wife subsequent to their marriage. The bank-books representing these deposits were in the wife's possession at the time the intestate died, but no written transfer of his interest therein was shown to have been by him made.

The question before the court is whether the deposits mentioned are a portion of the estate and subject to administration thereof as community property, or whether they belong to the surviving wife as her separate estate. This question comes up at the hearing of an order for the administratrix to show cause to the court why the said deposits should not be included in the inventory of the estate. Upon the hearing the administratrix testified that the deceased in his lifetime had told her that it was his intention that in the event of his death she should have the money in question without the trouble of getting it through the probate court, and that it was deposited in the names of husband *or* wife for her benefit, and to be her separate estate on his death.

The question here involved of the duty of an administratrix to make a true inventory of all estate coming to her possession or knowledge has been before passed upon by this court in Estate of Partridge, 1 Cof. Pro. Dec. 208. In the case here cited it was held that "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." The fact that in the case at bar the adverse claim is made by the administratrix in her personal capacity does not lessen her duty as administratrix to include in her inventory of the estate the property in question, to which she makes a claim adverse to the estate.

The motion in behalf of the minor heir is granted, and it is ordered that the administratrix include the moneys in controversy in this proceeding in the inventory of the estate, by

filing a supplementary inventory thereof in accordance with the provisions of section 1451 of the Code of Civil Procedure.

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, 1 Cof. Pro. Dec. 208.

ESTATE OF HENRY WELCH, DECEASED.

[No. 6,961; decided February 16, 1894.]

Probate Order—Conclusiveness and Effect.—An order by the superior court in probate is as efficacious and binding as to the matter therein determined and the rights thereby secured as any judgment can be.

Family Allowance.—An Order Making a Family Allowance is necessarily an adjudication of the existence of every fact requisite to support the order, whether the fact is expressly found or not.

Family Allowance.—An Order for a Family Allowance creates a vested right to all sums that have become due thereunder.

Family Allowance—Conclusiveness of Order.—All questions as to the right of a widow to an allowance, and as to the amount properly to be allowed her, are conclusively determined by the order of the court, if no appeal is taken.

Orders in Probate—How may be Vacated.—Orders and judgments in probate can be vacated on motion, only for the reasons and within the time provided by the code. After the lapse of that time the remedy is by independent suit.

Henry Welch died on January 14, 1888. Letters of administration upon his estate were issued to John Purcell on January 31, 1888.

On August 17, 1888, Honor Welch, widow of the decedent, filed her petition wherein she prayed for an allowance of $200 per month for her maintenance during the progress of the settlement of the estate. On August 28, 1888, the court made an order allowing the widow $125 per month from the date of her husband's death. This allowance was paid by the administrator up to March 14, 1889, and on March 23, 1889, his powers were suspended. On April 8, 1890, J. D.

Ruggles was appointed special administrator. On December 22, 1893, the widow made application for an order directing the special administrator to pay to her $7,125 alleged to be due to her as family allowance from March 14, 1889, to December 14, 1893. The special administrator filed an answer and resisted the application on various grounds.

Garret W. McEnerney, for the applicant.

Chas. A. Sumner and M. T. Moses, for the special administrator.

COFFEY, J. On August 28, 1888, subsequent to the filing of the inventory, the court, after notice of the hearing thereof given by posting for ten days, heard the application of Honor Welch, the surviving wife, for the payment to her of $200 per month as family allowance until the settlement of the estate. The petition was granted, but the amount was fixed at $125 per month. The family allowance has not been paid since March 14, 1889. This is a proceeding to compel its payment. The questions involved all turn upon the force and effect of the order.

An order made by the court sitting in probate, within the scope of its jurisdiction, is as forceful, efficacious and binding as to the matter therein and thereby determined, and as to the rights thereby granted or secured, as any judgment could be: Code Civ. Proc., sec. 1908, subd. 1; Howell v. Budd, 91 Cal. 342, 27 Pac. 747; Garwood v. Garwood, 29 Cal. 520.

An order of the court sitting in probate, making an allowance authorized by statute, is necessarily an adjudication of the existence of every fact requisite to support the order, whether the fact be expressly found or not.

An order of family allowance creates a vested right to all sums which have become due thereunder: Pettee v. Wilmarth, 5 Allen, 144; Estate of Lux, 100 Cal. 593, 35 Pac. 341.

All questions as to the right of the widow to an allowance, and as to the amount properly to be allowed to her, are conclusively determined by the order, no appeal having been taken: Code Civ. Proc., sec. 1908, subd. 1; Irwin v. Scriber, 18 Cal.

499; Brumagim v. Ambrose, 48 Cal. 366; Lucas v. Todd, 28 Cal. 182.

Orders in probate and judgments stand on like footing as to the rights thereby secured: Code Civ. Proc., sec. 1908, subd. 1; Freeman on Judgments, 4th ed., sec. 319b.

Judgments (and hence orders in probate) can only be vacated on motion, for the reasons and within the time provided by the code: People v. Goodhue, 80 Cal. 199, 22 Pac. 66. After the lapse of that time the remedy is by independent action: People v. Harrison, 84 Cal. 608, 24 Pac. 311.

The doctrine of laches is a doctrine which obtains in equity only. Delay less than the period of limitation never bars the remedy at law.

There is no period of limitation prescribed in probate, except in isolated instances, of which this is not one.

The allegations in the answer do not make a case of fraud: Allen v. Currey, 41 Cal. 320; In re Griffith, 84 Cal. 113, 23 Pac. 528, 24 Pac. 48; Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336. But even if they did, they would be of no avail. Fraud must be proved as well as pleaded.

An order reducing a family allowance previously granted, and made retroactive is error: Pettee v. Wilmarth, 5 Allen, 144; Estate of Lux, 100 Cal. 593, 35 Pac. 341; Ford v. Ford, 80 Wis. 565, 50 N. W. 489.

Application granted.

The Principal Case was Affirmed in 106 Cal. 427, 39 Pac. 805.

ESTATE OF ANTONIO SPINETTI, DECEASED.

[No. 13,106; decided February 19, 1894.]

Grandparent—Promise to Support Grandchild.—The law imposes no duty on a grandfather to provide for his grandchild, and his promise to do so is without consideration, and cannot be enforced against his estate.

Family Allowance.—A Grandchild whose mother is living is not entitled to an allowance from the estate of his deceased grandfather.

J. M. Burnett and E. D. Sawyer, for the motion to dismiss.

Sullivan & Sullivan, opposed.

COFFEY, J. Antonio Spinetti died, leaving four adult children, and one minor child named William Spinetti. The petitioner is one of the adult children, and is the mother of Antonio Demartini, for whose benefit the petition is filed by her. The child Antonio was born in the house of Mr. Spinetti, and lived in the house of his grandfather from his birth until the death of Mr. Spinetti. When Mrs. Ghiglieri obtained a divorce from Demartini (the father of the child), Mr. Spinetti promised he would provide for the child, and did so from that time. As he did not like the name of Demartini, the child was called Antonio Spinetti at his request.

The property of heirs at law, devisees and legatees can only be taken from them to discharge an obligation for which their ancestor or testator was legally bound, or which is imposed by the law.

On the death of any person his property descends to his heirs at law, or to his legatees and devisees, subject to the burdens imposed on it by law. Courts do not give the property of one man to another, unless there is some legal obligation calling on them to do so. While a man may be generous and do what he pleases with his own while living, the moment he dies the rights of others accrue, and those rights courts will not deprive them of, except where the law imposes an obligation in favor of one upon the other. The law enforces legal, and not merely moral, obligations. Therefore, if Mr.

Spinetti was under no legal obligation to support his child, the property of respondents should not be taken for that purpose.

Mr. Spinetti was under no legal obligation to support his grandson.

We look in vain to the laws of this state for any provision requiring a grandfather to support a grandson, when both parents are living, and where neither has been shown to be infirm or incapacitated in any way. On them, and not on him, is the burden imposed. We may as well search for a provision allowing a grandchild to inherit "through an ancestor who is not dead." Nor can the alleged promise to support the child avail the petitioner. The promise, if any were made, was not to be performed within one year, and to be of any force must have been in writing: Code Civ. Proc., sec. 1973.

There was no consideration for the promise.

There was no benefit accruing to the promisor, nor was there anything valuable flowing from the promise: Violett v. Patton, 5 Cranch, 142, 3 L. ed. 61; Civ. Code, secs. 1605, 1606.

Suppose Mr. Spinetti had refused to support this child, could the child have sustained an action compelling him to perform the agreement? Where was the consideration to support such a promise? The court would have held the promise was merely gratuitous, and imposed no legal obligation on Mr. Spinetti.

But to go further, and stand upon the promise itself, Mr. Spinetti, the decedent, as the case now stands, only promised he would provide for the child. This duty, even conceding one existed, only continued during his lifetime. There was no valuable or good consideration, which would make the agreement bind his heirs or executors, or impose any obligation on his estate.

As Antonio Demartini is a grandchild, and his mother is living, he is not entitled to an allowance from the estate of his grandfather.

The power to make a family allowance did not exist at common law. This court, sitting in probate, derives its authority from the statute, and to the statute, then, the court must look for that authority.

Section 1464, Code of Civil Procedure, provides that when a person dies, leaving a widow or minor children, the widow or children are entitled to an allowance for their support until letters are granted and the inventory returned. Section 1465 says that the court may, on the return of the inventory, set apart the property exempt from execution, and the homestead, to the surviving husband or wife or the minor children. Section 1465 provides if the amount set apart be insufficient for the support of the widow and children, a further allowance may be made. As the two preceding sections had specially mentioned minor children as those to whom property was set apart, the word children here must refer to minor children.

Section 1468 provides that when property is set apart, one-half of it must go to the minor children and one-half to the surviving husband or wife; but if there be no surviving husband or wife, then all goes to the minor children.

Section 1469 provides that when the estate is under $1,500, it all goes to the widow and minor children.

We look in vain over these provisions of the statute to find any provision for a minor grandchild whose parent, through whom he claims descent, is living.

Words are to be construed according to the context and approved use of the language: Code Civ. Proc., sec. 16. There is scarcely a word plainer than "child" in our language. But it is always in connection with "widow" or "surviving husband." When a person dies leaving a "widow" or "minor children," says section 1464. Webster defines child as "a son or daughter; a male or female descendant in the first degree, the immediate progeny of parents." He also defines grandchild as a "son's or daughter's child." The meaning of these terms in the law is plain and unambiguous, and the legislature is presumed to have meant what was said. There is no room for construction: Tape v. Hurley, 66 Cal. 474, 6 Pac. 129, and cases cited therein.

Now, whose widow is mentioned in the statute? Certainly the widow of the decedent, not the widow of a son. Whose children are mentioned? The children of the decedent, not those of anyone else.

The right to a probate homestead would depend on the construction of these provisions of the statute. If the contention of petitioner be tenable, then this child would be entitled to have a share in a homestead to be set apart by this court. Yet this will not be seriously contended for.

While discussing the statute, the fact is of importance to note that Mr. Spinetti left a minor child, for whom an allowance has already been made, and this brings the case directly within both the letter and spirit of the law.

Section 963 of the Code of Civil Procedure gives the right of appeal from an order making an allowance for a widow or child. The section shows, by placing "widow" and "child" together, that the legislature, when it used the word "child," meant child, and nothing else.

Motion to dismiss granted.

GUARDIANSHIP OF MAUD TREADWELL ET AL., MINORS.

[No. 5,038; decided November 3, 1893.]

Guardian—Applications for Letters in Different Counties.—Where applications for letters of guardianship are made by different persons in several counties, each applicant claiming his county to be the residence of the minors, and the second application is filed before notice is given of the first, and is first heard and determined, the order granting the same and determining that the minors are residents of the county of the second applicant is res judicata and a bar to the application first filed.

Res Judicata.—In Considering the Question of Res Judicata, it is immaterial which proceeding was first instituted, if it has not reached a final determination. The case in which the first judgment is rendered is the prior one and controls, although rendered in the later proceeding.

Guardian—Application for Letters in Different Counties.—Where an application for letters of guardianship is granted by the superior court of one county, and an application is thereafter made to vacate the order on the ground that the minors are not residents of that county, which application is denied, the order denying it is conclusive upon an application for letters in the superior court of another county, although that application was first filed.

Courts—Conflict of Jurisdiction.—As between courts of concurrent jurisdiction, that court in which process is first served has the prior jurisdiction, irrespective of which proceeding is first instituted.

Judgments.—The Doctrine of the Conclusiveness of Judgments against collateral attack applies to judgments of the superior court in probate and guardianship as well as to those in any other branch of its jurisdiction.

Guardian.—The Residence Necessary to Confer Jurisdiction in matters of guardianship is the actual residence or abode of the ward, not his legal residence or domicile.

Guardian.—Residence is not Required, under section 1747 of the Code of Civil Procedure, in order to confer jurisdiction in guardianship proceedings, but mere inhabitance is sufficient.

Inhabitancy—Residence.—The Distinction Between an Inhabitant and a Resident is that the place one inhabits is his dwelling place for the time being, while the place where one resides is his established abode for a considerable time.

Guardian.—A Minor Over the Age of Fourteen Years has an exclusive right to petition for the appointment of his guardian until he has been cited and has neglected for ten days to nominate a suitable person as his guardian.

John Garber and W. S. Goodfellow, for the petitioners.

William Rix, for the respondents.

COFFEY, J. This is an application filed in the above-entitled matter by W. S. Goodfellow and R. H. Lloyd to have guardians appointed by this court for the persons and estates of Maud Treadwell, Thalia Treadwell, James P. Treadwell and Ivan Treadwell, the children of James P. Treadwell and Mabel Treadwell, both of whom are deceased.

James P. Treadwell died at the city and county of San Francisco on the twenty-seventh day of December, 1884, leaving estate in said city and county, and being a resident thereof at the time of his death. He left surviving him his widow, Mabel Treadwell, and the above-named minors, and an infant daughter since deceased. By his will, which was duly admitted to probate by the superior court of the city and county of San Francisco, James P. Treadwell left his estate to his widow, Mabel Treadwell, and his said minor children.

Upon application, duly made to this court, the said Mabel Treadwell was on the twenty-sixth day of April, 1886, duly appointed by this court guardian of the persons and estates of said minor children, Maud, Thalia, Ivan and James P., and immediately entered upon the performance of her trust as guardian, and continued to act as such guardian down to the time of her death, which occurred at the city and county of San Francisco on the fifth day of December, 1892.

From the time of the death of said James P. Treadwell the said minor children lived with their mother up to the time of her death, most of the time in the city and county of San Francisco. By will, duly admitted to probate by this court, said Mabel Treadwell appointed George Heazelton and the said W. S. Goodfellow testamentary guardians of the estates of her said minor children, but the said Heazelton and Goodfellow resigned their trust as such guardians and renounced their rights to letters.

On the third day of February, 1893, and after the renunciation by the said Goodfellow and Heazelton as testamentary guardians, the said Goodfellow and R. H. Lloyd filed the present application praying this court to appoint guardians for the persons and estates of said minors, alleging that said minors had no guardians appointed by will or deed, and this court on the fourth day of February, 1893, made an order that notice of said application be given to Calvin F. Summers, a relative and uncle of said minors.

During the lifetime and up to the time of the death of the said Mabel Treadwell, said Calvin F. Summers lived with said Mabel Treadwell and her said minor children in the city and county of San Francisco, and after the death of said Mabel Treadwell the said minor children continued to live with said Summers in the said city and county of San Francisco. On the first day of February, 1893, and before the filing of the present application, the minor, James P. Treadwell, who was at that time over the age of fourteen years, left the city and county of San Francisco and took up his abode in the city of San Jose, county of Santa Clara; and on the fifth day of February, which was after the filing of the present application, but before any citation or other process herein was issued or served, the remaining three minor chil-

dren—to wit, Maud, Thalia and Ivan—removed from the city and county of San Francisco in company with, and in the custody of, their said uncle, Calvin F. Summers, to the city of San Jose, county of Santa Clara, where all of said minors took up their abode and have all since continued to live with their said uncle.

On the eighth day of February, 1893, which was before any citation or process issued from this court was served, the said Calvin F. Summers and E. W. Clayton applied to the superior court of the county of Santa Clara to be appointed guardians of the persons and estates of the minors, Thalia Treadwell, James P. Treadwell and Ivan Treadwell, alleging that the said minors were residents of the county of Santa Clara. Said application, after notice duly given in conformity with the statute and the order of the court, came on for hearing in the said superior court of the county of Santa Clara on the tenth day of February, 1893, and the said court thereupon determined and decided that said minors, Thalia, James P. and Ivan, were residents of the county of Santa Clara, and appointed the said E. W. Clayton guardian of the estates of the said James P. Treadwell and Ivan Treadwell, and appointed the said Calvin F. Summers guardian of the person and estate of the said Thalia and guardian of the persons of said James P. and Ivan—the said minors Thalia and James P., who were over the age of fourteen years, having upon said hearing consented in writing and requested the said court to appoint the said E. W. Clayton and Calvin F. Summers as such guardians of their persons and estates. The said Calvin F. Summers and E. W. Clayton duly qualified as such guardians, letters of guardianship were issued to them, and they thereupon entered upon the performance of their trust, and have since continued to act as such guardians of said minors.

No appeal was ever taken from the order of the superior court of Santa Clara county appointing the said Summers and Clayton as such guardians of said minors, but said Goodfellow and Lloyd on the sixth day of April, 1893, filed in said superior court of Santa Clara county an application to have the said order made by the superior court of Santa Clara county on the tenth day of February, 1893, appointing

the said Summers and Clayton guardians of said minors revoked and recalled, and set forth in said application the fact of the filing by them on the third day of February, 1893, of the present application in this court, and alleged in said application that the said minors were not residents or inhabitants of the county of Santa Clara, but were residents and inhabitants of the city and county of San Francisco. Upon and pursuant to this application to revoke, orders to show cause were duly made by the said superior court of Santa Clara county requiring the said E. W. Clayton and the said Calvin F. Summers to appear before the said superior court of Santa Clara county on the seventeenth day of April, 1893, and then and there to show cause why the letters of guardianship issued to them by said court should not be revoked and set aside upon the ground that the said minors were at said time, and were at all times, residents of the city and county of San Francisco, and upon the ground that before and at the time of the commencement of proceedings in the said superior court of Santa Clara county, the superior court in and for the said city and county of San Francisco had and was exercising jurisdiction of the estate and guardianship of said minors.

Pursuant to said orders to show cause, the said Calvin F. Summers and E. W. Clayton appeared in the superior court of Santa Clara county and filed a written answer to the said application of the said Lloyd and Goodfellow; and the said orders to show cause, and the issues raised by said application and the said answer thereto, came on regularly to be heard in said superior court of Santa Clara county and were duly heard and considered by said court, and the said court, on the twenty-seventh day of April, 1893, made and entered its order whereby it ordered that the application of the said Goodfellow and Lloyd to have the order theretofore made appointing the said Clayton and Summers revoked and the said letters of guardianship set aside be denied, and the said orders to show cause discharged. No appeal was ever taken from this last-mentioned order of the superior court of Santa Clara county, although an appeal was attempted to be taken after the statutory period for appeal had elapsed and the order had become final.

The citations issued from this court on the present application were not served until after the superior court of Santa Clara county had made the order above mentioned appointing the said Summers and Clayton guardians—citations issued on the twelfth day of April, 1893, having been served on Thalia Treadwell and James P. Treadwell at the city of San Jose on the fourteenth day of April, 1893, and a citation issued on the eighth day of May, 1893, having been served on said Calvin F. Summers on the tenth day of May, 1893. No citation was ever served on Ivan Treadwell.

Before the present application came on for hearing in this court, and on the sixth day of July, 1893, the said Maud Treadwell attained her majority.

The said Calvin F. Summers, Maud Treadwell, Thalia Treadwell and James P. Treadwell, in obedience to the said citations, appeared in this court by their attorneys, and on the twenty-second day of September, 1893, filed an answer to the said application of said Lloyd and Goodfellow, and in said answer set up and pleaded in bar of this proceeding the order so made by the superior court of Santa Clara county—to wit, the order made by said court on the tenth day of February, 1893, appointing the said Clayton and Summers guardians, and the order made by the said court on the twenty-seventh day of April, 1893, denying the application of the said W. S. Goodfellow and R. H. Lloyd to have the letters of guardianship issued to said Summers and Clayton revoked—and upon the hearing in this court they introduced in evidence the record of the proceedings so had and taken in the superior court of Santa Clara county.

The said Maud Treadwell and the said minors, Thalia and James P., testified on the hearing that the present application made by said Lloyd and Goodfellow had not been made at their request or with their consent, and the said Thalia and James P. testified that they did not desire guardians to be appointed for them in this proceeding, but were satisfied with the guardians appointed by the superior court of Santa Clara county; and the said Calvin F. Summers, Maud Treadwell, Thalia Treadwell and James P. Treadwell testified that at the time of their removal from the city and county of San Francisco to the city of San Jose they had no knowledge or

notice of the present application or of any application made to the court for the appointment of guardians, and further testified that the said Mabel Treadwell shortly before her death had placed the said minors and the said Maud, who was at that time a minor, in the charge and custody of their uncle, Calvin F. Summers, and requested that in the event of her death he should remove them from the city and county of San Francisco.

The order of the superior court of Santa Clara county appointing guardians is a complete bar to this proceeding, for it is the judgment first obtained that controls, although rendered in the later suit or proceeding: Wells on Res Judicata, sec. 292, and cases cited; Van Fleet on Collateral Attack, sec. 580; Mount v. Scholes, 120 Ill. 402, 11 N. E. 401; 2 Black on Judgments, sec. 791; 7 Rob. Pr. 224; Estate of Sealy, 1 Cof. Pro. Dec. 90; Casebeer v. Mowry, 55 Pa. 422, 93 Am. Dec. 766.

When we are considering the question of res judicata, it is not material which proceeding was first instituted if it has not reached a final determination. The case in which the first judgment is rendered is the prior one, and that, too, whether it is a domestic or a foreign judgment: 21 Am. & Eng. Ency. of Law, 233, and cases cited.

Not only is the order made by the Santa Clara court appointing the guardians a complete bar, but the order made by that court refusing to set aside the order appointing guardians is certainly also conclusive here, as the very question sought to be litigated in this proceeding was litigated and contested upon the application which resulted in the last-mentioned order: Gregory v. Kenyon, 34 Neb. 640, 52 N. W. 685, 687.

Moreover, the order of the Santa Clara court appointing guardians is in any event binding upon the whole world, for, as shown by the record introduced in evidence, the notices required by the statute were duly given, and it was the duty of anyone objecting to the application there made to appear and contest the same.

The principle that the judgment first obtained controls, when pleaded as a bar, does not at all conflict with the well-recognized doctrine relied upon by counsel for the San Fran-

cisco application, that where the jurisdiction is concurrent, the court first obtaining it will be entitled to hold it: Mount v. Scholes, 120 Ill. 402, 11 N. E. 401.

But as between courts of concurrent jurisdiction, that court in which process is first served has the prior jurisdiction irrespective of which proceeding is first initiated: Bell v. Ohio etc. Co., 1 Biss. 260, Fed. Cas. No. 1260; Union etc. Ins. Co. v. University of Chicago, 10 Biss. 191, 6 Fed. 443; In re Danneker, 67 Cal. 643, 8 Pac. 514; Code Civ. Proc., sec. 416. See, also, Sheldon's Lessee v. Newton, 3 Ohio St. 494, 499, 500; Keating v. Spinks, 3 Ohio St. 105, 62 Am. Dec. 214; Ball v. Tompkins, 41 Fed. 490; Smith Purifier Co. v. McGroarty, 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346.

As to when a court acquires jurisdiction over the subject matter, see Ball v. Tompkins, 41 Fed. 490.

That service of some character is necessary in proceedings for the appointment of guardians in order to acquire jurisdiction, see Burroughs v. De Couts, 70 Cal. 373, 11 Pac. 734; Seaverns v. Gerke, 3 Saw. 353, Fed. Cas. No. 12,595.

The question of residence, upon which question depends the jurisdiction of the superior court to appoint guardians, being a matter which the superior court of Santa Clara county had a right to hear and determine, the conclusion reached by that court is conclusive in this proceeding; for the determination by a court of general jurisdiction or court of record of any fact or facts upon which its jurisdiction depends is conclusive against collateral attack in another proceeding: Irwin v. Scriber, 18 Cal. 500; Warner v. Wilson, 4 Cal. 310; Burroughs v. De Couts, 70 Cal. 373, 11 Pac. 734; In re Pierce, 12 How. Pr. 534; Guardianship of Danneker, 67 Cal. 643, 8 Pac. 514.

And generally upon this question, see Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448, and note; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244, and note; Hammond v. Davenport, 16 Ohio St. 182; Hahn v. Kelly, 34 Cal. 413, 94 Am. Dec. 742; Carpentier v. Oakland, 30 Cal. 446; Hodgdon v. Southern Pacific Co., 75 Cal. 642, 17 Pac. 928; Paine v. Schenectady Ins. Co., 11 R. I. 411, 416.

The doctrine of the conclusiveness of judgments against collateral attack applies to judgments and decrees of the pro-

bate court or of the superior court sitting in probate and matters of guardianship, as well as to those of any other tribunal: Irwin v. Scriber, 18 Cal. 500; Burroughs v. De Couts, 70 Cal. 373, 11 Pac. 734; Garwood v. Garwood, 29 Cal. 514; Arlaud's Succession, 42 La. Ann. 320, 7 South. 532; Succession of Winn, 3 Rob. 304; Tutorship of Hughes, 13 La. Ann. 380, and other cases cited supra.

The residence necessary to confer jurisdiction in matters of guardianship is the actual residence or abode of the ward, not his legal residence or domicile: In re Hubbard, 82 N. Y. 90; In re Pierce, 12 How Pr. 532; Ex parte Bartlett, 4 Bradf. 221; Ross v. Southwestern R. R. Co., 53 Ga. 514; In re Raynor, 74 Cal. 422, 16 Pac. 229.

Under our law a minor fourteen years old may change his residence, although it be admitted that he cannot by his own act change his domicile: Pol. Code, sec. 52; In re Raynor, 74 Cal. 422, 6 Pac. 229.

But our statute does not even require residence in order to confer jurisdiction; mere inhabitance is sufficient: Code Civ. Proc., sec. 1747.

"Inhabitance: abode in a dwelling place for the time being. It is distinguished from the temporary sojourn of a transient person, but as often used it does not necessarily imply the finality of intention respecting abode that is implied by domicile. Inhabitance refers rather to actual abiding, domicile to the legal relation which is not necessarily suspended by absence": Century Dictionary.

"Resident: in law an established abode fixed for a considerable time, whether with or without a present intention of ultimate removal. A man cannot fix an intentionally temporary domicile, for the intention that it be temporary makes it in law no domicile, though the abode may be sufficiently fixed to make it in law a residence in this sense. Residence is a fact easily ascertained; domicile a question difficult of proof. It is true that the two terms are often used as synonymous, but in law they have distinct meanings": Century Dictionary.

The correct construction of the sections of the Code of Civil Procedure relating to the appointment of guardians of minors is that a minor over the age of fourteen years has the

exclusive right to petition for the appointment of his guardian until he has been cited to appoint a guardian and has neglected for the period of ten days: Code Civ. Proc., secs. 1747-1749.

Application denied.

As to the Conflict in Jurisdiction where letters testamentary or of administration are applied for in different counties, see Estate of Sealy, 1 Cof. Pro. Dec. 90, and note.

ESTATE OF P. N. MACKAY, DECEASED.

[No. 13,461; decided August 13, 1894.]

Marriage—White and Colored Persons.—A marriage between a white man and a colored woman is forbidden by the law of California, but if such a marriage is contracted in a state where it is valid, it will be recognized in this state.

Family Allowance—Validity of Marriage.—Where a colored woman claims to be the wife of a decedent by virtue of a marriage contracted in another state, she must, on her application for a family allowance, establish the marriage by a preponderance of proof, and no presumption will be indulged in her favor.

Family Allowance—Disputed Marriage.—Upon an application for a family allowance by a woman whose marriage to the decedent is disputed, her marriage must be established by the same quality of proof as in any other case.

Contract Marriage.—An Agreement to be "Husband and Wife" is distinguished from an agreement to live together as "man and wife." The latter agreement does not constitute a contract of marriage, and living together as "man and wife" does not constitute marriage.

Contract Marriage.—In Considering the Claim of a Contract Marriage, the circumstance that the alleged widow, a few days after her alleged husband's death, stated to the executors of his will that she was with child by him, and did not then or until sometime afterward assert her claim to widowhood, is to be taken as strongly negativing such claim.

Contract Marriage—Evidence.—The Acts of a Testator in making a bequest to a woman under a surname other than his own and describing her as his housekeeper, and in acknowledging a deed before an officer as an unmarried man, are evidence as to the truth of the facts so stated.

Void Marriage—Legitimacy of Issue.—Where the claim is made that a marriage was contracted in another state, which, if there contracted in fact, is valid under the laws of that state, and hence valid in this state, although such marriage would have been void if contracted in this state, the provision in section 1387 of the Civil Code that the issue of all marriages null in law are legitimate has no application.

Family Allowance—Void Marriage.—The court in this case finds: That the petitioner is not the widow and her child is not the child, either legitimate, adopted or illegitimate, of the decedent, and that the application for a family allowance should be denied.

Chas. J. Heggerty and Gaston Straus, for the petitioner.

Oliver P. Evans, for the executor.

COFFEY, J. This is an application, by petition, by and in behalf of Harriet Schenck Mackay for a family allowance under the statute, section 1466, Code Civil Procedure. The petition sets forth and alleges that P. N. Mackay died in San Francisco on April 21, 1893; that at the time of his death he and the petitioner were, and continuously from the 5th of September, 1880, had been, married as husband and wife, living, residing and cohabiting together as such, and mutually assuming and bearing each toward and with the other the relations, marital rights, duties and obligations of husband and wife; that said Mackay and petitioner, on about the fifth day of September, 1880, in the city and state of New York, mutually agreed and contracted to then and there be and become and thereafter, during their lives, continue married, under and by virtue of the laws of said state of New York, and to mutually sustain, bear and assume toward each other, and the world at large, marital rights, duties and obligations as husband and wife; and that then and there, under and by virtue of the laws of said state of New York, they were married in said state and became and were husband and wife and from that time on continuously down to the moment of his death said Mackay and petitioner resided, lived and cohabited together as husband and wife, and mutually assumed, bore and sustained toward each other and the world at large marital rights, duties and obligations as such husband and wife; that as such husband and wife they lived, resided and

cohabited together as Mr. and Mrs. P. N. Mackay in the said city and state of New York, from about the 5th of September, 1880, until about the 1st of March, 1884, whence, on about said last date, they removed to San Francisco, California, where they since lived and cohabited as such husband and wife and as Mr. and Mrs. P. N. Mackay from about the 25th of March, 1884, continuously down to the moment of his death on April 21, 1893, when he died in the arms of the petitioner in their family home, 1625 Polk street; that the laws of New York render and make incapable of contracting marriage in said state only those persons included within certain categories which did not comprehend either decedent or petitioner, and that they were both over the age of nineteen years, and by those laws they were both capacitated so to contract.

That on the twenty-second day of June, 1893, there was born to petitioner a child thereafter christened and named Ruth Margaret Mackay, which child was and is the issue and child of said marriage between decedent and petitioner; that an inventory and appraisement of the estate left by decedent shows its value as $355,000; that the indebtedness does not exceed $25,000; that the petitioner has no means of maintenance for herself and child, and that $250 per month is a reasonable sum to be allowed for their support pending settlement of estate. All of these allegations are traversed by the respondent executor, Duncan C. Mackay. It appears that the other executor, Robert G. Mackay, was not joined as a respondent or served with process, and a dismissal is asked for on the ground of nonjoinder, but that is not deemed of consequence by the court, as the application should be disposed of on its merits and not treated technically, if, indeed, there were anything in this point.

It is in proof that the applicant is a colored woman of the African race and that the decedent was a white man of the European race, and, consequently, they were incapable of contracting marriage, according to the laws of the state of California. If the relation of husband and wife subsisted between them, it must have been contracted elsewhere, in some country or state which recognized the validity of such a union. The allegation of the petition is that a marriage took

place in New York by contract on about the 5th of September, 1880. It seems that the laws of that state do not forbid such contractual conjugal relations, and therefore, if the testimony upon this point be true, the status thus created by contract entitles the applicant to the relief sought. It is incumbent upon her to establish her claim by a preponderance of proof. No presumption may be indulged in favor of her claim under the statutes of the state of California, which positively prohibit such marital miscegenation; but if it be shown by trustworthy testimony that such relation, however repugnant to our laws, had its origin in a manner and by a mode conformable to the statutes of another sovereign state, the courts of California are bound to respect it and to treat it as if it were not contrary to our code. If this court is not convinced that the applicant made a contract with the decedent in New York according to the substance of the allegation in her petition, then and there agreeing to be husband and wife, then her case fails entirely, and all the testimony introduced as to subsequent events becomes unimportant and immaterial. It can only be considered as tending to corroborate her claim of contract.

Is this claim of contract supported by the evidence? Do the allegations and testimony correspond? To what extent is the petition fortified by proof? In her petition the date of the contract is stated to be "on about the 5th of September, 1880." It appears that neither she nor decedent was in New York in 1880. In her testimony she first stated that they went to Denver in the fall of 1879 and from there to New York the next fall; "the marriage contract was written and signed in Denver, Colorado; he signed it first, then I signed it; he kept the paper; no copy was made; we were there a year or a year and a half." Upon further examination she said they did not go to New York until after President Garfield was assassinated; went there in the fall after the assassination, which was the fall of 1881; got married in New York in the same old way—no priest, lawyer, license, minister or judge, the same way by contract; the reason they got married again was that in Colorado and California colored and white persons cannot intermarry; in New York it is different; decedent kept the paper; she never touched his

papers. There is a discrepancy as to dates here between allegation and proof. In her testimony she says she was born in Fredericksburg, Virginia, "after the war," and that she is now (January, 1894) twenty-six or twenty-seven years old, but in her petition she swears that in September, 1880. she was over nineteen years of age—a disparity of at least six or seven years. In her petition she states that she and decedent lived, resided and cohabited together as Mr. and Mrs. P. N. Mackay in the city of New York from about September 5, 1880, until March 1, 1884; in her testimony she says she was in New York City from the fall of 1881 to March, 1884. There is no evidence to corroborate her statements, except the item of the tag from the drygoods house of Hugh O'Neill for a hat sold to a Mrs. Mackay for $3, and the deposition of the merchant showed that he recalled nothing of the transaction and knew nothing of the party. In fact, there is no evidence, apart from this tag, of a corroborative character from New York to support the pretensions of petitioner. Her claim is, as stated by her counsel, of a marriage by a civil contract, followed up by repute of the neighborhood in which the parties lived subsequent to the execution of the civil contract. There is no evidence from the neighborhood in New York where she claims to have so lived and cohabited with decedent. Her whole case of contract depends upon her statement. Her counsel argue that in an application for an allowance for support of family, strict proof of marriage is not requisite, but that if it be, such evidence has been adduced. The rule is that upon such an application the marriage must be established by the same quality of proof as in any other case.

The petitioner says she started from San Francisco in September, 1879, with P. N. Mackay, and that they traveled from here together in a Palace sleeping-car, occupying the same section at night, she the upper and he the lower berth, and took their meals on the train all the way from here to Denver. She is contradicted by Duncan C. Mackay, who traveled over the road in that month and year with his family. He says that meals were not served on the cars at that time. Passengers had to get out at eating-houses; that he inquired of a porter as to whether they could get meals on the train and was told they could not.

The evidence of Mr. Horsburgh, one of the managing passenger agents of that road, is that in 1879 no meals were served on board the train, and that the buffet service was not introduced until 1884.

If it is a fact that meals were served on those trains in 1879, it might have been proved by some of the numerous porters or conductors who were engaged there during that year. The fact that this has not been done shows that what Mr. D. C. Mackay and the railroad agent said is true. Is this a matter about which the petitioner would be mistaken? Would she be mistaken about having meals served on that train in 1879, going to Denver with Mr. Mackay to be married? She must have realized that she was in a delicate position traveling in a train with a white man, occupying the same section with him, and she must have been in a state of mind that would make it literally impossible to be mistaken whether they took their meals on a train or not. She starts at the very inception of this case with an important statement which is untrue. She is flatly contradicted by two witnesses, and no attempt to corroborate her evidence has been made.

Counsel for petitioner, in his opening argument, referred to the case of Pearson v. Pearson, reported in 51 Cal. 120, in which it was held that Laura Pearson, a mulatto woman, was the widow of Richard Pearson, a white man. That whole case hinged upon the fact that Richard Pearson, in his will, designated Laura as his wife and her children as his children, and devised his whole estate to them. The same case reported in 46 Cal. 609, establishes a doctrine favorable to the contention of the respondent in the case at bar.

Richard Pearson was married in Missouri by a solemnized marriage to Martha Powers. There was issue of that marriage Adelaide Pearson. Subsequently he was divorced from Martha, and brought this mulatto woman from Missouri to Utah, and there, according to her evidence, they contracted marriage by agreement in the following language:

"Q. What was the agreement? A. Well, the agreement was this: he told me that he would be my husband and I would be his wife.

"Mr. Van Clief—Q. Those are the very words he said? A. Those are the words he said, and that he would be kind

to me and I must be kind to him, and that I would live with him as long as he lived."

This precise language is worthy of specific notation. Even if this petitioner had made the contract with Mr. Mackay that she claims to have made, it would not have constituted marriage under a decision of the supreme court of this state. An agreement to be husband and wife is distinguished from an agreement to live together as man and wife, as petitioner says the agreement was in this case. When Pearson came to California from Utah he brought this mulatto woman with him and settled on Grand Island in Colusa county, and there lived for something like ten years, raised a large family of children and dealt with the woman and children as his wife and children commonly in the community in which he lived. He was a wealthy man. The children grew up and were known to the neighbors by the name of Pearson—Theodore, Henry, Mary, William, Richard and Jefferson Pearson. Before he died in 1865 he executed his will, which was subsequently admitted to probate, and in which he designated Laura as his wife, and the children by name as his children, and devised and bequeathed his whole estate to them. The estate was distributed to the devisees and legatees named in the will. The probate of the will was effectual, but there was a defect in the notice in regard to distribution, and the consequence was that the distribution was not final or binding on the child of his first wife, Adelaide Pearson. She instituted suit to recover the whole estate, on the ground that she was pretermitted, and was entitled under the statute to the same interest in the estate as she would have been if there had been no will. She claimed that Laura was not the wife of Richard Pearson and that the children were not his. In other words, that Laura was his mistress and the children bastards. Upon that issue the case went to trial in Colusa county before Judge Keyser, and the only evidence introduced touching the subject of marriage was the will itself. Upon that evidence Judge Keyser decided that there was no marriage. In the supreme court it was contended that the will itself was not only evidence, but the very best kind of evidence of

the facts therein recited, and the supreme court sustained this contention and reversed the judgment of the lower court.

The comparison between that case and the case at bar may be borne in mind, where the petitioner is described in the will of P. N. Mackay as "Hattie Schenck, housekeeper."

Theodore, Mary, Henry, William, Richard and Jefferson Pearson were described in the will of Pearson as children of the testator.

Under the authority of Pearson v. Pearson, 46 Cal. 609, the declarations of P. N. Mackay in his will devising to "Hattie Schenck, housekeeper," a certain legacy, and in his deed, acknowledged before Notary King, that he was an unmarried man, are the very best evidence as to the truth of the facts so stated. According to the doctrine of Pearson v. Pearson, 46 Cal. 609, an entry in a family Bible, an inscription on a tombstone, a pedigree hung up in the family mansion, are all good evidence; declarations of parents in their lifetime are statements made without any temptation to exceed or fall short of the truth. So the statement of P. N. Mackay in his will, when he said "Hattie Schenck, housekeeper," was the natural effusion of the party who knew the truth. So the declaration before the commissioner that he was an unmarried man was the natural effusion of the party who knew the truth.

These are two of the most solemn declarations a man could make, one in his will and the other in an acknowledgment to a deed, where the law required him to state whether he was married or not; the latter, made in a most public and solemn manner before a commissioner of the state of Washington authorized to take such acknowledgments. How are these declarations to stand against the uncertain evidence of persons who are brought here to say that decedent said that he was married or that petitioner was his wife, or words to that effect? Are a man's solemn declarations in instruments of that kind of less avail than such transient testimony? The authorities cited in Pearson v. Pearson say that they are most important in such matters.

In Whitelock v. Baker Lord Eldon says: "Who must know the truth? And who speaks upon an occasion when his mind

stands in an even position, without any temptation to exceed or fall short of the truth?"

So far from the case of Pearson v. Pearson being an authority for petitioner, it is directly against her; and it establishes a principle contrary to her contention. It is true that in the Pearson case the woman who claimed to be the widow was a mulatto and within the statute prohibiting marriages between whites and blacks and mulattoes. The proposition in the Pearson case was whether the mulatto woman, Laura, had contracted a marriage with Pearson in Utah, a country in which it was competent for her to contract marriage with a white man. That contract was followed by cohabitation, open and notorious, for a long number of years, and the rearing of a family in this state. But the point upon which the whole case hinged was his declaration in his will that she was his wife and that the issue were his children. Suppose Richard Pearson in his will had said Laura Jones, housekeeper, or Laura Schenck, housekeeper, would the court have decided that there was a marriage? Certainly not. Suppose Richard Pearson, within a reasonable time before his death, had made a solemn declaration, such as Mackay made, that he was an unmarried man, could a marriage be maintained between Richard Pearson and Laura? Certainly not. That case is unlike the case at bar.

The evidence of the petitioner is that she took regular meals on the train. She describes how the table was situated and how it was attached to the side of the car on that train all the way from San Francisco to Denver. That evidence is shown to be false.

Next, according to her evidence at Denver, having arrived there in September, 1879—in her deposition: "I got married in Denver; after we went to New York he gave me another writing.

"Q. Did you get married in Denver? A. We drew a contract in Denver, and when we went to New York he wrote another. We went from here (San Francisco) in 1879."

She says the only persons she knew at Denver were Mrs. Ghost and her sister, also Mrs. Ghost. They were married

to brothers. She never knew any colored people in Denver. "Don't know any store we traded with in Denver."

Why didn't the petitioner produce the testimony of the Ghosts, if they knew her there, in any way that would be favorable to her case?

Petitioner states that when they reached Denver they went to a hotel, but she is unable to locate it by name or number. She says they took their meals there at the public table, together. This is not probable in the circumstances.

Coming to the next proposition—the contracts which she claims were made in Denver and New York, which she has not produced here, and which she intimated were taken away with the papers of P. N. Mackay by the executors. Some comments may be indulged about the improbability of her ever having had any such contracts and having allowed them to be lost, destroyed or carried away by the executors.

It will be borne in mind that P. N. Mackay died on Friday, the 21st of April, 1893. His body was removed from his house on the Sunday following; he was buried at Rockville, in Solano county, on Monday, the 24th. The executors never asked for his papers, his trunks, nor personal belongings until Tuesday, the 25th, so that petitioner had in her possession, under her entire control, the trunks, with the keys and the loose papers in the bureau drawer, from Friday, the day of his death, until Tuesday following—four days—with unlimited power to do as she pleased with them.

Robert G. Mackay testified that when they got the trunks they were unlocked and petitioner had the keys. George Mackay saw her handling the papers in the bureau drawer and tearing up some of them after his uncle's death. He told his mother about it. (See evidence of Mrs. Rosa Mackay.) Is it within the range of probability that she had, or that there existed among those papers, written contracts which declared that she was the wife of P. N. Mackay, and that she did not take and keep them? She says that she never had the control of these contracts. He kept them in his trunk; she left them in his possession; she trusted him implicitly. But in another place she says she showed the contract to a Mrs. Emily Monteur. This is a contradiction. She either

had the paper in her possession or she did not have it. She says she saw the contract at Polk street. She says she never had possession of it, and then at the same time says she showed it to Mrs. Monteur at the house of petitioner. What is the truth? What are the probabilities? One might infer from her story about these marriage contracts that they were made for Mr. Mackay's protection, not for hers. Was he afraid that she would deny the marriage relation? It is to be presumed that such contracts are made for the woman's protection. Here the order seems (from her evidence) to have been reversed, and the man procured the evidence of marriage and securely locked it in his trunk for his protection.

Petitioner admits that when Duncan C. and Robert G. Mackay, the executors, came to 1625 Polk street to get the effects of the deceased she had in her mind the question of the difficulty of establishing the fact that she was the widow of P. N. Mackay, but it never occurred to her to look for that contract; and it never occurred to her to tell the executors that she claimed to be the widow of P. N. Mackay. She says that upon that occasion she told them that she was with child by P. N. Mackay, and yet she never intimated, according to her own evidence, upon that occasion that she claimed to be his widow. If at that time she had the slightest consciousness of a just claim of being the widow of P. N. Mackay, can it be believed that she would not then and there have asserted it? When people do not speak when they ought to, they may not be heard when they do.

When Duncan C. Mackay and Robert G. Mackay went to that house on Polk street and asked this woman for the papers and trunks of the deceased, she said she was in the family way by him. She did not then claim to be his widow. That is a significant fact. If she had intended to assert such a claim then is when she would have spoken, and not later, after she had had time to reflect and conclude that possibly she might establish such a claim. A woman who has to take time for reflection before she can determine whether she has been married or not certainly never was married.

The letters written by P. N. Mackay to petitioner show clearly that no marital relation existed between them—not

even the sexual relation of man and mistress. These letters are, without exception, addressed on the envelope, "Mrs. Hattie Schenck," and without exception addressed inside to "Hattie," or "My dear Hattie," or "Dear Hattie," and are uniformly signed "Your friend." They contain expressions of friendship, wishes for her welfare and health, and particularly that he would like to eat some lamb and green peas prepared according to her style of cooking. He says she knew how to boil bacon very well. To a question put by the court, she answered that she cooked for Mr. Mackay and he paid her for it.

"Q. Paid you to cook it, did he? A. Yes, sir; he did."

But subsequently she corrected this so her answer would read: "A. No, sir; he did not."

There is a conspicuous absence in these letters of any reference to love, or suggestion that she is his wife. In none of them is there any term of endearment or word that would not properly be used by a man writing to a good servant. How should a man address a servant in a letter? Would he say Mrs. Hattie Schenck? "Dear Hattie" would be the most natural expression for a man to use to his servant, and his signature is dignified, natural and respectful—"Your friend." She testified: "I often received correspondence from my friends in the name of Mrs. Mackay." Where is that correspondence? The only approximation to such correspondence produced was a note purporting to have been written to her by Annie Taylor. She preserved the letters addressed "Mrs. Hattie Schenck." Why not the others addressed "Mrs. Mackay"? If they had an agreement, as she states, to call each other "ducky" and no other name, would not that word have appeared in some of these letters? Does he express a wish that she could be near to him with a "communicating room"? Is there any such expression in any of these letters? She testifies that "during a portion of the time, we were living at 1625 Polk street and in New York, we occupied the same bed and room."

According to petitioner's evidence, they left San Francisco engaged to be married when they arrived in Denver; she never had any sexual intercourse with Mr. Mackay, or with any

other man, until after this marriage contract was made in Denver, and yet they were three or four days in the hotel with communicating rooms. In one place she said they made the contract and he put the ring on in the hotel; in another statement it was about a week after they moved into a furnished house; in another place it was after Christmas. What were they doing in that house during this week, or until Christmas? Three or four days in the hotel, a week or month in a house with communicating rooms, before the contract was made. What purpose did they have in living in that way? Was she there as housekeeper, servant, or mistress? She was not his wife. It was certainly an equivocal position for a girl of her age, if her testimony as to her present age be true.

Petitioner has stated different times and years as to her arrival in New York; in one place she says she was in Denver in the fall of 1879; in New York the next fall. That would be in 1880. Says she went to New York the fall after Garfield was assassinated—that is, in 1881. The marriage she puts at some indefinite time after she arrived there. She does not know and cannot state. In one place she says she never read the contracts; in another, that he kept them in his trunk; again, she showed the contract to Emily Monteur at her—petitioner's—house. She saw it on Polk street. What were these contracts? What was the substance of them, or what did they state? What was the language? "He signed and then I signed after him." "Should live together as man and wife as long as we lived." "I did not read it; . . . . I don't remember the words." "He said we should live together as long as we lived, as man and wife." "New York marriage same as Denver." "We didn't have no judge or lawyer or license." "We didn't have no priest."

In Letters v. Cady, 10 Cal. 537, it was decided that such language does not constitute a contract to be husband and wife. "Living together as 'man and wife' is not marriage, nor is an agreement so to live a contract of marriage," is the language of the court. This case expresses the law of this state now in force, and is binding authority for this court. Under this authority a contract such as she claims, it is argued, would not constitute a marriage even if it had been made.

Letters v. Cady was decided before the law in this state was so changed as to make it necessary in addition to the contract that there should be an assumption of marital rights, duties or obligations.

How could she show her contract to Emily Monteur at the house of petitioner if she never had possession of it? How was that possible? Where did she get the contract to show? Then, again, she says she saw it on Polk street. She says that the papers were kept in a bureau drawer. She had access to Mr. Mackay's papers for four days after his death. If she had any such contract, or there had been one, as she claims, she certainly would have taken it and kept it. To say that she did not think of it is idle. She knew its importance, if she knew there was such a contract. There is another very significant fact that petitioner admits herself; she never received a letter from Mr. Mackay in which the words "dear wife" or "dear ducky" appeared. She says that when Duncan C. Mackay came to obtain his deceased brother's effects she then had in her mind that her claim to be the widow would be disputed. She then thought of that subject between the death of P. N. Mackay on Friday and the day that Duncan Mackay came to get those papers and trunks on Tuesday following, and yet, knowing that her claim to wifehood would be disputed, she never thought of looking for this contract (although it was there among those papers), or asserting her claim of widowhood.

Petitioner does not know whether Mackay was in Europe once or twice during the time she claims to have been his wife. This is certainly remarkable. It is such an event in the life of an ordinary wife (her husband being away in Europe) that she could not forget it. When decedent returned to the west, after being away something like thirty months—two and a half years—in place of coming here to San Francisco he went directly from New York to his mine in Washington and remained there a long time before coming down here—an improbable thing for a man to have done if he had a wife in San Francisco. She does not know where he was in 1886; could not tell if he was away one or two years; did not know in what year he went to Europe; did not know where he was

in 1887; from Europe he went to British Columbia, and was there six months; did not know whether he remained here a week or more when he first returned from Europe; he said he was in Europe two years and six months; petitioner said she would have starved whilst he was away if it had not been for her friends. She says she produced all the letters she ever received from him. None came from Europe. Considering that he was two and one-half years without writing and that her friends had to assist her, his conduct seems singular if he was her husband. She did not know how many times he was at home during the first five years they lived on Polk street, nor that he was there as much as two months during that whole period. She says he never went where there were black women. He was always first class. This contradicts all her evidence about his intimacy with negroes on Polk street.

As between Mr. Mitchell and petitioner, there is no mistake about what Mr. Mitchell said. Counsel for petitioner, in his oral argument, called the court's attention to what he styled the improbability of her having made any statement to Mr. Mitchell that she was not married, or did not claim to be the wife of Mr. Mackay, because he did not ask her any question that called for such an answer. That is exactly what he did ask her, what her claim was; and she claimed he was the father of the child she was going to have, but she did not claim that she was his widow. Her statement was called for by the question Mr. Mitchell asked. Counsel also commented on the improbability of any such conversation having occurred because Mr. Mitchell did not put anything on the subject in the proposed contract. He would not put anything in the contract on the subject because she made no such claim. If she had claimed at that time that she was the widow of P. N. Mackay, then, as a matter of course, in drawing up any paper for her to sign as a disclaimer about the paternity of the child, a disclaimer about being the widow would have been inserted. There would have been no propriety in putting such a disclaimer in a paper for her to sign when she had never before, and did not then, assert any such claim. During all the years she now claims to have been known as Mrs. Mackay her name appeared in the directory every year as Hattie Schenck.

Whenever she had an account it was in the name of Hattie Schenck. Instance: Lebenbaum & Co., where she had the name changed to Mrs. Mackay after his death. In the directory, after Mr. Mackay's death, she puts her name in as Mackay, but before that time it was Hattie Schenck. It is remarkable, if she was known as Mrs. Mackay as she claims, that she would give a misstatement of her name as "Schenck" to the directory canvassers in 1886, 1887, 1888, 1889, 1890, 1891, 1892 and 1893.

In 1886 her name appears: H. Schenck, lodgings, 1625 Polk.

In 1887 her name appears: Mrs. Harriet Schenck, 1625 Polk.

In 1888 her name appears: Mrs. Harriet Schenck, 1625 Polk.

In 1889 her name appears: H. Schenck, dressmaker, 1625 Polk.

In 1890 her name appears: Hattie Schenck, 1625 Polk.

In 1891 her name appears: H. Schenck, dressmaker, 1625 Polk.

In 1892 her name appears: Harriet Schenck, 1625 Polk.

In 1893 her name appears: Harriet Schenck, 1625 Polk.

That she would have so described herself in a public directory as Hattie Schenck, when all the time she was known as Mrs. Mackay and was calling herself by that name, is not credible. She says everybody on Polk street knew her as Mrs. Mackay. Mr. Horabin evidently never had heard of her as Mrs. Mackay. According to his evidence, he thought Mr. Mackay was Mr. Schenck. If this witness is to be believed, he entirely contradicted her evidence about her being known as Mackay on Polk street. Here was a man who had more dealings with her than any other person, and yet he had never heard of Mackay. Her account then was in the name of Schenck, and he thought the man who lived in the same house where she did (P. N. Mackay) was named Schenck.

These tradespeople who testify that small parcels were bought by her and sent "C. O. D." to Mrs. Mackay cannot find a scrap of paper or a book of any kind whatever to show any such thing. Wherever we find her accounts at Lebenbaum's, or at Mr. Curtaz's, the piano dealer, or anywhere else

where a series of payments were made by her and credit given to her, there we uniformly find her name "Hattie Schenck."

We now come to the evidence of Miss Maud Mackay, daughter of Duncan C. Mackay, executor. There is a conflict between her evidence and that of the two colored women (petitioner and Mrs. Morris) with regard to what happened when she was at the house (1625 Polk street) after her uncle's death. The claimant said that she opened the trunks, or one of the trunks, when Miss Maud Mackay was there. This statement Miss Maud Mackay denies positively. They say she was there and remained a long time the Sunday night after her uncle's body was removed. This she denies emphatically and says she was at home and did not go out that night. Her brothers and her mother corroborate her in that particular.

Counsel for petitioner adverts to the fact that Thomas Mackay did not hear the conversation between his sister and Mrs. Morris. Miss Maud Mackay asked her if she was the housekeeper, and she said, "No, I am the cook, and the other," pointing to Hattie, "is the housekeeper."

Two persons being present where sound occurs, one hears it and the other may not. The fact that Thomas Mackay did not hear that conversation, although he was present and might have heard it, in no way contradicts his sister's evidence. Such matters are discussed in works on evidence and in decided cases; especially in criminal and damage cases. For instance, two persons being present, one will hear a clock strike at a particular time; the other will say, "It did not strike at that time; I was in the room and knew it did not strike." There is no conflict in such evidence when properly considered; it only shows that one heard the sound, the other did not. Take the common illustration of accidents happening on steam railroads, near crossings, when somebody is run over and injured. The engineer testifies that he rang the bell, according to the regulations of the service, before they approached the crossing. One passenger will swear positively that he knows he did ring it, he heard him ring it; the other, equally positive, will say he did not; the fact being the latter did not hear it. They may be equally honest. One man's

mind is attracted to the sound and it makes an impression on him, the other's mind may be occupied in another direction and the sound not attract his attention. Miss Maud Mackay talked to Mrs. Morris and had her attention directed to her particularly. The attention of Thomas was called away, and he did not hear what his sister said. There is no real conflict between Maud and her brother Thomas. She is corroborated by her brothers Robert and George, and by her mother, as to the fact that she was at home that Sunday night, and did not go out. Had she done so her family certainly would have known the fact. It was no ordinary occasion; P. N. Mackay was in his coffin and the funeral was appointed for the next day. There is all this evidence of these witnesses, six on one side, including Mr. Mitchell, and petitioner alone on the other. There is a square conflict. The petitioner does not pretend to know when her husband was away from her, or when he returned, or during what intervals or how long he was absent.

Regarding the time they lived at Fern avenue, a remarkable discrepancy of opinion exists which argues and illustrates the uncertainty of the memory of witnesses about petitioner's affairs and transactions. The landlady, Mrs. Pouyal, fixes it at one year, the claimant at eight months, whereas the exact time was four months.

Petitioner testified that Mr. Mackay gave her a piano, and that it cost between four and five hundred dollars. The evidence showed that the piano was sold to Hattie Schenck on the installment plan and that the purchase price was $200, and that she, not Mackay, paid for it. The clerk who collected from her on Polk street knew her only as Hattie Schenck. That piano had been rented by her for some years at a monthly rental of $5, and the aggregate amount of rent before the sale was $200 or upwards. It was subsequently sold to her for $200.

Mrs. Amelia Morris testified that Hattie said, "This is Mr. Mackay, my husband," and that he made no comment, but bowed to her very nicely and asked her whether she would stay, and she told him she would. She says the contract was to pay her $3 per week. Then this Mrs. Morris says that when she and Hattie were both there Mr. Mackay would answer the

bell. It is improbable that he would be in the habit of attending the door bell when there were two colored women there, one of them, at least, confessedly a hired servant.

Petitioner testified herself, and called other witnesses to prove, that she was generally called and known as Mrs. Mackay. This was done, apparently, upon the theory that it was necessary for her to show that she was reputed to be the wife of P. N. Mackay; but when confronted with the fact that she had habitually caused her name to be published in the directory as Hattie Schenck, and used that name in her accounts at stores and other places, she undertakes to explain the circumstance by saying there was an agreement between her and Mr. Mackay at the time of the reputed marriage that she should go by the name of Mrs. Schenck. The court cannot accept such an explanation. She was not generally known as Mrs. Mackay, and there having been no marriage, nor contract of *marriage*, there was no agreement between her and Mr. Mackay that she should be known as and use the name of Mrs. Schenck.

Duncan C. Mackay and his wife both testified that their relations with P. N. Mackay were of the most intimate and friendly character, and that all their children were much attached to their uncle and he to them. Mrs. Mackay says that her husband and her boys went to see Pat almost every day when he and they were in the city. They took his mail to him regularly. She recollects when he returned from New York in 1884. He lived at their house from March 15th to September of that year. He was away part of that time, but when in the city he was at home every night—was never out later than 9 o'clock. His habit was to go out for a walk and smoke after dinner for half an hour and then return and remain home the rest of the evening. Never heard or knew anything about his visiting Stevenson street during that time. She recollects when he moved to Polk street, and heard that he took rooms over a florist's. That he lived there until about December 9, 1884, when he removed to 1625 Polk street, and remained until his death.

Duncan C. Mackay and his family lived within five blocks of 1625 Polk street during all the time P. N. Mackay resided

there. She (Mrs. Mackay) had heard he had a black housekeeper. Sometimes he spoke of his housekeeper, but he was a very quiet man, who seldom spoke of his domestic affairs. About a year before his death he took his meals at her house for two weeks; he said his housekeeper had the rheumatism and could not cook for him.

Neither Mrs. Mackay nor her daughter visited him at his apartments, because it was unnecessary, as he visited their house daily, when here, and when well enough. He was away most of the time between 1884 and until within a year and a half before his death.

Witness never heard an intimation that P. N. Mackay was married, nor of any such pretense by petitioner, until the present counsel was employed in this case. After P. N. Mackay's death witness was told that petitioner had made some claim that he was the father of her child. Witness never heard of the birth of a child in his apartments in 1885.

Petitioner testifies she did not know where he lived in June nor July, 1884, nor from March to August of that year, yet she testifies that he visited her every night. Would it not be remarkable that a husband and wife should live in the same city, see each other daily, and yet the wife not know where her husband lived? The evidence shows that petitioner lived on Stevenson street from March to September, 1884. Mrs. Mackay said her husband and son Robert went, after the death of P. N. Mackay, to obtain his effects. George told her he saw Hattie, after his uncle's death, take papers out of his drawer and tear them up. Witness says she was present when her brother in law's trunks were opened, and is positive there were no letters from Hattie to him among his papers.

Petitioner admits that all the money she ever received from P. N. Mackay whilst living at 1625 Polk street came through Lebenbaum & Co. The amount was uniformly $60 per month, as appears from the books of that firm and also from the checks and drafts of the deceased, and the evidence of Bibo, who says that "the monthly remittance of $60 used to come to be turned over to her." Out of this it appears she paid the

rent of the flat and other bills. Upon this point there is no dispute.

It appears from Mr. Pomeroy's evidence that when P. N. Mackay gave him directions for making his will, he said that he wished to leave a sum of money sufficient to produce an income of $60 per month during her life. He first suggested $10,000, but upon being told by Mr. Pomeroy it would be difficult to so invest $10,000 as to yield regularly $60 per month, he said "Very well, make it $15,000." He gave the direction, "Hattie Schenck, housekeeper," and also gave her address. The income provided was for her life only. "During her life, and upon her death to divide and distribute the trust estate to and among my brothers and sisters . . . . share and share alike." The rest of his will was in all respects the same as a will he had previously executed. The first will was destroyed after the second was executed. His plan was to provide for her after his death and during her life. About the same time he executed the bill of sale to her of the furniture in the flat at 1625 Polk street. Shortly prior to this time he deeded his property in Washington to the Skagit Cumberland Coal Company. The will, bill of sale of the furniture, and the deed (in acknowledging which he recites that he was a single man) were all parts of a general plan in settling his business affairs in a way he wished them to be administered after his death. It all proceeded upon the basis of his being an unmarried man, and that so far as his housekeeper, Hattie Schenck, was concerned, she should be provided for during her life.

The importance to be attached to these transactions is to show conclusively that he was an unmarried man when he died, and that Hattie Schenck, the petitioner here, was his servant and housekeeper, and nothing more. Who could know so well as P. N. Mackay himself? The evidence of Duncan C. Mackay is important. It contradicts the petitioner in many ways and shows conclusively that her evidence must necessarily be false in its most material aspects; that she was his brother's housekeeper and servant only; and that all her pretensions that she was his wife—or more to him than a servant—are false. It is unnecessary to repeat his evidence here.

He had been his brother's attorney in fact since 1862, and up to his death. Their relations were of the most intimate character. Duncan C. Mackay visited his brother P. N. Mackay very often at his house—or flat—No. 1625 Polk street. He always knew petitioner as his servant and housekeeper and nothing more, and his brother spoke to him of her as such. He was present when P. N. Mackay gave instructions for the preparation and execution of that document. The bill of sale of the furniture was inclosed in the same envelope with the will. It was a part of Mr. Mackay's plan for settling all his affairs preparatory for leaving the country permanently, or in the event of his death. The bill of sale was to be handed to her upon the happening of either event. He was away from San Francisco after he returned from New York as much as forty-two or forty-three months during a period of four years. During all that time he maintained his flat at 1625 Polk street. Ten days before P. N. Mackay's death he spoke of petitioner as his "faithful housekeeper." When the executors took possession of and examined deceased's trunks and papers they did not find—and witness never saw—a single word or line ever written by petitioner to P. N. Mackay, and he never put her name to paper in writing to witness. The deceased always called her his servant or housekeeper, and when witness visited the house 1625 Polk street, as he did very often, she conducted herself in all respects as a servant should, and he never suspected anything to the contrary.

Counsel for petitioner argue that the child exhibited in court is the "issue of the bodies of petitioner and deceased," and claims:

1. It is legitimate—born in lawful wedlock.

2. If not born in lawful wedlock, it is "the result of the relations between petitioner and deceased in California, a marriage prohibited by law, and section 1387, Civil Code, provides: 'The issue of all marriages null in law . . . . is legitimate.'"

3. That if the child is illegitimate, it was adopted by the deceased, under sections 230 and 29, Civil Code.

It is contended that if any of these three propositions be true, this application for a family allowance should be

granted. Of course, if a marriage and cohabitation had been proved, the child would be presumed to be legitimate. But there was no marriage, and, consequently, no such presumption arises. What is the evidence as to paternity? We have the petitioner's statement, but can she be believed? The other witnesses do not pretend that Mr. Mackay ever in terms acknowledged that he knew petitioner was enceinte by him.

The evidence about the baby clothes and that he knew she was going to have a child comes from suspicious sources, is unreliable and improbable, and, at most, circumstantial.

It is not disputed that Duncan C. Mackay and his sons, particularly Thomas and George, were in the habit of visiting the deceased very often during the latter part of his life, and they frequently saw the petitioner there in her capacity of servant. That none of them noticed that she was pregnant is practically admitted by her when she deemed it necessary to tell the executors that she was with child by the deceased. Where so many suspicious circumstances surround a case and where so much untrustworthy evidence has been introduced, as in this case, the court will look with suspicion upon all the evidence, and require strict and positive proof upon every point in issue.

If P. N. Mackay was aware that petitioner was about to bear a child to him, and he desired to recognize it, why did he not make provision for it? He had disposed of his whole estate by will and knew that he was old and infirm. He had provided for petitioner under the name of "Hattie Schenck, housekeeper."

The fact that he died without making provision for any prospective child of hers ought to outweigh all evidence introduced tending to prove that he ever admitted or believed that he was its father—and this even if he had known of her pregnancy. There is no written evidence that he ever admitted he was the husband of petitioner, or the father of any child born to her in his lifetime, or with which she was pregnant at the time of his death.

The law applicable to the alleged marriage in this case is simple: "All marriages of white persons with negroes or mulattoes are illegal and void": Civ. Code, sec. 60. The law of

Colorado is presumed to be the same as that of California: Norris v. Harris, 15 Cal. 252; Marsters v. Lash, 61 Cal. 624; Shumway v. Leakey, 67 Cal. 460, 8 Pac. 12.

Counsel for petitioner says: "The evidence shows substantially that two marriage contracts were made and entered into—the first, in the state of Colorado; the second, in the state of New York." Neither of these alleged contracts was ever made. The contract alleged to have been made in New York is the only one pleaded.

The law of Colorado being the same as that of California, the so-called Denver contract cuts no figure. Petitioner in her pleading relies solely upon the alleged New York contract.

"All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state": Civ. Code, sec. 63.

The question here is, Did she, Hattie Schenck, ever contract marriage with deceased in the state of New York? She swears in her petition that she and P. N. Mackay lived and cohabited together as Mr. and Mrs. P. N. Mackay in the city and state of New York from September 5, 1880, until March 1, 1884. In her evidence she says from the summer or fall of 1881 to March, 1884. Her evidence on this subject must be false, otherwise she certainly would have been able to have found some one who had known her there.

Her failure in this particular is not cured by any evidence as to the manner of her life in California.

In the case of Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, and other cases of like import, there was no dispute as to the fact of marriage or legitimacy of children. That questions of such grave import can be disposed of ex parte, or that issues made by answer denying allegations of widowhood and legitimacy of children are not to be tried with reference to the pleadings like other issues of fact, has never been decided by our courts.

Sections 1464, 1465 and 1466, Code of Civil Procedure, manifestly proceed upon the theory of confessed widows and legitimate children. No marriage "null in law" is sought to be established here, and hence section 1387, Civil Code, has no application. The petitioner relies upon her alleged marriage in New York. There is no allegation or evidence of any

contract of marriage in California "followed by a solemnization or by a mutual assumption of marital rights, duties or obligations." These parties were either married before they arrived here in March, 1884, or they were never married. They were never married, nor did they ever contract to become presently husband and wife.

The claim that this child was adopted by deceased in his lifetime, and before the child was born, cannot be maintained. In what way did the deceased publicly acknowledge it as his own? When and where was any such acknowledgment made? In what way could he or did he treat an unborn child as if it were legitimate?

There is no written evidence and no evidence of any witness that deceased ever in any way spoke of adopting this child, or expressed a desire that it should inherit or receive any part of his estate or derive any benefit from it. It does appear that he had disposed of his whole estate by will without making mention of any child to be born to him by petitioner, or any other person. Is it to be believed that if he had publicly acknowledged the paternity of this unborn infant he would not have left some sign, some word, to his relatives or friends indicating his purpose?

The evidence of petitioner's lady friends, that he was about looking on and making comments about baby clothes, while they were being made, is uncertain and unsatisfactory in its character, and is contradicted by one of her most intimate friends, Mrs. Murphy. She was the friend of many visits, and, notwithstanding her apparent desire to testify in favor of petitioner, she says that Mr. Mackay was not present when the baby clothes were being made.

The application of petitioner should be denied because:

1. There is no widow nor child, legitimate or adopted, of deceased to whom a family allowance can be made in this proceeding; 2. The child of petitioner is not the issue of a marriage null in law within the meaning of section 1387, Civil Code, nor any other statute or law of the state of California; 3. The child in question is not the illegitimate child of P. N. Mackay, deceased, and never was adopted or recognized by him in any public way or at all as his child.

The rule as given by the Code of Civil Procedure, section 2061, is that the court, sitting as a jury, is not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction, against a less number or against a presumption or other evidence satisfying the mind; and the same section of the code also prescribes that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence.

Application denied.

The Principal Case was before the supreme court in 107 Cal. 303, 40 Pac. 558.

Contract or Common-law Marriages are considered at length in Estate of James, ante, p. 130, and extended note.

Marriages Between White and Colored Persons are considered, as to their validity, in the note to State v. Lowell, 79 Am. St. Rep. 382.

ESTATE OF PATRICK CLANCY, DECEASED.

[No. 4,750; decided May 23, 1894.]

Will.—In Construing a Will the Whole Instrument must be considered in order to arrive at the intention of the testator.

Will.—Positive Provisions in a Will are not to be Overcome by inference.

Will.—In Order to Reach the Obvious General Intent of a testator, implications may supply verbal omissions.

Will.—A Conditional Devise Necessarily Implies that the devisee shall be living at the time of the happening of the condition.

Will—Vesting of Gift.—Testamentary Dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death, but this presumption may be rebutted.

Will.—A Conditional Disposition is One which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Will.—A Condition Precedent in a Will is One which is required to be fulfilled before a particular disposition takes effect.

Will.—A Legacy is Contingent or Vested, just as the contingency, if any, is annexed to the gift or to the payment of it.

Will.—The Question of Vesting or not Vesting is to be determined by the fact whether the gift is immediate and the time of payment or of enjoyment is only postponed, or whether the gift is a future and contingent one depending on the happening of a particular event. If futurity is annexed to the substance of the gift, the vesting is suspended. The point that determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent.

Will—Contingent Devise.—Where one devised to his son and four daughters, share and share alike, certain real property, to be distributed to them when the youngest child should become of age, unless the testator's wife should before that time die or marry, in either of which events distribution to take place as soon as possible; the will further provided that if the son should die before distribution, the share to which he would have been entitled should go to testator's sister; there was no provision that the share of the sister, in case of her death before distribution, should go to her heirs; the son and the sister died before distribution could be had under the will; upon application by the heirs of the sister for the share thus conditionally devised to her, it was held that such devise was contingent upon the death of the son before the time for distribution and upon the survival of the sister until after such time, and that both the son and sister having died before such time, the sister's contingent interest terminated with her death, and her heirs are not entitled to take anything under the will.

Will—Trust—Precatory Words.—Where one devised an interest in certain property to his son, the same to be distributed to him upon the happening of a particular event, and also expressed a desire that in the event of distribution to the son, the testator's sister should take the same in trust for the son, it was held that the desire thus expressed was merely precatory, and that the devise to the son being direct, the will created no trust in the sister.

Patrick Clancy died on October 28, 1885, and the will set forth in the opinion below was admitted to probate on November 30, 1885.

On March 27, 1894, Mary T., John J. and Edward Feeney filed a petition for distribution to them of the share of the above-named estate conditionally devised to Bridget Feeney, their mother. The latter died on October 20, 1889. Thomas Clancy, the son of the testator, died on May 15, 1890, and before the youngest child of the testator became of age. The testator's widow did not remarry, and died on April 18, 1894. The youngest child of the testator became of age before the filing of the petition by the children of Bridget Feeney.

Leonard S. Clark, for the petitioners.

Sawyer & Burnett, for the testator's daughters, opposed.

COFFEY, J. The following is a copy of the will of the testator:

"I, P. Clancy, a resident of the City and County of San Francisco, residing with my family at the corner of California and Walnut streets, of the age of about 50 years and of sound mind and memory, do make this my last will and testament.

"I have two children now living with me, by a former wife—Thomas Clancy, aged about 25 years, and Catherine, aged about 23 years; and I have also, by my present wife Henrietta, three children: Henrietta, Julia and Jessie.

"I give and bequeath to my wife all my personal estate of every kind and character and wheresoever situated. The real property where I reside with my family at the corner of California and Walnut streets is community property, it having been acquired by myself and my said wife during our marriage, but the real property on Leavenworth street, between Jackson and Pacific streets, was acquired by me before my said marriage and is my separate property. I desire my said wife to have her share, that is to say, the one-half of said community property, and I therefore make no devise to her of any real property, and I give, bequeath and devise to my said five children, share and share alike, subject to the conditions hereinafter mentioned, the whole of my community interest in the California street property and the whole of the Leavenworth street property.

"There shall be no distribution of said property until my youngest living child shall become of age, unless my said wife should before that time die or marry, in either of which events I wish distribution to take place as soon as possible. If either of my said daughters should die before said distribution, then the share to which such daughter would be entitled shall be divided equally among the remainder of all my living children. I desire and direct that my said wife shall manage the whole of said property, pay all taxes and all

other necessary expenses for repairs thereon, and pay off the balance of the mortgage thereon, which is now about $300, and to have and use all the rents, issues and profits thereof for her support and for the support and maintenance of all my said children. My son Thomas being of feeble intellect and scarcely competent to take care of himself, I especially enjoin upon my said wife to keep him, if possible, with the family and to provide for him as he shall need, and at all events to provide for his maintenance.

"If my said son Thomas should die before the distribution of said estate, then I hereby give, bequeath and devise the share to which said Thomas would be entitled to my sister, Bridget Feeney, widow, now residing at 1027 Vallejo street, in said city and county; and I hereby appoint and nominate said Bridget Feeney guardian of my said son Thomas, and in the event of a distribution to him, said Thomas, of his share of my said estate, I desire that said Bridget shall take and hold the same in trust for him, without bonds, for his benefit, and at his death that she shall have the residue thereof.

"I hereby appoint my said wife Henrietta and my said daughter Catherine executrices of this my last will and testament, with full power to manage the said estate, collect rents, make leases and do all necessary things for its proper management, and hereby provide that neither of my said executrices shall be required to give any bonds for the performance of any duty or trust imposed upon them hereby.

"In witness whereof I have hereunto set my hand and seal, the 19th day of September, A. D. 1885.

"P. CLANCY. [Seal]

"The above instrument was at the date thereof signed, sealed, published and declared by the said P. Clancy as and for his last will and testament in presence of us, who at his request and in his presence and in the presence of each other have subscribed our names as witnesses thereto.

"JOHN MOLLOY,
"No. 1623 Clay St., San Francisco.
"LEONARD S. CLARK,
"No. 2011 Howard St., San Francisco."

The will devised and bequeathed to the five children of the testator certain property, "subject to the conditions hereinafter mentioned":

1. There shall be no distribution until the youngest child shall have reached the age of majority, or the widow shall die or remarry.

2. If either daughter shall die before distribution, the share that would have gone to such daughter shall go to the other living children.

3. The widow is to manage the property, etc., until distribution.

4. If Thomas should die before the distribution of the estate, then the testator gives to Bridget Feeney the share to which Thomas would be entitled.

5. In the event of a distribution to Thomas, of his share, the testator desires that "said Bridget shall take and hold the same in trust for him, without bonds, for his benefit, and at his death that she shall have the residue thereof."

It is to be noted that the will was drawn by a lawyer, and that no express provision is made that the share of Bridget Feeney, in case of her death before distribution, shall go to her heirs.

The omission of the testator to make such provision is a very significant fact, because if he had desired that the heirs of Bridget should take their mother's share he would have said so in the will. He may have desired to provide for his sister, as she was a widow; but it is scarcely probable he would take away property from his own daughter to give to his nieces and nephews. Such an intent should clearly appear on the face of the will.

Bridget Feeney died in October, 1889, and Thomas died in May, 1890—both events having taken place before the distribution could be had under the will.

The question for solution is whether Bridget Feeney's heirs take the share that would have gone to Thomas, had he lived; or whether Thomas' heirs take it; or whether, as to that interest, intestacy occurs.

The court cannot agree with counsel for petitioners, that the will created a trust in Bridget. The devise to Thomas

is direct—subject to the "conditions" in the will. The will nowhere, in direct terms, devises the property in trust to Bridget. The only provision in that regard is where it is provided "that in the event of a distribution to him (Thomas) of his share of my estate, I desire that said Bridget shall take and hold the same in trust for him." The will says, "I give, bequeath and devise to my said five children" (of whom Thomas was one); and then says in the event of a distribution to him of his share, the testator desires Bridget shall take and hold the same in trust, etc. If the will had devised the interest to Bridget, in trust for the uses and purposes mentioned, then a trust would have been created; but the will does not do so. The will makes a devise to Thomas, and provides for a distribution direct to him of his share.

Positive dispositions in a will are not to be overcome by inference. The "desire" is merely precatory.

It follows, then, that the interest of Thomas (whatever it might be) was one which he could dispose of, and would descend to his heirs.

The whole will must be considered, to get at the intention of the testator. An examination of the whole instrument will show that the devise to Mrs. Feeney was to take effect only in case she survived Thomas. "If my son Thomas should die before the distribution of my estate, I give, bequeath and devise the share to which said Thomas would be entitled to my sister, Bridget Feeney."

As no man would make a devise to a dead person, her survival of Thomas is necessarily implied. Further on the will provides for her appointment as guardian of Thomas. Can a man appoint a guardian who is dead? And as to the trust, which it is contended, was created by the will, how could she take in trust, unless alive?

The testator clearly meant that Bridget, to take, should be alive when the contingency on which she was to take arose. The court will supply the words, "if then living," in the proper place.

"In order to reach the obvious general intent of the testator, implications may supply verbal omissions": 1 Redfield on Wills, star p. 465, par. 17.

If the devise was to take effect only in case she survived, there was a condition precedent, which, not having been fulfilled, no estate vested: Civ. Code, sec. 1347.

The devise to Mrs. Feeney was a conditional disposition.

"A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated": Civ. Code, sec. 1345.

The first "uncertain event" in the case at bar is the death of Thomas before distribution. It is evident that such an event was uncertain. The second was the "distribution to Thomas of his share of my estate." Thomas might, or might not, have lived to take distribution; and, hence, this event was uncertain. The will itself shows that, because it says "in the event of a distribution."

It will be borne in mind that Mrs. Clancy had an estate in the property until distribution—that is, she was to receive the rents and profits. If Thomas survived, he was to have one-fifth; and, if he died before distribution, the share he would be entitled to goes to Mrs. Feeney.

The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment or of enjoyment only postponed; or is future and contingent, depending on the beneficiary arriving at age, or surviving some other person, or the like. If futurity is annexed to the substance of the gift, the vesting is suspended: Everitt v. Everitt, 29 N. Y. 75.

A legacy is contingent or vested, just as the contingency, if any, is annexed to the gift, or to the payment of it: Majors v. Majors, 32 Gratt. 819.

The point that determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent. If the arrival of the time is a condition without which the testator would not have made the bequest, as in the case of marriage or puberty, then in the very nature of things the time is annexed to the substance of the gift: McClure's Appeal, 72 Pa. 414.

But where the legacy is not given until a certain future time, it does not vest, and, if the legatee dies before, it is

lost: Reed's Appeal, 118 Pa. 220, 4 Am. St. Rep. 588, 11 Atl. 787.

When the time is annexed to the gift itself, and not to payment only, as a legacy to a legatee at twenty-one, or "if" or "when" he attains that age, the legacy does not vest. His attaining that age is a condition precedent, and if he dies before attaining that age the legacy never vests: Gifford v. Thorn, 9 N. J. Eq. 702; Clayton v. Somers, 27 N. J. Eq. 230; Snow v. Snow, 49 Me. 159; Travis v. Morrison, 28 Ala. 494.

Now, this will provides, "if my son Thomas should die before distribution" the share to which he would be entitled shall go to Mrs. Feeney.

The death of Thomas was the event which was "annexed to the gift itself," as without it the testator could not have made the gift to her. And as she died before the time, the gift was lost.

But aside from authority—if we look at the will—how could Mrs. Feeney have an estate that was vested while Thomas was alive? She had only a contingent interest, which would take effect on his death, and, as she died before him, her interest ceased with her death.

Again, if either had a vested interest Thomas was that one. If his interest was vested, then hers was not; because there cannot be two vested interests at the same time in the same property.

Section 695 of the Civil Code says, "a future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain."

According to the will, if Thomas died before distribution, Mrs. Feeney was to take. The above-cited section provides that whilst the event on which the future interest is limited remains uncertain the interest is contingent; and hence, whilst Thomas was alive, and his death before distribution was uncertain, Mrs. Feeney's future interest was contingent. As she died before the death of Thomas, her interest, being contingent, died with her.

As stated, Thomas died before distribution was made. His being alive and distribution made to him were conditions precedent to taking under the provisions of the will which provided for that event.

What has been said on the other provisions of the will applies equally to the one under consideration. Testamentary dispositions are presumed to vest at the testator's decease: Civ. Code, sec. 1341. But this is only a presumption, which may be rebutted or overcome by the will or by law.

Thomas Clancy died intestate, and whatever interest he had went to his sisters, who were his heirs at law.

If Thomas had died before the testator, and Mrs. Feeney had died before Thomas, certainly her heirs could not have come in. If she had lived after Thomas, then section 1344, Civil Code, cited by counsel for petitioners, might have been in point.

In the Goldtree case, 79 Cal. 613, 22 Pac. 50, the devise was in trust to pay the income to certain persons named, and on their death the corpus of the estate was to go to certain children when they arrived at majority or married. Of course, the corpus of the estate went to the children, but as none of them died no such question as is here presented arose.

In Re Reinhardt, 74 Cal. 365, 16 Pac. 13, the supreme court held, affirming the court below (Department Nine, Probate, San Francisco), that the husband took a determinable life estate under the will, and that, as to the rest of the estate, the decedent died intestate. In that case the children took under the statute of descents and distributions.

Williams v. Williams, 73 Cal. 99, 14 Pac. 394, was where a bequest of money was made to vest absolutely, to be paid at a certain time.

In Re Williamson, 75 Cal. 317, 17 Pac. 221, the court held that the intention of the testator was to give Robert only one-half, and that as to the other half (the wife's share) there was intestacy; and it went "to the heirs as the law directs."

In re Dolan, 79 Cal. 65, 21 Pac. 545, holds that under the devise in trust the beneficiary had no life estate or right of possession, but could only enforce the trust.

The conclusion of the court is therefore fourfold:

1. That Mrs. Feeney had only a contingent interest, and, as she died before the "event" on which it was to take effect, her devise was lost.

2. That the testamentary disposition to her was on conditions precedent, and did not take effect.

3. That as to Thomas' share there was intestacy.

4. If there was no intestacy as to the share of Thomas, it went to his heirs (his sisters), and not to the heirs of Mrs. Feeney.

ESTATE OF MARY A. DE NOON, DECEASED.

[No. 14,380; decided April 12, 1894.]

Residence.—The Statement by a Testator in His Will that he is a resident of a certain place may, under some circumstances, be conclusive on that question.

Probate of Will—Residence of Testatrix.—Where a testatrix and her husband had their home in Sierra county, and after his death there she occupied the home a part of each year and during the remainder of the year lived in San Francisco, where she conducted a lodging-house, and she repeatedly stated that when she had sold her Sierra home she would make her residence elsewhere, but she never consummated this inchoate intention, and stated in her will that she resided in Sierra county, it was held that she remained a resident of Sierra county, and hence the superior court in San Francisco had no jurisdiction of her estate.

Gunnison, Booth & Bartnett, for the petitioning executor.

J. F. Cowdery, for the coexecutor, opposed.

COFFEY, J. Section 1294 of the Code of Civil Procedure provides:

"Wills must be proved and letters testamentary or of administration granted—

"(1.) In the county of which the decedent was a resident at the time of his death, in whatever place he may have died."

Section 52 of the Political Code provides, among other things, the following rules for determining the residence:

"(1.) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

"(2.) There can be only one residence.

"(3.) A residence cannot be lost until another is gained.

. . . .

"(7.) The residence can be changed only by the union of act and intent."

Section 1239 of the Political Code sets forth the following rules, among others, for determining the residence for the purpose of voting:

"(1.) That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning. . . . .

"(8.) The place where a man's family resides must be held to be his residence; but if it be a place for temporary establishment for his family, or for transient objects, it is otherwise.

"(9.) If a man have a family fixed in one place, and he does business in another, the former must be considered his place of residence; but any man having a family, and who has taken up his abode with the intention of remaining, and whose family does not so reside with him, must be regarded as a resident where he has so taken up his abode.

"(10.) The mere intention to acquire a new residence without the fact of removal avails nothing; neither does the fact of removal without the intention."

Residence depends upon intention as well as fact: See People v. Peralta, 4 Cal. 175.

A person's residence in a place is presumptive evidence of domicile: Johnson v. Merchandise, 2 Paine, 601, Fed. Cas. No. 747; Ryal v. Kennedy, 40 N. Y. Sup. Ct. (8 Jones & S.) 347.

The residence which goes to constitute a domicile need not be long in point of time.

"If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile": 5 Am. & Eng. Ency. of Law, p. 863; Jacob on Domicile, sec. 137.

"On questions of domicile, a party's declarations in authentic acts, though admissible against him, are not conclusive, but may be disproved when not causes of the contract": Davis v. Binion, 5 La. Ann. 248.

The word "residence" being commonly employed in the sense of sojourn, a recital in a will that the testator is re-

siding at a place named is not controlling on the question of domicile: Tucker v. Field, 5 Redf. (N. Y.) 139.

Jacob on Domicile, section 150, says: "The intention requisite for a change of domicile is: (1.) Intention completely to abandon the former place of abode as a place of abode; and (2.) To settle presently and permanently in another place."

"The former place of abode must be abandoned only as a place of abode. Therefore occasional returns, or an intention to return for temporary purposes of business or pleasure, to remove one's family, or the like, will not prevent a change of domicile. The mere retention of landed estate at the former place of abode is certainly not inconsistent with abandonment; but whether the retention of a place of residence—a furnished house or the like, in which the person may and probably does intend to reside occasionally—is or is not consistent with abandonment, has been the subject of some difference of opinion": Jacob on Domicile, sec. 160.

In Richard v. Kimball, 5 Rob. (La.) 142, the defendant, as ship owner, in an affidavit made for the purpose of procuring an enrollment of his vessel, describes himself as having his "usual place of abode or residence in New Orleans." In a suit brought against him as owner of said vessel, witnesses testified to his residence in Nachitoches Parish. It was contended on behalf of plaintiff that in all matters relating to the vessel his description in the affidavit was conclusive, but the court held that it was not and that his domicile was in Nachitoches Parish.

Jacob on Law of Domicile, in section 463, says that the recital of a place of residence in a deed or a will is not conclusive. Speaking of such recitals, he says: "They are frequently made in both deeds and wills without any special importance being attached to them; and sometimes are introduced by scriveners without the attention of the grantor or testator being particularly called to them. Great caution should therefore be used against giving them too great weight, or attaching to them a meaning which was not intended.

"Said Surrogate Bradford in a learned opinion in Isham v. Gibbons: The declarations of the deceased in his will and in the deed of manumission furnish the only evidence point-

ing to the acquisition of a new domicile. In a nicely balanced case they might be decisive; but great caution should be used in not giving them too great weight, or attaching to them a meaning not designated by the testator. The truth is, after all, that such written declarations, even of the most solemn character, are but facts to enable the court to discover the intention of the party. It is in this light alone that they are to be received and weighed. At the best, the animus of the party is only to be inferred from them. In this respect they are like any other facts. Declarations of any kind are not controlling, but may be, and frequently are, overcome by other and more reliable indications of the true intention": See Whicker v. Hume, 7 H. L. Cas. 124; Jopp v. Wood, 4 De Gex, J. & S. 616; In re Steer, 3 Hurl. & N. 594; Attorney General v. Kent, 1 Hurl. & C. 12.

In the case of Steer, cited above, the will of the testator contained the following declaration: "Whereas, although I am now in England, my residence recently was in Hamburg, of which, for the purpose of enabling me to trade, I was constituted a burgher, and my intention is to return there; but I do not mean by such declaration of intention to renounce my domicile or origin as an Englishman."

The court held that the deceased was domiciled in Hamburg and not in England, notwithstanding this declaration in his will.

In Forbes v. Forbes, Kay, 341, Vice-Chancellor Woods was inclined to the opinion that the retention of a residence in the place of former domicile was not inconsistent with the abandonment of a resumed domicile in favor of a third place.

That "residence in a place and engaging in business there have generally been considered as evidence of animus manendi": Jacob on Domicile, sec. 410; Story on Conflict of Laws, sec. 47; Estate of Green, 1 Cof. Pro. Dec. 445.

It is not necessary to declare in a will that the testator (or other person) is a resident of any place; but if a testator states in his will that a fact exists, and, in the nature of things, if that fact may exist, and if the circumstances that combine to create that fact depend upon the option of

the testator, then such declaration ought to be conclusive that the fact is as stated.

Section 1850 of the Code of Civil Procedure is not in words as broad as the foregoing, but in spirit is on all-fours with it. It says that when the declaration forms part of a transaction, which transaction is itself the fact in dispute, such declaration is evidence of the transaction.

In the case at bar the declaration of the testator ought to be conclusive, because residence always depends upon intention: Pol. Code, sec. 52.

Of course, if the facts point to a conclusion different from the admitted intention, then the facts govern in all cases—that is to say, if a man should bona fide, through ignorance of the law, intend to reside in Sierra county (never having been there), his acts would govern his intention and he would be by the law domiciled in his true locus. But this is not the case. "The residence of the husband is the residence of the wife": Pol. Code, sec. 52, subd. 5. "A residence cannot be lost until another is gained": Pol. Code, sec. 52, subd. 3. "A thing once proved to exist continues as long as is usual with things of that nature": Code Civ. Proc., sec. 1963, subd. 32.

The facts in the contest in which the above-cited axioms are applicable are as follows: The residence and actual home of Mrs. De Noon was with her husband, at Gibsonville, Sierra county. He died a resident of that county. She died in San Francisco, where she conducted a lodging-house. She owned and occupied her husband's furnished dwelling-house, and other property at Gibsonville, every summer, and returned to San Francisco in the winter. She refused to rent her Gibsonville residence, always leaving it in charge of a man in the winter.

It may be said, generally, that all the witnesses agree that Mrs. De Noon repeatedly said that when she had sold her Gibsonville property she would make her residence somewhere else. In brief, she appears to have repeatedly given expression to her future intentions (if this expressive solecism may be permitted).

If Mrs. De Noon gained a residence in San Francisco then she abandoned her Gibsonville residence. If she had stated

in her will that she was a resident of San Francisco when she signed it, from that moment she would have been a resident of San Francisco, because having the right (under the facts) of choice, she then made it; but when she stated that she resided in Sierra county, she signified that she had not abandoned that residence.

Her inchoate intention to change her residence was never consummated; on the contrary, her testamentary declaration indicates her abandonment of the incipient intention. That declaration was the final intent coupled with the final act, which determines the jurisdiction of this court.

Application denied.

ESTATE OF JOHN B. THOMPSON, DECEASED.

[No. 12,653; decided May 26, 1894.]

Testamentary Capacity.—Upon a Consideration of the Evidence, and of the fact that the proponents of the will in this case failed to produce evidence which was within their power if their contentions were true, it was held that the testator was of unsound mind at the time of the execution of his will.

Undue Influence.—Upon an Examination of the Evidence the court found in this case that the will proposed for probate was procured by duress and undue influence.

Wills—Request to Witness to Sign.—The request to a witness to sign his name to a will should come from the testator and not from a third person.

J. T. Rogers, for Mrs. A. B. Kidder and Mrs. Mary A. Thompson, proponents of alleged last will dated July 14, 1892.

N. B. Malville, for Margaret Thompson, widow of testator and executrix of will dated January 23, 1867, opposed.

COFFEY, J. John B. Thompson died on the 7th of August, 1892; his will was filed on 12th of August, 1892, dated January 23, 1867, with a petition for probate thereof; said will (dated January 23, 1867) was admitted to probate on

the 26th of August, 1892, and letters testamentary issued to the widow, Margaret Thompson, on the same date.

The homestead and household furniture were set apart and assigned by order of court to said widow, being all the property of said estate, except a watch and a few small articles appraised at $16.50. On or about the twenty-fifth day of August, 1893, a paper purporting to be another will of said decedent was filed in this court, with a petition for probate thereof, alleging that the same was the last will of said decedent. Margaret Thompson, the widow, demurred to said petition, which demurrer was sustained, with leave to amend. An amended petition was filed on or about the 16th of October, 1893. Afterward in due time said widow filed written grounds of opposition to the probate of said paper, and the petitioners, Mrs. A. B. Kidder and Mary A. Thompson, filed an answer to said opposition.

The issues raised by said petitions and contest were:

1. The competency of decedent to make a will;

2. The freedom of decedent, at the time, from duress, menace, fraud and undue influence;

3. The due execution and attestation of the said paper purporting to be a will.

The cause came up for hearing before the court, a jury having been waived, on the 22d of November, 1893, John T. Rogers, Esq., appearing for petitioners, and N. B. Malville, Esq., appearing for contestant.

Dr. Daniel Maclean, a practitioner for about twenty-seven years, graduate of the Bennett Medical College, and chief of the faculty of California Medical College, eclectic school of medicine, testified that he knew the decedent testator by having visited him at his residence, but did not prescribe for him; deceased had dropsy; the doctor would not guarantee his cure; thought he was sound in mind.

Dr. John William Siefkes testified, in substance, that he was a graduate of Cooper Medical College; he met decedent frequently on the street; he was also attending physician on decedent at his last sickness; this doctor had treated deceased for Bright's disease; deceased was dropsical; had delusions and hallucinations; this doctor had known decedent for five years immediately anterior to his demise, which event oc-

curred August 7, 1892; witness had attended him up to that time; his memory had become impaired by chronic alcoholism; his mind was not sound on the 14th of July, 1892, the date of the instrument now propounded as a will; there was no time from June 1, 1892, to the day of his death, August 7, 1892, that decedent was competent to make a will; deceased was afflicted with Bright's disease, interstitial nephritis, and diseased kidneys.

The physician's testimony came in without objection or exception.

G. S. Eastman, a policeman, testified that decedent was under the influence of liquor nearly all the time in the spring of 1892, and he appeared mentally weak.

Mr. Gibson, an intimate acquaintance of the Thompson family, testified that he had called to see decedent frequently before he died in his last sickness, and that for three months before he died he was not in his right mind, and that his acts and remarks were peculiar and irregular and not like a man in his right mind.

Mrs. Jennie Taylor testified that decedent was not in his right mind on the 14th of July, 1892; he was always drunk; his mind was not right; he did not recognize this witness, sometimes he called her "Maggie" and "Cosgrove"; he asked her who took away the looking-glass on the 16th of July, 1892. The looking-glass was not taken away, but was still there.

Henry Lehrke testified that decedent was "half full" all the time; that something was the matter with his mind in the spring of 1892; he was not the same as he used to be mentally.

William Wiley testified that he was an intimate of decedent before he died; the mind of decedent began to give way and weaken in the spring of 1892, and for six months before he died he was mentally incompetent and unsound.

Mrs. Margaret Thompson, the widow, testified that decedent was not of sound mind for over six months before he died; he would talk of strange things that made her believe that he did not know what he was saying or doing.

This was about all the testimony as to the mental capacity of the decedent to make a will on 14th of July, 1892. Whether the mental incapacity and unsoundness of mind arose from excessive use of liquors or other cause does not

appear, nor does it matter. If decedent was mentally incompetent to make a will on the 14th of July, 1892, that is sufficient.

In behalf of the proponents of the will dated July 14, 1892, the following points, among others, were made:

First—By the code the burden of showing incapacity or other invalidating causes is distinctly placed upon contestant.

Second—Her proof must overcome the following presumptions:

(a) All parties present at the execution of the will and testifying to the circumstances thereof are presumed to speak the truth.

(b) Such witnesses are presumed to be innocent of wrong, and therefore it cannot be imputed to them that they consciously are assisting in the presentation of a spurious will: Code Civ. Proc., 1193; Rice on Evidence, sec. 54.

(c) Sanity is imputed: Rice on Evidence, sec. 48.

(d) Testamentary capacity is always supposed to exist in an adult: Rice on Evidence, sec. 59.

(e) It cannot be said "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. 530.

Third—The amount of property involved is not an essential criterion by which to measure the sanity of decedent.

Nor is the question of the validity of the homestead at this time before this tribunal.

If the document in controversy is in fact the will of decedent, then all the proceedings heretofore taken relative to the alleged will of January 23, 1867, are invalid, and do not furnish the court with legal evidence of any existing fact.

Fourth—The most favorable construction that can be placed upon the testimony of contestant is to the effect that decedent was at times under the mild delirium of intoxication.

The testimony in this case, however, shows that there was no delirium at the time of executing the will.

Fifth—The contestant presented testimony showing that decedent was afflicted with Bright's disease—death resulting therefrom.

As a medical fact, none of the forms of such disease present characteristics of insanity.

In the advanced stages of two forms of the disease there may be a coma which usually precedes and ends in death—rarely does it ever occur at any considerable length of time prior to death.

In this connection the contention of proponents is that alcohol is not usually a cause of the disease.

Dr. Tyson, in his treatise on Bright's Disease and Diabetes, on page 124, relative to chronic parenchymatous nephritis, says: "Although alcohol is not a common cause of chronic parenchymatous nephritis, yet I cannot but think that the chronic nephritis which we find in confirmed drunkards—those who are always saturated with whisky when they can get it—owes its presence to the latter agent. To be sure, it cannot be denied that the exposure to which these outcasts are subjected may be the cause."

On page 167, on interstitial nephritis, he says: "Alcohol, formerly thought to be a potent cause of the cirrhotic kidney, is now acknowledged to be an infrequent one. The analogy of this condition to the cirrhotic liver suggested a similar irritant action of the alcohol in the blood upon the interstitial tissue of the kidney. But although the portal blood contains a large amount of alcohol after its liberal ingestion into the stomach, by the time the blood passes through the heart and lungs and gets into the kidney very little, if any, remains unoxidized. It is barely possible, however, that when enormous quantities are used, enough may remain in the blood passing through the kidney to irritate its connective tissue, and also the cells lining the tubules. The latter, from their efforts to remove it, are probably more frequently irritated than the former; whence also the possibility, though rare, also, of chronic parenchymatous nephritis being caused by it, as referred to in discussing the latter disease."

On page 185, concerning the same disease, he says: "With regard to beverages, there is no doubt that the use of strong alcoholic drinks should be avoided, and brandy, whisky and

strong sherries and ports should be prohibited. The light wines, and especially the red wines, and lighter alcoholic drinks, as lager beer, porter, may be used."

Henry Doscher, one of the witnesses to the will of July 14, 1892, testified that he knew decedent for twenty years before he died; he was not asked if decedent's mind was sound at the time.

George W. Howe, the person who acted as an attorney in the matter, might have been called as a witness, but he was not produced by proponents of the paper of July 14, 1892. He was the lawyer of Mrs. Kidder, one of the proponents and sister of decedent, who testified that she employed and paid this person ten dollars to make the will.

Frank M. Thompson in his testimony failed to say that decedent's mind was sound on the 14th of July, 1892, when said paper was signed; his answer to a question in relation thereto being, "he was all right." On cross-examination he was interrogated as to any conversation between him and decedent in the buggy when he took decedent to his home on the 14th of July, 1892, but he said he did not remember; still he remembered other matters and what decedent said at other times. The subject matter of that conversation on the 14th of July, 1892, would have thrown some light on his mental condition at that time: Code Civ. Proc., sec. 1963, subds. 5, 6, sec. 2061, subd. 7.

Upon the issue of undue influence the testimony shows that Mrs. Kidder, the sister of decedent, and Mrs. Thompson, his sister in law, came to decedent's home frequently before his death and remained with him at his bedside for some time.

A resident on the opposite side of the street saw, through her window, the sister and sister in law place their arms around decedent when on his sickbed and kiss him on several occasions; they never did this in the presence of his wife. Afterward this sister, Mrs. Kidder, sent her brother Frank with a buggy on the 14th of July, 1892, and took him to Frank's house, where the parties had a person acting as a lawyer; Frank told decedent's wife that he was taking him to see a doctor; he did not take him to a doctor. These facts show a certain influence obtained by said parties over said decedent.

Mrs. Kidder said that decedent told her that he desired to make a will, and her object in sending Frank for him was to have him make a will. Still, those facts were concealed from his wife. When Frank took him off in the buggy he told his wife he was taking him to see a doctor, which was not the fact; it was a misrepresentation to her.

This testimony is sufficient to sustain the issue of duress, fraud and undue influence involved in this proceeding, and also the freedom of decedent at the time; he was in the house of defendants, under their control and power, when this paper, dated July 14, 1892, and drawn by defendants' lawyer, was produced, and decedent was constrained to sign it.

The third issue involved is as to the due execution and attestation of the will.

Frank M. Thompson testified that Mr. Hernan drew it, that he told Hernan what to say in it; Mr. Howe came to Frank's house and spoke to decedent and took down on paper what he said; but it does not appear what decedent told Howe. At all events, Howe did not attempt to put on paper the statement of decedent. Mr. Hernan drew the paper at the dictation of Frank Thompson.

"At the house the lawyer read the paper and handed it to J. B. Thompson, and asked him to sign it." Then it was handed by Howe to Doscher and he was asked to sign it at a certain place, which he did. It does not appear that the certificate to the will was read or explained to the witness.

Testator did not dictate the will or read it. Frank M. Thompson dictated it at the office of the attorney, Mr. Hernan. Frank M. Thompson, in fact, had the will drawn to suit himself.

The testator did not request the witnesses to sign their names as witnesses at the end of the will, and there was no signing done by any of the witnesses at the request of decedent.

The action of Howe in the premises, as appears by the testimony, should not be substituted as the act of decedent—the statute should not be so construed.

The decedent did not declare that the paper of July 14, 1892, was his will. It was not his will, and should be and is denied probate: Civ. Code, sec. 1276.

ESTATE OF MICHAEL LEAHY, DECEASED.

[No. 12,338; decided May 31, 1893.]

Homestead—Whether Absolute or for Limited Period.—When no homestead has been selected during the lifetime of decedent, a homestead for the use of the widow and minor children can be set apart absolutely only out of the common property; if there is no common property, then a homestead may be set apart out of the separate estate of the decedent, but only for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order.

Homestead.—While the Homestead Law Should be Liberally Construed, and the widow and minor child should not be deprived of any of the rights which the law gives them, yet nothing not equitable and just should be done as between the widow and minor child on the one hand and the adult children on the other.

Community Property.—The Changing of the Form does not Destroy the Identity of separate property.

Community Property.—Where Part of the Purchase Price of Real Property was obtained by the decedent by the pledge of his separate property, and there is not money enough on hand in the estate to redeem the pledge, the remote contingency that the estate of decedent might, at some time, be able to redeem it, cannot change the character of the transaction so as to make the real estate common property for the purpose of a homestead application.

Community Property.—Where Property is Acquired by Funds Belonging Partly to the separate property of one spouse and partly to the common property, the property so acquired becomes in part the separate property of the spouse who furnishes the funds from his or her separate property, and in part the common property of both spouses, in proportion to the separate and community funds invested in it.

Homestead—Property from Should be Selected.—In determining an application for a homestead, all the circumstances must be considered, and where the real property sought to be set apart was purchased mainly with separate funds of the decedent, and was all the real property of and constituted the major portion of the estate, and there are adult heirs, such real property should not be set apart to the widow and minor child absolutely.

Michael Leahy died intestate on July 12, 1892, leaving him surviving Ellen, his widow, and Alice, their minor child, and also a number of adult children by a former wife.

The widow was appointed administratrix of the estate on August 1, 1892, and on August 26, 1892, filed her petition to

have set apart to her as a homestead, absolutely, a lot on Bartlett street, in San Francisco, which she claimed was community property.

Sawyer & Burnett, for the petitioner.

Wheaton, Kalloch & Kierce, for the adult heirs.

COFFEY, J. The application to set apart a homestead in this proceeding is based on section 1465 of the Code of Civil Procedure of this state, which provides, among other things, as follows: "If none [referring to a homestead] has been selected, designated and recorded . . . . the court must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children, out of the common property," etc.

The petition filed herein alleges that the real estate described therein is the community property of the widow and her deceased husband; that it was purchased on the seventeenth day of May, 1888; that no homestead was recorded during the lifetime of the deceased, and that there is one minor child.

The answer filed to the petition of the applicant admits all the facts except that the property is the community property of the applicant and her deceased husband, but alleges that it was purchased in part with the earnings and dividends of the separate estate of the deceased, and that thirty shares of stock, separate property, were hypothecated as part of the purchase price.

It is admitted that the piece of property is appraised at $6,100; that thirty shares of stock have been pledged to pay $1,500 of the purchase price of the said piece of real estate; that the widow is to receive $2,000 from the United Order of Workmen, as her separate property, and that at the time applicant married deceased he owned as his separate property either thirty-one or two shares of stock in the Workingmen's Boot and Shoe Company of the par value of $50 per share.

The contention in the matter narrows itself down to the fact as to whether the real estate was purchased in part with

separate funds or whether it was entirely purchased with community funds.

For the purpose of proving opponent's side of the case, Walter Rosie, secretary of the Boot and Shoe Company, was subpoenaed, and after he was sworn and in part examined, it was suggested that he furnish an itemized ledger account showing the amount of dividends, and the amounts and times when stock was purchased, from the time of the marriage up to date. This account shows the following facts: At the time the deceased married he owned thirty-one shares of stock of the value of $1,550. On July 2, 1877, the dividends on that stock amounted to $186; to that amount the deceased added $14 in cash and purchased four shares of stock. On January 5, 1878, the dividends amounted to $210, and on that day he purchased four shares of stock for $200 and left the remaining $10 with the company. On July 1, 1878, the dividends amounted to $234, and adding $6 he purchased five shares of stock. On January 2, 1879, the dividends amounted to $198, and adding $2 in cash he purchased four more shares of stock. On July 2, 1879, the dividends amounted to $216, and on the following day he purchased four more shares of stock and drew out $16 in cash. On January 5, 1880, the dividends amounted to $234, to which he added $16 in cash and bought five shares of stock. On July 1, 1880, the dividends amounted to $85.50, to which he added $14.50 in cash and bought two shares of stock. On January 1, 1881, the dividends amounted to $88.50, and to that amount he added $11.50 in cash and purchased two shares of stock. On July 5, 1881, the dividends amounted to $183. To that $17 in cash were added and four shares of stock were purchased. On January 5, 1882, the dividends amounted to $195, to which $5 in cash were added and four shares of stock purchased. On July 10, 1882, the dividends amounted to $138, to which $12 in cash were added and three shares of stock purchased. On January 3, 1883, the dividends amounted to $288, to which $12 in cash were added and six shares of stock were purchased. On July 2, 1883, $400 in cash were put in, and on July 9th a dividend of $195 declared, and on that day ten shares of stock were purchased, and on the 16th of July $95 in cash were drawn out. On January 6, 1884, the dividends

amounted to $308, and six shares of stock were purchased, and $8 in cash drawn out. On July 7, 1884, the dividends amounted to $423, and on that day the last shares of stock, six in number, were purchased and $123 were drawn out. This fully accounts for the one hundred shares of stock owned by the estate.

To buy the sixty-nine shares of stock after the deceased married in 1877, the purchase price of which was $3,450, the deceased added to the dividends accruing from the stock the sum of $510 up to the time the last stock was purchased, and during the same period drew out from the dividends the sum of $242. If we assume that the $510 paid in be community property, it still leaves eighty-nine and four-fifths shares of stock as separate property, and it is admitted that thirty shares of stock were pledged to make part of the purchase price.

The secretary of the Hibernia Bank produced the accounts of the deceased with that bank, and copies of the accounts have been introduced in evidence pursuant to order. The first bank account covers a period of time from January 11, 1881, to May 9, 1888.

The second account covers a period of time from March 22, 1888, up to date.

From and after the last purchase of stock up to the time of the purchase of the real estate in May, 1888, the following facts appear from the first bank account and from the account with the Boot and Shoe Company: On July 12, 1894, the deceased received in cash as dividends the sum of $123, and on July 21st $100 were deposited in the bank. On January 3, 1885, $450 were received as dividends and $500 were placed in bank. On July 11, 1885, $300 were received as dividends, and on July 25, $300 were put in bank. On January 16, 1886, $225 were received as dividends, and on February 4th, $200 were put in bank. On March 1, 1886, $225 were received as dividends, and on March 8th, $250 were put in bank. On July 16, 1886, $150 were received as dividends, and on August 16th, $100 were put in bank. On August 28th, $150 were received as dividends, and on September 16th, $200 were put in bank. On March 18, 1887, $300 were received as dividends, and on March 28th, $350 were placed in

bank. On July 16, 1887, $200 were received as dividends, and on the 18th of July, $200 were placed in bank. On February 18, 1888, $225 were received as dividends, and on February 17, 1888, $130 were placed in bank.

The dividends during this time amounted to $2,573, and during this time $2,330 went into the Hibernia Bank. Now, as fully ninety per cent of the stock is separate estate, ninety per cent of its dividends must also be separate property, and a large percentage of this went into the Hibernia Bank and was drawn out to make part payment on the purchase price of the real estate on May 9, 1888. All the facts shown by the bank accounts and Boot and Shoe Company's account show that a large part of the separate estate went toward buying the real property.

Passing from the state of facts established, let us consider the contention of applicant.

Counsel for applicant suggest that this is not a controversy between creditors and a widow and minor, but that it is a contention between adult heirs and the widow and minor child.

Counsel also suggest that homesteads are provided for in every state in the Union, and are liberally construed in favor of the claimant.

This is true, and the widow and minor child should not be deprived of any of the rights which the law gives them, and the widow should have a homestead set apart, not, however, absolutely, as counsel desires, but either for life or for a limited period. Nor should anything be done but what is equitable and just, as between the widow and those who are, equally with her, entitled to the benefits of their father's patrimony.

Counsel for applicant contend that the court must set apart a homestead, and cites section 1465, Code of Civil Procedure, to sustain that contention.

The only condition under which a homestead can be set apart under that section is when it is community property, as by the use of the words "community property" it expressly excludes all other property, and where property partakes of the nature of both community and separate property, as in

this case it does, it is beyond the power of the court to set aside the homestead absolutely.

It is not necessary to contend against the doctrine laid down by the many cases of the supreme court of this state upon cases where homesteads have been applied for upon community property and been set apart absolutely.

In the Estate of Ballentine, 45 Cal. 696, cited by counsel for applicant, the property was community property, and so with the series of cases that have followed it.

It was once supposed in this state that the widow was entitled to have set apart to her absolutely a homestead out of the separate property, and such seems to have been the doctrine laid down by the supreme court in Mawson v. Mawson, 50 Cal. 541, but whatever effect that case may have had as an authority upon that subject, it has been overruled in the Estate of Schmidt, 94 Cal. 334, 29 Pac. 714.

This probate department has several times held that where the estate is separate property, a homestead should be given for a limited time or for life: Estate of R. T. Maxwell, 1 Cof. Pro. Dec. 126; Estate of Robert N. Tate, 1 Cof. Pro. Dec. 217; Estate of Lahiff, decided by this court and affirmed in 86 Cal. 151, 24 Pac. 850.

Whenever the property is not community property, the power of the court to set it aside as a homestead is governed by the provisions of section 1468 of the Code of Civil Procedure, which provides that "the court can only set it apart for a limited period to be designated in the order, and the title vests in the heirs of the deceased subject to such order."

The second point made by counsel for applicant is, that although the property is appraised at more than $5,000, that that is no objection to setting it apart absolutely as a homestead.

The Estate of Walkerly, 81 Cal., page 580, 22 Pac. 881, is cited to sustain that contention.

That case must be viewed in the light of the circumstances under which it was decided. In that case the estate was of the value of $500,000 over and above all indebtedness. The homestead was of the value of $15,000. The court below set apart the homestead for the widow and child for a limited

period, and the court says, page 584: "The estate here is a large one, and we cannot say, from the evidence before us, that the court below abused its discretion in the matter." The circumstances in the case at bar are very different. In this case the widow asks to have all the real estate set apart to her and the minor child absolutely and completely and forever taken from the assets of the estate.

The third point for which counsel for applicant contend is the presumption that the real estate, purchased eleven years after the marriage, is common property.

The case of Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538, is cited as sustaining the doctrine that this presumption can only be overcome by clear and convincing proof that the property is separate property. The counsel say we know of no "clear and convincing proof" that it is not common property. Counsel further say that it is in evidence that at the marriage Mr. Leahy owned thirty-one shares of stock in the Workingmen's Boot and Shoe Factory, but that the stock still belonged to him at his death, and now forms part of his estate, etc.

It is shown satisfactorily to the court, by the account taken from the books of that corporation, that the dividends of the stock have produced nearly all the other shares of stock now owned by the estate. It is also admitted that $1,500 of the very purchase price of the real estate came from the hypothecation of thirty shares of this stock, and no matter whether that stock be the original shares of stock, or that purchased afterward with the dividends and a small portion of advanced cash, it is still clearly and unmistakably mainly the separate, if not entirely the separate, property of the deceased. In addition have been traced the dividends which are largely separate property from the factory to the bank, and from there into the very purchase price of the real estate. There is no escape from one proposition, and that is that there is not money enough on hand in the estate to redeem these shares of stock. It matters not from what point it may be viewed, the fact is undeniably true that thirty shares of stock have been pledged, that these shares of stock are mainly, if not entirely, separate property, and that the money for

which they were hypothecated was paid as part of the purchase price of the realty.

The changing of form does not destroy the identity of separate property, and it is immaterial whether the indebtedness has been paid or not: Civ. Code, sec. 163.

Suppose that the deceased had owned anything else, and had pledged it, or exchanged it to pay part of the purchase price of this real estate, would not the money arising from that pledge be separate property? If A owes B $1,000 on a note before B's marriage, and B hypothecates the note to obtain $1,000 to pay upon a piece of real estate, would not that money be separate property?

The remote contingency that the estate of Michael Leahy might at some time be able to redeem the pledged stock from the hands of the pledgee cannot so change the matter as to make this piece of real estate, purchased by the hypothecation of this separate property, common property for the purpose of this application.

It has been shown that this property was purchased in part by separate funds, arising from the hypothecation of stock and cash dividends arising from the stock, nine-tenths of which is separate property: In re Bauer, 79 Cal. 304, 21 Pac. 759.

In that case, like the one at bar, the question was whether the realty was partly the separate estate of the deceased and partly community property, or whether it was entirely community property. It was claimed in that case, as it is in this, that the property was community property, as it was purchased during coverture. The effect of the presumption is fully discussed on pages 307 and 308 of the opinion. In the Bauer case, at the time of his marriage the deceased had personalty valued at $3,000; in the case at bar the value is $1,550. In that case it appears that he commingled his separate and community earnings; in this case every cent of dividends is accounted for up to the present time. The dates when stock was purchased, the dates when dividends were paid, and the amounts paid toward buying stock, fully appear and are easily figured out. From the time the last stock was purchased up to the time that the realty was purchased, the amount of dividends fully appears, the days

when drawn, and in fact the bank accounts almost conclusively show that nearly all the money went from the factory to the bank, and the proportions are easily seen.

In the case at bar the widow has it in her power to show where every cent of money was obtained, and, having failed to oppose the showing made by the opponents of the application, from the bankbooks, it may fairly be inferred that she was unable to show that the dividends were not conveyed to the bank at the times shown: See facts of the Bauer Case, 79 Cal. 309, 21 Pac. 759.

The doctrine applied in that case may be invoked in this, that "where property is acquired by funds belonging partly to the separate property of one spouse, and partly to the community property, the property so acquired becomes in part the separate property of the spouse who furnishes the funds from his or her separate property, and in part the community property of both spouses, in proportion to the separate and community funds invested in it: Schuyler v. Broughton, 70 Cal. 282, 1 Pac. 719. In following the separate property of deceased through its various mutations in the two banks and in his business until the purchase of the homestead, we are aided by the principles that, it having been conclusively shown that deceased owned separate property at the time of his marriage, it continued to remain such (Code of Civil Procedure, section 1963, subdivision 32), and that the profits thereof acquired the same character (Civil Code, section 163)": 79 Cal. 309, 310.

It has been satisfactorily shown in this case that the accumulations of the separate property of the deceased have in part paid for the realty, and the decision of this department in the Estate of Tate, supra, should control in this case.

In that case this court said: "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. . . . . 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 . . . . the court is of opinion that she is entitled to have a homestead set apart for life, and it is so ordered."

Counsel for applicant in their brief, in this case, say that "the policy of the law is to protect the widow and minor children. In most cases the widow has contributed by her exertions to the accumulation of the property, and she should not be turned out upon the world after years of hard labor, and frequently when her best days have passed. The minor children, of course, should be protected, because they are not able to make their livelihood."

It is evident from the foregoing statement that counsel assume that the adult heirs are trying to thrust out the widow and minor child upon the charity of the cold world, homeless and houseless, but the court does not so understand their position in the matter. The adult heirs are not contending that no homestead at all should be allowed, but that no absolute homestead should be set apart, and thus absolutely withdraw from administration the major portion of the estate, and leave comparatively nothing in the estate for them at its close.

Either a limited homestead, or a homestead for life, is all that ought to be allowed in this case. The widow is to receive, if she has not already done so, the sum of $2,000 from a benevolent order, and this for her own and separate use. The adult heirs, born of another mother, their father having a good paying separate estate at the time he married the applicant, should not be shut out of view in considering this application.

The widow is now nearly sixty years of age and the minor child is over the age of thirteen years.

The real estate is shown to have been purchased in part with the proceeds of separate estate, and a homestead should not be granted absolutely, but only for a limited period, or for life.

The court awards it for the life of the applicant.

What Property Belongs to the Community is the subject of a note to Estate of Foster, 4 Cof. Pro. Dec.

When a Probate Homestead is selected for 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: 1 Ross on Probate Law and Practice, 495.

ESTATE OF FREDERICK WIESE, DECEASED.

[No. 14,165; decided April 14, 1894.]

Inheritance Tax.—Property Passing by will or by the intestate laws is subject to the inheritance tax on its market value, and this tax, it would seem, should be assessed on the estate of a decedent after the deduction of costs of administration and debts.

J. S. Henderson, for the executrix.

J. A. Hosmer, assistant district attorney, for the state.

Elliott McAllister, appointee of court.

COFFEY, J. The following memorandum, submitted by Mr. McAllister, is adopted as the opinion of the court:

Question on construction of "An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection and to direct the disposition of the proceeds" (Statutes of 1893, page 193), as to whether the tax is to be assessed before or after the deduction of debts of the estate and expenses of administration, where such deduction must be made from property devised or bequeathed to collateral heirs, and, therefore, subject to the provisions of said law.

The question above formulated arises in the matter of the Estate of Frederick Wiese, deceased. Under the will of decedent all of the property over which decedent had the power of testamentary disposition—namely, one-half of the property of the estate, which was all community—was devised and bequeathed to persons not exempt under the statute.

The estate is ready for distribution, and the question now arises: On what basis shall the tax be computed—on the value of the property without deducting the cost of administration and the debts of the estate, or on the value of the property after making such deductions?

The statute does not seem to furnish a definite statement in reply; and so we must consider those portions of the statute that manifest the intention of the legislature in this respect.

Section 1 (Statutes of 1893, page 193) provides: ". . . . all property which shall pass by will or by the intestate laws of

this state . . . . to any person . . . . shall be and is subject to a tax of five dollars on every hundred dollars of the market value of such property."

And section 9 (page 195) provides: "Whenever any debts shall be proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so deducted or paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or to the state controller, or by them if it has been so paid."

The "passing" of the property contemplated under section 1 seems to be an unconditioned and completed transfer of the property. Bouvier's Law Dictionary defines "to pass" as "to become transferred"; and "transfer" as "the act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter." The rights of an owner include that of possession as well as of title. The rights of ownership of a decedent's estate are acquired by those entitled thereto by submission of the property to the jurisdiction of the probate court, in accordance with the provisions of the laws of California. And what this "passing" of property is and by what method consummated must be sought for in the codes.

The Civil Code, by section 1363, provides that the title of specific devises and bequests shall pass by the will; that the possession shall not so pass, but shall be obtained from the personal representative, who may sell such specific devises and bequests for certain purposes.

The same code, by sections 1384 and 1386, provides similar regulations for the passing of property under the intestate laws of this state.

In other words, the "passing" of all property, whether by will or by the intestate laws, is conditional, is subject to the debts of the decedent and to the purposes of administration. Such purposes are found in section 1516 of the Code of Civil Procedure, which provides: "All the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to

the family, except as otherwise provided in this code and in the Civil Code; and the said property, personal and real, may be sold as the court may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes."

The only priority is allowed when it is necessary to carry out the intention of the decedent, when he has made specific devises and there is insufficient property for the debts. Such order of resort to property is provided for in section 1359 of the Civil Code.

From all of the above it appears that whether any of decedent's property ever reaches the heirs or legatees is dependent on the possession of the personal representative and on the amount of the debts and costs of administration; and that the passing is not completed until the possession be surrendered by the personal representative to the legatee or heir.

It would seem, therefore, that the tax in question is to be assessed on the estate after deduction of costs of administration and debts.

This view is confirmed by the fact that the legislature has provided (section 9, above quoted) for a repayment to the legatee of a proportion of the tax paid, when the legatee, as sometimes may happen, after receiving the property, is compelled to refund a portion thereof to meet debts of the estate.

The same conclusions have been reached in Pennsylvania and New York, in which states the statutes on this subject are similar.

In Orcutt's Appeal, 97 Pa. 185, the court held: "The tax does not attach to the very article of property of which deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts and rightful claims of third parties are paid or provided for. It is on net succession to the beneficiaries, and not on the securities in which the estate of decedent was invested. How, then, is it possible to impose a tax on this fund when it has never been judicially ascertained how much or whether any of it will go to collateral legatees?"

In Commonwealth's Appeal, 34 Pa. 204, the court allowed the amount of a sum paid to the widow in compromise by collateral legatees from their legacy to be deducted before the

tax was assessed, and in so doing held: "It [the sum deducted] did not, therefore, pass to the legatees and devisees under the will, and was therefore not paid out of an estate so passing."

In Strode v. Commonwealth, 52 Pa. 181, the court cites with approval the nisi prius opinions: "It is the clear value of the estate passing to collateral heirs we are to look to, and that cannot be ascertained until after the debts are paid. The clear value for distribution must be exhibited by the executors in their settlement, and from that the state is to take its share, and we cannot inquire into the source from which that balance is made up"; and at page 189: "The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it. . . . . And it is not until this work of administration is performed that the right of succession attaches. . . . . The act operates on the residue of the estate after paying debts, and, theoretically, that residue is always a balance in money. The administration account always exhibits a balance in cash, not in specific goods, whether bonds or horses; and, though an heir may take bonds or horses as cash, the account must show, and always does show, a cash balance. That is the fund taxed by this law, and not the bonds or other chattels which may have produced the fund."

Mr. Dos Passos, in his work on this subject, summarizes the New York law in saying at page 112: "From the authorities, and on principle, it would appear that the tax can only fairly be imposed upon the net surplus passing to collaterals after all just debts and liabilities are deducted or paid."

The term "market value," used in our statute, should create no confusion. The New York statute of 1885 used the terms "fair market value" and "cash value," as did also the statute of 1887 of that state; these terms have been held to mean the same thing: Matter of Astor, 6 Dem. 402, 410.

The Pennsylvania statute uses the term "clear value," which might be somewhat more apt, if it be at all necessary to be more express. But the question turns on the time of the

"passing," for that is the time when the value, be it "clear," "market" or "cash," is to be computed; and on the amount of property so passing is the market value to be reckoned and the tax to be assessed.

ESTATE OF EDWARD HULL, DECEASED.

[No. 14,067; decided December 26, 1894.]

Wills—Lapse of Bequest to Corporation.—A bequest to a street railway corporation to establish a reading-room for its employees lapses where, before the death of the testator, the corporation is consolidated with others to form a new company.

Charity.—Where There is a Gift to Charity generally, indicative of a general charitable purpose and pointing out the mode of carrying it into effect, if that mode fails, still the general purpose of charity shall be carried out; but where the testator shows an intention, not of general charity, but to give to some particular institution, then if it fails because there is no such institution, the gift does not go to charity generally.

Cy Pres—When Doctrine not Applicable.—Where the object of a bequest in trust is incapable of being performed, both the trustee and beneficiaries having ceased to exist prior to the death of the testator, the doctrine of cy pres cannot be invoked, and the court is unable to name a trustee by whom the trust can be performed.

Charity.—The Main Distinction Between an Ordinary Trust and one for charitable uses is that the former is for a definite, ascertained object, while the latter is favored and supported in equity by reason of the uncertainty of its object.

Charity.—Where the Intention of the Testator, as shown by the language employed in his will, was to create a fund for the benefit of persons who were capable of being ascertained and recognized, there is no uncertainty of the object of the trust, and the main feature of a public charity is lacking.

Charity.—A Bequest to a Street Railroad Corporation in trust, to be by it invested and the income used in purchasing books and magazines for the reading-room of the employees of such corporation, is not a public charity.

Charity.—A Corporation can Exercise No Powers beyond those specified in its charter, and a street railroad corporation cannot be endowed with the powers, duties or responsibilities of an eleemosynary or charitable institution.

Trusts.—A Corporation Organized to Operate a Street Railroad or a system of street railroads, and of acquiring and holding property required for such purpose, has no legal capacity or power to accept or perform a trust to take a fund and invest it and use the income in the purchase of books and magazines for the reading-room of its employees.

Trust.—A Bequest to a Corporation in Trust, which cannot be enforced by the beneficiaries because beyond the power of the corporation to accept or perform, is void.

Trust.—Where a Bequest in Trust is Made to a Specified Corporation, and a discretion is confided to it in performing the trust, and such corporation goes out of existence and is succeeded by another corporation prior to the death of the testator, the bequest does not go to the successor, for to sanction the exercise by it of the discretion confided to its predecessor would be an altering of the testator's will.

The will mentioned in the opinion below was admitted to probate, and Timothy L. Barker and Joseph D. Grant were appointed executors thereof, and letters testamentary were issued to them, on November 14, 1893.

On November 5, 1894, the Market Street Railway Company (claiming as the successor of the Omnibus Cable Company) filed a petition for distribution to it of the bequest contained in the eighteenth clause of the will, which clause is fully set out in the opinion. On December 14, 1894, the executors filed an answer to this petition. The facts found by the court are stated in the opinion.

Fred B. Lake, for the petitioner.

Lloyd & Wood, for the executors.

COFFEY, J. 1. Edward Hull, a director and stockholder in the Omnibus Cable Company, on the 21st of May, 1891, made his will, the eighteenth clause of which reads:

"Eighteenth—I give, devise and bequeath unto the Omnibus Cable Company of San Francisco, State of California, a corporation organized and existing under the laws of said state, the sum of ten thousand ($10,000) dollars in trust, to be by it invested in such good and safe interest-paying securities as the directors of said corporation shall deem advisable. The entire income thereof to be appropriated, at such times

and periods during each year as said directors shall deem best, in purchasing such books and magazines as they shall deem suitable and best for the reading-room of the employees of said corporation."

2. October 13, 1893, the Omnibus Cable Company and ten other street railroads, under section 473 of the Civil Code, amalgamated and consolidated their capital stock, debts, property, assets and franchises. A new company was organized, called the "Market Street Railway Company." The Secretary of State certified that its certificate was properly filed in his office on the fourteenth day of October, 1893. Its board of directors immediately organized, and to it was assigned and it took possession of all the capital stock, property, assets and franchises of the eleven street railroads, including the Omnibus Cable Company, assumed their debts, and thereafter all of said roads became and were operated as one system. In consideration of the transfer of its franchises, property, etc., to the Omnibus Cable Company was issued twenty per cent only of the capital stock of the new corporation; the balance of its stock was divided amongst the stockholders of the other ten railroads. A large proportion of the employees of the late Omnibus Cable Company were employed by the new company, and any vacant places were filled by men, employees of the new company. A general superintendent for the entire system was employed, also track builders and track repairers. From the time of the consolidation on, the Omnibus Cable Company had no officers nor employees.

At the time of the consolidation the Omnibus Cable Company, at each of its power-houses, had what was called a waiting-room, where its employees came and waited until they were called to their several duties. In it were posted the rules and regulations for the government of the various employees, and bulletins containing instructions for them. This room was for the use of the employees of the company only; in it there was not any library, nor any books, magazines, newspapers or reading matter of any kind, excepting the posted rules, etc., above referred to. The employees called it the "gilly room." After the consolidation these rooms were maintained by the new corporation in the same manner as before, but to them all the employees of the new corporation

had access, if they chose to go there, including the general superintendent of the entire system, the track builders, repairers, etc.

There never was any reading-room maintained by the Omnibus Cable Company or the new corporation, unless the room above referred to might be considered one.

3. October 24, 1893, ten days after the issuance of the certificate by the Secretary of State, the organization of the new corporation, and its taking possession of all the franchises, property, assets, etc., as above stated, Edward Hull died.

The new corporation, the Market Street Railway Company claims that it is the successor to the Omnibus Cable Company; that the devise and bequest was a public charity, and, as such successor, it has the right to take and administer it.

The executors claim that the bequest could only vest on the death of Edward Hull; that it was a special and limited trust, for the especial and exclusive use of the employees of the Omnibus Cable Company only, and to be held and administered only by the directors of the Omnibus Cable Company. That ten days prior to the death of Edward Hull said Omnibus Cable Company went out of existence—died, and since then there have not been and cannot be any employees of said company. That since his said death there has not been, and at the time of the death of said Edward Hull there was not, anyone to take said legacy. The Omnibus Cable Company was dead; it had no employees, and never again could have any.

As said in Shields v. Ohio, 95 U. S. 323, 44 L. Ed. 357: "All—the old and the new—could not coexist. It was a condition precedent to the existence of the new corporation, that the old ones should first surrender their vitality and submit to dissolution."

And in Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 594, 6 Sup. Ct. 194, 29 L. Ed. 501: "It is a new corporation, created by the dissolution of several old ones, and the establishment of this in their place. It has new powers, new franchises and new stockholders," and, we may add, new employees for the entire new system, all commingled.

When the Secretary of State certified to the filing of the articles (October 14, 1893), that instant the new corporation was created: Civ. Code, sec. 295.

The bequest could not vest until the testator died (October 24, 1893): Civ. Code, sec. 1341.

The counsel for the Market Street Railway Company argues that this bequest creates a trust for a charitable purpose.

"A charity is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, by erecting or maintaining public buildings or works, or otherwise lessening the burdens of governments": Jackson v. Phillips, 14 Allen, 574, Gray, J., quoted in Estate of Hinckley, 58 Cal. 497.

"In the Girard Will Case the leading counsel for the will thus defined charity: 'Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish' (Mr. Binney's argument, p. 41)": Ould v. Washington Hospital, 95 U. S. 311, 24 L. Ed. 451.

"The word 'charity,' in its widest sense, denotes all the good affections men ought to bear toward each other; in a more restricted sense it means relief or alms to the poor; but in a court of chancery the signification of the word is derived from the statute of Elizabeth": Perry on Trusts, 3d ed., c. 23, sec. 697.

In the case of Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103 (bequest of money to be used in the education and tuition of worthy indigent females), the court says, at page 98: "It was objected that the beneficiaries of this charity are uncertain. A charitable use is essentially shifting. When a trust defines the beneficiaries with certainty, it is rather private than public. As Mr. Perry remarks, charity begins where uncertainty of the beneficiaries begins. (Section 687.) 'It is no charity to give to a friend. In the books it is said that the thing given becomes a charity where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field for the needy and passing stranger.' (Fontain v. Ravenel, 17 How. 369, 15 L. Ed. 80.) It is the number

and indefiniteness of the objects, and not the mode of relieving them."

In the case of Burd Orphan Asylum v. School District, 90 Pa. 21, testatrix by her will provided for the establishment of an asylum, whose object should be the maintenance and education of white female orphan children, of not less than four years or more than eight: First, who shall have been baptized in the Protestant Episcopal Church in the city of Philadelphia; second, the same class of children baptized in said church in the state of Pennsylvania; third, all other white female orphan children, between the said years, without respect to any other description or qualification whatever, except that at all times, and in every case, the orphan children of the Protestant Episcopal Church shall have the preference. Held, that the asylum was a purely public charity.

All gifts for the promotion of education are charitable in the legal sense: Russell v. Allen, 107 U. S. 172, 2 Sup. Ct. 327, 27 L. Ed. 401; Estate of Hinckley, 58 Cal. 511; Drury v. Inhabitants of Natick, 10 Allen, 169; Sweeney v. Sampson, 5 Ind. 465.

A will directing the executor to invest the residue of the estate "as he may deem best, as a fund, the annual interest of which shall be applied for the benefit of the Sabbath school library of the First Baptist Church in S., or the Baptist Home Missionary Society, whichever may be deemed most suitable," is a good charitable bequest: Fairbanks v. Lamson, 99 Mass. 533; see Drury v. Natick, 10 Allen, 169.

The attention of the court is also called to the case of Saltonstall v. Sanders, 11 Allen, 446; 3 Am. & Eng. Ency. of Law, 128, 129, 132.

There can be no doubt, says the counsel, but that Mr. Hull intended to benefit the employees operating the lines of the Omnibus Cable Company by providing them with a means of obtaining instruction, recreation and pleasure. The purpose of his bounty—this charity—was the same as if he had bequeathed the amount to provide clothing or food or medicine for the indefinite class of persons he had selected. It is a significant fact that although he was a stockholder in the Omnibus Cable Company, though he consented in writing to its consolidation with the other constituent corporations forming

the Market Street Railway Company, though the inception, development and consummation of such consolidation must have been the work of months, still this clause in his will remained unaltered, and he made no codicil to explain that in case such consolidation was effected, his will was that the bequest should lapse or should be diverted to some other channel.

Counsel for the corporation claimant contends, secondly, that the lines of railroad heretofore operated by the Omnibus Cable Company are now and will be hereafter operated by the Market Street Railway Company, under and by virtue of the franchises acquired from the Omnibus Cable Company by the consolidation.

By the consolidation the Market Street Railway Company acquired the franchises of the Omnibus Cable Company, together with those of the remaining constituent corporations. True, the constituent corporations lost their identity as corporations. The authorities quoted by the learned counsel for the executors fully sustain that position, but it is submitted that the employees operating the lines of railroad of the Omnibus Cable Company did not by such consolidation lose their identity as either conductors, gripmen or otherwise operating such lines. The class of persons selected by Mr. Hull remained the same as if no consolidation had in fact been made. He designated a class of persons to receive the benefits of this bequest, and this class still remains. It certainly seems hard that in case of such a charity the trustee, by voluntary action, in which the beneficiary has no word, can, with the aid of strangers, bar the legacy. It is submitted such is not the law. Again, though at the death of Mr. Hull the Omnibus Cable Company, as a company, had been merged in the Market Street Railway Company, its franchises still lived, and were and will be operated by the Market Street Railway Company; the class of persons selected by Mr. Hull were and are still performing identical duties to those performed by them prior to such consolidation, and on the identical lines of road. The trustee under the will is wanting; the beneficiaries are still in existence as a class.

Finally, counsel for the corporation claimant insists that the execution of the trust is for a definite purpose by a trus-

tee, and the court should take the administration of the trust and carry it into effect cy pres: Estate of Hinckley, 58 Cal. 457, 512; Jackson v. Phillips, 14 Allen, 580; Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154; Howard v. Society, 49 Me. 302; Derby v. Derby, 4 R. I. 439; Winslow v. Cummings, 3 Cush. 358; Bliss v. Bible Soc., 2 Allen, 334; Academy v. Clemens, 50 Mo. 167; Kiefer v. Seminary, 46 Mich. 636, 10 N. W. 50; Gilman v. Hamilton, 16 Ill. 225; Moore v. Moore, 4 Dana (Ky.), 354, 29 Am. Dec. 417; Philadelphia v. Girard's Heirs, 45 Pa. 9, 84 Am. Dec. 470.

In view of the fact that the legacy had vested in a charity prior to the decease of the testator, counsel thinks that the court ought to grant the prayer of petitioner to be appointed trustee for the execution of the trust.

The learned counsel for the Market Street Railway Company evidently appreciates the necessity of convincing the court at the outset that the bequest in question is for a charitable purpose in the strict legal sense of that term. Unless that point can be established, the claim of petitioner is overthrown without further examination, for the reason that both devisee or trustee and the beneficiaries have disappeared.

The main distinction between an ordinary trust and one for charitable uses is that the former is for a definite ascertained object, while the latter is favored and supported in equity by reason of the uncertainty of its object: 3 Am. & Eng. Ency. of Law, 132.

Tried by this definition, the trust in question is not a charity. The purpose of the testator is plain. His intention, as shown by the language employed in his will, was to create a fund for the benefit of persons who were capable of being ascertained and recognized.

The bequest was designed wholly and exclusively for the employees of the Omnibus Cable Company. There was no uncertainty as to the object of the devise. No difficulty could possibly arise as to the persons who should share in the benefits. If the testator had said that this fund should be employed in the purchase of reading matter designed for the education of certain named persons, it would not have been

more definite or certain than the description employed in his will by which the beneficiaries could at once be identified.

The benefit of the devise is confined by its terms to a certain number of people, and with as much exactness as if it had been limited to his own issue.

The counsel cites a case in which this proposition is illustrated: Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

In that case the court say, in speaking about the necessity that a charity should be uncertain: "This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field for the needy and passing stranger." When the harvest was ended and the grain was about to be gathered into the barns, a sheaf was left for the first needy one that might come that way; but the sheaf was not for the employee of any particular corporation. When the needy and passing stranger went into the field and proposed to take the sheaf, it was not required of him that he should exhibit his name on the payroll of some street railroad company.

The illustration exhibits the difference between an ordinary trust and one designed for charitable purposes.

The counsel also cites the remark of Perry, in his work on Trusts: "It is no charity to give to a friend." There can be no doubt that such is the accepted rule, and its application in this case becomes at once apparent when we find the learned counsel saying, in a subsequent part of his argument: "There can be no doubt that Mr. Hull intended to benefit the employees operating the lines of the Omnibus Cable Company."

It is evident that the design of Mr. Hull was to confine his bequest to that particular class of persons to whom he felt under obligations. They had served the corporation of which he was a large stockholder, and he intended to create a fund in their interests. In other words, they were his friends, and his devise to them was as such, and its certainty was ascertainable by a simple reference to the payrolls of the company.

In short, this bequest cannot be considered a charity under any of the rules declared in the adjudged cases.

There is neither trustee nor beneficiary competent to accept the devise in question. It is conceded that the Omnibus Cable Company, named in the will as the devisee of the fund in question, has passed out of existence. The learned counsel for petitioner concedes that at the oral argument this question was determined, and no attempt is made to combat the position then taken. If the Omnibus Cable Company ever had a soul, it has passed into the Market Street Railway Company, and that other part which Dean Swift declared it could not have for the purpose of affront must have gone the same way. In other words, the Omnibus Cable Company has been wholly absorbed by the Market Street Railway Company, and it has no longer any legal existence which makes it capable of performing the purposes of a trust.

It will be noticed that by the terms of the will the fund is to be controlled and managed by the directors of the Omnibus Cable Company. Upon the completion of the consolidation the directors of the Omnibus Cable Company ceased to have any power or authority, and there is no means provided by law whereby they can be retained in office or their successors elected. Not only is it clear that the corporation, the devisee named in the will, has ceased to have any being, but it also appears that the officers or instruments by which the corporation could alone act have ceased to exercise any of the functions which were absolutely requisite to the carrying out of the purposes of the testator.

The counsel says that the franchise of the Omnibus Cable Company still exists. In this there is evidently a misunderstanding on the part of counsel of the purport and intent of the section of the Civil Code which provides for a consolidation. It is there provided that two or more railroad corporations may consolidate their capital stock, debts, property, assets and franchises: Civ. Code, sec. 473.

The consolidation of the franchises can mean nothing more nor less than the gathering together of the rights to live of all of the consolidating corporations. This seems to be conceded by the counsel for petitioner; and it must be allowed that the Omnibus Cable Company went out of existence, and ceased to have any franchise or right to further existence, upon the completion of the consolidation. But not only did

the corporation pass out of existence and cease to have any being capable of either taking or executing a trust, but the beneficiaries named in the will ceased to occupy any such relations to the trustee, or to any trustee that this court might appoint, as would enable them to claim the benefits of the fund.

Recalling again the terms of the bequest, it is to be observed that its benefits are confined to the employees of the Omnibus Cable Company. If that company has ceased to exist, and if it has no employees, then the bequest must fail.

Take it that the Omnibus Cable Company, rather than consolidate with the Market Street Railway Company, had chosen to dissolve and wind up its affairs, and under such proceedings its street railways had been sold to the Market Street Railway Company; it would be at once conceded that the devise now in question must fail, because of the nonexistence of the trustee and the total disappearance of the beneficiaries; and the same result has been accomplished by means of the consolidation. The Omnibus Cable Company has not only ceased to have any legal existence, but it has wholly and absolutely ceased to have any employees. The class of persons named in the devise no longer exists. That class has passed into and become part of another and wholly different class, and there is no possible way by which that class can be followed or identified.

The testimony of Mr. Stein shows that the waiting-rooms maintained by the Market Street Railway Company are open to all the employees of that corporation. Any one of them has full liberty to go there and spend his leisure time, and if he be so disposed he can use any literature which may be in the room.

It will be seen at once that it would not be practicable, if possible, to confine the use of the reading matter to the employees named in the will, even if it should be construed, as claimed by petitioner, that the operators of the lines of road formerly owned by the Omnibus Cable Company are entitled to its benefit. All the other employees of the petitioner would be enabled to enjoy the use of the reading matter which was by the testator designed for a part only. This would be a diversion of the fund from the purpose intended by the tes-

tator, such as would wholly destroy his design. In other words, the changed condition of things renders the execution of the testator's purpose impossible. The introduction of the employees of a number of other corporations into the room renders its use for the purpose contemplated by the testator wholly out of question, and this court could not, under any powers it may possess, regulate the use in such a way as to confine it to the persons claimed by petitioner to be entitled to its benefits.

The claim that the court can nominate a trustee, by whom the purposes of this devise can be accomplished is met at the very threshold by the insuperable objection that such trustee could not execute the purposes of the trust. He would be without power to either demand or require the thing committed to his care.

The will requires the expenditure of the income arising from a fixed sum in the maintenance of a reading-room. This reading-room is the property of a corporation, and any trustee other than the corporation could have no legal right to enter upon, use or occupy the reading-room. He could, by act of the corporation, be precluded from any entry into the room for any purpose whatever. But it may be urged that the petitioner could be named the trustee. To this proposition the answer is apparent. The Market Street Railway Company has no capacity to execute such a trust.

The Omnibus Cable Company, named in the will, and the Market Street Railway Company are admitted to be street railroad corporations, organized under the provisions of the Civil Code of this state, and having only the powers conferred on such corporations: Civ. Code, secs. 354, 510 et seq.

When we look at the provisions of the code, it will at once be seen that a street railroad corporation cannot be endowed with the powers, duties or responsibilities of an eleemosynary or charitable institution. That this must be true is shown by the very nature of the trust which is undertaken by this will to be imposed upon the devisee.

Whether a trust can be accepted or held valid is determined by the relations which the parties making and accepting the trust bear to the subject matter.

It is conceded that Edward Hull could create a trust, but it is denied that he could constitute a street railroad company a trustee, because the trustee could not either accept or carry out the trust. In other words, neither the Omnibus Cable Company nor the petitioner ever had any legal capacity to accept or perform the purposes of the trust designated in the will of Edward Hull.

By reference to the articles of incorporation of the Omnibus Cable Company, and of the petitioner, it will be seen that each was formed wholly for the purpose of building and operating certain lines of street railroads, and of holding property required for the purpose of such railroads. The entire absence from the articles of incorporation of any declaration of a purpose to either accept or perform a trust must be apparent.

It has been frequently decided, and will be accepted as the rule, that a corporation has and can exercise no powers beyond those specified in its charter; and, failing to find anything in the charter or articles of incorporation of either of these corporations authorizing them to either accept or perform this trust, it must be conceded that the devise fails: Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950.

Whether a corporation can take a devise depends not only, as we have seen, upon its charter or its articles of incorporation, but also upon the relations which, by its acceptance, would be established between the corporation and the beneficiaries; and, in consideration of this question, we are at once confronted with the proposition that if the devise be lawful there must, in the very nature of things, be a corresponding remedy or right to its enforcement on the part of the beneficiaries.

If the Omnibus Cable Company, or the petitioner, took this devise and received the money, would it be possible for any employee to compel that corporation to maintain the reading-room in the will mentioned? It must be evident at once that no such order could be made, because of the simple fact that the corporation was not created for any such purpose. This would be a full and sufficient reply to any attempt on the part of any employee.

No stockholder of the corporation could be held for his proportion of the responsibility happening because of the failure of the company to properly dispose of the fund. If sued upon any such claim, the stockholder would necessarily reply that no such obligation as that imposed by the devise in this case was either expressed or contemplated in the creation of the corporation of which he became a stockholder.

As a result, from the foregoing considerations, it is concluded by the court:

1. That the bequest was not for charitable purposes.

2. That the Omnibus Cable Company, named in the will as devisee, passed out of existence during the lifetime of the testator, and no intention appears to substitute another in its place: Civ. Code, sec. 1343.

3. That by the consolidation of the several railroad corporations which were merged in and formed the Market Street Railway Company, the Omnibus Cable Company not only ceased to exist, but it is impossible for it to have any employees, and there are no longer any beneficiaries who could claim the benefit of the devise.

4. The Omnibus Cable Company was, and the petitioner is, unable to accept or perform the trust attempted to be created by the will.

5. This court is not able to name a trustee by whom the trust could be performed.

"Formerly the doctrine of cy pres was pushed to a most extravagant length; but that is now much restrained. If the charitable object is incapable of taking place at the time of the testator's death, the court is not to look out and substitute another, as they did formerly. Thus, in the case of Wheatley Church, it was pressed that the testator had a rage for building churches anywhere; Lord Kenyon said there was no such object; it was intended only for a particular parish; and, as it could not take effect there, it could not be anywhere else": Attorney General v. Minshull, 4 Ves. Jr. 14.

In 1 Drewry's Reports, pages 642, 644 (High Court of Chancery, 1853), in the case of Clark v. Taylor, where the testator gave "to the treasurer for the time being of the Female Orphan School in Greenwich aforesaid, patronized by Mrs. Enderby, the sum of fifty pounds for the benefit of that

charity," Mrs. Enderby's school was discontinued; and the court held that the legacy lapsed. The vice-chancellor said (page 644): "The question is, whether the gift in this will is to be considered as a gift intended for charitable purposes generally, or whether it was simply intended for the benefit of a particular private charity. Now, there is a distinction well settled by the authorities. There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the court says the general purpose of charity shall be carried out. There is another class, in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognized; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity."

The chancellor continued, stating that this legacy was intended for a particular institution, and, that institution having gone out of existence, the legacy lapsed and fell into the residue of the estate.

In volume 4 of Equity Cases, 521, 527, in the case of Fiske v. Attorney General, it was held, where testatrix gave one thousand pounds "to the treasurer for the time being of the Ladies' Benevolent Society of Liverpool, to be by him held and applied as part of the ordinary funds of said society," and the Ladies' Benevolent Society of Liverpool, in the year 1864, was dissolved and brought to a close, and the testatrix died March 1, 1866 (page 527), that when a gift is made by will to a charity which has expired, it is as much a lapse as a gift to an individual who has expired, and the legacy of one thousand pounds given to the Ladies' Benevolent Society lapsed and fell into the residue.

In the case of Marsh v. Means, in volume 3, part 1, of The Jurist (New Series), page 790, the testator, Fenner, by his will dated in 1834, gave three hundred pounds "to be applied, after the decease of his wife, for continuing the periodical published under the title of the 'Voice of Humanity,' according to the objects and principles which are set forth in

the prospectus contained in the third number of that publication, the money to be paid to a treasurer to be appointed at a meeting of the association at Exeter Hall."

The "Voice of Humanity" was being published when the will was made. The publication, and the society whose organ it was, subsequently, and before the death of the testator's wife, which occurred in 1855, went out of existence. The chancellor, in deciding the case, said: "It would, I think, have fallen within the description of charity, if this periodical had been subsisting at the date of the will and afterward ceased. That would be simply a case where, the particular intention having failed, the general intention must be carried out. At the date of the will, however, had the bequest then immediately taken effect, there would have been the probability of getting the same persons together to carry it on who had established it. But the gift, so far from taking effect then, did not even take effect immediately on his decease, but only after his wife's decease. Not only has the periodical itself ceased, but the association, whose organ and property it was, has perished. I must hold that this legacy has lapsed and failed, and cannot be applied cy pres."

In the case of Crum v. Bliss, 47 Conn. 593, 603, a bequest was made to a charitable corporation located in the state of Pennsylvania. After the will was made, and before the death of the testator, the legislature of Pennsylvania authorized the corporation to transfer its entire property and franchise to a corporation established in the state of New York for the same charitable purpose, which corporation was to become its legal successor, and hold and enjoy all its corporate franchises and powers. The legislature of New York authorized the New York corporation to receive the property and franchise of the Pennsylvania corporation. The transfer was effected, and the New York corporation thereafter carried on, and at the time of the testator's death was carrying on, the same charitable work that had been carried on by the Pennsylvania corporation, using the same means and employing the same agencies. The legacy was a general one, with no directions as to the objects for which or the class of persons for whose benefit the money was to be applied. Held that the legacy lapsed. The court, in its opinion, said that

a case could not be found in all the books where it has been held that one corporation can exercise the discretion confided to another. To sanction this would be an altering of the testator's will.

In conclusion, in the language of the court in the case of Smith v. Smith, 141 N. Y. 34, 35 N. E. 1075: "The expectations of a testator and his intentions may be two different things. He never expects that any of the dispositions of his will are void, and he rarely expects that any of the devises and bequests will lapse. But when he attempts to dispose of all the property he may own at his death, he never intends to die intestate, and he intends that a general residuary clause shall carry whatever, as matter of fact or law, is not otherwise disposed of."

So in this case it may be said that the unexpected to the testator happened. The corporation to whom the trust was confided and the beneficiaries both went out of existence. At the time of drawing his will such a thing could not have been reasonably expected to happen. It occurred too close to his death, and his end came so suddenly and unexpectedly that no change was made in his will; and hence this legacy has lapsed, and goes to the residuary legatees.

ESTATE OF WILLIAM T. GARRATT.

[No. 9,293; decided May 24, 1892.]

Ademption.—Ademption is the Revocation of a Grant, Donation, or the like, especially the lapse of a legacy, by the testator's satisfying it by delivery or payment to the legatee before his death, or by his otherwise dealing with the thing bequeathed so as to manifest an intent to revoke the bequest.

Ademption.—To Adeem is to Revoke a Legacy either by implication, as by a different disposition of the bequest during the life of the testator, or by satisfaction of the legacy in advance, as by delivery of the thing bequeathed, or its equivalent, to the legatee during the lifetime of the legator. A specific legacy may be adeemed; if the subject of it is not in existence at the time of the testator's death, then the bequest entirely fails.

Ademption.—The Question of Ademption is Purely One of Fact and not of intention, differing in this respect from revocation, which is purely one of intent.

Ademption.—Ademption is the Extinction or Withholding of a Legacy in consequence of some act of the testator, which, though not directly a revocation of the bequest, is considered in law as equivalent thereto or indicative of an intention to revoke. The ademption of a specific legacy is effected by the extinction of the thing or fund, without regard to the testator's intention; but where the fund remains the same in substance, with some unimportant alteration, there is no ademption.

Ademption.—The Very Thing Bequeathed must be in Existence at the death of the testator and form part of his estate, otherwise the legacy is wholly inoperative.

Ademption—Change Worked by Organization of Corporation.—Where the owner of land devises the same, together with the buildings and business thereon conducted, and thereafter organizes a corporation and leases the property to it, he being the principal stockholder in the corporation and continuing to manage the business as before, there is no change in the substance of the property, and on his death the devisees and legatees named in his will are entitled to a distribution of the property as therein specified.

B. Noyes and Lloyd & Wood, for Benjamin F. Garratt, the petitioner.

John A. Wright, for William T. Garratt, Jr.

L. H. Sharp and H. A. Powell, for Anna G. Garratt, widow and residuary legatee.

COFFEY, J. The court has been favored with approximately one hundred pages of briefs and an equal number of pages of oral statement, argument and testimony in this matter, and it is proper to say that both sides of the controversy have been presented with exemplary clearness and ability. It has been most thoroughly and fairly discussed, and whatever difficulty the court labors under in deciding the points at issue is due to the strength with which the respective counsel have presented their opposing theories.

This is an application for distribution before close of administration under section 1658 of the Code of Civil Procedure.

The application depends upon a certain clause in the will of William T. Garratt, who died on January 14, 1890, in San Francisco. The will bears date April 4, 1883, at which time the testator was the owner of a brass foundry on the corner of Fremont and Natoma streets in San Francisco, with the land upon which the foundry was situated, the buildings, stock, tools, machinery and fixtures, and all the appurtenances of such a business.

The will is here inserted in full:

"San Francisco, April 4, 1883.

"This is my last will disposing of my worldly effects.

"To my daughter Emma the residence property she now resides in, also the springs and lands known as the California Seltzer Springs, and the sum of ten thousand dollars. To my daughter Amelia the residence property she now resides in, also the five-acre lot in Oakland, and the sum of ten thousand dollars. To my daughter Clara the lot on Howard street, between Twenty-second and Twenty-third streets.

"To my daughter Julia the lot on Fremont street, between Howard and Folsom streets, also the sum of ten thousand dollars. To my daughter Mary Alice all interest I have and am to have in the two fifty-vara lots on Bryant street, between 4th and 5th streets. The land known as the tide lands to be equally divided with Emma, Amelia, Clara, Julia and Mary Alice, hoping that it will be kept as a whole for many years.

"To my brother Benjamin F. Garratt, and my son William, and my son Milton, the business and real and personal property corner of Fremont and Natoma streets, consisting of buildings, land and tools and stock, with what stock may be at the different agencies, the moneys bequeathed in this my last will to be paid out of the moneys due me on book accounts and to be paid in equal installments of one-third and to be paid in three years, my just debts to be paid first, and the balance of the book accounts to be equally divided or left as a whole to the firm of William T. Garratt & Co., consisting of my brother Benjamin, my son William and my son Milton, the firm to allow my father, Joseph Garratt, the sum of seventy-five dollars for each and every month of his life;

and also the sum of five thousand dollars to my sister Rose, and three thousand dollars to Miss Ellen Little, these sums to be paid in three installments, same as above mentioned. To my wife Anna all my stocks, consisting of insurance and steamboat and railroad, and my life insurances, together with the homestead property of every kind. To my son William and my son Milton the land and buildings known as Nos. 513 and 515 Market street, near First. My wife Anna to take charge for William and Milton, collect or have collected the rents, and use the same, if needed, for William and Milton's benefit; all property not mentioned, real or personal, to my wife Anna. In case of my wife's death, then the property, both real and personal, to be divided as follows, this being the property left for my wife Anna: To my daughter Emma my life insurance in the Connecticut Mutual Insurance Company, amount ten thousand dollars. To my daughter Amelia my steamboat stock in the California Steam Navigation Company, excepting one hundred shares I leave for Capt. Domingo Marcucci. To my daughter Clara one-half of the lots and buildings now used as the homestead, No. 405 Sixth street, the other half of the lots and building No. 405 Sixth street, and all the furniture and personal property, to be divided as follows, excepting what I shall dispose of as per schedule attached: My sons-in-law, William A. Allen and James Bond, to have my books in library and book-cases, and portraits of the family to go to each as painted for, the other painted by Nahl to go to my son William, those painted by Wise to go to my son Milton. My scrap books to my brother Benjamin, with what cabinet I may have including my desk and papers in the library desk meant the writing table and fixtures, and what is in the laboratory to go to the firm of W. T. Garratt & Co.; I prefer this style of the firm to be kept; the personal and one-half of the homestead lots and buildings, No. 405 Sixth street, to be disposed of as follows: To my daughters Emma and Amelia and Julia each to have one-third, and any property not mentioned that would of become the property of my wife Anna by this my last will to be divided between my daughters Emma, Amelia and Julia. I appoint my wife Anna to take charge and administer on the same, and without bonds, and in case of her death then my

brother Benjamin F. Garratt, and my father Joseph Garratt, and without bonds; the word Emma was written in the margin before signing.

"W. T. GARRATT.

"Witness, GEO. W. GATES.

"Witness, ARCHIBALD L. TAYLOR."

The clause under which this application is made is as follows:

"To my brother Benjamin F. Garratt, and my son William, and my son Milton, the business and real and personal property corner of Fremont and Natoma streets, consisting of buildings, land and tools and stock, with what stock may be at the different agencies, the moneys bequeathed in this my last will to be paid out of the moneys due me on book accounts and to be paid in equal installments of one-third and to be paid in three years, my just debts to be paid first, and the balance of the book accounts to be equally divided or left as a whole to the firm of W. T. Garratt & Co., consisting of my brother Benjamin, my son William, and my son Milton."

At the time of making this will the sole constituent of the firm of W. T. Garratt & Co. was the testator himself.

It is manifest, therefore, that in mentioning the names of his brother and sons as members of the firm he was alluding to the future. About two years after executing the will he conceived the idea of incorporating the business, and a corporation was formed bearing the name of W. T. Garratt & Co., in which the testator was the prime mover, holding about four-fifths of the stock. Shortly thereafter, and on June 15, 1885, the testator executed a lease and agreement between himself, W. T. Garratt, as party of the first part, and the corporation, W. T. Garratt & Co., as party of the second part, whereby he leased this business and personal property, not including the real property upon which it was situate, to the corporation for nine years at an annual rent of $20,111.11, or an aggregate sum of $181,000, and provided that when the last payment should have been made, with interest at four per cent per annum on overdue payments, he would execute a bill of sale to the corporation, or the property should be-

come the property of the corporation, in which he was at that time and continued to be the chief stockholder, owning almost the entire body of stock. In that agreement he included two thousand three hundred and ninety shares of the capital stock which he agreed to transfer to the corporation, thus virtually retiring so much of the stock and leaving in his own name fifteen hundred and fifty-six shares. He died a few years thereafter. Up to the time of his death testator continued in the business and managed and directed the operations of the corporation in much the same manner as he had done prior to its creation. At the time of his death some of the annual rents were overdue and unpaid, $72,000 or thereabouts, and the remainder was to become due.

The first question presented by this proceeding, according to the claim of the petitioner for partial distribution, is, To whom does the money due and to become due from the corporation to W. T. Garratt, for the rent of the business, go by the terms of the will?

Counsel for petitioner claim that section 1301 of the Civil Code furnishes the answer to this question. That section reads as follows: "An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession."

Counsel for petitioner contend that inasmuch as the property was agreed to be sold, not sold, by testator to the corporation, the whole subject of the bequest passes to petitioner and the two other legatees, subject only to such remedies as the corporation is entitled to upon said agreement of lease and sale. Section 1301 gives the petitioner and his colegatees not the claim against the vendee but the property itself, in specie, limited only by the right of the vendee to complete the inchoate purchase.

Counsel for residuary legatee contend, on the contrary, that the quoted section of the Civil Code does not apply to the case at all; and they insist the only question involved is one of ademption of legacies. Section 1301, Civil Code, and the suc-

ceeding sections, by their terms, apply to questions of revocation and not to ademption.

In law, says the dictionary, ademption is the revocation of a grant, donation, or the like, especially the lapse of a legacy, (1) by the testator's satisfying it by delivery or payment to the legatee before his death; or (2) by his otherwise dealing with the thing bequeathed so as to manifest an intent to revoke the bequest.

To adeem is to revoke a legacy either by implication, as by a different disposition of the bequest during the life of the testator, or by satisfaction of the legacy in advance, as by delivery of the thing bequeathed, or its equivalent, to the legatee during the lifetime of the legator. A specific legacy may be adeemed; if the subject of it be not in existence at the time of the testator's death, then the bequest entirely fails.

The question of ademption is purely one of fact and not of intention, differing in this respect from revocation, which is purely one of intent.

Bouvier says that ademption is the extinction or withholding of a legacy in consequence of some act of the testator, which, though not directly a revocation of the bequest, is considered in law as equivalent thereto or indicative of an intention to revoke. The ademption of a specific legacy is effected by the extinction of the thing or fund, without regard to the testator's intention; but where the fund remains the same in substance, with some unimportant alteration, there is no ademption.

The very thing bequeathed must be in existence at the death of the testator and form part of his estate, otherwise the legacy is wholly inoperative.

Did the property bequeathed to the petitioner here form a part of the estate of William T. Garratt? Counsel for residuary legatee claim that by the contract in evidence here William T. Garratt had parted with all beneficial interest in the property to William T. Garratt & Co., the corporation; that the interest which W. T. Garratt held at the time of his death was a right to the money agreed to be paid; that the only interest which he held in the property itself was the naked legal title, simply for the purpose of securing to him the payment of the money due from W. T. Garratt & Co.; that he had no

beneficial interest in the property, and that none could or did pass by his will to the petitioner; that inasmuch as the property itself, the beneficial interest therein, was not in William T. Garratt, it cannot pass to petitioner; that it being a specific bequest he cannot have money due upon the contract, nor can he have the shares of capital stock which he claims of W. T. Garratt & Co.; that the only thing which he takes is the naked legal title in trust for the beneficiary who is entitled to the purchase money under the residuary clause of the will.

Mr. John A. Wright, of counsel for William T. Garratt, Jr., in a brief filed by him, declares that the whole controversy is controlled by the provisions of sections 1303 and 1304 of the Civil Code, and not by the provisions of section 1301 of the Civil Code, as asserted by the briefs of counsel for Benjamin F. Garratt.

Section 1303 of the Civil Code provides that any "act of a testator by which his interest in a thing previously disposed of by his will is altered but not wholly devested is not a revocation, but the will passes the property which would otherwise devolve by succession"; and section 1304 provides for an exception to this general rule in cases where the subsequent instrument expresses the testator's intent to revoke his will thereby or contains provisions wholly inconsistent therewith.

Mr. Wright considers that the court is dealing with such a case as is provided for by section 1303.

I am inclined to the opinion that there was no change in the substance of the property possessed by the senior Mr. Garratt at the time of making his will, and that the corporation, with all its powers, franchises and privileges, was only William T. Garratt under another name; indeed the name itself, of which he was justly proud and desirous of perpetuating, remained the same, and the control, management and direction of affairs was in no material respect altered or modified until after his death.

The court agrees with the counsel for petitioner and adopts his argument and conclusions as hereinunder expressed.

The only change in the testator's business arrangements which can be claimed as an evidence of change of intention,

as expressed in the will, was the incorporation of W. T. Garratt & Co., a corporation.

That the testator did not consider his position in any respect different after the formation of the corporation is evident from the fact that he continued to manage and direct the affairs of the business; his word was law, and, while his acts were sometimes ratified by the board of directors, they were never questioned by anyone. Mr. Taylor, an employee of the corporation, kept his private books as he had done before. The testator leased the personal property to the corporation for nine years, and by a separate instrument leased to it the real estate for five years, which last-named lease has expired. It is not reasonable to suppose that he intended to leave to one person the land, and to another a majority of the capital stock in the corporation which occupies said land with its extensive works, and which at this moment has no agreement as to the rent it shall pay.

The expiration of the lease of the real estate has left the corporation entirely at the mercy of the devisees of the land as to the amount of rent it must pay, and has made the corporation liable to be turned out of possession at short notice. To a business of the nature of Mr. Garratt's this might be disastrous, and it cannot be said that testator meant to so dispose of his property as to leave such conflicting interests.

On the other hand, to hold that the testator meant his interests as stockholder and tenant, as well as his interest as landlord, to become vested in the same hands, will avoid any such complication as the one just referred to, and would seem to carry into effect the testator's wishes.

It seems to the court, as it did to counsel for petitioner, that "an intelligent effort to ascertain what the writer (testator) meant" can result in no other conclusion than that Mr. Garratt, after the formation of the corporation, considered that matters stood on about the same footing as before, and expected and wished that his brother and sons should become the owners, not only of the land on which the foundry stood, but of all his interests in the foundry itself, which interest at the time of his death consisted of three thousand nine hundred and forty-six shares out of five thousand shares of the corporation's capital stock; of said three thousand nine hun-

dred and forty-six shares two thousand three hundred and ninety shares were included in the agreement of sale to the corporation.

If these views be correct, the petitioner herein is entitled to one-third of the following described property:

First—The real estate, corner of Fremont and Natoma streets, fully described in the inventory, together with the rent accrued thereon since the death of testator;

Second—The business, stock, tools, etc., owned by the testator on April 4, 1883, together with similar property by which it has been replaced; subject, however, to the right of W. T. Garratt & Co., a corporation, to purchase the same on payment of the unpaid portion of the rent specified in the lease introduced in evidence as Exhibit "D";

Third—Three thousand nine hundred and forty-six shares of the capital stock of W. T. Garratt & Co., a corporation, subject to the right of said corporation to purchase two thousand three hundred and ninety shares thereof, as provided in said Exhibit "D."

Let a decree be drawn in conformity with these conclusions.

ADEMPTION OF LEGACIES.

Ademption Defined.—"Ademption is the technical term used to describe the act by which a testator pays in his lifetime to his legatee a general legacy which, by his will, he had proposed to give him at death; or else the act by which a specific legacy has become inoperative, on account of the testator having parted with the subject": Cozzens v. Jamison, 12 Mo. App. 452. See, also, Connecticut Trust etc. Co. v. Chase (Conn.), 55 Atl. 171. Notwithstanding the clearness and conciseness of this definition, it is, nevertheless, often confused with advancement and satisfaction, and used interchangeably with these terms. The doctrine of advancement applies only in cases of intestacy, or where the testator in his will has directed that property given to his children in his lifetime should be accounted for by them: Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; McFall v. Sullivan, 17 S. C. 504. The distinction between ademption and satisfaction is pointed out by Lord Romilly to be as follows: "In ademption, the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word 'ademption,' because the bequest or devise contained in the

will is thereby adeemed, that is taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he gives benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore, this distinction is manifest. In cases of satisfaction the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenants, and the persons intended to be benefited by the bequest or devise—in other words, the objects of the bequest—must be the same. In cases of ademption they may be, and frequently are, different": Chichester v. Coventry, L. R. 2 H. L. Cas. 17. And see Tussaud v. Tussaud, 9 Ch. D. 363; Cooper v. McDonald, L. R. 16 Eq. 258.

The doctrine of ademption has no application to property taken by descent, but only to that taken by devise: Stokesberry v. Reynolds, 57 Ind. 425.

Ademption by Advancement to the Testator's Children.—One of the most common modes of ademption is by the advancement of a portion to a legatee by one standing in loco parentis to him. It is universally recognized as the common law that where, in such cases, an advancement takes place, it is the presumption that it is intended in lieu of the legacy, which is to be regarded as a portion; and the reason for this rule is stated in Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308, as follows: "The rule is based upon the equitable presumption that a parent, or one standing in loco parentis, and owing a like natural duty to all of his children, would not, after having voluntarily established the portion each should receive of his estate, take from one to his detriment, for the purpose of benefiting another. The natural obligation of the parent to provide for his offspring is an imperfect obligation, and the portion of each child remains wholly under the control of the testator, and may be changed at his pleasure. The rule is based upon the presumed intention of the testator, where he owes a like common obligation to all, not to give one of the objects of his bounty a double portion of his estate to the injury of the others. The rule was created by courts of equity on account of their leaning, as it is said, against double portions, and to facilitate the equitable distribution of estates. Hence, if a legacy be given by a parent, or one standing in loco parentis, and the testator afterward makes an advancement, or gift, of money or property ejusdem generis, to the same beneficiary, the presumption will arise that the gift was intended in satisfaction of, or substitution for, the prior legacy, and unless this presumption be rebutted, an ademption in full, or pro tanto, as the gift is equal to, or less than, the prior benefit, will take place. When the equitable presumption arises, and the rule applies, the ademption, in whole or in part, is complete by the act of the donor in conferring the two benefits,

from which the intention of substitution is implied." In accord with this are Rogers v. French, 19 Ga. 316; Haywards v. Loper, 147 Ill. 41, 35 N. E. 798; Low v. Low, 77 Me. 37; Wallace v. DuBois, 65 Md. 153, 4 Atl. 402; Paine v. Parsons, 14 Pick. 318; Van Houten v. Post, 32 N. J. Eq. 709, 33 N. J. Eq. 344; Langdon v. Astor, 16 N. Y. 9, 3 Duer, 477; Matter of Townsend, 5 Dem. (N. Y.) 147; Hine v. Hine, 39 Barb. 507; Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 139; Swoope's Appeal, 27 Pa. 58; Watson v. Lincoln, Amb. 325; Clarke v. Burgoine, Dick. 353; Suisse v. Lowther, 2 Hare, 424; In re Peacock's Estate, L. R. 14 Eq. 236; Hopwood v. Hopwood, 7 H. L. Cas. 728; Pym v. Lockyer, 5 Mylne & C. 29; Booker v. Allen, 2 Russ. & M. 270; Platt v. Platt, 3 Sim. 503; Scotton v. Scotton, 1 Strange, 235; Barrett v. Rickford, 1 Ves. Sr. 510; Ellison v. Cookson, 1 Ves. Jr. 100; Hinchcliffe v. Hinchcliffe, 3 Ves. Jr. 516; Trimmer v. Bayne, 7 Ves. Jr. 508; Robinson v. Whitley, 9 Ves. Jr. 577; Hartopp v. Hartopp, 17 Ves. Jr. 184.

The most usual event upon which an advancement is held to work an ademption of the bequest is the marriage of the legatee: Roberts v. Weatherford, 10 Ala. 72; Paine v. Parsons, 14 Pick. (Mass.) 318; Richardson v. Richardson, Dud. Eq. (S. C.) 184; Hartop v. Whitmore, 1 P. Wms. 681; Dawson v. Dawson, L. R. 4 Eq. 504; Nevin v. Drysdale, L. R. 4 Eq. 517; Carver v. Bowles, 2 Russ. & M. 301; Jenkins v. Powell, 2 Vern. 115. It is, however, not necessary that the gift be made on marriage or any other special occasion with reference to the donee: Leighton v. Leighton, L. R. 18 Eq. 458; and where a father declared that his daughter should have more on his death, a gift upon her marriage is no satisfaction of a prior legacy: Debeze v. Mann, 2 Bro. C. C. 165, 1 Cox, 346.

Money expended on the education of a child during the testator's lifetime, whether general or professional, is not an advancement within the meaning of the rule: Bird's Estate, 132 Pa. 164, 19 Atl. 32; Cooner v. May, 3 Strob. Eq. (S. C.) 185; White v. Moore, 23 S. C. 456.

For an advancement to work an ademption, it must be certain, and not merely contingent, and be of the same character as the legacy: Benjamin v. Dimmick, 4 Redf. (N. Y.) 7; but small gifts of money made from time to time are not to be taken into account: Schofield v. Heap, 27 Beav. 93; Watson v. Watson, 33 Beav. 574; In re Peacock's Estate, L. R. 14 Eq. 236. So, where there is a great disparity between the gift made inter vivos and the legacy, the latter being largely in excess of the former, such gift will not be regarded as a portion, or an advancement so as to work an ademption, in the absence of any showing of the testator's intention to that effect: State v. Crossley, 69 Ind. 203.

The advancement must be one for the benefit of the legatee in fact, and not merely colorable; so where a testator gave his daughter an unconditional bond, payable immediately, but he always kept it, his object being to screen himself from taxes, and it was so re-

garded by the daughter, and by will he gave portions to all his daughters, it was held that, upon his death, it should be set aside, and that that daughter might take with the rest: Ward v. Lant, Prec. Ch. 182.

The gift made may also be an imperfect one and be perfected by will, as where the will recites that the testator has given all he intended to give to certain legatees, and taken their notes therefor, which the executors were directed to deliver up as satisfied and discharged; this was held to operate as a gift to one of the legatees of a note executed by him for money not at the time intended as a gift, and which both maker and payee expected to be paid: Tillotson v. Race, 22 N. Y. 122; and see, also, Lawrence v. Mitchell, 48 N. C. (3 Jones L.) 190.

Ademption by Advancement to Strangers.—The rule holding that advancements to children by one standing in loco parentis is peculiar in this, that strangers are more favored than the testator's own children, for gifts to the former can in no wise be considered a portion, but rather a bounty, and so they are held to be, not in satisfaction of a legacy given by a prior will, but cumulative, and the presumption is in favor of the latter: Rogers v. French, 19 Ga. 316; Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308; Evans v. Beaumont, 4 Lea (Tenn.), 599; Powel v. Cleaver, 2 Bro. C. C. 499; Suisse v. Lowther, 2 Hare, 424. This rule has been the subject of much adverse criticism on account of its harshness, but has nevertheless been followed as a correct exposition of the common law, unless altered by statute. By statute in Kentucky, strangers and children of the testator were put on the same footing as to advancements: Duncan v. Clay, 13 Bush, 48; and in California it is provided that "advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing": Cal. Civ. Code, sec. 1351; thus removing an unjust presumption against the testator's children.

By Whom and to Whom Made.—It is not necessary that the advancement be made directly by the testator; so where he procures a third person to convey property to his daughter, for a consideration moving from himself, the presumption is that it is meant in satisfaction of the legacy, the same as when he himself conveys: Piper v. Barse, 2 Redf. (N. Y.) 19.

As to whether a gift to a son in law is to be considered as an advancement, there is some conflict of authority. In Hart v. Johnson, 81 Ga. 734, 8 S. E. 73, the testator advanced a sum of money, equal in amount to a bequest to one of his daughters, to her husband, and it was held to be no ademption, the father not stating whether it was in lieu of the legacy or not. So a conveyance of realty to a son in law was held not to be an advancement to his wife, if not shown to have been so intended: Rains v. Hays, 6 Lea, 303, 40 Am. Rep. 39. A simple gift to a husband after marriage does not

adeem a legacy to his wife, daughter of the testator, nor does a sum to provide a wedding outfit: Ravenscroft v. Jones, 32 Beav. 669.

In Dilley v. Love, 61 Md. 603, the court held an advancement by a father in law to the husband of his daughter was an advancement to the latter; and that it was held an ademption pro tanto where the testator gave a legacy to his adopted daughter to be paid her on marriage, and she marrying during his lifetime, he gave her husband thereafter sums of money from time to time to advance him in business: Ferris v. Goodburn, 4 Jur., N. S., 847.

For a Particular Purpose.—As before stated, where the testator stands neither in a natural nor assumed relation of parent to the legatee, the legacy is considered as a bounty and is not adeemed by a subsequent advancement. This rule is subject to an exception, however, and that is where the legacy is given for a particular purpose, and the testator afterward fulfills it in his lifetime, or gives money to that end: Hine v. Hine, 39 Barb. (N. Y.) 507; In re Ritter's Estate, 10 Pa. Super, Ct. 352; Monck v. Monck, 1 Ball & B. 298. Where, therefore, a testator in his will directs his executors to make good to a client any loss she might sustain by reason of a certain investment which he had made for her, and subsequently to the execution of the will he refunds her the exact amount of the principal, and she agrees to have no further claim upon him whatever, she cannot, after his death, recover under the will a loss resulting from costs and taxes, all of which were not referred to on the settlement: Johnson's Estate, 201 Pa. 513, 51 Atl. 342. See, also, Keiper's Appeal, 124 Pa. 193, 16 Atl. 744. But where a husband leaves his wife £200 to be paid ten days after his decease, and several years after, at the request of his wife, during his last illness, she not knowing the contents of the will, he gives her £200, so that she might have money immediately on his death without interference of the executors, this is not such a particular purpose as to bring the case within the rule, and the legacy is not adeemed: Pankhurst v. Howell, L. R. 6 Ch. App. 136. In Rosewell v. Bennett, 3 Atk. 77, the testator provided in his will for £300 for putting his son as apprentice; in his lifetime he spent £200 in placing him out as clerk; and it was held that evidence was admissible to show that this was intended as an ademption.

A testatrix by her will bequeathed £500 to a niece of her deceased husband, with these words, "according to the wish of my late beloved husband," and subsequently, during her life, she paid the niece £300, making an entry in her diary that such payment was a legacy from the legatee's uncle. The court held the legacy adeemed to the amount of the money advanced: In re Pollock, L. R. 28 Ch. D. 552, in which case the Earl of Selborne, S. C., said: "To constitute a particular purpose within the meaning of that doctrine it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (e. g., for binding him an apprentice, purchasing for him a house, advancing him upon marriage

or the like) should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfillment of some moral obligation recognized by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognized, or would have presumed to exist."

The doctrine of ademption arising from advancement for a particular purpose applies only where the testator gives the legacy for one particular purpose alone and afterward gives a sum of money with the same end in view. So, where a testator left £1,000 for the maintenance of his grandson, with directions that the executors might apprentice him, and use the interest on the money therefor, so much as not used to be transferred to him when of age, and the testator, in his lifetime, subsequently apprenticed him and paid out £126, this was held no ademption, the money being bequeathed for more than one purpose: Roome v. Roome, 3 Atk. 181.

Ademption is merely presumed, in this class of cases, and may be rebutted by evidence: Monck v. Monck, 1 Ball & B. 298; and parol evidence is admissible to repel or strengthen this presumption: In re Ritter's Estate, 10 Pa. Super. Ct. 352.

Requisites for Ademption by Advancement to Children.—In order for the doctrine of ademption by advancement to apply, it is necessary that the thing given in satisfaction be of the same nature and equally certain with the thing bequeathed, as land is no satisfaction for money, nor vice versa: Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498; Bellasis v. Uthwatt, 1 Atk. 426; nor is a house for a pecuniary legacy: Dugan v. Hollins, 4 Md. Ch. 139; Swoope's Appeal, 27 Pa. 58.

This rule does not mean that the gift must be in all respects identical with the legacy in order to work a satisfaction of the latter. It is sufficient if substantially the same, and a small variance in the time of payment, or other trifling differences, does not vary the application of the rule: Hine v. Hine, 39 Barb. (N. Y.) 507.

Where the testator left his son £500 by will, and afterward took him into partnership in his jewelry business, the stock of which was worth £3,000, it was held no ademption of the legacy, the gift not being ejusdem generis: Holmes v. Holmes, 1 Bro. C. C. 555. So the value of a beneficial lease granted a son was held no satisfaction of a legacy: Grave v. Salisbury, 1 Bro. C. C. 425. On the other hand, a bequest of a share in powder works, £10,000 in value, charged with an annuity of £20 for a life was held a satisfaction of a portion of £2,000: Bengough v. Walker, 15 Ves. Jr. 507. In Tuckett-Lawry v. Lamoureux, 1 Ont. 364, 3 Ont. 577, a Canadian case, a testator gave by will an annuity to each of his two daughters of $6,000. After its execution he gave one daughter, absolutely, bonds sufficient to produce an annual income of $1,200, and reduced her annuity to that amount by codicil. Subsequently, he gave the other daughter the same amount of bonds, and instructed his lawyer

to alter his will so as to reduce the annuity to that amount, but, on account of his sudden death, it was never done. The court held, in spite of the different natures of the gifts, that the doctrine of ademption applied, and that the second daughter's annuity should be reduced pro tanto, even without evidence of the testator's intention.

Money advanced to a daughter during the lifetime of the testator was held to work an ademption, although the limitations of the settlements were different: Sheffield v. Coventry, 2 Russ. & M. 317; the circumstance of the limitations being different not affecting the question: Durham v. Wharton, 3 Clarke & F. 146. See, however, Phillips v. Phillips, 34 Beav. 19.

A condition attached to a gift may render it not ejusdem generis, as where money is given upon a contingency, as marriage or in case of surviving the testator; in which case it is no satisfaction of a legacy: Spinks v. Robins, 2 Atk. 491. Nor is it where the contingency is that she arrive at age: Bellasis v. Uthwatt, 1 Atk. 426.

Even though the gift is of a different species from the legacy, if it was the intention of the testator that it should be substituted for the latter, it will be adeemed: May v. May, 28 Ala. 141; Jones v. Mason, 5 Rand. 577, 16 Am. Dec. 761; Booker v. Allen, 2 Russ. & M. 270.

Who are in Loco Parentis.—As a gift to a legatee by one in loco parentis is alone presumed to be in satisfaction of the portion given by will, it becomes necessary to determine who is considered as being in that relation. The rule of ademption by advancement is not favored by law, as the intent of the testator is as often disappointed as served by it: Powel v. Cleaver, 2 Bro. C. C. 499; and being technical, is not to be extended: Watson v. Watson, 33 Beav. 574. Of course, when the bequest is made by a father to his child no difficulty arises, he standing by nature in loco parentis. The rule has been held not to apply to remote relations, such as a great uncle, where the legatee's father was alive: Shudal v. Jekyll, 2 Atk. 516. The fact that the father is alive, however, is not of controlling importance, as in Pym v. Lockyer, 5 Mylne & C. 29, the grandfather was in loco parentis, although the father of the child was living. To the same effect, see Powys v. Mansfield, 3 Mylne & C. 359.

A grandson stands to a grandfather as a stranger, for the purposes of the rule that satisfaction is to be presumed as advancement: Swails v. Swails, 98 Ind. 511, citing Ex parte Pye, 18 Ves. Jr. 140; Richardson v. Richardson, Dud. Eq. (S. C.) 184; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Shudal v. Jekyll, 2 Atk. 516; Powel v. Cleaver, 1 Bro. C. C. 499; Lyddon v. Ellison, 19 Beav. 565. See contra, Clendening v. Clymer, 17 Ind. 155; Gilchrist v. Stevenson, 9 Barb. (N. Y.) 9.

At common law a man did not stand in the relation of parent to his natural child, and on that account such child was favored at the expense of legitimate offspring: Wetherby v. Dixon, 19 Ves. Jr. 407, Cooper, 279; Ex parte Pye, 18 Ves. Jr. 140. In the latter case Lord

Eldon condemned this rule, stating that it proceeded upon the artificial notion that by giving a legacy to legitimate children the father was considered as merely paying a debt of nature: See, however, In re Lowes, L. R. 20 Ch. Div. 81.

There being no obligation on the mother of a child to provide for it, as in the case of a father, she cannot be said to stand in loco parentis: Bennett v. Bennett, L. R. 10 Ch. D. 474. Nor is a legacy to the testator's housekeeper adeemed by a subsequent gift of a house, there being no evidence on the part of the testator to put himself in loco parentis to the legatee: Appeal of Sprenkle (Pa.), 15 Atl. 773.

The test is whether the circumstances taken in the aggregate amount to a moral certainty that the testator considered himself in the place of the child's father, and as meaning to discharge those natural obligations which it was the duty of the parent to perform: Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 139.

The fact that the child's father is alive is not conclusive against the assumption by a stranger of the place of the parent, but it affords some inference against it: Powys v. Mansfield, 3 Mylne & C. 359. On the question as to whether he intended to assume that relation parol evidence is admissible, and the declarations of the testator allowed for that purpose: Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 139; Powys v. Mansfield, 3 Mylne & C. 359; Booker v. Allen, 2 Russ. & M. 270.

The relation of parent must exist at the date of the will, or it will not be presumed as a portion: Watson v. Watson, 33 Beav. 574.

Bequest of Residue.—The early rule was that a bequest of the residue, or part of the residue, of an estate was not adeemed by a subsequent advancement, the reason being that such bequest was uncertain; or, as stated in Freemantle v. Banks, 5 Ves. Jr. 79, the idea of a portion is ex vi termini a definite sum; therefore a residuary bequest cannot be a portion, and if there is no portion there is no ademption by advancement: See, in accord, Davis v. Whittaker, 38 Ark. 435; Clendening v. Clymer, 17 Ind. 155; Grigsby v. Wilkinson, 9 Bush (Ky.), 91; Hays v. Hibbard, 3 Redf. (N. Y.) 28; Farnham v. Phillips, 2 Atk. 215; Smith v. Strong, 4 Bro. C. C. 493.

Later cases have refused to adopt this view, however. In Matter of Turfler's Estate, 1 Misc. Rep. 58, 23 N. Y. Supp. 135, the present view is stated as follows: "It is claimed that this principle of ademption is not applicable to a bequest of residue, but while the earlier authorities seem to have so indicated, yet the later ones hold the contrary." In Montefiore v. Guedalla, 1 De Gex, F. & J. 93, Lord Chancellor Campbell writing the opinion, at page 99: "It has been said that there cannot be an ademption where a testamentary gift is of the residue of the testator's property. This position rests upon no principle, and if strictly acted upon would produce great injustice. The doctrine of ademption has been established for the purpose of carrying into effect the intention of fathers of families in providing

for their children, and of preventing particular children from obtaining double portions, contrary to said intention. The only reason for the exception is that a residue is uncertain and may be worthless. . . . . But if a testator, after directing his executor to pay debts, funeral expenses, and legacies, goes on to say: 'And whereas, I wish all the residue of my personal property to be equally divided among my three children, I direct that each of them receive one-third of the residue,' and afterward he advances £5,000 to a daughter on her marriage, or to a son to purchase a commission in the army, can there be any doubt that he meant this sum to be deducted from the one-third of the residue coming to the daughter or the son?" Speaking of the cases to the contrary, he said: "The whole of that class of cases has been swept away by Thynne v. Glengall, 2 H. L. Cas. 131. Upon the whole, [Lord Campbell still writing] I think the question whether a gift of residue does or does not operate as an ademption or satisfaction must depend upon the intention": See, also, 2 Williams on Executors, 1442.

A daughter's share of the residue was held adeemed by advancements made upon her marriage in Beckton v. Barton, 27 Beav. 99; Stevenson v. Masson, L. R. 17 Eq. 78. And see In re Vickers, L. R. 37 Ch. D. 525, in which case a bequest of the residue was held adeemed by advancements to sons in business.

In Meinertzagen v. Walters, L. R. 7 Ch. 670, a testator directed his trustees to pay the income of one-half of the residue to his widow for life, and to divide the other half between his children in equal shares, as tenants in common. After the date of the will, the testator made advances to some of his children. It was held that such advances could only be brought into account for the benefit of the children among themselves, and that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue. In his opinion, Mellish, L. J., said: "If the rule is, that we are to carry out what the testator intends, it is clear that when he makes a gift in his lifetime, as in this case, he does not intend to take away from the residue which he has given to a stranger. It cannot possibly be disputed that if the testator had given to his widow a life interest in the whole of the residue, the fact of making a gift in his lifetime to a child, just as to anybody else, must have had the effect of diminishing that residue; and it certainly appears to me contrary to reason to hold that if, instead of having given his wife a life interest in the whole residue, he gives her a life interest in the half, and then makes presents to children, she is in that case to have a life interest in that which he meant the child to enjoy immediately."

Time When Advancement Made.—It is recognized as the law in all of the states and in England that a legacy is not adeemed by an advancement made prior to the execution of the will bestowing the legacy: Chapman v. Allen, 56 Conn. 152, 14 Atl. 780; In re Lyon's Estate, 70 Iowa, 375, 30 N. W. 642; Jacques v. Swasey, 153 Mass.

596, 27 N. E. 771; Matter of Crawford, 113 N. Y. 560, 21 N. E. 692; Zeiter v. Zeiter, 4 Watts (Pa.), 212, 28 Am. Dec. 698; Taylor v. Cartwright, L. R. 14 Eq. 167. It will, of course, operate as an ademption if the testator charges it in his will against the legatee: Kreider v. Boyer, 10 Watts (Pa.), 54; Strother v. Mitchell, 80 Va. 149; and in Upton v. Prince, Cas. t. Talb. 17, a father advanced some of his children with portions during his lifetime, and then made a will, in which he recited that he had advanced two of the children, but omitted to recite the third, whom he had also advanced, and left him a certain sum, and devised the residue equally among them; it was held that the money advanced to the third son should go in satisfaction of the legacy.

Where a grandfather made provision for the marriage of his grandson, which he did not fulfill to the letter, but made a larger and more beneficial one by will, the latter is a substitution for the former, and excludes the idea of a double portion: Waters v. Howard, 8 Gill, 262.

In Robbins v. Swain (Ind.), 32 N. E. 792, an advance was made by an aunt to one of her nieces, who gave her a receipt, prior to the execution of the will, acknowledging the sum as part of the bequest. It was held that this was an ademption pro tanto of the legacy, as the testatrix intended by her will to make her bounty to this and another niece equal, and although the receipt was not mentioned in the will.

Devises of Real Estate.—The doctrine of ademption has no application to devises of real estate, acting only upon personalty bequeathed by will: Marshall v. Rench, 3 Del. Ch. 239; Weston v. Johnson, 48 Ind. 1; Swails v. Swails, 98 Ind. 511; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Clark v. Jetton, 5 Sneed (Tenn.), 229. The reason for this is well expressed in Fisher v. Keithley, 142 Mo. 244, 64 Am. St. Rep. 560, 43 S. W. 650, in the following language: "A conveyance by the testator, during his lifetime, of the land previously devised, operates as a revocation of the devise. This results from necessity on account of a failure of the subject of the devise. It cannot be regarded either as ademption or as an exception to the statutory mode of revocation. In neither case is it intended by the courts to set aside the statute or to defeat its provisions. Real estate is known and transferred by its description, and in case specific land is devised, a subsequent conveyance of other land does not take the devised land out of the will, and cannot effect an ademption of the devise without violating the letter and spirit of the statute. The statute was supposed to subserve a salutary purpose, and should not be disregarded by the courts, even to carry out the intention of the testator, and to accomplish a more equitable division of his property among his children." See, also, Davys v. Boucher, 3 Younge & C. 397, which holds that to allow ademption in such cases would be virtually repealing that section of the statute of frauds relating to the revocation of wills of real estate.

An exceedingly strong case in this connection is Burnham v. Comfort, 108 N. Y. 535, 2 Am. St. Rep. 462, 15 N. E. 710. There a testator, by will, devised certain land to his daughter. After its execution, in consideration of a sum of money, she signed a written instrument which stated that the sum so received was in lieu of her share of her father's estate; and it was intended to be in satisfaction of the devise. The testator never altered his will, and died fifteen years after. It was held that the daughter was entitled to recover the land devised, the writing not working a revocation, which could only be done by alienation of the land by the testator, or by complying with the statute.

The Virginia court, however, has held a contrary doctrine, and in Hansbrough v. Hooe, 12 Leigh (Va.), 316, 37 Am. Dec. 659, a devise of land was considered adeemed by a gift of other land.

Pro Tanto Ademption.—In an old English case—Hartop v. Whitmore, 1 P. Wms. 681—it is laid down as the law that where, by will, a daughter is given £500, and afterward on her marriage, the testator gives her £300 for her portion, this is a revocation of the bequest.

The law now is otherwise, and in such a case where ademption occurs, it is pro tanto only, and not absolute: New Albany Trust Co. v. Powell (Ind. App.), 64 N. E. 640; Brady v. Brady, 78 Md. 461, 28 Atl. 515; Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; Richardson v. Richardson, Dud. Eq. (S. C.) 184; Thellusson v. Woodford, 4 Madd. 420; Pym v. Lockyer, 5 Mylne & G. 29; Dawson v. Dawson, L. R. 4 Eq. 504; Nevin v. Drysdale, L. R. 4 Eq. 517.

So where land is conveyed or sold, which has been devised, this operates as a revocation only as to the portion transferred: Carter v. Thomas, 4 Me. 341; Emery v. Union Soc., 79 Me. 334, 9 Atl. 891; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; Webster v. Webster, 105 Mass. 538. And where a testator undertakes to dispose of real and personal property, and subsequently conveys the real estate, this does not revoke the will as to the personalty, but only pro tanto, as to the amount actually alienated: Warren v. Taylor, 56 Iowa, 182, 9 N. W. 128.

Burden of Proof.—The doctrine of ademption by advanced portions proceeds entirely along the lines of the intention of the testator. In the case of his child, it is presumed to be in satisfaction of the legacy, and the burden is upon the child to show that such was not the testator's intention, and if this is done, no ademption occurs. So where a gift has been made to a stranger, although not presumed as a satisfaction, it may be shown to have been really so intended, but the burden is on the person asserting it: Carmichael v. Lathrop, 108 Mich. 473, 66 N. W. 350.

Admissibility of Parol Evidence.—To repel this presumption, it is now well settled that parol evidence is admissible. "The object of such proof is not to change the will, or to give the language employed a meaning different from that which it ordinarily and appro-

priately has, but merely to show that the testator has not executed or satisfied some bequest contained in it, in whole or in part. The proof, in other words, does not alter, add to, or change the will, but is admitted to show with what intent the subsequent portion, gift, or advancement was made": May v. May, 28 Ala. 141. This is borne out by the following authorities: Johnson v. Belden, 20 Conn. 322; Rogers v. French, 19 Ga. 316; Richardson v. Eveland, 126 Ill. 37, 18 N. E. 308; Timberlake v. Parish, 5 Dana (Ky.), 345; Matter of Townsend, 5 Dem. (N. Y.) 147; Degraaf v. Teerpenning, 52 How. Pr. (N. Y.) 313; Langdon v. Astor, 16 N. Y. 9, 3 Duer, 477; Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 139; Biggleston v. Grubb, 2 Atk. 48; Shudal v. Jekyll, 2 Atk. 516; Kirk v. Eddowes, 3 Hare, 509; Ellison v. Cookson, 1 Ves. Jr. 100.

If the presumption against double portions is attempted to be rebutted by parol, it may be supported by evidence of the same character: Miner v. Atherton, 35 Pa. 528; Powys v. Mansfield, 3 Mylne & C. 359. In such a case equity raises the presumption against double portions, and parol evidence is admitted merely to confirm the presumption already raised: Sims v. Sims, 10 N. J. Eq. 158.

In Wallace v. Du Boise, 65 Md. 153, 4 Atl. 402, parol evidence was held admissible where the money was advanced by a father under such circumstances as not to raise the presumption of satisfaction, to show that such was really his intention.

Strength of the Presumption.—Advancements to children are presumed to be in satisfaction of legacies, and this presumption is not rebutted by slight circumstances: Hinchcliffe v. Hinchcliffe, 3 Ves. Jr. 516. So where there is a slight difference between the gift and the legacy as to the time of payment, it will not prevail against the presumption of satisfaction: Barclay v. Wainwright, 3 Ves. Jr. 462; Hartopp v. Hartopp, 17 Ves. Jr. 184. A contrary view is held in Van Houten v. Post, 32 N. J. Eq. 709, 33 N. J. Eq. 344, holding that the presumption is slight, and citing in support Rosewell v. Bennet, 3 Atk. 77; Kirk v. Eddowes, 3 Hare, 509.

As to the strength of the presumption, the court in May v. May, 28 Ala. 141, said: "Had the amounts advanced been inconsiderable, the presumption that the provisions were cumulative and intended so to operate, would have been much less stringent. But when the provision amounts to as much, or more, or approximates very nearly the amount to which the child would be entitled under an equal distribution as provided for in the will, the presumption becomes very strong that the father was executing his will, in part at least, and under such circumstances, the law requires very clear and satisfactory proof that it was intended by the father to give the children thus advanced double portions." As to the occasion of making the gift, and its influence upon the presumption, see Robinson v. Whitley, 9 Ves. Jr. 577.

Intention of Testator.—The intention of the testator being the essence of ademption by advancement, the assent of the legatee is

not necessary: Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414. In Georgia a legacy may be adeemed by delivery of property to the legatee during the testator's lifetime, but the delivery must be of such a character as to show it was the testator's intention to part at that time irrevocably with dominion over the property; and ademption is a question of fact for the jury: Clayton v. Akin, 38 Ga. 320, 95 Am. Dec. 393.

A Kentucky statute provides that a provision for or advancement to, any person, whether child or stranger, shall be deemed a satisfaction in whole or in part of a devise or bequest contained in the will, in all cases in which it shall appear from parol or other evidence to have been so intended. Under this statute, one claiming an advancement to be in satisfaction of a legacy must aver that such was the intention of the testator: Swinebroad v. Bright, 23 Ky. Law Rep. 55, 62 S. W. 484.

Testator's Books of Account as Evidence.—The books of account of a testator, wherein certain sums are directed to be taken from a child's portion, as bequeathed by will, are not evidence per se. The fact of advancement must be proved by evidence aliunde, which taken in connection with the books would prove the fact: Benjamin v. Dimmick, 4 Redf. (N. Y.) 7; Lawrence v. Lindsay, 68 N. Y. 108; Marsh v. Brown, 18 Hun, 319.

Specific Legacies—Testator's Intention.—The class of legacies thus far discussed are those known as general or pecuniary. We now come to another class, as to the ademption of which some conflict and confusion has arisen—specific legacies, which are, as the name implies, bequests of certain, definite objects: Hood v. Haden, 82 Va. 588.

One line of cases holds that the ademption of a specific legacy does not depend upon the intention of the testator, the sole test being, Does the thing bequeathed remain in specie at the time of the testator's death? If it does not, it is adeemed: Richards v. Humphreys, 15 Pick. (Mass.) 133; Beck v. McGillis, 9 Barb. (N. Y.) 35; Hoke v. Hermann, 21 Pa. 301; Stanley v. Potter, 2 Cox, 180; Humphreys v. Humphreys, 2 Cox, 184.

The doctrine of these cases is repudiated and criticised in Beall v. Blake, 16 Ga. 119, in the following strong language: "A testator's intention, if that is not illegal, is the law to his will. To this rule there is no exception of which I am aware. And yet I am aware, that in 1786, Lord Thurlow, as chancellor, in the case of Ashburner v. Macguire, commenced the making of an exception to it, and that in the course of a short time afterward in the cases of Badrick v. Stevens, 3 Bro. C. C. 431, Stanley v. Potter, 2 Cox, 180, and Humphries v. Humphries, 2 Cox, 184, he completed the work, as far as in him it lay to complete it.

"In the last of these cases, he makes the announcement, 'that he was satisfied, from the consideration he had given to the cases on a former occasion, that the only rule to be adhered to, was to as-

certain whether the subject of the specific bequest remained in specie at the death of the testator; and if it did not, that then there must be an end of the bequest; that the idea of discussing what might be the particular motives and intentions of the testator, in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion': Roper on Legacies, 244.

"Now a thing cannot be said to 'remain in specie' a testator's, at the time of his death, if before that time he has sold it or otherwise parted with it, or if the thing has perished, or if it was never his, but was always another's, although he thought it to be his when he bequeathed it. Lord Thurlow's announcement comes, therefore, to this: That if a testator, after making his will, has sold the thing which constitutes a specific bequest, or has otherwise parted with it; or if the thing has itself perished; or if it was never his to bequeath, but was always another's, although he thought it his—in any of these cases, the specific bequest is adeemed—is so completely adeemed, that if the case be that the thing given has perished, there can be no replacement of it by an equivalent, in money or other thing; or if the case be that the thing bequeathed has ceased to belong, or has never belonged to the testator, there can be made, by the executor with the true owner, no arrangement by which to render the thing subject to the bequest, no odds how manifest it may be in the will that the testator intended such replacement, or arrangement, whichever it might be, that the case should require. . . . .

"The upshot of this innovation of Lord Thurlow was a state of evil so intolerable that parliament had, at length, to interpose with a statute for its suppression. This parliament did, by Statute 1 Victoria, chapter 26, section 23, which enacts, 'that no conveyance, or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked, as aforesaid, shall prevent the operation of the will, with respect to such estate, or interest in such real or personal estate, as the testator shall have power to dispose of by will, at the time of his death.' And section 24, which enacts 'that every will shall be construed with reference to the real estate, and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear in the will.'

"The effect of these enactments must be, in a great measure, if not altogether, to suppress Lord Thurlow's innovation, and to make the old rule its pristine breadth—to make it a rule without exception—the old rule, that the testator's intention gives law to his will."

Bequest of Debt.—The bequest of a debt is a specific legacy, and payment to the testator during his lifetime works an ademption thereof: Succession of Batchelor, 48 La. Ann. 278, 19 South. 283;

Badrick v. Stevens, 3 Bro. C. C. 431; Fryer v. Morris, 9 Ves. Jr. 360; Pawlet's Case, Ld. Raym. 335; Manton v. Tabois, L. R. 30 Ch. D. 92. So where a husband gives and bequeaths to his wife "all moneys and interest that may be recovered of and from Dr. K., for the purchase of the Penrose estate," and he receives the money therefor in his lifetime, the specific debt is adeemed: Gilbreath v. Alban, 10 Ohio, 64. So a legacy given to satisfy a debt due a legatee from a third person is in the nature of a specific legacy, and payment by the testator in his lifetime works an ademption: Tanton v. Keller, 167 Ill. 129, 47 N. E. 376, affirming 61 Ill. App. 625. See, also, Taylor v. Tolen, 38 N. J. Eq. 91.

A distinction was formerly made in the case of a bequest of a debt, between when it was voluntarily paid, and when paid by compulsion. In the former case it was held not to work an ademption, as the act was not that of the testator, and he could not help receiving the amount; while in the latter case the act was his own, and showed an intention on his part to treat the legacy as at an end: Stout v. Hart, 7 N. J. L. 414; Lawson v. Stitch, 1 Atk. 507; Crockat v. Crockat, 2 P. Wms. 164; Rider v. Wager, 2 P. Wms. 328; Drinkwater v. Falconer, 2 Ves. 623; the distinction being borrowed from the civil law: Birch v. Baker, Mosely, 373.

This distinction is at present not recognized, and ademption is held to have taken place when the debt was paid, regardless of whether done voluntarily or under compulsion: Wyckoff v. Perrine, 37 N. J. Eq. 118; Ashburner v. Macguire, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, p. 246.

A debt may be made the subject of an advancement the same as a gift of money. So where by will a testator, after reciting that his son owed him a certain sum, due on notes, released him from the payment of interest up to the time of his death. Some years later he made a codicil, not referring to said release. At the date of the will the son owed the testator £1,400, and between the date of its execution and that of the codicil that sum was paid off, and a subsequent advance of £1,200 was made to the son, which was owing at the testator's death. It was held that the release of interest was equivalent to a specific legacy of the interest on the debt due when the will was made, and that it had been adeemed, not extending beyond the date of the will: Sidney v. Sidney, L. R. 17 Eq. 65. See, also, Davis v. Close, 104 Iowa, 261, 73 N. W. 600.

The declarations of a parent, made after debts have been contracted, of an intention to treat them as advancement, are not admissible, such declarations not being communicated to the child, nor accompanied by an act sufficient to obliterate the obligations as debts: Yundt's Appeal, 13 Pa. 575, 53 Am. Dec. 496.

Where the proceeds of a debt, and not the debt itself, given by will, are paid during the life of the testator, no ademption occurs. In Coleman v. Coleman, 2 Ves. Jr. 639, the testator gave the interest of a certain bill of exchange to his wife for life, and directed that

after her death the bill should be sold and the money divided among certain persons; the bill was paid before the testator's death, and was held not adeemed thereby. So where "an amount of money" that might accrue from a certain claim was bequeathed, and subsequently paid, under order of court, the money being invested in consols, which were treated as subjects of the legacy, ademption was held not to have occurred, the court saying: "The strict construction of the testator's language makes it not a gift of the debt qua debt, but of the sum of money produced when the debt was recovered and ceased to exist as a debt. This goes to show that the testator contemplated the recovery of the debt in his own lifetime, when the subject of the gift could not be the debt itself, but the amount recovered in respect of it": Clark v. Browne, 2 Smale & G. 524.

Where a legacy of £2,000 was devised, which was made up of debts due the testator and mentioned in a schedule annexed to the will, but in fact they amounted only to £1,700, it was held that the devisee was entitled to the full £2,000: Pettiward v. Pettiward, Rep. T. Finch, 152.

Stocks, Shares and Bonds.—Stocks and bonds are the common subjects of bequests, and difficulty has arisen in the application of the doctrine to them. The sale of stock specifically bequeathed, the same as the sale of any chattel, works an ademption, and the difficulty lies in determining whether the legacy is specific. Where a testator leaves the income of a certain number of shares, which is the exact number he owns at the time, and subsequently sells them, the legacy is specific and adeemed: White v. Winchester, 6 Pick. (Mass.) 48. So where "my £1,000 East India stock" was left by will, it was held specific and adeemed by sale thereof: Ashburner v. Macguire, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, p. 246. See, also, Douglass v. Douglass, 13 App. D. C. 21; Harvard Unitarian Soc. v. Tufts, 151 Mass. 76, 23 N. E. 1006; Blackstone v. Blackstone, 3 Watts (Pa.), 335, 27 Am. Dec. 359.

In Hosea v. Skinner, 32 Misc. Rep. 653, 67 N. Y. Supp. 527, the testator left shares or the proceeds thereof "when realized as same would have been to me." Before his death they were sold and the proceeds invested in shares of another company. It was held that the legacy was specific and adeemed, and the legatee not entitled to the other shares. In Matter of Andrew's Estate, 25 Misc. Rep. 72, 54 N. Y. Supp. 708, shares or "the proceeds thereof when realized" were bequeathed, and sale of them by the testator was held no ademption, and the legatee entitled to the proceeds.

The sale of stock specifically bequeathed, then, working an ademption, stock subsequently purchased by the testator does not pass to the specific legatee: Harrison v. Jackson, L. R. 7 Ch. D. 339; Macdonald v. Irvine, L. R. 8 Ch. D. 101. In Pattison v. Pattison, 1 Mylne & K. 12, a testator bequeathed certain annuities, sold them and bought others, different only in that they terminated a quarter

of a year sooner. The court held that the specific thing bequeathed not existing at his death, it was adeemed.

Ademption by Exchange, Investment and Conversion.—The same rule applies where it is exchanged for, or converted into, other security. So where a testator bequeathed debentures in a certain company, and subsequently converted them into debenture stock of the same company, the latter did not pass by will: In re Lane, L. R. 14 Ch. D. 856.

Slight and immaterial changes in form of the security do not work an ademption: In re Frahm's Estate (Iowa), 94 N. W. 444; as where the stock is vested in trustees for the use of a person, who afterward takes it into her own name: Dingwell v. Askew, 1 Cox, 427. Where stock in an insurance company was left, which company lost its capital stock in the course of business, after the making of the will, and on its stock being filled again, the testator paid up part only of his shares and retained them till his death, the legacy was held not to be adeemed as to such part of the stock: Havens v. Havens, 1 Sand. Ch. (N. Y.) 324.

In Re Peirce, 25 R. I. 34, 54 Atl. 588, a testatrix bequeathed shares of stock in a bank, which subsequently during her lifetime consolidated with other banks, the new concern taking over the liabilities and assets of the several banks without a formal liquidation, and their stockholders were allowed to exchange their shares for shares in the consolidated bank. No ademption was held to have occurred, although the testatrix had to make a small additional payment: See, also, In re Pitkington's Trusts, 6 N. R. 246.

An exception to the rule exists where the alteration in the stock is brought about by an act of law. So where stock bequeathed is subsequently turned into annuities by act of parliament, it is not adeemed: Bronsdon v. Winter, 9 Amb. 56; nor does the conversion of a state bank into a national bank, under an act of Congress, adeem the stock: Maynard v. Mechanics' Nat. Bank, 1 Brewst. (Pa.) 483. See in this connection Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456, and Partridge v. Partridge, Cas. t. Talb. 226.

In Oakes v. Oakes, 9 Hare, 666, a bequest was made of all the testator's Great Western Railway shares, and all other railway shares of which he might be possessed at the time of his death; this was held to pass the Great Western Railway shares which he had at the date of his will, and which were afterward converted into consolidated stock, by resolution of the company, made under authority of an act of parliament; but not to pass the consolidated stock purchased by the testator after the date of the will, share and stock being two different things.

When the stock bequeathed is sold, the legacy is adeemed, even though similar shares be in the testator's possession at the time of his death. So where, being possessed of £1,000 guaranteed stock in the N. B. railway, a testator left to a legatee "my one thousand N. B. preference shares," and afterward sold them, and died possessed

of shares in the N. B. railway, acquired by several successive purchases, exceeding the amount bequeathed, it was held to be adeemed: In re Gibson, L. R. 2 Eq. 669. The court there said: "In this case the testator, at the time of his death, had not this specific stock in any shape. He had parted with it, and acquired by subsequent purchase a much larger number of shares. These subsequent purchases were not in any shape a replacing of the original fund, and there is nothing to lead the court to suppose that, having once adeemed the specific bequest, the testator has replaced the identical thing. He has distinctly referred to one thing in his will, which was no longer in existence at the time of his death. That thing, and that only, can be considered as the subject of the bequest."

In Partridge v. Partridge, Cas. t. Talb. 226, one devised to another £1,000 capital South Sea stock; at the time of making his will he had £1,800 such stock, which afterward, by sale, he reduced to £200, subsequently increasing it to £1,600, which amount he had when he died. In his opinion the lord chancellor said: "All cases of ademption of legacies arise from a supposed alteration of the intention of the testator; and if the selling out of the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again. . . . . It would be very hard in the case at bar to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again."

The investment of proceeds unauthorized by the testator has been held not to work an ademption: Busan v. Brandon, 8 Sim. 171. The facts in that case were as follows: A resident of Jamaica bequeathed to a legatee £2,000, part of £7,000 in the hands of his agents in England. He afterward went to Philadelphia, where he died. A week before his death he wrote to his agent in Jamaica, requesting him to order his agents in England to invest all of the above-mentioned sum in any stock most beneficial to his estate. The agent wrote accordingly, but before the arrival of his letter in England, the agents there had voluntarily invested the whole of the testator's moneys in their hands in certain securities. No ademption resulted, the court saying: "A mere unexecuted intention to change the state of a fund, which the testator might have revoked, and which, in fact, was never carried into execution, cannot, in any sense, be considered as an ademption."

A testator, after bequeathing specific stock, was found a lunatic, and under an order in lunacy the stock was sold and the proceeds invested in consols. The court held the first stock adeemed, and the consols went into the residue of the estate: In re Freer, L. R. 22 Ch. D. 622; Jones v. Green, L. R. 5 Eq. 555. In Jenkins v. Jones, L. R. 2 Eq. 323, however, after the testator had become insane, the specific legatee, with the concurrence of the executrix, put the money derived from the sale of the shares in a bank, in the names of

themselves and a third person, where it remained till the testator's death; and it was held not to be adeemed.

Mortgages.—Like a debt, a mortgage may be specifically bequeathed, and the same rule in regard to its being in esse as a mortgage applies. In Abernethy v. Catlin, 2 Dem. (N. Y.) 341, a testator gave his executors, by will, a certain bond and mortgage for $7,000, the amount of principal due, held against a certain person, to convert into money on a fixed occasion, and divided the proceeds. The principal had originally been $10,000, the unpaid balance being due at the execution of the will. That balance was afterward paid the testator, who deposited it in a bank, where it remained. This was held a specific legacy, and adeemed by payment. Two important New York cases were discussed, as follows: "In Gardner v. Printup, 2 Barb. 83, the supreme court of this state had under consideration a case closely resembling the present. A testator bequeathed 'the proceeds of a bond and mortgage,' which he described. In his lifetime he commenced proceedings for the collection of the amount due on the bond. This led to a sale of the mortgaged premises. The testator was paid a certain sum in cash, and took from the purchaser a bond which he indorsed as payment on the original mortgage. It was held that, under these circumstances, the legacy was extinguished.

"The question of ademption came again before the supreme court in the case of Beck v. McGillis, 9 Barb. 35. A testator had executed a will bequeathing a certain mortgage which he had afterward foreclosed. He had taken from the purchaser a new mortgage upon the same premises. It was held that the foreclosure had destroyed the legacy, and that, too, in spite of the fact that, after the decease of the testator, there was found among his papers a memorandum in his own handwriting declaring that he intended the new mortgage to take the place of the old, and to pass under his will as the other would have done if it had remained unextinguished at his death."

In Gardner v. Hatton, 6 Sim. 93, £7,000 secured on mortgage was bequeathed; after the will was made, that sum was received by the testator, and £6,000 of it immediately invested on another mortgage, the other £1,000 being deposited in a bank. The legacy was held to be specific and adeemed. Where a will directed that the proceeds of a certain mortgage owned by the testatrix should be used to pay an existing mortgage against the estate, but which was paid to her before her death, and the proceeds invested in certain railroad bonds, it was held that, as the bonds were traceable to the immediate proceeds of the mortgages, they were the proceeds thereof within the meaning of the will: Hopkins v. Gouraud, 23 N. Y. Supp. 189.

Where a will directed the amount of a certain bond to be collected after the death of the decedent's wife, and divided among certain legatees, and afterward the testator took from the obligors an as-

signment of another bond and mortgage of equal amount, in place of the first bond, and it was not paid at his death, the court held the legacies general and not adeemed: Doughty v. Stillwell, 1 Bradf. (N. Y.) 300.

For a case in which the mortgages bequeathed were held not to be adeemed by the mere transfer to a different name, they remaining in specie at the testatrix's death, see In re Tillinghast, 23 R. I. 121, 49 Atl. 634.

Insurance Policies.—Policies of life insurance rest on the same ground as instruments bequeathed, and where paid during the testator's lifetime do not pass: Barker v. Rayner, 5 Madd. 208, on appeal, 2 Russ. 124. Where specific chattels bequeathed were insured and lost at sea, the legatee was held to have no claim upon the insurance money, being different from what was by will left: Durrant v. Friend, 5 De Gex & S. 343.

Articles of Partnership.—A partner by will gave part of the profits reserved to him to his partner. Afterward, at the expiration of the partnership, he renewed it with the same men, giving them a greater interest than they had under the former articles. It was held that the renewal of the partnership did not work an ademption: Blackwell v. Child, Amb. 260.

Ademption by Acquisition.—Ademption in the case of specific legacies arises generally in one of two modes, alienation and acquisition.

Acquisition occurs where the thing bequeathed is not the testator's when the will is made, but subsequently becomes his; and has been more fully discussed under the preceding subdivision of debts, etc., in detail. Ademption by acquisition applies only to specific legacies: In re Bradley's Will, 73 Vt. 253, 50 Atl. 1072.

Ademption by Alienation.—Alienation is, perhaps, the most common cause of ademption. As where a slave is bequeathed and is sold during the lifetime of the testator, ademption occurs, there being nothing for the bequest to act upon: Godard v. Wagner, 2 Strob. Eq. (S. C.) 1. It was held in Blakemore's Succession, 43 La. Ann. 845, 9 South. 496, that the sale of property bequeathed does not revoke a legacy of it, when clearly proved that such was not the intent of the testator, as in the case of a simulated transfer acknowledged by the vendee, the property returning to the testator, and being in esse at his death.

The strict common-law rule as to the alienation of the subject of a specific legacy was changed in Kentucky by statute, which enacts that: "The conversion, in whole or in part, of money or property, or the proceeds of property devised to one of the testator's heirs into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise unless the testator so intended; but the devisees shall have and receive the value of such devise unless a contrary intention on the part of the

testator appear from the will, or by parol or other evidence": Schaefer v. Voght's Trustee, 23 Ky. Law Rep. 2291, 67 S. W. 54; Miller v. Malone, 109 Ky. 133, 58 S. W. 708. This statute applies only where the devisee is an heir of the testator: Franck v. Franck, 24 Ky. Law Rep. 1790, 72 S. W. 275. See Patton v. Patton, 2 Jones Eq. (N. C.) 494, for a case in which the property was sold, without the knowledge of the testator, and the legacy was held not adeemed.

If the real property devised is sold, the money received cannot be substituted for the land, it becoming personalty, and the devisee has no claim upon the fund: Philson v. Moore, 23 Hun (N. Y.), 152. So a conveyance in fee simple of a lot is a revocation as to it, and the rent reserved to the grantor therefrom does not pass to the devisee: Skerrett v. Burd, 1 Whart. (Pa.) 246. And where a testator devised all his real estate to his wife, for life, to be sold after her death and the proceeds divided among his nephews and nieces, and he subsequently sold a portion of the land, taking a mortgage for part of the purchase money, this operated as a revocation of the devise, and the nephews and nieces took no interest in the purchase money mortgage, that going to the residuary legatee: McNaughton v. McNaughton, 34 N. Y. 201.

Generally, where an option is given and not exercised till after the death of the testator, the proceeds are treated as personalty: Lawes v. Bennett, 1 Cox, 167, 1 R. P. 10. Where the intention, however, is otherwise manifested, a different rule prevails: In re Pyle, 13 Rep. 396. In that case the decedent devised real estate, subsequently made a codicil confirming the will, and on the same day executed a lease of the realty, giving the lessee an option to purchase, which was exercised after the testator's death. This was held a sufficient indication of intention that the money should go the same way as the land, and that the specific legatee was entitled to it.

Where the property was sold, and the will provided for sale thereof, and distribution of the proceeds, and no ademption occurred, see Connecticut Trust etc. Co. v. Chase (Conn.), 55 Atl. 171.

Where the real estate is sold under condemnation proceedings, the proceeds thereof become personal property, the same as in the case of a voluntary sale, and the devisee is not entitled thereto: Ametrano v. Downs, 170 N. Y. 388, 88 Am. St. Rep. 671, 63 N. E. 340, affirming 62 App. Div. 405, 70 N. Y. S. 833.

As to the appointment of a power working an ademption, see Gale v. Gale, 21 Beav. 349; In re Dowsett (1901), 1 Ch. 393, 70 L. J. Ch. 149.

Bequest of Proceeds.—Where the proceeds of a bond and mortgage are specifically given, it is a specific legacy; but not where a certain sum, to be paid out of the proceeds of a bond and mortgage, is given. So if the legacy is specific, the proceeds must exist in some form at the testator's death, and when any part of them has become used in the payment of debts or otherwise, so as to have lost their sepa-

rate identity, ademption pro tanto occurs: Gardner v. Printup, 2 Barb. (N. Y.) 83.

In Nooe v. Vannoy, 59 N. C. (6 Jones Eq.) 185, the court said: "As the proceeds of the sale of the property are given, it follows that if such a part thereof as is specified can be traced out and identified, at the time of the death of the testator, the legacy will take effect, and there will be no ademption, or only a partial one. The distinction between the gift of the property itself and a gift of the value of the property, or the proceeds of the sale of property is well settled: Pulsford v. Hunter, 3 Bro. C. C. 416; 1 Roper on Legacies, 246, where it is said: 'The last class of cases to be noticed as not falling within the general rule of ademption is where the terms of the bequest are so comprehensive as to include within their compass the fund specifically bequeathed, although it has undergone considerable alteration.' He illustrates the exception by supposing the value of certain notes and cash in the hands of B., to be given to C., and afterward the testator changes the notes and cash, by an investment, into exchequer bills, bonds or mortgages, which are placed in the hands of B., the exchequer bills, bonds or mortgages will pass, because they answer the specification of the fund in the will." See the distinction made between this case and Starbuck v. Starbuck, 93 N. C. 183, where the money was given and subsequently reinvested.

Change in Subject of Bequest.—An essential change in the thing specifically bequeathed works an ademption, and it therefore becomes necessary to determine what is an essential change.

Where notes, secured by mortgage, were bequeathed, which notes the testator surrendered, and took a reconveyance of the property for which they were given; and afterward sold the same property to another and took notes for it that were unpaid when he died, the legacy was held adeemed on account of the change: Tolman v. Tolman, 85 Me. 317, 27 Atl. 184. But where a testator, after bequeathing by will a certain claim against his debtor, exchanges with the latter the original evidence of his debt for his bond, the legacy is not revoked by implication under the Louisiana statute, the only modification being in the form of the evidence, the obligation remaining: Irwin's Succession, 33 La. Ann. 63. So where notes bequeathed were signed by two persons, one of whom the testator, before his death, released, and took new notes for the debt from the other, signed, secured by mortgage, no ademption resulted: Ford v. Ford, 23 N. H. 212.

Change as to Deposit in Bank.—In Prendergast v. Walsh, 58 N. J. Eq. 149, 42 Atl. 1049, a testatrix by will gave her money in certain banks to her sisters; before her death she drew it out and deposited it in another, where it remained till her decease. Although a specific legacy, the court held it not to have been adeemed, saying: "It is undoubtedly true that a general deposit in a bank creates a debt from the bank to the depositor. The bank is not bound to preserve the

money in specie, and it can be paid by the delivery of any money of equal amount. It is also true that a testamentary gift of a debt due to the testator is adeemed, if the debt is paid to the testator during his life. But it seems to me that, while such a deposit creates a debt, yet the gift of the amount of such deposit, as money or cash, differs from the gifts of an ordinary debt. It will pass by a gift of all the testator's ready money or cash." Sir Lancelot Shadwell, in the case of Parker v. Marchant, 1 Younge & C. C. 290-307, affirmed by Lord Chancellor Lyndhurst on appeal (1 Phill. Ch. 356), said: "Undoubtedly, an ordinary balance in the banker's hands is, in a sense, a debt due from him. Certainly, he may be sued for the debt. But it may be equally true that, in a sense, it is ready money. . . . . The term 'debt,' however correct, is not colloquially or familiarly applied to the balance at a banking-house. No man talks of his banker being in debt to him. Men, speaking of such a subject, say that they have so much in their banker's hands. A mode of expression indicating virtual possession, rather than a right to which the law applies the term 'chose in action.' . . . . In the present case the intention of the testatrix was not to give a mere thing in action. What she gave was the money in the banks—using the words in their popular sense. It is true that the money did not exist in specie, and would not again be delivered to her or her personal representatives in specie; yet, having put money there, which was still there as money, liable to be drawn as money, so she designated it as money. The thing she bequeathed she drew from the bank. It remained the identical thing bequeathed until disposed of in some way by her. . . . . If the money remained practically the same money, then the removal of it from the place of its deposit did not amount to an ademption. The place of deposit was merely used as descriptive of the thing bequeathed." But see Bell's Estate, 8 Pa. Co. Ct. Rep. 454.

Change as to Place or Locality.—Some confusion has arisen among the authorities as to the effect of removing goods bequeathed as at a particular place. Where the place is merely descriptive, removal to another location is immaterial: In re Tillinghast, 23 R. I. 121, 49 Atl. 634; Cunningham v. Ross, 2 Cas. t. Lee, 272. The difficulty arises in determining whether the place, in each particular instance, is descriptive. In Norris v. Norris, 2 Coll. 719, 10 Jur. 629, there was a bequest of furniture in a certain house; subsequently the testator moved, took that furniture with him, and bought more. It was held that the bequest was not adeemed, being a general gift. So where a testator gave all his plate and linen in his house at S. to his wife, he having but one set of plate and linen, which was usually removed with the family from house to house, and at the time of his death it happened to be at B., the country house, it was held to pass to his wife: Land v. Devaynes, 4 Bro. C. C. 537.

In Houlding v. Cross, 1 Jur., N. S., 250, a testator bequeathed all the furniture which should be in a certain house at his death, in

which he lived when the will was made; subsequently he moved, taking the furniture with him, and it was held to be adeemed: See to the same effect, Blagrove v. Coore, 27 Beav. 138; Green v. Symonds, 1 Bro. C. C. 129, note; Colleton v. Garth, 6 Sim. 19; Heseltine v. Heseltine, 3 Madd. 276. In Shaftsbury v. Shaftsbury, 2 Vern. 747, after the bequest of the goods in a certain house, the steward of the testator, in the latter's absence, removed them to another house, on account of the expiration of the lease. It was considered an ademption, the testator having approved the move; but, if it had been fraudulently done, to defeat the legacy, or by tortious act with the testator's privity, the legacy would have passed. See, generally, Domvile v. Taylor, 32 Beav. 604.

The removal of goods for a necessary purpose is not an ademption of a specific legacy: Moore v. Moore, 1 Bro. C. C. 127; as where removed from a ship if likely to founder, or a burning house: Chapman v. Hart, 1 Ves. 271, in which case a distinction is made between a legacy of goods on board a ship and in a house.

If the removal be temporary, the goods pass, as the intent is to return them, but not if taken permanently: Spencer v. Spencer, 21 Beav. 548. Intention, however, alone is not enough. In Beaufort v. Dundonald, 2 Vern. 739, one devised furniture in his house at D. and ordered goods to be carried from London thereto, making arrangements with carriers for that purpose. Before the goods were removed he died, and they were held not to pass by will, the mere intention to remove them not being sufficient.

Where a testator devised goods in a certain house at his death, and the tenant in possession thereof refused to allow him to place certain goods there, he wishing to do so, and in consequence of such refusal he stored them in farm buildings belonging to him, where they were at his death, there was no ademption: Rawlinson v. Rawlinson, L. R. 3 Ch. D. 302.

The Renewal of a Lease Devised works an ademption, for it is the old lease alone which is given, and that is gone: Updike v. Thornton, 100 Ill. 406; Colegrave v. Manby, 6 Madd. 72; Home v. Medcraft, 1 Bro. C. C. 261; Abney v. Miller, 2 Atk. 593. It is, however, a question of intention, and if the testator so desires he may dispose of a future interest in a chattel real: Slatter v. Noton, 16 Ves. Jr. 197; Colegrave v. Manby, 6 Madd. 72; Carte v. Carte, 3 Atk. 174. In Digby v. Legard, Dick. 500, the renewal of leases for lives was held a revocation as to them, but not as to leases for years, they being personalty. In Porter v. Smith, 16 Sim. 251, an ademption was held to be worked by the testator taking an assignment of the original lease bequeathed: See, also, Rudstone v. Anderson, 2 Ves. 418.

Where there was a general bequest of "all my leasehold estates," and the testator afterward surrendered and took a new lease, a revocation resulted: James v. Dean, 11 Ves. Jr. 383; but the court there held it depended upon the context of the whole will, whether the

general doctrine should be applied; and in Stirling v. Lydiard, 3 Atk. 199, a bequest of "all and singular my leasehold estates" was held to be a general legacy, and the subsequent renewal of a lease passed.

Demonstrative Legacies.—While a specific legacy is subject to ademption by failure of the thing bequeathed to be in esse at the time of the testator's death, neither general nor demonstrative legacies are so subject thereto. It therefore becomes of the highest importance to distinguish between these kinds of bequests. "A demonstrative legacy is a legacy of quantity, with a particular fund pointed out for its satisfaction, and it is so far general and differs so much from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet is so far specific that it is not liable to abate with general legacies upon a deficiency of assets: 2 Lomax on Executors, 70; 2 Williams on Executors, 1252; 2 Redfield on Wills, 137; Corbin v. Mills, 19 Gratt. (Va.) 438; 3 Pomeroy's Equity Jurisprudence, sec. 1133"; Morris v. Garland, 78 Va. 215. And see Roquet v. Eldridge, 118 Ind. 147, 20 N. E. 733. So where a testator bequeathed to his daughter a certain sum to be paid out of the profits of certain real estate, it was held a demonstrative legacy, and a subsequent disposition of that estate did not extinguish the legacy, which was then payable out of the general assets: Welch's Appeal, 28 Pa. 363. And a legacy to be paid out of the testator's life insurance is payable out of the general assets of the estate if the insurance is not collected, being demonstrative: Byrne v. Hume, 86 Mich. 546, 49 N. W. 576. But where the legacy is so connected with the fund out of which it is payable that the legacy and fund are the same, it is specific: Smith's Appeal, 103 Pa. 559.

A bequest of "$2,000 of the S. W.," by a person owning $10,000 worth of bonds known by that designation is demonstrative, and not adeemed by the payment thereof to the testator: Ives v. Canby, 48 Fed. 718. See, also, Mahoney v. Holt, 19 R. I. 660, 36 Atl. 1; Botkin v. Boykin, 21 S. C. 513; Morriss v. Garland, 78 Va. 215. The collection of certain claims against the government, bequeathed by will, was held to adeem the legacy, if paid during the testator's lifetime, being considered specific, and not demonstrative: Georgia Infirmary Co. v. Jones, 37 Fed. 750, making the distinction before referred to, as to the gift out of a fund and the identity of the gift with the fund.

A bequest of "the sum of $1,200 and interest on the same contained in a bond and mortgage," described in the will, with a subsequent provision that the same is given the legatee for life, with a limitation over, is not a specific, but a demonstrative, legacy, and is not adeemed by the assignment or extinction of the bond and mortgage in the lifetime of the testator: Giddings v. Seward, 16 N. Y. 365.

Construction by Court.—In construing a legacy, courts lean in favor of a general legacy. Where they are clearly defined, they will be given their legal effect: Ludlam's Estate, 13 Pa. 188; but, unless clearly so intended, will not be so construed: Corbin v. Mills, 19 Gratt. (Va.) 438. The reason for thus leaning against specific legacies is stated as follows, in Kunkel v. Macgill, 56 Md. 120: "If the legacy is to be considered specific, then in the event of the testator's parting with the thing or property bequeathed, or if from any cause it should be lost or destroyed, the legacy fails. Then again, such legacies are not liable to abatement with general legacies, nor are they liable to contribution toward the payment of debts. And hence the inclination on the part of the courts to construe legacies as general, unless a contrary intention plainly appears."

Mortgage as Revocation of Devise.—A devise is not revoked by a mortgage to the devisee: Baxter v. Dyer, 5 Ves. Jr. 656, overruling Harkness v. Bayley, 1 Prec. Ch. 514. In McTaggart v. Thompson, 14 Pa. 149, however, the mortgage of an estate devised was considered a revocation pro tanto.

A mortgage executed by a testator after making his will does not manifest an intention to revoke, unless the will or the instrument creating the charge shows such to have been his intention, under an Alabama statute, and any interest or right of redemption or other right remaining in the testator at his death would fall within the operation of the bequest: Stubbs v. Houston, 33 Ala. 555.

In Yardley v. Holland, L. R. 20 Eq. 428, the court held that the purchase by the testator of the equity of redemption revoked the devise by his will, not only of the beneficial interest, but of the legal interest in the mortgaged property.

Effect of Codicil on Adeemed Legacies.—The authorities uniformly hold that the confirmation of a will by a codicil does not set up a legacy which has been adeemed since the execution of the will: Ware v. People, 19 Ill. App. 196; Howze v. Mallett, 4 Jones Eq. (N. C.) 194; Alsop's Appeal, 9 Pa. 374; Garrett's Appeal, 15 Pa. 212; Montague v. Montague, 15 Beav. 565; Cowper v. Mantell, 22 Beav. 223; Powys v. Mansfield, 3 Mylne & C. 359; Booker v. Allen, 2 Russ. & M. 270. See, also, Sidney v. Sidney, L. R. 17 Eq. 65.

In Hopwood v. Hopwood, 22 Beav. 488, a testator, in 1829, directed his trustees to raise £5,000 for his son; in 1835, on his son's marriage, he covenanted to pay £5,000 to the trustees of his son's settlement. In 1850, after referring to the legacy of £5,000 to his son, he directed his trustees to raise a further sum of £7,000. It was held that the first bequest was not adeemed, and that all three were payable; and that it was a question of intention in making the codicil.

As to a codicil rebutting the presumption of ademption, see De Groff v. Terpenning, 14 Hun (N. Y.), 301.

Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy: Hertford v. Lowther, 7 Beav. 107.

IN THE MATTER OF THE ESTATE OF GEORGE W. GRANNISS, DECEASED.

[No. 24,305; decided October 9, 1902.]

Wills—Constructions Which Lead to Intestacy.—Such an interpretation should, if reasonably possible, be placed upon the provisions of a will as will prevent intestacy, total or partial. Ordinarily the presumption is that the testator designed to dispose of his entire estate, and the instrument will be so construed, unless the contrary is clearly shown by its terms or by evidence.

Wills are to be Liberally Construed so as to Effectuate the Intention of the testator, and it is the duty of courts to search for a construction that will carry such intention into effect.

Wills.—A Devise or Bequest of the "Residue" passes all the property which the testator was entitled to devise or bequeath at the time of his death not otherwise effectually disposed of by his will, unless it is manifest from the context or from the provisions of the will that the testator used the word in some more restricted sense.

Wills—Residuary Clause—Declaration that Property is Separate.—A will making certain bequests, and giving all the residue of the property to the daughter of the testator, passes to her all the property which he was entitled to dispose of at the time of his death and not otherwise effectually devised or bequeathed; and such residuary gift is not affected by a subsequent declaration in the will that all the estate therein devised is separate property.

Community Property.—Where the Only Earnings of the Testator, after his second marriage, were $900 during a period of eight years, while the appraised value of his estate was over $88,000, it was in this case held, following the rule that there is no presumption that the testator supported the family out of his separate estate and preserved the community funds intact, and considering the smallness of the sum earned as compared with the value of the whole estate, that the entire estate was separate property.

Community Property.—The Sums Gained by Two Investments in this case of a portion of the testator's separate property in Pacific Mail stock were held not "earnings," but belonged to the category of "rents, issues and profits," and formed a part of his separate property.

Wills—Rules of Interpretation.—Many of the rules which courts have adopted as guides in ascertaining the intention of testators assume such intention from words and phrases, where often it is very doubtful whether they were used with any intelligent application of the legal meaning given to them. But these rules have become, in many cases, rules of property, and work out in a majority of instances results as nearly just as may be. It is better to adhere to them in their integrity than to permit exceptions upon slight grounds.

Wills—Construction of Residuary Clauses.—The rule that, in the interpretation of wills, residuary clauses are to be given a broad rather than a narrow interpretation, has a stronger foundation in natural reason than have some of the other rules adopted by courts.

Application for final distribution.

F. S. Brittain, for Mrs. Elizabeth I. Granniss, widow.

Henry H. Reid, for Harriet G. Center, executrix.

COFFEY, J. This application is submitted upon the records and an agreed statement of facts in the terms of a stipulation that (1) said decedent died in the city and county of San Francisco, state of California, on the twenty-sixth day of January, 1901, and was at the time of his death a resident of said city and county; (2) he left him surviving his widow, Elizabeth I. Granniss, and his only child, Harriet G. Center; (3) his last will and testament, dated January 8, 1894, and a codicil thereto dated August 20, 1900, were duly admitted to probate by this court on February 18, 1901; (4) that the first wife of decedent, mentioned in his will dated January 8, 1894, died on the twelfth day of September, 1890; (5) he was married to said Elizabeth I. Granniss on December 27, 1892; (6) on the said twelfth of September, 1890, said decedent was the owner of an unimproved and unproductive lot of land situated on the south side of Vallejo street, between Leavenworth and Hyde streets, having a frontage of one hundred and thirty-seven and one-half feet, with a uniform depth of one hundred and thirty-seven and one-half feet, the assessed valuation of which was $4,175, for the fiscal year 1890-91, and $5,840 for the fiscal year 1900-01; also an undivided one-half interest in a lot of land, with the improvements thereon, situated on the southwest corner of Front and

Merchant streets, in said city and county of San Francisco, having a frontage of twenty-six and one-half feet on Front street, the assessed valuation of which was $5,685 for the fiscal year 1890-91, and $5,350 for the fiscal year 1900-01, the gross rental for which for the past twenty months has been and now is $50 per month; also lots 1 to 14, both inclusive, of Stratton survey in the city of Alameda, county of Alameda, state of California, of the assessed valuation of $50; the promissory note of the Pacific Improvement Company for the sum of $100,000; the sum of $14,152.21 in money, besides personal property, such as household and office furniture and jewelry, worth about $1,000; (7) of said property he gave to his daughter, Harriet G. Center, the real estate above mentioned situated on Front street and Vallejo street in said city and county, by deed dated December 8, 1892, and recorded on the same day; that on August 20, 1892, he gave to said Harriet G. Center $15,000 toward constructing and furnishing a house for her, and on December 31, 1892, the further sum of $5,000 for the completion of the same; (8) subsequent to September 12, 1890, and up to December 27, 1892, the gross income of decedent amounted to $27,400, consisting of $12,500 interest upon said $100,000, $2,700 rent of said Front street property, being at the rate of $100 per month, gross rental; $2,100 for services to General George W. Cullum, to wit, $100 per month up to and including May, 1892; $100 for services to Frederick Billings, and a legacy of $10,000 from the estate of Frederick Billings, deceased, on December 16, 1890; (9) from December 27, 1892, until his death, the gross income of decedent was $157,949.66, as follows: From the trustees of the estate of Frederick Billings, deceased, for services, the sum of $912.50, to wit: $100 each year, for the years 1893-98; $150 a year for the years 1899-1900, and $12.50 for the month of January, 1901; interest on said Pacific Improvement Company's note to September 25, 1897, $28,763.88; the principal of said note, $100,000 on September 25, 1897; interest of fifty $1,000 bonds of the Northern California Railway Company, and twenty-five $1,000 Contra Costa Water Company bonds, amounting to $9,375; besides the sum of $5,000, a legacy from the estate of George W. Cullum, deceased ($3,500 of which he received May 2, 1893, and $1,500 on May 2, 1894); the sum of $1,440.35

profit from the purchase of one thousand shares of Pacific Mail Steamship Company's stock on October 19, 1893, for $15,434.65, and the sale thereof on November 22, 1893, for $16,875, and $5,457.93 profit from the purchase of one thousand shares of Pacific Mail Steamship Company's stock on January 26, 1894, for $16,929.57, and the sale thereof on April 2, 1895, for $22,387.50; (10) on February 6, 1896, decedent purchased seventeen Los Angeles Light Company bonds for $17,170, and on February 11, 1896, gave the same to said Harriet G. Center, and on October 14, 1897, he purchased eight Los Angeles Light Company bonds for $8,020, and on October 16, 1897, gave the same to said Harriet G. Center; (11) on September 8, 1898, decedent purchased fifty $1,000 Northern California Railway bonds, bearing interest at five per cent per annum, payable semi-annually on December 1st and June 1st of each year, for $47,500, and between October 8 and October 18, 1898, he purchased twenty-five $1,000 Contra Costa Water Company bonds for $25,205, being the same bonds of which he died possessed and from which he received interest as hereinbefore stated; (12) on the twenty-fifth day of September, 1887, decedent deposited in his general account in the Bank of California, there being then a balance to his credit, $7,425, the sum of $101,500 derived from principal and interest of said Pacific Improvement Company note, and thereafter, between the said twenty-fifth day of September, 1897, and the nineteenth day of October, 1898, he had at all times more than said sum of $7,425.44 to his credit in said deposit; (13) on said twenty-fifth day of September, 1897, decedent was indebted to the trustees of Frederick Billings, deceased, in the sum of $1,203.97, and to the New York Cancer Hospital, in the sum of $479.94, moneys had and received by him for their use; (14) subsequent to the said twenty-fifth day of September, 1897, the only deposit in bank made by decedent was on the third day of December, 1900, upon which last-named date he deposited in the Bank of California the sum of $1,250; (15) from the twenty-fifth day of September, 1897, to the first day of December, 1898, the expenditures of decedent amounted to $5,754.74, in addition to those for the purchase of eight Los Angeles Light Company bonds for $8,020 on October 14, 1897, fifty

Northern California Railway bonds for $47,500 on September 8, 1898, fourteen Contra Costa Water Company bonds for $14,140 on October 8, 1898, and eighteen Contra Costa Water bonds for $18,135 on October 18, 1898, hereinbefore mentioned; (16) at the date of his death decedent had to his credit on deposit in the Bank of California the sum of $3,903.16; in his box in the vaults of the California Safe Deposit Company $3,990 in gold coin of the United States, two certificates of deposit issued in his name by Wells, Fargo & Co.'s Bank, one for $1,550, dated January 14, 1898, and one for $1.250, dated December 2, 1898, besides $250 in gold coin at his residence in said city and county; (17) all of the property of said estate which came into the hands of said Harriet G. Center, as executrix aforesaid, is set forth in her final account herein, which was settled, approved and allowed by this court as presented, on April 11, 1902. The settlement of said account concluded neither party, as to the character of the property in the executrix's hands, as to whether or not it was the separate property of the decedent or the community property of the decedent and his second wife, nor whether it was or was not the community property of his first wife and himself; (18) said Elizabeth I. Granniss has received the bequests to her mentioned in the will of said decedent; (19) said decedent was engaged in no business from which he received any income except as hereinbefore set forth, to wit, from George W. Cullum and Frederick Billings, deceased; unless the purchase and sale of shares of Pacific Mail Steamship Company's stock herein mentioned be adjudged to be business.

THE WILL AND CODICIL.

"I, George W. Granniss, of the City and County of San Francisco, State of California, do hereby make, publish and declare this my last Will and Testament, as follows, to wit:

"*First.* I give unto my wife Elizabeth Ingargiola Granniss the sum of Twenty thousand dollars ($20,000), together with all the household furniture and personal property now contained in the dwelling No. 19 Hawthorne street, San Francisco, with the exception that my daughter hereinafter mentioned may select and possess the portraits of her Grand-

father, Grandmother, her Father in his youth, and any and all of the pictures painted by her Mother.

"*Second.* I give unto my daughter Harriet Granniss Center all of the rest, residue and remainder of my estate, both real and personal, and wherever situated.

"*Third.* I hereby appoint my said daughter Harriet Granniss Center the Executrix of this Will without bonds.

"*Fourth.* I solemnly declare that all of my estate herein devised is my separate property, and was the community property of my first wife and myself.

"In Witness Whereof I have set my hand to foregoing will which is all in my own handwriting, this 8th day of January, 1894.

"GEO. W. GRANNISS.

"The foregoing instrument, consisting of one page besides this, was, at the date thereof, by the said George W. Granniss signed and published as and declared to be his last Will and Testament, in presence of us, who at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

"HENRY H. REID, San Francisco, Cala.
"FRANCIS M. WARD, Alameda, Cal.

"To the Executrix of my Estate:

"It is my desire and direction, that all my jewelry, my watch, swords, canes and personal effects of that nature be given to my Grandson, Alexander Granniss Center, in the event of my death.

"G. W. GRANNISS.

"San Francisco, August 20, 1900."

In Le Breton v. Cook, 107 Cal. 416, the supreme court used language that may be appropriated to the facts and conditions of the case at bar, which has been argued by counsel with great learning and research, and with an abundance of authorities cited and reviewed on each side, and with regard to these citations we may repeat what was quoted from Rosenberg v. Frank, 58 Cal. 387, 411: "The case before us is one of interpreting the meaning of a written document, and decided cases afford but little aid in arriving at a correct interpretation. We hazard nothing in saying that this

is in accordance with the universal experience of gentlemen learned in the law, who have been frequently called on to employ their faculties in the solution of such questions. The good sense of what was said by Washington, J., in 1803, in Lambert's Lessee v. Paine, 3 Cranch, 131, will be generally acknowledged: 'Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike.'" And the court then proceeds to say that "the general principles which must control in the determination of the question here presented are well settled. Constructions which lead to intestacy, total or partial, are not favored; and, therefore, such an interpretation should, if reasonably possible, be placed upon the provisions of the will as will prevent that result. Especially should this be done where the will evinces an intention on the part of the testator to dispose of his whole estate. A devise or bequest of the 'residue' of the testator's property therefore passes all the property which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will: Civ. Code, secs. 1332, 1333. Where, however, it is manifest from the context or from the provisions of the will that the testator used the word in some more restricted sense, it will be given the meaning in which it is clear that the testator used it."

In this case the widow concedes that if the second clause of the will stood alone, there would be no controversy as to the nature and extent of the daughter's title; but she asserts that it does not stand alone, and does not contain any expressions which necessarily anticipate or limit any subsequent provisions affecting it (Colton v. Colton, 127 U. S. 300-302), for it is qualified and defined by the fourth clause, wherein the testator solemnly declares that all his estate therein devised was the community property of his first wife and himself.

The burden of the widow's contention stated by herself is that, although the second clause, considered independently of the other provisions, gives the daughter the title to the residuum of the estate, yet reading the second and fourth clauses together, it is clear that such residuum is of that part

of the testator's separate estate which *was* the community property of his first wife and himself.

In a New Jersey case—Miller v. Worrall, 48 Atl. 586—cited by the widow, Lord Mansfield's statement of the rule is recited that the intention of the testator is to be collected from all the parts of the will, and it must be clear, or else the heir at law shall not be disinherited.

As was said by this court in the Estate of Theresa Fair, decided November 19, 1892, it should seem unnecessary to quote the commonplaces of construction in this connection, as, for example, that the interpretation of a will must depend upon the intention of a testator, to be ascertained from a full view of everything contained within the "four corners" of the instrument; or, that 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; or, that an intent inferable from the language of a particular clause may be qualified or changed by other portions of the will evincing a different intent, for the substance and intent, rather than words, are to control.

The intention of the testatrix is the first and great object of inquiry, and to this object technical rules to a certain extent are made subservient.

It is a cardinal rule of construction that effect must be given, if possible, to every part of a will.

There is, perhaps, no rule of construction of wider application to wills, or which oftener requires to be acted upon, than that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.

The general principles, discussed at length by respective counsel, are evident enough; the difficulty is, as remarked by our own supreme court, in applying them to a given case. The object 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, its duty is to execute that intent.

In the Estate of Young, 123 Cal. 337, upon which both counsel rely, this sentiment is syllabized in the statement that the courts have leaned to such construction of a will as

shall avoid intestacy; but such construction cannot be permitted where the terms of a will fail to make a legal devise; and if the legal effect of the expressed intent of the testator is intestacy, he must be presumed to have intended that result. The intention of the testator to be sought after is not that merely which existed in his mind, but that which is expressed in the language of the will.

Applying these familiar principles of construction to the case at bar, what do we discover in this document to manifest the intention of the testator? Did he intend to die intestate as to part of his property? Is his intention obvious to dispose of all his estate?

The daughter contends that having been named in the second clause as the residuary legatee, she is entitled to the whole estate after the payment of debts and specific legacies; but, says the widow, this contention, if approved by the court, would render nugatory the fourth clause, for the will in that event would be given exactly the same effect it would have had if the fourth clause had never been written. Why, then, did he write the fourth clause? Why, in so serious a matter, did he contrive this solemn declaration of the status of the estate therein devised.

It is the duty of the court to harmonize the various parts of the instrument, the rule being that all the parts shall be construed in relation to each other, so as, if possible, to form one consistent whole, but where several parts are absolutely irreconcilable, the latter should prevail as the latest expression of the testator's desire; still this rule is not to be resorted to except in cases where the repugnance is clear, so that one of the parts of the will must of necessity be rejected; for they are to be reconciled, if they possibly may be by reasonable construction.

Ordinarily the presumption is that the testator designed to dispose of his entire estate, and the instrument will be so construed, unless the contrary is clearly shown by its terms or by evidence, and it is laid down by the courts that any reasonable construction will be adopted so as to effect this presumed purpose; for it has been said, that the idea of anyone premeditating to die testate as to a portion of his property and intestate as to another is so unusual as to jus-

tify almost any construction to avoid it; and no such intention will be imputed when the language can fairly be construed otherwise, for wills are to be liberally construed so as to effectuate the intention of the testator, and it is the duty of courts to search for a construction that will carry it into effect.

It is true that this search should not seek the secret workings of the mind of the testator, and that, as was said in the state supreme court in the Estate of Young, it is not what he meant, but what his words mean, but it is also true, as has been said by the United States supreme court, that in the construction of wills it may be doubted if there be any source of instruction superior to the application of natural reasoning to the terms of the instrument, under the light which may be thrown upon the intent of the testator by the circumstances of its execution and connecting the parties and the property devised with the testator and with the instrument.

What the circumstances in this case were may be seen by an examination of the stipulated statement of facts prefaced to this opinion. I am satisfied that the conclusion of the supreme court in the Cudworth case could be applied with equal force to these facts and circumstances, and that what the testator had in mind there was very much the same as here in respect to the declaration made as to the character of his property.

It may well be doubted whether decedent left any property which was the community of himself and his second wife. In the nineteenth and last paragraph of the stipulation it was agreed that he was engaged in no business from which he received any income except as thereinbefore set forth, namely, from George W. Cullum and Frederick Billings in their lifetime and from the estate of Frederick Billings, deceased, unless the purchase and sale of shares of P. M. S. S. Co.'s stock herein mentioned be adjudged to be business.

The widow claims that by the terms of the stipulation there is an admission on the part of the daughter that there was community property of the second marriage, in this, that decedent earned the sum of $912.50 and made profits upon two speculations in stock of the steamship company, one of

$1,440.35, and the other of $5,457.93, and it is maintained by the widow that these sums were the result of his exercise of his business ability in which she had a community interest, and were not mere profits upon his separate estate, even though it had been shown that such estate only was invested; and she insists that there is no proof that some part of his admitted earnings did not enter into the first speculation and no evidence as to what part of the profits of that speculation was community and what part separate property, and, therefore, the whole profit must be deemed community.

In support of this proposition, the widow cites, among other cases, Lewis v. Lewis, 18 Cal. 654, which citation her adversary asserts is no authority, as the law was changed shortly after the decision in that case, to which assertion the widow replies that this court is not advised of any legislative act altering the law of community property in California, and certainly it has been held uniformly by our supreme court that the burden is upon the contestant to prove by clear and convincing evidence that property acquired during marriage is separate.

In view of this controversy, it may be worth while to have recourse to a monograph by the late Professor Pomeroy in the West Coast Reporter, volume 4, pages 194, 195, in which he undertakes to comment on the case cited:

In Lewis v. Lewis, 18 Cal. 654, the husband married in 1854, then possessed of separate property in cattle, horses and money to the amount of $20,000. He died in 1859 possessing cattle, horses and money valued at $40,000. His sole business at his marriage and down to the time of his death was that of dealing in such stock. Of the stock owned by him at the time of his death, a portion, worth about $4,000, consisted of certain cattle which he owned when married; the remainder consisted of the increase of stock owned at the time of his marriage, and of other stock bought with the proceeds of the sale of his original stock, or with the proceeds of the sale of the other stock by which the original stock had been replaced. The court held, as the deceased was engaged in no other business, the fair inference was that the community property was the difference between the original value of the property owned by him at his marriage and the

value of the property possessed by him at the time of his death, after deducting the amount of the community debts. In other words, all the increase made upon his separate property as capital was declared to be community property.

This increase was held to be community property, because under a statute, existing at that time, "all the rents, issues and profits" of separate property were declared to become community property. But this provision of the statute itself had been unconstitutional and void, so far as it affected the "rents, issues and profits" of the wife's separate estate, as early as the case of George v. Ransom. If the decision in the case of Lewis v. Lewis is based upon the notion that the rents, issues and profits of the husband's separate estate became community property, under the then existing statute, it certainly would not be law under the code, which expressly declares that the "rents, issues and profits" of the husband's separate estate continue to be his separate property.

In the Cudworth case counsel for appellant, the son, commenting on Lewis v. Lewis, said that it was decided under the statute of 1850, which made the rents, issues and profits of separate property community, which statute was declared unconstitutional by the supreme court, and our laws were accordingly changed to confer the rents, issues and profits of separate property upon its owner: See Supreme Court Records, volume 2172, pages 207, 208. The change in the law came with the codes. The law as it now stands is to be found in the constitution, article 20, section 8, which provides that all property, real and personal, owned by either husband or wife before marriage and that acquired by either of them afterward by gift, devise or descent, shall be their separate property. This was in substance, so far as it goes, the old article 11, section 14, of the constitution of 1849, dealt with by Mr. Justice Baldwin in George v. Ransom, in construing the act of 1850, regulating the relation of husband and wife.

Section 163 of the Civil Code furnishes the appropriate legislation that all property owned by the husband before marriage and that acquired after by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property, and section 687 of the same code provides that community property is property acquired by husband

and wife, or either, during marriage, when not acquired as the separate property of either.

Decedent's will is short and simple in form: First, he gives to his wife $20,000, together with all the household furniture and other personal property in their dwelling, excepting certain family portraits and pictures to be selected by his daughter. Second, he gives to his daughter all of the rest, residue and remainder of his estate, both real and personal, and wherever situated. Fourth, he solemnly declares that all his estate therein devised *is* his separate property and *was* the community property of his first wife and himself.

This document was dated January 8, 1894, and was republished in legal effect by the codicil of date August 20, 1900.

Reading the will as a whole, it is clear to my mind that he intended to limit the share of the widow to the legacy specified in the first paragraph, and that in writing the second paragraph he designed to donate all the residue of his estate to his daughter, making her executrix, without bonds, in the third paragraph, and in the fourth he undertook to give his conception of the character of his entire estate. Whatever the fact might be, his idea was at the date of the will and of the codicil that the entire estate devised or disposed of or given to the persons named was his separate property and the product of the community property of his first wife and himself, and it does not seem to me that this is a strained or artificial interpretation of his language, but a sensible construction of its import and effect, without any ingenious conjecture whether the testator meant more or not.

This court does not think decedent intended to die intestate as to any part of his property, and does think that his intention is obvious to dispose of his entire estate.

In conclusion it seems to me that the final words of Judge Andrews in the Lamb case may apply here: "We have been impressed in this case with the difficulty which often attends the search for the intention of a testator. Many of the rules which courts have adopted as guides in ascertaining the intention of testators assume such intention from words and phrases, where often it is very doubtful whether they were used with any intelligent application of the legal meaning

given to them. But these rules have become, in many cases, rules of property, and work out in the majority of instances results as nearly just as may be. It is better to adhere to them in their integrity than to permit exceptions upon slight grounds. The rule that in the interpretation of wills, residuary clauses are to be given a broad rather than a narrow interpretation, has a stronger foundation in natural reason than have some of the other rules adopted by courts."

In the case at bar this court is of the opinion that there is not found in the will so clear an indication that the testator intended a restricted meaning to the residuary clause as to justify its limitation in the manner contended for by the widow.

The prayer of the daughter is granted.

The Case of Estate of Grannis was before the supreme court of California in 142 Cal. 1, 75 Pac. 324.

IN THE MATTER OF THE ESTATE OF ANDREW NELSON, DECEASED.

[No. 24,184; decided June 9, 1903.]

Will.—In the Interpretation of a Will No Recourse to Technical Rules is necessary or permissible, if the intention of the testator clearly appears from the provisions of the instrument.

Will—Life Estate—Power of Disposition.—Where a will gives an estate for life to the widow, with remainder over, a power of disposition given her by another clause in the will does not enlarge her estate into a fee and destroy the rights of the remaindermen.

Campbell, Metson & Campbell and J. C. Campbell, for the petitioner.

Bishop, Wheeler & Hoefler and Charles S. Wheeler, for certain devisees.

COFFEY, J. Andrew Nelson died in San Francisco on January 1, 1901, leaving a will which was admitted to probate on January 23, 1901, and the executrix named therein

was on that date appointed and immediately qualified and entered upon the discharge of her duties. All the obligations of her office having been fulfilled and the administration of the estate brought to the point of final settlement and distribution, the executrix prays that the property may be distributed to those entitled thereto; claiming, however, that a certain clause in the will is void and that she is entitled to the entire estate.

The clause sought to be invalidated is the one marked "Thirdly," concerning which the petitioner avers that she is advised and believes that the limitation over in favor of Johan Nelson, John Leale, and the nephews and nieces of testator, is void, and that she is entitled to have distributed to herself, absolutely and without condition, limitation, or reservation, the whole of the estate of said decedent.

The application of the widow executrix is opposed by Johan Nelson and the nephews and nieces of testator on the ground that said limitation is in law and estate for life to the widow with remainder to them.

It is contended on behalf of the widow that under and by the terms of the will she takes an absolute fee, and that the subsequent attempt at limitation is repugnant and void, because she is the first taker with an absolute right to dispose of the property in her own unlimited discretion, and therefore any estate over is invalid as being inconsistent with the first devise, which was coupled with full power to dispose of the life estate so conferred in every way, except that she is not affirmatively empowered to deal with it testamentarily; the power of sale is affirmative and absolute, and it is not restricted to a certain event or for a specific purpose. It is claimed for the widow that the authorities sustain the proposition that where an absolute power of disposal is given to the first devisee, a remainder is void for repugnancy. Such full dominion in the devisee or legatee is said to be inconsistent with and destructive of all other rights; and this principle of the common law, it is asserted, comports with the Civil Code section which treats of the subject matter. In a case where the question was whether the testator's widow might convey in fee simple a portion of his real estate, the court entertained no doubt of her power to do so,

because the gift was of a life estate, with a full power of disposition, both by deed and will, over the entire property, at the pleasure of the devisee, without limitation or restriction as to the time, mode or purposes of the execution of the power. In such a case, the courts and authorities seem to hold that the life estate and unlimited power of disposition over the remainder coalesce and form an estate in fee, and that the devise over is void because inconsistent with the unrestricted power vested in the first taker. This was the doctrine announced in Hale v. Marsh, 100 Mass. 468, which cites numerous cases in support of that principle, including Ramsdell v. Ramsdell, 21 Me. 288, in which the court said that the rule to be extracted from these cases would seem to be that where a life estate only is clearly given to the first taker, with an express power on a certain event or for a certain purpose to dispose of the property, the life estate is not by such power enlarged to a fee or absolute right, and the devise over will be good. It is contended, however, by the executrix that this statement in the Ramsdell case is an exception to the general rule and does not apply to the Nelson will, in which the power of sale is absolute, and not restricted to a certain event or for a certain purpose.

On the other hand, it is maintained that the rules relied upon by the widow have been modified by the statutes of this state, and that consequently the cases cited have no binding force wherever the code system prevails. For this contention dependence is placed upon sections 697 and 740 of the Civil Code, the first of which declares that a future interest is not void merely because of the improbability of the contingency on which it is limited to take effect, and the second provides that a future interest may be defeated in any manner or by any act or means which the party creating such interest authorized in the creation thereof; and no future interest thus liable to be defeated shall be on that ground adjudged void in its creation. As to a case cited by the widow—Estate of Inwood, No. 24,925, in this department—respondents assert that it is not a precedent, as it was not well considered, and is not to be taken as an authority, and is directly in the teeth of adjudicated cases under the code; it may have been correct at common law, but not un-

der the sections cited of our Civil Code; and it is insisted that the law of California and of New York to-day is in derogation of the common law.

The retort to this insistence is, that the common law has not been altered in relation to these matters, and that the rules already stated in behalf of the widow have been crystallized in the code. Here is a sharp divergence of opinion, which renders necessary some examination of the subjects to resolve the question aright. In this pursuit we are referred to an interesting opinion expository of the common law reported in 55 Maryland, the matter germane to this point being found on page 310 (Foos v. Scarf), in which allusion is made to a former decision, Benesch v. Clark, 49 Md. 497, where the courts say they decided, in accordance with all the authorities, that when an estate is given to a person generally or indefinitely with power of disposition, such gift carries the entire estate, and the devisee or legatee takes not a simple power, but the property absolutely; but where the property is given to a person expressly for life, and there be annexed to such gift a power of disposition of the reversion, the rule is different; and in such case the first taker takes but an estate for life, with the power annexed; and if the person so taking fails to execute the power, the property goes, where there is no gift over, to the heir or next of kin of the testator, according to the nature of the property. Such is the rule as laid down by Chancellor Kent in Jackson v. Robins, 16 Johns. 588, which is more compactly presented in Preston on Estates, in these words: "Grant that an express estate is limited, and a power of disposition either generally or in favor of particular persons is added; the person to whom the devise is made will have merely the estate limited by express word and the right in point of power and not of estate of disposing of the remainder." As an instance of the application of the rule, Preston cites as good law a case of a devise to one for life to dispose at his will and pleasure, which gives an estate for life only, for the words superadded to the limitation express merely an intention to authorize a power of alienation during that period for which an estate is devised in terms. It has been said that the distinction is perhaps slight between a gift for life, with a power of disposition

superadded and a gift to a person indefinitely, with a superadded power to dispose by deed or will, but that distinction is perfectly established, and has been recognized and adopted in many cases sustaining the rule approved by Chancellor Kent cited in the Maryland report.

Notwithstanding the confident assurance of counsel on either side, it will be seen that there is some dissonance in the decisions, and the summing up of the text-books by no means tends to restore harmony. In Page on Wills, a much commended treatise, it is said that if testator devise an estate, which is clearly a life estate, and adds to such devise limited powers of disposition and alienation, the authorities are nearly unanimous in holding that such a power of disposition does not enlarge the life estate into a fee, but that the estate created is exactly what it purports to be—that is to say, a life estate with power under certain conditions and in certain methods to dispose of the fee; but where the testator devises land for life and confers upon the life tenant an absolute and unlimited power of disposition of the property thus devised, there is a very serious conflict of authority, caused in part by peculiarities of statute law in some states, as to whether such a devise gives a life estate with power of disposition or a fee simple. Page concludes that the weight of authority upon this point is that such a devise gives only a life estate; and it would seem that the result of this investigation is, that an absolute power of disposition does not necessarily enlarge the life estate to a fee.

Woerner says that powers so conferred are to be executed, like all testamentary dispositions, according to the testator's intention; if that be clearly apparent, there need be no recourse to rules of construction; but the coupling of the power with the gift of a life estate requires peculiar caution in ascertaining such intention, so that the rights of the respective parties in interest, as well as of possible purchasers under the power, may not be prejudiced.

The supreme court of California in the Morffew Case, 107 Cal. 587, 40 Pac. 810, decided that where there is no trust for the purpose of sale, and the power of sale is by the terms of the will discretionary, a life estate vested in the trustee individually is not enlarged to a fee by the power of sale, and

such power is a mere naked power to sell not coupled with any interest in the fee. Commissioner Britt, in his opinion, says that as the will did not impose upon the widow any other duty which required for its discharge an estate in the land greater than for her life, so there was no enlargement of her life estate to be implied from the necessities of the trust; and the life estate in the trustee being created by express words in the will, with limitation over, it is not enlarged to a fee by the power of sale. Among the authorities cited by the commissioner in support of this proposition is the case of Hatfield v. Sohier, 114 Mass. 48, which says that an express devise of an estate for life is not to be enlarged to an estate of inheritance by the subsequent provisions unless they clearly show the intention of the testator to be so. In that case it was held that the power to dispose of the property by will or by deed during her life is not inconsistent with a life estate.

We must now consider the terms of the will in the case at bar, and especially the controverted causes, to ascertain the character of the estate devised to the wife, and to execute the intention of the testator so far as it may be discovered by an examination of the entire instrument.

The will, after the usual invocation, describes in the first person the testator Andrew Nelson, an old resident of San Francisco, aged seventy-two years, of sound mind, and otherwise competent, who certifies in the first paragraph that he is a married man, and that his wife's name is Elizabeth Nelson, now living with him at 706 O'Farrell street, and that he has no child.

Secondly, he declares that all the property he possesses is community property, having been acquired by him subsequent to his marriage, and therefore he has the testamentary disposition over the one-half thereof only, the other half belonging to his wife, the said Elizabeth.

Thirdly, he bequeaths and devises to his wife all the property, real and personal, over which he has testamentary disposition, to hold during the term of her natural life, and upon her death to his brother, Johan Nelson of Boda, Sweden, John Leale, his wife's nephew, and his own nephews and nieces, share and share alike, subject, however, to the provi-

sions that if his brother Johan should predeceease him, then his portion should go to his widow; and, also, that if any of his devisees or legatees at the time of his own death, or at the termination of his wife's life estate, or at any time between the two events, should be engaged in the liquor business, the share of such person should lapse and be divided among the other legatees and devisees. This proposition he inserted because of his antipathy to the traffic in alcohol.

Fourthly, he nominated his wife executrix, to act without bonds, for any purpose whatever during the course of administration.

Fifthly, he gave to his executrix full power and authority to sell, mortgage, hypothecate and lease any or all of the property of his estate without order of court.

Sixthly, he requests that when the time during which creditors can present claims has expired, his entire estate shall be distributed to his wife immediately, individually, and in trust for herself and his devisees and legatees, and that no bond be required of her for that or any other purpose.

Seventhly, he gives to his wife full power to manage, control, invest, sell, mortgage, hypothecate, lease and enter into such contracts as she may deem expedient in reference to the life estate given her by the will, especially directing that she shall not be held liable or responsible for any loss or bad investment that she may make; and he also requests and directs that she shall not be curtailed in the management thereof by any of the devisees or legatees.

Eighthly, he declares that if his wife should die first, he would probably execute another will, but if in that event he should not do so, he desires that her community half of the estate should go to her heirs.

Ninthly, he nominates his nephew, N. P. Nelson, and his wife's nephew, John Leale, without bonds, to take charge and manage the life estate given to his wife at the time of her death, if anyone is required to act, and he directs that they see that the property is correctly distributed among his devisees and legatees; and in case of his wife's death prior to his own decease, if he should not execute another will, he appoints the said N. P. Nelson and John Leale as executors of this will without bonds; and lastly, he revokes all former wills

by him made. Then followed finally the signature and formal attestation clause. The instrument was witnessed by two attorneys, William F. Gibson and Edwin T. Cooper, the former of whom is said to have been the draughtsman of the document. He is now deceased, but he was a long time practitioner in probate, and it is not too much to say of him that he was a skillful and conscientious lawyer, and that he discharged his duties in this particular with due regard to the law in which he was versed.

To discover the testamentary purpose is our first greeting. A will is to be construed according to the intention of the testator, and this intention must have effect as far as possible. If its provisions are clearly apparent, no recourse to technical rules is necessary nor permissible to establish its contents. This is code and common law. The difficulties of interpreting wills inartificially constructed by testators who undertake the task for themselves are many and great, justifying the remark of Lord Coke that such wills and their interpretation do more perplex a man than any other learning, and to reach certainty and conclusion as to their meaning often transcends the art of the jurisprudent. This instrument, however, is not of the sort that provoked Coke's censure; it is not one drawn lacking legal counsel, but bears intrinsic evidence that it was designed with great caution, forethought and competent professional advice; and its intention is not obscure for want of apt and adequate expression.

Andrew Nelson intended that his wife Elizabeth should have, first, what rightfully belonged to her as the survivor of the community; so he declared his domestic status and that of his property through his mode of acquisition. Then he undertook, in the third clause, to deal with that portion over which he had power of testamentary disposition, and in that moiety he created a life estate in his wife, with remainder over to his brother Johan, his wife's nephew, John Leale, and his own nephews and nieces, subject to certain provisions not necessary to repeat here. In the sixth clause he provides for the distribution of the estate in trust for herself and his devisees and legatees. In the seventh clause he gives the unrestricted management of the life estate; and then we come to the ninth or last of the controverted clauses, by which he

provides for the transference of the property upon the death of his wife, and appoints his nephew N. P. Nelson, and her nephew, John Leale, if anyone is required to act, to supervise the correct distribution among the devisees and legatees, and he also appoints those two persons alternate executors without bonds.

Nothing could be more perspicuous or persistent than the purpose of testator with respect to the devolution of the title to the fee.

Having ascertained his intention, are we to defeat the purpose of the testator by construction? The petitioner contends that the question is not so much what the law is, but whether the provisions of this instrument are within the well-settled principles of the law; and she claims the entire estate by virtue of the law as against the text and tenor of the testament, because the testator has given her a power, the exercise of which is inconsistent with his attempted disposition of the fee. She asserts in herself absolute power under the seventh clause, contending that authority to sell the life estate includes right to convey the fee; and asserting that the most natural construction of the language of the testator is that the power so given extends to a sale and conveyance of the remainder; thus incurring the defeasance of the title of the devisees which the ninth clause was designed to protect; but this contention of the executrix does not square with the simple and plain words of the will, which mention only the life estate, make no allusion to the remainder, and leave no room for implication. The testator did not intend that the first taker should have an absolute estate in fee, for her own use and benefit, of his disposable share of their common property; and no technical rule, assuming such to exist, should be allowed a controlling effect, when the testator, in clear terms, has made his meaning manifest and left no occasion for indulging in presumptions.

It is repeated, however, by the executrix that the expressions of the seventh clause imply an absolute power of disposition, and that, therefore, the remainder over is void for repugnancy; but it is not certain that, even at common law, this contention could be made good, for there are common-law cases that maintain that an absolute power of disposition must

include a right to dispose of an estate by will, and unless the authority conferred on the first taker were broad enough to include testamentary privilege, the limitation over would be valid. The seventh clause of this will communicates no power of testamentary disposition, and so far it falls short of absolute quality. Its essential feature is the unfettered management of the life estate of the widow, but the preservation of the remainder for the devisees and legatees is clearly contemplated and is constantly in the mind of the testator. While the widow is not to be molested in management, the remaindermen are to be protected in their expectancy. In such a case, the particular estate is not enlarged to a fee. In a case in New York, which seems in point, the court said that annexed to the gift was a power to sell or otherwise dispose of the property, if the devisee should require it or deem it expedient. In the case at bar, the donee is given full power to manage, mortgage, lease, sell and enter into such contracts, "as she may deem expedient in reference to the life estate given her by this will." The New York court held that this was an additional power of disposal, and did not operate to enlarge the estate. It held that power was to be exercised during the life and not at death, for an absolute power of disposal includes a power to dispose by will, as well as by sale or otherwise during life, which would be incompatible with the mere life estate; and such power is not given by the terms of this will: Terry v. Wiggins, 47 N. Y. 514.

On this subject at this time the laws of New York and of California are in unison, and whatever may have been the rule at common law the Civil Code must be the rule of decision in the case at bar. Our code sections on property in general are appropriated almost wholly from the New York statutes, which have received a construction by the courts of that state contrary to the contention of the petitioner here. In this case, it may be concluded that the testator confided the custody of the corpus of the estate to the widow for life, with power to sell and otherwise deal therewith as she might deem expedient during her lifetime, but not beyond, with valid remainder over to the persons indicated by name and description in the third clause of the will. The testator had the right to make the life tenant the trustee, subject to the

obligations established by the code and free from certain onerous conditions, such as the requirement of security for performance of trust. Such is the rule established by the supreme court in Estate of Garrity, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485. It follows from the reasoning of this opinion that the petitioner is not entitled to the entire estate.

A Power of Sale Added to a Life Estate does not raise the estate to a fee: Mansfield v. Shelton, 67 Conn. 390, 52 Am. St. Rep. 285; Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Skinner v. McDowell, 169 Ill. 365, 61 Am. St. Rep. 183. Where, by the terms of a will, there has been an express limitation of the estate to the first taker for life and a limitation over, with general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, the power of disposal is only coextensive with the estate which the devisees take under the will, and means such a disposal as a tenant for life could make, unless there are words showing that a larger power is intended: Wardner v. Seventh Day etc. Board, 232 Ill. 606, 122 Am. St. Rep. 138.

IN THE MATTER OF THE ESTATE OF KATE DONOVAN, DECEASED.

[No. 15,063; decided April 9, 1903.]

Decree of Distribution—Failure of Executor to Comply with.—Where an executor is cited to show cause why he should not have paid to a distributee the amount apportioned her by a decree of partial distribution, and in defense he raises issues of law and of fact, the question should be tried in the ordinary case of law rather than in the probate form.

Application of Kate Donovan for an order on executors to show cause why they have not paid amount distributed to her.

Kierce & Gillogley, for the applicant.

William M. Sims, for Daniel King, one of the executors.

Edward C. Harrison, formerly attorney for executors.

COFFEY, J. In this case the records show that while Daniel King and James King were the executors of the will

of Cornelius King, deceased, this court made a decree of partial distribution, distributing to Kate Wholley, now Donovan, the sum of $2,343.75. She claims that no part of this amount has ever been paid to her, nor to any person authorized by her to receive it, and that the executors are liable, and should be ordered to pay, as they never have been discharged from their trust.

Daniel King alone was cited, and he appears and answers by affidavit, setting forth that one Kate Sullivan, claiming kinship with said Cornelius King, entered into a written contract with an attorney, W. H. Levy, to revoke the probate of decedent's will and obtain for her a part of the estate, agreeing to give him one-half of all moneys received for her, and to secure said Levy assign to him one-half of her interest in the estate; that pending the contest Kate Sullivan died leaving several sons and daughters, including Kate Wholley; that the said attorney, W. H. Levy, after her death, continued the contest in the name of Kate Sullivan, in behalf of her children, and finally obtained a compromise, which was reduced to writing, and in which it is recited that said W. H. Levy was the duly authorized attorney in fact of all of said Kate Sullivan's children, and was signed by W. H. Levy as their attorney in fact; that following this agreement, and on September 18, 1896, a partial distribution of the estate was made, under which decree two thousand three hundred and forty-three and seventy-five one-hundredths ($2,343.75) dollars was distributed to said Kate Wholley, and a like sum to each of the other seven children of Kate Sullivan; and afterward, on September 21, 1896, the two executors paid said W. H. Levy the amount distributed to said Kate Wholley and took from him a receipt signed "Walter H. Levy, attorney for Kate Wholley"; that afterward, on September 28, 1906, the probate of said will and the letters testamentary thereon were revoked, and the said Daniel King and James King had no further authority as executors of said estate except to close their account as such; that on November 11, 1896, said executors filed their final account, and among their disbursements was an item of the sum paid to said W. H. Levy for Kate Wholley; and on November 25, 1896, after due and legal notice, the account was settled.

These matters of response and defense raise issue of law to be determined at this time, and of fact to be tried hereafter, if the court finds that it has jurisdiction to afford relief in the premises.

The payments which the respondent here claims to have made, and by the record appear to have made, were to the late Walter H. Levy, the attorney of record for Kate Wholley, now Donovan, the petitioner. This attorney had appeared for her, and being an officer of this court his right to so appear must be presumed. It seems that he claimed also to be her attorney in fact, and as such authorized to receive and receipt for her share of the estate. It appears that in this guise he received that share more than five years before the filing of the petition herein. Ordinarily, the statute of limitations would be pleadable; but in view of the conclusion this court has reached upon the first point the other need not be discussed.

The respondent's position that he is entitled to have the question raised here tried in the ordinary course of law is sustained by the latest expressions of the sense of the supreme court.

If there were any doubts upon this point, the court should not attempt to exercise jurisdiction, especially if it appear that the petitioner has another remedy. In this case section 1666, Code of Civil Procedure, would seem to afford relief to her, and to forbid recourse in this form to this forum. The section cited provides that in the order or decree of distribution, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession, and such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

The citation is discharged.

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. 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 the respective shares. More than this, the codes expressly confer on the distributees the right to maintain an action against the executor or administrator to recover their distributive shares. The action is against him individually, and may be prosecuted notwithstanding his final discharge. The complaint therein need not allege a demand on him as executor or administrator; the action itself is a sufficient demand: Estate of Treweek, 1 Cof. Pro. Dec. 132; 1 Ross on Probate Law and Practice, 852.

IN THE MATTER OF THE ESTATE OF STEPHEN R. O'KEEFFE.

[No. 30,536.]

Inheritance—Waiver of Right by Wife in Divorce Proceeding.—The stipulation in this case, signed by a wife in her divorce proceeding, is held not to constitute a waiver of her right to inheritance in her husband's estate.

Thomas W. Hickey, for the public administrator.

F. R. Whitcomb, for the nominee of alleged widow.

COFFEY, J. At the close of the hearing of the petitions on the part of the public administrator and of C. L. La Rue for letters of administration, with the will annexed, of the above-named decedent, all matters were decided except as to one point, whether Mrs. Nellie C. O'Keeffe had, by a stipulation signed by her in her divorce proceeding, waived her right to inheritance in her husband's estate.

The public administrator relies upon the case of In re Davis, 106 Cal. 453, 39 Pac. 756, decided by Mr. Justice Van Fleet, with reference to the construction of articles of separation between the husband and wife, which read substantially as follows: "In these articles Alice A. Davis, the wife, stipulates and agrees, for the consideration expressed, that she will receive the same in full satisfaction of all claims she may have as the wife of said W. W. Davis on any property he has now

or may in any manner acquire, and hereby does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now have or may hereafter in any manner acquire."

In his concurring opinion Justice McFarland says: "It is to be observed, however, that the case was tried and is argued here upon the theory that by the articles of separation Mrs. Davis relinquished all her rights as heir of her husband. As to the question whether or not she did relinquish her heirship, I express no opinion."

Mr. Commissioner Chipman, in the case of Jones v. Lamont, 118 Cal. 499, at page 501 (62 Am. St. Rep. 251, 50 Pac. 766), says: "In Re Davis, 106 Cal. 453, 39 Pac. 756, the agreement read that the wife does relinquish and surrender forever all claims of any nature she may now or hereafter have against any property that said W. W. Davis may now have or may hereafter in any manner acquire. And it was held that the wife contracted away her inheritable interest in her husband's property. Here were apt words importing an intention never to assert in any way any right to the property of the husband, present or future."

In the case at bar we have a stipulation in a divorce proceeding, reading as follows:

"In the Superior Court of the County of Alameda, State of California.

"NELLIE C. O'KEEFFE,
Plaintiff,
v.
STEPHEN R. O'KEEFFE,
Defendant.

"It is hereby mutually agreed by and between the plaintiff and defendant in the above-entitled action that in the event that a decree of divorce is obtained by plaintiff in said action, that there may be inserted in said decree a provision to the effect that all property questions having been settled by the parties hereto out of court, the said defendant shall not be required by said decree or otherwise to pay to the plaintiff or for or on behalf of plaintiff, any money whatsoever, either as

costs, counsel fees, alimony, suit money or money for her support and maintenance.

"NELLIE C. O'KEEFFE.
"STEPHEN R. O'KEEFFE."

By a comparison of the agreements made in Re Davis, and in the case of Jones v. Lamont, with the stipulation made between Mrs. O'Keeffe and her husband in her divorce proceeding, it will be seen that she waived no right whatever to her children or inheritable interest, and "bartered away" no rights whatever: Jones v. Lamont, 118 Cal. 502, 62 Am. St. Rep. 251, 50 Pac. 766.

By the terms of this stipulation no consideration whatever appears, and it is no part, and never can be any part of the judgment-roll, in the suit brought by Nellie C. O'Keeffe v. Stephen R. O'Keeffe.

It has been decided by this court that no one, after the death of one spouse, outside the parties litigant and the people of the state of California, has any interest in the particular divorce proceeding.

In this case, the superior court of Alameda county, under a petition duly made by Mrs. O'Keeffe, dismissed her action of divorce, and her case now stands as if she had never begun any divorce proceedings whatever; and no one in being can disturb the judgment of dismissal.

This stipulation, then, was signed by the parties, as is evident, during the pendency of divorce proceedings, prior to the entry of the interlocutory order; and was to become effective by the very words of the stipulation only in case a certain judgment was rendered in the pending divorce suit, and comprehended nothing but the pendency of said suit.

The suit is the inspiration of a stipulation and is its vitality. And therefore, with the dismissal of the action in this cause, the stipulation became a nullity. The word "otherwise," in the context, is void of meaning and of force, and of no effect, there being no consideration or mutuality upon which to base it.

C. L. La Rue is appointed as administrator with the will annexed of the estate of the above-named deceased.

IN THE MATTER OF THE ESTATE OF JOHN PFORR, DECEASED.

[No. 27,214; decided April 25, 1903.]

Will—Construction Against Intestacy.—The rule that a construction which involves intestacy will not be favored is a salutary one, and should be enforced where it can be applied.

Will—Rejection of Invalid Parts.—If the parts of a will whose validity are questioned can be removed so that the remainder of the will presents an intact instrument, expressive of the ultimate intention of the testator, then the court may declare the will void as to such rejected parts and executable as to the rest.

Will—Rejection of Clauses Suspending Distribution.—If among provisions valid in themselves are clauses illegal for attempting undue suspension or postponement, which are not essential to the final scheme of the testator, then they should be severed from the body of the will and the main idea preserved.

Will—Rejection of Clauses Suspending Distribution.—Where a testator's main scheme is valid, it is not destroyed by the presence of provisions effecting an illegal suspension if they are separable from the other provisions of the will and not essential to the harmony and proportion of the whole, for then they may be eliminated without destroying the general design.

Application for partial distribution by Margaretha Thornagel.

John J. Burt, for the applicant.

Pringle & Pringle, Wm. B. Pringle and E. J. Pringle, for the respondents, executor and executrix.

COFFEY, J. Margaretha Thornagel filed her petition on December 23, 1902, alleging that John Pforr, her brother, died in San Francisco on July 17, 1902, being a resident thereof and leaving a will dated January 27, 1902, which was admitted to probate on August 20, 1902; that Anna Pforr and Max Waizman were duly appointed executrix and executor of said will and qualified as such and received letters testamentary thereon, and have continued to act thereunder ever since and are now so acting.

The will is in words and figures as follows:

"I, John Pforr, of the City and County of San Francisco, State of California, do make, publish and declare this as my

last will and testament, hereby revoking all wills and testaments by me heretofore made, and I hereby appoint my niece, Anna Pforr of this City of San Francisco, to be the executrix, and Max Waizman, also of this city of San Francisco, to be the executor of this will and testament, and I direct that no bond shall be required of them as such Executrix and Executor.

"a. First: I give and bequeath to my said niece, Anna Pforr, all household furniture, books and pictures which I may possess at the time of my demise.

"a. Second: I desire and direct that my executrix and executor shall take in charge all my property, real and personal (except that which I hereinbefore bequeathed to Anna Pforr), and to collect all the rent and other income from the same and to defray all expenses thereon including interest on mortgages, and to renew mortgages and to execute new mortgages thereon when necessary for the maintenance of the same for a term of 2 years from the day of my demise.

"a. Third: I desire that my executrix and my executor at the expiration of two years from the day of my demise shall have the property sold at public auction or otherwise and after paying all indebtedness standing against it, to divide the net proceeds of such sale into six equal parts or divisions and to distribute the same share and share alike to my heirs and devisees as hereinafter set forth.

"b. First: I give, bequeath and devise to my niece, Anna Pforr, of this City and County of San Francisco, California, one-sixth part of my estate.

"b. Second: I give and bequeath to my sister, Fredericka Waizman, wife of Max Waizman of this City and County of San Francisco, California, one-sixth of my estate.

"b. Third: I give and bequeath to my sister, Margaretha Thornagel, wife of George Thornagel of this city and county of San Francisco, California, one-sixth part of my estate.

"b. Fourth: I give and bequeath to my brother, Christian Pforr, of Santa Clara County, State of California, one-sixth part of my estate.

"b. Fifth: I give and bequeath to my brother, John Pforr, junior, of Half Moon Bay, San Mateo County, California, one-sixth part of my estate.

"b. Sixth: I give and bequeath to the heirs of my deceased sister, Elizabeth Keller of the City and County of San Francisco, Sonoma County and Napa County, State of California, one-sixth part of my estate.

"JOHN PFORR.

"1. On this 27 day of January, A. D. 1902, the above named John Pforr in our presence, signed and sealed this instrument and published and declared the same to be his last will and testament, and we, at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

"CHAS. L. QUAST.
"C. E. C. SCHWARZ."

The petition further recites that all of the legatees and devisees mentioned in said last will and testament were at the time of the execution of said last will and testament and at the time of the death of said deceased over the age of majority, and none of them were, nor was either of them, at either of said times, minors or a minor; that she is advised and believes, and therefore alleges, that the trust or disposition attempted to be created or made by said portion of said last will and testament was, and is, void in its inception, and that all of the property therein mentioned, at the death of said John Pforr, deceased, passed to and vested in his heirs at law; and that she is advised and believes, and therefore alleges, that she is entitled to have distributed to her, as a sister and heir at law of said deceased, an undivided and one-fifth part of the real estate described in the inventory on file herein, and belonging to the estate of said deceased, and she is also advised and believes, and therefore alleges, that she is entitled to have distributed to her one-fifth part of all of the personal property belonging to the estate of said deceased, now in the hands of the executrix and executor, save and except the household furniture, books and pictures mentioned in said clause or portion of said last will; that the estate of said John Pforr is not indebted in any further or greater sum than twenty-five thousand dollars ($25,000), and that the whole of said indebtedness is secured by mortgages upon said real property; and the aforesaid portion of said property may be allotted and distributed to her without loss to the creditors of said estate, or

any of them, and she is ready and willing and hereby offers to execute and deliver to the executrix and executor a bond in such sum as shall be desired by the court, with sureties to be approved by the judge thereof, payable to the executrix and executor, and conditioned for the payment, wherever requested, of her proportion of the debts due from said estate, not exceeding the value or account of the portion of said estate which may be distributed to her, or to which she may be entitled.

The executrix and executor respond to this petition in its essential averments by alleging that said estate is largely indebted, and that the encumbrances thereon and there against amount to approximately twenty per cent of the value thereof; that they consist of unsecured claims and promissory notes, and of promissory notes secured by mortgages upon the real property of said estate; that the said last will and testament of John Pforr, deceased, does not attempt to create a trust as to the whole or any portion of the property belonging to said decedent, but that the provision for the suspension of the distribution thereof for a term of two years is valid and not repugnant to the laws of the state of California; that at the death of said John Pforr, deceased, all of his property passed to and vested in the devisees of his will in accordance with the provisions thereof; that in accordance with the provisions of said will Margaretha Thornagel, the petitioner, is entitled to a one-sixth part of all of the estate of said John Pforr, deceased, except his household furniture, books and pictures, the same to be reduced to money by a probate sale, and one-sixth part of the net proceeds distributed to her; that no part of the estate of said John Pforr can or may be distributed to petitioner without loss to the creditors of the estate.

On behalf of petitioner it is contended that the only provisions of this testament that are valid are those appointing the executrix and executor, and disposing of the books, pictures, and household furniture, thus making the deceased intestate as to the remainder of the property.

It is argued in the same behalf that the testamentary language creates a trust, and deposits the legal fee of the estate in the executors for a fixed and absolute term; that under it the beneficiaries take no interest in the property, but only the

right to have the trust enforced, and if either of the beneficiaries died before the termination of the trust, his interest would remain in the estate and a resulting trust would arise in favor of his heirs; that the will neeessarily gives the fee in trust, for the right to sell and convey the fee and also to mortgage is given, which could not be done unless the fee were placed in the trustees.

It is further argued that the disputed dispository provisions are void because they violate section 715 of the Civil Code, and, also, section 724 of the same, since there is no disposition made of the net proceeds during the period named, but they are to be accumulated and cast into the corpus of the estate to be divided at the end of the time indicated.

It is finally contended by petitioner that the court cannot undertake to meddle with the will by attempting to mend it, for such an instrument is contrary to public policy as established by the statute, as vice permeates the entire scheme of testator so completely that no part is effectual except the bequest of books, pictures and furniture, which is severable.

In connection with this last contention the rule of construction laid down by the appellate tribunal should be kept constantly before the eyes of the judge of the trial court. It must be remembered that the law abhors partial intestacy as nature is said to abhor a vacuum; and, therefore, if we can maintain the substantial integrity of the testamentary disposition by excising the unsound parts, it is our duty to save the substance by eliminating what is nonessential. The supreme court has expressed the rule in Estate of Fair, 136 Cal. 81, 68 Pac. 306, in these words:

"Of course, the general rule is well settled that where there are valid and invalid clauses in a will, the question whether or not the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator.

"Where a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole testament taken together, was evidently never the design of the testator. Otherwise where a

good part is so far independent that it would have stood had the testator been aware of the invalidity of all the rest."

The sections of the statute invoked in aid of this application read:

"Section 715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, except in the single case mentioned in section seven hundred and seventy-two."

"Section 724. An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, as follows:

"1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or,

"2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interest, and during the minority of the beneficiaries and terminate at the expiration of such minority."

Is there here a suspension of the absolute power of alienation under section 715, Civil Code? It is said by respondents that paragraph "a, second," does not interfere with the power of alienation, but merely directs that the executors take charge of and hold the property for the term of two years; it suspends the distribution, but any heir can alienate his share without impediment from its terms. Respondents say that if any period within which alienation is suspended be created by this testament, it is found in paragraph "a, third," but even that directs an alienation and does not prohibit one, and counsel cite the Toland Case, 123 Cal. 140, 55 Pac. 681, to sustain this view.

In the case at bar, paragraph "a, third," expresses the desire of the testator that at the expiration of two years from the day of his demise the executrix and executor shall have the property sold at public auction or otherwise, and after paying

all indebtedness standing against it to divide the net proceeds of such sale into six equal parts or divisions, and to distribute the same share and share alike to his heirs and devisees as thereinafter set forth.

It is said by respondents that this does not prohibit a sale by the executors within the two years, and is, therefore, not a suspension of alienation. In the Toland case the supreme court said her direction to sell the land "so soon as" the leases are canceled designates a point of time after which the beneficiaries might enforce a sale, but does not postpone the right to make the sale until the expiration of the terms created by those leases. It is equivalent to a direction to sell the land "whenever" the leases are "canceled." The word "canceled" is to be taken in its ordinary sense, and the use by her of that word instead of "expired," or "determined," justifies an inference that she had in her mind the possibility that the tenants might surrender the leases prior to the expiration of the term for which they were given. There was, therefore, no time after the death of the testatrix that an absolute interest in possession could not have been conveyed. The tenants could at any time by agreement with the executor cancel their leases, or unite with him in a conveyance, and give to the grantee the fee and the possession of the land.

From this it is argued that the question of distribution is distinct from alienations. Respondents call attention to the opinion in a case decided in a co-ordinate department, while presided over by Hon. Charles W. Slack, in the matter of the Estate of Nickolaus Becker, No. 15,939, which being brief is here inserted:

"The application is made on the theory that the provision of the will postponing distribution for five years from the death of the testator is void as an invalid suspension of the power of alienation. This question has arisen in New York under statutes similar to our own, and it is there settled that such a postponement of possession is not invalid: Chaplin on Suspension of the Power of Alienation, secs. 288, 295, 401, 410. Following the authorities the application must be denied. October 20, 1897.

"The sections referred to in Chaplin on Suspension of the Power of Alienation, are as follows:

"Section 288. There may be a valid power in trust to retain possession of land vested in devisees, manage the same, receive the rents and profits, pay charges from the same, and pay over the surplus rents to the legal owner. The performance of such duties does not necessitate a trust. Such a power does not occasion a suspension of the absolute power of alienation. The legal title is in the beneficiaries and they may at any time convey an absolute title. Consequently, such a power may be created for a term not measured by lives in being, or to begin after the full statutory period of suspension has expired. The principle is illustrated in a number of cases.

"Section 407. The whole matter may therefore be summed up as follows: Where the successive gifts of the same property, or of the enjoyment thereof, are each vested, with possession of anyone merely postponed until the termination of that preceding it; or where the gift is itself vested and is charged upon specific property; in these cases the fact that the property and all interests in it are all vested satisfies the rule. And where property given vests immediately in the donee as a present gift, of a portion of the existing corpus, with a mere prohibition against actual payment until a subsequent date, this right of the executor to retain is regarded as a power which does not interfere with vesting in absolute ownership, and does not interfere with the owner's free right to sell, assign or release, and, therefore, is not hostile to the rule concerning suspension of absolute ownership. This postponement of possession may be for the convenience of the estate, as where it is desirable to allow the executor two or three years, or more, or an unmeasured period in which to collect the assets, or turn them into cash to good advantage before the legatee shall have the right to enforce payment."

In reference to this decision counsel for petitioner says that if Judge Slack intended to hold that the testator could place the property in the executors, and direct them and their executors to hold it in probate for one hundred years, and prevent any distribution by the probate court until after that time, his decision is not sustained by the work cited by him, but is opposed by that of all other authorities on the subject.

As a matter of curiosity, if not particularly pertinent to this point, the will of Nickolaus Becker is here inserted, and it may be remarked incidentally that it seems to be (including the attestation clause) in the handwriting of John Pforr, the decedent testator herein:

"Know all men by these presents, that I, Nickolaus Becker, of the City and County of San Francisco, State of California, being of sound and disposing mind and memory, and not acting under menace, fraud, duress or undue influence of any kind or person whatsoever, do make, publish and declare this my last will and testament in the manner following, that is to say:

"First. I nominate and appoint John B. Lauinger and John Pforr, both of San Francisco, California, executors of this my last will and testament.

"Secondly. I desire and direct that my body may be preserved sufficiently long to be absolutely certain that death has occurred and then to be buried decently but without ostentation or extravagance.

"Thirdly. I declare that I have never been married, consequently have neither wife or child.

"Fourthly. I give, bequeath, and devise all property and estate of which I may die seized or possessed, or in which I may have any interest, real, personal and mixed, of whatsoever kind and character and wheresoever situate as follows:

"(a) One-sixth thereof to my sister, Marianna Herwig, residing at present in one of the Eastern States (but her exact place of residence is unknown to me).

"(b) One-sixth thereof to the children of my deceased brother Ferdinand Becker, now residing in this city—share and share alike.

"(c) One-sixth thereof to the children of my sister Antonia Ferrisch by her husband Adam Ferrisch—now residing in the State of New Jersey; share and share alike.

"(d) One-sixth thereof to my sister Valporia Heimerle, residing in Westminster, British Columbia.

"(e) One-sixth thereof to my sister Magdalena Becker, who, at last accounts, resided in Boston, Mass.

"(f) One-sixth thereof to my sister, Sophia Becker, who at last accounts resided in Boston, Mass.

"But no distribution of any part of my estate shall take place or be made until five years after my death. Should any of my sisters above named, as legatees and devisees be dead, before the expiration of said five years, leaving no bodily issue, the share to which she or they may have been entitled, shall be distributed among the other devisees and legatees, share and share alike, the children of any deceased sister or brother herein named taking their share, by representation and not as individual beneficiaries.

"Fifthly. I direct my executors to hold and possess all of my estate and property intact, for the period of five years from and after the date of my death and to see that the same shall not be distributed among the legatees and devisees above named until the expiration of that time.

"I desire that they the said executors shall keep the improvements on the real property in good repair and that they shall invest any surplus income and funds above expenses in good securities.

"Sixthly. I hereby revoke, cancel, and annul all other and former wills by me at any time made.

"In witness whereof, I have hereunto set my hand and subscribed my name in the City and County of San Francisco, this 19th day of December, 1892.

"NICKOLAUS BECKER.

"The foregoing instrument in writing was by the above-named Nickolaus Becker subscribed in our presence on the 15th day of December, A. D. 1892. And was by the said Nickolaus Becker at the time of subscribing the same published and declared to be his last will and testament, and thereupon we at his request and in his presence and in the presence of each other subscribed our names as witnesses thereto.

"JOE POHEIM,
"1806 Pacific Ave., San Francisco.
"J. GEORGE SHAEFER,
"724½ Howard St., San Francisco."

In comparing these two documents a similarity of scheme may be perceived, and as they are both the product of the same penman, it is fair to presume that he wrote his own in 1902 on the plan of the one drawn in 1892, instructed by the ruling of Judge Slack in 1897. The testator here was the

draughtsman, apparently, as well as an executor of the Becker testament, and, as he was a man of affairs, properly assumed to understand how to construct such instruments, and undertook in the light of the law as he saw it and as it was interpreted by respectable authority to impose limitations upon the administration of his own estate such as were sustained in the matter of Becker.

These remarks may be regarded in the nature of surmise and speculation, and not necessary to the consideration of this case, but the reference to the record and the suggestion as to the probable facts in the other case may justify such sidelight allusion or observations.

In the Becker case the heir at law petitioner asked for partial distribution on the ground that the trust attempted to be created by her in the fourth and fifth clauses of the will was void in its inception, and in violation of the provisions of section 716 of the Civil Code of California, and that all the property therein mentioned at the death of the testator passed to and vested in the heirs at law.

Section 716, Civil Code, says that every future interest is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

Judge Slack seemed to consider in his short statement of a conclusion that the New York cases settled the question, and that the attempted postponement of the period for distribution was not in contravention of the statutes. Petitioner challenges the correctness of this conclusion, but it may be said of his assertion that Chaplin does not support Judge Slack, but, on the contrary, and that work and all the authorities, so far as seen by petitioner, are opposed to the decision in the Becker case, that there is room for difference of opinion on this point.

The fact is, that decisions have been diverse, and that there is no such uniformity as to justify absolute assurance of authority on either side. It has been held that such provisions giving ample power to take in charge and manage the property, with a right to receive the rents and profits, could be very

well executed under such a power and occasion no suspension of alienation; and again, it has been decided that such a power as would seem to be created by "a, third" of the Pforr testament occasions suspension, because it operates to suspend the vesting of the fee until the power is executed or the estate is terminated.

In certain of the cases, the suspension was held to arise out of the particular provision of the will in hand, rendering imperative a sale at, and not before, a future date not limited by two lives.

In the case at bar, in clause "a, second," testator desires and directs that his executors shall hold up his estate "for a term of two years" from the date of his demise; and in clause "a, third" he desires that they shall, at the expiration of that period, sell the property at public auction or otherwise, and after discharging all debts against it divide and distribute the proceeds. Now, if this constitutes a case where there is a power which, for the time being, renders absolute alienation impossible, and where it can be neither released nor extinguished, then suspension results. Much stress is laid, in some cases, upon the fact that the power is imperative, and some important ruling rests upon this distinction. It is said that every trust power, unless its execution or nonexecution is made expressly to depend upon the will of the donee, is imperative, and imposes a duty the performance of which may be compelled in equity by the beneficiaries. This is the test: Is the power sought to be imposed imperative? If it is not imperative, but leaves a discretion possible to be perverted, such a contingency will not invalidate the power. Upon this question, appellate judges of eminence have differed diametrically.

Many cases are cited on either side of the proposition presented by petitioner, and each of the respective counsel undertakes to show that his opponent's citations are inapposite or to be discriminated from the case at bar; thus illustrating the remark sometimes made by appellate courts that little aid is derived from decisions in matters of testamentary construction; each controversy has its own peculiarities developing its own doubts and difficulties, not easily settled by reference to other cases.

The rule that construction of a will which involves intestacy is not to be favored is a salutary one, and where it can be applied it should be enforced.

If the parts of the will under censure be removed, and the remainder, freed from their operation, present an intact instrument expressive of the ultimate intention of the testator, then the court may declare the instrument void as to such paragraphs and executable as to the rest.

Take out clause "a, second" and "a, third" and we have the will in this shape:

"I, John Pforr of the City and County of San Francisco, State of California, do make, publish and declare this as my last will and testament, hereby revoking all wills and testaments by me heretofore made, and I hereby appoint my niece, Anna Pforr, of this City of San Francisco, to be the executrix and Max Waizman, also of this City of San Francisco, to be executor of this will and testament, and I direct that no bond shall be required of them as such executrix and executor.

"(a) First, I give and bequeath to my said niece Anna Pforr all household furniture, books and pictures which I may possess at the time of my demise.

"(b) First, I give, bequeath and devise to my niece, Anna Pforr, of this city and County of San Francisco, California, one-sixth part of my estate.

"(b) Second, I give and bequeath to my sister, Fredericka Waizman, wife of Max Waizman of this City and County of San Francisco, California, one-sixth of my estate.

"(b) Third, I give and bequeath to my sister, Margaretha Thornagel, wife of George Thornagel of this City and County of San Francisco, California, one-sixth part of my estate.

"(b) Fourth, I give and bequeath to my brother, Christian Pforr, of Santa Clara County, State of California, one-sixth part of my estate.

"(b) Fifth, I give and bequeath to my brother John Pforr, Junior, of Half Moon Bay, San Mateo County, California, one-sixth part of my estate.

"(b) Sixth, I give and bequeath to the heirs of my deceased sister, Elizabeth Keller, of the City and County of

San Francisco, Sonoma County and Napa County, State of California, one-sixth part of my estate.

"JOHN PFORR."

If the situation here presented is such that among provisions valid by themselves there are clauses illegal for attempting undue suspension or postponement, which are not essential to the final scheme of testator, then they should be severed from the body of the testament and the main idea preserved. The main idea here was to divide the estate into six equal parts, and this may be done after the exclusion of the infected portions of the instrument as well as if those portions were untainted.

It does not necessarily follow that the whole scheme is vitiated because certain separable clauses are unsound.

The rule has been stated that where the testator's main scheme is valid, it will not be destroyed by the presence of provisions which effect an illegal suspension, if these provisions are separable and not essential to the harmony and proportion of the whole; for then they may be cut out without destroying the general design.

In determining, in any given case, whether an invalid provision is or is not separable, it is said that importance may sometimes be attached to the form of the document.

If we regard form in this case, it will be seen upon inspection of the original that the instrument is so divided into paragraphs that any one may be removed without affecting the symmetry or stability of the entire structure. Certainly this is true of the paragraphs marked "a, second" and "a, third," as appears above from the document with those divisions discarded. Expunge these clauses and we still have the intention of the testator, validly expressed, to divide his estate in six parts, each part conveyed by its separate and sufficient words of devise.

The contention of petitioner that the language of the will, in the clauses expunged by this process, creates a trust and places the legal fee of the property in the executrix and executor for a fixed and absolute term, has some seeming support in the cases cited, although in most of them the distinction dwelt upon by respondents, as to the California cases particularly, that those authorities presented conditions of

absolute trusts created after an estate had been administered upon and by a decree of distribution following the testamentary terms, and are not analogous to the Pforr will, where the circumstances are entirely connected with powers in probate, cannot be ignored by the court; but in view of the premises recited in this opinion that the paragraphs in question may be eliminated without harm to the entire instrument, since their vice, if they be vicious, does not necessarily affect the whole scheme of testamentary disposition, which is complete and valid without them, the petition for partial distribution should be denied.

Estate of John Pforr was Before the Supreme Court of California in 144 Cal. 121, 77 Pac. 825.

The Fact that a Portion of a Will is Invalid does not necessarily vitiate the effect of the entire instrument. A will may be void in part and valid and effectual as to the residue. On the other hand, the void provisions of a will may destroy the otherwise valid provisions. If there are valid and invalid clauses in a will, the question whether the valid ones may be allowed to stand depends upon whether or not the invalid ones are so inextricably interwoven with them that they cannot be eliminated without interfering with or changing the main scheme of the testator. "When the several parts of a will are so intermingled or interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be": Estate of Fair, 136 Cal. 79, 68 Pac. 306; Estate of Pichor, 139 Cal. 682, 73 Pac. 606; **Toland v. Toland**, 123 Cal. 140, 55 Pac. 681.

IN THE MATTER OF THE ESTATE OF MARY PIERCY, DECEASED.

[No. 29,127; decided February 27, 1904.]

Administrator—Drunkenness as a Disqualification.—The mere use of intoxicants, sometimes to excess, does not in itself disqualify one to act as administrator; the drunkenness contemplated by the statute as a disqualification is that excessive, inveterate and continued use of intoxicants to such an extent as to render the victim an unsafe agent to intrust with the care of property or the transaction of business.

Administrator—Evidence of Character.—The admissibility in evidence, on the issue of the improvidence of an applicant for letters of administration, of specific acts rather than general reputation, is discussed.

Administrator—Improvidence as a Disqualification.—The fact that a person has been pursuing the profession of baseball playing, has conducted saloons and gaming resorts, has indulged in gambling and lost heavily thereby, does not render him disqualified to act as administrator by reason of improvidence.

Administrator—Want of Understanding as a Disqualification.—Want of understanding, as a disqualification to act as an administrator, does not import a lack of comprehension of the law of administration, but rather refers to a want of common intelligence amounting to a defect of intellect.

Administrator—Want of Understanding as a Disqualification.—Education is not essential to qualify one to act as administrator.

Administrator—Want of Integrity as a Disqualification.—The "integrity," which one must possess to be qualified to act as administrator, means soundness of moral principle and character as shown by his dealing with others in the making and performance of contracts and in fidelity and honesty in the discharge of trusts. It is used as a synonym for probity, honesty and uprightness in business relations with others.

Administrator—Want of Integrity as a Disqualification.—Isolated instances of departure from paths of rectitude, especially when remote from the time when application for letters is made, do not constitute "want of integrity," if it is not shown that the occasional acts have been repeated or become continuous and evidence character at the date of the filing of the petition or the hearing of the accusation.

Administrator—Disqualification of Applicant.—The court in probate must appoint the next of kin as administrator, unless he is shown to be disqualified by clear and convincing proof.

Applications for letters of administration—the first by Andrew J. Piercy, son; and the second by the Central Trust Company, nominee of eldest son and daughter.

H. V. Morehouse and John E. Alexander, for Andrew J. Piercy.

Jackson Hatch, of San Jose, and W. F. Williamson, for the Central Trust Company.

COFFEY, J. Edward M. Piercy and Mrs. Jane Martel, son and daughter, respectively, of decedent, ask the appointment of the Central Trust Company as administrator of the estate of their deceased mother, and oppose the application of their only surviving brother, Andrew J. Piercy, on the grounds of incompetency under the statute, section 1369, Code of Civil Procedure, by reason of drunkenness, improvidence and want of understanding and integrity.

The precise language of the pertinent part of the statute is: No person is competent or entitled to serve as administrator or administratrix who is adjudged by the court incompetent to execute the duties of the court by reason of drunkenness, improvidence, or want of understanding or integrity.

These conditions of incompetency must exist at the time of the trial or application; or, at least, some of them must be established.

It is clear, as counsel for the trust company concedes, that in the absence of evidence satisfactory to the court of the incompetency of Andrew J. Piercy he will be entitled, upon the present proceedings, to have letters of administration issued to him; but while counsel contends that there is testimony tending to prove all the allegations, he particularly wishes to impress upon the mind of the court the force of the opposition to the appointment upon the ground of improvidence. This is, as has been suggested in argument, as is each of the other grounds of opposition, a question of fact to be found by the court from the evidence before it; and, we are told by counsel, that the history of Andrew J. Piercy's career and his associations strongly tend to the support of the charges made against him. Considering the accusations each in the order of the statute:

1. DRUNKENNESS.

That the applicant Andrew is addicted to drinking liquor and occasionally, if not frequently, indulges to excess, has been testified to by his brother and sister, and, as to one instance, by a stranger, a notary of San Jose.

This is what the counsel for the trust company calls an "array of testimony."

As against this array, four or five witnesses, two of them proprietors of saloons, and others frequenters thereof, all of them, perhaps, in the category of experts, have testified in substance, that Andrew is a moderate drinker.

Taking all this testimony as true, this question does not turn upon the fact that the applicant is in the habit of imbibing intoxicants even to a considerable extent. However reprehensible this may be regarded from a moral point of view, it is not within the province of the court to deny letters on that account alone; the mere use and occasional abuse of intoxicants is not enough in itself to deprive him of his statutory right. The drunkenness contemplated by this statute is that excessive, inveterate and continuous use of intoxicants to such an extent as to render the subject of the habit an unsafe agent to intrust with the care of property or transaction of business.

The evidence in this case does not show habitual, continued, inveterate and irremediable habits of drunkenness, incapacitating the applicant for the transaction of business. Only such habits can be held to have been intended by the legislator as a disqualification for the trust of administration on the ground of drunkenness as would warrant a magistrate in designating such a person as a common drunkard under the statute or a jury in adjudging him to be so.

In such a case as this, as between the applicant, Andrew, and a stranger, the law expressly confides the privilege of administering upon the estate of the deceased to him on condition of his giving adequate security; and this privilege is not to be forfeited without clear evidence of his incapacity: Kechele's Case, Tuck. 52. This case is reported as Elmer v. Kechele, 1 Redf. Surr. 472; Pen. Code, sec. 647.

The vital question in the investigation of this objection is whether or not the applicant for letters is, by reason of the

inveterate use of intoxicants, incompetent, and not whether he may or may not have used the same to some extent, or even at times indulged immoderately: Root v. Davis, 10 Mont. 245, 25 Pac. 105. This disposes of the first ground or charge of incompetency alleged against Andrew.

2. IMPROVIDENCE.

This is the ground mainly relied upon by the opposition to Andrew, and it is contended that by his own admissions on the witness-stand he has proved the truth of his allegation. It is claimed, as proof, that at the age of forty-nine years he is without visible means of support; that he has not transacted any business nor earned any money for several years; that in fact since 1871 he has done nothing of an honorable character by way of business, having been engaged in no other occupation than that of keeping saloons and gaming resorts, and professional baseball playing; he was also partner in a poolroom and the associate of its frequenters; that he spent his patrimony of many thousands in a short space; and that his undivided interest in his inheritance, the enjoyment of which was conditioned upon his mother's death, was mortgaged, and that the mortgage is now in foreclosure. Andrew's brother, Edward, testified strongly against applicant's capacity on the score of improvidence. Edward swore that Andrew had squandered his share of his father's estate in gambling and dissipation; he had spent forty thousand dollars in two years; for five years he had been entirely supported by Edward and the decedent; that he had collected and appropriated sums of money belonging to Edward and their mother; and that he had admitted to Edward that he had embezzled the funds of his brother, the late Samuel W. Piercy.

Edward admitted on cross-examination that he was vindictive toward Andrew; that he believed in revenge, and that he wanted to retaliate on Andrew for the wrongs he had suffered from him, and that he wanted the trust company appointed because thereby whatever estate decedent had would be better protected. He also said that Andrew had threatened him with all sorts of litigation if appointed administrator. It is admitted that there is some suit in court which in-

volves some question of Edward's liability to the estate of decedent, and in the event of Andrew's appointment he will undertake to prosecute the proceedings.

Several witnesses were called in behalf of Andrew to sustain his reputation as against the charges made; but counsel for the trust company contends that it is not a question of reputation, but of character, and that upon this point no light has been shed by these witnesses. Some of them testify that they had transactions with him in business in years past and that he had proved trustworthy; but it is claimed that the effect of this testimony is so remote as not to aid the court in any manner in this matter. Character is usually established by evidence of reputation; the general rule being that character is a fact which is proved by another fact—that is, general reputation; and it cannot be shown by evidence of particular and specific facts, but may be proved by negative testimony.

It is said, however, that where character is the fact in issue, this rule is relaxed, and that evidence of acts may be introduced tending to establish the ultimate fact; but the evidence in this case was offered and received without objection, and the consideration of its admissibility in such a situation might seem more academic than practical.

In the Connors Case, 110 Cal. 408, 42 Pac. 906, cited and relied upon by the trust company, the counsel for applicant claimed that improvidence is an attribute of character that can be proved or disproved only by evidence of general reputation, and that all the testimony introduced on the issue as to specific acts was inadmissible and should be disregarded by the appellate court, but that tribunal said it did not think such contention could be sustained, although, for the reason that no exception had been saved in the trial court, the discussion became immaterial.

In the same case the supreme court said that improvidence is defined to be want of care or foresight in the management of property, and quoted from Coope v. Lowerre, 1 Barb. Ch. 45, that "the improvidence which the framers of the statute had in contemplation as a ground of exclusion is that want of care and foresight in the management of property which would be likely to render the estate and effects of the intestate

unsafe and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person."

Counsel for the trust company thinks that the principle of exclusion stated in the quotation, when applied to the facts of the case at bar, should bind the applicant Andrew on account of his improvidence, for, it is claimed, the court can come to no other conclusion, in view of his own career and his present condition than that he has been improvident beyond question, and that his improvidence would be likely, for that seems to be the test, to render the estate of his intestate unsafe and liable to be lost or diminished in value; and counsel insists that it is no answer to this to say that he will be compelled to give a sufficient undertaking for the execution of the trust, for the statute commits the administration only to a *provident* principal, with good sureties, and denies to it an *improvident* applicant irrespective of a bond. Nor is the smallness of the estate material; nor is the fact that the purpose of the applicant is not so much to deal with the nominal estate as to carry on litigation involving the estate in what seems to the opponent fruitless efforts to derive a benefit personal to himself.

This court has no means of judging, and no power to judge, in this proceeding of the merits of the litigation alluded to; it has no right to say whether it may be fruitless or otherwise. That question is in another forum, and is not presently, at least, a matter for the consideration of the probate department.

The evidence against Andrew is mainly that of his brother Edward, and his testimony is so tinctured by his grievances that its trustworthiness is impaired. It is an unfortunate fraternal feud of many years' duration; but the bitterness of the brothers toward each other does not of itself disqualify either for the trust. That Andrew has indulged in card-playing, or that he has been pursuing the profession of a baseball player for gain, or conducted licensed saloons or resorts where persons engaged in horse-racing or pugilism or other so-called legitimate sporting events met and made or laid wagers, and that he himself lost heavily at times by a lack of judgment or an error of calculation in such ventures, may be admitted; but

to hold that these acts make out a case of incompetency, by reason of improvidence, in the sense of the statute, would be to give the language a very loose and undiscriminating interpretation: Emerson v. Bowers, 14 N. Y. 454.

In the case last cited it is said that all the departures in conduct from the principles of rectitude, including all abuses of trust, are unwise and inexpedient, and, therefore, in a certain sense, improvident; but they do not constitute the kind of improvidence which the legislature had in view in these enactments. Edward testified that Andrew had admitted to him that he had embezzled the funds of another brother, now deceased, and that he had collected and appropriated sums of money belonging to Edward and their mother; but the court of appeals of New York has held that a person may be guilty of negligence or abuse in a fiduciary capacity, and yet not be improvident in the sense of the statute. The words in which the term is associated, "drunkenness," "want of understanding," are of some importance in arriving at its true construction. He may have misbehaved himself in a trust, but for that misbehavior the law provides a remedy; but even if that misconduct be established here, it does not constitute improvidence, according to the authority so strongly relied upon by the trust company, Coope v. Lowerre, 1 Barb. Ch. 48, in which the chancellor said that although it appeared that the applicant was grossly negligent in the management of his property and affairs and in the contracting of debts by indorsing for strangers or for men without visible means of payment, the court could not come to the conclusion that the party was improvident to such a degree as to render him incompetent to act as administrator, for no degree of moral delinquency is sufficient to exclude a person preferred by the statute.

This is stating the case in the strongest form against Andrew, for the charges made by Edward depend principally upon that brother's testimony, and are not to be accepted without reserve, and they are negatived by testimony of uninterested persons who have had dealings with Andrew of considerable dimensions in times past, and who testify to the personal probity and business providence. Whatever criticism may be cast upon their character by reason of their commercial calling, their credit may be considered as at least

equal to that of Edward, and their interest and bias are not so great, if, indeed, any such element may be assigned to them. The remarks of the chancellor in Coope v. Lowerre may be read with advantage upon this phase of the case, as made against Andrew, so far as Edward's testimony is to be taken; and these comments seem to have received the approval of our supreme court in the Bauquier matter, 88 Cal., pages 311, 312, 26 Pac. 178, 532.

3. WANT OF UNDERSTANDING.

This charge is not relied upon as a ground of incompetency, and may be dismissed without further consideration as to the applicant Andrew. Ordinarily, the words do not import a lack of comprehension of the codes or the law of administration; but the phrase rather refers to a want of common intelligence amounting to a defect of intellect. Education is not essential, no matter how useful to administrator: Matter of Shilton, Tuck. 73; Estate of Pacheco, 23 Cal. 480.

4. WANT OF INTEGRITY.

While the court is authorized to refuse to appoint as administrator for want of integrity, yet this power should not be exercised except upon clear and convincing evidence. The word "integrity," as here used, means soundness of moral principle and character, as shown by a person's dealing with others, in the making and performance of contracts, in fidelity and honesty in the discharge of trust; in short, it is used as a synonym for probity, honesty, and uprightness in business relations with others. This is the definition of the Bauquier Case, 88 Cal. 307, 26 Pac. 178, 532, and the evidence in the record before this court, apart from the assertions of Edward in his testimony, would not warrant a finding that Andrew is lacking in integrity as thus defined.

Much of what has been said under the head of improvidence may be regarded as repeated here, and need not be enlarged. Some of the acts attributed to Andrew by Edward are so remote as to come within the criticism of counsel for the trust company that the testimony does not assist the court in arriving at a conclusion as to the applicant's present status as to integrity; and they are combated by evidence already

adverted to coming from citizens with whom he has had business relations.

In a case in New Jersey, Cramer v. Sharp, 49 N. J. Eq. 558, 24 Atl. 962, an applicant was accused of misconduct in connection with the administration of his father's estate, in that he attempted through a third party to secure title to lands, of which his father died seised, at less than their fair value—in other words, as the court said, he undertook a fraudulent breach of his duty; yet he was eligible to the appointment sought by him. It is true the court in that case found extenuating circumstances, yet it is clear that the attempted act of the applicant was tainted with turpitude.

One reason for the court's ruling was that the opponent was equally guilty in a similar transaction, and was thereby estopped from assigning misconduct to the applicant, who was also the choice of the majority of the next of kin.

In this New Jersey case the court observed that the right of administration grows out of the right to distribution, and, consequently, those who are entitled, by the statute of distribution, as to what remains as the intestate's clear estate, after the payment of debts and expenses of administration, have an exclusive primary right to administer, which right, however, is purely personal, not coupled with any power or right on the part of the person possessing it to nominate or select the person to be appointed. This privilege is sometimes conferred by statute; but ordinarily the court said, it is undoubtedly true where a part of the next of kin, even a majority, ask for the appointment of a stranger against the will of one of their own number, who is willing to take the appointment and qualified to be the appointee; the rule, however, is different where the majority ask for the appointment of one of their own number.

In the case at bar two of the kin out of four ask for the appointment of a stranger, the trust company, as against Andrew, who is not opposed by a third, the daughter of a deceased brother, Samuel, whose funds he is said to have converted to his own use many years ago.

The forces here are evenly divided, as it seems.

The general rule was stated in the New Jersey case to be that if the majority of interests desire that the administra-

tion shall be placed in the hand of one of the next of kin, the court, in its discretion, will usually grant it to the nominee of such majority.

Under this view of the law, if the applicant, Andrew, being one of the next of kin of the intestate, were the choice of the majority of interests, his appointment would be entirely proper, unless his misconduct operate, as a matter of law, to totally disfranchise him; but in Cramer v. Sharp, the court said it knew of no adjudication which declared that a single breach of duty or a single act of dishonesty would produce such results.

While Andrew is not the choice of a majority of the kin, his opponent is, as to that fact, in no superior position, but occupies an inferior situation, as a stranger, and unless the evidence establishes a legal lack of integrity in the applicant, letters should issue to him.

Isolated instances of departure from the principles and paths of rectitude, especially when remote from the point of time at which the application is made, do not constitute a cause of exclusion on the ground of "want of integrity," where it is not shown, by legal proof, that the occasional acts have been repeated or become continuous, and evidence character at the date of the filing of the petition or hearing of the accusation. This seems to be the tenor and tone of the decisions.

This court is of opinion that while there may be testimony tending to support the charges against the applicant, Andrew, there is not evidence sufficient to prove their truth, and the supreme court has declared and decided that the judge in probate must appoint the next of kin unless he is shown to be disqualified by clear and convincing proof.

The application of Andrew J. Piercy is granted upon furnishing a bond in the sum of fifteen hundred dollars.

IN THE MATTER OF THE ESTATE OF D. V. B. HENARIE, DECEASED.

[No. 22,363; decided March 28, 1901.]

Community Property, What is.—On the Application for Partial Distribution by the widow in this case, the court finds that the investment of $10,000, out of which the estate of the decedent developed, was community property, with the possible exception of $100 raised by him from the sale of a watch owned by him before marriage.

Community Property—Adjustment of Right to in Dismissal of Divorce and Execution of Release.—Where a woman institutes an action for a divorce and a division of the common property, but before answer filed the suit is dismissed by stipulation, and as a part of the proceedings she receives valuable consideration in full settlement thereof and executes a receipt to that effect, the dismissal and release operate as a bar to a petition by her for partial distribution after his death.

Application for partial distribution by Mary A. Henarie, the widow of the decedent.

Van R. Paterson, and E. B. Young, for the petitioner.

A. Heynemann, for the respondent, Radgesky.

Myrick & Deering, for the absent heirs.

COFFEY, J. Mary A. Henarie petitions the court, alleging that she is the surviving wife of D. V. B. Henarie, who died in San Francisco, of which city he was a resident, on the 28th of November, 1899, leaving a last will admitted to probate on the 23d of February, 1900; that all the property of which the testator died seised was community property, acquired after their intermarriage on December 24, 1854, to one-half of which she is entitled in her right as surviving spouse. This is the pith of her petition.

In opposition the legatees and devisees deny each and all of the allegations specifically, and assert that petitioner, for a valuable consideration, on the 27th of February, 1886, released, relinquished, renounced, waived and surrendered any and all rights she had or may have, or might, could, would,

or should have or have had to any of the property of decedent, separate or community; and that on or about the 2d of January, 1889, for a valuable consideration, she made, executed and delivered an instrument in writing in full settlement, satisfaction and discharge of any interest which she might have in the community property of the intermarriage of herself and decedent.

Opponents further aver that petitioner instituted a suit for divorce against decedent involving the community rights of the parties, and that in said proceeding for a dissolution of their marriage she did receive valuable consideration in full settlement, satisfaction and discharge of her claims to any of the community property, and that pursuant to the terms of settlement a judgment of dismissal of the action was given and entered on January 9, 1889, and that by reason of these premises she is forever barred and estopped from claiming any right in the estate of decedent.

Opponents finally aver that petitioner has property acquired by her subsequent to her marriage with decedent, otherwise than by gift, bequest, descent, or devise, and that the same is community property; that the same is of great value, and they ask that she be compelled to disclose the facts in regard thereto, and they assert that at least one-half thereof is subject to the testamentary disposition of the decedent.

At the time of their marriage on December 24, 1854, the parties were penniless, at least they were substantially without property, and each was without employment, and it was not until about eight months thereafter that the husband secured an engagement as a clerk in a hotel; in that situation he subsisted for about eight months more, and then work became slack and irregular until September 1, 1856, when he entered the mercantile house of Peter Chrystal, where he continued for two years. During his service as a hotel clerk he received $100 a month and found. Of his salary he gave one-half to his wife, a thrifty and industrious woman, who rented rooms to lodgers and kept a boarder, and in every way known to a frugal and skilled housekeeper saved every penny possible until she accumulated a sum of $500 out of the money given to her by her husband "to live on." After

two years spent with Chrystal an opportunity offered to the husband to form a copartnership connection with E. Martin in the liquor business, Mr. Martin proposing to sell him an interest for $1,000. He communicated this proposal to his wife, but lamented his lack of the wherewithal, having but $400 in cash, whereupon she revealed to him that she had saved out of what he had given to her $500, which she then and there gave to him and he sold his watch for $100, thus making the requisite sum of $1,000, with which he purchased an interest in the firm of E. Martin & Co., thus laying the foundation of the fortune of which he died possessed.

According to the testimony of the wife, he was engaged in no other business, and continued to be so exclusively occupied down to the year 1886, when in February of that year, differences having arisen between them, there was an adjustment in the form of a deed of separation, which is here inserted:

"This indenture made and entered into this 27th day of February, A. D. 1886, by and between D. V. B. Henarie, of the City and County of San Francisco, State of California, the party of the first part, and Mary Ann Henarie of the same place, the party of the second part, Witnesseth:

"That whereas the parties hereto have been for many years and still are husband and wife, and

"Whereas, unhappily differences and disagreements have arisen, and do still subsist, between them by reason whereof they have agreed to live separate and apart from each other during their natural lives.

"And whereas the party of the first part has this day conveyed, transferred and assigned by Deeds purporting to be Deeds of Gift of real property and certain transfers of personal property to the party of the second part to hold, possess, and enjoy as her separate property and estate, Sixty (60) shares of the Capital Stock of the Chico Gas Company, sixty-seven (67) shares of the Capital Stock of the National Bank of Stockton, and two hundred (200) shares of the Capital Stock of the San Francisco Gas Light Company, and certain real estate situate in the Counties of Butte, Humboldt and San Diego in this State, which said real estate is particularly and fully described in four certain Deeds of Conveyance made this day by the party of the first part, to the party

of the second part, reference to which said deeds and each and every thereof is hereby made for a full and perfect description of said real estate; and has executed to her his certain promissory note for the principal sum of $11,169.28 payable in one year from date and bearing interest at the rate of six per cent annum, interest payable monthly.

"Now, therefore, in consideration of the premises, and of the said conveyances and of the mutual consent and agreement of the parties hereto, they have covenanted and agreed and by these presents do covenant and agree to and with each other that they shall and will, at all times hereafter live separate and apart, free from the molestation or control, each of the other, and from all connubial association or relation.

"And the party of the second part, for and in consideration of the premises, and particularly of the conveyances, transfers and assignments hereinbefore referred to, does hereby covenant and agree to and with the party of the first part, that she will not at any time hereafter compel or require the said party of the first part to cohabit or live with her, and that the said party of the first part shall be to all intents and purposes whatsoever, freed and discharged from the power, will and constraint of the party of the second part, and that she will not molest, hinder, interrupt, interfere with, or disturb him in his manner of living or in his liberty or freedom of going to, or staying in, or returning from such place or places as he shall think proper, and that saving and excepting her preservation of her rights in the community property of herself and the said party of the first part she will not claim nor demand nor have any ownership of, any property which the said party of the second part now has, or may hereafter acquire an interest therein, or any maintenance or support from him, and that she will, from and after the date hereof, entirely support and maintain herself from and out of her separate estate, and that she will waive and renounce all right or claim to institute legal proceedings against the party of the first part, for a divorce or for a dissolution of the marriage tie between them.

"And the party of the first part for and in consideration of the premises, does hereby covenant to and with the party of the second part and her heirs and assigns that all and

every of the real estate, described in the conveyances hereinbefore referred to are free and clear of all encumbrance made or suffered by him, or by any person or persons claiming through or under him.

"In witness whereof, the parties hereto have hereunto and to duplicate hereof, set their hands and seals, the day and year first above written.

"(Seal) D. V. B. HENARIE.

"(Seal) MARY A. HENARIE.

"Signed, sealed and delivered in the presence of

"J. F. WENDELL.

"EUGENE W. LEVY."

(Annexed to the above instrument are the separate acknowledgments of the parties, both taken before Notary Public Eugene W. Levy, on February 27, 1886.)

Decedent continued his allowance of $50 a month to his wife from 1858 until 1871, and pursuing the same provident course she saved and invested her money. Between 1858 and 1867 she received by gift from her husband and savings $4,000, and in 1867 purchased property on Pine street. He paid her $40 a month rent for this property from 1867 until he built an addition to the house and paid her $6,000, which was then its value. In 1876 he deeded to her this property, and from that time on it is claimed by her counsel that it was her separate property as well as the personal property therein.

From April, 1876, to August, 1878, they resided in the cottage on Taylor street and let the house fronting on Pine street, and from August, 1878, they lived in the Pine street house and let the cottage on Taylor street.

At the time of separation, February, 1886, as is seen by the agreement hereinabove inserted, he made deeds of gift to her of the Pleasanton, Chico, Eureka, and San Diego properties, and gave her his note of hand for $11,169.28 payable as therein provided, and in consideration of the premises she agreed, among other things, that saving and excepting her preservation of her rights in the community property of herself and him, she would not claim nor demand nor have any ownership of any property which he had at that date or might thereafter acquire, or any interest therein, or any main-

tenance or support from him, and that she would from and after that date entirely support and maintain herself from and out of her said separate estate, and that she would waive and renounce all right or claim to institute legal proceedings against him for a divorce.

Notwithstanding this final clause to forbear and renounce any claim or right to divorce, she did institute proceedings in that behalf on April 30, 1888, by filing a complaint which charged defendant with adultery, and alleged that since their intermarriage the parties had earned, acquired and accumulated a large amount of property of the value of one million of dollars or thereabouts, the legal title to which was in his name, but the whole of which was their community property, describing it as the wholesale liquor business carried on by the name of E. Martin & Company, a large number of shares of the Eastern Oregon Land Company, Leak Glove Company, and other real and personal property. Another count in this complaint alleged extreme cruelty, grievous mental suffering caused by his adulterous conduct and its consequences, and repeating the allegation as to community property. Finally, she demands judgment for a dissolution of the bonds of matrimony, costs and counsel fees, alimony, apportionment of common property, injunction against alienation, and appointment of a receiver pending divorce proceedings.

An amended complaint was filed on December 19, 1888, in which substantially the same causes of action were pleaded, but the allegations as to community were modified by omitting particular description thereof from inability to set forth specifically.

To this complaint a demurrer was interposed assigning several specific grounds as to the charges of adultery and raising the issue of law with respect to community property, because it did not appear from the allegations what was the value of the community property, in that the same was said to be of the value of $1,000.000 or thereabouts, and did not state with particular certainty what was the value of the said property; and that it did not appear how much the said property had earned nor how much was acquired, nor whether it was or was not acquired by one of them by gift, bequest, devise or descent, or with the rents or issues or profits

of said property, nor did it appear how much the said property had accumulated, nor with what means, nor that said property was acquired or accumulated as the result of the joint or several exertions or skill or labor of the parties or either of them.

It is contended on this hearing by the respondents that this demurrer made the same point in relation to the different kinds of community property which they have raised here supporting their contention that the deed of separation reserved rights in community property only the result of their joint efforts.

This was the state of the record when on December 31st, 1888, pursuant to stipulation a judgment of dismissal was entered. The stipulation was in the following form, after title of court and cause:

"It is stipulated and agreed by and between the parties hereto, that the above-entitled cause be and the same is hereby dismissed, each party paying his own costs, and that judgment may be entered accordingly.

"Dated, San Francisco, December 31, 1888.

"GORDON & YOUNG,
"Attorneys for Plaintiff.

"McALLISTER & BERGIN,
"Of Counsel.

"GARBER & BISHOP,
"Attorneys for Defendant."

Upon this followed a judicial order in this form:

"Title of Court and Cause.

"Upon reading and filing stipulation of parties to the above-entitled action, it is ordered that the said action be and the same is hereby dismissed, each party paying his own costs, and that judgment be entered accordingly.

"WM. T. WALLACE,
"January 8, 1889. Judge."

Finally came the following entry in the record:

"Title of Court and Cause.

"January 8, 1889.

"In this action, upon filing stipulation and upon application of counsel for respective parties, it is hereby ordered that this action be and the same is hereby dismissed.

"Wherefore by virtue of the law and by reason of the premises aforesaid it is ordered, adjudged and decreed that Mary A. Henarie, plaintiff, do take nothing by this her said action as against Daniel V. B. Henarie, defendant, but that a judgment of dismissal be and the same is entered herein."

Subsequent to the stipulation and prior to the dismissal, to wit, on January 2, 1889, an instrument was executed by the plaintiff which seems to have furnished a motive for the termination of the divorce proceedings. This instrument is in these terms:

"Received of D. V. B. Henarie the sum of $3,000 and other valuable consideration, in full settlement, satisfaction and discharge of all matters in controversy in the case of Mary A. Henarie vs. D. V. B. Henarie in the Superior Court of the City and County of San Francisco, State of California, Department No. 6, No. 22,854, with date."

It is contended that this document, which is a part of the proceedings in divorce and in this application, operates as a full and final release by petitioner of all claims past, present, and future on, in or to the estate of decedent, and that in addition to the stipulation for the dismissal all matters in controversy in that action were settled, satisfied and discharged, including necessarily her claim of community property, as that was one of those matters, and that in the light of this instrument the doctrine of retraxit applies with increased emphasis, making the judgment in that suit a complete bar to the proceeding herein for partial distribution.

This is the nub of the whole case.

It is claimed by counsel for petitioner that everything she possessed at the time of filing this application was and is her separate property, and that she had no community property; but that is not now the question before the court, although it is asserted that every dollar in her possession is the increment of the original gift of $6,000 and the income from the house on Pine Street. These sources, together with the acquisitions by deeds from her husband to her and the avails of the property so acquired, constituted her separate property, the deeds made by him to her in February, 1886. All that he had at the time of his death was the product of his investment in E. Martin & Company, and was the outcome of

the purchase of an interest in that firm, to which he was aided by the contribution of his wife; hence it was all community; no act of his could have changed its legal character. Her community rights were not affected by the articles of separation, while her separate property was recognized and confirmed; he certified on the record as to her separate property and the mode of its acquisition; the reservations, express and implied, in the articles protected her present claim, and that agreement should not be construed to alter or affect conditions which were not intended to be within its scope. But whatever may be the construction of the deed of separation, does not the determination of this application depend upon the outcome of the divorce proceedings and the issues involved therein?

Petitioner insists that the question of property was simply incidental and collateral; the issue was one of *divorce* on certain grounds and not of division of property; the proceedings in the divorce suit are all before this court; there was no answer in the case; there was no trial on the merits; there was no failure to prove the allegations of the complaint; the judgment in such a case does not amount to a retraxit; it does not act or operate as a forfeiture of her right to maintenance or to her share in the community property. Because she chose to dismiss that action or suffer a dismissal, did she forfeit a right which could not come into existence until the occurrence of a contingency which did not happen until twelve years thereafter, namely, the death of her husband? The judgment was "that she take nothing by the action"—that is, that she have no divorce. Only upon that issue was the judgment operative and conclusive; only upon the facts directly in controversy—adultery and cruelty. Matters only incidentally and collaterally in issue are not touched by such a judgment; the renunciation or release or receipt, whatever or whichever it may be termed, in no wise concluded her community or property rights.

Counsel for respondent claim that the clause in the agreement of separation which reads, after agreeing that they shall live separate and apart, "and that saving and excepting her preservation of her rights in the community property of herself and the said party of the first part, she will not claim or

demand or have any ownership of any property which the said party of the first part now has, or may hereafter acquire or any interest herein, or any maintenance or support from him, and that she will from and after the date hereof entirely maintain and support herself from and out of her said separate estate," refers to the preservation of rights in such property as might be acquired thereafter by their joint efforts; and that there is no evidence in this record of the existence of such property. It is contended by counsel that at the date of this agreement, February 27, 1886, there were three kinds of community property: 1. Acquired by the husband after marriage; 2. Acquired by the wife after marriage; 3. Acquired by both. This contention is supported by sections of the code needless to insert here, and by decisions interpreting the civil law as it was applied in California prior to the adoption of our first statute on the subject in 1850. The same counsel claims that at the date of the deed of separation no more than two-fifths of that property could be community property, for the reason that it was all the result of the investment of $1,000, $600 of which was Henarie's separate property, and not more than $400 of which could have been community property. In February, 1886, Henarie had property of the value of $270, the result of this $1,000 investment. Two-fifths of that, to wit, $180, was community property, we will say—not more. One hundred and sixty-two thousand dollars, at least, was separate property. Of the $108,000, Henarie gave to Mrs. Henarie $90,000 (in fact, $91,000), leaving $18,000 in his hands, and not more, as community property. Assuming that she used this with the three-fifths of the whole—that is with the $162,000—and we have $162,000, plus $18,000, to wit, $180,000 worth of property with which he made the estate with which he died seised. Of this $180,000, $18,000 is but one-tenth and therefore the product of one-tenth, and no more could be community property—that is, only one-tenth of the property of which he died seised was community property; and of this one-tenth the utmost that Mrs. Henarie could claim would be one-half, so that all she could receive would be one-twentieth of the estate which he left for her community share.

This was the situation, it is claimed by counsel for respondents, with regard to property rights of the respective parties at the time of the deed of separation, February 27, 1886.

It appears from the deposition of defendant in the divorce suit that at the time of the separation in 1886 decedent conveyed to his wife about one-third of the whole amount of the property then held by him, or in value as $90,000 is to $270,000, having previously given her from time to time about $35,000 in property and money.

This court does not subscribe to the theory of counsel for respondents as hereinabove summarized. The evidence shows that the petitioner's possessions at the time of this application were all her separate property, and it is immaterial how much she possessed, if it be separate; the probate court, moreover, has no jurisdiction to settle questions of title on distribution. As the supreme court has repeatedly decided, there are many matters relating to estates of deceased persons of which the probate court has no jurisdiction, and this is one of them. What she received from her husband on the occasion of the separation and what he had previously given to her became thereby her separate property, saving rights of creditors existing at time of transfer. This was the understanding of both parties, according to the evidence of each.

As to the origination of the property and its consequent character, my conclusion is, from the testimony and from the application thereto of the authorities, that the prime investment, $1,000, out of which the fortune developed, was all community property, with the possible exception of the $100 the husband raised on the watch, which was about all he owned at the time of his marriage. In his deposition taken August 24, 1888, he testified that when they intermarried on Christmas Eve, 1854, he had "not anything of account" and was in no business, and she was equally endowed. Afterward he secured employment, gave her money monthly out of his earnings for household expenses; she took a boarder and lodgers, toiled and scrimped and denied herself until she had saved $500, which sum, when the chance came to him to purchase an interest in E. Martin & Co., she contributed to make up the amount needed for that investment; the balance

he furnished as stated. If the amount raised on the watch is to be taken into account as separate property of the husband, then there were nine parts community and one part separate property in the common stock which produced the great profits of the business of E. Martin & Co. that finally centered in the sole dominion of decedent.

It is contended by counsel for respondents that under the articles of separation the right reserved by the wife was to preserve her interest in whatever might be in future the product of joint endeavor; that only in such community property as should be the result of the joint efforts of both herself and her separated spouse was she to share. As there was no concerted action or united endeavor subsequent to the separation, there could be no such result, if that were what was contemplated by the parties, and the record discloses that this third kind of species of community property has no existence. This court does not consider that such was the design of the draftsman of that document or of the parties thereto. In drawing the deed of separation language was carefully chosen and aptly applied by her attorney, and she herself was a woman of uncommon clearness of mind and intellectual energy, a most remarkable person, of great mental acumen, according to her counsel in this case; and this tribute is indorsed by opposing counsel, who conducted her examination, who described her mental character, notwithstanding age and physical infirmities, as sound, acute and robust, with a marvelous memory, definite and exact to a degree, a shrewd judge of human nature, with a keen eye to the main chance, thoroughly alive to her own interests.

These encomiums are borne out by a perusal of her deposition, which shows that to an advanced age, while prostrated with incurable illness, she preserved and exhibited alertness and sharpness of faculty and a wariness and ability that made her more than a match for the most masterly antagonist. Such a woman scarcely needed the advice or assistance of an attorney, except to attend to professional details, and in essentials she was able to cope with counsel of erudition and experience; but in the business she transacted with her husband in the matter of the separation, and subsequently, she

had, in addition to her own talents, the advantage of aid from gentlemen of approved legal skill and culture, and the instruments prepared by them and executed by her were the reflex of her judgment based upon her belief as to her property rights and claims. A woman of her penetration and sagacity was not apt to be imposed upon by deception or artifice, and none was practiced upon her.

Assuming now that this court has a correct conception of the law as to the community property and has given it intelligible expression, what was the effect of the proceedings in the divorce suit upon petitioner's claims herein? That is the question before the court. It is a new question, in which the principle is not as plain as a pikestaff. The authorities cited on either side do not touch the precise point, and the court must reason it out upon first principles. The nature of an action for divorce must be considered and construed; the effect of a judgment of dismissal as a retraxit; when a dismissal will operate as a bar to subsequent action; what is a cause of action in such case; the interpretation of the receipt or release, whether it be a surrender or abandonment by the wife of community rights; the relations of the parties after separation: all these questions as they arise to the surface in the course of this controversy are interesting and some of them novel.

Counsel for petitioner claim that in the action for divorce the question of property was subordinate to the main issues, the causes of action—adultery and cruelty—and that the judgment of dismissal did not, and could not, reach matters only incidentally and collaterally connected with the grounds of complaint, and that the receipt introduced here necessarily in no wise enters into the discussion of the community rights.

An action for divorce proceeds primarily upon the proposition that the defendant has committed a breach of the marriage contract entitling the plaintiff to a decree of dissolution; but when there is property, something more is implied according to the circumstances pleaded. So that in this case the facts in issue were, first, the acts imputed to defendant, and, secondly, the existence and apportionment of community property. These issues were tendered by plaintiff and were directly involved in the judgment. They were all the sub-

ject of examination by counsel, as appears from the depositions in the divorce suit, and such great stress was laid upon the matter of property in the taking of testimony that there is some excuse for the criticism of one of the counsel for respondents that property was really the paramount issue, divorce the mere means to the end of obtaining a larger share of his property. In the course of that searching inquisition into the resources of defendant every particle of his property and its disposition was traced, and his conscience was probed until no concealment of his possessions seemed possible. In addition, at the request of her counsel defendant furnished memoranda and list of properties involved in that action.

It is claimed by petitioner that in the suit for divorce the question of property was merely an incident; that the property could not be considered until the ground for divorce was established; but I think that this view was not correct, for the issues were tendered by the pleadings, and embraced the grounds of divorce and property rights. The parties undertook to litigate their rights as to community. The points raised by counsel for defendant in that case on demurrer were substantially the same as those urged by respondents on this application; they did not compromise collateral or incidental issues, but facts in issue tendered by the complaint—facts upon which the plaintiff proceeded by her action and which the defendant controverted by his plea, not collateral facts or probative matter offered in evidence to establish those issues. The former extends to every question necessarily litigated between the parties; the latter to that which is evidentiary or prohibitive of the former; matter which is incidentally cognizable to the issue, only collateral to the facts in the issue made by the pleadings; introduced in evidence to establish the main facts litigated. What were the main facts litigated in the divorce suit? An examination of the pleadings and the evidence shows that they comprehended grounds of divorce and community right in property. These were the material issues upon which joinder was made.

The issue being material, necessarily litigable, was determinable and determined by the dismissal.

If, then, the community right was a material issue in that cause, as it was raised by the pleadings there and is again

raised in this proceeding, the determination in the divorce case is an estoppel by judgment here. Taken in connection with the paper of January, 1889, construed as a release, it operates as a complete bar to any further attempt to litigate the facts in issue in divorce proceedings. A judgment of dismissal in the circumstances recited in this case, pursuant to stipulation, each party paying his own costs, amounts to the open voluntary renunciation of a suit pending, which must be held to operate a retraxit.

What is a retraxit? It is a bar to all actions of a like nature; it is the withdrawal by plaintiff of his suit; and the legal deduction from such a withdrawal followed by a judgment by consent, as in this case, is that the parties had, by their agreement, adjusted the subject matter of controversy in that action; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other proceeding between the same parties on the cause of controversy then adjusted by the parties and merged in the judgment thereon rendered at their instance and in consequence of their agreement. This was not a mere dismissal by plaintiff, but a judgment based upon and entered in pursuance of the stipulation of the parties, and must be understood to amount to such an adjustment of the merits of the controversy by the parties themselves, through the judgment of the court, as would constitute a defense to another action for the same cause.

It is not material that the issue raised was merely one of law, for the judgment rendered was not upon demurrer but upon dismissal, and the authorities show that the doctrine of res adjudicata and estoppel by judgment applies to issues of law as well as those of fact.

The law in case of retraxit assumes the adjustment of all matters in dispute in the litigation, and this assumption finds support in this case upon the instrument of January 2, 1889, signed by petitioner and hereinabove recited on page nine of this opinion.

What was the effect of that document? Counsel for petitioner argue that this paper is a receipt, and not a release, and cannot be interpreted a surrender or abandonment by

the wife of the community rights, and they claim that the signer was not properly protected by legal advice when the instrument was executed, and rely upon the testimony of a subscribing witness, an attorney, to point its meaning merely to the expenses attendant upon the divorce litigation. It is argued that it could not possibly have referred to an inchoate right, a mere expectancy, dependent upon the prior decease of her husband; something that might not occur in the order of nature anterior to her own demise, and that it has no reference to anything but the main issue. It could not have altered her legal relations to the property, and she is here demanding her due. As heir at law she cannot be devested of her rights by any instrument so meager and restricted as this receipt, which is not a relinquishment. It is insisted by her counsel that petitioner has a substantial claim upon the estate of decedent, and is entitled to the consideration of the court in a meritorious manner. She is not estopped by any act of hers in evidence from asserting her spousal rights; her conduct throughout has been consistent with her claim. Furthermore, it is insisted that the relations of the spouses must always be borne in mind; so long as the law had not severed their status, although separated by agreement, they occupied toward each other confidential and fiduciary relations.

This is the proposition of petitioner upon the final point.

In order to arrive at an accurate answer to these arguments, we must consider the circumstances of the execution of that document at the time of its date, January 2, 1889, for it must be explained, if it be not self-explanatory, by reference to those circumstances and the matters to which it relates. That instrument standing by itself shows that whatever was in controversy was settled, satisfied and discharged. What were the matters in controversy? One of them was her claim to community rights. She had sued for a divorce and for a division of "the common property." Three years before this paper was signed by her petitioner had entered into articles of separation for their natural lives with her husband, by which she had bound herself to refrain from molesting him or interfering with his acts or conduct or movements in any way, and waiving and renouncing all right to institute suit for divorce. The relation of husband and wife, with its con-

fidential character, ceased from that moment. The execution of those articles was equivalent to a divorce from bed and board as it exists elsewhere. To all intents and purposes the spouses were the same as strangers after the deed of separation, February 26, 1886. They then sustained no fiduciary or confidential relations. After that point of time they lived separate, and on April 30, 1888, in violation of her covenant to the contrary, she filed her bill for divorce, and it was not until just after the expiration of that year that this receipt or release was executed by her.

In view of these facts, what did this document embrace and comprehend? It was "in full settlement, satisfaction, and discharge of *all* matters in controversy." It could not include more, nor did it comprise less, than each and every controverted issue or matter in the action for divorce.

Counsel for petitioner contend that this instrument did not purport to comprehend community property, and that this is not an attempt to rescind but to exclude a subject which the signer did not intend to include in it. She is not seeking to disaffirm her act, but she is objecting to the application of the written evidence of it to a subject she was led to believe was not included in it.

It seems to this court that this is not a case such as one cited by the counsel, where it was held that the duties of the husband toward the wife, arising out of the personal relation of trust and confidence, required from the husband obligations of the highest good faith in any dealings between them, and precluded him from obtaining advantage over her by means of any misrepresentations, concealments or adverse pressure. The facts here do not fit into the principle of the citation. This is not that case; but it is a case where the spouses were dealing at arm's-length. She was not dependent upon him or his counsel; she had her own. She did not deal directly with her separated spouse; he acted through his attorneys and she had advisers of her own selection, although one of them was at that time no longer living; but the instrument was not signed by reason of any connubial or other confidence reposed in her husband.

The instrument was what it purported to be on its face — a full settlement, for valuable considerations, of all matters

in controversy in the divorce case, which included necessarily a complete adjustment of any rights she might have preserved by her deed of separation in the community property. It was *not* a mere receipt, but was a contract for a substantial and valid consideration, therein expressed in pecuniary terms, relinquishing all rights, past, present and prospective, in or to the subject matter of the litigation. It was a final compromise of all their differences and a termination of their disputes. It was so acted upon by the releasee, and it would seem inequitable to allow its validity to be now gainsaid by the releasor. The transaction was fair. In addition to the thousands of dollars passed to her by its terms, there were other valuable considerations, including an implied waiver of any right he might have to recover the ninety odd thousand dollars' worth of property transferred to her under the contract which she had broken by her institution of an action for divorce, which breach was repaired by this release, an instrument constituting the conclusion of the conjugal controversy for all time. Application denied.

Where the Parties to an Action Settled their dispute and agreed to a dismissal, this amounts to a retraxit and to a decision on the merits: State Medical Examining Board v. Stewart, 46 Wash. 79, 123 Am. St. Rep. 915.

IN THE MATTER OF THE ESTATE OF JOSEPH ROSS, DECEASED.

[Decided May 6, 1901.]

Wills—Pretermitted Child.—Where a Man Makes a Bequest to his son who, unknown to the testator, is at the time dead, for which reason the legacy lapses, the child of the son is entitled to the same share of the estate as if the testator had died intestate.

Decree of Distribution—Right of Omitted Child to Relief.—The superior court in probate has jurisdiction to open a decree of distribution in behalf of a minor child whom the decedent omitted from his will and for whom the decree makes no provision; and want of diligence, in ascertaining his rights, will not be imputed to the child, if he is of tender years.

Death—Presumption of from Absence.—The Presumption of Law is, that a person absent and unheard of for seven years is dead.

Joseph Ross died October 27, 1898, leaving a will which was admitted to probate. The provision of the will involved in the present decision will be found in the first paragraph of the opinion of the court.

COFFEY, J. "Thirdly, I give and bequeath to my two sons, Joseph L. Ross and John M. Ross, the sum of ten dollars each, and no other part or portion of my estate."

He specifically devised a house and lot to a stepdaughter, Harriet C. Babson, and the remainder of his estate to his two daughters, Mrs. Hallet and Mrs. Frear, making the latter, together with the husband of the former, his executors. Hallet subsequently pending administration died, leaving Mrs. Frear sole executrix.

Testator was a widower aged about seventy-six years when he died. On October 7, 1899, the executrix filed her petition for distribution of the estate, according to the terms of the testament, alleging performance of her duties, and reciting that decedent left him surviving two daughters, namely, Mrs. Mary E. Hallet and Mrs. Meda F. Frear, both over the age of twenty-one years and residents of San Francisco, and "that Joseph L. Ross and John M. Ross, the two sons of decedent named in his will, have not been heard of for more than ten (10) years last past, and are believed to be dead." In her final report as executrix she states that "by the will of decedent ten dollars is bequeathed to each of the two sons of decedent, namely, Joseph L. and John M. Ross. John M. Ross went to sea over twenty years ago and has not been heard from since, and has long been believed to be dead by his family. Joseph L. Ross left California over ten years ago and has never been back since, and though diligent efforts have been made, especially since the death of decedent, to ascertain his whereabouts, no trace of him has been discovered, and he is believed to be dead."

This report was subscribed and sworn to by Meda F. Frear, executrix, on the seventh day of October, 1899. On the twentieth day of October, 1899, pursuant to petition, a decree of distribution was made, entered and filed, according to the terms of the will. On the 16th of December, 1899, a

letter was addressed to the judge presiding in this department reading as follows:

"December 16, 1899.

"Dear Sir: From investigations made, I am convinced that my daughter, Ethel Ross, the child of myself and my former husband, Joseph L. Ross, is entitled to a share, of the estate of Joseph Ross, deceased; the administration of this estate was, and is, pending in your Court, and I think the interests of the child should be protected through the appointment of an attorney to represent her. As the child's mother and natural guardian, I would request that you would appoint Mr. I. I. Brown, as such attorney.

"Very respectfully,

"Mrs. SOPHIE JENSEN."

In compliance with this request the court made the appointment of the attorney on the same day, the letter and order being filed on the 20th of December, 1899, and on this latter named date the attorney so appointed filed the petition of Ethel Ross, the minor mentioned, wherein it was recited that she was twelve years of age and the only child of said Joseph L. Ross, who died outside of the state of California during the year 1890. Other facts are recited to show her right to relief by setting aside the decree of distribution entered on October 20, 1899.

Simultaneously was filed the petition of the said minor claiming to be pretermitted heir of Joseph Ross, the testator, as sole issue of his son, Joseph L. Ross, deceased, at the time of the execution of the will, and averring that the omission of the testator to provide for her was not intentional, and that she is thereby entitled as an heir to a one-third interest in the estate and praying for a distribution to her of such share. Objections and answers were made to these petitions by the executrix and by Mrs. Babson, a devisee, and in due course, after full consideration of the affidavits of parties and the arguments of counsel, the judgment and decree of distribution were set aside and the matter reopened on the petition by the minor.

The cause came on regularly for trial and much evidence was elicited, from which it was sought to show on the one side that Joseph L. Ross, the son of testator and father of claim-

ant, was not in existence at the time of the making of the will; that the provision in that instrument for the son was not a provision for his daughter Ethel, such as is contemplated by section 1307 of the Civil Code of California; that she is not provided for under the law by reason of section 1310 of the same code; and that the legacy to Joseph L. Ross was void and did not pass to Ethel.

On the other side, it is contended that there are two propositions necessary to the success of petitioner: 1. Establishment by claimant of presumption of death of Joseph L. Ross; 2. If that be established, the law of pretermission as affecting the claim of minor as successor of her father.

As to the first proposition, the position of respondents is, that the death of Joseph L. Ross has not been established by presumption of law or otherwise.

The testimony of Mrs. Meda F. Frear is that her father told her about the time of the execution of the will that he had heard that his son, Joseph L. Ross, was living in La Grange, Illinois, with his brother's widow, whom he had married and who was supporting him; that when she made the statement in her report as executrix she meant only that from the search she had made through her attorney since the death of her father she could not find her brother and believed him to be dead; that afterward again she searched for information and learned that one Mrs. George Walker, who had relatives in La Grange, Illinois, had received tidings of Joseph L. Ross and in that connection the executrix received a letter as follows:

"San Francisco, Jan. 2, 1899.

"Dear Meda: You asked me to let you know by mail if we should hear about Joe. Mrs. Walker called to-day, with a letter she had just received from her people, saying that after many inquiries, they found that Joe was living in Chicago, and that his address was Adams Street, near Holsted, Chicago. She also said that they had sent him word of his father's death; and had given him your address. Uncle John was here when Mrs. Walker called, and heard all that was said.

"With love,

"Aunt LILLIE."

Mrs. Mary Walker testified that she was acquainted with the family of Joseph Ross, deceased; that she had in the month of December, 1898, two cousins residing in La Grange, Illinois; that after the death of Joseph Ross she wrote to her cousin, Nellie Dickson, then residing there, and received from her on or about January 2, 1899, a letter stating that Joseph L. Ross was then living there in La Grange; that afterward she wrote again to her said cousin, Nellie Dickson, and was informed that said Joseph L. Ross had left La Grange and had gone to Chicago to live.

Mrs. Mary E. Hallet deposed that she frequently heard her father, Joseph Ross, state that her brother, Joseph L., was residing in Illinois, and a short time before her father died she heard him say that Joseph L. was living in Chicago, and that he was married again, and that he had no doubt that Joseph L. would return as soon as he was dead and make them trouble about the will.

Thomas R. Henshelwood was intimately acquainted with Joseph Ross, Sr., for more than forty years prior to his death; boarded on two occasions with his family and was intimate with all of them; two or three years before the death of the father in a conversation with Henshelwood about the Ross family matters he asked him if he ever heard from his son, Joseph L., and the answer was, "Yes, he is married to Willie's widow and is now living in Chicago."

The presumption of law is, that a person not heard from in seven years is dead. The burden being originally cast upon the claimant, she relied principally upon her mother's evidence, which was to the effect that Joseph L. Ross was last heard from in Spokane, Washington, in 1889. In that year she received the last letter from him, dated July 24, 1889; this was the last communication direct from him and was tender in tone and tenor, couched in terms of affection, engaging to write again, treating of his illness and the malarious condition of the locality in which he was sojourning; all of the letters exhibiting solicitude for her and for her child, and tending to prove that if he lived he would write to her.

Prior to this letter of July 24, 1889, Joseph L. Ross was a constant correspondent, having written during a period of less than eight months at least a dozen letters to his wife,

all in the same strain of endearment as the last. No reason consistent with his continued existence is in evidence to account for the cessation of his correspondence. The statement of Newbery sustains the theory of presumption:

"N. Y., Jany. 8, '01.

"Gavin McNab, San Francisco.

"Dear Sir: Your letter of December 15th was received during my absence from the city.

"I have not seen Joseph L. Ross since 1889, and know nothing about his whereabouts. He came to me at Spokane in 1888, I think it was, with all the outward evidence of being a tramp. I fed and clothed him, obtained employment for him and tried to redeem him. It was useless, however. Before very long he went back to his evil ways and I refused to have anything to do with him further. I have no doubt he is dead, but that is merely an opinion. Sometimes such wretched creatures last longer than they ought to.

"Yours, etc.,

"A. A. NEWBERY."

It appears from this correspondence that the relations between Joseph L. Ross and his wife were friendly, and that he was concerned for the welfare of his child and desired to be with his family, his last letter ending in these words at the end of five pages of recital of hardships experienced by him in the northern territory:

"So, my dearest Soph, your only resource for the immediate present is to call on my father, and you must certainly do this at all hazards. I will and shall make a place for you and myself in this world and that as soon as I can get out out of here. Where I shall go I will let you know as soon as I decide, but of this rest assured, I in my next start will make a place for our baby and ourselves. You cannot think how tenderly I have cherished the lock of hair you sent me of sweet Ethel, nor can you think how much I long for you both, nor how much your sufferings have worried and driven me almost to desperation.

"Dearest Soph, I must now say good-bye, but not for long as I trust and firmly believe we will ere long be happily united, never again to be separated. Let me urge you to share in this my belief; and may God's help be with you to

enable you to do so. With my deepest love and affection for yourself and baby. Yours ever,

"JOE."

"P. S.—I will surely write you where I am and my prospects."

He never wrote again, and his wife having made unavailing search and inquiry for him for years concluded her mourning by marrying a second time; she believed him dead in 1891; she sought information about him in 1892 and could hear nothing of him; but, notwithstanding her belief that he was no longer living, she was induced to institute a suit for divorce, having been persuaded that it was best for her to make assurance doubly sure by a judicial decree of dissolution, and in order to obtain jurisdiction she made an affidavit for publication of summons in which she recited that she had made diligent inquiry and had heard that he was living in New York. In her testimony she undertakes to explain this statement by saying that it was made upon information received through her attorney, upon which she relied.

It is contended that this affidavit estops her from now denying its contents, and that, moreover, after the divorce secured in 1892 she was a stranger to him and there was no reason why she should have heard from him; and besides her complaint in divorce alleged desertion in 1888, and when she made the affidavit in 1891, and when it was her interest to so state, she alleged his existence and whereabouts. But the affidavit alluded to is not conclusive evidence against her; it is not an estoppel, as our appellate court has declared. When she went upon the stand as a witness in this proceeding in behalf of her child she explained that she made the statement therein upon the strength of a rumor she had heard through her attorney, which rumor turned out to be false. This court can well find so far as that affidavit is concerned, in view of her testimony herein, that there was no authentic information that her husband, Joseph L. Ross, was alive at that time. Convinced of his death she subsequently married and became Mrs. Jensen.

When claimant established the fact that Joseph L. Ross was last heard from in 1889 in Spokane, through the testimony of

her mother and the letters received by her and the statement admitted as coming from Newbery, she did all that was required by the law of presumptions to make out her case in chief. The burden of proof then shifted to respondents, and they rely mainly upon the belief imputed to the testator from his statements that he had heard that his son, Joseph L., was living in Illinois with his brother's widow. Notwithstanding her statement made in the report verified by her as executrix that she had after diligent efforts made, especially after the death of testator, to ascertain the whereabouts of Joseph discovered no trace of him, and believed him to be dead, she now asserts the contrary on the strength of rumors which, when ciphered down to final demonstration, show that a man supposed by some persons to be Joseph L. Ross was living for a time in La Grange, Illinois, with the widow of William Ross, and that the correspondence introduced in the testimony of Mrs. Freer and Mrs. Walker referred to this individual and the statements attributed to testator pointed to the same person, but there is no proof of the identity of the missing son with this man other than that he was sometimes called by the same name, Ross, or Joseph Ross, or "Joe L." Ross. The husband of executrix made a journey pending this proceeding to Illinois, but failed to find any satisfactory evidence of identity; at least no testimony came from him throwing light on the subject; and, finally, there came upon the stand a witness answering here to the name of John Watson, of whom it is said that his testimony, fortified by certain voluminous reports from detectives, furnishes the last link in the chain of evidence that he was the man mistaken for Joseph L. Ross in La Grange.

Counsel for respondents comments on what he denominates the peculiar character of the testimony of John Watson in connection with the reports of the operations of Pinkerton's National Detective Agency, called for convenience the "Pinkerton letters," written to attorneys for claimant, for the purpose of verifying or falsifying the report that Joseph L. Ross had ever lived at La Grange, Illinois, and counsel claimed as the result of an analysis of those letters that the man here produced as John Watson was not the person known in La Grange as Joseph L. Ross; that he in no wise tallies

with the description of that individual in the letter; that he states positively that he is not the man referred to as Ross, although he says people around the building called him by that name, but that he was never known by any other name than Watson.

Joseph L. Ross and John Watson were two different persons, it is true; but it is also true that during the six years prior to 1899 that the latter was in La Grange he was sometimes called and known as Ross by persons with whom he was familiar, and that he received letters so addressed which he says he always turned over to Mrs. Ross, the widow with whom he lived. Watson swears that all around the building where he was working they used always to call him Ross, which was not his true name, nor did he assume it, but he allowed the neighbors and the others to apply it to him. Watson had known Joseph L. Ross about eighteen years ago, but he had never seen him in La Grange, nor had ever heard of him there, and Ross never was in that town during his time, so far as he had ever heard or seen; the widow Ross had never been married to Joseph, and Watson testified that he certainly would have known that fact if it were true. La Grange was a place of nine or ten thousand inhabitants. Watson knew that Joseph L. Ross did not leave La Grange and go to live on Adams near Halsted street, Chicago, because he lived there himself in the same house with the widow Ross. While he was not married to her his association was intimate, but his family and home were in San Francisco, to which place he returned about twelve or fourteen months prior to this trial.

The testimony of Watson is in the main substantiated by the stories collected and collated by the Pinkerton corps of detectives, who supply and clarify what is deficient or obscure in the narrative of this witness. While, as counsel for respondents declares, this man does not freely and fully expose his relations with the Rosses in La Grange, and denies that he ever posed as Joseph, yet it does appear from the report of Pinkerton's operatives that when John Watson went to La Grange in 1893 and found William Ross dead, with whom he had been acquainted, both having been lathers by trade, he lived for a time with the widow, but was not married

to her, as he had a wife and grown daughter in San Francisco, to whom he subsequently returned. The chief of police knew Watson from the time the latter came to La Grange in the early part of 1893, about the time of the opening of the World's Fair, and the chief states that Watson was known to everyone as Joe L. Ross, a brother of the late William Ross, who had died the previous year, but he generally introduced himself as Watson and so signed his letters. Watson was living very intimately with the widow Ross, but they were not married. The former postmaster stated that during his term Joe L. Ross had a box for his letters, which were addressed sometimes to that name, and other times Joe L. Watson, but always claimed by the same man when called for. It is clear from the statements made by the various persons named in the Pinkerton letters, and the circumstances in which they were produced and compiled, that the facts are not fabricated, and they all conspire to one irresistible conclusion: That the genuine Joseph L. Ross did not live at any time in La Grange, but that John Watson, the witness examined here, was the individual to whom that appellation was applied in the small town where he spent the period of six years or more, and where for purposes of his own he did not undertake to deny that he was the brother in law of the widow with whom he was maintaining meretricious relations while he had a wife and family in the city of San Francisco. Watson is the man who was mistaken for Joseph L. Ross, and the circumstances of his allowing himself to be so called and known to the townspeople, tradesmen, shopkeepers, artisans, contractors by whom he was employed, companions generally, and police officers particularly, and his cohabitation with the widow Ross, were the source of the false rumors that found their way across the continent and reached the ears of the family in San Francisco, and led them to believe that the relative who disappeared in Spokane in 1889 had come to life again several years thereafter in La Grange, Illinois, although they were not so far credent of the tale as to give it the dignity of affirmation until after the appearance of the minor as a claimant subsequent to the decree which vested in them virtually the whole estate.

It seems to this court that, so far as the presumption of the death of Joseph L. Ross is concerned, claimant has established that proposition, but counsel for respondent exclaims, assuming that petitioner has prevailed on this point, it avails her naught.

Counsel for respondents contend that even if it be established that testator made a mistake in regard to the continued existence of his son, Joseph L. Ross, that it is immaterial so far as the estate is concerned, because that statute, section 1307, was satisfied when he made provision for the said son; if testator was erroneously informed and mistakenly believed that Joseph L. was still living at the date of making the will, the case of claimant is not aided by testator's error of information and belief, because if, according to the argument, testator believes a child to be living, he cannot be said to have forgotten the issue of that child, for under the statute, section 1307, he is not bound to provide for or remember a grandchild if its parent be provided for. A grandchild is to be provided for only in the event that there be no provision for its parent, and the statute is satisfied if there be such provision.

Sections 1306 and 1307 may be read together:

"1306. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

"1307. When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section."

It has been held in California that the purpose of the statute is not to compel actual provision for heirs, but simply to require that the testator should have them in mind. When they are present to the mind of the testator, the statute affords no protection if provision is not made for them. It

has been uniformly held that the statute applies only to a case where a child or descendant is forgotten or unknown, or for some reason unintentionally overlooked. The object of the statute is to protect the children from omission or oversight unintentional, but when they are present in the mind of the testator, the statute affords no protection if provision be not made for them. In the case of Callaghan cited by counsel the children were expressly named in the will, and there was no doubt they were intended, but the bequest or devise failed because the property had been transferred by testatrix and was not owned by her at the time of her death. That is not the case at bar. But counsel for respondents contend that a grandchild is to be provided for only in the event that there be no provision for its parent, and that the court will not review the correctness of the conclusion of testator upon the existence of his son Joseph L. Ross, and nothing in the will negatives testator's belief in the continued existence of his child, and the legacy of $10 is a clear indication of testator's belief, which must be taken as proved, for the law presumes that he is correct in his conclusions and has made no mistakes, and the court will not concern itself as to his correctness. Assuming, however, that Joseph L. was dead at the time of execution of the will, counsel for respondents insist that the legacy does not lapse, but descends to his daughter Ethel, and, therefore, the will containing a provision for the issue of deceased child fully satisfies section 1307 of the Civil Code, and precludes her from claiming as pretermitted, and, consequently, she has no legal status here in any event, for under the dominant statute, section 1310, Civil Code, the legacy does not lapse, but goes to her as the issue of her deceased father, the son of testator.

"Section 1310. When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator."

The application of this section to the case at bar raises a question new in this state, but I do not think the construction of counsel for respondents will be countenanced by the appellate tribunal upon a review of this record. A case from

Missouri, where the statute seems to be similar to our code, sections 1307 and 1310, is cited as an exact photograph of the one we are dealing with here, but after a careful reading I do not consider that it chimes in with all the facts and circumstances of this claimant's case, and, as said by our supreme court in the matter of Stevens, on questions of construction, one case, unless in all respects similar to this, cannot be regarded as an authority. In the opinion of this court, the acceptance of the Missouri case as an authority here would be repugnant to the reason of our code section upon which she depends, and destructive of a right guaranteed as a presumptive heir of the testator.

I am unable to conceive how section 1310 can be applied rationally to substitute as the recipient of the legacy to Joseph L. his child Ethel, who was not therein suggested as substitute or successor in any event. That section was designed to benefit a class of lineal descendants who were not presumptive heirs at the date of the will, but who, by reason of the contingency occurring between that time and the death of the testator, became entitled to the devise or bequest made to their ancestor; but section 1307 of the Civil Code describes a separate class, in which is found this claimant, and was passed for the protection of presumptive heirs, in which guise she presents herself to this court, and not as *one* within the contemplation of section 1310.

At the date of the will Ethel's father was dead; the bequest to him was vain. It is immaterial whether the testator was mistaken as to his son's existence; it is only material that the junior Joseph was incapable of inheriting through a natural cause; that he left a child, who was presumptive heir to the testator, but who was not mentioned or alluded to in the testament, and who is entitled to the share she could have claimed at the date of that document had the senior Joseph died intestate.

This conclusion is in concord with all the California cases cited.

Prayer of Ethel granted.

The Estate of Joseph Ross was Before the Supreme Court of California in 140 Cal. 282, 73 Pac. 976.

IN THE MATTER OF THE ESTATE OF S. ANTOLDI, DECEASED.

[No. 26,972; decided September 9, 1903.]

Olographic Will—Revocation of Probate.—The Application in this Case for the revocation of the probate of an olographic will, on the ground that the second date line which was essential to complete the instrument was not in the handwriting of the testator, was denied.

Application for revocation of probate of olographic will.

Reuben W. Hent and Augustus D. Splivalo, for the contestants.

Garret W. McEnerney, for the respondent.

COFFEY, J. "If the second date line was written by the testator, it must have been inserted after the document had been written, and after he had acquired knowledge that the first date line was defective, and would invalidate the instrument. The paper bears intrinsic evidence that the second date line was so written. It may be ascertained upon examination by any intelligent person that there are essential differences between the penmanship in that second date line and the first."

Those are the first points made by Judge Hent, and I think it is very likely that that is the fact, that was the fact, that that second date line was not written at the time the first date line was written, and I think also that it is a good argument that a man of testator's intelligence, or of any intelligence, would hardly be likely to have written that second date line after he had written the first, unless he had just been instructed that that was a defective date.

The supreme court, the other day, in deciding a case, said that it will not do for trial courts to decide upon conjectures; that they ought to decide according to the facts and evidence before them. What are the facts that are before us here? If the case were to be submitted upon the testimony produced by the contestant, there would be no great difficulty in the decision, because we find here that Mr. Splivalo's testimony is direct and unequivocal to the point that the second

dated line was not in the instrument when he inspected and copied it on the thirteenth day of June, 1902. Mr. Corbett also saw it and made a copy, which was without the second dated line. The copy made by young Mr. Splivalo, to which he testified, also omitted that line, and he said, "If it had been there, he would have copied it as he did the other parts of the paper." He was not as absolute in his testimony as Mr. Splivalo, Sr., was, nor as Mr. Corbett was, because he could only put it in that form, that "he was so careful to make a correct copy of everything that he saw there, that if that line had been there he would have copied it"; but he did not swear positively that it was not there; he could not swear to that. Young Mr. Splivalo showed a great deal of caution and care and propriety in the manner in which he testified, and he is to be commended for that, because he was evidently conscientious in what he testified to.

It is certainly a singular coincidence that these three persons should, in copying, have omitted that line, if it was there.

Mr. Splivalo's correspondence with the heirs, and the contest, all assumed that there was no such line, and that the instrument was invalid because of the defective date in the first line.

Dr. Ames, the handwriting expert, pointed out what he considered important discrepancies between the two lines, and gave his opinion that the two date lines were not written by the same person; he took certain measurements, which showed that there was a certain degree of care superior in the second dated line to what was in the first date line; that it was written, as Mr. Splivalo says, "more labored." That would, of course, carry out the theory, or would be in consonance with the theory of Judge Hent, that this was inserted afterward, and that the testator had received some instructions in the premises. Having received instructions, he would necessarily impart more care to the production of the second line than he did to the first. The first was written in the manner that he wrote his ordinary business correspondence; he wrote down the first date spontaneously, an unconscious habit, but on the second dating his mind was upon the legality of the operation; and, therefore, when he wrote that line,

he wrote with greater care and circumspection. Now, that would be common to him and to a forger; the forger, of course, having in mind the characteristics that he must copy, would necessarily be "more labored" in his writing than a spontaneous penman. So would a man who was endeavoring to comply with a law with which he had just become acquainted.

Take this envelope—Respondent's Exhibit 2—which is admitted to have been in his handwriting. "San Francisco" in second dated line of the will and the "San Francisco" in the exhibit, at least the "Francisco" have elements in common. Take the "F" and the other letters; take the "c," for instance, upon which such stress was laid by Dr. Ames, the expert, and also by Mr. Splivalo, who claimed that it was retouched. Mr. Splivalo said that there were three "stoppages" there, and that it did not "assimilate" with the remainder of the writing upon the same page. There seem to be "stoppages" and a lack of "assimilation" in this small "c" upon the envelope, and yet it is admitted to be in the handwriting of the decedent, S. Antoldi.

Now, these are all the conjectures, and one might speculate on those matters without end; but the question here is, What is the positive testimony in this case? On which side does the direct evidence preponderate? I have great respect for Mr. Splivalo and for his son, and so far as I know Mr. Corbett, he is a credible witness. These three gentlemen are entitled to credit. Mr. Benussi, another witness for contestant, however, declined to commit himself to the proposition, although he was obviously introduced for the purpose of showing that that date line was not there when he first saw it, but he would not so testify. He could not, by any process of suggestion, or by reviver of his recollection, be induced to testify that that line was omitted.

On the other side, as against this contention, what have we in the shape of positive testimony in reference to the alleged defect in this instance? Mr. Casey, the chief deputy county clerk, is an official and entitled to credit, not because he is an official exactly, but he is not impeached as a witness. In his official character it was his function to make a certificate. He does that every day upon request. He did make

that certificate. He made a charge for that service and for filing the will for probate, and he made an entry of that charge and the receipt of the money in his cash-book. All these simultaneous acts support his statement here, as a matter of recollection of what was done. Mr. Casey is certainly entitled to equal credit with anybody that opposes him. His testimony, unimpeached, has a right to reception by the court. It is in a sense contradicted, but not impeached. This certified photographic copy is an official paper and has come from an official source. It is corroborated by the entry in an official book, and, also, by the independent testimony of the official himself, and in that respect it is an item of positive evidence that cannot be disregarded.

We have also the testimony of Mr. McEnerney himself, that he was visited at his house at 7 o'clock in the morning and this paper produced to him by Mr. Morbio in a sealed envelope. Mr. Morbio professed not to know what was in it, and there and then the envelope was opened and this instrument brought forth, just in the state that it is now. This is the direct and positive testimony of Mr. McEnerney, who has an equal claim to credence with his antagonist. He said that subsequently he sent and had the instrument photographed, judging from his experience that it was a proper thing to do. Then the photograph having been made, the paper was on that same day taken to the county clerk's office and filed, and the annotations made on the photographic copy by three persons to correspond to his notion of what would be necessary in case the original document were lost. The chief deputy clerk, Mr. Casey, indorsed upon the original a description of the document and the fact that it was filed at that time, and then, having compared the will with the photographic fac-simile, extended his certificate as to the trueness of the copy, and attached the same thereto with the impression of the official seal. Mr. Casey's statement is sustained by the appearance of the documents and by other testimonies. The photographer, Petersen, testified that there was no alteration in the original instrument and no doctoring of the photographic copy. Mr. Newbert, the agent of the public administrator, testified that the will had the second date line in it when he first saw it on the day of filing. Mr. R. W. Harri-

son testified to the same effect. Mr. Morbio, the respondent, testified that he knew nothing of the tenor of the testament or the contents of the envelope when he handed it to Mr. McEnerney. Mr. Morbio, as guardian of his child, is a party in interest, to be sure, but that does not discredit him. Measurably, moreover, it appears that Mr. Splivalo is a party in interest, under a contract, with his clients, not to the same extent as Mr. Morbio, but he is a party in interest, yet I would not think for a moment that that interest would infect the testimony of Mr. Splivalo. I have too much respect for him, and have too high an opinion of his veracity. But in order to sustain his cause, he must show that there is a preponderance of proof upon his side. The burden is upon him, in other words, and must be borne by him.

Mr. Hent concluded his argument, and then he said: "One word more. It was certainly a singular performance and remarkable to arouse an attorney from his slumbers at 4 o'clock in the morning, to advise him of the death of Antoldi, at 2 o'clock—two hours before—and of the existence of a will; and the subsequent proceedings, as testified to by Mr. McEnerney, were extraordinary in respect to the haste with which the paper was photographed and filed on the very day of the death of the deceased, and before 4 o'clock in the afternoon. Why such haste?"

Mr. Splivalo repeated that remark and commented upon this phenomenon. Mr. McEnerney replied to Mr. Hent: "I will tell you why: because there were land pirates then, as there are now, and it was necessary to take these precautions to protect the property."

This remark has necessarily no offensive personal allusion to the parties in this controversy, and would not be permitted by the court to be so interpreted, but, on general principles, it was suggested by the experience of the gentleman in connection with the Fair estate, to which he alluded; and it is a notorious fact that in two or three instances, or more, wills have been abstracted from the files. The advice was prudent and might apply to all cases; and it may be said that this court has frequently so advised persons in similar situation, and in that case they are to an extent protected against any abstraction or mutilation or tampering with the document.

If Mr. Splivalo, in this instance, had made a photograph, instead of relying upon a manuscript copy, as he conceived it to be, and as he in good faith thinks it was, he might be said to have a better case here, because that photograph would have revealed the omission of the second date; and, consequently, his theory that that date was subsequently imported into this document might be without successful contestation. But he did not do that. He is compelled to depend upon these copies in which mistakes are very often committed. There are frequently material errors in them, errors of omission and errors of commission. But with all the imperfections of the photographic fac-similes, they are as nearly infallible as anything of that kind can be in black and white. Moreover, this particular photograph is authenticated, officially and otherwise, in a manner to compel assent to its accuracy.

Mr. Hent made a very strenuous endeavor to destroy the value of the testimony of Mr. Petersen, the photographer, without any success whatever, in attempting to show, what would necessarily impute infamy to the witness, that it was not only possible, but probable, and no doubt the fact, that there were two photographs, two negatives taken and copied from, making a sort of composite, so that this document could have been produced in that fraudulent and criminal way. The photographer denied that that could be done. It had not been done within his experience. There is no proof from any other photographer that it could be done, or had been done, in any other case. There is Mr. Petersen. He is interested only to the extent of compensation. It appears that he received $12 from Mr. McEnerney for doing this work "in a rush." He received $20 subsequently from Mr. Splivalo for making some enlarged copies of the instrument, which took him four days, and he made the charge more for the greater time consumed the second time. Petersen had stated in answer to Mr. Hent that the first time took two days, but when on the stand and he was shown his memorandum and a statement of account from Mr. Backus, his late principal, it appeared it was done that very day—June 11, 1902.

This man is in no wise impeached. He is not contradicted in any way at all, so far as he is related to the case, and his testimony must be accepted.

The arguments of Mr. Splivalo and of Mr. Hent, apart from the recitals as to the making of the copies, are all conjectural. The facts are on the other side, except as to the statements of Mr. Splivalo, his son, and Mr. Corbett, which must, so far as the court is concerned, be subordinated to the preponderant proof.

The court denies the application to revoke the probate of this will.

ESTATE OF WILLIAM RENTON, DECEASED.

[No. 11,203; decided June 1, 1892.]

Will Contest.—Any Person Interested may Contest a Will, either before the same is admitted to probate or at any time within one year thereafter.

Will Contest—Parties Plaintiff and Defendant.—On the trial of a contest of a will before probate, the contestant is plaintiff and the petitioner is defendant.

Will Contest—Form of Written Opposition.—The "written grounds of opposition" to the probate of a will constitute the only pleading of the contestant, and must have the same qualities and contain the same requisites which the code prescribes for complaints in civil actions.

Will Contest—Form of Written Opposition.—The written opposition to the admission of a will to probate must, in addition to the formal parts and the prayer, contain a statement of facts constituting the contestant's cause of action in ordinary and concise language, which statement must answer all requirements of the general rules of pleading prescribed by the code for complaints.

Will Contest—Persons not Interested.—The right to contest a will is confined to persons interested in the estate, and therefore no stranger can be heard to object to the validity of a will.

Adoption—Compliance with Statute.—The adoption of children was unknown to the common law; the institution in this state is purely a creation of statute, and one who claims to have been adopted must show that the statute has been complied with.

Common Law.—The Jurisprudence of California rests exclusively upon the common law, which was made the rule of decision at the

time of the formation of the state government in all cases where not abrogated or modified by statute.

Adoption—Right of Inheritance—Conflict of Law.—The legal status of a person as a child by adoption, acquired under the lex domicilii, follows him on a change of domicile, and carries with it the right of inheritance incident to such status, unless the same is repugnant to the law of the latter domicile.

Will Contest.—An Allegation that the Contestants are the Adopted and only children and heirs of the decedent is the statement of a mere conclusion of law, and defective as against special demurrer; the particular facts upon which the claim of adoption rests must be alleged so that the court may determine whether, under the laws of this state, or under the laws of any state, the precedent conditions exist which constitute a valid adoption and invest the contestants with the right of inheritance.

William Renton died on July 18, 1891, at the town of Port Blakely, county of Kitsap, state of Washington, of which place he was a resident at the time of his death. He left a will dated December 12, 1876, and executed in the state of Washington according to the laws of that state, and in conformity with the laws of this state. John A. Campbell was named as executor in the will, which was admitted to probate on October 28, 1891, by the superior court of Kitsap county, state of Washington.

On December 24, 1891, the executor filed in the superior court of the city and county of San Francisco, state of California (in which city and county decedent left estate), a copy of the will and the probate thereof by the superior court of Kitsap county, state of Washington, together with a petition for letters testamentary, pursuant to section 1323 of the Code of Civil Procedure.

On January 27, 1892, Mrs. Elizabeth W. Sackman and Mrs. Mary A. Gaffney filed written grounds of opposition to the probate of this will, and alleged that they are the adopted children and the only children and heirs at law of the deceased, to which the executor filed a demurrer.

Blake, Williams & Harrison, for the petitioner.

James L. Crittenden, for the contestants.

COFFEY, J. On December 4, 1891, petitioner filed in this court a copy of said will and the probate thereof by the superior court of Kitsap county, state of Washington, duly authenticated, as required by statute, with a petition that the said will be admitted to probate. After notice duly published this court heard said petition and received proof of the probate of said will, at the time and place appointed and heard the evidence of the petitioner in support thereof.

On the twenty-seventh day of January, 1892, the contestants filed their "written grounds of opposition" to the probate of said will, alleging their interest in said will, and in the estate of said deceased, to be that of "adopted" and the only children and heirs at law of said deceased, and alleging as grounds of contest the several grounds allowed specifically by the code in cases of contest *before* the admission of wills to probate.

To these written grounds of opposition, filed by contestants, the petitioner filed a general demurrer, and also a special demurrer to the sufficiency of the allegations therein relating to adoption, and upon the ground that the allegations of contestants respecting the same were ambiguous, unintelligible and uncertain.

In support of the questions raised by the special demurrer, and not to aid the general demurrer on the questions raised thereby, petitioner presented an elaborate argument in writing. The general demurrer was argued orally.

The code provides that persons interested may contest a will, either before the same is admitted to probate or at any time within one year after the same is admitted to probate.

The method of contesting a will before its admission to probate, as prescribed by section 1312 of the Code of Civil Procedure, consists of the filing by the contestants of written grounds of opposition to the probate thereof. In such a contest the statute makes the contestant the plaintiff and the petitioner the defendant.

The same section provides that the petitioner, and any other resident of the county interested in the estate, may demur to the written grounds of opposition upon any of the grounds of demurrer provided for in part 2, title 6, chapter 3, of the Code of Civil Procedure. This chapter,

title and part refers to and prescribes the office and functions of a demurrer to the complaint in civil actions.

The "written grounds of opposition" constitute, under the code, the only pleading of a contestant of a will before its admission to probate; and, if the same may be demurred to upon any or all of the grounds allowed by the code to a complaint in a civil action, it necessarily follows that this pleading in this special proceeding must have the same qualities and must contain the same requisites which the code prescribes for complaints in civil actions.

Therefore, this pleading, in addition to the formal parts and the prayer, must contain a statement of facts constituting the contestant's cause of action in ordinary and concise language, and such statement of facts must be sufficient, and answer all requirements of the general rules of pleading prescribed by the code for complaints.

The right to contest is confined by the code to persons interested in the estate, and, therefore, no stranger can be heard objecting to the validity of a will.

In the written objections filed by the contestants against this will they allege, for the purpose of showing that they are so interested and therefore entitled to contest, that they are the adopted and only children and heirs at law of the deceased. They do not show when or where, under what law, or in what state or domicile, they acquired this status, or what judicial proceedings, or what legislative act, if any, created this relation of parent and child and invested these adopted children with the capacity of succession or inheritance. Neither do the contestants allege any other interest in said will except as the adopted children of said deceased.

Against this allegation and the written grounds of opposition that the contestants are adopted children, petitioner interposed a special demurrer, because the allegation is ambiguous, unintelligible and uncertain in this:

First. Because it does not state the place of their adoption.

Second. Because it does not specify the time of their adoption.

Third. Because it does not state the manner or any particulars of said adoption.

To support this special demurrer, as well as the general demurrer that the written grounds of opposition do not state facts sufficient for a denial of the probate of said will, petitioner urged the following as propositions of law, pertinent to the issue, viz.:

First. That the adoption of a child creates a status which was and is entirely unknown to the common law, and that this relation has been established by statutes in various states in this Union, and that, until such establishment, there was no procedure or method in existence by which the relation of parent and child could be created, investing the latter with the legal right of succession and inheritance.

Second. The status of any person with the inherent capacity of succession or inheritance is to be ascertained by the law of the domicile which creates the status—at least, when the status is one that may exist under the laws of the state in which it is called in question, and when there is nothing in the latter laws to prevent giving full effect to the status and capacity required in the state of the domicile.

Third. That the statement of the contestants, without any allegation of further facts, that they are the adopted children and the only children and heirs at law of William Renton, deceased, involves a mere conclusion of law or inference, in which they may be greatly mistaken. That the status of an adopted child in this state being created by statute and by compliance with certain formalities upon a judicial hearing and determination, it will not do for them to merely state that they have been adopted, without giving the court the necessary material and information to test the accuracy of that statement. If the parties rely upon the judgment of any court authorizing the adoption, they must state what court rendered the same, and the date when, and that it was duly given, so their adversary may join issue upon these facts, and deny the existence of such judgment, or plead facts in avoidance of the same; or, if the parties rely for adoption upon any other method or procedure prescribed by statute, they must show by specific averments that the statute has been strictly complied with.

Fourth. That when a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he

must show those facts; those facts which the statute requires as the foundation of the rights must be stated in the pleading. And that in this case, in order to give the contestants a right to be heard in this court against the probate of the will, they must allege such particular facts showing that they are parties interested, and not mere strangers to the proceedings.

1. In support of the first proposition above stated, petitioner cited the case of Morrison v. Estate of Sessions, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249. In this case the court gives an interesting historical account of the origin and nature of adoption as a product of the Roman law, requiring an imperial rescript, or a proceeding before a magistrate to create the relation of parent and child by adoption. The court say: "It (adoption) is not recognized by the common law of England, and exists in the United States only by special statute, and only a few of the states have ingrafted it upon their 'Jurisprudence.'"

The supreme court of Massachusetts, in Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, to the same point declares that "The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent who adopts, was unknown to the law of England or Scotland, but was recognized by the Roman law, and existed in many countries on the continent of Europe which derived their jurisprudence from that law. It was long ago introduced from the law of France or of Spain into Louisiana and Texas, and more recently at various times and by different statutes throughout New England, New Jersey, New York, and in a large proportion of other states of this Union. One of the first, if not the very first, of the states whose jurisprudence is based exclusively on the common law, to introduce it was Massachusetts, by the statute of 1851, chapter 324."

In the case of Tyler v. Reynolds, 53 Iowa, 146, 4 N. W. 902, the supreme court say: "The right of inheritance is purely a statutory right, and is therefore arbitrary, absolute and unconditional. Nevertheless the provision of the statute must prevail, although to do so in some instances is inconsistent with our views as to what constitutes natural right

and justice. Therefore, a child by adoption cannot inherit from the parent by adoption unless the act of adoption has been in strict accord with the statute."

The jurisprudence of the state of California rests exclusively upon the common law. The common law was made the rule of decision at the time of the formation of the state government in all cases when it was not abrogated or modified by statute. Following the decisions of the highest courts of other states, the supreme court of California, in the matter of the Estate of Stevens, 83 Cal. 322, 331, 17 Am. St. Rep. 252, 23 Pac. 379, declares that "The adoption of children is purely a matter of statute pertaining to the legislature, with which a court or judge has nothing to do unless the power is conferred on them by statute. The matter of adoption belongs to the legislature, and not the judicial department of the government. We know of no rule which ever enabled any person or tribunal, whether notary public, clerk of the court, judge or court, to perform the ceremony of adopting a child, unless such authority was conferred by the legislature. As the legislature has full power over this matter, it may invest any person, officer or court with the power of receiving, witnessing and declaring the adoption. It may prescribe what that ceremony shall be, and before whom it is to be celebrated. It may make the ceremony so simple that its celebration only requires the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt, and filing such paper with a public officer. These rules are so evident that it is unnecessary to cite any authority to sustain them. The authorities on this subject are abundant."

The same proposition is more strongly stated by the supreme court of this state in the recent case of Ex parte Clark, 87 Cal. 638-641, 25 Pac. 967, decided at the February term, 1891, as follows: "We have held that our law of adoption is not unconstitutional, but to acquire any right under it its provisions must be strictly followed, and all doubts in controversy between the natural and adopting parents should be resolved in favor of the former. A child by adoption cannot inherit from the adopting parents, unless the act of adoption has been done in strict accordance with the

statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. The right of adoption is purely statutory. It was unknown to the common law, and as the right when acquired under our statute operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law, and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with."

In support of the same proposition are the following cases: Coke on Littleton, 7 b., 237 b. 4; Phill., sec. 531; Fuselier v. Masse, 4 La. 423; Vidal v. Commagere, 13 La. 516; Ex parte Chambers, 80 Cal. 216-219, 22 Pac. 128; Am. & Eng. Ency. of Law, tit. "Adoption"; Schouler on Domestic Relations, sec. 232, n.; 2 Lawson's Rights, Remedies and Practice, sec. 809.

2. In support of the second proposition, that the law of the domicile alone can create a status of adoption and invest the adopted child with the right of succession or inheritance, reference is again made to a case already cited (Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321), where this proposition was elaborately and ably expounded by Chief Justice Gray of the supreme court of the state of Massachusetts. The case presented for adjudication in that proceeding was whether a child adopted, with the sanction of a judicial decree, and the consent of its father, by another person in the state of Pennsylvania, where the parties at that time had their domicile, under statutes similar to those in Massachusetts, and which, like the latter, gave a child so adopted the same rights of succession and inheritance as legitimate offspring, in the estate of the person adopting him, was entitled, after the adopting parent and the adopted child had removed their domicile into the commonwealth of Massachusetts, to inherit the real estate of the parent situated in Massachusetts, upon his dying there intestate. Without quoting the opinion in that case, the court unanimously held, in substance, that notwithstanding the settled principle of law

that the title and disposition of real estate must be governed and regulated by the law of the place in which it is situated, yet the legal status of a person as to legitimacy of birth, or marriage, or as a child by adoption, acquired under the lex domicilii, followed the party on a change of domicile and carried with it the right of inheritance incident to such status, unless the same was repugnant to the law of the latter domicile. The court in that case holds that: "The law of the domicile of the parties is generally the rule which governs the creation of the status of the child by adoption: Foster v. Waterman, 124 Mass. 592; 4 Phill., sec. 531; Wharton on Conflict of Laws, sec. 251. We are not aware of any case in England or America in which a change of status in the country of the domicile with the formalities described by its laws has not been allowed full effect as to the capacity thereby created on succeeding to and inheriting property, real as well as personal, in any other country, the laws of which allow a like change of status in a like manner, and with a like effect, and under like circumstances."

3. The foregoing serves simply to illustrate and expose views in relation to the subject of adoption, its origin, nature, qualities and incidents, and to the formalities required by law to create the status, in order to show that under well-known rules of pleading the "written grounds of opposition" to the probate of this will are utterly defective, and that the special demurrer ought to be sustained. If the contestants claim to be "parties interested" in this will, and base their claim because they are the "adopted children" of the deceased, and if the status of adoption is created only by a compliance with the statute of the state or country where the parties have their domicile regulating that relation and that status, they ought not to be allowed to state a mere conclusion of law, which tenders no issue and does not enable this court to judge from the statements of fact made by these contestants whether or not they have been legally adopted, and whether or not the statutes of the state under which they have acquired that status have been strictly complied with, so as to invest them with the right of inheritance, and to come into this court and object to the special proceedings instituted to admit this will to probate.

The contestants should be required to state whether they were adopted as children in this state and in pursuance of its statutes on that subject, or in the state or territory of Washington, where, according to the will, the deceased had his domicile, and if in the latter, they ought to plead as facts the provisions of the statutes of adoption, if there are any in force in that state, because this court does not judicially notice the statutes of a sister state; and, if they were adopted in some other state or country, they ought to plead the statutes of adoption of such state or country so as to enable this court to determine whether such statutes are contrary, in respect to inheritance, to the laws of this state, being lex rei sitae or repugnant to the public policy of the state.

If the contestants claim the status of adoption under a judgment of a court of this state or a sister state, or a foreign country, of either general or special and limited jurisdiction, they ought to give the title of the court and place of its jurisdiction and the date of rendition of the judgment, together with the allegation that such judgment was duly given as required by section 456 of the Code of Civil Procedure.

The contestants should state the time when they acquired the status of children by adoption, and that they were *minors* at the time of adoption, because the right to adopt and to create this artificial relation of parent and child is limited by the statutes of this state and by the statute of Washington, and that of every other statute in this country relating to this subject of *minor* children.

The written grounds of opposition herein filed state that each of the contestants is over the age of forty years. If they claim that they were adopted in this state the adoption is clearly illegal, because the first statute of adoption in this state was passed on March 31, 1870, when each of the contestants must have been at least twenty-two years of age, and four years past the time when they ceased to be minors.

The decisions of the supreme court of this state are innumerable that a conclusion of law, when pleaded, is not the "statement of fact" contemplated by the code, and does not tender an issue.

The supreme court of this state has also frequently held that a person pleading a right derived from a statute or a

statutory privilege must allege the facts which the statute requires as the foundation of his right.

In the case of Dye v. Dye, 11 Cal. 163, the question attempted to be put in issue was the status of certain property, whether it was common property of the husband and wife or the separate property of one of the parties. The wife as plaintiff alleged that the property in question was the common property, under the statutes of the state, of herself and husband from whom she had been divorced, and the object of the suit was to divide this common property. There was an allegation in the complaint that at the time of the divorce the property in question was their common property acquired after marriage and during coverture, and that their marriage took place in 1838, but contained no allegation as to the place of the marriage, nor the residence of the parties, nor that the property was acquired by the defendant subsequent to the passage of the community property act of April 17, 1850. The defendant demurred to this complaint, and the demurrer was sustained, from which ruling the plaintiff, not electing to amend, appealed. The supreme court affirmed the judgment, holding that the allegation that the property in question "was the common property" of the parties was insufficient, and that to bring herself within the provision of the act, therefore, the facts must be stated which give the right to the wife by the terms of the statute.

The court proceeds to say: "When a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts. The court pronounces upon the law, or the legal effect of these facts. The only question in this connection is whether in a bill of this sort it is sufficient to aver in general terms that the plaintiff is entitled under the statute to certain property, describing it as 'common property.'

"It is said in Mann v. Morewood, 5 Sand. 557, that the facts which the code requires to be stated as constituting a cause of action 'can only mean real traversable facts, as distinguished from propositions or conclusions of law, since it is the former, and not the latter, that can alone, with any propriety, be said to constitute a cause of action.' So in Adams v. Holley, 12 How. Pr. 330, it was held that a count was

fatally defective which averred the plaintiff to be the owner of certain effects, the court saying: 'The defendant has the right to be informed how and when the plaintiff became the owner of the rights and interests of the respective properties. The plaintiff only alleges that he is the owner, etc., which is only a legal conclusion. He should state some issuable fact by which it would appear that he was the owner.' In Thomas v. Desmond, 12 How. Pr. 321, the same question arose on the same words, and the court said: 'The allegation (of ownership) is only a conclusion of law. The defendant has a right to be informed by the complaint how the plaintiff became the owner of the demand, whether by purchase, assignment, operation of law, or how otherwise. Some fact or facts should be stated by which it would appear how he became such owner': See, also, Russell v. Clapp, 7 Barb. 482, etc. The averment that particular property is common property amounts, in the connection in which it is used, to the same general claim of ownership. It could only, under the statute or the civil law, be such by virtue of particular facts or relations; and it is necessary for these to appear to enable the court to pronounce whether it be such. According to the argument, it would do for the late wife, in a proceeding of the sort, to omit every averment except the fact of marriage and dissolution, and the averment that there was 'common property' now held by the husband. We think this cannot be maintained."

The same doctrine was held by the supreme court of this state in the case of People v. Jackson, 24 Cal. 630, where it was held that in pleading title to land under any act of the legislature which prescribes conditions upon the performance of which the title may be secured, it is necessary to aver a performance of all the acts required by the statute; that while in cases of contract a general averment of the performance of conditions precedent would be sufficient, yet, in all other cases, the facts showing a performance must be specially pleaded.

The same doctrine was reaffirmed in the case of Rhoda v. Alameda County, 52 Cal. 350. In this case the plaintiff sued the county for an injury to real property and obtained judgment by default, from which the county appealed. The court

in its opinion said: "The Political Code, section 4072, prohibits the board of supervisors from considering a claim against a county 'unless an account, properly made out, giving all items of the claim duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within a year after the last item of the account occurred.' No action can be prosecuted against the county on such demand until it has been first presented to the board of supervisors for allowance in the manner required by the statute, and has been rejected: Alden v. County of Alameda, 43 Cal. 272.

"The averment on this point in the complaint is that the plaintiffs 'have duly presented their claim for the value of said vault to the board of supervisors of said county of Alameda for allowance, and that said board have rejected said claim and the whole thereof.'

"This averment is insufficient. It is the averment in general terms of the performance of a condition precedent prescribed by the statute. 'In actions upon contracts a general allegation of performance of conditions precedent is declared sufficient by our statute. But a general allegation of the performance of conditions prescribed by a statute has not been so declared and is not therefore sufficient': Himmelman v. Danos, 35 Cal. 441. 'When a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts': Dye v. Dye, 11 Cal. 167."

In the case of Aurrecoechea v. Sinclair, 60 Cal. 540, in passing on an allegation in a pleading by the plaintiffs "that they were bona fide purchasers of land under the laws of the state, and that a certificate of purchase was issued to them," which was coupled with a statement of facts showing that plaintiffs had complied with the laws of the state, so as to constitute them bona fide purchasers from the state, the supreme court held the pleading insufficient, because it alleged a conclusion of law, instead of a statement of facts. The court in that case said: "Averments of legal conclusions in a pleading do not obviate the necessity for a statement of the facts which are essential to constitute a right claimed under a statute."

In the case of Judah v. Fredericks, 57 Cal. 389, the supreme court of this state held that an allegation in the complaint that the plaintiff "is the duly appointed, qualified and acting executrix of the last will and testament of John Ferguson, deceased," was not a sufficient averment of the official character of the plaintiff, and accordingly on this ground the complaint was held to be bad on general demurrer. After citing several cases to which reference has hereinbefore been made, our supreme court speaks with approbation of the decision of the New York court of appeals, in several similar cases, as follows:

"The case of White v. Joy, 13 N. Y. 86, was the case of a receiver claiming title to property, and the court there says: 'The answer is apparently founded upon the principle that where a receiver would make title in pleading to a chose in action or other property, which had belonged to a corporation which he represents, he must set out the facts showing his appointment. In such a case it will not answer merely to describe himself as receiver, or even under the former system to aver that he was duly appointed. He must set out the proceedings so that the court may see that the appointment was legal. In such a case the appointment of the receiver is a part of the plaintiff's title. It is like the granting of administration or of letters testamentary in a suit by executors or administrators; unless the fact is stated, the plaintiff does not show any right to sue.'

"The case of Beach v. King, 17 Wend. 197, is directly in point, and Mr. Justice Bronson, speaking for the court, there says: 'The defendant cannot be administrator unless letters of administration of goods and chattels and credits of the intestate have been granted to him by one of the surrogates of this state. The proper mode of pleading the fact is by a direct allegation that such letters were granted. The defendant has not pursued that course, but pleads that he was duly appointed administrator. This allegation consists partly of matter of fact and partly of matter of law, and is not capable of trial. That the defendant was appointed administrator by somebody or in some form is a question of fact, but whether he was duly appointed or not is a question of law. The defendant should have stated how he was appointed, and

then the court could determine its sufficiency on demurrer, or, if an issue to the contrary were joined upon the fact of having obtained letters, the question could be tried by a jury': See, also, Gillet v. Fairchild, 4 Denio, 83; Forrest v. Mayor etc., 13 Abb. Pr. 350.'' See, also, Barfield v. Price, 40 Cal. 535.

It seems to be shown by an unbroken current of decisions of the supreme court of this state that a pleader, under our Code of Civil Procedure, wishing to avail himself of a statutory right or privilege, or whose right to appear as a party in court depends upon conditions prescribed by statute, must allege the particular facts showing a compliance with the statutes under which he claims the right to appear as a party to an action or special proceeding under our code.

It is also shown by the same weight of authority that in all states having the common law for their basis of jurisprudence, the status of adoption and the method by which this relation is created must of necessity be a statutory product, and that in this state particularly it must rest upon the judgment and determination of a judicial officer, and that, therefore, the naked allegation that the contestants are the adopted and only children and heirs at law is nothing but a conclusion of law, tendering no issue of fact, and that this court and this petitioner have a right to be informed by the written grounds of opposition to the probate of this will upon what particular facts rests this claim of adoption, so that this court may determine whether, under the laws of this state, or under the laws of any state, the precedent conditions exist which constitute a valid adoption, and invest these contestants with the right of inheritance as the heirs at law of William Renton, deceased.

Demurrer sustained; ten days to plead anew.

RIGHT OF ADOPTED CHILDREN TO INHERIT.

Status of Adopted Children as Heirs.—Adoption was recognized by the law of Rome and of other ancient nations: Hockaday v. Lynn, 200 Mo. 456, 118 Am. St. Rep. 672, 98 S. W. 585. It was known even to the American Indians: Non-she-po v. Wa-win-ta, 37 Or. 213, 82 Am. St. Rep. 749, 62 Pac. 15. At the common law of England, however, adoption and heirship by adoption were unknown. They are therefore dependent, in the several states of the Union, upon statutory en-

actments. It would seem that statutes providing for so humane and beneficent an institution as adoption would be welcomed by the courts and given full force and effect. But as a rule the courts have been inclined to maintain the same frigid attitude toward such statutes as they maintain against all legislative changes in the law. Some, though by no means all, of the courts have exacted a strict compliance with the statutes in order to effect a legal adoption at all, while the great majority of the courts have been disposed to minimize the rights of adopted children to take property by inheritance: See the note to Van Derlyn v. Mack, 109 Am. St. Rep. 674; Albring v. Ward, 137 Mich. 352, 100 N. W. 609; Bowins v. English, 138 Mich. 178, 101 N. W. 204; Beaver v. Crump, 76 Miss. 34, 23 South. 432; Estate of Carroll, 219 Pa. 440, 123 Am. St. Rep. 673, 68 Atl. 1038.

It has been decided that an adopted child is not within a conveyance to "bodily heirs": Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289; and that where a testator bequeaths his property to his "lawful heirs," he does not intend to include an adopted child: Morrison v. Estate of Sessions, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249. But a deed conveying a remainder in fee to the "heirs generally" of the life tenant, if she should die leaving no child, gives such remainder to an adopted child: Butterfield v. Sawyer, 187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 75, 79; and under a conveyance transferring real property to a trustee to be held for the use of a designated beneficiary during her natural life, and at her decease to her heirs at law, a child subsequently adopted by the beneficiary is, upon her death, entitled to take under such conveyance as heirs at law of the original beneficiary: Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 116 Am. St. Rep. 536, 78 N. E. 697; and an adopted child is "issue" under a statute providing that when a husband dies intestate and "leaves no issue living," his widow shall receive a certain portion of his real estate: Buckley v. Frazier, 153 Mass. 525, 27 N. E. 768.

Adopted children take under a life insurance policy as "children" of the assured, who is their adoptive parent: Virgin v. Marwick, 97 Me. 578, 55 Atl. 520; Von Beck v. Thomsen, 60 N. Y. Supp. 1094, 44 App. Div. 373, affirmed in 167 N. H. 601, 60 N. E. 1121. An adopted child who is not mentioned in the will of his adoptive parent takes his share of the estate by descent as a pretermitted child: Flannigan v. Howard, 200 Ill. 396, 93 Am. St. Rep. 201, 65 N. E. 782, 59 L. R. A. 664; Van Brocklin v. Wood, 38 Wash. 384, 80 Pac. 530; In re Sandon's Will, 123 Wis. 603, 101 N. W. 1089; and the adoption of a child works a revocation of a prior will executed by the adoptive parent, the same as would the birth to him of a child: See the note to Van Derlyn v. Mack, 109 Am. St. Rep. 678.

Extraterritorial Force of Adoption.—The general rule is that the adoption of a child authorized by the laws of the state gives it the status of a child of the adoptive parent, and this status, with the consequent capacity to inherit from such parent, will be recognized

and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Hence, a child adopted in one state has capacity to inherit land situated in another state whose law and policy are not essentially different from those of the first state: In re Williams, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; Van Matre v. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628, 23 L. R. A. 665; Gray v. Holmes, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207; Succession of Caldwell, 114 La. 195, 108 Am. St. Rep. 341, 38 South. 140; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. The extra-territorial effect of adoption proceedings is further discussed in the note to Van Matre v. Sankey, 39 Am. St. Rep. 229.

Retrospective Operation of Statutes.—Heirs at law do not, prior to the death of the ancestor or other person from whom they claim, have any vested right in the continuance of their heirship, but the legislature has power to provide for a different line of inheritance. Hence it is that, though at the date of its adoption, a child may not be entitled to take as heir at law of the adopting parent, a subsequent enactment giving adopted the same right of inheritance as other children of the adopting parent operates for the benefit of a previously adopted child, although thereby persons who would be heirs at law but for such enactment are deprived of the inheritance: Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. Supp. 800; Theobald v. Smith, 103 App. Div. 200, 92 N. Y. Supp. 1019; Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 116 Am. St. Rep. 536, 78 N. E. 697.

A deed conveying land in fee to the "heirs generally" of the life tenant, if she should die leaving no child, gives such remainder to an adopted child, under a statute which provides that such child shall be deemed, for the purposes of inheritance, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, even though such statute was enacted after the deed was executed: Butterfield v. Sawyer, 187 Ill. 589, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 73, 79. But adoption proceedings under a statute cannot devest an estate already vested in heirs, although the statute is intended to act retrospectively: Ballard v. Ward, 89 Pa. 358. A holding somewhat analogous to this will be found in Blodgett v. Stowell, 189 Mass. 142, 75 N. E. 138.

Inheritance by Child from Adopting Parent.—The authorities are generally agreed that for purposes of inheritance from the adoptive parents an adopted child is the lawful child of such parents, the same as though he were born of them in lawful wedlock, save as otherwise provided by the statute: Matter of Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 76 Pac. 887; Matter of Evans, 106 Cal. 562, 39 Pac. 860; Flannigan v. Howard, 200 Ill. 396, 93 Am. St. Rep. 201, 65 N. E. 782, 59 L. R. A. 664; Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Patterson v. Browning, 146 Ind. 160, 44 N. E. 993; Wagner v. Varner, 50 Iowa, 532; Hilpire v. Claude, 109 Iowa, 159, 80 N. W. 332; Vidal v. Commagere, 13 La. Ann. 516; Cunningham v. Lawson, 111 La. 1024, 36 South. 107; Fiske v. Pratt, 157 Mass. 83, 31 N. E.

715; Fosburgh v. Rogers, 114 Mo. 122, 21 S. W. 82, 19 L. R. A. 201; Moran v. Stewart, 122 Mo. 295, 26 S. W. 962, 132 Mo. 73, 33 S. W. 443; Moran v. Moran, 151 Mo. 558, 52 S. W. 378; Martin v. Long, 53 Neb. 694, 74 N. W. 43; Simmonds v. Burrell, 8 Misc. Rep. 388, 28 N. Y. Supp. 625; Rowan's Estate, 132 Pa. 299, 19 Atl. 82; Peterson's Estate, 212 Pa. 453, 61 Atl. 1005; Eckford v. Knox, 67 Tex. 200, 2 S. W. 372. A contrary rule appears to prevail in the District of Columbia: Moore v. Hoffman, 2 Hayw. & H. 173, Fed. Cas. No. 9764a.

The status of an adopted child in this respect is well expressed in Power v. Hafley, 85 Ky. 671, 4 S. W. 683. "It is the event of the adoption," said the court in that case, "that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parents, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions of the statute authorizing adoption declare otherwise. And when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties"; approved in Virgin v. Marwick, 97 Me. 578, 55 Atl. 520; Ferguson v. Herr, 64 Neb. 649, 90 N. W. 625, 94 N. W. 542.

In case one spouse alone adopts a child, or in case the statute gives an adopted child the right to inherit from one parent only, it would seem that the child is not entitled to inherit from the other spouse: Webb v. Jackson, 6 Colo. App. 211, 40 Pac. 467; Sharkey v. McDermott, 16 Mo. App. 80; note to Van Derlyn v. Mack, 109 Am. St. Rep. 676, where the property rights of the surviving spouse, as against those of adopted children, are discussed.

Inheritance from Natural Parents.—The adoption of a child does not deprive him of his right to inherit from his relatives by blood, unless the statute provides otherwise. Hence, a child may inherit both from his adoptive and from his natural parents: Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788; Clarkson v. Hatton, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761, 39 L. R. A. 748.

Inheritance from First and Second Adopting Parents.—If, then, a child may inherit from its natural and also from its adoptive parents, there is no reason why an adopted child cannot inherit from both its first and its second adoptive parents. In other words, the relation of heirship created by the adoption of a child is not destroyed by a second adoption after the death of the first adopting parent: Patterson v. Browning, 146 Ind. 160, 44 N. E. 993.

Inheritance in Twofold Capacity of Children and Grandchildren.—Where a person adopts his grandchildren, and the natural parent of the children dies before the grandparent who has adopted them, it has been decided in Iowa that they would inherit from him in the double capacity of children and grandchildren: Wagner v. Varner,

50 Iowa, 532. But in Massachusetts and Pennsylvania it has been affirmed that they inherit from him in the capacity of children only: Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698; Morgan v. Reel, 213 Pa. 81, 62 Atl. 253.

Inheritance from Kindred of Adopting Parent.—While an adopted child is entitled to inherit directly from his adopting parents, he is not, as the statutes have usually been construed, entitled to inherit through them from their ancestors: In re Sunderland, 60 Iowa, 732, 13 N. W. 655; Meader v. Archer, 65 N. H. 214, 23 Atl. 521; Quigley v. Mitchell, 41 Ohio St. 375; Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445. Neither is he entitled to inherit from the collateral kindred of his adoptive parents: See Hockaday v. Lynn, 200 Mo. 456, 118 Am. St. Rep. 672, 98 S. W. 585; Van Derlyn v. Mack, 137 Mich. 146, 109 Am St. Rep. 669, 100 N. W. 278; Estate of Moore, 35 Vt. 98. "He can inherit directly from his parent, but he cannot inherit in lieu of his parent, by right of representation, from any of his parent's kindred": Wygeth v. Stone, 144 Mass. 441, 11 N. E. 729. In some of the states, moreover, an adopted child cannot inherit from the natural children of his adoptive parent: Keegan v. Geraghty, 101 Ill. 26; Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535; note to Van Matre v. Sankey, 39 Am. St. Rep. 226. But in other states the law is otherwise: Stearns v. Allen, 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349.

Inheritance from Adopted Child.—There are a number of adjudications to the effect that on the death of an adopted child his estate goes to his relatives by blood, and not to his adopting parents or relatives by adoption: See the note to Van Derlyn v. Mack, 109 Am. St. Rep. 676; White v. Dotter, 73 Ark. 130, 83 S. W. 1052. But under a statute which provides that the adoptive parents shall inherit from their adopted child such property, with its profits and accumulations, as the child may have taken through them, the right of inheritance is not restricted to the particular property received by the child, but includes the proceeds thereof: Swick v. Coleman, 218 Ill. 33, 75 N. E. 807.

Inheritance Through Adopted Child.—The heirs of an adopted child may be entitled to inherit through her a share of the estate of the deceased adopting parent, just as though she were a daughter by blood: See the note to Van Derlyn v. Mack, 109 Am. St. Rep. 676. Where an adopted child dies before the death of his adopting parent, leaving children, they inherit from the estate of the adopter of their deceased parent as if they were his grandchildren: Power v. Hafley, 85 Ky. 671, 4 S. W. 683. And an adopted child takes a legacy given to one of its adopted parents, who dies before the testator, where the statute authorizing the adoption declares that the child becomes, to all intents and purposes, the child of its adopters, the same as if born to them in lawful wedlock: Warren v. Prescott, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. 948, 17 L. R. A. 435.

ESTATE OF MARY TOBIN, DECEASED.

[No. 13,988; decided February 12, 1895.]

New Trial.—The Motion for a New Trial has Become in Practice virtually a new trial—a fact which the court in this case comments upon.

Testamentary Capacity.—An Intimate Acquaintance may Give His Opinion respecting the mental condition of a testator; but he cannot give an opinion as to whether the testator possessed mental capacity to make a will.

Will Contest—Burden of Proof Where Relatives are Omitted.—In a contest of a will the burden is on the contestants, and the fact that relatives are ignored and the estate given to a stranger does not shift the burden.

Mary Tobin died on October 1, 1893, leaving a will dated July 21, 1891. James H. Kehoe was named as executor, and filed a petition for the probate of the will on October 4, 1893. Thereafter a contest was filed by Catherine Kehoe, a sister of the testatrix, and others. The contest resulted in the will being sustained, and the same was admitted to probate and letters testamentary issued thereon to the applicant. Subsequently contestants moved for a new trial.

Charles J. Swift, for the proponent.

M. Cooney, for the contestants.

COFFEY, J. The motion for a new trial has become in practice virtually a new trial. Counsel deem it necessary, in the discharge of their duty, to rehearse the testimony and to belabor the witnesses with as much minuteness and energetic eloquence on the motion for a new trial as if they were engaged in demonstrating their original proposition that the testator was on the one hand a raving maniac, a victim of delirium from disease or drink, a gibbering idiot, a bedlamite from birth, or, on the other hand, that he was a marvel of mental salubrity and soundness, whose intellectual powers were always in perfect poise, and whose insusceptibility to influence was superior to all human power, ingenuity, cunning, art or artifice, even if opportunity existed to permit of

anyone's attempting to exert or exercise influence, due or undue. And this motion for a new trial is, through the indulgence of the court, allowed to occupy as much time as the original trial, if duly compressed by counsel, should have consumed. Days are destroyed where hours, if economically utilized, would have sufficed to present the issues; but if the court say aught to assist counsel to expedite the trial it is prejudicial error, and the waste of time is permitted to proceed without let or hindrance until a verdict is reached, which is naturally unsatisfactory to the vanquished party. These remarks are not peculiarly pertinent to the case at bar; they apply generally, perhaps universally, under a practice now become prevalent of retrying the case before the court, after verdict, upon such a motion. Most cases of this kind are where a will is set aside. This present motion is almost unique, in that the will was upheld by a jury so unexceptionable in its character and composition that the first twelve citizens who filled into the box were accepted by both counsel without question. So seldom does it happen that a will is sustained by a verdict of a jury, that it is seriously proposed by legislative bill to permit a probate of a man's will in his lifetime. The logic of such a situation, if the situation be an intolerable one (as has been well said in an epitome of objections to the legislative project, which I have been permitted the privilege of reading and which I take the liberty of presenting here in part), is either to prohibit the making of wills altogether or to abolish the jury system; but it is plain enough that if the jury system breaks down at one point it is apt to break down at all points, and that if it be an inefficient instrument in the matter of passing on wills, it must likewise be inefficient in the matter of passing on other litigated questions of fact. Few persons, however, notwithstanding cheap current criticism, would be in favor of abolishing our jury system, which is one of the most valuable elements of our civil and political life, and must have been so esteemed by the contestants' counsel in this case when he exercised his constitutional right to demand a jury trial.

This motion is made mainly upon the ground of the insufficiency of the evidence to support the verdict sustaining the will. The errors of law assigned are in no single instance

tenable. A careful and candid review of the record authorizes me to say that there is no error in the rulings of the court.

Judging from the oral argument of counsel for contestants, to which the court listened attentively, and from his points and authorities which I have examined carefully, he seems to think that the burden in this case lay upon his antagonist. The authorities in California are to the contrary; and the cases cited from other states by counsel are not to the purpose. In going over the statement on this motion, it seems to me that the contestants failed to make a case at all, and that upon their own evidence, had the case been submitted to the jury, respondent would have been entitled to a verdict. There was scarcely a chance to catch "at a mere semblance of evidence" (97 Cal. 653), to support the only issues upon which any evidence whatever was attempted to be introduced, to wit, unsoundness of mind and undue influence. Of the four witnesses for contestants—Peter Kehoe, Catherine Kehoe, Annie Cunningham and Katie Caulfield—the evidence of the first bears more favorably for proponent than for the side in whose favor he was called, apart from the natural bias of his interest in the result of the controversy. (See throughout his testimony, particularly pages 12 and 14 of statement.)

It was quite plain that when the testator made up her mind to make a will she was in possession of her faculties, according to this witness, her brother. He says:

"My sister told me she wanted to make a will and she wanted Mr. O'Brien sent for. I told her that he was an old acquaintance of mine. I did not tell her that she ought not to make a will; did not say to her that she was not in a fit condition to make a will. My wife went out to O'Brien's house by order of my sister and my son's wife. O'Brien came there about 9 o'clock in the morning; it may have been earlier for all I know. My sister, Mrs. Tobin, could not know O'Brien much at the time. I don't know whether it was on the 20th [of July, 1891]; I am not positive as to the date. He came there in the morning and wrote out a will in the back parlor; what date it was I would not swear to; that was the first time he said anything about a will. It was supposed to have been a will; I never saw it. I didn't know

anything about the contents of the will. There was another occasion when a will was made. I was not there when the second will was made. I heard from Thomas M. O'Brien of the second will being made afterward. He told me he had written out another will, and had destroyed the first one."

One of the errors of law assigned by contestant was in connection with this witness' testimony: "Q. On the 21st, when the will was supposed to have been made, was your sister (the testatrix) of sufficient soundness of mind to make a will or transact any business?" The objection to this form of question was properly sustained upon the ground that it was a conclusion for the jury to draw from the evidence.

"Under section 1870 of the Code of Civil Procedure, the opinion of an intimate acquaintance respecting the mental capacity of a person is admissible, the reason for the opinion being given; but there is a wide difference between such an opinion and one as to whether a testator at the time of the execution of his will possessed the quantum of intelligence or mental capacity that in law is deemed sufficient to enable one to make a valid disposition of his property. The latter involves a question of law as well as of fact, and was in this case the very thing for the jury to determine from the evidence and under the instructions of the court.

"The precise question we are now considering was before the supreme court of Alabama, in the case of Walker v. Walker, 34 Ala. 470, and the court, in passing upon it, said: 'Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. Hence it is improper to ask and obtain the opinion of even a physician as to the capacity of anyone to make a will. Under our system that question was addressed to the jury. All evidence which tended to shed light on his mental status—the clearness and soundness of his intellectual powers—should have gone before them. This being done, however, the witness should not have been made to invade the province of the jury' ": Estate of Taylor, 92 Cal. 564, 28 Pac. 603.

This form of question was several times repeated to the witnesses and each time properly excluded.

It is clear from Peter Kehoe's evidence that the premises upon which he based his opinion that his sister, Mary Tobin, was not capable of making a will or transacting any business either on the 19th or 20th or 21st day of July, 1891 (his ingenious counsel finally managed to get into the record the objectionable answer in this shape), were not sound, and that his "reasons" did not support that conclusion; on the contrary, his conduct and conversation with her show that at the times indicated he believed her to be of sound mind; he says, "she was partly delirious most of the time" (page 15, statement), but yet he held a conversation with her about a will on the 18th or 19th when she spoke to him, but did not tell him in whose favor she wanted to make it (page 14, statement). She was not delirious at that time, nor does there appear anything in the evidence of this witness to show that she was "delirious" on the 20th or 21st, when the first and second wills were drawn by O'Brien; the contrary does appear as to the transaction of the 20th, and he was not present on the 21st. The opinion of this witness, Peter Kehoe, as to her incapacity to make a will at either time is destitute of reason or ground of any kind in its support. His reasons are, indeed, better calculated to support an opinion that she was of sound mind.

The evidence of Catherine Kehoe, one of the contestants and the sister of testatrix, yields nothing whatever on the point of the soundness of mind. If any inference be deducible from it at all, it is that Mary Tobin was of sound mind on the 20th and 21st, because she evidently was so on the 19th according to this witness. The witness says: "When I first saw my sister after the injury I did not talk much to her because she was not able to talk. When I went there on Saturday, after the injury, my sister was feeling better. She cried, and while Margaret was out of the room we talked about how friendly and affectionate we had been when we were living in the east; now it was different; she said we were always kind to one another, and glad to help one another; and these were the last words that passed between us; I kissed her and left the room, and did not see her again."

Mrs. Annie Cunningham gave cold comfort to contestants, her only testimony relative to the mental condition of testa-

trix being that "decedent was of a nervous temperament, but she was competent to manage her own affairs; plenty of nervous people are competent to manage their own affairs." This witness did not see the testatrix in July, 1891; did not visit her at the time of or subsequent to the injury or the date of the will, and therefore could not have an opinion as to decedent's mental condition at that time. (See page 28, statement.)

The fourth and final witness for contestants was Miss Katie Caulfield, niece of the testatrix. The sum and substance of her opinion on the sanity issue is: "The day after the date of this instrument, on the 22d of July, 1891, I formed an opinion as to the soundness or unsoundness of mind of my aunt, Mrs. Tobin, from the nervous state and pain that she was in, that her mind must be *impaired.*"

This falls short of an opinion that the testatrix was of an unsound mind, and is no answer to the only proper question, which is not as to *impairment* but as to *unsoundness* of mind—even if the opinion of this witness, if otherwise valuable, were of any weight as to the existence of the fact on the 22d, a date subsequent to the making of the will, plainly an afterthought.

This is the whole affirmative case for the contestants upon the issue of unsoundness of mind, the wheat having been winnowed from the chaff. It seems to the court scarcely sufficient to warrant a favorable verdict.

Upon the issue of undue influence there is next to no evidence that the will was made, or that any of its provisions was inserted therein, by reason of any undue influence.

The will here is a dutiful and natural disposition of the property of the decedent; the beneficiary had been brought up from a point of time anterior to her own earliest recollection as the daughter of testatrix and her husband; she had known no other parents; she was called by her father "Mamie Tobin," the name of testatrix, who was "the only mother she ever knew"; she was confirmed in her religion at the age of eleven years by the name of "Mary Elizabeth Tobin," the middle name being adopted at confirmation, and the name "Mary Tobin" being the only name that at that time she ever knew as her own, and it was years after before she

learned her true birth name, Margaret Montgomery; she worked from the time she was fourteen years of age for six years, six months each year, and gave her earnings to her "mother," as she considered her, and the remaining six months bestowed her services in the care of the household and sometimes in the field at mowing and the like, helping her "mother" in the domestic circle, as the old lady had grown feeble; three years after her "father" died she came with her "mother" to California, being her only companion, and so continued until her marriage with decedent's nephew.

It is true that this child was never adopted by legal process or procedure. This fact, however, rather strengthened the moral obligation to provide for her, after she had been reared in the impression of a subsisting natural relation, and this moral obligation testatrix faithfully carried out in the making of this testament. There was nothing in or about its execution from which could be drawn a legitimate inference of undue influence. The testimony is direct and positive that it was the free, voluntary and sane act of decedent. As to the execution of the will, the evidence of Mr. O'Brien, the draftsman of the document, is precise, straightforward and uncontradicted, and there is no doubt that all the conditions of the code were complied with; the other subscribing witness, Edward McGinnis, corroborates O'Brien in every essential particular (see page 52 et seq., statement). The attempt to make any point in this regard is far-fetched and vain. There is not a tittle of testimony tending to show that any prescription of the statute was unfulfilled in the execution of this instrument. Upon this question there was nothing to go before the jury.

It has been urged that the beneficiary here was a stranger in blood; but the supreme court has held that circumstances may be such that failure to provide for one who is a stranger in blood may be inequitable: Estate of McDevitt, 95 Cal. 31, 30 Pac. 101.

The fact that blood relatives are unprovided for and the estate given to a stranger does not shift the burden of proof: Redfield on Wills, 526.

This will is not at variance with natural instincts. On the contrary, decedent would have been less than human and this

beneficiary most unattractive if, in the peculiar circumstances of the case, she did not get close to her "mother's" heart, although that "mother" was not hers by nature: Estate of McDevitt, 95 Cal. 31, 30 Pac. 101.

The decedent was not bound to bestow her bounty upon brother or sister. Ordinarily there is no such obligation. Decedent obviously did not intend to do so, as she pointedly told her brother Peter, in answer to a remark of his about the will made on the 20th of July, 1891, just prior to the making of the will, that she "never intended to leave him anything" (see page 60, statement). She lived for over two years after making this will and never changed it nor expressed any design or intention to do so; it remained until October 1, 1893, the day of her death, her solemn declaration of what should be done with her property after her death, and it is not pretended that the temporary pains of the injury received on the 18th of July, 1891, protracted her delirium during that period.

The will is natural and equitable, the product of a sound mind unconstrained by influence, and, the evidence being palpably in its favor, the verdict of the jury should stand: Wachlin v. Town of Glencoe, 41 Minn. 499, 43 N. W. 967.

Motion for new trial denied.

ESTATE OF DOMINICK E. GRIFFITHS, DECEASED.

[No. 16,436; decided November 18, 1895.]

Administrator—Right of Nonresident to Act or Nominate.—One who is not a resident of this state is not competent to act as administrator; neither is he, unless a surviving spouse of the decedent, entitled to nominate an administrator in the first instance, or to have letters already granted revoked and his nominee appointed.

Administrator—Revocation of Letters.—Section 1385 of the Code of Civil Procedure applies only to an applicaton for a revocation of letters, and to give the court jurisdiction, a petition must be presented praying for such revocation. The section has no application to a petition for letters in the first instance.

Administrator.—As Between the Nominee of Nonresident Brothers of an intestate, and the public administrator, the latter is entitled to letters of administration.

Superior Court.—While the Decisions of One Department of the superior court are not absolutely binding upon the other departments, still they should at least be regarded as authority and not departed from except for substantial reasons.

Dominick E. Griffiths died intestate in the Republic of Mexico on May 27, 1895. At the time of his death he was a resident of San Francisco, California, and left estate therein. He left him surviving as his heirs his brothers, Joseph, Thomas M. and Edgar V. Griffiths. These heirs resided in New York, and on August 23, 1895, signed a request in writing that William S. Phelps be appointed administrator of their brother's estate, and on September 30, 1895, Mr. Phelps filed his petition for letters, together with this request. On the following day A. C. Freese, public administrator of the city and county of San Francisco, filed a counter-petition.

The provisions of the Code of Civil Procedure construed in the opinion below are as follows:

"Section 1365. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administration only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order:

"1. The surviving husband or wife, or some competent person whom he or she may request to have appointed;

"2. The children;

"3. The father or mother;

"4. The brothers;

"5. The sisters; . . . .

"8. The public administrator."

"Section 1369. No person is competent or entitled to serve as administrator or administratrix who is . . . . ; 2. Not a bona fide resident of the state."

"Section 1379. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court."

"Section 1383. When letters of administration 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, or any competent person at the written request of any one of them, may obtain the revocation of the letters and be entitled to the administration, by presenting to the court a petition praying the revocation and that letters of administration may be issued to him."

Morrison, Stratton & Foerster, for petitioner William S. Phelps.

J. D. Sullivan, for petitioner A. C. Freese, public administrator.

COFFEY, J. These are applications for letters of administration upon the estate of Dominick E. Griffiths; one application being filed by the public administrator, and one by W. S. Phelps at the request of the brothers of the decedent, who are his sole heirs at law, and who are all nonresidents of the state of California.

The application of Phelps should be denied and letters issued to the public administrator, for the reasons:

1. The supreme court has decided in several cases, on this state of facts, that the public administrator is entitled to letters of administration: Estate of Beech, 63 Cal. 458; Estate of Hyde, 64 Cal. 228, 30 Pac. 804; Estate of Muersing, 103 Cal. 585, 37 Pac. 520.

Counsel for Mr. Phelps endeavors to avoid the effect of these decisions by contending that the arguments he adduces were not presented to the supreme court in those cases.

This court will not overrule the supreme court decisions on any such presumption as that.

Such an argument could be made to the supreme court, and, if they desired, they could reverse their former decisions; but, until such decisions are reversed by the supreme court, they are the law in all such cases, to be followed by the lower court.

2. The petition of Phelps should be denied because, upon the very arguments presented by his counsel, the superior

court of the city and county of San Francisco (per Slack, J.) has decided in two cases that the public administrator is entitled to letters: See Estate of Clarissa P. Wheeler, No. 15,634, Probate; Estate of Jacob Rehder, No, 16,125, Probate.

So far as Judge Slack's decision is concerned, counsel contend that department 10 being of equal jurisdiction with this department, that, while his decision would be the law of the particular estate in which it was made, it would not be and is not authority in this case. Counsel further contend that this department will not be governed by any decision of Judge Slack, unless the reason of such decision addressed itself to the mind of this court, and this court is convinced that such decision is a proper exposition of the law.

In the case at bar, whatever possible criticism might be made upon a reversal by the supreme court would attach to the judge of this department, even though his decision should be based upon the prior decision of Judge Slack as authority; and it is further submitted that unless this court is convinced, independently of the authority of Judge Slack's decision, that the contention of the public administrator is correct, that the petitioner, Phelps, should not have cast upon him the hardship and expense of being an appellant instead of a respondent in any review of this case by the supreme court.

The provisions of the Code of Civil Procedure affecting this controversy are embraced from section 1365 to section 1383, inclusive. It is not necessary to quote these sections in full.

The application of Mr. Phelps is based upon the provisions of section 1383 of the Code of Civil Procedure, and he takes the position that while that section, properly speaking, provides for the *revocation* of letters, and the question now before this court is as to the original issuance of letters, yet the controversy practically rests upon the interpretation of section 1383. For if Mr. Phelps, as the nominee of the nonresident brothers of the deceased, is entitled to have the letters of the public administrator revoked immediately after their issuance, that then and in that event the first appointment would be nugatory and the procedure dilatory, which is contrary to the policy of the law, and will not be upheld by this court.

Counsel for Mr. Phelps contend that where this section says, "any competent person at the written request of *any one of them,*" that this "any one of them" refers to the husband, wife, child, father, etc., without any reference to their competency or incompetency; that it is an elementary rule of grammatical and legal construction, that where a portion of a sentence refers to a class of persons such as "them" or "those" or the "aforesaid persons," such reference will not be limited to the parenthetical division of the sentence next preceding the reference, but will go back to the first recital of the class behind such parenthetical sentence; that the words "any one of them" cannot be held to refer to the parenthetical sentence next preceding, to wit, "any one of them who is competent," but refers to the list of persons immediately preceding that parenthetical sentence; that this is the only reasonable construction, and, had the legislators desired that the nomination should be only at the request of the person who is competent, they should have said so; that they do not say so, and in order to have said so they should have said, "at the written request of any one of them *who is competent,*" thus making the reference cover the same class as the parenthetical sentence preceding it.

The Estate of Stevenson, 72 Cal. 164, 13 Pac. 404, it is claimed supports this construction of that section. At page 166 of the report the court uses this language: "And that section" 1365, Code of Civil Procedure, "does not conflict, as the appellant contends, in any respect with section 1383, Code of Civil Procedure."

Counsel argue that the only way in which sections 1365 and 1383 can be entirely reconciled is by giving to section 1383 this construction; that this is demonstrated by a simple reading of the two sections; for if, as was decided in the Estate of Stevenson, the surviving husband or wife can nominate whether competent or not, the same construction must be given, under section 1383, to the brothers whether competent or not.

Indeed, say the counsel, by examining the record in the Estate of Stevenson, it appears that the appellant's counsel, Messrs. Sawyer & Burnett, contended, on page 6 of their brief, for the construction of section 1383 which is here denied;

that is, that the nomination must be the nomination of a competent person.

In the brief in that case the attorneys for appellant proceed as follows: "We contend that, by the provisions of the section under consideration, an innocent kinsman is not only disqualified from serving as administrator, but also estopped from appointing another. Argument on this point is superfluous, as a mere reading of the law establishes it. 'When letters of administration have been granted to any person other than the surviving husband or wife, etc., ... *any one of them who is competent,* or any competent person at the written request of *any one of them*'—i. e., at the written request of any *one of them who is competent.* This is the unavoidable grammatical and logical construction of the statute, and as a consequence the incompetent husband or wife, or any other incompetent relative, cannot nominate a competent substitute. Section 1365, therefore, if it confer the right of nomination on the nonresident wife (which we feel justified in doubting), is here flatly contradicted. For, although section 1383 does not expressly put the negative declaration that *no competent person can appoint* another, yet it permits this privilege *only* to those who are competent. In effect, therefore, it is prohibitory, and antagonizes the Cotter decision. But if, on the other hand, we could construe the two sections (1365 and 1383) so that both would stand, it can only be done by denying that section 1365 contemplated the right of an incompetent husband or wife to appoint a nominee. Thus only can they be reconciled and the law reduced to harmony and consistency."

The supreme court, however, did not reconcile those two sections in the manner suggested by counsel in that case, by denying the right of either an incompetent husband or wife to nominate, but, on the contrary, upheld such right of nomination under section 1365, and, therefore, since the supreme court declared that there was no conflict, they must have reconciled those sections by giving to section 1383 the construction for which counsel contend; for it is manifest that if, under section 1365, the surviving spouse can nominate, in no other manner can those sections be reconciled.

A further argument is submitted in favor of giving to section 1383 the construction asked for by petitioner Phelps, as follows: Section 1383 provides for the revocation of letters, and is the only section in the code which does so provide. Section 1365, and other sections subsequent to it and prior to section 1383, relate only to the application for letters in the first instance. Since the legislature has provided in express terms for such revocation in section 1383, this court will not seek to patch up authority for the persons seeking such revocation from other sections of the code, but will look to section 1383 as alone embodying the law on the subject.

It is manifest, therefore, that if a surviving husband or wife has a right to nominate a person to obtain revocation of letters issued, such right must arise from the provisions of section 1383, or it does not exist. A mere inspection of that section will show that a surviving husband or wife and surviving brothers are in exactly the same position. No distinction whatever is made between them, and, as a necessary result, if surviving brothers incompetent to serve because of nonresidence cannot nominate a person to secure revocation of letters issued, a similarly incompetent surviving spouse cannot so nominate.

If the construction contended for by the public administrator is given to section 1383, we would be met with this curious anomaly, that though a surviving spouse, incompetent from nonresidence to act, would have the absolute right, under section 1365, to nominate a person who would obtain letters of administration in the first instance, still, if such surviving spouse failed to do so, and the public administrator or some other person should be appointed, revocation of the letters so issued could not be obtained by such incompetent surviving spouse.

Counsel for Mr. Phelps contend that this would be the unavoidable result of construing section 1383 in the manner contended for by the public administrator, for that section makes no distinction between the rights of a nominee of a surviving husband and wife and the rights of a nominee of brothers or sisters.

They say this cannot be the policy of the law nor the intention of the legislature, for since the surviving spouse can

nominate in the first instance, though incompetent to serve, there is and can be no reason why they should not be similarly allowed to nominate for revocation.

In the written opinion filed by Judge Slack in one of the cases above referred to, in which a contest similar to this arose, he bases his opinion principally upon the reason that it is not reasonable to suppose that the legislature intended to provide that a nonresident child could not nominate an administrator, and at the same time did intend to provide that, upon the appointment of another person, the child could then secure the revocation of the letters and the appointment of the other nominee, whose appointment he could not have originally obtained.

But it is contended by the counsel for the nominee that the intention of the legislature is manifestly the reverse of that recited by Judge Slack, and attention is directed to the provisions of section 1379 in that regard. That section evidently intended to provide that the person entitled to letters because of being in the proper class, as laid down by section 1365, could, if a nonresident, nominate another to be appointed in his stead. The section is carelessly drawn, and proceeds: "When the person entitled is a nonresident," etc., and the supreme court has held in the Estate of Beech, 63 Cal. 458, that by section 1379 the legislature has provided for a contingency which never can arise, since it uses the words "the person entitled," and since a nonresident cannot be "entitled" because of such nonresidence the section is virtually of no effect.

However, though section 1379 may be carelessly and unskillfully drawn and worded, still the intention is manifest to give the person entitled the right to nominate though a nonresident, for it cannot be contended that the legislature would burden the statute books with a law which would be without effect, except by construing it to give a nonresident the right to nominate.

But it chances that section 1383 following section 1379 is more carefully and skillfully drawn, and by its terms the right to nominate for revocation is expressly given to a nonresident by language to which, it is insisted by counsel for the nominee, no other construction can be given.

If it should be held, under the decisions of the supreme court construing section 1379, that in effect section 1383 conflicts with it, why then section 1383 must prevail: See Pol. Code, secs. 4483, 4484.

In case of conflict the later section must prevail, though to give it effect works a repeal of the prior section.

It is said that the arguments herein adduced have never been presented to the supreme court, and were not presented to Judge Slack in the cases decided by him (published in the "San Francisco Law Journal," Saturday, November 16, 1895).

While these decisions are not absolutely binding upon another department of the superior court, such decisions should at least be taken as authority for a decision, and they should not be reversed by another department of this court except for the gravest reasons, which do not exist in this case.

3. The petition of Mr. Phelps, the nominee, should be denied because section 1383 of the Code of Civil Procedure, upon which he bases his application, is wholly inapplicable to the application in this case.

Section 1383 applies only to an application for a revocation of letters, and in order to give the court jurisdiction, a petition must be presented praying for the revocation of letters. In this case there is no such petition, and this court is called upon to presume that if letters of administration were issued to the public administrator, the brothers of the decedent in New York would be dissatisfied, and would ask to have those letters revoked; this they have not done, and until they are dissatisfied with an administrator appointed there can be no proceeding under section 1383.

4. The application of Mr. Phelps should be denied, for the reason that under a proper construction of section 1383 the brothers would not be entitled to have letters of administration issued herein to the public administrator revoked, even if the same had been granted, because they themselves are not competent to serve as administrator and cannot request: Estate of Clarissa P. Wheeler, No. 15,634, Probate; Estate of Jacob Rehder, No. 16,125, Probate.

The construction given by Judge Slack to section 1383 is the correct construction of the statute, and harmonizes the several sections, to wit, 1365, 1379 and 1383: See, also, Estate of Stevenson, 72 Cal. 164, 13 Pac. 404.

At the end of the opinion the court refers to section 1383, and holds there is no conflict between that section and sections 1365 and 1379.

Now, the supreme court has decided that in a case of this kind the public administrator is entitled to letters, and if there is no conflict he would be similarly entitled, if compelled, to resist an application to revoke letters upon a similar state of facts under section 1383.

Under the construction of section 1383 claimed by counsel for Mr. Phelps, there would be a distinct conflict between sections 1379 and 1383 and sections 1365 and 1383.

Under section 1379 the public administrator would be entitled to letters, and under the construction of 1383 claimed by his counsel Phelps would not be entitled. Here is a conflict.

Under section 1365 only relatives entitled to succeed to the personal estate of the decedent, or a portion thereof, are entitled to administer.

Suppose in this matter Griffiths' father was alive and living in New York. Under the provisions of section 1365, even if the brothers were residents, in such a case the public administrator would be entitled to the letters; but under the construction of section 1383, as contended for by counsel for Mr. Phelps, the nominee of the brothers (even if the father were living) would be entitled to letters as against the public administrator (though they had no interest in the estate, the father being the sole heir), thus creating a conflict between sections 1365 and 1383, Code of Civil Procedure.

With reference to the rights of the surviving husband and wife, counsel seems to have the idea that sections of the code are not to be construed together. Under the provisions of section 1365 and the decisions of the supreme court the right of a surviving husband or wife to nominate an administrator is well established, and, construing these sections together, there is no conflict between them.

Sections of the codes relating to the same subject matter are to be read together in order to ascertain the intention of the legislature: Taylor v. Palmer, 31 Cal. 244.

Application of public administrator granted.

A Person Nominating Another for Appointment as Administrator must himself be competent to fill the office, except that a surviving husband or wife has an absolute right to nominate a fit person to serve in his or her stead. It follows that a nonresident father or brother of a decedent is not entitled to nominate an administrator of his estate; but that a surviving spouse, though incompetent to act as administrator because of nonresidence, is entitled to nominate some person competent for the position: Estate of McDougal, 1 Cof. Pro. Dec. 109, and note; Estate of Bedell, ante, p. 78; 1 Ross on Probate Law and Practice, 341.

INDEX TO THE NOTES.

INDEX.

ACCOUNT OF EXECUTOR.

ACCOUNTS OF ADMINISTRATOR.

1. In General.

Account.—Sections 1632 and 1633 of the Code of Civil Procedure, as to the settlement of accounts of administrators, do not apply to an exhibit filed pursuant to section 1622, but to an account filed under section 1628.—Estate of Byrne, 69.

Accounts.—The Statutes do not Require that Any Particular Designation should be given by executors to any account which they may file; the code leaves the nature of the account to be determined by its intrinsic qualities and contents, and not by any title or heading which may irrelevantly be placed upon it.—Estate of Callaghan, 84.

Final Account and Final Settlement Defined.—A final account, except as the term is used in Code of Civil Procedure, sections 1652, 1653, merely means a complete account of all matters necessary for the complete administration of the estate, and a "final settlement" means such a settlement as completes all matters which the court should act upon to cover all the true functions of administration, namely, which provides for the payment of all presented debts, which passes upon all receipts and disbursements up to the date of the payment of the debts and the expiration of the normal period of administration, and puts the court in possession of data sufficient to determine and ascertain the distributable assets.—Estate of Callaghan, 84.

Final Account.—The Account of an Executor may be regarded as final, although it does not set forth the amount of his commissions or the amount of the attorney's fees, and although there have other sums accrued to the estate since the filing of the account.—Estate of Callaghan, 84.

Account—Only One is Necessary.—In ordinary estates there is no necessity for more than one account, which is a final or complete account.—Estate of Callaghan, 84.

Account.—The "Finality" of the Account of an Executor is to be determined by reference to its completeness and to the circumstances

of the estate, and not by reference to the title which the executors choose to apply to it.—Estate of Callaghan, 84.

Account.—A "Final" or Second Account is not contemplated by the code, except in the single case where the court, on settling the original or general account, determines that the estate is not ready for closing, and fixes a limit for the rendering of another account.—Estate of Callaghan, 84.

Account.—The Term "Final Account," as used in Code of Civil Procedure, section 1652, applies only to the cases mentioned in the last half of section 1651; and the term "final settlement," as used in section 1665, applies not specially to the settlement of a "final account" (in the sense of a second account, as prescribed by section 1652), but to any settlement of account which completes the payment of the debts and determines the distributable assets.—Estate of Callaghan, 84.

Accounts.—Three Classes of Notices of the Hearing of Accounts are provided by the code: 1. Where the account is filed by itself, notice must be given as prescribed by Code of Civil Procedure, section 1633; 2. Where the petition for distribution is filed by itself, notice must be given as prescribed in Code of Civil Procedure, section 1668; 3. Where the account and distribution are filed together, the notice must be given as prescribed in Code of Civil Procedure, section 1634. Estate of Callaghan, 84.

2. Delay in Rendering.

Accounts of Executor—Delay in Rendering.—When an executor fails to render an account and delays closing the administration for a number of years, he cannot, when he at last files an account in obedience to a citation, urge that objections to the account come too late.—Estate of Sylvester, 112.

Accounts of Executor—Delay in Contesting.—An heir or legatee who contests an executor's account when it comes up for settlement is not chargeable with laches in not having exercised his right to compel the executor to file his account sooner than he did.—Estate of Sylvester, 112.

3. Conclusiveness—Estoppel—Vocation.

Accounts of Executor—Estoppel Against Executor.—Where an Executor shortly after his appointment files an account wherein he charges himself with certain money and property received as executor, and ten years after, in obedience to a citation, files a second account not charging himself with such money and property, but claiming that they belonged to a partnership composed of himself and the testator, his claim comes too late.—Estate of Sylvester, 112.

Account.—An Order Settling an Annual Account is Final and Conclusive as to all parties in interest, subject only to appeal, and cannot, after the time for appeal has passed, be placed again in a position for appeal by motion to set it aside.—Estate of Byrne, 69.

Account—Setting Aside for Fraud.—Allegations of fraud give the superior court, sitting in probate, no jurisdiction to vacate an order settling an account on motion, but such charges of fraud are the subject of an independent proceeding in equity.—Estate of Byrne, 69.

ACCUMULATIONS.

Accumulations.—Provisions of a Will for accumulations beyond the period of majority are in this case held void.—Estate of Werner, 225.

ADEMPTION OF LEGACIES.

Ademption.—Ademption is the Revocation of a Grant, Donation, or the like, especially the lapse of a legacy, by the testator's satisfying it by delivery or payment to the legatee before his death, or by his otherwise dealing with the thing bequeathed so as to manifest an intent to revoke the bequest.—Estate of Garratt, 394.

Ademption.—To Adeem is to Revoke a Legacy either by implication, as by a different disposition of the bequest during the life of the testator, or by satisfaction of the legacy in advance, as by delivery of the thing bequeathed, or its equivalent, to the legatee during the lifetime of the legator. A specific legacy may be adeemed; if the subject of it is not in existence at the time of the testator's death, then the bequest entirely fails.—Estate of Garratt, 394.

Ademption.—The Question of Ademption is Purely One of Fact and not of intention, differing in this respect from revocation, which is purely one of intent.—Estate of Garratt, 394.

Ademption.—Ademption is the Extinction or Withholding of a Legacy in consequence of some act of the testator, which, though not directly a revocation of the bequest, is considered in law as equivalent thereto or indicative of an intention to revoke. The ademption of a specific legacy is effected by the extinction of the thing or fund, without regard to the testator's intention; but where the fund remains the same in substance, with some unimportant alteration, there is no ademption.—Estate of Garratt, 394.

Ademption.—The Very Thing Bequeathed must be in Existence at the death of the testator and form part of his estate, otherwise the legacy is wholly inoperative.—Estate of Garratt, 394.

Ademption—Change Worked by Organization of Corporation—Where the owner of land devises the same, together with the buildings and business thereon conducted, and thereafter organizes a corporation and leases the property to it, he being the principal stockholder in the corporation and continuing to manage the business as before, there is no change in the substance of the property, and on his death the devisees and legatees named in his will are entitled to a distribution of the property as there specified.—Estate of Garratt, 394.

ADMINISTRATION IN GENERAL.

Administration.—Proceedings for the Settlement of the Estate of a decedent, and matters connected therewith, are not civil actions within the meaning of the Code of Civil Procedure, sections 392-395, nor within the meaning of section 15 of article 1 of the constitution.—Estate of Harris, 1.

Estate of Limited Value—Setting Apart to Widow.—Under section 1469 of the Code of Civil Procedure, as amended in 1897, the court cannot set apart an estate under $1,500 for the joint benefit of the widow and children; the whole of the estate must be assigned "to the widow."—Estate of Stuart, 231.

ADMINISTRATORS.

ADMISSIONS.

ADOPTED CHILDREN.

ADOPTION.

Adoption—Compliance with Statute.—The adoption of children was unknown to the common law; the institution in this state is purely a creation of statute, and one who claims to have been adopted must show that the statute has been complied with.—Estate of Renton, 519.

Adoption—Right of Inheritance—Conflict of Law.—The legal status of a person as a child by adoption, acquired under the lex domicilii, follows him on a change of domicile, and carries with it the right of inheritance incident to such status, unless the same is repugnant to the law of the latter domicile.—Estate of Renton, 519.

APPEAL.

Undertaking on Appeal.—An Undertaking in Double the Amount of Costs, taxed in a case where no undertaking is required to stay execution, is without validity either as a statutory or common-law bond, and cannot be enforced against the sureties.—Estate of McGinn, 127.

APPRAISEMENT.

ARBITRATION.

BONDS.

See Appeal.

CHANGE OF VENUE.

See Guardian and Ward, 2.

CHARITIES.

1. In General.

Charity.—Where There is a Gift to Charity generally, indicative of a general charitable purpose and pointing out the mode of carrying it into effect, if that mode fails, still the general purpose of charity shall be carried out; but where the testator shows an intention, not of general charity, but to give to some particular institution, then if it fails because there is no such institution, the gift does not go to charity generally.—Estate of Hull, 378.

Charity.—The Main Distinction Between an Ordinary Trust and one for charitable uses is that the former is for a definite, ascertained object, while the latter is favored and supported in equity by reason of the uncertainty of its object.—Estate of Hull, 378.

Charity.—Where the Intention of the Testator, as shown by the language employed in his will, was to create a fund for the benefit of persons who were capable of being ascertained and recognized, there is no uncertainty of the object of the trust, and the main feature of a public is lacking.—Estate of Hull, 378.

Charity.—A Bequest to a Street Railroad Corporation in trust, to be by it invested and the income used in purchasing books and magazines for the reading-room of the employees of such corporation, is not a public charity.—Estate of Hull, 378.

Charity.—A Corporation can Exercise No Powers beyond those specified in its charter, and a street railroad corporation cannot be endowed with the powers, duties or responsibilities of an eleemosynary or charitable institution.—Estate of Hull, 378.

Charities.—A Degree of Vagueness is allowable in charitable bequests.—Estate of Hanson, 267.

Will—Whether Creates Charity or Personal Bequest.—A clause in a will "the residue (if any) I leave to my executor M., to dispose in charities as he think best," creates a personal bequest.—Estate of Hanson, 267.

2. Gifts Within Thirty Days of Death.

Charitable Corporation—Gift to Within Thirty Days of Death.—The Kings Daughters Home for Incurables, a corporation without capital stock, organized to maintain a home for persons afflicted with incurable diseases, is a charitable or benevolent corporation, although it receives pay patients in carrying out the objects of its formation but not for the profit of its members; and a bequest to it is gov-

Funeral Expenses—Time for Payment.—The funeral expenses of a decedent must be paid by the administrator as soon as he has sufficient funds in his hands.—Estate of Finch, 294.

COMMISSIONS.

See Executors and Administrators, 7.

COMMON LAW.

Common Law.—The Jurisprudence of California rests exclusively upon the common law, which was made the rule of decision at the time of the formation of the state government in all cases where not abrogated or modified by statute.—Estate of Renton, 519.

COMMON-LAW MARRIAGE.

Note.

COMMUNITY AND SEPARATE PROPERTY.

Community Property, What is.—On the Application for Partial Distribution by the widow in this case, the court finds that the investment of $10,000, out of which the estate of the decedent developed, was community property, with the possible exception of $100 raised by him from the sale of a watch owned by him before marriage.—Estate of Henarie, 483.

from a judgment against him in a contest of the will before probate, establishes the law governing this contest after probate, so far as the facts in evidence are substantially the same as those involved on such appeal.—Estate of Dolbeer, 249.

Will Contest—Injustice or Unnaturalness of Gifts.—A will cannot be contested on the ground that it is foolish, unnatural, capricious or unjust.—Estate of Harris, 1.

Will Contest—Relative Wealth or Poverty of Parties.—If a testatrix was of sound and disposing mind when she made her will, the jury cannot consider, in case of a contest of the will, the relative wealth or poverty of the parties to the controversy.—Estate of Dolbeer, 232.

Will Contest.—Upon an Issue of Unsoundness of Mind in a will contest the jury must determine, and the real point is, whether the testator was or was not of sound and disposing mind at the precise time of the subscription and declaration of the instrument. (11th Issue. Instructions VIII, XIII, 31, 58.)—Estate of McGinn, 26.

Will Contest.—The Decree Admitting a Will to Probate, in the First Instance, is not evidence as to any issue raised in a subsequent contest, or of any fact contained in any issue. (Instructions 61, 62.)—Estate of McGinn, 26.

Will Contest—Effect of Admitting to Probate.—Upon the contest of a will after probate, the decree in the first instance admitting the will does not create any presumption of law, nor is it evidence that the testator was mentally sound at the time of the execution. (Instructions 61, 62.)—Estate of McGinn, 26.

2. Foreign Wills.

Foreign Will—Whether Subject to Contest in this State.—A will which has been proved in another state where the probate has not yet become final is subject to contest when offered for probate in this state as a domestic will.—Estate of Renton, 120.

3. Persons Interested and Parties.

Will Contest.—An Allegation that the Contestants are the Adopted and only children and heirs of the decedent is the statement of a mere conclusion of law, and defective as against special demurrer; the particular facts upon which the claim of adoption rests must be alleged so that the court may determine whether, under the laws of this state, or under the laws of any state, the precedent conditions exist which constitute a valid adoption and invest the contestants with the right of inheritance.—Estate of Renton, 519.

Will Contest.—Any Person Interested may Contest a Will, either before the same is admitted to probate or at any time within one year thereafter.—Estate of Renton, 519.

Will Contest—Persons not Interested.—The right to contest a will is confined to persons interested in the estate, and therefore no

stranger can be heard to object to the validity of a will.—Estate of Renton, 519.

Will Contest—Parties Plaintiff and Defendant.—On the trial of a contest of a will before probate, the contestant is plaintiff and the petitioner is defendant.—Estate of Renton, 519.

4. Pleading—Form of Opposition.

Will Contest—Form of Written Opposition.—The "written grounds of opposition" to the probate of a will constitute the only pleading of the contestant, and must have the same qualities and contain the same requisites which the code prescribes for complaints in civil actions.—Estate of Renton, 519.

Will Contest—Form of Written Opposition.—The written opposition to the admission of a will to probate must, in addition to the formal parts and the prayer, contain a statement of facts constituting the contestant's cause of action in ordinary and concise language, which statement must answer all requirements of the general rules of pleading prescribed by the code for complaints.—Estate of Renton, 519.

Will Contest.—The Facts Constituting the Cause of Action in a will contest should be stated in ordinary and concise language.—Estate of Harris, 1.

Will Contest—Manner of Pleading.—Under Our System of Pleading facts only must be stated. This means the facts, as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. Those facts, and those only, must be stated, which constitute the cause of action or the defense.—Estate of Harris, 1.

Will Contest—Pleading Unsoundness of Mind.—If unsoundness of mind is relied upon in a will contest, it is sufficient to state that the deceased at the time of the alleged execution of the proposed paper was not of sound and disposing mind.—Estate of Harris, 1.

Will Contest—Pleading Fraud and Undue Influence.—When the grounds of a contest embrace duress, fraud, undue influence, or execution of a subsequent will, such matters not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded.—Estate of Harris, 1.

Will Contest.—In Pleading Fraud the Facts must be Clearly stated, so that the court may determine therefrom whether the charge is well founded.—Estate of Harris, 1.

Will Contest.—In Pleading Fraud and Undue Influence it is not sufficient to state the nature of the fraud and undue influence, but the facts should be alleged; and they should be stated with certainty and expressly connected with the testamentary act.—Estate of Harris, 1.

Will Contest.—Allegations of Fraud and Undue Influence should be as positive, precise and particular as the nature of the case will allow. The mere fact that the beneficiary had an opportunity to procure a will in his own favor or that he had a motive for the exercise

EVIDENCE.

1. Direct and Indirect.

Evidence.—Direct Evidence Proves the Litigated Fact in a direct manner, without (the necessity of) inference or presumption. (Instruction 4.)—Estate of McGinn, 26.

Evidence.—Indirect Evidence is Proof of a Fact other than the litigated fact, but which justifies an inference or presumption of the existence of the litigated fact. (Instruction 4.)—Estate of McGinn, 26.

Evidence.—Indirect Evidence is of Two Kinds, namely, inference and presumption. (Instruction 4.)—Estate of McGinn, 26.

2. Inference and Presumptions.

Evidence.—A Presumption is a Deduction Made by the Law from proof of particular facts. (Instruction 4.)—Estate of McGinn, 26.

Evidence.—An Inference is a Deduction Made by the Reason of the jury from proved facts; the law being silent as to the effect of such facts. (Instruction 4.)—Estate of McGinn, 26.

Evidence—Conclusive Presumption.—A Jury must Find a Fact in accordance with a conclusive presumption of law announced by the court. (Instruction XXVIII.)—Estate of McGinn, 26.

Evidence.—An Inference must be Founded upon a Fact Legally Proved, and upon such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. (Instruction 4.) Estate of McGinn, 26.

3. Expert and Opinion Evidence.

Evidence—Weight and Reliability of Expert Testimony.—The testimony of experts (here medical witnesses) based upon hypothetical questions, is frequently unsatisfactory and often unreliable; and while accepted in law, and so requiring consideration, is not entitled to as much weight as are facts, especially in cases of conflict between opinion and fact. (Instruction XLV.) (*This instruction is hardly in accord with Estate of Blake, 136 Cal. 306, 70 Pac. 171, holding that it is the sole province of the jury to determine the credibility of experts and the weight to be given their testimony.*) —Estate of McGinn, 26.

Evidence.—Experts and Opinion Evidence, Contrasted with Non-experts and nonopinion evidence (facts), and discussion as to characteristic differences in the certainty or uncertainty of the various subjects themselves, embraced within the domain of expert evidence. (Instruction XLV.)—Estate of McGinn, 26.

The Opinion of a Witness Founded upon a Hypothetical Question must be brought to the test of facts in order that the jury may judge what weight the opinion is entitled to.—Estate of Dolbeer, 232.

See Contest of Will, 5; **Jury.**

EXECUTORS AND ADMINISTRATORS.

1. Persons Entitled to Letters.

Administrators—Order of Persons Entitled to Letters.—Section 1365 of the Code of Civil Procedure specifies ten classes of persons to whom letters of administration may be granted, who are entitled to letters in the order of enumeration. The parents constitute the third class; the public administrator the eighth class; and any person legally competent the tenth class.—Estate of Bedell, 78.

2. Disqualification to Act.

Administrator—Drunkenness as a Disqualification.—The mere use of intoxicants, sometimes to excess, does not in itself disqualify one to act as administrator; the drunkenness contemplated by the statute as a disqualification is that excessive, inveterate and continued use of intoxicants to such an extent as to render the victim an unsafe agent to intrust with the care of property or the transaction of business.—Estate of Piercy, 473.

Administrator—Evidence of Character.—The admissibility in evidence, on the issue of the improvidence of an applicant for letters of administration, of specific acts rather than general reputation, is discussed.—Estate of Piercy, 473.

Administrator—Improvidence as a Disqualification.—The fact that a person has been pursuing the profession of baseball playing, has conducted saloons and gaming resorts, has indulged in gambling and lost heavily thereby, does not render him disqualified to act as administrator by reason of improvidence.—Estate of Piercy, 473.

Administrator—Want of Understanding as a Disqualification.—Want of understanding, as a disqualification to act as an administrator, does not import a lack of comprehension of the law of administration, but rather refers to a want of common intelligence amounting to a defect of intellect.—Estate of Piercy, 473.

Administrator—Want of Understanding as a Disqualification.—Education is not essential to qualify one to act as administrator.—Estate of Piercy, 473.

Administrator—Want of Integrity as a Disqualification.—The "integrity," which one must possess to be qualified to act as administrator, means soundness of moral principle and character as shown by his dealing with others in the making and performance of contracts and in fidelity and honesty in the discharge of trusts. It is used as a synonym for probity, honesty and uprightness in business relations with others.—Estate of Piercy, 473.

Administrator—Want of Integrity as a Disqualification.—Isolated instances of departure from paths of rectitude, especially when remote from the time when application for letters is made, do not constitute "want of integrity," if it is not shown that the occasional acts have been repeated or become continuous and evidence character at

person as administrator, and his nominee applied for letters and thus went to expense and trouble, the father is estopped from withdrawing his waiver or retracting his renunciation.—Estate of Bedell, 78.

5. Executor—According to Tenor.

Executor According to the Tenor.—Where It Appears from the Terms of a will that it was the intention of the testator to appoint a certain person executor, although not named as such in the will, courts will be guided by the intention so expressed and make the appointment.—Estate of Berg, 259.

Executor According to the Tenor.—Courts do not Look with Favor upon the appointment of an executor "according to the tenor," but will rather appoint an administrator with the will annexed.—Estate of Berg, 259.

Executor According to the Tenor.—Before a Person Who is not Directly named as executor can receive an appointment "according to the tenor," not only must his identity be certain, but the court must be able to conclude from the language of the will itself that there is a testamentary intent that he shall take charge of the estate to perform the duties usual to an executorship.—Estate of Berg, 259.

Executor According to the Tenor.—A Person will not be Appointed executor according to the tenor unless there is some expression in the will clothing him with at least some of the duties and powers of an executor.—Estate of Berg, 259.

6. Management of Estate.

Executors—Payment of Stock Assessments.—The payment by an executor of assessments on speculative shares of stock purchased by his testator is not encouraged by courts, and usually is at his hazard, and justified only by a successful issue of the investment.—Estate of Fargo, 219.

Executor—When Chargeable with Interest on Money Used as His Own.—Where an executor uses money of the estate as his own, he is chargeable with interest thereon; in this case, however, it appearing that the executor did not use the money with any intent to defraud the estate thereof, it is held that justice will be subserved by charging him with simple interest only.—Estate of Sylvester, 112.

7. Commissions.

Executors—Computation of Commissions.—Under section 1618 of the Code of Civil Procedure, when part of the estate over $20,000 comes under the provision as to labor involved, commissions should be computed on it at the one-half rate, and on the balance at full rates. For the property not distributed in kind, and for property involving more "labor than the custody and distribution of the same," full commissions are allowed; for that distributed in kind, and involving no labor beyond its custody and distribution, half commis-

disputed, her marriage must be established by the same quality of proof as in any other case.—Estate of Mackay, 318.

Family Allowance—Void Marriage.—The court in this case finds: That the petitioner is not the widow and her child is not the child, either legitimate, adopted or illegitimate, of the decedent, and that the application for a family allowance should be denied.—Estate of Mackay, 318.

Note.

conclusiveness and appeal, 223.

FILES.

See Wills, 4.

FINAL ACCOUNT.

See Accounts of Administrator.

FOREIGN ADMINISTRATOR.

See Claims Against Estate, 1.

FOREIGN WILLS.

See Contest of Wills, 2; Probate of Wills, 2.

FORGED MARRIAGE CONTRACT.

See Marriage.

FRAUD.

Fraud.—A Fraudulent Misrepresentation must Contain these elements: materiality; falsity; knowledge of its falsity by the party making it, or want of reason by him for belief and lack of belief in its truth; intent to deceive; accomplishment of intent; resultant act of party deceived contrary to what it otherwise would have been. (Instructions XXXVI, XXXVII, XXXVIII, 13.)—Estate of McGinn, 26.

Fraud.—The Materiality Essential to Characterize Misrepresentation as fraudulent in law is lacking if the transaction would have taken place without the representation. (Instruction XXXVII.)—Estate of McGinn, 26.

Fraud.—The Character of Materiality Essential to a Fraudulent misrepresentation must exist notwithstanding that there were no other inducements than the misrepresentation charged to cause the party to act as he did. (Instruction XXXVII.)—Estate of McGinn, 26.

Fraud.—Fraud is Never Presumed, but must always be proved. (Instruction XL.)—Estate of McGinn, 26.

Fraud.—Fraudulent Misrepresentations must be Proved as they are alleged; and only the acts alleged can be proved. (Instructions XXXIX, XXXVIII, 13.)—Estate of McGinn, 26.

See Accounts of Administrator; Contest of Will, 4.

FRAUD IN PROCURING EXECUTION OF WILL.

Wills—Misrepresentation to Testator.—A Will may be Set Aside if made through fraudulent misrepresentation exerted upon testator by any beneficiary thereunder, touching the subscribing or publishing of the will, or the making of any disposition or provision therein, or the disherison of any heir. (13th Issue. Instructions XXXVI, 5, 13, 14.)—Estate of McGinn, 26.

Wills—Fraud Against Testator.—A Will may be Set Aside if made through fraud practiced upon testator by any beneficiary thereunder, touching the subscribing or publishing of the will, or the making of any disposition therein. (14th Issue. Instructions XL, 5, 14.)—Estate of McGinn, 26.

Wills.—A Fraudulent Misrepresentation Sufficient to Avoid a Will must have been made by a beneficiary, and have operated upon the testator, and so operated that the will would not have been made, or would have been different, except for misrepresentations. (Instructions 13, XXXVI, XXXVIII, XXXII.)—Estate of McGinn, 26.

Will—Fraud in Procuring.—A Testator may be of Sound Mind, and yet the victim of fraudulent misrepresentation. (Instruction 13.)—Estate of McGinn, 26.

Wills—Fraud in Procuring.—If a testator be circumvented by fraud, the testament is without legal force. (Instruction 14.)—Estate of McGinn, 26.

Wills.—Circumvention of a Testator by Means of Fraud is to be considered in the same light as "constraint by force," and will have the same effect in setting aside the will. (Instruction 14.)—Estate of McGinn, 26.

Wills—Fraud in Procuring.—Honest Intercession or Request is not prohibited; but it is otherwise as to those fraudulent and malicious means which secretly induce the making of testaments. (Instruction 14.)—Estate of McGinn, 26.

Will Contest.—Upon an Issue of Fraudulent Misrepresentations in the execution of a will, a jury cannot raise a presumption of falsity as to a representation by a beneficiary. (Instruction XXXVIII.)—Estate of McGinn, 26.

Will Contest.—Upon an Issue of Fraudulent Misrepresentation in the execution of a will, the consideration of delusion or insanity is not involved. (Instruction 13.)—Estate of McGinn, 26.

Will Contest.—The Issue of Fraud in a Will Contest can be Established Only by proof of the commission of a fraud; the constituent facts, and of what the fraud consisted; the influence of the

GUARDIAN AND WARD.

1. In General.

Guardians—Classes and Definitions.—Guardians are either general or special; a guardian of the person, or of all the property of the ward within the state, being a general guardian, and all others being special guardians.—Estate of Harris, 1.

Guardian.—It is the Duty of a Guardian to Supply the place of a judicious parent. He stands in the place of a parent, and supplies that watchfulness, care and discipline which are essential to the young in the formation of their habits.—Guardianship of Taylor, 105.

2. Venue and Jurisdiction to Appoint.

Change of Venue—Guardianship Proceedings.—The probate court has power to order the place of trial of guardianship proceedings to be changed, notwithstanding there is no express authority therefor in the statute.—Guardianship of Murphy, 103.

Guardian—Applications for Letters in Different Counties.—Where applications for letters of guardianship are made by different persons in several counties, each applicant claiming his county to be the residence of the minors, and the second application is filed before notice is given of the first, and is first heard and determined, the order granting the same and determining that the minors are residents of the county of the second applicant is res judicata and a bar to the application first filed.—Guardianship of Treadwell, 309.

Guardian—Application for Letters in Different Counties.—Where an application for letters of guardianship is granted by the superior court of one county, and an application is thereafter made to vacate the order on the ground that the minors are not residents of that county, which application is denied, the order denying it is conclusive upon an application for letters in the superior court of another county, although that application was first filed.—Guardianship of Treadwell, 309.

Guardian.—The Residence Necessary to Confer Jurisdiction in matters of guardianship is the actual residence or abode of the ward, not his legal residence or domicile.—Guardianship of Treadwell, 309.

Guardian.—Residence is not Required, under section 1747 of the Code of Civil Procedure, in order to confer jurisdiction in guardianship proceedings, but mere inhabitance is sufficient.—Guardianship of Treadwell, 309.

HOLOGRAPH.

See Probate of Wills, 5.

HOMESTEAD.

INHERITANCE TAX.

INSANITY AND INSANE DELUSIONS.

INTEREST.

See Claims Against Estate, 2; Executors and Administrators, 6.

LOST WILL.

See Probate of Wills, 3.

MARRIAGE.

1. Void Marriage.

Void Marriage—Legitimacy of Issue.—Where the claim is made that a marriage was contracted in another state, which, if there contracted in fact, is valid under the laws of that state, and hence valid in this state, although such marriage would have been void if contracted in this state, the provision in section 1387 of the Civil Code that the issue of all marriages null in law are legitimate has no application.—Estate of Mackay, 318.

Marriage—White and Colored Persons.—A marriage between a white man and a colored woman is forbidden by the law of California, but if such a marriage is contracted in a state where it is valid, it will be recognized in this state.—Estate of Mackay, 318.

2. Common-law Marriage.

Contract Marriage.—An Agreement to be "Husband and Wife" is distinguished from an agreement to live together as "man and wife." The latter agreement does not constitute a contract of marriage, and living together as "man and wife" does not constitute marriage.—Estate of Mackay, 318.

Contract Marriage.—In Considering the Claim of a Contract Marriage, the circumstance that the alleged widow, a few days after her alleged husband's death, stated to the executors of his will that she was with child by him, and did not then or until sometime afterward assert her claim to widowhood, is to be taken as strongly negativing such claim.—Estate of Mackay, 318.

Contract Marriage—Evidence.—The Acts of a Testator in making a bequest to a woman under a surname other than his own and describing her as his housekeeper, and in acknowledging a deed before an officer as an unmarried man, are evidence as to the truth of the facts so stated.—Estate of Mackay, 318.

Marriage—Sufficient Marriage Contract.—The following contract signed by the parties, but not witnessed, is not legal in form: "San Francisco, Cal., January 6th, 1895. We, the undersigned, Charles A. James, aged 60, and Laura Milen, aged 19, do hereby mutually bind ourselves unto each other as husband and wife. This agreement or contract to be authority for same before God and man."—Estate of James, 130.

Marriage—Assumption of Marital Rights and Duties.—In this case where a woman claimed to be the widow of the decedent by virtue of a contract entered into with him followed by an assumption of the marriage relation, the court holds, after an extended review of the evidence, that there was no mutual assumption of rights, duties or obligations marital, and that they never lived together as husband and wife.—Estate of James, 130.

SUICIDE.

Suicide is Never Presumed by the Law from the mere fact of death.—Estate of Dolbeer, 232.

TAXATION.

See Inheritance Tax.

TENOR OF WILL.

See Executors and Administrators, 5.

TRIAL.

See Contest of Wills; Jury.

TRUSTS.

1. In General.

Trusts.—A Corporation Organized to Operate a Street Railroad or a system of street railroads, and of acquiring and holding property required for such purpose, has no legal capacity or power to accept or perform a trust to take a fund and invest it and use the income in the purchase of books and magazines for the reading-room of its employees.—Estate of Hull, 378.

Trust.—A Bequest to a Corporation in Trust, which cannot be enforced by the beneficiaries because beyond the power of the corporation to accept or perform, is void.—Estate of Hull, 378.

Trust.—Where a Bequest in Trust is Made to a Specified Corporation, and a discretion is confided to it in performing the trust, and such corporation goes out of existence and is succeeded by another corporation prior to the death of the testator, the bequest does not go to the successor, for to sanction the exercise by it of the discretion confided to its predecessor would be an altering of the testator's will.—Estate of Hull, 378.

Trust.—Three Conditions must Concur in order that a power be deemed a trust or that the specified beneficiaries take trust interests by implication in default of appointment: Imperativeness of request that donee execute the power; certainty of subject matter; and certainty of object.—Estate of Hanson, 267.

Trust—When Expires—Parol Evidence.—The trust in this case expired twenty-five years after the execution of the will, which bears date May 25, 1859. This being the plain language of the will, it cannot be changed by parol evidence.—Estate of Fay, 270.

UNDUE INFLUENCE.

Wills—Undue Influence, What Constitutes.—In order to avoid a will on the ground of undue influence, 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 that could not be resisted, constrained the testator to do that which was against his free will and desire, but which he 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 kindly acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear.—Estate of Blanc, 71.

Undue Influence—Presumption and Burden of Proof.—Undue influence cannot be presumed, but must be proved in each case, and the burden of proof lies on the party alleging it.—Estate of Dolbeer, 249.

Undue Influence—When Vitiates Will.—The kind of undue influence that would destroy a will must be such as in effect destroys the free agency of the testatrix and overpowers her volition at the time of the execution of the instrument, and evidence must be produced that pressure was brought to bear directly upon her testamentary act.—Estate of Dolbeer, 249.

Undue Influence—What does not Amount to.—Surmises and suspicions arising from opportunity and propinquity may be indulged in to an illimitable extent, but these do not constitute proof and must be disregarded by the court. The evidence in this case shows that the testatrix, at the time of executing her will, was unconstrained by undue influence, and is entirely in favor of the respondents.—Estate of Dolbeer, 249.

2. Persons Exercising Influence.

Wills.—To Exert an Undue Influence the Person charged must be of sound mind. (Instructions XXIX, XXX. And see XXVIII.)—Estate of McGinn, 26.

Wills—Undue Influence Exercised by Lunatic.—Where a beneficiary under a will who was charged with having exerted undue influence over the testator had been adjudged insane at a date before the execution of testator's will, and there had been no judicial restoration to sanity, the jury were instructed that such beneficiary must be deemed incompetent to have entered into any agreement or conspiracy with anybody. (Instructions XXX, XXVIII.)—Estate of McGinn, 26.

Wills.—Influence Arising from Legitimate Family and Social relations must be allowed to produce its natural result, even in the making of last wills; such influence being a lawful one. (Instruction XX.)—Estate of McGinn, 26.

Wills.—However Great may be the Influence Exerted by and through legitimate family and social relations, there is no taint of

Wills—Right to Dispose of Property.—A person of sound mind may leave his property by will to relatives, or dispose of it otherwise as he pleases. His own wishes and judgment in this regard are sole and supreme.—Estate of Dolbeer, 232.

2. Testamentary Capacity in General.

See Insanity and Insane Delusions.

Wills—Testamentary Capacity.—A person is of sound and disposing mind who is in the full possession of his mental faculties, free from delusion, and capable of rationally thinking, acting and determining for himself. Weakness of mind is not the opposite of soundness, but is the opposite of strength of mind, and unsoundness is the opposite of soundness. A weak mind may be a sound mind and a strong mind may be unsound.—Estate of Blanc, 71.

Wills—Lack of Testamentary Capacity.—A Will may be Set Aside if the testator was not of sound and disposing mind at the time of the alleged execution thereof. (11th Issue. Instructions VIII, 31, 58.) Estate of McGinn, 26.

Wills.—Intellectual Feebleness or Weakness of the Understanding, of whatever origin, is not of itself a disqualification of the testamentary right. (Instruction X.)—Estate of McGinn.

Wills.—Unsoundness of Mind Embraces Every Species of Mental incapacity, from raging mania to that debility and extreme feebleness of mind which verges upon and even degenerates into idiocy. (Instruction 46.)—Estate of McGinn, 26.

Wills.—A Person is of Sound and Disposing Mind Who is in full possession of his mental faculties, free from delusion and capable of rationally thinking, acting and determining for himself. (Instruction 8.)—Estate of McGinn, 26.

Wills.—A Person may be Said to be of Sound and Disposing Mind who is capable of fairly and rationally considering the character and extent of his property; the persons to whom he is bound by ties of blood, affinity or friendship, or who have claims upon him or may be dependent upon his bounty; and the persons to whom and the manner and proportions in which he wishes the property to go. (Instruction IX. And see XII, XVI, 8, 33, 34, 35, 36.)—Estate of McGinn, 26.

Wills.—A Partial Failure of Mind and Memory, even to a considerable extent, from whatever cause arising, will not disqualify testator, if there remain sufficient mind and memory to enable him to comprehend what he is about, and ability to realize that he is disposing of his estate by will, and to whom disposing. (Instruction XI.)—Estate of McGinn, 26.

Wills.—In Deciding as to Testamentary Capacity, It is the Soundness of Mind and not the state of bodily health that is to be considered. (Instruction XII.)—Estate of McGinn, 26.

Wills—Injustice of as Showing Want of Testamentary Capacity.— The prima facie character of a will as just or unjust, equitable or in-

Testamentary Capacity.—The Test of Capacity to Make a Will is this: The testatrix must have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which she is about to dispose, the nature of the act which she is about to perform, the names and identity of the persons who are the proper objects of her bounty, and her relation toward them.—Estate of Dolbeer, 232.

Testamentary Capacity.—In Order to have a Sound and Disposing Mind the testatrix must be able to understand the nature of the act she is performing, she must be able to recall those who are the natural objects of her bounty, she must be able to remember the character and extent of her property, she must be able to understand the manner in which she wishes to distribute it, and she must understand the persons to whom she wishes to distribute it. It is not sufficient that she have a mind sufficient to comprehend one of these elements; her mind must be sufficiently clear and strong to perceive the relation of the various elements to one another, and she must have at least a general comprehension of the whole.—Estate of Dolbeer, 232.

Testamentary Capacity—Discrimination Against Heirs.—It cannot be presumed that a testatrix was of unsound mind because she discriminated against her heirs in the disposition of her estate.—Estate of Dolbeer, 232.

Testamentary Capacity—Perfect Mental Health.—The law does not require that a person, to be competent to make a will, should be in perfect mental health.—Estate of Dolbeer, 232.

Testamentary Capacity—When Established.—A review of the evidence as to the habits, characteristics, conduct, manner and testamentary capacity of the decedent, establishes that at the date of the execution of the will the decedent was in full possession of her faculties, and competent to execute a will.—Estate of Dolbeer, 249.

3. **Testamentary Capacity—Time of Existence.**

Testamentary Capacity—Time When must Exist.—When a will is contested on the ground that the testatrix was of unsound mind, the time when the will was executed is the time to which the jury must look in determining the question of testamentary capacity. What her mental condition was before or after the execution of the will is important only so far as it throws light upon her mental condition when the will was executed.—Estate of Dolbeer, 232.

Wills—Condition of Testator Before and After Execution.—The mental condition of the testator, before and after the alleged execution of a will, is only important to throw light upon and show the actual mental condition at the time of execution. (Instructions XIII, 58.)—Estate of McGinn, 26.

Wills.—If Mental Unsoundness Existed at the Time of Execution of a probated will, no act or declaration of testator, subsequent to

the execution, could validate the same as a will. (Instruction 58. And see XIII.)—Estate of McGinn, 26.

Wills.—If Mental Unsoundness Existed at the Time of the Execution of a will, the jury should disregard all evidence of sanity existing at a subsequent date. (Instruction 58.)—Estate of McGinn, 26.

4. Testamentary Capacity—Presumption in Favor.

Testamentary Capacity.—The Law Presumes that Every Person possesses a sound and disposing mind, and his devisees and legatees are entitled to this presumption as a matter of evidence.—Estate of Dolbeer, 232.

Testamentary Capacity—Burden of Proof in Will Contest.—Those who contest a will on the ground that the testatrix was of unsound mind have the burden of proof to establish such unsoundness by a preponderance of evidence. If the evidence is equally balanced, the contestants fail to sustain the burden which the law imposes upon them.—Estate of Dolbeer, 232.

Testamentary Capacity—Burden of Proof and Preponderance of Evidence.—Persons who assert the insanity of a testatrix are required to prove their assertions by a preponderance of evidence, by which is meant that amount of evidence which produces conviction in an unprejudiced mind.—Estate of Dolbeer, 232.

Testamentary Capacity.—The Presumption that Every Person is of Sound Mind until the contrary is proved is a legal presumption.—Estate of Dolbeer, 232.

5. Testamentary Capacity—Bodily Health.

Testamentary Capacity—Bodily Health and Strength.—In determining testamentary capacity it is the soundness of mind, not the state of bodily health, that is considered. The bodily health of a testatrix is important only so far as it may be evidence of the state of her mind. Neither sickness nor physical disability alone will disqualify a person from making a will.—Estate of Dolbeer, 232.

Wills—Testamentary Capacity—Bodily Affliction.—The paramount right of testamentary disposition is not forfeited, nor subject to be defeated, because a person may have been stricken with apoplexy, or afflicted with hemiplegia or paralysis, or stutters or stammers in speech, or suffers from any bodily affliction. (Instruction XIV.)—Estate of McGinn, 26.

Wills.—A Person's Bodily Health may be in a State of Extreme Imbecility, and yet he may possess testamentary capacity; i. e., sufficient understanding to direct the disposition of his property. (Instruction XII. And see 33, 36.)—Estate of McGinn, 26.

Wills.—Neither Old Age, Distress, nor Debility of Body Incapacitates to make a will, provided there remain possession of the mental faculties and understanding of the testamentary transaction. (Instruction XIII.)—Estate of McGinn, 26.

6. Testamentary Capacity—Intoxication.

Wills.—Unsoundness of Mind may be the Result of Disease, Drunkenness, or one of many other causes. (Instruction 10, 33, 36.)—Estate of McGinn, 26.

Wills.—Drunkenness, to Result in Unsoundness of Mind, must overcome the judgment and unseat the reason, either temporarily—the litigated moment—or permanently. (Instructions 10, 33, 36.)—Estate of McGinn, 26.

Wills.—There are Two Conditions of Drunkenness Which may result in mental unsoundness, viz.: Where a person is overcome by the delirium of intoxication, or where the use of intoxicants has been so extended and excessive as to permanently disable the mind; in either case the judgment must have been overcome and the reason unseated. (Instructions 10, 33, 36.)—Estate of McGinn, 26.

7. Testamentary Capacity—Consideration of Will and Property.

Testamentary Capacity.—The Will Itself may be Considered in determining whether the author was of sound and disposing mind.—Estate of Dolbeer, 232.

Testamentary Capacity—Manner of Acquiring Property.—Persons contesting a will may introduce evidence of the manner of acquisition of the property disposed of in the will, as bearing in some degree, however remotely, on the question of testamentary capacity.—Estate of Harris, 1.

Testamentary Capacity—Terms of Will and Condition of Estate.—In determining the soundness of mind of a testatrix, the jury should take into consideration the provisions of the will itself, and also the condition and nature of the estate disposed of.—Estate of Dolbeer, 232.

Testamentary Capacity—Condition and Relation of Beneficiaries.—In determining the soundness of mind of a testatrix, the jury should consider the condition of the beneficiaries under the will, the relations between the testatrix and any contestants or excluded relatives, and also their age, condition, circumstances, and their conduct toward the testatrix.—Estate of Dolbeer, 232.

8. Testamentary Capacity—Opinion of Acquaintance.

Insanity of Testator—Opinion of Acquaintance.—Section 1870 of the Code of Civil Procedure permits as evidence the opinion of an intimate acquaintance respecting the mental sanity of a person, but with that opinion must be given the reasons upon which it is based, and the opinion itself can have no weight other than that which the reasons bring to its support.—Estate of Dolbeer, 249.

Testamentary Capacity.—An Intimate Acquaintance may Give His Opinion respecting the mental condition of a testator; but he cannot

give an opinion as to whether the testator possessed mental capacity to make a will.—Estate of Tobin, 538.

Testamentary Capacity—Opinion of Acquaintance.—Where the opinion of an intimate acquaintance is given respecting the mental capacity of a testatrix, it is proper for the jurors to consider the degree of intimacy of the acquaintanceship in determining how much weight should be given to the opinion, and they must determine the weight to be given the opinion of each witness from the facts and circumstances upon which he founded his opinion, keeping in view the degree of intimacy existing in each case.—Estate of Dolbeer, 232.

9. Execution of Will.

Wills—Request to Witness to Sign.—The request to a witness to sign his name to a will should come from the testator and not from a third person.—Estate of Thompson, 357.

Wills.—Subscribing Witnesses to a Will are not Required to be informed or have any knowledge of the contents of the instrument. (Instruction L.)—Estate of McGinn, 26.

Wills—Subscription and Attestation.—A Will not Olographic or Nuncupative in Character may be set aside, if it was not subscribed and attested as prescribed by the Civil Code, section 1276. (Issues 1 to 10, inclusive. Instructions VII, 6.)—Estate of McGinn, 26.

Wills—Manner of Execution.—Every will, except a nuncupative will, must be in writing; and every will, other than olographic and nuncupative wills, must be executed and witnessed as provided in section 1276 of the Civil Code. (Issues 1 to 10, inclusive. Instruction 6.)—Estate of McGinn, 26.

10. Revocation and Alteration of Will.

Wills.—A Will can be Revoked or Altered in the manner and cases prescribed in section 1292 of the Civil Code. (Instruction 7.)—Estate of McGinn, 26.

Wills—Revocation by Subsequent Will.—A Will may be Set Aside if, subsequent to the execution thereof, the testator duly executed another will which in express terms revoked all former wills. (16th Issue. Instruction 7.)—Estate of McGinn, 26.

Wills—Revocation by Subsequent Will.—A Will may be Set Aside if, subsequent to the execution thereof, the testator revokes it (as prescribed by Civil Code, section 1292). (17th Issue. Instruction 7.) Estate of McGinn, 26.

11. Validity—Unnatural or Unjust Will.

Wills—Injustice or Unreasonableness of Disposition.—The competency of the testatrix being shown, the wisdom or folly, justness or unjustness of the will, can play no part in the question of its validity; but the character of the provisions of the will, as being just or unjust, reasonable or unreasonable, may be considered by the

son the legacy lapses, the child of the son is entitled to the same share of the estate as if the testator had died intestate.—Estate of Ross, 500.

Wills.—**A Niece is Under No Obligation to Provide for Her Uncles** and aunts, either when living or by will, and the failure to name them in her will raises no presumption that they were forgotten.—Estate of Dolbeer, 232.

13. **Interpretation and Construction.**

Will.—**In Construing a Will the Whole Instrument** must be considered in order to arrive at the intention of the testator.—Estate of Clancy, 343.

Will.—**Positive Provisions in a Will are not to be Overcome by** inference.—Estate of Clancy, 343.

Will.—**In Order to Reach the Obvious General Intent** of a testator, implications may supply verbal omissions.—Estate of Clancy, 343.

Wills are to be Liberally Construed so as to Effectuate the Intention of the testator, and it is the duty of courts to search for a construction that will carry such intention into effect.—Estate of Granniss, 429.

Wills—**Rules of Interpretation.**—Many of the rules which courts have adopted as guides in ascertaining the intention of testators assume such intention from words and phrases, where often it is very doubtful whether they were used with any intelligent application of the legal meaning given to them. But these rules have become, in many cases, rules of property, and work out in a majority of instances results as nearly just as may be. It is better to adhere to them in their integrity than to permit exceptions upon slight grounds.—Estate of Grannis, 429.

Will.—**In the Interpretation of a Will No Recourse to Technical Rules** is necessary or permissible, if the intention of the testator clearly appears from the provisions of the instrument.—Estate of Nelson, 442.

Wills—**Rules of Interpretation.**—The interpretation of a will depends upon the intention of the testator, to be ascertained from a full view of everything contained within the four corners of the instrument.—Estate of Fair, 90.

Wills—**Rules of Interpretation.**—The intention of the testator, as gathered from the whole scheme of the will and all its provisions, must prevail.—Estate of Fair, 90.

Wills—**Interpretation of Trusts.**—Such a construction must be put upon a will as will uphold all its provisions and enable the trustees therein named to perform each and all of the trusts imposed upon them.—Estate of Fair, 90.

Wills.—**The Intendment is that a Will as Written** correctly manifests the intention of the testator, and the whole thereof.—Estate of Fair, 90.