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**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 FIVE.**

**SAN FRANCISCO:**  
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# COFFEY'S

## PROBATE DECISIONS.

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ESTATE OF CHARLES WILLIAMS, DECEASED.

[No. 15,564; decided September 10, 1895.]

**Wills—Technicalities of Execution—Acknowledgment.**—The technicalities of the law relating to the making of wills are deemed to have been satisfied where the circumstances surrounding the transaction show a substantial compliance, and that compliance need not consist of words or even gestures, but may find its legal expression in silence and acquiescence. This is particularly true as to the acknowledgment of the signature.

**Wills.—The Acknowledgment of His Signature** by a testator is not required to be made in any particular words or in any specified manner, but if, by sign, motion, conduct or attending circumstances, the attesting witness is given to understand that the testator has already subscribed the instrument, this is a sufficient acknowledgment.

**Wills—Testimony of Subscribing Witnesses.**—The comparative powers of remembering legal details in the execution of wills, possessed by professional and laical minds, is commented upon by the court in considering the testimony of subscribing witnesses.

Matt. I. Sullivan for the contestant, daughter of decedent and sole heir at law.

Julius Reimer, for the executor.

Gustav Gutsch, for the legatee.

COFFEY, J. On the eighteenth day of January, 1895, Charles Williams, a resident of the city and county of San Francisco, state of California, died, leaving estate.

On the nineteenth day of January, 1895, an instrument purporting to be the last will of said Charles Williams and to

(1)

have been executed and attested on January 21, 1892, was filed in this court by G. T. Knopf, therein named as executor, together with a petition for probate. Mary E. Madden, formerly Mary E. Williams, a daughter of the deceased, opposes the petition upon the alleged ground that the instrument was not executed in accordance with the provisions of section 1276, Civil Code.

By the terms of the instrument, the sum of one thousand dollars is given to one Nicolaus Sinn, a distant relative of the deceased, the gold watch and chain of the deceased to the said G. T. Knopf, and the residue of the estate to the said G. T. Knopf in trust for said Mary E. Williams, to be paid to her in monthly installments of not more than twenty-five dollars.

The subscribing witnesses to the will are the said G. T. Knopf and one Julia M. Coffey. Their attestation recites the facts required by section 1276, Civil Code, and is followed by a certificate of John F. Lyons, a notary public, in the usual form of a certificate of acknowledgment of a deed, to the effect that Charles Williams, on the date of the instrument, duly acknowledged to the notary that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

The sanity of the testator at the time of the execution of the instrument was established by sufficient evidence.

It is admitted that the bequest of the gold watch and chain to G. T. Knopf is void under section 1282, Civil Code.

Issue was joined, and the matter was heard on April 18, 1895. Five witnesses were examined, viz., Mrs. Julia M. Coffey and G. T. Knopf, the subscribing witnesses, John F. Lyons, the notary, Mary E. Madden, the contestant, and Henry A. Madden, her husband.

Julia M. Coffey testified that on the twenty-first day of January, 1892, the date of the instrument, she had a desk-room at No. 607 Montgomery street, in the city of San Francisco, within the railing which inclosed the office of Mr. Lyons, and about fifteen feet from the latter's desk, which occupied the front of the store; that she was sitting at her desk on that day when Mr. Lyons called her to his desk—called her "loud enough that she heard him from where she was sitting" (Transcript, p. 15); that there were two men, besides Mr.

Lyons, standing at Mr. Lyons' desk, and that they could hear him call her (Transcript, p. 15); that Mr. Lyons then and there requested her to sign her name as a witness to the instrument in question and told her it was a will (Transcript, p. 4); that she took the pen and, either standing or sitting at Mr. Lyons' desk, signed it, while Mr. Lyons and the two other men were standing by—"standing right near the desk somewhere" (p. 4)—"right beside her" (p. 13)—"right by the desk and around by the desk" (p. 16)—and therefore were able to, and probably did, see her sign it (p. 15); that after signing her name she went back to her desk (p. 72), and that she did not remember the appearance of the deceased (p. 8), nor whether he said anything (p. 22), nor other facts, testified to by Mr. Lyons (*infra*) as having occurred at the time (p. 72).

G. T. Knopf, the other subscribing witness, testified that he wrote out the will at the request of the deceased, using a printed blank for that purpose (p. 29); that he and the deceased went together to the office of the notary, Mr. Lyons, with the instrument, being then under the impression that the same, to be valid, must be acknowledged like a deed (p. 31); that Mr. Lyons, when they saw him, advised them as to how many witnesses would be necessary (p. 45), and that an acknowledgment "did not hold," but would not hurt (p. 46); that Mr. Lyons asked Mr. Williams if this was his last will, and Williams said "yes" and then signed it; that Julia M. Coffey, at the time he signed it, was sitting at her desk, about fifteen feet away (p. 23); that Williams requested him, Knopf, to sign as a witness (p. 33); that Williams and the witness signed before Mrs. Coffey did (pp. 33, 34); that the deceased, at the time the instrument was executed, declared it to be his will (p. 32); that Mr. Lyons called Mrs. Coffey over and introduced her to Mr. Williams (pp. 34, 35), and that Mr. Williams said to Mrs. Coffey that that was his last will (p. 42); that when Mr. Lyons asked Mrs. Coffey to be a witness, Mr. Williams could hear his request (p. 37); that the deceased signed in the presence of witness and of Mr. Lyons, on Mr. Lyons' desk (p. 49); that Mrs. Coffey, in the presence of both the deceased and the witness, signed the instrument about half a minute after they had signed it (pp. 28, 49);

and that he, the witness, did not remember all the many details of the transaction (p. 28).

John F. Lyons, on direct examination, testified as follows:

"Well, on this day [January 21, 1892], a Mr. Knopf, whom I was acquainted with for years, brought this gentleman Williams, whom I had never seen before, and presented this instrument, saying that this was the last will and testament of Mr. Williams, and that he wanted it acknowledged; I looked at it and asked him if he had any witnesses. He said he had Mr. Knopf, and he did not have any other. Well, Mr. Williams, I asked him to sign it at my desk and he sat down and wrote it; and then also Mr. Knopf signed it; and I called Mrs. Coffey up and introduced her to Mr. Williams; and I told Mrs. Coffey that this was Mr. Williams' last will and testament, and that was his signature, he had just signed it, and Mr. Williams wanted her to sign it as a witness to his last will and testament. And I said, 'Mrs. Coffey, this is his signature'; and I said to Mr. Williams also, 'Is that not your signature?' Says he: 'Yes. Do you want Mrs. Coffey to sign it?' He replied in the affirmative, or made an affirmative answer of some kind, and so she signed that." (Transcript, p. 58.)

On cross-examination, Mr. Lyons admitted having made statements to Mrs. Julia M. Coffey, to Mr. and Mrs. Madden and to the counsel for the contestant, substantially to the effect that he did not remember the circumstances of the transaction. The witness, in explanation, testified that since making the statements he had looked at his records, that "these things generally came back to him after a while when he got a chance to think of them" (p. 61); and that, by refreshing his memory, he might distinctly testify as to circumstances attending the execution of any will drawn or signed in his office more than two years ago (p. 64). Being further questioned on the subject by contestant's counsel, the witness swore that it was his invariable practice to refer to signatures where wills were signed in the absence of witnesses (p. 63), but that, independently of his practice, he distinctly remembered having called Mrs. Coffey's attention to the signature of the deceased and that Mr. Williams acknowledged the same

to her as his signature (pp. 64, 63). In answer to questions by the court, the witness testified as follows (pp. 66, 67, 68):

“Q. Mr. Williams’ signature was appended to that instrument when he came in with Mr. Knopf? A. No, sir, it was not; it was signed in my presence.

“Q. It was signed in your presence and at your desk? A. Yes, sir.

“Q. Then Mr. Knopf signed it? A. Yes, sir.

“Q. That was before you called Mrs. Coffey, was it? A. Yes, sir.

“Q. Then you called her up? A. Yes, sir.

“Q. What occurred, if anything, between her and Charles Williams? A. I don’t recollect.

“Q. You are sure she did not see him sign Charles Williams, his name? A. She came.

“Q. She did not see him sign? A. No, sir, I don’t think she did.

“Q. Nor did she see Mr. Knopf sign? A. No, sir, I don’t think so.

“Q. When she came, you called her up about fifteen feet away? A. Yes, sir, about that, I think.

“Q. Give me the tone of voice, the very expression you used when you called her. A. Says I: ‘Mrs. Coffey, will you step this way and act as a witness?’

“Q. You said it in just that way? A. Something similar.

“Q. You called her up and asked her to acknowledge it, did you say? A. No, sir, as a witness. I did not tell her what it was until she came up to my desk.

“Q. She did come from her desk; her desk was on the inside? A. Yes, sir, the further end of my office.

“Q. And she came up, and then what occurred? A. I introduced her to Mr. Williams.

“Q. In what manner; what did you say? A. The usual introduction.

“Q. What was it? I don’t know what was the usual introduction in your office. A. ‘Mrs. Coffey, this is Mr. Williams, Charles Williams. This is his last will and testament, and he declared it in the presence of us.’

“Q. You said this all of your motion? A. I used the words of the attestation as near as I could.

"Q. You did? A. Without repeating it.

"Q. Say that again, without repeating them. Say now what you said at that time to Mrs. Coffey in the presence and hearing of Mr. Williams. A. 'Mr. Williams declares this to be his last will and testament and he wishes you to act as a witness to his signature for this instrument, which he has just signed'; something like that, not the words exactly.

"Q. That is just about what you said? A. Yes, sir.

"Q. Did Mr. Williams say anything then? A. I don't recollect. He affirmed what I said.

"Q. How did he affirm it? A. By acquiescing.

"Q. Did he say anything? A. Yes, sir, he nodded his head, or something of that kind. I don't recollect." (pp. 66, 68.)

Henry A. Madden, husband of the contestant, testified that about three days after Mr. Williams was buried he, the witness, with his wife, called on Mr. Lyons, presented to him a copy of the will and asked him if he knew anything about it, to which Mr. Lyons replied that it was "a thing foreign to him"; that Mr. Lyons subsequently pulled forth his ledger, looked over it, saw the name, and said that he remembered about it; that on a later occasion, when witness with his wife and Mrs. Coffey called on Mr. Lyons, the latter said that they had been "down and bothering" him about the matter and that he did not know "the first thing about it at all" (pp. 78, 79); that, on a still later occasion, the witness again went to see Mr. Lyons, alone this time, and Mr. Lyons said: "The will is all right. I know all about the will, and the will is all right." (p. 80.)

Mrs. Mary E. Madden, the contestant, in substance, confirmed the testimony of her husband touching the conversation had with Mr. Lyons upon the occasion of their joint visit to his office.

The answers of John F. Lyons to the questions addressed to him by the court probably state the actual facts as accurately as any witness could be expected to remember them after a lapse of more than three years. Mrs. Coffey knew neither Mr. Williams nor Mr. Knopf; she was busy at her desk when she was called; she came over, understood what was wanted, signed her name as a witness, and immediately returned to her own work. Mr. Knopf, when he came to the

notary's office, was under the impression that a will, to be valid, had to be acknowledged like a deed. As a layman he was unacquainted with the law referring to the execution of wills or with the importance of observing the formalities required by section 1276, Civil Code. The legal details of the transaction, including the particular form and succession of declarations, so noticeable to a legal mind, naturally failed to attract his special attention or to impress themselves strongly or clearly upon his memory. Hence, the indefiniteness of his testimony on some points, as, e. g., his failure to recollect whether the deceased declared the instrument his will before or after he signed it. "I don't think there is any difference, he meant to say that" (after he signed it—p. 28). John F. Lyons, however, who, in the course of his business, had learned how a will must be made under the law, and to whom the parties applied in his professional capacity for the very purpose of making a will according to law, would naturally pay attention to those important details, and they would impress themselves upon his mind, though he might forget the face of the principal party. They might lie dormant in his memory. Professional men frequently, and in some cases intentionally, allow legal matters to vanish from their ever-ready recollection, and then, while engaged in other matters, or having no particular interest in exerting themselves for the sake of recalling facts immaterial to them, find it troublesome to be interviewed in regard to such matters, particularly by strangers. What would be more available to a man thus annoyed, as a means of escape from such questions, than to answer that he does not know "the first thing" about the transaction? This was the case of Mr. Lyons precisely. When he was subpoenaed as a witness (by the proponent of the will) and knew that he would be compelled to testify upon oath, he refreshed his memory by making an effort to do so; and gradually, one after another, the facts reappeared in his mind. His testimony is positive and distinct on all points necessary to establish the validity of the will. He is not contradicted by the testimony of Mr. and Mrs. Madden referring to his statements made to them; for he had substantially admitted the statements before the others were called on the stand. The fact that Mrs. Julia M.

Coffey did not remember certain circumstances, if they occurred (p. 75), probably because she took no interest (p. 74, last line), does not contradict the affirmative answers of Mr. Lyons. The evidence, on the whole, shows no necessary or substantial conflict with Mr. Lyons' testimony; his reputation has not been attacked; and the court, therefore, is bound to accept his testimony as true.

Particular stress must be laid upon the fact that according to every witness present at the transaction, not excluding Mrs. Julia M. Coffey, whatever was done and said at the time occurred within the sight and hearing of the deceased. No question is raised as to his intention to make the instrument then and there executed by him his last will and testament. The fairness of its provisions, which (apart from the legacy of \$1,000), were evidently intended for the benefit of his daughter, the contestant, herself, is not disputed. Her opposition on the ground that the deceased was mentally unsound has been withdrawn (p. 70). The contest concerns only his compliance, in detail, with all the technicalities of the law.

It is a settled rule that the technicalities of the law relating to the making of wills are deemed to have been satisfied where the circumstances surrounding the transaction show a substantial compliance, and that that compliance need not consist of words or even gestures, but may find its legal expression in silence and acquiescence.

This is particularly true as regards the acknowledgment of the signature.

"The acknowledgment is not required to be made in any particular words or in any specified manner, but if, by sign, motion, *conduct or attending circumstances*, the attesting witness is given to understand that the testator had already subscribed the instrument, it is sufficient acknowledgment": *Luper v. Werts*, 19 Or. 122, 23 Pac. 850, 7 Am. Prob. Rep. 256.

"As to request to sign as witnesses—the request may be words or signs. It may be implied. For instance—if I am about making a will, it is a good request if I by words make the request; it is good, if the request is made for me by another, I understanding the matter and acting in accordance with the making of the request. No particular form of re-

quest is necessary. It may be implied from acts. Anything which conveys to the witnesses the idea that I desire them to be witnesses is a good request. Even a knowing acquiescence may be equivalent to an actual request in words": Estate of Howard Crittenden, Myr. Prob. Rep. 54, 55.

"The request need not be formally expressed in words; an act or sign will suffice, and it may be made either by the testator himself or by some one acting for him, in his presence and hearing": Beach on Law of Wills, sec. 46, and a large number of authorities cited in notes 2 and 3.

The case of the Will of Humphreys, Tuck. Sur. Rep. (N. Y.) 142, was in all its essential features almost identical with the case under consideration. It sustains, in felicitous language, the observations made above on the comparative powers of remembering legal details, possessed by professional and by laical minds. It holds that the evidence of a professional man in such case, swearing that all the formalities were observed, is more reliable than the evidence of two other witnesses, ladies, not remembering a portion of the proceeding. It attaches to the attestation clause, certifying the observance of the necessary formalities, the presumption "*omnia esse rite acta*"—a view which must have formed the basis of the ruling affirmed by the supreme court of this state in Estate of Gharky, 57 Cal. 280.

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## WHAT CONSTITUTES A TESTAMENTARY WRITING.

### General Requisites and Essentials.

**Definition of Will.**—"A will is commonly defined as an instrument by which one makes a disposition of his property to take effect after his death, or as a declaration of one's intention as to the manner in which he would have his property disposed of after his death. These definitions make the disposition of property an essential feature of a will, whereas an instrument merely appointing an executor, without making any bequest or devise of property, may, nevertheless, be a will. More accurately defined, a will is the legal declaration of the intention of a person, which he wills to be performed after his death, in respect to the distribution of his property, the administration of his estate, or the guardianship of his children. The generic term 'will' includes codicil": 1 Ross on Probate Law and Practice, 1.

Some authorities have thought that an instrument appointing a guardian for the children of the maker, without any disposition of

property, is not entitled to probate as a will: *Williams v. Noland*, 10 Tex. Civ. App. 629, 32 S. W. 328; *In the Goods of Morton*, 3 Swab. & T. 422. And it has been affirmed that an instrument excluding a son of the author from participation in his estate, yet making no disposition thereof, is not a will: *Coffman v. Coffman*, 85 Va. 459, 8 S. E. 672. Some courts have supposed that a man cannot dispose of his dead body by will, on the theory that there is no property in it: *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 63 Pac. 170; *Williams v. Williams*, L. R. 20 Ch. D. 659. Compare the note to *Keyes v. Konkel*, 75 Am. St. Rep. 425.

**Essential Characteristics.**—The essential characteristic of a will is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory and revocable. By its execution the author has parted with no rights nor divested himself of no interest in or control over his property, and no rights have accrued to, and no estate has vested in, any other person. The death of the maker for the first time establishes the character of the instrument. It then ceases to be ambulatory, acquires a fixed status, and operates as a transfer of title. An instrument which is to operate in the lifetime of the donor, and to pass an interest in his property before his death, even though its absolute enjoyment by the donee is postponed till the death of the donor, or even if it is contingent upon the survivorship of the donee, is a deed, contract, gift, or some instrument other than a will. It is essential to a will that it should be made to depend upon the death of the maker to consummate it, up to which time it is inoperative and revocable: *Gillham v. Mustin*, 42 Ala. 365; *Daniel v. Hill*, 52 Ala. 430; *Refeld v. Bellette*, 14 Ark. 148; *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089; *Kirkpatrick v. Kirkpatrick*, 6 Houst. (Del.) 569; *Jones v. Morgan*, 13 Ga. 515; *Pelley v. Earles* (Ky.), 55 S. W. 550; *Carey v. Dennis*, 13 Md. 1; *McDaniel v. Johns*, 45 Miss. 632; *O'Day v. Meadows*, 194 Mo. 588, 112 Am. St. Rep. 542, 92 S. W. 637; *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 188; *Matter of Diez*, 50 N. Y. 88; *Rochester Sav. Bank v. Bailey*, 34 Misc. Rep. 247, 69 N. Y. Supp. 163; *Egerton v. Carr*, 94 N. C. 648, 55 Am. Rep. 630; *Patterson v. English*, 71 Pa. 454; *Sunday's Estate*, 167 Pa. 30, 31 Atl. 353; *Kinard v. Kinard*, Spear Eq. 256; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *In the Goods of Robinson*, L. R. 1 Pro. & D. 386.

#### Rules of Construction.

**In General.**—The rule of construction in determining whether an instrument is a will or contract is, that if it passes a present interest, it is a deed or contract; but if it does not pass an interest or right until the death of the maker, it is a testamentary paper. And in ascertaining whether an instrument is a testament or a contract, courts do not allow the use of language peculiar to either class of instruments, nor even the belief of the maker as to the character of

the instrument to control inflexibly their construction of it; but giving due weight to these circumstances, courts look further, and weighing all the language as well as the facts and circumstances surrounding the parties and attending the execution of the instrument, give to it such a construction as will effectuate the manifest intention of the maker: *Clarke v. Ransom*, 50 Cal. 595; *Burlington University v. Barrett*, 22 Iowa, 60, 92 Am. Dec. 376.

**Intention of the Maker.**—It is the *animus testandi* that makes an instrument a will. When the *animus testandi* is established, the character of the instrument is fixed—it is a will. In the absence of a testamentary intent, there can be no will. A paper, to be a will, must be intended to take effect as a testamentary document: *Estate of Meade*, 118 Cal. 428, 62 Am. St. Rep. 244, 50 Pac. 544; *Estate of Scott*, 128 Cal. 57, 60 Pac. 527; *In re Estate of Longer*, 108 Iowa, 34, 75 Am. St. Rep. 206, 78 N. W. 834; *Lyles v. Lyles*, 2 Nott & McC. 531; *Ferguson-Davie v. Ferguson-Davie*, 15 Prob. Div. 109. It is the settled intention of a man to pass his property in a certain way after his death that constitutes an instrument a will: *Boling v. Boling*, 22 Ala. 826. The true test is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect after his death, and passing no present interest: *Kenney v. Parks* (Cal.), 54 Pac. 251. When an instrument on its face is imperfect and equivocal, the presumption is against its operating as testamentary, unless it is made clearly to appear that it was executed *animo testandi*, or being intended by the author to operate as a posthumous disposition of his estate. Nevertheless, courts have inclined to solve doubtful cases by giving such instruments a testamentary effect when necessary to prevent the defeat of their legal operation: *Rice v. Rice*, 68 Ala. 216. See, too, *Kelleher v. Kernan*, 60 Md. 440.

The intention of the maker, then, is the controlling consideration in construing an instrument of doubtful testamentary character. This intention usually is to be gathered from the terms of the entire instrument, construed together, and always so when its provisions are plain and clear, but extrinsic evidence may be received to enable the court to place itself in the position of the parties in order to interpret doubtful and ambiguous provisions. The intention may be ascertained, not only from the instrument itself, but from all the facts and circumstances surrounding the parties and attending the execution of the instrument: *Rice v. Rice*, 68 Ala. 216; *Tuttle v. Raish* (Iowa), 90 N. W. 66; *Beebe v. McKenzie*, 19 Or. 296, 24 Pac. 236; *Kisecker's Estate*, 190 Pa. 476, 42 Atl. 836; *Parker v. Stephens* (Tex. Civ. App.), 39 S. W. 164. Parol evidence may be received to aid in arriving at the intention of the maker and the character of the instrument, when such intention is not clearly and satisfactorily expressed in the writing itself: *Clarke v. Ransom*, 50 Cal. 595; *Kelleher v. Kernan*, 60 Md. 440; *Egerton v. Carr*, 94

N. C. 648, 55 Am. Rep. 630; Witherspoon v. Witherspoon, 2 McCord, 520. Such evidence is admissible to show that the maker did not, at the time of signing an instrument, understand it was a will or intend that it should operate as such: Barker v. Comins, 110 Mass. 477, 488. Testimony of his conversation at that time may be received to show his intention: Wareham v. Seller, 9 Gill & J. 98.

### Testamentary Writings in Various Forms.

**Materiality of Form in General.**—It is well understood that the formalities prescribed by statute in the execution of wills must be substantially observed in order to make them effective and valid testamentary instruments: In re Walker, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. 815; Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225; Peake v. Jenkins, 80 Va. 293; Roberts v. Coleman, 37 W. Va. 143, 16 S. E. 482. However, if the statutory requirements are complied with in the execution of an instrument, its form is of little consequence in determining whether or not it is testamentary: Lautenschlager v. Lautenschlager, 80 Mich. 285, 45 N. W. 147; Ferris v. Neville, 127 Mich. 444, 89 Am. St. Rep. 480, 86 N. W. 960. But while courts indulge in no inconsiderable liberality in construing and giving effect to the intent of testamentary papers without strict requirements of form and technicality, of course not every writing rises to the dignity of a testamentary instrument. If an instrument is neither testamentary in form nor substance, there is no intrinsic evidence that it was intended as a will; and if there is no other evidence to show that it was intended as a posthumous disposition of property, it cannot be a will: Lungren v. Swartzwelder, 44 Md. 482; Young v. Wark, 76 Miss. 829, 25 South. 660; Patterson v. English, 71 Pa. 454; Jacoby's Estate, 190 Pa. 382, 42 Atl. 1026; Johnson v. Johnson, 103 Tenn. 32, 52 S. W. 814.

It is not requisite to the validity of a will that it should assume any particular form, or that it should be framed in language technically appropriate to its testamentary character. However irregular in form or inartificial in expression it may be, if it discloses the intention that the destination of the property on which it operates is posthumous only, it is testamentary. Neither is it material by what name or title it is designated. Instruments in form and denominated deeds, contracts, letters, and other instruments, have often been considered testamentary, to whose validity the statutory formalities of execution are requisite, and to whose operation probate is necessary: Kinnebrew v. Kinnebrew, 35 Ala. 628; Daniel v. Hill, 52 Ala. 430; Hester v. Young, 2 Ga. 31; In re Estate of Longer, 108 Iowa, 34, 75 Am. St. Rep. 206, 78 N. W. 834; In re Stumpfenhauser's Estate, 108 Iowa, 555, 79 N. W. 376; Kelleher v. Kernau, 60 Md. 440; High, Appellant, 2 Doug. (Mich.) 515, 521; Conrad v. Douglas, 59 Minn. 498, 61 N. W. 673; Miller v. Holt, 68 Mo. 584; Matter of Belcher, 66 N. C. 51; Tozer v.

Jackson, 164 Pa. 373, 30 Atl. 400; Gaston's Estate, 188 Pa. 374, 68 Am. St. Rep. 874, 41 Atl. 529; Kinard v. Kinard, Spear Eq. 256; McBride v. McBride, 26 Gratt. 476; Roberts v. Coleman, 37 W. Va. 143, 16 S. E. 482.

An instrument in form "I agree to will," but intended by the maker as a will, and executed as provided for in the case of wills, is a will: *In re Estate of Longer*, 108 Iowa, 34, 75 Am. St. Rep. 206, 78 N. W. 834.

"The form of an instrument is of little importance in determining whether or not it is testamentary. It is not essential to the creation of a will that it should assume any particular form, or that it should be couched in language technically appropriate to its testamentary character; instruments in the form of deed, contracts, letters, transfers of bank deposits, and other writings, have often been considered testamentary, which must, to operate as transfers of property, be executed in the manner prescribed by the statute of wills. And however informal a writing may be, or however crude and inartificial its expression, still, if it discloses a testamentary intention, it will be given effect as a will, provided the statutory requirements of execution have been substantially complied with.

"The intention of the maker, rather than the form of the instrument, is the controlling consideration and the ultimate object of inquiry in the interpretation of writings of doubtful testamentary character. Did he intend the instrument to be ambulatory, revocable, and dependent upon his death for consummation, or did he intend to create irrevocable rights and interests, though perhaps with their enjoyment postponed? If the former, the instrument is testamentary; if the latter, it is not. Primarily, the intention of the maker is to be gathered from the language of the entire instrument, construing all the different parts together. But if his intention is not clearly and satisfactorily expressed in the writing itself, then a recourse to extrinsic evidence and a consideration of the facts and circumstances attending the execution of the instrument and surrounding the parties is proper": 1 Ross on Probate Law and Practice, 2-4.

**Illustrations of Informal Wills.**—Instruments in the following forms have been held testamentary in character, and valid or not according as they were executed as required by the statute of wills: "I wish \$5,000 to go to John C. Cole in the event of my dying intestate, and the balance of my property to go to Robert Beatie, to be disposed of by him as his judgment may dictate": *Matter of Estate of Wood*, 36 Cal. 75; "Dear old Nancee: I wish to give you my watch, two shawls, and also \$5,000. Your old friend, E. A. Gordon": *Clarke v. Ransom*, 50 Cal. 595; "This is to serifey that ie levet to mey wife Real and personal and she to dispose for them as she wis" (olographic will): *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614; "After my mother's death, my cousin, S., is my heir. This writing is instead of a formal will which I intend to

make. M. B., executrix": *Matter of Beebe*, 6 Dem. (N. Y.) 43; "Know all men by these presents, that I, J. M., . . . do order and direct my administrators or executors, in case of my death, to pay R. C. the sum of \$75,000, as a token of my regard for him and to commemorate the long friendship existing between us": *Frew v. Clarke*, 80 Pa. 170; "I, C. S., husband of M. S., have insured my life with the Knickerbocker Co., in New York, for four thousand dollars (\$4,000). I, C. S., assign the whole amount, four thousand dollars, to my wife M. S. after my death, when she can do with it according to her best will without partiality toward her children. This I have written with good sound mind, and set my name to it": *Shad's Appeal*, 88 Pa. 111; "This article is to certify that if E. S. survive me, I bequeath him one thousand dollars of my property—free from any lien or encumbrance. To the above bequest I herewith set my hand and seal this first day of June, 1888": *Swann v. Housman*, 90 Va. 816, 20 S. E. 830; a letter of attorney, authorizing persons therein named to administer upon the party's estate after his death: *Rose v. Quick*, 30 Pa. 225; an assignment, in consideration of one dollar and love and affection, to a daughter of all one's property to take effect at death: *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; an indorsement by the holder of certificates in a beneficial order, giving her children all her interest therein at her death, and appointing an executrix to receive payment thereof: *Grand Fountain etc. v. Wilson*, 96 Va. 594, 32 S. E. 48; and a writing in form, substantially, "I, A, out of my love for my sister B, do agree to make her my heir if she outlives me; and I, B, out of love for my sister A, do agree to make her my heir if she outlives me": *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751.

**Wills in the Form of Transfers of Bank Deposits.**—The question sometimes arises as to whether a transfer of a bank deposit is a gift or a testamentary disposition of the fund. If the donor does not mean to relinquish his right to use the money on deposit during his lifetime but to keep control of it, and on his death the funds or what remain of them to go to the donee, then there is an attempted testamentary disposition of the money which will be ineffectual unless the statute of wills is complied with: *Main's Appeal*, 73 Conn. 638, 48 Atl. 965; *Dougherty v. Moore*, 71 Md. 248, 17 Am. St. Rep. 524, 18 Atl. 35. See, also, *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Martini v. Allegreti*, 146 Cal. 214, 79 Pac. 871; *McCloskey v. Tierney*, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699. The changing of an account in a bank from the name of a husband to that of a husband and wife, and the writing of an agreement at the head of the pass-book, to which the husband and the bank assent, that the moneys are to be subject to the order of either him or her, the balance at the death of either to belong to the survivor, do not constitute a will: *Metropolitan Sav. Bank v. Murphy*, 82 Md. 314, 51 Am. St. Rep. 473, 33 Atl. 640. But an agreement between two savings bank de-

positors that the survivor shall have the other's deposit on his death, each retaining absolute control over his own deposit during life, is a testamentary disposition of the balance remaining at the decease, and if not properly executed as such cannot be given effect: *Towle v. Wood*, 60 N. H. 434, 49 Am. Rep. 326.

Where a railway employee becomes a depositor in the company's saving fund under an agreement which preserves to him the right to deal with the deposits for his own benefit, but which provides that upon his death any balance standing to his credit shall be paid to his wife, the gift is testamentary and invalid if not made in the manner prescribed by the statute of wills: *Stevenson v. Earl*, 65 N. J. Eq. 721, 103 Am. St. Rep. 790, 55 Atl. 1091.

**In the Form of Letters.**—A testamentary writing may be in the form of a letter: *Crowley v. Knapp*, 42 N. J. L. 297; *Morrell v. Dickey*, 1 Johns. Ch. 153. But if not executed according to the requirements of the statute of wills, it will be ineffectual: *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 48 N. E. 277, 44 N. E. 17; *Gibson v. Van Syckle*, 47 Mich. 439, 11 N. W. 261. A writing in the form of a letter from a person in his last illness to his attorney, requesting the latter to draw a will in accordance with instructions therein set forth, and containing all the requisites of a will as to the disposition of property, may be established as a will by proof of its due execution and publication by the testator as such: *Scott's Estate*, 147 Pa. 89, 30 Am. St. Rep. 713, 23 Atl. 212. And a letter by a testator to his attorney, saying: "What I want is for you to change my will so that she may be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I do not know what ought to be done, but you do," should be admitted to probate with the instrument to which it refers: *Barney v. Hayes*, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282. A person wrote and signed on the back of a business letter addressed to a man and his wife the following, addressed to her: "After my death you are to have \$40,000; this you are to have, will or no will; take care of this until my death." This was held to be a testamentary gift of personalty: *Byers v. Hoppe*, 61 Md. 207, 48 Am. Rep. 89.

On the other hand, a letter directed to an undertaker, asking him, in the event of the writer's death, to cremate her body and to apprise her brother of such death, adding that her brother would take charge of her estate and be sole administrator without bonds, to trade, sell, or occupy, as may seem fit to him, is not testamentary in character, and neither gives him her estate nor appoints him administrator thereof: *Estate of Meade*, 118 Cal. 428, 62 Am. St. Rep. 244, 50 Pac. 541. And a letter from a brother to his sister expressing a desire for information about her children and mother, and stating that he is pecuniarily independent; that probably his health is ruined; that he wants to anticipate possibilities, and that "you and your children

get everything; your boy I want given the best education," is not testamentary: *Estate of Richardson*, 94 Cal. 63, 29 Pac. 484.

**Of Obligations and Acknowledgments of Indebtedness.**—The fact that an obligation is made payable after the death of the obligor does not of itself make it testamentary: *Fitzgerald v. English*, 73 Minn. 266, 76 N. W. 27. But if the relation of debtor and creditor is to exist it would seem that it must be created and subsist in the lifetime of the parties, though payment may be deferred until the death of one. A writing which reads, "At my death, my estate or my executor pay to July Ann Cover the sum of \$3,000," is testamentary and not an obligation for the payment of money, though delivered to the obligee: *Cover v. Stem*, 67 Md. 49, 1 Am. St. Rep. 406, 10 Atl. 231. See, in this connection, *Ferris v. Neville*, 127 Mich. 444, 89 Am. St. Rep. 480, 86 N. W. 960. But an instrument in the following form: "Due F. the sum of two hundred and four dollars and sixty-eight cents with interest, and said sum of money and interest is not to be paid during my lifetime, but to be paid by my executor out of my estate within a year after my death; and said sum is due and owing by my son E. to the said F. I bind my executor to pay the same out of my estate, and then to be deducted from the distributive share coming to my said son E. out of my estate," is an acknowledgment of indebtedness binding on the executor: *Feeser v. Feeser*, 93 Md. 716, 50 Atl. 406. So an instrument executed by A, declaring that, in consideration of the care and attention shown him by B during his illness, he was justly indebted to her, and declaring that his executor or administrator should pay her \$1,000 in one year after his decease, which was delivered to B, is an obligation and not a testamentary disposition: *Shields v. Irwin*, 3 Yeates, 389.

**In the Form of Contracts.**—A will may be in form and in some substantial respects a contract if the intention of the author to make it a testamentary disposition of his property is nevertheless clearly apparent: *Castor v. Jones*, 86 Ind. 289; *Heaston v. Krieg*, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805; *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 188. A contract whereby A agrees with B that if the latter will maintain the former during life, "all the personal property of A shall, at his death, become the property of B," is testamentary, and will not be given effect if the attestation is insufficient: *McCarty v. Waterman*, 84 Ind. 550. The reasons, as given by the court for this conclusion, were that the consideration for the agreement was executory, no present interest was passed, and A might, in accord with the terms of the agreement, have deprived B of a right to any specific property by divesting himself of all his personality so that none should "belong to him." In *Emery v. Darling*, 50 Ohio St. 160, 33 N. E. 715, a writing by one sister covenanting with another that if the latter will reside with her as long as she desires she will "give and bequeath" to her all the property of which she dies seised, is held enforceable as a con-

tract, and not void for want of conformity with the statute of wills. "It is the essence of a will," says the court, "that its dispositions should be in the nature of gifts."

Clearly, a contract does not take on a testamentary character merely because its performance is postponed until after the death of the maker and devolves upon his representative. The instrument must, of course, possess the essential characteristics of a testamentary writing: *Huguley v. Lanier*, 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. 922. Where an uncle and nephew enter into articles of partnership for the practice of medicine, whereby it is agreed to that, "in the event of the death of the senior member of the firm, all his property, personal and otherwise, which he held in partnership at the time of his death, should go to the junior partner," this is not a testamentary disposition of the property: *McKinnon v. McKinnon*, 56 Fed. 409, reversing 46 Fed. 713.

**Of Promissory Notes.**—A promissory note may be made payable after death. The mere fact that it is made payable at or a certain time after the death of the maker does not make it a testamentary paper which must be executed in accordance with the statute of wills: *Bristol v. Warner*, 19 Conn. 7; *Beatty v. Western College*, 177 Ill. 280, 69 Am. St. Rep. 242, 52 N. E. 432; *Price v. Jones*, 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683; *Wolfe v. Wilsey*, 2 Ind. App. 549, 28 N. E. 1004; *Martin v. Stone*, 67 N. H. 367, 29 Atl. 845; *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487; *Crider v. Shelby*, 95 Fed. 212; *Roffey v. Greenwood*, 10 Ad. & E. 222. A note payable on or before a certain date, providing that in the event of the death of the maker before maturity it shall then become due, is not testamentary: *Miller v. Western College*, 71 Ill. App. 587. And a note, founded on a consideration, which remains in the hands of the payee until the death of the maker, although received by him and held during the life of the maker subject to the condition that it should be returned to the maker whenever he might wish it, is valid: *Worth v. Case*, 42 N. Y. 362.

Where the payee of a note wrote upon its back: "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," and having signed it, died before the note was paid, it was held that the indorsement was testamentary and entitled to probate as a will: *Hunt v. Hunt*, 4 N. H. 434, 17 Am. Dec. 438. It is well to remember that the statute of wills cannot, of course, be evaded by making a promissory note intended as a testamentary bequest merely: *Graves v. Safford*, 41 Ill. App. 639.

**In the Form of Leases.**—A provision in a lease that, in the event of the death of the lessor before the expiration of the lease, the rent for the unexpired term shall be paid to his wife, she not being a party to the lease or apparently giving any consideration for the promise, is in the nature of a will and inoperative if not properly executed: *Priester v. Hohloch*, 70 App. Div. 256, 75 N. Y. Supp. 405.

But in the case of *In the Goods of Robinson*, L. R. 1 Pro. & D. 384, a provision in a lease as to the application of the rent in case of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application, was held not testamentary, since no part of the agreement was revocable and it came into operation immediately upon its execution.

### Wills in the Form of Deeds and Conveyances.

**Distinction Between Wills and Deeds.**—Instruments of doubtful testamentary character are found most frequently in the form of deeds. The fact that a writing is in the form of a deed is persuasive, but not conclusive, that it was not intended as a will. If it passes no present interest or right, is dependent on the death of the maker to consummate it, and is under his control and recoverable during his lifetime, it is a will, notwithstanding it is denominated a deed, and is a deed in form, and in some essential characteristics. The validity of such an instrument, then, will depend upon whether it is executed in the manner prescribed by the statute of wills: *Dunn v. Bank of Mobile*, 2 Ala. 152; *Shepherd v. Nabors*, 6 Ala. 631; *Moser v. Moser*, 32 Ala. 551, 556; *Gillham v. Mustin*, 42 Ala. 365; *Gomez v. Higgins* (Ala.), 30 South. 417; *Griswold v. Griswold*, 148 Ala. 239, 121 Am. St. Rep. 64, 42 South. 554; *Estate of Skerrett*, 67 Cal. 585, 8 Pac. 181; *Bright v. Adams*, 51 Ga. 239; *Dye v. Dye*, 108 Ga. 741, 33 S. E. 848; *Jones v. Loveless*, 99 Ind. 317; *Tuttle v. Raish* (Iowa), 90 N. W. 66; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Poore v. Poore*, 55 Kan. 687, 41 Pac. 973; *Rawlings v. McRoberts*, 95 Ky. 346, 25 S. W. 601; *In re Lautenschlager's Estate*, 80 Mich. 285, 45 N. W. 147; *Sartor v. Sartor*, 39 Miss. 760; *Murphy v. Gabbert*, 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731; *Babb v. Harrison*, 9 Rich. Eq. 111, 70 Am. Dec. 203; *Jaggers v. Estes*, 2 Strob. Eq. 343, 49 Am. Dec. 674; *Armstrong v. Armstrong*, 4 Baxt. 357; *Millican v. Millican*, 24 Tex. 426; *De Baglithy v. Johnson*, 23 Tex. Civ. 272, 56 S. W. 95.

If, on the other hand, the instrument conveys a present vested interest or right, it is a deed, although it may contain provisions and terms ordinarily found in wills. An instrument having otherwise the general formalities of a deed will be construed as a deed, whenever it appears that the maker intended to convey any estate or interest whatever, to vest upon the execution of the paper, though the absolute enjoyment of the estate passed is postponed until the death of the grantor: *Adams v. Broughton*, 13 Ala. 731; *Thompson v. Johnson*, 19 Ala. 59; *Stewart v. Sherman*, 5 Conn. 317; *Cumming v. Cumming*, 3 Ga. 460; *Guthrie v. Guthrie*, 105 Ga. 86, 31 S. E. 40; *Bowler v. Bowler*, 176 Ill. 541, 52 N. E. 437; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726; *Kelley v. Shimer*, 152 Ind. 290, 53 N. E.

238; *Hinson v. Bailey*, 73 Iowa, 544, 5 Am. St. Rep. 700, 35 N. W. 626; *Ward v. Ward*, 104 Ky. 857, 48 S. W. 411; *Pennington v. Lawson*, 23 Ky. Law Rep. 1340, 65 S. W. 120; *Exum v. Cauty*, 34 Miss. 533, 569; *Hileman v. Bonslaugh*, 13 Pa. 344, 53 Am. Dec. 474.

**Effect of Reservation of Life Estate.**—The fact that the grantor reserves the possession, use, enjoyment, or profits during his life does not make the instrument a will: *Hall v. Burkham*, 59 Ala. 349; *Abney v. Moore*, 106 Ala. 131, 18 South. 60; *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563; *Graves v. Atwood*, 52 Conn. 512; *Jackson v. Culpepper*, 3 Ga. 569; *Robinson v. Schly*, 6 Ga. 515; *Moye v. Kittrell*, 29 Ga. 677; *Bass v. Bass*, 52 Ga. 531; *Youngblood v. Youngblood*, 74 Ga. 614; *Seals v. Pierce*, 83 Ga. 787, 20 Am. St. Rep. 344, 10 S. E. 589; *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395; *Cates v. Cates*, 135 Ind. 272, 34 N. E. 957; *Saunders v. Saunders* (Iowa), 88 N. W. 329; *Love v. Blauw*, 61 Kan. 496, 78 Am. St. Rep. 334, 59 Pac. 1059; *Beebe v. McKenzie*, 19 Or. 296, 24 Pac. 236; *Dawson v. Dawson*, Rice Eq. 243; *Swails v. Bushart*, 2 Head, 561; *Hart v. Rust*, 46 Tex. 556; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40, 26 S. W. 759; *Martin v. Faries*, 22 Tex. Civ. App. 539, 55 S. W. 601. On the contrary, a reservation of a life estate, and that only, indicates an intention on the part of the grantor to pass the remainder interest immediately. *Worley v. Daniel*, 90 Ga. 650, 16 S. E. 938. "It is true that a will is a disposition of property to take effect after death, but that definition of a will does not exclude the conclusion that a deed may be the same in that particular. The former is necessarily so, but not the latter": *Horn v. Broyles* (Tenn.), 62 S. W. 297, 304.

"The original tendency," observes Mr. Justice Lumpkin, in *West v. Wright* (Ga.), 41 S. E. 602, "was toward holding that papers indicating an intention to postpone enjoyment by the persons claiming to be grantees till after the death of the persons executing the papers should be classed as wills. This tendency in time yielded to another, namely, that it was the sounder policy in case of doubt to declare that the instrument was a deed, and thus make it effectual, when holding it to be testamentary would, for want of the requisite number of witnesses, render it nugatory. The true test, of course, is the intention of the maker."

**Importance of Maker's Intention.**—When an unskillfully drawn instrument employs apt words of conveyance and of devise or bequest, and mingles provisions peculiar to deeds with provisions peculiar to wills, and besides postpones enjoyment or possession until after the death of the maker, it becomes a matter of no inconsiderable difficulty to ascertain whether it is a will or a deed. Necessarily, only general rules can be formulated for the determination of the question, since in practically every case the language of the paper is different, and the circumstances under which it is executed are widely varying. The true inquiry is as to the effect and operation the party making it intended it to have. His intention is the controlling ques-

tion and the ultimate object of inquiry. Did he intend it to be ambulatory, revocable, and dependent upon his death for its consummation, or did he intend to create irrevocable rights and interests, though perhaps with their enjoyment postponed? If the instrument cannot be revoked, defeated, or impaired by the act of the maker, it is a deed; but if the estate, title, or interest does not pass except in the event of his death and is subject to revocation during his lifetime, it is a will. The form of the writing or the designation given it is of little consequence. If it passes a present interest, it is a deed; if its operation is posthumous only, it is a will: *Walker v. Jones*, 23 Ala. 448; *Jordan v. Jordan*, 65 Ala. 301; *Tradwick v. Davis*, 85 Ala. 342, 5 South. 83; *Crocker v. Smith*, 94 Ala. 295, 10 South. 258; *Moore v. Campbell*, 102 Ala. 445, 452, 14 South. 780; *Kenney v. Parks* (Cal.), 54 Pac. 251; *Hester v. Young*, 2 Ga. 31; *Dudley v. Mallery*, 4 Ga. 52; *Symmes v. Arnold*, 10 Ga. 506; *Hall v. Bragg*, 28 Ga. 330; *Williams v. Tolbert*, 66 Ga. 127; *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Barnes v. Stephens*, 107 Ga. 436, 33 S. E. 399; *West v. Wright* (Ga.), 41 S. E. 602; *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864; *Saunders v. Saunders* (Iowa), 88 N. W. 329; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Allison v. Allison*, 4 Hawks (N. C.), 141; *President etc. of Bowdoin College v. Merritt*, 75 Fed. 480. In determining whether an instrument is a testament or a deed, courts "will not consider what the maker believes it to be, but what, in point of law, it is": *Brewer v. Baxter*, 41 Ga. 212, 5 Am. Rep. 530.

**How the Intention is Ascertained.**—Primarily, the intention of the maker is to be gathered from the language of the instrument itself. In doubtful cases, however, this does not preclude a consideration of the facts and circumstances under which it was made and which existed up to the death of the author: *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 23, 5 South. 497; *Gage v. Gage*, 12 N. H. 371; *Robertson v. Dunn*, 2 Murph. (N. C.) 133, 5 Am. Dec. 525. Moreover, if the instrument recites a consideration, describes the land with particularity, contains covenants of title, is sealed, acknowledged, delivered, or recorded—these, or any one of them, is a circumstance tending to show that the maker intended the paper as a deed: *Whitten v. McFall*, 122 Ala. 619, 26 South. 131; *Worley v. Daniel*, 90 Ga. 650, 16 S. E. 938; *Owen v. Smith*, 91 Ga. 564, 18 S. E. 527; *Gay v. Gay*, 108 Ga. 739, 32 S. E. 846; *Cates v. Cates*, 135 Ind. 272, 34 N. E. 957; *Decker v. Decker*, 93 Iowa, 204, 61 N. W. 921; *Saunders v. Saunders* (Iowa), 88 N. W. 329; *Schmidt v. Reed*, 132 N. Y. 100, 30 N. E. 373; *Branch v. Byrd*, 15 S. C. 142; *Brown v. Moore*, 26 S. C. 160, 2 S. E. 9. So a reservation of a power of revocation is a circumstance tending to rebut the idea of a will: *Hall v. Burkham*, 59 Ala. 349. Nevertheless, instruments, acknowledged and recorded, have been pronounced testamentary: *Stevenson v. Huddlesen*, 13 B. Mon. (Ky.) 299; *Carlton v. Cameron*, 54 Tex. 72, 38 Am. Rep. 620; *Hannig v. Hannig* (Tex. Civ. App.), 24 S. W.

695; *Grigsby v. Willis* (Tex. Civ. App.), 59 S. W. 574. The non-delivery of a writing is a circumstance favoring it as a will: *Nichols v. Chandler*, 55 Ga. 369; *Ragsdale v. Booker*, 2 Strob. Eq. (S. C.) 348.

**Writings of Doubtful Import.**—If a writing cannot have operation as a will, but may as a deed, then, in doubtful cases, it will be made effective by construing it to be a deed: *Dismukes v. Parrott*, 56 Ga. 513; *West v. Wright* (Ga.), 41 S. E. 602; *Love v. Blauw*, 61 Kan. 496, 78 Am. St. Rep. 334, 59 Pac. 1059; *Jacoby v. Nichols*, 23 Ky. Law Rep. 205, 62 S. W. 734. Conversely, if a paper cannot operate as deed, it will be given effect as a will when this can fairly be done: *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 23, 5 South. 497; *Abney v. Moore*, 106 Ala. 131, 18 South. 60. But an instrument intended to operate as a deed is not entitled to probate as a will, if inoperative as a deed: *Edwards v. Smith*, 35 Miss. 197. However, it is well said by Mr. Justice Brannon, in *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986: "If it were an open question, I would say that the law ought to give a paper not so executed as to be good as a will effect as a deed if good as a deed, and a paper so executed so as not to be good as a deed effect as a will, if good as a will."

**Illustrations of Wills.**—The following instruments have been held testamentary in character: "Due at my death to J. the sum of \$2,500, from the general fund of my estate, as a gift. The condition of the above bond or obligation is such that whereas, for the fidelity and obedience, as well as the natural love and affection that I have for my daughter J., I donate, in the above manner, what I design for her at my death": *Johnson v. Yancey*, 20 Ga. 707, 65 Am. Dec. 646; a writing in form a deed conveying all the property of which the maker may die seised or possessed: *Brewer v. Baxter*, 41 Ga. 212, 5 Am. Rep. 530; *Ward v. Campbell*, 73 Ga. 97; or an undivided interest therein: *Watkins v. Dean*, 10 Yerg. (Tenn.) 320, 31 Am. Dec. 583. Compare *Robey v. Hannon*, 6 Gill (Md.), 463; an instrument executed by a husband, reciting a gift of land to his wife to take effect on his death, and reserving the right to sell or dispose of it during his life, in which case the paper to be void: *Ellis v. Pearson*, 104 Tenn. 591, 58 S. W. 318; a writing in form a deed and styled and acknowledged as such, but containing a provision "that this deed is not to take effect until after my death," coupled with a direction that the beneficiary should pay the maker's debts, and have only the remaining property: *Cunningham v. Davis*, 62 Miss. 366; a conveyance reserving a life estate in the grantor, with the power of management and disposition, and the proceeds of any sale to his own use, upon his death, if the land remained unsold, to go to his children: *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864; a conveyance, in the usual form, "to commence after the death of both of said grantors," and providing that "it is hereby understood and agreed between the grantors and the grantees that the grantee shall have no interest in the said premises as long as the grantors or either

of them shall live": *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. 522; and an instrument filled out on a printed warranty deed form, reciting a consideration of one dollar and natural love and affection, conveying, besides two tracts not here involved, "all our right, title, and interest in" our homestead, "should we not sell or dispose of the same before death," the grantors remaining in possession up to their death: *Wren v. Coffey* (Tex. Civ. App.), 26 S. W. 142.

**Illustrations of Deeds.**—The following writings have been held not testamentary in character, but deeds: An instrument in the form of a warranty deed except for these words: "Conditions of this deed is such as said party of the second part that this land shall not be encumbered in any way, or this deed shall be void. The party of the first part is to hold said property his lifetime": *Bevins v. Phillips*, 6 Kan. App. 324, 51 Pac. 59; or except for a clause, "To hold the above-described premises to the said B. P. W. of the second part, his heirs and assigns, to be his at my death and the death of my wife, E. W.": *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 378; an instrument in form and name a deed, acknowledged and delivered, whereby, for a consideration of five dollars and love and affection the grantors "do grant with general warranty," a tract of land, closing with this clause, "but it is hereby distinctly understood and stipulated that this deed shall take effect and be in full force and effect immediately after the said L. shall depart his life, and not sooner": *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; a deed "not to take effect during my lifetime, and to take effect and be in force from and after my death": *Wyman v. Brown*, 50 Me. 139; a deed "not to take effect and operate as a conveyance till my decease": *Abbott v. Holway*, 72 Me. 298; a conveyance delivered but not to take effect or be recorded until the death of the grantor, without the creation of an intermediate estate to support it: *Shackleton v. Sebree*, 86 Ill. 616; *Harshbarger v. Carroll*, 163 Ill. 636, 45 N. E. 565; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; a writing by which the maker deeds land to his wife for life, remainder to his grandson, which provides that "this deed shall not take effect" until the grantor's death, he "to have and keep full possession of said farm during his life": *Phillips v. Thomas Lumber Co.*, 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652; deeds executed by a husband and wife, conveying each to the other his or her separate property, and delivered to a third person, with instructions to record that of the one dying first: *Kenney v. Parks* (Cal.), 54 Pac. 251; an instrument conveying property "to take effect, as far as regards handing over of property, at my death," and reserving the right to revoke the instrument during life, and providing that "placing the same among my papers is intended by me as a delivery of said property at my death": *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; a conveyance subject to a life estate in the grantor, the payment of his debts, the expenses of his last sickness, and certain bequests: *Powers v. Scharling* (Kan.),

67 Pac. 820. See, also, *Bromley v. Mitchell*, 155 Mass. 509, 30 N. E. 83; a paper in form a will, the disposition of property therein made taking effect at once, the consideration being the care and support of the maker for life: *Goad v. Lawrence* (Ky.), 68 S. W. 411; *Dreisbach v. Serfass*, 126 Pa. 32, 17 Atl. 513; and a deed executed in expectation of approaching death, delivered and intended to take effect immediately and unconditionally: *Brown v. Atwater*, 25 Minn. 520; *Diefendorf v. Diefendorf*, 8 N. Y. Supp. 617, 29 N. Y. St. Rep. 122; *Billings v. Warren*, 21 Tex. Civ. App. 77, 50 S. W. 625.

A conveyance executed by a married woman, intended to be operative after her death and therefore testamentary in character, and never delivered, cannot be admitted to probate as a will, though her husband joined in the execution of the conveyance, and there was attached thereto the certificate of a notary by him signed, certifying to its acknowledgment. The signatures so placed on the deed cannot be considered as the signatures of subscribing witnesses: *Gump v. Gowans*, 226 Ill. 635, 117 Am. St. Rep. 275, 80 N. E. 1086.

**Writings in the Form of Trust Deeds.**—Many instruments settling property contain provisions that become operative only after the death of the settler. Notwithstanding this, however, if they are executed and delivered to take immediate effect, passing a present interest to the trustee, they are deeds of trust and not testamentary dispositions: *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *Smith v. Baxter* (N. J. Eq.), 49 Atl. 1130; *Lines v. Lines*, 142 Pa. 149, 24 Am. St. Rep. 487, 21 Atl. 809; *Lightfoot v. Colgin*, 5 Munf. (Va.) 42; *President etc. of Bowdoin College v. Merritt*, 75 Fed. 480. If there is no restriction in a trust deed as to when it shall go into effect, presumptively it takes effect at once, and hence is not testamentary: *Brace v. Van Eps*, 12 S. D. 191, 80 N. W. 197.

An instrument executed by a father, under seal and recorded, conveying property to two of his sons, to be managed by them, for the support of himself and wife during life, and at death to be divided among all the children, and also providing for the support of an imbecile child and the education of another, is not a will but a deed of trust: *Robinson v. Ingram*, 126 N. C. 327, 35 S. E. 612. So a trust deed purporting to convey property to trustees at the time of its execution is not rendered testamentary because of reservations, trusts, and conditions concerning the use of the property during the lifetime of the grantor: *Kelly v. Parker*, 181 Ill. 49, 54 N. E. 615. But an instrument purporting to convey to a trustee the undivided half of all property which the maker might leave at his death, after the payment of his debts, to be held for the heirs of his wife, reserving the control and disposal of the property during life, and providing it should be void if he survived his wife, is testamentary in character: *Roth v. Michalis*, 125 Ill. 325, 17 N. E. 809.

**Instruments Partly Testamentary.**—An instrument may be in part a contract or deed and in part a will. The fact that some of its provisions may have the force of a contract and may become operative during the maker's life does not necessarily deprive the remainder from being testamentary and admissible to probate: *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Burlington University v. Barrett*, 22 Iowa, 60, 92 Am. Dec. 376; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177. And a conveyance need not be homogeneous. It may be a deed in part and a will in part. There is nothing to prevent one in the same instrument from selling or giving certain property to another and willing other property to the same individual: *Robinson v. Schly*, 6 Ga. 515, 523; *Powers v. Scharling* (Kan.), 67 Pac. 820.

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#### IN THE MATTER OF THE ESTATE OF LUIGI DAMA, DECEASED.

[No. 6972; decided January 30, 1892.]

**Will—When Both Olographic and Attested.**—A testamentary document in the handwriting of the testator and having subscribing witnesses may be proved either as an olographic or as an attested will.

**Expert in Handwriting—Who Qualified as.**—One who has made a specialty in penmanship at college, who has taught it for many years and to thousands of pupils, and who gives evidence of his proficiency in the presence of the court, may be regarded as an expert in the simulation and imitation of handwriting.

**Expert Witnesses—Weight of Evidence.**—Numbers do not necessarily count in the case of expert witnesses, any more than in other cases. It is quality, rather than quantity, which the law regards, so that the mere fact that numerically the force of sheer experts is stronger on one side than on the other is not a matter of moment in itself.

**Expert in Handwriting—Counsel as.**—If the attorneys in a case involving the alleged forgery of a will show themselves possessed of science and skill in handwriting, their argument may be regarded as expert testimony, relieved of the constraint of cross-examination and free from the burden of an oath.

**Expert Testimony—Credibility—Character of the Witness.**—Where an expert on handwriting gives an opinion contrary to what he expressed before the trial, the court said: "The validity of scientific deduction is not to be tested by the tergiversation of scientist in his moral conduct outside the record; his individual deceit and duplicity in dealing with clients may be established or admitted,

but the scientific value of his evidence is dependent upon the logical connection between premises and conclusion."

**Handwriting—Evidence of Genuineness.**—The strongest evidence of the genuineness of handwriting is the testimony of the alleged writer, and next to this is the testimony of a witness who saw the instrument executed and is able to identify it. There are, however, other and different modes of proof.

**Handwriting—Evidence of Genuineness.**—In determining the question of authorship of a writing, the resemblance of characters is not the only test. The use of capitals, abbreviations, punctuation, paragraphing, erasures, interlineations, idiomatic expressions, orthography, underseoring, composition and the like, are all elements upon which to form the judgment.

**Handwriting — Genuineness—Evidence of Dissimilitude.**—Conclusions drawn from dissimilitude between disputed writings and authentic specimens are not always entitled to much consideration; such evidence is weak and deceptive, and of little weight when opposed by evidence of similitude.

**Expert in Handwriting—Value of Testimony.**—Evidence of the genuineness of an instrument, based upon a comparison of handwritings and the opinion of an expert, is of low order and of an unsatisfactory character.

**Expert Witnesses—Bias—Manner of Retaining.**—The present system of retaining expert witnesses is discussed and criticised as not tending to unbiased testimony.

**Expert Witnesses—How Should be Regarded.**—Under the present system of retaining expert witnesses, the true position for them to take is that of persons to whom a question has been presented, and who, having given a certain opinion, are retained by the parties in whose favor they have given it, to carefully prepare the opinion, with the reasons therefor, and state it before the tribunal before which the case is tried. Experts should be considered and treated as advocates, rather than as witnesses.

**Physician as Witness in Will Contest.**—It seems that in a will contest a physician who attended the testator in his last illness may testify that the testator stated that he executed the will in question.

**Letters of Administration—Proceedings to Obtain.**—The proceedings in an application for letters of special administration, which under the general practice are somewhat informal, have been modified by the court by requiring the application to be made in open court and upon notice.

**Will—Conflicting Testimony of Witnesses.**—Where there are three witnesses to a will, its probate will not be denied or revoked because one of them, against the positive testimony of the others, fails or refuses to authenticate his signature or the execution of the instrument.

**Will—Conclusiveness of Witnesses' Testimony.**—On the contest of a will the testimony of a subscribing witness is not conclusive either way, nor does the law presume that he is either more or less truthful than others, though it does not presume that he had, when he signed, full knowledge of what he was doing.

**Will—Death of Subscribing Witness.**—In case of the death of a subscribing witness to a will, his attestation, when proved, is prima facie evidence that all was done as it should have been.

**Will—Credibility of Witnesses.**—When a will is contested, the case is open for general witnesses, and when the testimony is all in, each witness is credited according to the impression he leaves of candor and intelligence, and not according to his being, or not being, an attesting witness.

**Will—Falsehood or Forgetfulness of Witness.**—Neither the failure of memory nor the corrupt or false swearing of attesting witnesses will be allowed to defeat a will, if its due execution can be shown by other testimony.

**Will—Witness Who does not Subscribe.**—In case of a will contest a person who was present at the execution of the testament, but who is not a subscribing witness, may give evidence of a valuable character.

**Will—Proof of Forgery.**—Where a will is contested on the ground of forgery, the contestant is not called upon to indicate the forger, but he is compelled to establish by a preponderance of evidence the charge laid in his complaint, while it is not incumbent on the respondent to do more than hold the balance.

**Will—Probate Sustained Against Heirs.**—The probate of a will in this case is sustained as against contesting heirs with whom the testator was not on friendly terms, he being an eccentric old music master, and having given practically his entire estate to a married woman for the cultivation of her voice, who was not related to him, but who had been his pupil.

Application to revoke probate of will.

Joseph P. Kelly and H. I. Kowalsky, for the petitioners.

Russell J. Wilson, Henry C. Hyde, R. H. Lloyd and Frank J. French, for the respondents.

Timothy J. Lyons, for certain Italian legatees.

#### STATEMENT OF THE CASE.

COFFEY, J. On January 3, 1889, Sarah Randall, by her attorneys, Joseph P. Kelly, Esq., and H. I. Kowalsky, Esq.,

filed in this court a petition praying for the revocation of the probate of the Will of Luigi Dama, in which she set forth that Luigi Dama died intestate in San Francisco on the twentieth day of January, 1888, being at that time a resident of that city and county and leaving estate therein of real and personal property; that at the time of his death he was a widower, his wife, Wealthy B. J. Dama, having predeceased him on the sixth day of November, 1882, in the said city and county; that she left surviving her Luigi Dama, her husband, and Sarah Randall, her mother, the contestant; also brothers and sisters—Edward W. Randall, of Bath, Maine, aged fifty-eight years, Benjamin Randall, Boston, Massachusetts, aged forty-five years, Frank H. Randall, aged thirty-two years, and Jennie Forbes, Boston, Massachusetts, aged forty-six years; that at the time of the death of Luigi Dama he left property which was acquired by the joint labor of himself and his spouse, Wealthy, and that during his marriage he acquired all of the property of which he died seised; that he had no kin living at the time of his death, and that the only heir at law to his estate was the contestant, Sarah Randall; that his estate, situated in California and Massachusetts, was valued at about \$35,000; that on the thirtieth day of January, 1888, an instrument was filed in this court purporting to be the last Will and Testament of said Luigi Dama, accompanied by a petition by one Sara Barkér Smith, wherein it was alleged, among other things, that the said instrument was the last Will and Testament of said Luigi Dama, deceased, and praying that the same be admitted to probate as such and thereafter, on the twenty-ninth day of February, 1888, the said paper was admitted to probate; that said paper was not signed, written or executed by said Dama, nor was the same subscribed to by Jules Matthieu, No. 214 O'Farrell street, San Francisco, Henry Godard, No. 222 O'Farrell street, nor Antonio Bellini, No. 222 O'Farrell street, nor were the names that are now subscribed thereto, purporting to be the names of said witnesses, written or subscribed to by them, nor was the same signed by the said Luigi Dama, in the presence of said

witnesses, whose names are signed thereto, nor were the names of said witnesses subscribed thereto by them in the presence of said Dama or in the presence of each other; that the name "Luigi Dama" was not written by him nor subscribed thereto by some person in his presence or by his direction; that the names of the subscribing witnesses, Mathieu, Godard and Bellini, were not signed by them or subscribed thereto by some person in their presence or by their direction; that the said alleged Will was not written by the said Dama, nor at or by his direction, but that it is false, fraudulent and forged, and not his last Will and Testament; that according to said alleged Will one Sara Barker Smith, wife of Julius Smith, is named as the executrix without bonds, and also the principal devisee and legatee thereunder; and the contestant therefore prays for a revocation of the Will, because of the premises.

On January 22, 1889, a demurrer was interposed by two of the legatees in the Will, namely, the Reale Stabilimento dell' Annunziata di Napoli and Andrea Manzo, and at the same time an answer of general denial was filed on behalf of the same legatees; this demurrer was subsequently overruled; and on January 14, 1889, an answer was filed by the executrix of the Will, Sara Barker Smith, which was subsequently on the twenty-third of January, 1889, superseded by an amended answer traversing all the material allegations of the contest.

On December 17, 1890, while the trial was in progress, the death of the contestant was suggested and a continuance thereupon had until January 5, 1891, when a legal representative, James C. Pennie, administrator, was substituted and the trial resumed.

The trial began on the twentieth of November, 1890, and proceeded with many interruptions from various causes until June 23, 1891, when it was submitted for the decision of the court, a jury having been theretofore expressly waived in open court.

On September 24, 1891, the submission was by stipulation set aside and on September 25, 1891, the cause was resubmitted for judgment and decision.

(The trial occupied in all two hundred and sixty-four hours, and the argument in summing up by counsel, sixty-eight; in all, the time consumed was three hundred and thirty-two hours. The judge's notes of evidence and argument comprise two hundred and seventy-three pages of legal cap.)

On Friday, in the forenoon, January 20, 1888, Luigi Dama died at his residence, 317 Mason street, San Francisco, and on Saturday afternoon, January 21, 1888, one R. W. Burtis applied for and obtained letters of special administration upon the estate of said Dama, which estate, according to the petition filed by said Burtis, consisted of real and personal property, the value and particular character of which he was unable to state; the petition also recited that the papers and documents belonging to said deceased were supposed to be in his box in the Safe Deposit Company; and that it was necessary that some person should be immediately appointed to collect, preserve and take care of the same; that there would be considerable delay in procuring general letters of administration, and that the said estate required immediate care and attention in order to preserve the same from loss and injury; that said Dama was unmarried and left no heirs or relatives in California; that the petitioner had made due search and inquiry for the purpose of ascertaining if the deceased left a Will, and from the information received the petitioner believed a Will to be among the decedent's papers in the Safe Deposit Company. This petition was signed by R. W. Burtis, petitioner; and the name of Frank J. French, attorney for petitioner, appears subscribed to the same. On the same day an order was made, entered and filed, appointing said Burtis special administrator of the estate of Luigi Dama, deceased, and directing special letters upon his giving a bond in the sum of \$1,000, which bond, signed by Frank J. French and B. F. Jellison and

executed before George T. Knox, notary public, on the same day, was approved by the judge on that day; whereupon special letters of administration were issued to said R. W. Burtis and he entered upon that office.

On January 30, 1888, a petition was filed, signed by Sara Barker Smith and Frank J. French, her attorney, which set out that she was a resident of San Francisco, California, of lawful age; the petition recited the facts of the death and residence of Luigi Dama, and that the decedent left a Will dated at San Francisco, the eighth day of May, 1887; that said Will was left in the possession of the petitioner by the testator after its execution, and she believed and alleged it to be his last Will and Testament, and the same was filed simultaneously with the petition and presented for probate; that the Will was an olographic Will, it being entirely written, dated and signed by the hand of the testator himself; and it was also attested by three subscribing witnesses, whose names were signed at the end of the Will and under the signature of said testator; that the names and residences of said witnesses were as follows, namely: Jules Mathieu, No. 214 O'Farrell street, Henri Godard, No. 222 O'Farrell street, Bellini Antonio, No. 222 O'Farrell street; that the petitioner, Mrs. Sara Barker Smith, was named in said Will as executrix thereof, without bonds, and she consented to act in that capacity; that said Dama left him surviving no wife, children or child, and no issue of any deceased children or child; that he left no heirs residing in the state of California, and that the names, ages and residences of his heirs were unknown to the petitioner, but if there were any heirs of the decedent, the petitioner believed that they resided in Italy; that the legatees and devisees were as follows, namely: The Stabilimento dell' Annunziata, Naples, Italy, to which is given and bequeathed \$2,000; Andrea Manzo del fu Simone, Naples, Italy (age unknown to petitioner), to whom is given \$1,000, but in case of his decease this bequest to go to the Stabilimento before named; the property contained in the

safe deposit at Boston, Massachusetts, and described in the fourth paragraph of the Will was bequeathed to Mrs. Sara Barker Smith, the petitioner, residing in San Francisco, California; the property contained in said safe deposit and described in the fifth paragraph was desired by the testator to be sold and the amount brought by it to be disposed of by the executrix for a charity purpose as she think the best; the sixth paragraph of the Will provides that the property mentioned in said paragraph and all the property and estate of the testator shall go and belong to said Mrs. Sara Barker Smith for the purpose of further study and developement of her vocal organs and cultivation of the voice. The petitioner was unable at the time of filing her petition to state the probable value and character of the property of said decedent, further than that the personal property consisted of money in bank and in the hands of R. W. Burtis, special administrator, amounting to about eight hundred dollars, household furniture, piano, jewelry, and other personal effects; that the real property consisted of unimproved real estate in San Francisco, San Mateo, and Tulare counties, California, mentioned in the sixth paragraph of the Will; that decedent left personal property in Boston, Massachusetts, described in the fourth and fifth paragraphs of the Will, the value and character of which the petitioner was unable to state; that all of the estate left by decedent was separate property; that at the time of the execution of the Will, May 8, 1887, the testator was of the age of sixty-four years, or thereabouts, and was of sound and disposing mind and in all respects competent to make a Will.

The Will, which was admitted to probate by this court, after the proper preliminary procedure, on the twenty-seventh day of February, 1888, is in words and figures as follows:

“Know all men by these presents, that I Luigi Dama of San Francisco, state of California, being of sound mind, but feeling the uncertainty of life, do hereby make my last Will and Testament. After my just debts, Doctors

bills, and funeral expenses shall be paid, I give and bequeath.

*“First.*

“I desire to have my body embalmed, and buried by the side of my dear lamented wife, Wealthy B. J. Dama, in *Bath, Maine*, and that to be paid out of my Estate.

*“Secondly.*

“I do hereby give and bequeath two thousand dollars (\$2000.00) to the *Stabilimento dell’ Annunziata, Naples, Italy*, to be paid in United States gold coin.

*“Thirdly.*

“I give and bequeath the sum of one thousand dollars (\$1,000.00) to *Andrea Manzo del fù Simone, Naples, Italy*, but in case of his disease, the same sum to go to the *Stabilimento dell’ Annunziata, Naples, Italy*, above named.

*“Fourthly.*

“I desire that all the jewelry contained in the Safe Deposit in Boston, Mass. *Watch, gold chains, Diamonds studs, (two pairs) with solitaire diamonds each a breast pin with nine diamonds, and three pearl studs, also eleven (11) Government Bonds of United States of America, Nine of One thousand dollars each (\$1,000.00) and two of Five hundred each (\$500.00) and a ring with a large solitaire diamond.* All those are my property, which I bequeath to Mrs. Sara Barker Smith, living at present in San Francisco, State of California.

*“Fifthly.*

“In the above mentioned safe deposit in Boston, Mass., contains also a bracelet ornamented with diamonds and inside a portrait— A ring also ornamented, with diamonds and an Emerald stone in the middle of it —These two articles belong to my dear beloved wife Wealthy B. J. Dama which were bequeath to me *by her*. I desire these two articles to be sold, and the amount of what it will

bring to be dispose of, by the Executrix Mrs. Sara Barker Smith for a charity purpose, as she think the best.

*“Sixthly.*

“In the safe deposit in San Francisco State and County of California, contained valuable papers, land contract between Wm. T. Cummins and myself, Luigi Dama Four deeds of land bought from R. R. Co: of one hundred and sixty acre's each paid one-fifth by myself Luigi Dama— Also the deed of the land on Jackson street, and Pacific Avenue Sixty eight feet and nine inches front on either of the streets, and two hundred fifty five feet in depth—bought from Mr. Davis for the sum of fourteen thousand and five hundred dollars (\$14-500.00) paid cash on the first June one thousand eight hundred and eighty five, and also eleven shares (11) of American Watch Co: of Waltham, Mass —These and all of my property and Estate of whatever sort, or description, and where so ever situated shall go, and belong to the above mentioned Mrs. *Sara Barker Smith*, for the purpose of further study and development, of her vocal organs, and cultivation of the voice.

*“Seventhly.*

“I appoint Mrs. Sara Barker Smith Executrix of this Will and Testament without bonds— Written this Sunday the day of May eight of the year One thousand eight hundred eighty seven, entirely by myself, without influence from any one.

“San Francisco May the eighth of the Year One thousand Eight Hundred and Eighty seven LUIGI DAMA

“Witness JULES. MATHIEU.

“No. 214. O'Farrell. Street

“HENRI GODARD. 222. O.Farrell. Street

“BELLINI ANTONIO. 222 O farrelle”

[This is fac-simile of original Will.]

I know all men by these presents, that I Luigi Dama of San Francisco, state of California being of sound mind, but feeling the uncertainty of life, do hereby make my last will and testament. After my just debts, Doctors bills, and funeral expences shall be paid, I give and bequeath.

= First =

I desire to have my body embalmed, and buried by the side of my dear lamented wife Wealthy B J Dama, in Bath, Maine, and that to be paid out of my Estate. —

= Secondly =

I do hereby give and bequeath two thousand dollars (\$2000) to the Stabilimento Dell' Annunziata, Naples, Italy, to be paid in United States gold coin. —

= Thirdly =

I give and bequeath the sum of one thousand dollars (\$1000) to Andrea Manzo del fu Simone, Naples, Italy, but in case of his Decease, the same sum to go, to the Stabilimento Dell' Annunziata, Naples, Italy, above named. —

= Fourthly =

I desire that all the jewelry contained in the Safe deposit in Boston, Mass. Watch, gold chains, Diamonds studs, (two)

pairs) with solitaire diamonds each, a breast pin with nine diamonds, and three pearl studs, also eleven (11) Government Bonds of United States of America, Nine of one thousand dollars each (\$1000<sup>00</sup>) and two of Five Hundred each (\$500<sup>00</sup>) and a ring with a large solitaire diamond. All those are my property, which I bequeath to Mrs Sara Barker Smith, living at present in San Francisco State of California—

= Fifthly =

In the above mentioned safe deposit in Boston Mass. contains also a bracelet ornamented with diamonds and inside a portrait—A ring also ornamented with diamonds and an Emerald stone in the middle of it—These two articles belong to my dear beloved wife Wealthy B. J. Dama which were bequeath to me by her. I desire these two articles to be sold, and the amount of what it will bring, to be dispose of, by the Executrix Mrs Sara Barker Smith for a charity purpose, as she think the best—

= Sixthly =

In the safe deposit in San Francisco State and County of California, contained valuable papers, land contract between

W.<sup>m</sup> C. Cummins and myself. Luigi Dama  
 Four deeds of land bought from R. B. Co:  
 of one hundred and sixty acre's each paid  
 one fifth by myself Luigi Dama. Also  
 the deed of the land on Jackson street, and  
 Pacific Avenue Sixty eight feet and nine  
 inches front on either of the streets, and two  
 hundred fifty five feet in depth - bought  
 from M<sup>r</sup> Davis for the sum of fourteen  
 thousand and five hundred dollars (\$14500)  
 paid cash on the first June one thousand  
 eight hundred eighty five, and also eleven  
 shares (11) of American Watch Co: of  
 Waltham, Mass. - These and all of my  
 property and Estate of whatever sort, or  
 description, and where so ever situated  
 shall go, and belong to the above mentioned  
Mrs Sara Barber Smith, for the purpose  
 of further study and development of her  
 vocal organs, and cultivation of the voice.

= Seventhly =

I appoint Mrs Sara Barber Smith  
 Executrix of this will and testament  
 without bonds - Written this Sunday  
 the day of May Eight of the Year One  
 thousand eight hundred eighty seven,  
 entirely by myself, without influence  
 from any one

San Francisco May the eight of the  
Year One Thousand Eight Hundred and  
Eighty seven — Luigi Dama

Witness Jules. Mathieu.

No 214. O'Farrell, Street

Henri. Godard, 222. O'Farrell Street  
~~Bellevue Avenue~~ 222 O'Farrell

The order admitting this paper to probate may also be here inserted in extenso for convenience of future reference, if need be:

#### Order Admitting Will to Probate.

The petition of Sara Barker Smith, heretofore filed in the above-entitled matter, praying for the admission to probate of a certain document filed herein, purporting to be the last Will and Testament of Luigi Dama, deceased, to be appointed executrix of the said last Will and Testament of said deceased, and that letters testamentary thereon be granted to said petitioner, coming on regularly to be heard on the thirteenth day of February, 1888, and due proof being then made that notice had been duly given of the time appointed for proving said Will and for hearing said petition according to law, to all parties interested, the further hearing of said application and the proofs in support thereof was regularly continued until the twenty-seventh day of February, 1888, at 2 o'clock P. M., of that day, at which time the following named witnesses were sworn and examined, viz.: William T. Cummins, R. W. Burtis, Mrs. Helen M. Cushman and Columbus Waterhouse, and the applicant, Sara Barker Smith, having also been sworn and examined; and from the testimony of said witnesses it satisfactorily appearing to this court, that said document is the last Will and Testament of said Luigi Dama, deceased; that it is an olographic Will, and was entirely written, dated and signed by the hand of the

testator himself, on the eighth day of May, 1887, the time it bears date, and that the said testator at the time of the execution of the same was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence; that said testator died on the twentieth day of January, 1888, being a resident of the city and county of San Francisco, in the state of California, at the time of his death, and leaving estate of the value and character as follows: Unimproved real estate in the city and county of San Francisco of the value of about fifteen thousand dollars (\$15,000), and unimproved real estate in the counties of Tulare and San Mateo, and in this state, and certain personal property in the city and county of San Francisco, the value of which is unknown, and also personal property in the city of Boston, commonwealth of Massachusetts, the value of which is unknown.

And no objection made thereto:

IT IS ORDERED, that the said document heretofore filed, purporting to be the last Will and Testament of said Luigi Dama, deceased, be admitted to probate as the last Will and Testament of said deceased; that said Sara Barker Smith be and she is hereby appointed executrix thereof, and that letters testamentary thereon issue to said petitioner upon taking the oath as required by law, it being expressly provided in said Will that no bonds be required of said petitioner.

Dated February 27, 1888.

J. V. COFFEY,  
Judge.

### **Proceedings on Original Probate, February, 1888.**

This paper so probated might have been proved in either one or both of two ways: as an olographic Will (sections 1309, 1940, 1943, Code of Civil Procedure), or as an attested Will (sections 1308, 1935, Code of Civil Procedure).

It was propounded in both ways—as an olographic Will and also as an attested Will (see Contestant's Exhibit P—16); but it was proved, in the first instance, only as an olographic Will.

The matter of original probate first came on for hearing on February 13, 1888, Frank J. French appearing as

attorney for petitioner, T. J. Lyons for the Italian consul, and Joseph Naphtaly for the public administrator; ex-Judge M. A. Edmonds was also present representing heirs at law, informally, but not putting in any authenticated appearance; and there were called as witnesses, Henri Godard, Jules Mathieu and Antonio Bellini, whose names appear as subscribing witnesses to the Will, the last named of whom refused to testify that the signature "Bellini Antonio" was made by him; he then testified that he had never before seen the paper offered for probate, and that the name "Bellini Antonio" appended to the attestation clause was not written by him; he had, however, signed a paper in Dama's house, at his request, together with Godard and Mathieu, with whom he went to the house, 317 Mason street, upon the invitation of Dama for the purpose of witnessing a paper, but this propounded instrument was not the paper they witnessed; it was a paper with a stamp on it; the stamp was an impression on the paper itself; he had never signed more than one paper, and this was not that paper; and the words "Bellini Antonio 222 O farrelle" were not in his handwriting—of this he was positive; and at the request of the court he wrote his name a number of times on a sheet of legal cap paper (see Respondent's Exhibit 30); when Dama went to the witness at 222 O'Farrell street he told him that he had a paper that he wanted him and two others to sign, and afterward the witness procured the two other persons, Godard and Mathieu, and they went to Dama's house and signed as stated, on a Sunday, sometime about June or July, 1887. On the same occasion, February 13, 1888, that this testimony was taken, Henri Godard testified that he had signed the paper offered for probate, as a witness, one Sunday about half-past seven or eight o'clock in the evening, he thought it was about May, 1887 (the date of the paper was May 8, 1887); he did this at the request of Dama and in his presence and in the presence of Jules Mathieu and Bellini Antonio, who also signed at the desire of Dama, who himself first signed his own name; there was also another person present, a friend

of Bellini, whose name Godard did not recall; Dama spoke throughout the transaction in French, which was the language used at the time by all the persons present upon that occasion.

Jules Mathieu, the third subscribing witness, testified that he signed a paper at the request of Dama, and in presence of Godard and Bellini, who also signed at the same request, but he did not see Dama sign, nor did he see anything on the paper except the word "Witness" above the place where he signed; the paper was so folded and held down by Dama that Mathieu saw nothing above the place where he signed except the word "Witness." Dama held the paper down on the top of the piano until the three witnesses signed. Dama said to Mathieu, "Will you please put down your name here?" indicating the place, and said the same to Godard and Bellini; there was another person present, an Italian named Dellasanta. Dama did not say that the paper was his Will nor allude to it in any way, but Bellini told the witness after leaving the house that it was a Will and witness guessed that that was the object of their being wanted there by Dama. The witness Mathieu testified also that prior to going to Dama's house Bellini had told him that the purpose of their going there was to sign a Will.

After this testimony was taken on the thirteenth day of February, 1888, the return day for the hearing of the application for probate of the paper propounded, a continuance was had; and on February 27, 1888, at 2 o'clock P. M., the matter was again brought before the court, the counsel appearing being ex-Judge Myrick and F. J. French for the petitioner, and T. J. Lyons, for the Italian consul; at this hearing the testimony went to establish the olographic character of the instrument, the witnesses examined in that behalf being Wm. T. Cummins, R. W. Burtis, Mrs. Helen M. Cushman, Columbus Waterhouse, Sara Barker Smith, and after hearing the testimony of these witnesses the court found that the paper propounded was an olographic will, entirely written, dated, and signed by the hand of the testator Luigi Dama on the eighth day of May,

1887, the time it bears date, and admitted it as such to probate.

### **What Contestant Undertook to Establish.**

In his opening statement counsel for contestants claimed that he would be able to show that the names of the witnesses to the alleged Will were not written by them nor at their direction, and that he would establish by witnesses familiar with the writing of deceased that the instrument in dispute was not in his handwriting, and also by expert evidence beyond a peradventure of doubt that the alleged Will was a forgery; and that the beneficiary was a stranger to the deceased, not related by blood or connection, by consanguinity or affinity with or to him, and that the alleged object of his bequest was not such as he naturally would have designed, and contrary to his oft-repeated estimate of the legatee's capacity; the counsel asserted his ability to demonstrate by proof that this alleged Will was forged; and if he should not be able to identify the perpetrator in person, counsel claimed that the burden would rest upon those who had caused this paper to be probated.

### **The Single Issue: Forgery.**

There is but one issue in this case: FORGERY. This issue applies not only to the Will itself, but to certain other papers which are so connected with its fabrication that the evidence which applies to one must, for the most part, affect the others. These papers are briefly described as the "Will"; the "Altered Will"; the "Long Memorandum"; the "Draft of the Long Memorandum," and the "Short Memorandum."

These papers stand or fall together; if any one of them be false, the others cannot be true; and conversely. If a forgery were committed in this case, as alleged by the contestant, the author must have manufactured not only the paper probated as a Will, dated May 8, 1887, but also the papers denominated the "Altered Will," dated November 1, 1885 (Respondent's Exhibit 3); the "Long Memorandum" (Respondent's Exhibit 2); the "Draft of the Long Memo-

randum" (Respondent's Exhibit 31); and the "Short Memorandum" (Respondent's Exhibit 1).

### **A Fact Beyond Dispute.**

One thing seems to be certain in this case: There was a paper signed by Luigi Dama in May, 1887, at his dwelling-house, 317 Mason street, San Francisco, in presence of four persons, Jules Mathieu, Henri Godard, Antonio Bellini, and Gaetano Dellasanta; the three first named signing as subscribing witnesses, and the fourth—Dellasanta—not signing for the reason stated in his testimony, which I abridge here:

Dellasanta testified that he knew Antonio Bellini who lived at 222 O'Farrell street in May, 1887, and also knew Jules Mathieu, who kept a bar at 221 in that street, and also Henri Godard, who lived at 222 in the same street; he knew also Luigi Dama, whom he first saw at Mathieu's bar; he met Bellini, Godard, and Mathieu in Dama's house, 317 Mason street, in May, 1887; Bellini asked him to go there with him, that he was to sign a Will; Dama took out of a basket a big envelope, and a paper out of it, and he said that was a Will that he called them up to sign; he took out a pen and he said, after he wrote his name, to Jules Mathieu to whom he gave the pen, to write his name; then he gave the pen to Godard and he signed, and then to Bellini, who wrote his name "Bellini Antonio"; they wrote their addresses after their names, and Dama explained what it was, and at the same time said to Dellasanta that there was no necessity of his signing as three witnesses were enough; the Will was placed on the top of a piano when it was signed; Dellasanta was standing near the piano and looked at the paper after it was signed, but he could not read the paper the way it was folded up; after Bellini wrote, everybody made a remark, the way he signed his name; the paper here in question—the alleged and probated Will—looked to the witness Dellasanta to be the same paper that Dama signed in May, 1887, when Jules Mathieu, Henri Godard, and Antonio Bellini signed, on one Sunday even-

ing in May, 1887, at about 8 o'clock; but he would not swear that it was the same paper; it looked to him to be the same, but he was not judge enough to swear that no man could imitate the paper; this witness Dellasanta is an Italian, and a cook in the café of the Occidental Hotel (see pages 108 and 109 of the judge's manuscript notes). Dellasanta was a witness called by and for respondent, and was examined and cross-examined on Tuesday, March 17, 1890.

### **The Question to be Decided.**

The question then is, Was the paper admitted to probate on the 27th of February, 1888, and now sought to be revoked and annulled as false and forged, the paper executed by Luigi Dama and witnessed by Mathieu, Godard and Bellini, in the presence of Dellasanta?

### **The Evidence of the Subscribing Witnesses.**

Counsel for contestant first undertakes to establish that it was not the same paper, and that the names of the witnesses to the probated instrument were not written by them, nor at their direction; and in support of his case introduced Antonio Bellini, a native of Italy, fifty years of age and fifteen years a resident of San Francisco, who knew Luigi Dama, and who worked for him two or three hours every day, cleaning the house for him, a three-story brick house with a large garden in front, 317 Mason street; and in answer to the question of contestant's counsel: "Q. I will ask you to look at the fourth page of a paper marked 'Will of Luigi Dama, filed January 30, 1888,' and say if that signature 'Bellini Antonio' is yours? said: A. No, I never write that; never write my name that way. Never saw that paper before I saw it in this court here about two years ago, February, 1888."

Upon cross-examination Bellini testified that he now (November 20, 1890) lives and works at Lo Presti's restaurant, 203 Larkin street; formerly lived at 222 O'Farrell street for six years; knew Henri Godard and Jules Mathieu; on May 8, 1887, was with them in Dama's house; witness wrote his name on a paper but it was not this paper (at this point of

the examination the witness gave specimens of his writing in response to request of the court, writing the lines "Bellini Antonio 222 O'Farrell st." six times sitting at the clerk's desk, and three other lines, standing at the corner of judge's desk: See lines 3 to 11 inclusive of the judge's manuscript notes of testimony).

Witness testified, after writing these specimens, that the paper he signed in Dama's house, while he was standing up, rested on the top of a piano; Jules Mathieu and Godard were there at the time and also signed; it was a long paper, doubled, about the size of that paper (indicating the roll in which the Will, Proof and Certificate are preserved); Mr. Dama stood on one side of the piano, and Mathieu, Godard and himself, Bellini, on the other side; they could walk around the piano, Dama was behind the piano, the witnesses in front; Gaetano Dellasanta was in the room at the same time, standing at the end of the piano, to the left of Dama; Dama asked everybody to put his name down, but did not ask Dellasanta; witness Bellini was in the house often working, cleaning the house; Dama had a good many pupils, some ladies; when witness Bellini came up to this court about two years ago Godard and Mathieu were with him; witness being shown the will admitted to probate on February 27, 1888, says that he never saw that paper before this morning (i. e., the morning of November 20, 1890); he remembers being in court as a witness two years before; and remembers that the judge showed him a paper and his name was there and he said it was *not* his writing; *but he never saw this paper* (the alleged and probated Will) *before this morning*; (witness was testifying on cross-examination in the afternoon of November 20, 1890) *he was not shown that paper*; it was a new paper, "not old rags like that"; *never saw that paper before to-day* (i. e., November 20, 1890); *that is not the paper the judge showed him*; his signature was not in the same place, it was nearer the bottom of the page, about four fingers from the bottom.

Upon his redirect examination, the witness Bellini said that it was nearly three years since he was examined in this court; this is *not* the paper shown to him then

(referring to the alleged and probated Will); it was a clean paper; *it was not that paper anyhow* (indicating the probated paper, Will admitted February 27, 1888); at this point of the witness' testimony, an interpreter, Antonio Lo Presti, was called in to assist, and through him Bellini related how he came to be a witness at the time of the hearing of the application for probate, February 13, 1888. The judge showed him a paper at that time; that is the paper, but with this one difference, that it was then fresher and newer than now. Witness indicates the probated Will.) The paper he signed in Luigi Dama's house had a stamp on it, but the color he does not remember; his name was signed near the bottom (the witness marked where—the relative position—on a blank sheet of legal cap paper). Mathieu signed first, then Godard, then Bellini; witness did not see Dama sign; he said it was a testament; he said to the three of them, "if you please sign your names," that it was a testament; after that the four, Dellasanta and the witnesses, left together; witness Bellini did not notice anything of Dama's habits, only worked there three or four months. Upon the recross-examination witness Bellini repeated that Dama said that it was his Will; the paper probated being again shown to witness, he reiterated that he had never seen that paper before; there was a stamp or seal on the paper but he could not remember the color, whether it was black or red or blue; the probated paper being again shown to witness, he said. "I do not know that paper, *never saw it before to-day*; it was a similar paper; *that is the paper.*"

Upon the next morning, November 21, 1890, the services of an interpreter were again called into requisition and the contestant's counsel was permitted by the court to resume his redirect examination of the witness, Bellini, and the Will probated February 27, 1888, being again shown to witness he was asked:

"Q. Is that the paper that you signed at Professor Dama's house the night that Jules Mathieu and Henri Godard accompanied you?" And he answered:

"A. No. *That is not my signature, nor any part of it. I did not sign that.*"

The witness was then examined again by respondent's counsel and admitted that he did on the day before testify that the word "Antonio" and "222 O farrelle" was in his handwriting and that he said also "I swear it"; but he was excited and he did not clearly comprehend it, but now he understands it better. Witness Bellini was at this point requested to put on his spectacles and look at the Will and signature "Bellini Antonio, 222 O farrelle"; and having done so, he said: "I see that now as plainly as I did yesterday and say, *it is not my signature.*"

GODARD.

On the same day, November 21, 1890, the surviving subscribing witness, Henri Godard, was called by consent, out of the regular order, for respondent and testified that at the time of testifying he resided in Dallas, Texas; he was a married man, an instrument maker and musician; formerly lived in San Francisco for about three years; was in San Francisco about three years ago; lived at 222 O'Farrell street; knew Luigi Dama; also knew Jules Mathieu, who was a musician; also knew Antonio Bellini; went to Dama's house at his request with Mathieu and Bellini to sign a Will as witnesses; the paper shown to witness, Will admitted to probate February 27, 1888, he says was the paper which he signed as a witness at Luigi Dama's request; it was signed on the top of a piano, a square piano; Dama had his hand on the paper and he asked the witnesses to sign; Godard saw Mathieu sign and Antonio Bellini; Dama asked the witnesses to put their addresses after their names; there was another person in the room, an Italian, whose name Godard did not then know, but afterward ascertained to be Dellasanta; the witnesses were all facing the piano; Dama was of sound mind; Dama spoke to Godard on the street in French telling him he was going to make his testament; Godard wrote his name all at once and only once, he was sure of that; he saw Luigi Dama sign his name. (Witness at request of cross-examining counsel took the paper—the alleged and probated Will—to the light of the courtroom window and after scrutinizing it said:) "I am sure that that is the paper." Witness then by request gave several specimens of his handwriting seated at

a table and desk, and also standing at side of judge's desk in same relative position as when signing as witness to Will on top of piano. (See judge's notes of testimony, pages 8 and 9, also Contestant's Exhibits "K," "L," and "M.")

At the time witness Godard was requested to go and sign the Will he was in an Italian restaurant with Bellini and Mathieu, and Dama came in; after a while Bellini and Dama spoke Italian with each other at 222 O'Farrell street and then Dama came over to witness Godard and said, "I am getting old and want to make a donation to some one and want to make a Will," and requested Godard to act as a witness; then they all proceeded to the house, Dama and Godard in advance of the others; they entered the house, 317 Mason street, and Jules Mathieu sat down at the piano and after playing a while and trying his voice they shut up the piano and Dama took a bunch of keys and opened a closet and took out some papers from it; the Will in probate being shown to witness, he said that there (pointing to signature) was his name; he knew that and that was all he had to say; he could not remember what Dama said; Dama was talking all the time; Dama was very careful, and after putting the paper down on the top of the piano he requested the witnesses to sign; Dama handed the pen first to Jules Mathieu and then to the others, and after signing the professor asked each to put after his name the address; the witness Godard was sure that Bellini wrote his name "Bellini" before "Antonio."

### **Evidence of the Waterhouses and the Randalls as to Hand-writing of Dama.**

Among the witnesses on the hearing of this contest called in behalf of contestant was Columbus Waterhouse, who is described by counsel, without controversion, as a pioneer of California, a Mason, whose character is equal to that of the highest in the fraternity, a man who in the commercial community and in society is the peer of the most exalted (see page 252 of the judge's manuscript notes), president of the People's Home Savings Bank, trustee in Pacific Bank, dealer in carriage and wagon materials on a most extensive wholesale scale, resident here, where he has reared his family, from the earliest days.

Columbus Waterhouse knew Luigi Dama well; their acquaintance began in 1884 or 1885; Mr. Waterhouse made the acquaintance of Professor Dama through his daughter, now Mrs. D. S. Dorn, having been a pupil of the professor; he also became a pupil in the professor's system of voice development or vocal culture; Professor Dama considered that system as the only one of any account, others being valueless; Mr. Columbus Waterhouse knew the handwriting of Professor Dama from having seen him write—the Will admitted to probate February 27, 1888, being shown to the witness, he said he had very grave doubts of it; in the opinion of Mr. Waterhouse it was *not* the handwriting of Mr. Dama; Professor Luigi Dama was a careful, punctilious man, of perfectly sound mind, very close in money matters; the witness was a member of the Mission Lodge, Free and Accepted Masons; also of the Golden Gate Commandery, Knights Templar, in both of which the witness Waterhouse presented Dama's petition for membership, he was already a Master Mason; the witness Waterhouse knew whether Dama felt kindly toward his family in the east, the Randalls; Dama was very bitter toward them and had been for three months before he left for the east; upon his return he declared himself more kindly toward them; the witness Waterhouse saw Dama for the last time about the middle of December, 1887, before the witness left for Mexico, which was on the 21st of that month; the family of witness and Dama interchanged visits; they were on mutually very friendly terms; Dama visited the Waterhouses a great many times; when the professor went east with his wife in 1884 or 1885 he left with witness Waterhouse a bundle of papers, but witness had no knowledge whether his safe deposit key was in them or not; a paper shown to witness, Petitioner's Exhibit No. 1, "Short Memorandum," the witness expresses his opinion that it is *not* in the handwriting of the deceased Dama; this paper the witness never saw before the time of testifying (November 28, 1890, at 12 o'clock meridian). Dama told witness Waterhouse that he had some bonds but had disposed of them; Professor Dama told him that Mrs. Smith had no chest power whatever and would never make much of a singer; Dama said that as the result of her

taking lessons that she had improved considerably and also she had improved in health; witness Waterhouse thought that Professor Dama went east in the fall of 1884, but was not sure; when Dama returned he took portions of the papers from the witness' safe; the witness was not present at the time the professor took the papers from the safe; upon cross-examination the witness being shown the Respondent's Exhibit No. 31, "Draft of Long Memorandum," said that the side opposite the file-mark was in the handwriting of Dama; as to the other side, witness said that was written at a different time and with a different pen, but the witness thought it was in the handwriting of Dama; he thought, also, that Respondent's Exhibit No. 2, the "Long Memorandum," was Dama's writing. The witness at a later date in his examination (Monday, December 1, 1890, 11 A. M.) corrected an error into which he had fallen at an earlier stage of his examination, as to the date of the beginning of his acquaintance with Dama; the correct date was in 1880, and Dama's first visit to the east with his wife was in 1881. A paper shown to witness, Respondent's Exhibit No. 23, he identified as a Will written by Dama, or at least a copy made by him of the olographic Will of his wife which was refused probate on account of the omission of a date. The witness said that he should not call Respondent's Exhibit 3, the "Altered Will," the handwriting of Dama nor any part of it; but the witness had not offered himself as an expert, and did not consider that anything he should say would be a test. He thought that Respondent's Exhibit No. 4, the blank form of Will, had many features of Dama's handwriting, but if it were his it must have been copied from some other article; he thought, however, that it was the handwriting of Dama; the paper shown to witness, attached to the Randall deposition, marked "Comm'rs Ex. A-a," was written by Dama without a doubt. The witness Waterhouse was friendly with Dama up to the time of his death; witness thought that Dama went east in May and returned in August, 1887; that was the time when Dama told witness that he had sold his bonds; Dama simply said, "I've sold my bonds"; the friendship of witness for Dama continued until his death, and it was reciprocated to

all appearances, but witness could not say that he respected Dama's memory as a friend and as a gentleman, from reports of his remarks related to him, and witness had assumed the truth of the reports; the deceased professor made no statement about his making a Will, except that he said he had made a Will; this remark was made in 1886; this was after the Dorn visit; witness Waterhouse started for Mexico on January 15, 1887, then he had ceased taking lessons from the professor, after his return he began again taking lessons in 1887, witness went to Mexico again in December, 1887, and did not subsequently take any lessons, witness returned from his first trip February 18th and within a week resumed lessons with the professor and continued until Dama went east in August, 1887; witness did not as a fact cease on March 19, 1887; there were three or four weeks of interruption, but he resumed again; the first trip of witness to Mexico was begun December 15, 1886, not January 15, 1887, this last date was an error of witness. Witness Waterhouse began taking lessons in vocal culture not to become a singer, but because of his health; he was troubled with asthma and thought the lessons would benefit his ailment; his hour of instruction was very often 11 o'clock in the morning; it was sometimes after Mrs. Smith's hour, sometimes after Mrs. Cummins'; most of Dama's pupils were there for their health, some went there for their voice, to learn singing. Witness, on being examined as to what he testified to at the time of the probate of the Will (February 27, 1888), said that he had at that time said, "I think the signature is his, the other looks rather strained"; but the witness now (December 1, 1890) believed that it was *not* Dama's writing, from examinations he has since made of the writings of the deceased, among them letters in evidence to his brother Ben Randall; several papers presented to witness (Respondent's Exhibit 33, 34, and 35) he pronounced to be in the handwriting of the deceased Dama. (See judge's manuscript notes of evidence, pages 16-23.)

The Boston depositions of the Randalls, so far as they touch the handwriting of the alleged Will, affirm as matter of opinion that it is not that of Luigi Dama, although Jennie Forbes says that "*it is a very good representation,*" and

Benjamin Randall detects in the photograph "*a standard resemblance but it is not the same.*" (See judge's manuscript notes of evidence, page 23.)

Frederick A. Waterhouse, a brother of the witness Columbus Waterhouse, connected with the establishment of "Waterhouse & Lester," of which firm his brother is sole constituent, was acquainted with Luigi Dama; first met him in 1880 and took lessons in vocal music from him; Dama was a very careful man in his habits; sometimes Dama seemed to be very liberal and sometimes close; Dama claimed that his was the only true method of teaching vocal music, and all other systems were wrong; witness Frederick A. Waterhouse was familiar with the handwriting of Dama, and from his remembrance of his writing he pronounced the alleged Will to be *not* in the handwriting of the deceased Luigi Dama. Witness Frederick A. Waterhouse was administrator of the estate of Wealthy B. J. Dama, deceased wife of the professor; he had not seen the alleged Will since it was admitted to probate.

### The Evidence of the "Experts."

PROFESSOR F. O. YOUNG.

If any man deserves to be classified as an expert in handwriting that man is Frederick Osborne Young, and with reference to his history and qualifications it may be well to note briefly an epitome of the history of his evolution as an expert penman, as told in his testimony: Professor Young describes himself as a teacher and executer of penmanship since 1873; he was born in Maine, and was graduated at Bryant's Business College, Manchester, New Hampshire, the college of Gaskell, the celebrated calligrapher. Young's object in going to school was to make a teacher of himself in all common school branches, and since 1873 he has made a specialty of penmanship; it was his ambition to excel in writing; being left-handed, having no right hand, it was difficult for him to become expert, but he succeeded in excelling in writing and also in drawing; he became a teacher and taught thousands, he could not say how many he had had, perhaps from fifteen to twenty thousand pupils under instruction in the course of years, and he had opportunities abundant to sup-

plement by observation and experience his scientific and theoretical attainments; in the art of penmanship he has given unusual proofs of proficiency in the presence of the court; and in capacity of imitation and simulation he is undoubtedly an adept. So much for his qualifications. He is an expert in his profession; "a person instructed by experience": Lawson's Expert and Opinion Evidence, 426. "A person who, by virtue of special acquired knowledge or experience on a subject presumably not within the knowledge of men generally, may testify in a court of justice thereon, as distinguished from ordinary witnesses, who can in general testify only to facts": Century Dictionary.

Professor Young says that there are certain habits that persons take on in writing, such as position, lifting the pen, making letters and combinations, and slope; "slope" is one of the professor's strong points, "the main thing in writing is the slope"; in this case Professor Young had submitted to him several writings for his examination, and had had them for say a month for purpose of comparison and test; he had fully and carefully examined all the papers submitted to him that he was informed were the genuine writings of Luigi Dama, and from that examination he had formed an opinion as to the genuineness of the alleged Will; and after examining that instrument and also the Respondent's Exhibit 1, "Short Memorandum," his opinion was that they were *not* in the handwriting of Luigi Dama, basing that opinion upon an examination and comparison with fourteen writings represented to him as Dama's authentic compositions; the first feature in the formation of his opinion was the difference in the slope of the writing; "slope" is not an accident; it is a habit almost impossible to change; the slope was in this case enough to determine that the alleged Will was not genuine, but it was not the only point; in reference to the paper Respondent's Exhibit 2, "Long Memorandum," he could not say in whose handwriting it was; he did not think it was in Dama's; in his opinion it was copied from an original; but he had a doubt about it; and classed it in the same handwriting as the Will; as to the paper marked Respondent's Exhibit 31, "Draft of Long Memorandum," Professor Young thought it was genuine, except the word "Memorandum" on the second page

seemed odd to him, and he did not think it had Dama's slope; as to the paper called the "Copy of the Wealthy B. J. Dama Will," he had never seen it before it was presented to him on cross-examination (December 4, 1890), but he should say it was in the handwriting of Luigi Dama; there was one letter there which he had not found elsewhere, the small letter "p" in the words "presents" and "page"; those resemble the writing in the alleged Will; this paper ("Copy of Wealthy B. J. Dama Will") does not in general resemble the alleged Will more than other papers he had seen; usually the more a man writes the more cramped his hand becomes, but with an expert it is different; an expert's muscles become more relaxed as he proceeds, so that on the third page of the Will the fact of the writing being a little freer than on the preceding page convinced the professor that it was not written by Dama, but by a better writer. Witness gave a number of interesting illustrations to support his opinion that the alleged Will was not the emanation of the mind and hand of Luigi Dama.

The professor said that in his examination of the alleged Will and Respondent's Exhibit No. 1 and the genuine writings, he had noted or noticed some resemblances, but he was principally concerned in detecting the differences; his engagement as an expert in this case was not dependent on the result of the trial; he would not have it that way, but he was paid according to the time consumed in the employment. A summary of the notes made by Professor Young on the handwritings examined by him in connection with his testimony in this contest is here appended, as furnished by him at the time of the trial:

#### **Professor Young's Summarized Statement.**

"After a long and careful examination of Mr. Dama's admitted genuine handwriting covering a period of about fifteen years, and especially letters written by him just before and after the date of the Will, and finding no material differences in the slope and general character, formation, style, and habits of his writing, and on the contrary finding the Will, a copy of the Will, and a memorandum exhibited to prove the genuineness of the Will, were in a much less sloping hand, and had many and material differences in character, forma-

tion, style, and habits, I feel convinced that Mr. Dama did not write the Will, copy of Will, or memorandum. The writing shows on the face of it the character of imitation, instead of a natural hand. In tracing the two handwritings I notice many points of difference that can hardly be explained. I seem to feel two different identities, and some good observers see the same thing in the character of the writing when comparing the two. Mr. Dama had one way of holding his pen and one position of his hand in relation to the paper and letter or letters which he was making; as his slope and habit of lifting the pen shows it inclined him to write downhill; as shown by the beginning of his letters when the name of the place was not written on the top line but above, he usually wrote downhill; also shown in his signature at the end many times. The forger shows an opposite result; his slope shows the hand to be on the paper a little to the right of Mr. Dama's, hence his inclination to slope less and write uphill, as shown in 'Bellini' in signature of Will, and his habit of lifting the pen oftener, also shown in slope of first two strokes of L and D in signatures to Will, copy, and memorandum, these strokes slope less than Mr. Dama's.

"The following are some of the many differences I made note of, viz.:

In Exhibits 1, 2, 6, 7, 8, 9, 11, and '76 Will, Dama's writing, there are 1062 loops (l h k b & f) above the line, and 100 of them are open at the top thus, *ℓ*, the remainder are closed like t, thus *ℓ*.

In the Will, 280 are open in 315.

In the copy of Will, 338 are open in 361.

In the Mem., 38 are open in 38.

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Total . . . . . 656 are open in 714.

Dama's, 100 are open in 1062.

"In the above Exhibits and Mrs. Dama's Will there are 330 h's and all closed at base, thus *h*, but one which, is made by lifting the pen thus *ℓ*, pg. 4.

In the Will,	12 h's open in 116 <i>h</i>	(remainder, h.)
In copy of Will,	58 h's open in 122 <i>h</i>	" "
In Mem.	5 h's open in 12 <i>h</i>	" "
	<hr/> 75 h's open in 250 <i>h</i>	<hr/> " "

In Dama's, 1 h open in 330 *h* (remainder, h) closed.

I also looked over nine pages of Dama's manuscript, & 4 pages of the same recopied, and two pages of the old Will form, also catalogue of music, and did not find it

made thus, *h*, with the habit of lifting the pen and separating the base.

"In the same Exhibits that I looked for h, I also looked for p and never found it open, thus, *p*, but

always closed thus, *p*, i. e. made without lifting pen,

In the Will 12 were open ( *p* ) in 30.

In the copy of Will 11 were open ( *p* ) in 37.

In the Mem. 3 were open ( *p* ) in 5.

Total..... 26 were open ( *p* ) in 72.

I did not count Dama's but there were hundreds all closed. In connection with the p and h it is well to speak of the small letter a, the last part of which is similar to the last part of p and h. In the copy of the Will it is disconnected 5 times in the following words, viz, California, Maine, nine, nine, and think, thus, *n* and in the Will in Godard's first name, Henri, it occurs. Neither of these habits were Dama's; if it occurred with him it was accident, not the result of habit.

"It was Dama's habit to connect the combination 'am,' wherever it occurred in a word. In 44 cases where he used 'am,' 42 were connected, and 1 of those disconnected was a skip of the pen evidently. In the copy of the Will there are 13 disconnected in 20, and

evidently from habit. In the Will they are all connected, and now the question, why this sudden change of an established habit?

"In Dama's letters, the letters th when used together in a word were generally connected or made without raising the pen thus, *th* In 156 used, 18 were disconnected thus, *th*

"In the Will 57 were disconnected in 63, and in copy of Will 55 were disconnected in 61.

"If I may be allowed the illustration, I should say that the small letter "s" in the forgeries is generally well made like a plump dame, the fullness extending well up to a short neck,—while Dama's are inclined to be "long necked," "slab-sided" and when fullness occurs it prevails in the abdominal regions.

"Small "s" is a difficult letter to make right, owing to the short curve of the down stroke, and right there is where the difference occurs in the two writings.

"The first part of the small letters d, g, and q, together with the "a," as a principle, are made in the forgeries more like the small letter "u," i. e., cut off the top of the first line thus, *a* ; while in Dama's writing this principle is more like the form of the small letter o, the first down stroke slopes more and the principle is not so wide.

The small letter d in the forgeries has too much sameness; I refer to the stem or finishing stroke. It has the appearance of being traced, or copied. This fact occurs in many other cases.

"The small letter "z" is made twice in the '85 Will, thus, *z* , and in his letters it was made without the last stroke or cross, thus, *z*

#### "SHORT MEMORANDUM."

"The general slope is less than in Dama's. There are 33 loops above the line and all are open. Dama would have made them nearly all closed.

“There are 12 h’s and five are disconnected at the base, thus, *h*,—Dama would have connected them. There are 5 p’s and 3 are disconnected thus, *p*,—Dama would have connected all thus, *p*. Small

“i” is not dotted in the word Will,—a mistake a forger would make, Dama would have dotted it. Influence is spelled “enfluence.” Dama spelled it *influece* at times but I never noticed it “en.” There are 5 th’s all discon-



nected thus, *th*,—Dama would have connected 4 at least. The pen was lifted in first down stroke of g (Compare with Gumpel’s “a” in California, Judge’s notes;) in the word ‘signed’ (6th line) Dama never would have done it. Capital G in the word “God” is unlike Dama’s and pen was also raised which indicates forgery. Dama made


his thus, *G*, and never raised pen.)

“The capitals “*S*” and “*F*” in San Francisco are *new styles* of letters introduced. I found such an “*S*” used once. It was written on Dama’s general memoranda of his pupil’s time for lessons, and was used in the name Mrs. Sara Barker Smith. It was written *above the headlines* or on the top margin, and a very significant fact is that it runs uphill at about the same degree that ‘Bellini’ does. The F should be compared with the same letters in ‘Farrell street’ in signatures of Godard and Mathieu and the ‘G’ with Godard’s initial.

“The signature to this memoranda is unlike Dama’s, especially in style and shade of capitals L and D.

“Compare small t’s with same in ‘street’ in Godard’s address. 1st t: It starts high up, and while doing this compare r in same word with r’s in Will, etc. Also compare ‘r’ in Mathieu’s address in the word ‘street’ with r in Godard’s name; now compare the crossing of

the first  in Godard's street with crossing of last  in Mathieu's, then compare these with same in the word "presents," 1st line of Will, after 5th line, and "Street," 2nd page.

Look at 1st stroke in small g in "Luigi," pen was lifted thus, , but the connection was made so that it appears one stroke.

The capital "L" starts with hesitation and too high and the first stroke of it & "D" do not slope enough and the appendage at the end is connected with less slope than Dama's. Compare it with the same on Godard's name.

"The general expression of these signatures is of one handwriting."

#### **The Expert Doctor R. U. Piper.**

Dr. R. U. Piper is an expert whose methods of reaching results in the ascertainment of authenticity and the discovery of forgery are different from those of Professor Young. His methods are best explained in his own diction, after premising a statement of his claims to be considered an expert in this branch of science: Doctor Piper is a physician by profession, for twenty years, however, engaged as an expert in handwriting; he has used the microscope since he began practice as a physician over twenty years; he is a man over seventy years of age and has been called as an expert perhaps hundreds of times in cases in court in many of the United States and in Canada; his method of examination is the "Baconian" or inductive; he had seen the alleged Will several times and had made examinations of it in the courtroom and also examined photographs of it; he made copies and diagrams of letters (chirographic characters) and compared them letter by letter and point by point from what is called "Short Memorandum," Respondent's Exhibit 1, and did the same with other documents, letters purporting to emanate from Luigi Dama, which he used as genuine handwritings in order to compare them with the alleged Will and as a result of this examination and comparison came to the conclusion that the alleged Will and

the "Short Memorandum" were *not* in Luigi Dama's handwriting; this opinion resulted from his examination of those papers and comparison from his materials and *according to his methods*; Dr. Piper thought that the imitation on the Will *was a very good one*; the letter "d" seemed to be a type in the disputed documents. After giving numerous details, Dr. Piper read a mathematical résumé or recapitulation of his reasons for the conclusion that the alleged Will was a forged paper, which is here inserted in connection with the foregoing and following abbreviation of his testimony:

### Dr. Piper's Mathematical Résumé.

"The Will purports to have been written by the testator himself, and I have therefore used the body of the paper as well as the signature for the purpose of this examination.

"The question involved is, as to the genuineness of the document, it being claimed by one party to be genuine, while the other claims it to be fraudulent.

"For the purpose of making an investigation of the question involved in the case, that is, as to the genuineness of the document, I have made enlarged copies of some of the letters and also of some of the dots over and after the letters, which go to make up the Will, as also the signature. I have further made enlarged copies of letters and of dots, over and after letters from documents, used as standards for comparison in this examination, these documents being in the handwriting of the said Luigi Dama. These enlarged copies of letters and dots from the two sources I have placed side by side with each other so that they can be compared, and thus a correct deduction be made in the premises. Without such enlargement, and side-by-side arrangement of the letters and other characters which go to make up written documents, I hold it impossible to come to a just conclusion in many of such cases. It is certainly impossible to carry in the mind the characteristics of letter-forms which constitute them the property of different individuals; at least to carry in the mind the characteristics of a sufficient number of these forms through the comparison of which we should be warranted in coming to any conclusion in a given case. I have made over three hundred (300) of these letters and characters in the

present case, nor do I deem these any more than sufficient data on which to base my conclusions. Think of them in their true size scattered through the documents from which they have been gathered, and how certainly it will be seen that no one possessing an ordinary memory could carry one-tenth of them in his mind so as to make such a comparison as would warrant any sort of a conclusion whatever.

"I have made the diagrams containing the enlarged written forms—TABLES—and refer to them under this name in my exposition. Table 1 contains an enlarged copy of the signature to the disputed Will, as also a like enlarged copy of a genuine signature to a letter to 'Miss Harris' dated July 14, 1887, written just two months and six days after the Will purports to have been written. Here the *fraudulent signature*, as I am warranted in calling it from proof already obtained and which I shall adduce hereafter, is a pretty good imitation of the genuine; so much so that I do not notice any essential difference, with the exception of one fact, which would certainly seem to be very significant, that is, that in the name 'Luigi' in all of the genuine ones that I have seen, the first 'i' after the 'l-u' is separated from the 'g,' while in the one on the Will and Altered Will (second name on the Table) it is indistinctly joined to the 'g.' The principal object of this table was to show difference in slope. Differences remaining being in favor of respondents.

"In the genuine documents I have numbered marked 'E. S. 1' up to 'E. S. 11,' as in all the others in my possession containing the name, the first 'i' is separated from the 'g.' This being the case, one would hardly fail to be convinced that that fact of separating the letters of his name at this point was a fixed habit with the writer. Especially is this significant as in the letter already alluded to dated July 14, 1887, so near the date of the Will, it is as marked a fact as in all the others which I have examined.

"The letter 'd': It will be seen that there exists a marked distinction between the genuine and the disputed 'd's' which can be seen without magnification. I have, however, taken a number of them from various parts of the original Will as well as from some six genuine documents, and have brought

them together in an enlarged form on Tables 2, 3, 4, in order that they might be seen together, and thus be in a proper position to be fairly compared with each other. There are some one hundred and thirty of these letters (d) in the disputed Will, all without exception made after one type with scarcely any marked variation. All of them terminate in a thickened end which only varies from a distinct rounded and blunted form to one somewhat more elongated and pointed. The letters are remarkably alike in size with two or three exceptions, and the length and thickness of both the upper and lower curves or hooks are remarkably uniform. I have copied on the Tables twenty-six (26) of these letters from the Will, and fifty-four (54) from genuine letters; these last have been taken from six different documents so as to get at the average facts in this respect.

“It will be seen how widely they differ in almost every respect from these same letters in the Will.

“They vary very much in actual thickness and length of line constituting the inkstroke, this last being more than twice the length in some cases than in others, on the same document—e. g., figures 10–11, Table 2, and figures 13–14 on Table 4. The final ends of the genuine letters terminate in various directions, in contradistinction to the disputed ones, which always look downward. In some cases in the genuine letters, the terminal end forms almost a right angle with the ascending stroke; in others this part of the letter turns directly upon itself and crosses the ascending stroke. Further, with the exception of a few instances, the genuine letter tapers into an elongated point at the terminal end. On Table 3, figure 14, is a marked exception to this, and also figure 21, Table 4. It would almost seem that this letter in the Will might have been copied from some genuine letter like one of these. What is very strange about the whole matter and what of itself alone separates the Will from the genuine documents is the striking uniformity of these letters in the Will, one hundred and thirty in number (130) compared with the great variety in this respect in the genuine letters. There are twenty-two (22) of these letters (d) in the document marked ‘E. S. 1,’ letter to Miss Harris dated July 14, 1887, which

I have alluded to before. This letter, it will be remembered, was written two months and six days previous to the date of the Will. Every one of the twenty-two 'd's' in this are made after the forms of those seen on Table 4, second line.

"It certainly seems to me preposterous to claim that a party could (not to say would) so entirely change their handwriting in so short a space of time as is here seen to exist between the letter *d* in the Will and the same letter as seen in the genuine document.

"And the same idea may of course be repeated in regard to this letter as seen in the other ten documents (genuine) which I have used as standards in this examination.

"The second line of those letters on Table 4 was written within two months and six days of the alleged time of writing the Will, and here without any conceivable motive or reason, is seen an entire change in the formation of this letter.

"And here, too, is seen an entire change of the habit of a lifetime as we may suppose, exhibited in the (documents) letters I have copied from, covering some four years of time. Such an immediate change of habit in this respect I think may be set down at once as being almost, if not quite, impossible. And then again, what could be the motive of such change on the part of one writing an honest paper? We could easily see why this uniformity of style in this letter, as well as of others in this document, might be adopted by an imitator, as it would not be difficult for an expert to copy and follow a single form so as perhaps to defy detection, but to follow the great variety of forms of the various letters seen in the genuine documents so as to prevent discovery would seem to be impossible.

"It should be remembered that in all cases of this kind, where an attempt has been made to imitate another's handwriting that there is likely to be more or less likeness of some of the letter forms, as in this single letter and in the signature in this case, whose only radical difference would seem to be in the connection of the first 'i' with the 'g.'

"TABLE 5. THE LETTER 'II.'—There are some over one hundred of these letters in the Will, all made with an open or closed loop, with the exception of one or two; the only

clearly seen example, analogous to most of the genuine letters of this sort, I have copied from a section of the Will, marked 'Sixthly.' It is shown enlarged at figure 7, Table 5. There are thirty-four of these letters in the document before alluded to as having been written within two months and six days of the date of the Will; and here, too, is seen the strange discrepancy of an entire departure from a lifetime habit in the formation of a single letter.

"There seems to be no possible reason for this being done, even if it could be done. As the work of an imitator, as I have said before, it seems reasonable enough that one form of letter should be used on account of its being much easier to copy one form than a variety of forms, such as are seen in the genuine documents.

"The looped forms of the shaft of the 'h' occur much less frequently in the genuine documents, it will be noticed, than the other forms; still this form has been chosen for some occult reason as the one for imitation.

"There is another curious and significant fact in this connection. It is the habit of this writer, as seen in the genuine documents, frequently to connect this letter with either the preceding or succeeding letter, or both, in words in which it forms a part. Thus, in document marked 'E. S. 1,' there are some thirty-four of these letters (h), twenty or more of which are so connected with other letters. In the document marked 'E. S. 2' there are some fifty-five *h*'s, forty-five of which are joined with one or two letters each. 'E. S. 3' has seventy-five of these letters, sixty-five of which at least are joined to other letters. In looking over the Will, it will be seen that not one in ten of the *h*'s are joined to other letters.

"Here is a very essential and important difference which separates the Will very far from the genuine document. This habit of joining or not joining letters in the making of written words is an unconscious habit, and, as we see, exists in all the genuine documents in the case and would certainly be found to exist to some analogous extent in the Will, if it had any claim to be recognized as a genuine document. Here again comes in the pertinent question: Why did the writer of the Will, provided we admit that he could have done so, change his usual habit in the production of this document?

"Certainly the difference between the letters from the two sources, which I have figured and described, and which constitutes them two styles of writing, does exist, and it seems as positively certain that they must be the work of two different persons.

"TABLE 6. On this table I figure thirty-eight specimens of the letter *l*, twelve from the Will and sixteen from genuine documents. I have counted one hundred of these letters in the Will, nearly or quite all made as shown with the looped shaft and with, in most cases, a slightly hooked base. In the genuine documents, there are three distinct varieties of the letter with open and closed loops, and with a single downstroke starting from the tip of an upstroke and thickening somewhat as it proceeds to the line. In the document E. S. 1, written as we have before noticed, within some two months of the date of the Will, there is not a single open-looped letter, and in all the eleven genuine documents on which this examination is based, we find these three forms of this letter in contradistinction to the single form seen in the Will, and here again we find two distinct styles of writing as far as this single letter goes, claimed to be written by one and the same hand. Perhaps this looped form of this letter was chosen as the one for imitation in the case on account of the analogy between it and the other looped forms—e. g., the 'b' and the 'h' and the top of the 'f,' all of which are fashioned on a similar form. This certainly simplifies the matter, and renders it much easier to repeat these few forms than the variety which are found in the genuine documents.

"TABLE 7. On this Table I have figured a number of these letters (*l*) from the two sources; the first line from the Will, the other two lines from genuine documents. I have counted over two hundred of these letters in the Will, and it will be seen by the example on the Table how uniform they appear, and how they compare in this respect with those from the genuine documents.

"Then, again, these letters in the Will are rarely connected at all with the other letters near them, and never, as in the case in the genuine, with the terminal upstroke being carried up to the top of the following letter, as the 'h,' for instance.

Here is a radical difference, which of itself alone separates this letter in the genuine documents from those in the Will.

“Next come TABLES 8, 9, 10, which are made up of the magnified forms of the dots over and after letters and words; those on Tables 8 and 9 are magnified fourteen diameters—that is, one hundred and ninety-six areas or times—while those on Table 8 are magnified twenty diameters—forty areas or times.

“On Table 8 there are twelve forms—the first two lines from the Will; the lower two lines show twenty-three magnified forms from two genuine documents; the first being the letter to Miss Harris (E. S. 1), dated July 14, 1887, within two months and six days of the date of the Will; the other, the lower line being from a genuine letter dated July 8, 1885 (marked E. S. 3).

“Table 9 contains four rows of these magnified dots from the two sources; the first, the Will, the second, third and fourth from genuine letters of Luigi Dama, the decedent in the case. There are twelve of these dots in the first line of the Will and forty-seven (47) from six genuine documents.

“Table 10 contains twenty-two of these enlarged dots from the Will (lines 1 and 3), while lines 2 and 4 contain twenty-eight of these magnified dots from two genuine letters.

“There is perhaps no evidence so certain, so positive, in connection with this line of investigation as is furnished by the comparison of these characters. In the first place, they are the results of absolutely unconscious habits of manipulation so far as their form is concerned. No one is ever taught to observe any form in making these dots, when being first initiated into the practice of shaping written letters, and they are of so small size in most cases as to render the fact of form inappreciable to the eye, and further, this fact of form is of no sort of consequence as regards the accuracy of the writing, or the construction or meaning of the sentences.

“The location of stops or marks (as all know) is of vital importance in the construction and meaning of sentences, but the fact of size has no relation whatever to such question.

“There are 158 of these enlarged dots shown on the three Tables 8, 9, 10; 60 from the Will, 98 from ten genuine docu-

ments, consisting of ten letters written by the alleged author of said Will. These dots (as is recorded on the diagram) have been taken with no idea of selection from various parts of the genuine documents. Upon comparing the two sets of forms, it will be seen at once, I think, that under the conditions of their formations they could not have been the work of one and the same hand. The genuine forms cover over a space of a number of years as the constant practice and habit of the writer. Any single group would be recognized at once as coming from the same source as all the rest. Thus, those on Table 8, line 3, from the letter of July 14, 1887, were certainly made by the same hand as the one that made those on line 4 on the same table, from the letter to another party, dated July 8, 1885. And so of those on Table 9 from six different genuine documents, there could be no question but that they are all from one and the same source. The same fact of individual likeness is seen in those copied from the Will, which as surely connects them with each other as the work of one and the same person, and as clearly and positively separates them from the author or writer of those from the genuine documents.

“The form and position of the genuine dots are curiously various; elongated, shortened almost to a point, sometimes quite straight, then again turned in opposite directions—pitched both to the right and left, sometimes horizontal, sometimes bent in a semi-lunar form, and in two or three instances they seem to have been made by a mere dot of the pen. It would seem impossible to get up a much greater variety of these forms, were one to do so, and were they to be made large enough so that one could see his work during its performance, as is the case in the diagrams.

“Upon comparing these forms from the Will, we shall see these last (from the Will) were all made with a single simple motion of the hand, involving but little muscular action, while in the genuine quite a variety of motions of the hand and of the fingers also must have been employed in the construction of these curiously varied forms.

“It will be seen that I have based this investigation mainly upon a few of the letters and the dots constituting the docu-

ments. This has been from the fact that the comparison of these forms so fully, so clearly, establish the fact that the Will and the genuine writings of the alleged writer of the Will were by two distinct parties, and consequently the said Will is a forgery, that further illustration would add nothing to such proof.

“As regards the general appearance of the document, the Will, I may say that is much more evenly written as a whole (like the letters I have) enlarged than the genuine documents. These last have a scratchy appearance, as compared with the Will. There are a great many more ascending hair lines, such as those joining the ‘h’ with the preceding letter in the words ‘the,’ ‘that,’ etc., which tends, with other causes, to produce this effect. The words, too, are much more broken into syllables and single letters in the Will than is the case in the genuine documents. In the first fifty words in (apen. 2) from the Will, there are 160 of these breaks consisting of syllables and single letters in the Will than is the case in E. S. 3, July 8, 1885, there are eighty-three (83) in fifty words. In section ‘Sixthly’ of the Will, beginning at line 4, the first fifty words show (150) breaks, while the second fifty words in E. S. 1 show (85). The second 50 words after the above of section Sixthly of the Will contains 190 breaks, in E. S. 6 the genuine letters the first fifty words show 90 of these breaks. Here, too, is a curious and, as I think, an important distinction between the documents, showing very clearly that they could not be the production of one and the same hand. I have made these counts as carefully as possible, so they may be relied on as practically correct.

“In looking back over the whole ground, I think I am warranted in coming to the conclusion that, as a scientific fact it is clearly proven from the data presented that the alleged Will of Luigi Dama is not in his handwriting, as therein claimed, and is, therefore, a forged document.

“All the materials I have collected and which I show on my diagrams can be seen by the unaided eye, and as I have referred to each one in its order, so that the Tables may be used as indexes to find the letters, a comparison can at once be made, so as to test the fairness of my work. The points which I have made, all of which may be seen by the unaided eye, are

as follows: 1st, the signature to the Will, the first 'i' joined to the following 'g,' which is never the fact in the genuine signatures.

"2d. The (d) Tables 2, 3, 4, in the Will terminal, and always, thickened and more or less blunted, and pretty uniform in length and direction. Genuine rarely blunt in the terminal ends, or if so, continuously so, on account of the general thickening of the line of the whole letter, terminal end often very much elongated, varying greatly in direction.

"3rd. Table 5, the letter 'h' very uniform in size in the Will and in almost every case made with a looped top, mostly open, sometimes closed.

"The genuine 'h' has rarely a looped top and is quite variable in form, which is mostly in marked contrast with those on the Will.

"In clause 'Sixthly' of the Will, beginning at the fourth line to the next clause 'Seventhly' there are twenty lines containing thirty-three of these letters (h), three of which only are connected with other letters in words which go to make up the document. In E. S. 1, letter of July 14, 1887, written, as will be remembered, within two months and six days of the date of the Will, there are 21 lines, showing 36 letters (h); of these 25 are united with other letters, while eleven stand alone, not being joined with their fellows.

"This joining or non-joining of certain letters in written words must be an unconscious habit on the part of the writer; how then shall we account for the entire change of habit on the part of this writer, and in so short a time too, provided for one moment we admit the claim of the genuineness of the Will. In the genuine, two-thirds of the h's are joined with other letters; in the other, the Will, only one-tenth are so joined.

"The claimants as to the validity of the Will are certainly bound to account for this strange and sudden discrepancy, between the genuine documents and the Will in this respect.

"4th. TABLE 6. The letter (**l**) here almost every one of these letters which occur in the Will are looped,

while in the genuine but a small percentage are looped letters, thus separating the two documents a wide distance from each other. The claim for the genuineness of the Will becomes still more absurd when we remember that such a marked change of habit in respect to the formation of these letters, must have taken place in so short a space of time.

“5th. The letter ‘t’; the principal and marked difference in these letters as they exist in the Will and the genuine documents, consists in this connection with other letters in the words which go to make up the said documents. In the Will, taking the 20 lines following ‘Sixthly’ from the 4th line, I find 45 of these letters (t) eight (8) only connected with other letters, while in the letter of July 14, 1887, there are 49 of these letters, forty of which are connected with their neighbors. Here, too, as we see, the same fact is confirmed of an entire change of habit in the short time of two months, provided we claim that the two kinds of documents were written by one and the same person.

“6th. The dots over and after letters.

“Tables 8, 9, 10. These are fully gone over elsewhere.

“In view of the great and marked distinction between those on the genuine documents and those on the disputed (the Will), and the fact that first these must have been habitual with the writer; that he could not have thought of their forms at all, and the fact that these on the Will are so entirely different in every respect, it seems to me from this evidence alone, we should be warranted in coming to the conclusion that the two kinds of papers were, without question, the work of two distinct individuals.” (The foregoing résumé is indorsed “Brief R. U. Piper.”)

### Dr. Piper’s “Method.”

Dr. Piper testified that he took the enlargements on his tables with the *camera lucida*, and afterward filled in with ink; he explained his method of producing the illustrations upon his tablets; he had taken, as already stated, certain letters or characters from the photograph of the alleged Will and examined and enlarged them on these tables; a dash or dashes may or may not be characteristics in writing and also the

formation of the numerals; one cannot tell by the appearance of writing whether it was written fast or slow; the doctor explained his mode of examining the paper, Respondent's Exhibit No. 3, the "Altered Will," of November 1, 1885, and stated his conclusion that the document was false and fraudulent; he had used the microscope to make his examinations; he had examined also the Respondent's Exhibit No. 31, the "Draft of Long Memorandum" and pronounced it *not* false; he had not examined the paper marked Respondent's Exhibit No. 2; the Respondent's Exhibit 31, "Draft of Long Memorandum," he pronounced *true* and *genuine*; *he had examined it with a microscope*; he examined Respondent's Exhibit No. 3, "Altered Will," and Respondent's Exhibit No. 31, "Draft of Long Memorandum," with a microscope and compared them with certain tables prepared by him of illustrations from other writings offered to him as examples of genuine writing; a single individual writing sometimes shows as well as twenty; he had no question but that the two papers, the Alleged Will of May 8, 1887, and the "Short Memorandum" were forgeries; to him they had enforced a demonstration. No testimony could be more positive and precise than that of Dr. R. U. Piper, expert witness for the contestant.

### Experts of a Contrary Opinion.

Experts cannot err. In matters of science and art they are infallible, in their own opinion. But opinions differ.

GUMPEL—HICKOX—HOPKINS—HORTON—HYDE.

Numbers do not necessarily count in the case of expert witnesses, any more than in other cases. We are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in our mind, against a less number or against a presumption or other evidence satisfying our mind: Code Civ. Proc., sec. 2061, subd. 2.

It is *quality* rather than *quantity* that the law regards; so that the mere fact that numerically the force of sheer experts is stronger on one side than the other in this case is not a

matter of moment in itself. We shall try to determine the effect of this evidence by its aggregate value on either side by weight and not by number.

GUMPEL.

A lithographer, forty-five years old, who has made a special study of handwriting for many years, a frequent witness as expert in court trials; he had first examined some of the papers in this case at request of one of the counsel for the contestant; he had conversations with him in German about the case and Gumpel told the counsel that he did not like the appearance of one of the papers—the alleged Will—the writing looked “too stiff”; Gumpel had also examined a number of other papers at the request of the attorneys for Respondent; they are all Respondent’s exhibits, except one, which is marked Contestant’s Exhibit H—60. Upon being shown the alleged Will, the “Short Memorandum,” the “Long Memorandum,” the “Altered Will,” the Respondent’s Exhibit 29, a large white envelope, and Respondent’s Exhibit 28, a large yellow envelope, the witness Gumpel pronounced them, in his opinion, in the handwriting of Dama; the four disputed papers first specified (Alleged Will, “Short Memorandum,” “Long Memorandum,” “Altered Will”) are written slowly and distinctly in every letter; Gumpel found that every characteristic in all the letters of the alphabet in the genuine writings are preserved and repeated in the disputed documents, same misspellings and use of apostrophe, and other coincidences, and Gumpel gave upon the blackboard a series of illustrations expository of his opinion and reproduced some of them in fac-simile on page 162 of the judge’s manuscript notes of testimony (Thursday, April 30, 1891, 12 meridian). Gumpel says that an imitated script will always betray a stereotyped form, reproducing habits in the same style, whereas a genuine composition will vary in style of formation of characters. (See judge’s manuscript notes of testimony, pages 161–163, 176.)

## HICKOX.

George C. Hickox has given special study to handwriting for over thirty years with a view to testing genuineness; has testified hundred of times in all the courts; examined some of the papers here in dispute, first at the instance of counsel for contestants and afterward upon request of Mr. J. P. Smith (husband of executrix) and of Mr. Samuel M. Wilson, the lawyer, and after having made that examination he came to the conclusion that the alleged Will (except the signatures of subscribing witnesses) was written entirely by Luigi Dama and he said the same of Respondent's Exhibit No. 1, the "Short Memorandum"; Exhibit 2, "Long Memorandum"; Exhibit 3, "Altered Will"; Exhibit 4, "First and Second Draft Will"; and Exhibits 28 and 29, large envelopes. Expert Hickox gave reasons illustrated on the blackboard in detail for his opinion as to the genuineness of the papers in dispute. He also, with the aid of the microscope, examined the signature "Bellini Antonio" on the alleged Will to discover whether it was written over or under the final stroke of the name "Henri Godard," and Hickox declared that the result of the microscopical examination showed that "Bellini" was written over the stroke, and he produced on page 156 of the judge's manuscript notes an example of the manner in which this was done. Upon this point Professor Young had expressed a contrary opinion; that the downstroke in the flourish to the signature "Henri Godard" had the appearance of being written over the name "Bellini"; the professor was not positive; but he could and did give reasons for this opinion; the peculiar way in which the person wrote who signed the name "Bellini" showed this; Professor Young made some experiments with the purpose of testing this and proved his premises by deductive demonstration; see page 34, judge's manuscript notes of testimony. Counsel Kelly in discussing this feature of the evidence said that no one after considering the testimony of Professor Young could question his ability as an expert in chirography and a professional

penman; the professor showed in the presence of the court his capacity not only to judge scientifically of the authenticity of autography, but to imitate and produce simulations with rare rapidity; the counsel thought the professor's opinion was entitled to a great weight as a whole, and that in the details of his evidence he had given unanswerable reasons for his conclusion and had shown that the name of "Henri Godard" as a witness to the alleged Will *must* have been written after the name "Bellini Antonio"; and Counsel Kelly showed himself to be possessed of talent as an expert by personally elucidating and illustrating this theory on the blackboard. (See judge's manuscript notes, page 200.)

#### HORTON.

Peter Davis Horton, a teacher of writing, sixty-four years of age, for over forty years almost continuously engaged in the profession of penmanship; often employed as expert in court; had a system of his own, "Horton's Pen Guides"; had some original methods and an adaptation of the Spencerian system; had examined the papers submitted to him—a series of the Respondent's Exhibits—and he pronounced them genuine, that is, all written by the same hand; he had examined the papers assumed to be authentic and had used photographs of the alleged Will, the "Altered Will," the "Long Memorandum," the "Short Memorandum," the "Long Draft" and the "Short Draft" and the copy of Mrs. Dama's Will, and the E. S. series of papers and he had made comparisons, the results of which he set forth with great minuteness and literal detail. Horton had discovered a cause which was satisfactory to him why there were more loops in some of the writings than in others: One of the papers is the "Short Memorandum," Respondent's Exhibit No. 1 (characterized by counsel for contestants in his argument as "the most vicious forgery of them all"). Witness Horton illustrated on the blackboard the process and result of his discovery. In the alleged Will a finer pen was used than in many of the undisputed writ-

ings; had Dama used a coarser pen fewer loops would have occurred; "it is the simplest thing in the world, just an accident," said expert witness Horton; he discovered also in that most difficult thing to make, the rubric under Dama's name, a striking similarity in the shades and in the movement, the hardest thing for a forger to handle; in comparing the general styles of the two sets of writing Horton found that the correlations fit together like that of the warp and woof in a piece of cloth; the witness Horton went through all the letters of the alphabet as they appear in different documents, pointing out resemblances between the characters in the disputed papers and those assumed to be authentic; in his opinion the writing on the large yellow envelope was genuine. Expert Horton furnished to the court a table of references to similarities between disputed and admitted writings, which is somewhat in the nature of a brief in support of his theory.

#### HOPKINS.

R. C. Hopkins, aged seventy-five years, a resident of San Francisco for forty-one years, formerly employed in the United States surveyor general's office as keeper of the Spanish archives; had been employed to examine papers in the archives for the purpose of giving testimony concerning land grants, was so employed from 1855 to 1879, in which latter year he was sent as special agent of the Treasury to Mexico to examine papers with reference to land grants in the territory of Arizona, and afterward was engaged in the office of the surveyor general of Arizona until 1885, then came back to San Francisco and was about a year more in the United States land office in San Francisco; testified often in the United States district court as to handwriting and had also testified in this probate department before the present judge in a contest over an alleged forged Will; the expert Hopkins was first spoken to about this case by Mr. Samuel M. Wilson, the attorney, in 1889, and made some examination of photographic copies of papers shown him by Mr. Wilson at that time; since then within a few months before date of testify-

ing (Monday, April 13, 1891), he had examined the alleged Will and the "Short Memorandum," the "Long Memorandum," and formed an opinion that they were genuine writings of the deceased Dama. Expert Hopkins gave, among other reasons for his opinion, the disconnection or want of connection of certain letters; the connection of certain letters; it appeared to Hopkins that Dama had a prevailing habit of connecting certain letters such as "a m" in "Dama," "same," "testament," and "diam ond"; in "testament" it is unconnected in several instances, but Hopkins alluded to the prevailing habit; of course there were exceptions; in every example of his name this expert witness found the letters "a m" connected "D am a"; the same persistency of habit appears in the letters "an," "em," "en"; another characteristic was the spelling of certain words, for example, the word "influence" is spelled "influece," omitting the second "n"; also similarity of language in the disputed and undisputed documents, and there were other examples of persistent peculiarities of habits. In his cross-examination the witness Hopkins said that he did not exactly comprehend what an "expert" is; he did not profess to be infallible as an expert nor did he see how there could be anything akin to infallibility outside of the exact sciences; "in handwriting there can be no such thing as exactitude or demonstration"; he was the same person who examined the so-called "Markham letter" and pronounced it genuine and he had heard that expert Hyde (one of the counsel in this case) and expert Hickox expressed a contrary opinion, but expert Hopkins said and continued to believe that the "Markham letter" was an authentic emanation, he had examined what purported to be an original paper written in pencil and he understood that experts Hyde and Hickox examined a photographic copy of that letter. Mr. Samuel M. Wilson, whom witness Hopkins had known for forty years, and for whom he entertained regard as a man of high principle and honor, asked him to examine these papers, and he did so without prepossession and with a view solely to discover the truth; the witness said that

his respect for Mr. Wilson's character might have exerted a moral influence, but certainly had he found the fact of forgery Hopkins would have so declared without hesitation; he was concerned in ascertaining the bona fides of the documents and learning the truth; Dama's hand would not be a hard one to simulate; the handwriting of the alleged Will was written with the care befitting the solemnity of the occasion; it was evidently copied from some document of similar import and done with deliberation and less freedom of movement than his ordinary writing. Witness being shown the Respondent's Exhibit No. 3, the "Altered Will," said that from the apparent care with which it was written he should say it was originally written as a Will; each letter is distinctly and carefully made. (See page 141, judge's manuscript notes of evidence.)

#### HYDE.

While Mr. Henry C. Hyde appears in this case as counsel, his argument is of such a character that I feel justified in treating it in the category of expert testimony, for such it is essentially, relieved of the constraint of cross-examination and free from the burden of an oath. Mr. Hyde has made a specialty of the study of handwriting for thirty years or more, and had used the microscope in his examination of manuscripts for above twenty years, and had frequently been called upon to employ and exhibit his talents in court in judicial inquiries in controversies over disputed writings, and had been so engaged in noted cases in probate. Mr. Hyde in his expository statement undertook to confine himself entirely to the facts connected with the charge of forgery and to the scientific proofs demonstrated; he assumed to elucidate the elementary principles that underlie proof of handwriting, and said that the handwriting of a man is as distinctive as any other phase of personality or individual character; the qualities and habits of writers are as various and distinct as the writers themselves; there are definite limits and possibilities to the capacity of a forger and the difficulty of the task of a

forger is the reason why so few forgers have been successful; the forger only sees effects to imitate, but he does not see how those effects are produced; it has been argued that if a small number of characteristics can be simulated an indefinite number may be imitated, provided time be given—the answer to this is, that the smaller the number of items to be imitated the easier the task of the forger and the more difficult detection; in the case at bar, Mr. Hyde asked, what was the necessity of simulating and manufacturing so many documents as are in dispute? Why should the forger act so recklessly? He must have had a sublime confidence in his own ability to fabricate and to deceive by his fabrication. It is difficult to imagine the magnitude of the task set to himself by the forger of this alleged forged Will; it must have involved his perfect transformation into Dama himself; he must not only have acquired his habits of hand but have become possessed of l's spirit; it would have been impossible for a forger to have accomplished all these forgeries unless he were in the possession of facts and gifted with powers not given to any other man than Dama himself; no other man could possibly have executed all these manuscripts in dispute; the difficulties in the path of the alleged forger rendered his success practically impossible; the excess of loops in the Will may be accounted for by the manifest desire of Dama to make every letter perfect and distinct—this is plain from an inspection of that instrument, and the expert counsel undertook to show the proportion of loops, blind loops, and mended loops in the various documents under examination. The expert, Doctor Piper, had set great store by the dots over the letter “i,” which, in his opinion, were enough to amount to a mathematical demonstration that the Will was a forgery, and expert Counsel Hyde engaged in an analysis of the exhibits of undisputed papers to offset and overthrow the opinion of Dr. Piper; upon an examination of the Exhibits E. S. 2, 8, 6, 5, 7, 9, respectively designated in evidence as Contestant's Exhibit C—3, letter signed “Luigi” and addressed to “My Dear Jennie,” dated “San Francisco,

March 28/86"; Contestant's Exhibit I—9, letter signed "Luigi," beginning "Brot Benj," dated "San Francisco, Decr. 25/86"; Contestant's Exhibit F—6, signed "Luigi," beginning "My Dear Sister Jennie" and dated "San Francisco, Decr. 9/83"; Contestant's Exhibit E—5, letter signed "Luigi Dama," beginning "Bro Ben," dated "San Francisco, Octr. 6th, /85"; Contestant's Exhibit H—8, letter signed "Luigi Dama," beginning "Capt. E. W. Randall, Dear Sir," dated "San Francisco, Feby. 24/84"; Contestant's Exhibit J—10, letter signed "Luigi Dama," beginning "Dear Brother" and dated "San Francisco, Decr. 15/84"; it appears that in very few of these sample letters are there not dots over the "i," angular or rounded mixed, that is to say, examples of each kind of dot; expert Counsel Hyde thought that it looked as if expert Doctor Piper had purposely selected his standards to support his theory. Expert Counsel Hyde claims to have shown that there are rounded "i" dots and angular "i" dots scattered promiscuously in the documents disputed and undisputed; in the word "buried," in line 10 of the alleged Will, there is a light dot over the "i," a light stroke or touch of the pen, and there is a prevalence in Dama's writings to this form of dot, and the conical dot, or the dot with the point sharp downward, is often met with; there are in the alleged Will numerous examples corresponding to the "i" dots in the undisputed papers. Another point adverted to by the expert Doctor Piper and illustrated on his Tables is as to the form of the small "a." Expert Counsel Hyde says that there are certainly differences between the forms of the "a" small letter, but they are all made on the same principle, they are all begun with the curl on the inside, "a" see


Respdts. Ex. 123, these are counterparts in all respects of the "a" in Dr. Piper's Tables and absolutely negative his deductions, "a" "a" "a", these are shown in the Altered Will, a paper drawn with more care even than the Will itself, they are characteristic of Dama's writing in his more slowly and carefully composed papers, such as the superscriptions on envelopes and the Will and Altered Will: As to the joinder and disjoinder of the "t" with other letters in words: The very motive of the writer of the Will, that is, the precise formation of the letters, will account for the

disjunction: The capital "S"

 in the Randall Will, Contestant's Exhibit M-13, and in

the alleged Will; the "S" on line 54 of the alleged Will is the only example of that form in the Will

and that is the prevailing form of Dama's "S", and it is curious, if Dama were not the writer of this Will, that there should be a variation throughout from the common form of this letter, and that it should be used in one place only: In the "Short Memorandum" there is another and very peculiar form of the capital

letter "S", "S", "S", 

see the Buhne letter, Respondent's Exhibit 89, the envelope addressed "Mrs. J. P. Smith," Respondent's Exhibit 97 and 98: The variations or discrepancies which expert Doctor Piper adduced as proofs of the falsity of the Will do not exist: It was a remarkable habit of Dama to repeat similar forms in a single writing; this is shown in the "Randall" Will, which is certainly a document that cannot be and is not disputed: It was manifestly his object to make his Will with the utmost care: In writing his more careful compositions his habit of disjoining letters is apparent;

this is shown in the Will and the Altered Will, in the Randall Will, in his superscriptions on envelopes and endorsements on documents; it should seem that this feature of disjoined letters which is relied upon by expert Doctor Piper as a proof of forgery is evidence to the contrary: Professor Young's accounting for the apparent lapsing of the writer of the Will in line 72 is very ingenious, that the forger had by this time become so practiced in imitating Dama's hand as to become less careful, but expert counsel Hyde argued the contrary that the writer having become fatigued from the exercise of unusual care relaxed the rigidity of writing and resumed his normal habit, wrote in his usual style: Every capital letter in the alleged Will has its exemplar in the undisputed documents and letters: Counsel illustrated his argument on blackboard: Five

forms of the letter *A A A A a*, the last

enlarged small *a*: *B*, found in the Will, *B B* in

Randall Will, *B* in the letter addressed, "Miss *B*

Harris;" E. S. 3, presents a sample in "Dear *B*rother

*B*en," the "*B*" in "*B*en;" another form with

one stroke: "*B*:" There are two forms "*C*" "*C*,"

see the "*C*" in "California," third line of Will and

compare with the "*C*" in "Chase" in Respondent's

Exhibit 73: The other form of his capital *C C C*, only one example in the Will, but many in the standards:

The forms of capital *D D D*: The prevailing form is

found in the "Long Memorandum." The letter *E E*, first form found in lines 12 and 71 of the Will and 18 or

20 found in standards *E*: other form six times in the

Will: *E E E E* In the will there is but one form

of the letter *J* and in Respondents Exhibit 27, *J*; this is used in other parts of his writing as a part of his capital

*K M*; his usual form was *J* as found in the "Long Memorandum."

There is but one example of *G* in the Will, in line 31, in word "Government," its exemplars are to be found in Respondent's Exhibit 23, the "Blue Will,"

twelfth line, *G* in "Gas;" and in Respondent's Exhibit 34, in the address "*G* ibbons;" the other form of

the *G* "*G*" in "*G* as Stock" is found in the Randall Will, i. e., Contestant's Exhibit M—13, one example in Will, three in standards, the second is the more com-

mon form, *G*, in shape of letter *E*: The capital

letter *Jb*, he makes the *J* and then he proceeds to

add to it the common form of small "*b*," thus

"*Jb*;" "*Jb*," in Randall Will, line 58, and 30.

and 8, are congeners of the second form of the

*Jb Jb Jb*: The capital *J* has three prevailing forms, compare line 40 of the Will and E. S. 1, the

Belle Harris letter, "*J*," "*J*," "*J*;" the

next form *J J J* is found in line 9 of Will and

in line 8 of E. S. 7, "*J*" "*J*" and in E. S. line 15,

E. S. 3, " *J* " In line 61 of Randall Will and in line 47 of alleged Will compare the *JJ*; this is important in connection with other matters,—if isolated

it might not have so much force—the " *J* " in Respondent's Exhibit No. 89, note the thickened termination with a slight suggestion of a tick to the right;

" *J* : " There are two forms of the capital letter " *J* , " but they are so alike to the letter " *J* " in principle that he gave no illustration. The capital

" *K* " in Randall Will is not characteristic of Dama; his ordinary form of capital " *K* " was a small *k* enlarged, thus " *k* " " *k* " compare *K* in " *K* " Randall Will and same letter in same word

in alleged Will: Now we come to " *L* " (Expert Counsel Hyde continued illustrations on blackboard:) Proceeding with the capital letters, expert Counsel Hyde put upon the blackboard three forms of the letter

*L L L*, the first form is in line 2 and 60 of Will and 3 and 12 of Short Memorandum, the second form is found but once in Will in line 57; the third form is found only in signature; the last form is the prevalent one in Dama's usual writing, there are found no less than 18 examples of it in the standards:

Next the capital *M* —

*M M M M M* : there are five different varieties of this letter, it would be of no consequence to separate them, if they were not common to all his

writings,—a typical example of the first form is line

27 of Will, “ *Mass* ;” in the groupings of expert Counsel Hyde it has been sometimes difficult to separate the first and second forms, examples of the second are in

line 11 and 36 of Will, “ *Maine*” and “ *Mrs.*” see standards Respondent’s Exhibit 73, envelope address,

“ *Martha*,” and Contestant’s Exhibit L—12, line 36,

“ *Me?* ;” third form in line 50 of Will and in envelope to E. S. 6,—in envelope on Randall Will in word

“ *Monmouth*,” only no hook at end, and in E. S. 6, address, “ *My dear Sister Jennie* ;” there is very little

difference between the fourth and fifth forms: on Photo Plate 23 are very good representations of the different forms and their analogies: As to the N, expert counsel Hyde made no table, finding but one form throughout, it

is made with but one stroke of the pen: The letter *O*

is a very characteristic letter of Dama: *O O O O*: in the Will; two noticeable examples in standards, one in

the Buhne letter, Exhibit 89, in the word “ *O’Clock*”

and in Contestant’s Exhibit D—14 in word “ *Omaha* ;” Photograph Plate No. 24 contains good analogies: The

capital *P P P P P*: there are some modifications to the terminal loop; another form is one stroke

*P*, not found in the Will but in the standard: a remarkable uniformity in Dama’s writing is in the terminations:

see Photograph Plate 25; see the words

"*Private Paper*" , line 7 Short Memorā-

dum: The capital *R* cannot be better illustrated than by reference to expert Gumpel's Tables, photographed from blackboard; the remarkable feature is that they

begin from bottom like the *P* and then go on like the

*B*; note line 58 of the Will and in one of the envelopes addressed to Benjamin Randall in Randall deposition:

"*RR*" in line 58 of the Will: The capital letter

*S* has three forms in Dama's writings: *SSP*: there are 23 examples of the first form in Will; but that is not the prevailing form in his usual writings: expert counsel Hyde says he has referred to but six

"*S*" in the standards; the second sample *S* is the prevailing form, forty-eight instances counsel has taken from standards: In Respondent's Exhibit No. 73, are found both the first and second forms; three times in envelope, is the first form, and the second form occurs twice in the letter; the reason is manifest, writing in his customary manner with ordinary rapidity and fluency he

used the second form: As to the letter "*z*," *I*, there is but one general form, the European script

*z z*: Photo Plate No. 28 contains a series of parallel examples; closer resemblances it would be difficult to conceive of, allowing for slowness of writing and use of

pen: *z z z z z z z* Coming down

to the capital *W*, omitting U and V,—there are five

forms found in Will: *W W W W W*: the same series of variations is found in the standards; it is inconceivable that a forger could have discovered these slight variations and reproduced them in the indiscriminate manner found in the Will: E. S. 11, line 36, the

*W* in the word "*W*aterhouse" corresponds to fourth form; there is but one example of the fifth form in the

Will, line 69, "*W*" in "*W*atch:" Observe Photograph Plate No. 29 for remarkable resemblances as to general form and character; grouped because of resemblance:

The letter Y is found in two instances only in Will: *Y*, almost like print, the second more like writing, *Y*, line

86; compare second form with *Y* in *Y*ork in blue letter, Respondent's No. 25: E. S. 8, Contestant's Exhibit I—9, on lines 19 and 22 are examples not quite as good however as the other standard. The next point is the abbrevi-

ated character *Z*, thus: *Z Z Z Z* this is frequent in the standards, see line 9, E. S. 1; there are 15 in E. S. 6; in E. S. line 8, *Z*, E. S. 9, and in

E. S. 11, line 47, *Z* . In Respondent's Exhibit 43,

draft pencil letter, there is one, there seems to be no up-stroke, but that is of slight importance, the general resemblance being such as to preclude possibility of forgery: Now as to the small letters: Photograph Plate No. 21 exhibits a large variety, "*a*" "*a*," these are the same that are produced on the Piper Table 13, "*a*" "*a*" "*a*:" There are several forms of the terminal "*a*," the first example is in "*Californi a*,"

there is a slight tick to the left: "a," "a," "a," in the standards these characteristics are common,—in E. S. 10, alone. they are very numerous, "*Mia cara sorella Jemio*," all through this letter are found these examples,—this characteristic tick terminal appears in other letters, such as "b" in E. S. 1, and also in E. S. 11, and in the letter "v" we find a marked example in envelope to Randall letter in the word "Bosto<sup>v</sup>" see also Photograph Plate No. 42: there are also examples of the same kind in "t," and in the Long Draft see the terminal in "o" in "devise:" The small letter

"b" is written by Dama in three forms, thus: (the expert counsel illustrated on blackboard:) indeed there are four: *b b b b*: the Will, line 80, illustrates this: the same or a similar form is found in the Randall

Will, line 36, in word "*be*;" also "business" in line 48: Expert counsel Hyde has made complete tables of the small "d" "d" "d" "d" "d" "d" "d"

*d d d d d d d d*

In the Will on the third page on line 64, one sample of the first form, and on others, lines 72, 73, 74, 75, and 76, and in the standards the expert counsel enumerated in his Tables seventy-five examples, showing that it was

Dama's common and prevalent forms of his *d*, first

form as in "depth," "d<sup>e</sup>pth" on third page of Will; this is a very important point not touched by other experts: The expert counsel proceeded to illustrate the

different " *g* " forms, not touched by contestant's experts, because they were looking for differences and not for resemblances: Photo Plate 53 shows good examples of those found in Will and equally good examples from standards: the clubshaped form is seen in Photo. Plate

50: " *g* ;" Photo. Plate 49 shows the "shaded curl," as expert counsel Hyde called it: note the general construc-

tion of the word " *and* ," parallelisms such as never could have occurred in a simulated script; a coincidence marvelous to a degree: there is a demonstration that these words at least were written by the same hand; also see for the same purpose Photo. Plates 51 and 52: The expert counsel proceeded with the examples of the other

forms of " *g* ": The next is the letter " *f* ," counsel

having no table of that letter, used Photo. Plate No. 33; the forms are taken from the Long Memorandum and

from various standards; see " *f* " in "formation" in

Altered Will, line 82, and compare almost a counterpart

in E. S. 1, line 15, Belle Harris letter, word " *f* or;"

this is a resemblance impossible to be accidental: Now we turn to the small " *g* ,"—note the commencement

of the " *g* " in the signature to the Will, and compare

with the " *a* " in Dama in the second line of the "Blue Will," Respondent's Exhibit 23; the counsel says he does not claim exact similarity but there is resemblance:

The small letter " *h* ," the expert counsel presented

some peculiarities on the blackboard: " *h* " " *h* "

“*h*” “*h*” “*h*,”—see Photo. Plate 35,—there is an unusual form, loop in the main shaft, “*h*,” both in the disputed documents and in the standards: As to “*h*,” see Photograph Plate 38, simply a letter “*h*” with a third stroke to make the “*h*,” “*h*,” “*h*,” “*h*,” these identities are marked: The small “*l*” is of considerable importance: see Photo. Plate 39: expert counsel Hyde went over this plate pointing out important peculiarities: note the double “*ll*,” these are photographs of actual letters used in Piper Table 6: Photo. Plate 56 has some examples of “*ll*” in combination, and expert counsel Hyde asked the Court to compare “*all*” in line 70, of Will, and “*all*” in “*Randall*” in *Randall Will*; the resemblances in termination of the “*l*s” in double “*ll*” counterbalances the apparent discrepancies alluded to by other experts: Expert counsel Hyde said he would not spend much time on the small “*m*” because the experts Horton and Gumpel had so fully treated this letter: The letter “*n*” has some remarkable peculiarities, one feature is the wide separation between the first upstroke and the second: Passing the “*o*,” which Professor Horton dealt with, the Expert Counsel Hyde took up Photo. Plate 41, containing illustrations of the letter “*p*,” in “*p*” of “*development*” in line 75 of the Will is found Dama’s common form as may be seen on Photo. Plate 41. There is no significance in the “*g*,” and expert counsel Hyde passed it by and went to the small “*r*,” of which there are two forms: *r*, *r*; *r*, *r*; there are 46 open “*r*” forms in the Will against 65 closed “*r*”

forms ; approximately like ratios in all the writings ; the Photo. Plate 42 shows correspondences as to tops and also terminals, a very important point. The word

"Barker" in line 78 of the Will "*Barker*" and the mate to this in E. S. 11, line 10, in word "perfect," this is a point worthy of particular attention: A point which has escaped argumentative attention may be alluded to here, Respondent's Exhibit 24, line 14, "which he think benefit." The small letter "s" was

made in various forms: *s s ss es* ; but the prevailing form is not common to the Will, yet there are examples in the Altered Will, if there are any in the Will they are rare ; but in the undisputed papers they are frequent ; the ordinary form is occasionally found in the disputed documents ; it is found so often in Dama's admitted writings that it cannot be deemed to be a mere accident ; see "satisfied" and "expression" in Respondent's Exhibit 128, marked examples of the Will form, and the word "singers ;" in E. S. 6, line 19, "s" in "rooms" is a type of the Will ; in E. S. 2, line 10, "s" in "friends ;" Photo. Plate 43, figure 20, shows an "*ſ*" found in Will, compare Exhibit 89, line 13, same form, even to the small upper oval loop, "*ſ* ;" fig. 23, "*ſ*," in Altered Will and in Chase letter, Exhibit 73: other examples on Photo. Plate 43: Respondent's Exhibit 33, "*s*" in "Mrs.": There are two forms of "*x*" "*x*:" "*x, x*:" first example in "Executrix" in line 50 of Will, second form *x* on line 59 of Will ; E. S. 9, line 18, "Ex press," see Photo. Plate 44 in which are examples of both, *x* and *x*, latter in first Draft Will, on line 10, "*vix*" or "*trix*;" curiously enough both of these forms are found in the Will: Now the numerals: Mr. Gumpel has shown some of the characteristics, as illustrated on the photographic plates: See Will, line 15, figure 2, counterpart, in Brother Ben letter, April 20th, 1885; another in Exhibit 100, line 5: the

numeral 4 presents a very marked resemblance on line 66 of Will and line 4 of Belle Harris letter,

E. S. 1: the figure 5 has a marked peculiarity,

the final curve like the bottom of his B: The numeral 6 is alike all through; in the 8 the feature is the smallness of the lower loop, compare Long Memorandum and E. S. 2; the cipher 0 shows similarities, note the cent ciphers on line 34 of the Will: (\$500. 00) and line 35 Altered Will (\$500. 00), and line 28 Draft Long Memorandum (\$500. 00): these are three sets of combinations, the brackets, the dollar marks, the figure 5, the large ciphers, the cent ciphers and the dashes under these last; the manner of uniting the ciphers: Now there is a point hitherto untouched of considerable importance, the dashes = : any one will do as an example,

take e. g.: on line 8 of Will = First = : compare with Respondent's Exhibit 120, envelope addressed to Forbes, the word = Mass =, Respondent's Exhibit 124, and 119, identical characteristics; it is a persistent habit, in all respects the type of the writing of the Will; and here again referring to the Belle Harris letter, which has given the expert counsel so many examples of similarities: The dashes are remarkable as exemplifications of persistency of habit; where the dash is long it is a waving line, see the Will, lines 24 and 52, see the Story Receipts, Exhibit 68, 69, 70, 71, 72; these occur only in formal documents, not in the letters: his habit of dividing a word at end of line is peculiar, almost uniform habit, thus in E. S. 3, line 20, pla at end, and tran

on line 27: numerous examples exist: The orthography of Dama is an item that should influence the mind of the Court in coming to a conclusion; it is very important.

After this exposition expert counsel Hyde undertook to examine to some extent the evidence of the expert

Doctor Piper and to point out errors in his examples and inferences: The Doctor was asked a very important

question about the loops of the double l, “*ll*,” and the terminals: the loops are conscious characteristics and they appear to have been put in *ex industria* by the writer of the Will in his careful construction of the instrument. Dr. Piper said that the dots on the “i” were enough to amount to a demonstration to his mind that the alleged Will was a forgery. How could it possibly be maintained that such a circumstance would be sufficient predicate for such a conclusion, especially when it is shown that there are different kinds of dots running through the papers? No genuine document would be safe if such evidence or opinion were accepted as enough to condemn it. Much stress was laid upon the repetition of forms in the Will as indicating imitation, but the same general feature may be seen in exhibits that have come from contestant’s undisputed writings, the “Randall Will,” among them, and the E. S. Exhibits. Professor Young is undoubtedly an expert penman, very clever as a teacher of penmanship, but certainly not an expert in detection of handwriting, and his observations were of the crudest character; his statement as to “slope” being sufficient basis for opinion is in itself enough to impair the value of judgment pronounced upon such premises. “Slope” is by no means a test of authenticity; it is a very variable attribute of a writer, as we all know from our own experience, and dependent upon a variety of accidental circumstances, such as temporary position of penman or other transient cause. Professor Young’s opinion is not amenable to analysis. Professor Young says he was looking only for analysis of differences, that he was not searching for resemblances; but the true expert makes an examination of the entire instrument with a view to finding out the preponderance of probabilities; it is nothing but a balancing of probabilities, a question of circumstantial evidence, and no expert can pronounce a judgment or opinion worthy of respect unless he have first thoroughly and impartially examined the paper with an eye single to the ascertainment of exact truth. There

are over 7,000 letters in these disputed documents, and the court can recognize the comparative value of the evidence of the experts for respondents when they have shown so many precise parallelisms in undisputed documents with those in dispute. The experts on respondent's side have made a most elaborate examination and found all of these remarkable resemblances and the extraordinary identities, and in addition the attorneys have made for themselves examination fortifying and amplifying the conclusions of the experts. No matter how counsel may denounce these experts, their reasons stand; let their reasons be assailed, for those reasons, being the basis of their opinion, should alone be the object of assailment, and those reasons are as repellant of assault as the great wall of China; they are impenetrable to any attack that may be made upon the witnesses personally; there is no value in expert testimony except as it is supported by good and sufficient reasons; there must be a substratum of facts supporting the superstructure of opinion. Now, assuming this as the rule of reasoning and the canon of criticism, let us weigh the testimony of contestant's experts. The principal witness for contestant was the expert Doctor Piper. His object was to show that the Will was a forgery and he selected his examples in subordination to this object; and in his drawings on his Tables these examples are enlarged with the evident intention of emphasizing his purpose by the exaggeration of differences not originally existing in the disputed documents; this was Dr. Piper's "method," so much relied upon by contestant. These Tables do show difference, but how has that difference been produced? That is the question to which the court's attention is drawn. By selecting samples of letters as standards and then doctoring them in the process of enlarged drawings on his Tables to lead to the demonstration which, "according to the method" of Dr. Piper, was

that of forgery. This phrase, "according to his method," was the favorite phrase of this expert, Dr. Piper, to justify his opinion: a curious "method" which prevented the cross-examination of the witness and compelled the acceptance of his *ex cathedra* judgments. It would be a monstrous "method" which would permit so grave an issue to depend for determination upon such testimony. The claim that Godard or Mrs. Fannie Johnson may have forged this Will, or had the capacity to write it, is not worthy of serious consideration; neither could have done it. Even if it were not abundantly established by affirmative evidence that this Will was the authentic emanation of the mind and hand of Luigi Dama, it cannot be maintained that it was *not*, and this negative proposition the contestant was bound to enforce and he has not done so.

As the court has treated the argument of Mr. Hyde in the nature of expert testimony, it may be well to consider, in this immediate connection, the comments upon the same subject by opposing counsel, who has shown himself to be possessed of science and skill in this peculiar province. Counsel for respondents having undertaken to show that the paper upon which the alleged will was written was the same as the ordinary "legal cap" to be found in any stationer's shop and used for a score or more of years in the courts and law offices, counsel for contestants called attention to the watermark "Niantic" in the sample of common and ordinary legal cap introduced to show the identity of the quality or kind of paper, whereas in the "Altered Will" and in the alleged Will there is no watermark at all; hold up to the light and examine and compare both and observe the difference; it is remarkable that Dama should have departed from his usual habit of using foolscap when the "Altered Will" of November, 1885, and the alleged Will of May 8, 1887, were

written—in only two instances have we examples of his using legal cap. It is not believable that Dama ever laid hands or eyes upon either of these feigned papers; it would have been more adroit in the fabricator of these documents to have omitted the mention of Mrs. Sara Barker Smith in the “Altered Will” of 1885; this paper was concocted coincidentally with the alleged Will of 1887. (See judge’s manuscript notes of argument, page 266, lines 3–19.)

According to this counsel, and notwithstanding the exposition of the opposing experts, the signature of Jules Mathieu was proved by competent witnesses to his handwriting to have been simulated; his brother Gaston so testified and his testimony was free and unpurchased, unlike that of the other brother Alphonse. What occurred when this Will was originally presented for probate? The witness Antonio Bellini refused to swear that his name as appended to the alleged Will was ever written by him; he swore then that he never signed the paper, but that the paper he signed then near the bottom of the page had a *red seal* upon it near the bottom corner. Bellini said so on February 13, 1888, and he has said so ever since; this one fact alone would be sufficient, when it is shown that Bellini never wrote his name in that way, as will appear from the samples of his writing on page 3 of the judge’s notes given on November 20, 1890, at the request of the court.

Counsel for contestants, after the manner of an expert, gave blackboard illustrations to enforce his claim that Bellini never wrote the signature “Bellini Antonio” on the alleged Will, and compared page 3 of the judge’s manuscript notes with the specimens written in court by Bellini, February 13, 1888.

This counsel animadverted strongly on the testimony of the expert Gumpel and alluded to the circumstance that

contestant was prevented by technical objections from showing what was the original opinion of this expert in regard to the disputed writings and why Gumpel came to abandon his first opinion and turn over to the respondent when he could not succeed in blackmailing the contestant. There seems to be no doubt that Gumpel originally expressed an opinion against the genuineness of the alleged Will, which largely influenced counsel in instituting proceedings to revoke the probate of the disputed document and the strictures of counsel, however severe, are not without warrant; but the validity of scientific deduction is not to be tested by the tergiversation of the scientist in his moral conduct outside the record. His individual deceit and duplicity in dealing with clients may be established or admitted, but the scientific value of his evidence is dependent upon the logical connection between premises and conclusion; if it have any value at all, it is nothing if not scientific. How far such testimony or evidence deserves to be dignified by the term "scientific" is at best a moot question, and remains for further consideration.

The court having propounded to counsel for contestants a question, in the course of the argument, as to a peculiarity in the signature "Bellini Antonio" in the alleged Will,

Witness *Jules Mathieu.*  
*No 214 O. Farrell. Street*  
*Henri Godard. 222 O. Farrell Street*  
*Bellini Antonio 222 Ofoiselle*

the counsel said the query was of great advantage to him, as it had caused him to examine particularly the reason for the remarkable departure from the habit of

the witness in the signature "*Bellini* "

appended to the Will: Where did he get the pattern for

"*Bellini* ?" And counsel undertook

with rare ingenuity to account for and illustrate how this departure came about in the act of the imitator. Counsel had a theory about the last page of the alleged Will which to his mind was equal to demonstration; it could be observed that all the way through the alleged Will the lines are adhered to, but when we come to the last page there is a significant departure from the line first and the line second; it is written down and across in the first, second, and third lines; this points to the proposition that it is evidently written to meet something; "Bellini" was written first and "Antonio, 222 O farrelle," then "214 O'Farrell street" and after that "Jules Mathieu," then "Luigi Dama;" and the counsel very cleverly illustrated and "demonstrated" the correctness of his theory, showing that the last lines were written

first and the upper clause to fit in; note the "*J*" in

"Jules Mathieu" and observe the way in which the

"*A*" fits into the bowl of the "*J*" and

other features of great significance; this shows that the last lines were written first and the upper clause

written to fit in; the peculiar "f" in the address  
 "222 O'Farrell" no where is there an

"f" like that in Bellini's specimens of writing and no

where does he add a terminal "e" to "O'Farrell;" the  
 "rs" in "O'Farrell" have many features common to Go-  
 dard's examples in the writing made in Court, this is very  
 remarkable, and is seen throughout his writings: the for-

mation of the "o" in "No" and the "O" in  
 "O'Farrell" in the Godard specimens and

in the subscription to the Will are an index finger to the  
 perpetrator of the forgery; these things taken in cou-  
 nection with the other circumstances amount to a demon-

stration; the dots on the "J."

"J." in "Jules."

no single signature of Dama like that on line

87 of Will and no rubric like that: The "rr"

"O'Farrell" in the signature on the Will,  
 in the addition to Bellini's supposititious signature  
 without a break, different in his real signatures, e. g., Re-  
 spondent's Exhibit 30 and page 3 of Judge's notes of  
 testimony: Counsel Kowalsky proceeded to point out  
 chirographic characteristics in the genuine writings  
 of Dama and in the alleged Will and in the Altered  
 Will; Dama's real writing had a persistent down-  
 ward tendency or slope to the right, whereas in  
 the feigned papers the inclination is upward and the  
 same habitude is perceptible in the handwriting of  
 Godard; invariably upward in the latter and downward  
 in the former: Note the signature "Luigi Dama," the

"g" in "Luigi," the tick to the left in the upper bowl of this "g" must have been added after the letter was formed, and the "J" in "Dama" the worst ever made,

if by Dama, and yet we are told that this was Dama's "dress-parade" handwriting: Counsel Kowalsky commented on the evidence of the witnesses for the respondent on the question of general handwriting, Mrs. Chase, Mrs. Cushman, Mr. Cummins, and Mr. Thomas R. Knox, all of whom showed then themselves signal failures as they picked out the crudest fabrications, made hastily, as genuine and pronounced papers admittedly authentic to be false, of course such testimony is not worth consideration: Counsel contrasted the quality of the experts opposed to those on his own side, claiming that they could not compare with Doctor Piper who stands at the head and front of his profession and who had demonstrated by the most accurate processes and the true scientific methods the falsity of the disputed documents; Doctor Piper's analysis here proves to a demonstration that the alleged Will was a forgery; his testimony is entitled to the highest respect. Counsel proceeded to consider the internal evidence in the Will of its falsity and to show how utterly impossible it is that the decedent Dama ever had a hand in the construction of it: After a partial analysis of the alleged Will down to the letter "p" in the word "papers," counsel took

up the "Blue" Will and noticed the formation of the

small "h" and ventured to declare that there could not be found a single disconnection in the "h's" of that

document,—on further examination he found just one,—this proved to him that Dama's habit was to write without lifting the pen ; the forger of the Will tried to follow Dama's habits but at times he naturally fell into his own ; in the Contestant's Exhibit M-13, the " Raudall " Will, like characteristics of Dama's true writing are shown ; now take the " Short Memorandum " and attention should

be paid to the small letters "*h*" "*h* : "

(This is a crude tracing of the "Short Memorandum.")

San Francisco May eight of the  
year one thousand eight hundred eighty seven  
By Luigi Dama made my last will and  
testament by myself without influence of  
any one, and in presence of three witnesses  
I signed it. After I sealed it, in a large  
envelope and marked it, as Private Paper,  
and handed it to Mrs Sara B. Smith  
of San Francisco. California to keep  
for me, in whose care it will be found.  
So help me God. Amen.  
Luigi Dama.

Almost every one of the other letters has been tacked on afterwards; observe also the forms of “*h* :” In the

“Altered Will” note the “*h* ;” counsel claimed that in all the “hs” that he pointed out are observed the habit of Godard as is shown by his specimens on page 3 and 4 of Contestant’s Exhibit G, also on pages 5, 6; the same habit prevails as to the small letter “*p*” of same Ex-

hibit; Dama’s habit is never to lift the pen, and Contestant has shown that Godard’s habit in these letters is to lift the pen: Counsel next considered Gumpel’s blackboard illustrations and particularly the parentheses or brackets

( ) upon which he laid so much stress as demonstrative of Dama’s authorship of the Will, if these examples are compared with the Godard specimens it will be seen

that his ( ) brackets are similar: Mr. Hyde contended

that the assertion made by expert Professor Young that the more a forger writes the better he writes, is not correct, but that the contrary is the truth, to wit, that the more he writes the less does he retain ability to imitate, thus denying the validity of the principle that practice makes perfect. Counsel Kowalsky contends that the principle is valid. The court’s attention was called by respondents to the genuine handwriting of Dama on the envelopes as showing the care with which he wrote at times and as evidencing the “dress-parade” argument of respondent’s counsel—contestant’s counsel also desired to dwell upon this theme and asked the court to compare the envelope superscriptions with the writing of the disputed documents; a mere superficial glance at the disputed papers is enough to condemn them; when Dama wrote he sat with his glasses on leaning over and close to the paper upon which he was writ-

ing, so that it was impossible for Dama to have executed this Will: The dots on the "i," which are considered very important, and of which Dr. Piper has given more than a hundred examples, making to his mind positive proof that the paper was false: Compare the top of the capital "G" in the word "God" in the Short Memorandum with the top of the "G" in "Godard" in the specimens of Godard's writing and note also particularly the signature of Godard in the band books of the Park Band: Counsel proceeded to illustrate on the blackboard the comparative peculiarities of the forger and of Dama: The capital "D" in the alleged Will and in the Altered Will have no counterpart in the admittedly authentic papers, it is entirely unlike the capital "D" in the documents that have come from a pure source, such as the "Randall" Will or the "Blue" Will: This is remarkable, if the papers in dispute be honest: The "Story receipts" Contestant never admitted, always viewed with suspicion, they came into the case at a very late day, like others that respondents used as standards: The two documents, the alleged Will and the "Altered Will," were in date nearly two years apart and yet there are identities in caligraphic execution of a most extraordinary character if one be not taken as the fabricated model for the other; tracings show by exact measurements that some of the words are studiously copied the one from the other; compare the name "Sara Barker Smith" in each, and see the name "Smith" as he wrote it in a letter to Mrs. J. P. Smith, an exhibit from respondent's side. See other exhibits in same connection: Counsel Kowalsky adverted to the religious

style of the termination of the Short Memorandum, "*the most vicious forgery of them all*"; and compare with the formal style of the alleged Will and the Altered Will, and then note the manner in which he wrote the First Draft Will and the Second Draft Will, Respondent's Exhibit 4.

### Witnesses as to Handwriting Other than Experts.

Richard Emerson, secretary of the Park Band (page 22, judge's notes), as to signature of Mathieu, did not think it was genuine.

Isaac Clinton Coggin, general manager of Park Band, "do not think that is Mathieu's writing *or Godard's*; it looks too finished."

Frank Merlet, shoemaker, 222 O'Farrell street, saw Mathieu write often; the name on the Will is not in Mathieu's hand, in his opinion; he never saw that paper before testifying.

Mrs. Ida M. Cummins, wife of Wm. T. Cummins, knew Luigi Dama very well; took music lessons from him, three or four times a week; was most decidedly a friend of his; he was very careful in business matters, most conscientious in his work, punctual to a dot in time; he was not much given to talk; her sister, Miss Belle Harris, was also a pupil; a most strong friendship existed between the professor and the witness; she saw him write several times; she attended school fourteen years and had made a careful study of penmanship; had seen the professor write friendly letters and also receipts: *he was always standing when writing*; she did not think the signatures attached to the papers shown to her (Respondent's Exhibit No. 1 and the alleged Will) were in the professor's handwriting; she remembered when he died, January 20, 1888; she heard of his death at 4 o'clock in the afternoon of that day and she went there the next morning at half-past 9; there were several ladies there, among others her sister Miss Belle Harris, Mrs. Adley H. Cummins, and Mrs. Sara Barker Smith came after she arrived; witness had no unkindly feeling toward Mrs. Smith, had heard the professor say she was a great worker but had little voice; the professor was a peculiar combination of man, he was exceedingly enthusiastic at times and then excessively passive—she had seen the professor write about from five to eight times and then he was

standing and writing either on top of the piano or on the mantel-piece. (See judge's manuscript notes, pages 26, 27.)

Wm. T. Cummins, the husband of the last-named witness, knew Luigi Dama for just four years from January 20, 1884, to January 20, 1888, four years to a day, the date of Dama's death; took lessons in vocal culture from him; had many business transactions with him; saw him write; saw him sign his name to Respondent's Exhibits 37, 38, contracts in respect to land between Dama and Cummins; this witness believed the alleged Will to be genuine; but he had stated in his own house that the fact that four deeds of land which Dama did not own were included in the Will was sufficient evidence to his mind that it was a forgery, but he explained why he had made such a statement; it was because for the last three years he was almost a pariah in his own household because he was honestly convinced that the Will probated was genuine and had been accused of aiding to cheat his sister in law, Miss Belle Harris, out of a fortune and he had honestly striven to convince himself to the contrary, and had come out to the court to examine the Will, and the result was to indelibly impress his mind with the conviction that it was genuine. (See judge's manuscript notes, pages 70, 72, 73, 74, 75, 78, 79, 80.)

Miss Martha Belle Harris, a sister of Mrs. Ida M. Cummins, had been a pupil of the deceased professor in vocal music and voice culture; she had studied as a specialty drawing; had been fully and thoroughly instructed in that art; often saw Professor Dama write, perhaps thirty to fifty times; had witnessed his signature before a notary; had received letters from him; had seen a great deal of his writings; had been to the courthouse often and had examined the paper probated February 27, 1888, and the paper found in the safe deposit box, "the Short Memorandum, Respondent's Exhibit No. 1," and they are not in Professor Dama's handwriting; the professor was rather careful in business, careless about the house; she took lessons for four years of him, at first once a week, then twice and finally three times a week; did many things for him; took money for him to the bank; he told her he was a poor man when he married; she saw the alleged Will on February 27, 1888, the day it was probated;

she came to the court and examined the paper because she thought there was something wrong; she had had a conversation with the professor in which he told her that those people who expected to get his money would be disappointed and that he was now a poor man and would have to depend on her as he had left her all his fortune. (See judge's manuscript notes, pages 28, 31, 32.)

Mrs. Amelia A. Waterhouse, wife of Columbus Waterhouse, had seen the professor write ten or twelve times and had seen several of his letters; she did not think the Will or the Short Memorandum were in his writing. (Page 37, judge's notes.)

David Milton Ramsay, a former secretary and treasurer of the Second Regiment Band from 1883 to 1886, knew Jules Mathieu, who was a member of that band, and had seen him write his name as many as two hundred times, and was familiar with his signature, and he said, "as a matter of fact," that the name attached to the Will was not the signature of Jules Mathieu; Mathieu's manner in writing was slow and labored; he was positive that it was not Mathieu's signature appended as a witness to the alleged Will; his opinion was based upon the comparison of handwriting with the signatures he saw Mathieu make. (Page 41, judge's notes.)

D. S. Dorn, an attorney at law, an intimate friend and, to some extent, a legal adviser of the deceased, had seen Dama write very frequently, more than twenty times surely, and was well acquainted with his handwriting; Mr. Dorn had examined the alleged Will very carefully before; the handwriting was very similar to that of Professor Dama, but in Mr. Dorn's opinion it was not his handwriting; "it is a forgery"; it was very plain to Mr. Dorn that it was not written by Dama; and the "Short Memorandum," Respondent's Exhibit No. 1, Mr. Dorn declared was most decidedly *not* the handwriting of Professor Dama, "it is a strained imitation of his style of writing and of composition." (See judge's manuscript notes testimony, 45-47, 50-53.) Further and fuller reference to Mr. Dorn's testimony will be made hereinafter.

Albert M. Whittle, paying teller of the San Francisco Savings Union, testified that Luigi Dama opened an account there October 4, 1876; the witness believed from comparison with bank "token book" signatures that the name signed to the alleged Will was the genuine signature of Luigi Dama. (Page 71, judge's notes.)

Alphonse Mathieu, a brother of Jules Mathieu, deceased, testified that the signature to the alleged Will was that of his brother "Jules Mathieu"; he had often seen him write, was familiar with his handwriting; went to school with him for five years.

Louisiana Mathieu, wife of the witness Alphonse, knew the late Jules for thirteen years and had had much correspondence with him; saw him actually write several times; knew his handwriting, and the signature and address

*Jules Mathieu*  
*No. 214. O'Farrell Street*  
were in his handwriting.

Gustav Folte, paying teller of the German Savings and Loan Society, testified that deceased Dama was a depositor in that bank and believed from his acquaintance with the signature in the depositor's book that the name "Luigi Dama" signed to the alleged Will and also to the "Short Memorandum" were written by the deceased.

Clara E. Story, wife of D. W. C. Story, had lived in the house of Professor Luigi Dama and rented rooms of him; this witness produced receipts given by the professor for room rent, marked Respondent's Exhibits 67-72; she paid the rent herself; the Storys lived there in 1884; the receipts indicate the time.

The testimony of the Reverend Joseph Worcester should be considered as a whole, in another connection, for upon the question of handwriting it lacks preciseness and positiveness; he says that he does not think that his opinion is of any value, "the resemblance creates the impression that it is Dama's signature" on the alleged Will.

Martha E. Chase is a witness from away back, and her testimony was objected to by contestant because of the remoteness of her acquaintance with the handwriting of Dama; but the objection was overruled. This lady identified two documents, Respondent's Exhibit 43 and Respondent's Exhibit 73; the first comprised a letter written by her to Professor Dama with his draft of answer on the blank back of same, and the second was the answer dated February 21, 1884, received by her in the envelope addressed "Miss Martha E. Chase, Santa Rosa Seminary, Santa Rosa, Cal.," of which seminary the witness was principal; she believed the disputed writings to be genuine; she had known the deceased Professor prior to 1867 and afterward; first knew him in Stamford, Connecticut; had seen him write, sometimes when she was taking music lessons; did not remember ever to have seen him write a letter; he had tried her voice here, but she did not take music lessons from him in California.

A. H. R. Schmidt, cashier of the German Savings and Loan Society, formerly assistant cashier, knew Luigi Dama as a depositor in that institution, and was prepared to say from what he had seen of his signature that the name "Luigi Dama" signed to the alleged Will was the genuine handwriting of the decedent Dama. (See pages 100, 101, judge's notes.)

Sophie Buhne knew Professor Dama and took lessons from him from 1881 to 1885, every day except during her vacation, which was usually in June, and when the professor paid a visit to the east; she recognized a paper presented to her (Respondent's Exhibit 44) as a letter from her to him, dated at San Francisco, Sept. 3, 1883, and his draft reply dated Boston, Sept. 18, 1883; when Miss Buhne began taking lessons from him she had lost her voice and under his instructions she regained it entirely; she knew Sara Barker Smith, who took lessons of the professor and she had a high soprano voice; she identified Respondent's Exhibit 88, a receipt of Luigi Dama to Miss S. Buhne, November 3, 1884, and Respondent's Exhibit 89, a letter of L. Dama to Miss Buhne, August 29, 1885, as in the handwriting of the deceased professor; all the letters received by her from him had been destroyed; she identified Respondent's Exhibit 4, draft Will

in which "Miss S. B." is mentioned, as Professor Dama's handwriting; the Respondent's Exhibit 18, Mem. to Miss Sophie Buhne, was to her knowledge written by the professor; the envelope to Exhibit 89 was destroyed, for what reason she could not recall, but she retained the letter, which she found a few months before date of testifying (March 13, 1891), because after Professor Dama's death she thought more of it, as she was very much attached to him on account of his being her teacher; she thought the body of the alleged Will and the signature were in the handwriting of Dama. (See pages 105 and 106, judge's manuscript notes.)

Frank Davey, a photographer, explained how he took a photograph of the Altered Will; it was taken January, 1889 (the "Altered Will," Respondent's Exhibit No. 3); the pinholes were made by pinning it against the wall for purpose of photographing; to his memory there were no pinholes in it when he photographed it; if there were any other pinholes in the paper they would be shown in the negative; when the paper was turned over to be photographed on the other side it had to be repinned. (See page 109, judge's notes.)

This pinhole evidence is esteemed of great importance by the counsel for contestants, and it may be well in this place to note his comments upon the significance of these minute perforations. He insisted in his summing up, that there were pinholes in that paper before it went to the photographers, as is shown by the paper itself, and they were *not* all made by the artist in photographing the paper; he thinks it no wonder that respondent's counsel squirmed and floundered in striving to explain away these phenomena, these little pinholes, that speak with mute eloquence, with tongues of fire that like living flames let in lurid light upon the iniquitous nature of the whole business, like molten lead poured through the corporal structure it exposed the entire nefarious transaction; these little pinholes, counsel for contestant contended, were of great significance and it was beyond the ingenuity of the most ingenious and skillful counsel to destroy the effect of such momentous evidence; these little pinholes are there to stay with all their consequences.

Thomas R. Knox, a shorthand reporter, officially connected with the courts, a pupil for a time of the deceased, who had frequently seen him write, was of opinion that the disputed documents were in the handwriting of Dama. (See pages 126-131 of judge's notes.) It may be worth while hereafter to deal with other portions of this witness' testimony than his opinion upon the handwriting, but in this place I do not care to more than indicate a possible future allusion to the abridgment of Knox's cross-examination on page 130, lines 3-18, judge's manuscript notes.

### **The Views of the Court upon Expert Evidence.**

I have striven to exhibit, in the foregoing epitome of expert evidence and counsel comment, the variant and opposing views entertained upon the same subject matter. There is an amusing, if aggravating, arrogation of absoluteness in judgment upon a proposition of which certainty is not predicable. Expert Hopkins is the only witness of his class who acknowledges himself liable to err in process or result. He, alone, thinks that he *may* be mistaken. Each of the others is cock-sure of the correctness of his conclusion. But all, differing as they do, cannot be right; and it is worth while to "consult the authorities" upon this vexed question of expert and opinion evidence as to handwriting. In Lawson's *Work on Expert and Opinion Evidence*, page 277, it is said that the strongest evidence of the genuineness of handwriting is the testimony of the alleged writer himself, and next to this comes the testimony of a witness who saw the very instrument executed and is able to identify it. The competency of such evidence is never disputed. But it is obvious that there must be other and different modes of proof—modes which must of necessity be resorted to when the former are not attainable and likewise whenever it is sought to contradict the testimony of the alleged writer, or that of the actual witness. By nature and habit individuals contract a system of forming letters which gives a character to their writing as distinct as that of the human face. In handwriting, as in other arts and in literature, "the style is the man"; and yet there are curious contrarieties. In determining the question of authorship of a writing, the resemblance of characters is by no means the

only test. The use of capitals, abbreviations, punctuation, mode of division into paragraphs, making erasures and interlineations, idiomatic expressions, orthography, underscoring, style of composition, and the like, are all elements upon which to form the judgment: See Taylor's Ev., sec. 1669 (sec. 1871); The Handwriting of Junius (Twistleton & Chabot's ed.); The Tichborne Trial, Charge of Chief Justice Cockburn (London ed.), vol. 2, pp. 762, 768, 774, 779, 783; Da Costa v. Pym, Peake's Additional Cases, 144; 2 Stark. Ev. (Metcalf's ed.) 515; Cowper's Works (letters), vol. 5, p. 217 (ed. 1836); United States v. Chamberlain, 12 Blatchf. 390, Fed. Cas. No. 14,778; Brooke v. Tichborne, 2 Eng. L. & Eq. 374, 5 Exch. 929; Reid v. State, 20 Ga. 681, 682, 683; 1 Whart. Ev., p. 656, note, and sec. 706; 1 Greenl. Evidence, sec. 58a. But see Waddington v. Cousins, 7 Car. & P. 595. For quotation from Cowper's letters, see Ram on Facts, 4th ed. (edition of 1890 is the copy I use for reference), page 69. "Manifold as are the points of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting; and when a man comes forward and says, 'you believe that such a person is dead and gone, he is not, I am the man,' if I knew the handwriting of the person supposed to be dead, the first thing I would do would be to say, 'sit down and write, that I may judge whether your handwriting is that of the man you assert yourself to be'; if I had writing of the man with whom identity is claimed, I should proceed at once to compare with it the handwriting of the party claiming it. For that reason I shall ask you carefully to look and consider the handwriting of the defendant, and to compare it with that of the undoubted Roger Tichborne, and with that of Arthur Orton": Tichborne Trial (Rex v. Castro), Charge of Chief Justice Cockburn (London ed.), p. 762; Buller's Nisi Prius, 326; Peake's Ev. 102; 2 Evan's Pothier on Obligations (3d Am. ed.), 156; Cowper's Works (letters), vol. V, p. 217 (ed. 1836). "Men are distinguished by their handwriting as well as by their faces; for it is seldom that the shape of their letters agree, any more than the shape of their bodies. Therefore the likeness produces the presumption that they are the same": Buller's

Nisi Prius, 236; 2 Evan's Pothier on Obligations, 3d Am. ed., 156. "The general rule which admits of proof of handwriting of a party is founded on the reason that in every person's manner of handwriting there is a peculiar prevailing character which distinguishes it from the handwriting of every other person": Strong v. Brewer, 17 Ala. 706, 710. "The handwriting of every man has something peculiar and distinct from that of every other man, and is easily shown by those who have been accustomed to see it": Peake's Ev. 102. "Hours and hours and hours have I spent in endeavors, altogether fruitless, to trace the writer of the letter that I send, by a minute examination of the characters, and never did it strike me until this moment that your father wrote it. In the style I discover him—in the scoring of the emphatical words—his never-failing practice—in the formation of many of the letters, and in the adieu, at the bottom—so plainly that I could hardly be more convinced had I seen him write it": Cowper's Works (letters), vol. V, p. 217 (ed. 1836). Conclusions drawn from dissimilitude between the disputed writing and authentic specimens are not always entitled to much consideration; such evidence is weak and deceptive, and is of little weight when opposed by evidence of similitude. The reason why dissimilitude is evidence inferior to similitude is that it requires great skill to imitate handwriting, especially for several lines, so as to deceive persons well acquainted with the genuine character, and who give the disputed writing a careful inspection; while, on the other hand, dissimilitude may be occasioned by a variety of circumstances—by the state of the health and spirits of the writer, by his position, by his hurry or care, by his materials, by the presence of a hair in the nib of the pen, or the more or less free discharge of ink from the pen, which frequently varies the turn of the letters—circumstances which deserve still more consideration when witnesses rest their opinion on a fancied dissimilarity of individual letters: Young v. Brown, 1 Hagg. Ecc. Rep. 556, 569, 571; Constable v. Seibel, 1 Hagg. Ecc. Rep. 56, 60, 61; Murphy v. Hagerman, Wright (Ohio), 293, 298; 2 Phillips on Ev. (Cow. & Hill's Notes), 608, note 482; Taylor Will Case, 10 Abb. Pr., N. S., 300, 312; Tome v. Parkersburg R. Co., 39 Md. 38, 93, 17 Am. Rep. 540.

It is held in Texas that the fact that comparison of handwriting has been permitted by statute does not make it any the less a feeble and unsafe kind of proof.

In a Michigan case it was said: "Everyone knows how unsafe it is to rely upon anyone's opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge whose notions are pure speculation. Opinions are necessarily received, and may be valuable, but at best this kind of testimony is a necessary evil. Those who have had personal acquaintance with the handwriting of a person are not always reliable in their views, and single signatures, apart from some known surroundings, are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called, with great liberality, scientific opinion, is a step toward greater uncertainty, and the science which is so generally diffused is of very moderate value." In another case, Mr. Justice Grier said: "Opinions with regard to handwriting are the weakest and least reliable of all evidence as against direct proof of the execution of an instrument. Generally, when the jury have acknowledged signatures for comparison, they can judge as well of the character of the disputed signature as if they had seen the party write a hundred or a thousand times. It is but an opinion formed from comparison simply. The witness compares with his remembered original—the juror has actual original before his eye. Tell a man that a person's name, with which he is acquainted, has been forged, and nine cases out of ten he will be astute enough to fancy he discovers some marks of it. If it be a good forgery, very few men are able to detect it; and hence other witnesses, not prepared beforehand to pronounce it such, will very truly say they would take it to be his signature. But there may possibly be such glaring marks of forgery on the face of an instrument as to condemn it, especially if proved by witnesses of doubtful character, and connected with other suspicious circumstances as to the persons and place where it had its origin, and these marks may be so strong and circumstances so convincing that a paper may be pronounced a forgery in

the face of the testimony of witnesses whose previous character cannot be otherwise impeached": *Turner v. Hand*, 3 Wall. Jr. 115, Fed. Cas. No. 14,257. "The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence and of the most unsatisfactory character": *Borland v. Walrath*, 33 Iowa, 131. "We believe that in this opinion experienced laymen unite with members of the legal profession": *Whitaker v. Parker*, 42 Iowa, 585. "It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence": *Cowan v. Beall*, 1 McA. 221.

In the *American Law Review* (the old quarterly) for July, 1870, volume IV, pages 641-655, is an interesting article upon the *Howland Will Case*, which contains so much that is concurrent with my own independently formed views and experience that I refer to it.

It is for the extraordinary conflict of expert testimony demonstrating how completely scientific opinions may differ, that this case, after the interest awakened by the magnitude of the struggle has died away, will be most famous in the annals of the law. Here were three signatures of Sylvia Ann Howland: one to her will of 1862, Exhibit 1; one to each duplicate second page, Exhibits 10 and 15. That to the will was confessedly genuine. But it appeared upon superposing the other two over this that the covering was so exact, letter for letter, stroke for stroke—"10" (duplicate "second page" given to the niece) somewhat closer than "15" (that kept by the aunt, and found in the trunk)—and that not merely this covering existing, together with identity of all the spaces between the letters and the words, but that the locality on the paper and the distance from the margins of the signatures so nearly coincided, that the defendants, supported by the opinion of some of the best experts in the country, were led to bring forward the theory that this extraordinary coincidence was not the result of chance, but of design. They claimed that these signatures had been forged to these papers by the complainant, by tracing upon the original signature to the will.

It was, a priori, beyond the bounds of probability, they argued, that this coincidence of precise covering could occur, in short, practically an impossibility; but infinitely incredible, that just the signature the plaintiff wanted should match the only one she had. They claimed that the signatures 10 and 15 bore in themselves marks of tracing, and produced a large number of bills of lading signed by the deceased, none of which, they claimed, bore the characteristics of the disputed signatures. This issue was fully and squarely met by the complainant's counsel. They answered that the idea that no two signatures could cover was false in theory and in fact, and they produced signatures of many well-known persons which they claimed covered better than the signatures of the deceased lady. They met expert by expert. Wall street and State street furnished their most eminent judges of handwriting to the one side or to the other. The rival "commercial colleges" sent presidents and representatives, each equally positive, and ready to support by oath the truth of their several opinions. The Coast Survey sent on from Washington one of its most eminent members, Professor Benjamin Peirce. The science of photography was exhausted in the variety and number of pictures of the disputed signatures. Recourse was had to the magnifying glass. Numberless exaggerated images of the words "Sylvia Ann Howland" were manufactured, and appear upon the files of the court in immense books of exhibits; and not merely of these signatures, but of the many which are claimed to cover as well as the disputed signatures, and of other signatures of the testatrix of the will itself, of the papers 10 and 15. Learned chemists were called, who gave their judgment of the ink. Skilled engravers, habituated in the art of tracing, pored over the strokes and curves of the letters. Harvard University contributes to the list of witnesses three of its most distinguished names. The most celebrated mathematician of the country is invoked, who states the doctrine of chances with a precision and solemnity that astounds the uneducated understanding. The learned physician, Oliver Wendell Holmes, so famed both in poetry and science, applies his microscope and gives his opinion. The naturalist, Agassiz, whose name on both continents is second only to Humboldt's, who, as he testified, began natural his-

tory as a child, and was still (1870) a student, gave his analysis with characteristic zeal and earnestness. The testimony of witnesses developed weeks of laborious preparation. Before they came on the stand many of these witnesses passed months in the closet, working sometimes ten hours a day, comparing, analyzing, photographing, magnifying, doing everything that science and experience could suggest to fit themselves to give a correct opinion. They produced the result of their labors in the elaborate magnified exhibits, which, bound in large volumes, are lasting proofs of their diligence and ingenuity. Not a curve in a letter, not a downstroke or an upstroke of the pen, not a dot of an "i," or a cross of a "t," or a waver of the hand, but what was subjected to the most searching examination under powerful microscopes; while essays were read upon the philosophy of handwriting in theory and practice. Page follows page of minute criticism of hair-lines, loops, curves, turns, body strokes, and so on, to utter weariness. Yet, after all, with what result?

No slur could be cast upon the integrity of any of these gentlemen. They had no interest in the result of the suit; their characters were above suspicion; truth was primarily their object. Did that old woman beyond the grave sign those two papers? On this side of the grave the niece alone knows. The niece says she did. But for this, if an untruth, she is to have millions. Can science give her the lie? So scientific men pore over these nine little words for many months. They apply to them the many instruments that the laboring brains of former scientific men have invented; and the scientific data of past years. Yet, with all this, they stand ranged on one side and the other, differing from and contradicting one another, not only on the main question of the forgery, but in a thousand more minute but still important particulars; equally confident of adverse opinions, until the brain of the unprejudiced reader of this mass of conflicting opinions swims with confusion, and he asks, What is truth? Thus the result of so much labor of experts—their skill, their ingenuity, their patience, their anxiety, simply demonstrates to the profession their inutility as witnesses in a court of justice. Fact is untrustworthy enough. Of a single occurrence, a hundred different accounts may be given in good faith by honest spectators.

But when we come to opinion, who shall state the limit of discrepancy, or dare to name the number of conflicting theories? Let it not be understood that it is desired to cast reflections upon science, nor upon the curious and ingenious means which it supplied—unhappily not for the elucidation of this case. Let anyone take the testimony of either one or the other side to this controversy, and he will marvel at the precision with which it was possible, by the resources of science, to supply the conclusions which were wanting to facts. Let anyone read only the evidence of the contestants, and, however little prone to moralize, he will wonder at the appliances of modern art which has detected, both by mathematical demonstration, and by an analysis of handwriting and chemical investigation very nearly amounting to mathematical demonstration, a hidden crime, and made it as patent as the daylight. This, he will say, is providential. No link is wanting. The discovery of the footprint, the trace of blood, bears no comparison to this. Hereafter, the curious stories of Poe will be thought the paltriest imitations, when real life affords such an instance of the detection of guilt by the unanimous testimony, not of eye-witnesses, but of bankers, photographers, writing-masters, mathematicians and naturalists. So positive is their testimony, so exact in its details, so nicely does one fact fit the other, and so curiously is each explained and reconciled, that the eye will almost see the forger holding to the window the genuine document, folding over it the spurious paper, wetting her pencil, and tracing the words, and then covering the pencil tracings with ink. But let the testimony of the respondent's experts alone be read, and the picture is wholly changed. The providential detections of science become unjustifiable slanders; it is the old woman who has traced, with trembling fingers, her fixed and formal autograph. The genuineness is beyond a doubt, and is patent upon a comparison with the aunt's former undisputed signatures. The signs of tracing are but the nervous trembling of old age; the curious covering, the not unusual result of writing from the wrist, in a cramped position, by an aged woman, unused for many years to write more than her signature.

Who, then, shall decide when such doctors disagree, or do more than review their testimony, and wonder, on the one hand, at its ingenuity, its research, and its elaboration; on the other hand, at its curious discrepancies, its multifold and manifold contradictions? (See, also, on same subject the *American Law Register*, Sept. 1890, pp. 553, 562.)

The system, as it now stands, of retaining an expert, is much the same as retaining a lawyer. Neither is under any obligation to devote his time, as is every eye-witness, to the party requiring his services. Both lawyers and experts have knowledge, skill and experience, which must be bought and paid for. It is in both cases their property, their capital, their means of earning a livelihood. A litigant, approaching the trial of a cause where expert testimony is required, secures the service of his experts much as he does his counsel. He takes their opinion, and if it is favorable to him (and what is most remarkable, it is almost always favorable to him), the experts are almost, if not quite, as much in his employ as his counsel. Honorable men, whether of the legal or other professions, go only to a certain mark in identifying themselves with the interests of their clients. But the expert not infrequently goes further than the lawyer. He is familiar with the preparation of the case; he is present at consultations; his own evidence is carefully prepared, and noted; his sympathies are enlisted; he acquires a belief in the justice of the side upon which he is called, and of the injustice of the other. Upon taking the stand, the counsel for his employer becomes his personal protector, that of the adversary his personal assailant; and the assailant of what are dearer to him, his favorite scientific theories. His opinions are turned and twisted, and subjected to a searching cross-examination. Perhaps covert imputations are cast upon his motives. He is unwilling to recognize the fact that he is to receive pay for his services. It seems to degrade him to acknowledge that anything but a love of truth induces him to testify; while, as a matter of fact, if truth only—or the reward of virtue, which the proverb gives—should be held out to him as an inducement to appear on the witness-stand, he would decline to be a witness. Properly enough, too, for he has a right to be paid for his time and skill. In short, he is in a false position. He wishes to appear

a judge. Circumstances have made him a partisan. No one can read the cross-examination of some of the experts without feeling keenly the defects of the present system. One of the witnesses, doubtless a perfectly fair-minded man, says, with a sort of shame (false it is thought), when pressed about the compensation that is honestly due him, that the "responsibilities of his situation forbid his giving his mind to it." The compensation of another witness has reached \$1,000 in one case, and \$500 in a second. (Howland Will Case.) But throughout the experts, when questioned, generally evade the question of pay, instead of frankly acknowledging that this is an element, and a legitimate element, in their services under the present system. As long as this lasts, the only true position for them to take is that of persons to whom a question of opinion has been presented, and who, having given a certain opinion, are retained by the parties in whose favor they have given it, to carefully prepare that opinion, with its reasons, and state it to the tribunal before which the case is tried, with as much freedom from prejudice in favor of their employers on other points of the case as poor human nature will permit. These remarks fit right into the body of expert and opinion evidence in this case. Experts should be considered and treated as advocates rather than as witnesses, and dealt with as I have undertaken to deal with expert Counsel Hyde in condensing his argument.

### **Internal Evidences of Character of the Will.**

In judging the internal evidence of the authenticity or falsity of the document in dispute, it is important to consider the property possessed by testator at the date of the Will and the disposition made of it and the purpose and object of the testamentary design. What property did Dama possess and own when he made the Will?

### **Diodemus Dorn's Description of Dama.**

Before proceeding in the attempt to answer this question, it may be well to take a view of the composite character of the man himself, as furnished by the evidence, and perhaps best stated in the description of the witness, Diodemus S. Dorn.

Mr. Dorn knew Luigi Dama very well, was intimate and friendly with him; had innumerable conversations with him on every variety of subject from the North Pole down; Dama spoke to Dorn about his family and property; Dama was by nature a miser; he was formerly an opera singer; when he came to America he taught vocal music; he wanted to marry one of his pupils, the lady whom he did afterward marry, but she married someone else, as they often do, a wealthy man in the south; her husband died, and Dama renewed his attentions, and she, having had more experience, accepted him; Dama often went over his affairs to Dorn and liked to dwell on the details of his property; she was the financial member of the firm; Dorn drew several Wills for Dama, who was a kind of a crank on the subject of Wills; Dorn drew one for him in 1885; it took them about a year to draw that Will; Dorn could not recollect when the second Will was drawn, but it was about the time Dama went east; the last conversation Dorn had with Dama was a week or two before he died; Dama sent for Dorn, who used to joke a good deal with him about his pupils, and on this last occasion Dama spoke of Mrs. Smith; Dama was a very sarcastic man, and he compared her voice to that of a cow in a cornfield; he also spoke of Miss Belle Harris' voice; on another occasion when Dorn called again subsequently Dama spoke of the Will that Dorn had drawn and said that it was in the Safe Deposit Company; Dama asked Dorn if it was all right, and Dorn replied that it was if it had been properly executed and duly attested; all the Wills were pretty much the same; an institution in Italy, the "Stabilimento dell' Annunziata, Naples," was the beneficiary of the bulk of his property; this was a musical institute, as Dorn understood; Dama often said that he was a Catholic, and the man that was born a Catholic always died a Catholic, and although he did not share in the prejudices of the church against secret societies, yet he left something to a friend in Italy, an intimate Italian friend, who would make provision for masses for the repose of his soul; in the Wills drawn by Dorn the Reverend Joseph Worcester and Columbus Waterhouse were named as executors; Dama was very much attached to the memory of his wife; he always kept fresh flowers under her picture; he left two lots in Red-

wood to Reverend Mr. Worcester for the benefit of his church, of which decedent's deceased wife had been a member; Dorn made four drafts of Will for Dama; two about 1885, which he submitted to Dama; this was before he went east; afterward, when Dama returned, he felt more kindly toward his wife's family in the east, and Dorn drew another Will in which Dama made a small bequest to them, and also to Miss Harris; each time Dorn drew a Will for Dama the latter went over everything he had and very frequently at other times. Dama was a man who was very cynical—not cynical but sarcastic—and made many remarks concerning his pupils and their powers and capacities; he spoke of Mrs. Smith as having no vocal power or capacity.

### **What Property did Dama Own at Date of Will?**

To return now to the question of the property possessed and owned by Luigi Dama at the date of the alleged Will, May 8, 1887. It is asserted by counsel for contestants that Dama never owned exactly eleven government bonds, at the time of making the Will only \$5,000 in bonds and before he had thirteen \$1,000 bonds; it is claimed by contestants that the person who forged the Will slipped up on this point, as he did on some others; the forger knew he had bonds of this kind, but did not know the exact figures. Is it possible, queries counsel for contestants, that a man of Dama's intelligence would attempt to dispose of property he did not own? Or that a man of integrity would write down a deliberate lie in so solemn a document? This is a very important factor in determining this issue of forgery. This provision of the alleged Will challenged attention by reason of its inaccuracy and nonexistence, wherein he undertook to give what he did not possess; it is inexplicable, contends the counsel for the contestants, why he should have attempted to bequeath what he did not own, upon any hypothesis consistent with his mental competency. Dama knew very well, no man better, what he owned and what he did not own, and this vain bequest cannot be explained away on the ground of the testator's idiosyncratic character. Was it a vain bequest. Did he possess or own on May 8, 1887, eleven (11) government bonds

of the United States of America, nine of one thousand dollars each (\$1,000) and two of five hundred each (\$500), as described in clause Fourthly of the alleged Will, and in clause Fourthly of the "Altered Will," November 1, 1885, in the same terms? These are described in the same way in the "Long Memorandum," Respondent's Exhibit No. 2.

Let us trace the history of these bonds, deemed of determinative influence in this controversy by the contestant's counsel.

### • The History of Dama's Bonds.

According to the evidence of the Boston Maverick National Bank officers, as developed in their depositions, there were sold to Benjamin Randall United States bonds of the par value of \$11,000, as follows:

- \$2,000, April 22, 1880;
- 2,000, October 30, 1880;
- 2,000, March 2, 1881;
- 1,000, March 12, 1881;
- 4,000, May 12, 1882.

These bonds were in denomination and number as follows: Nine \$1,000 bonds, numbered 41,767, 59,792, 84,021, 56,282, 95,947, 88,901, 2,838, 8,777, 107,255, and four \$500 bonds numbered 14,525, 1,875, 16,111, 14,737. These bonds are the same numbers purchased by the bank from Luigi Dama May 18, 1885, as appears from the original entries of the transactions on the books of the Maverick National Bank, in payment for which the bank gave its check in favor of Dama No. 7,237 for \$13,500, payable at Anglo-Californian Bank, San Francisco.

It appears also from the same source that on May 29, 1885, the Maverick Bank purchased of Luigi Dama \$6,000 par value N. O. Jackson and Great Northern R. R. bonds, numbered 565, 566, 567, 568, 569, 570, six bonds; and on the same last-mentioned date he bought of the bank \$6,000 par value United States bonds five \$1,000 each, numbered 67,167, 85,942, 69,581, 7,711, 6,522, and two \$500 bonds numbered 14,524, and 25; on the 10th of June, 1887, Dama sold to the same bank one \$1,000 United States bond, numbered 85,942, of the same lot purchased by him May 29, 1885; these constituted all the transactions between Luigi Dama and the Maverick National Bank,

according to the depositions of Starr and Kelsey, officers of the said bank, witnesses examined on behalf of the respondent. Now, let us examine the evidence of Benjamin Randall, a witness for contestant, in his answer to the twelfth, thirteenth and fourteenth direct interrogatories, as to the contents of the box of Luigi Dama in the Safe Deposit Company of Boston in 1887. Benjamin Randall says that he "knew exactly," because everything that was put into the box was put in in his presence by Dama, and Dama never went to the safe deposit vaults except in Randall's presence; Dama came to Boston in 1885 and returned to California in the fall of that year, came back to Boston in 1887 and returned west in the summer of 1887; the contents of the safe deposit box in 1887, depones Benjamin Randall, were \$5,000 in government bonds, four of \$1,000 each and two of five hundred dollars (\$500) each, two bonds of the Burlington and Missouri Railroad, one N. O. Jackson and Great Northern R. R. bond; two articles of jewelry which Dama had obtained permission to keep from his wife's sisters, the gift to his deceased wife by her former husband, a ring and a bracelet with portrait of her first husband, Mr. Haynie; a locket of Mr. Dama's, and some diamond studs, and some other articles of jewelry; these were the principal part of what was contained in the safe deposit; there were *not* nine bonds of \$1,000 each and two of \$500 each; there were four \$1,000 each and two \$500 each; but on May 1, 1885, there were nine government bonds of \$1,000 each and two of \$500 each; Dama was not the owner of those bonds in 1887, there were *not* then nine \$1,000 bonds, he was the owner of four; in 1885, 1884, and 1883, he was the owner of the nine; on May 18, 1885, Benjamin Randall with Mr. Dama, at his direction and in his presence, sold *five* of those bonds to the Maverick National Bank, together with six of the New Orleans, Jackson, and Great Northern Railroad bonds, each of a thousand dollars denomination, for which they received \$12,600, to which Randall depones that he added personally about \$900, making \$13,500 received for those; Randall received for that a check number 7237, signed by J. Work, cashier, payable to Luigi Dama, which Dama indorsed to Joseph Worcester and Randall inclosed it in a letter and sent it by registered letter to Worcester; \$990, was the

amount of cash Randall gave; in 1885, Randall testifies, that Dama was possessed of seven N. O., Jackson and Great Northern R. R. bonds, of \$1,000 value each; also of nine government bonds of \$1,000 each and two of \$500 each in addition to the Burlington and Missouri.

Now, if Randall be right, and he certainly is precise and positive, Dama retained six United States bonds in 1885, having sold five of \$1,000 each to the bank, leaving four of \$1,000 each, two of \$500 each, equal to six bonds, and these were in the safe deposit box in 1887.

It is difficult to square this testimony so as to make out Luigi Dama the owner of eleven bonds, or \$11,000 in bonds, on November 1, 1885, or on May 8, 1887.

It is certain that Dama possessed on the 18th of May, 1885, thirteen United States bonds aggregating in par value \$11,000, which on that day he sold across the counter to the Maverick National Bank of Boston for \$12,395.62, aggregate market value.

This evidence comes straight from the books of the bank. The bank officers say they gave a check numbered 7237 for \$13,500 in payment; but it does not appear from their testimony how the difference between \$12,395.62, and the amount of the check was made up. This difference would be \$1,104.38.

Benjamin Randall testifies that on that day he sold in the presence and by direction of Dama five United States bonds of the par value of \$1,000 each, \$5,000, and six R. R. bonds of \$1,000 each, \$6,000; for which they received \$12,600, and that he, Randall, made up the difference, represented by the check numbered 7237 of \$13,500, which was transmitted to San Francisco to Rev. Joseph Worcester and the proceeds invested in the Jackson street property.

The books of the bank show that the R. R. bonds were sold by Dama on May 29, 1885, and that on the same day he bought from the same \$6,000 in United States bonds in seven pieces, five of \$1,000 each and two of \$500 each.

These R. R. bonds are those that Benjamin Randall testifies were sold on May 18, 1885. Randall knew "*exactly*" everything that was put into the box because it was done in his presence by Dama, who never went to the safe deposit

vaults except in his presence." Dama left Boston for California in the fall of 1885. The "Altered Will" and the "Long Memorandum" are dated at San Francisco, November 1, 1885, after his return from Boston. At that date, according to the depositions of the bank officers, he had disposed of all of the government bonds which he owned on May 1, 1885.

According to Randall, who knew everything "exactly," Dama had at that date four \$1,000 bonds and two \$500 bonds of the original acquisition still in the safe deposit box. According to the books of the bank he did not sell the R. R. bonds until May 29, 1885, which Benjamin Randall states were sold on May 18, 1885. According to the books of the bank Dama bought \$6,000 in U. S. bonds on May 29, 1885, in seven pieces, five of \$1,000 and two of \$500 each, of which transaction Benjamin Randall appears to have known nothing, nor of the subsequent sale back to the bank on June 10, 1887, of one \$1,000 bond.

It is clear that on November 1, 1885, and on May 1, 1887, Dama did not own either \$11,000 in par value of government bonds nor eleven bonds, nine of \$1,000 each and two of \$500 each; but he did own at those dates seven government bonds, five of \$1,000 each and two of \$500 each. It is plain that, as between the entries on the bank books and the testimony of Benjamin Randall, we must accept the evidence of the former and conclude that Randall errs in recollection as to the transaction of May 18, 1885.

At the date of making the alleged Will, May 8, 1887, he held only the bonds purchased on May 29, 1885, described in the depositions of the National Bank officers, one of which bonds for \$1,000 he subsequently, on June 10, 1887, sold back to the bank, leaving at his death in the safe deposit box six bonds, four of \$1,000 and two of \$500 each, all bought by him on May 29, 1885; he had none of those acquired in 1882, all of which he sold in 1885.

It does *not* appear clearly that he ever owned precisely eleven bonds; of the first lot there were thirteen in number, \$11,000 in par value; and yet Randall says that Dama owned in 1885, 1884, and 1883, eleven bonds, just as they are de-

scribed in the "Altered Will" and "Long Memorandum" of November 1, 1885, and the alleged Will of May 8, 1887.

Whatever may be the effect upon the general result, the fact would seem to be at variance with the statement in the disputed documents, that at their respective dates there were in the safe deposit at Boston eleven government bonds, nine of \$1,000 each and two of \$500 each. Dama had some bonds, but not the amount described in the disputed documents. It was not entirely a "vain bequest," but it was a singular misdescription of what he had, as well as an omission to note the railroad bonds that were remaining in the box.

### **Dama's R. R. Land Transactions.**

Turning now to the provision in clause Sixthly of the alleged Will, in which the testator undertakes to dispose of the railroad land: "Four deeds of land bought from R. R. Co. of one hundred and sixty acre's each paid one-fifth by myself Luigi Dama." It appears by the evidence of Jerome Madden, land agent of the Southern Pacific Railroad Co., that on February 5, 1885, Dama purchased 640 acres; February 24, 1885, 80 acres in Fresno; he paid twenty per cent (one-fifth) of the purchase price; Madden had only two transactions with him as indicated in the books but never came into personal contact with him; Dama paid the last interest, according to the books produced by Land Agent Madden, on February 11, 1886. (See judge's manuscript notes of testimony, pages 49, 50.)

William T. Cummins testifies that he had three unfinished contracts for railroad lands with Dama for 680 acres when Dama died. (See judge's manuscript notes of testimony, page 73.) Upon the cross-examination of this witness he testified that shortly after Columbus Waterhouse was on the stand in this case in the fore part of December, 1890, witness called upon him at his office and told him that he would like to get all the light he could on the subject and called upon him for that purpose. Cummins told him that his brother Adley, then recently deceased, had said that French and Burtis having got hold of the papers Smith was afraid they might get hold of some other paper, and for that reason employed French from such fear; he did not recollect

that he said that the testimony of Waterhouse made such an impression upon him that he believed now that the Will was a forgery, nor that he said to Waterhouse at that time in December, 1890, that if that Will was a forgery they had murdered his deceased friend, but he may have said it, and he does say it now (February 19, 1891). Witness Wm. T. Cummins admitted having stated in his own house that the fact that four deeds of land which Dama did not own were included in the Will was sufficient evidence to his mind that it was a forgery, but he made this remark because of the persecution to which he had been subjected for years in his own household, to secure relief from domestic dissension. It appears that Dama had sold and assigned the original 640 acres early in 1885.

Wm. T. Cummins testified that Professor Dama did not know anything about the lands for which he had contracts; Dama depended entirely on Cummins. This would appear to be the fact from the contracts themselves and the copies of correspondence furnished by Cummins and in evidence and on file herein. The friendship of Cummins was clearly coincident with forty per cent of the profits on the land transactions into which he let his deceased friend Dama; and in this respect the contracts filed herein speak for themselves. Dama was dabbling in land speculation for years through Cummins, entirely dependent on the latter, it would appear, and if he did not possess the exact number of acres indicated in the Will at the time of its date he had at least that amount.

These points just adverted to as among the internal evidences of the character of the alleged Will are conceived by contestant's counsel to be the projecting and positive points, the natural projections that stand out as monumental manifestations of malefaction in the manufacture of this probated paper, and these points, coming from the testimony furnished by the proponent and respondent, are so convincing that the contestant's counsel think that upon them they might rest secure of success in this contest. But important as these points may be in the cogent contention of counsel for con-

testant, it is possible to explain them if otherwise they be not found inconsistent with any theory contrary to that advanced by the counsel, who contend that what they call these "extraordinary provisions" were a mistake upon the part of the alleged forger, who erred in thinking that Dama owned the bonds and the four quarter sections of railroad land which he had long before sold and conveyed by deeds of conveyance; counsel claims that this is one of the most damning provisions of this disputed document—enough of itself to condemn it (see judge's manuscript notes, page 257)—but this censure is too strong, unless other circumstances conspire to justify it.

### **The Rationale of the Bequest to Mrs. Smith.**

It is claimed by contestant's counsel that the clause in the Will giving all of his property to Mrs. Sara Barker Smith "for the purpose of further study and development of her vocal organs and cultivation of her voice" is so absurd in its nature as to be itself enough to condemn that instrument; the preposterous idea of expending the assets of the estate in the vain pursuit of a voice at her age was held up to ridicule by counsel, who asserted that no one can read that clause without coming to one of two conclusions—either that Dama was an idiot or that he was the quintessence of absurdity.

I have undertaken to present a view of Dama as described by Dorn, and it may be well here at the expense of some repetition, and in connection with the censorious comment of counsel for contestant upon the whimsical character of this clause of the alleged Will, to take another observation of the decedent, as he appeared to the witness Worcester and to some of the counsel in this case.

Counsel for respondent insist that it is not for them to account for the peculiar provisions or the eccentric conduct of the decedent in making this Will, for the contestant's counsel themselves say that Dama was an odd and eccentric man, and it is neither possible nor necessary for respondent

to account for this manifestation of his eccentricity. Dama began his experience with Wills with a bitter and painful disappointment in failing to secure the probate of his wife's Will through a trivial technicality in the omission of a date; this made him, in the language of D. S. Dorn, "a kind of a crank on the subject of Wills," and he had reason to feel embittered toward the Randalls for their taking advantage of this technical omission and disregarding the desire so solemnly expressed by his wife that the property derived by her from him should return to him. Dama evidently felt very keenly this treatment, and so frequently expressed himself (see letter of Columbus Waterhouse to Dama, Respondent's Exhibit No. 32, dated San Francisco, June 17, 1885, to Luigi Dama, East Boston, Massachusetts), and at that time his feelings toward the respondent may be judged from the letter to her dated Chicago, May 14, 1885. This does not accord with Mr. Dorn's statement that after Dama's return from the east he felt kindlier toward the Randalls. Respondent claims that it is shown here by the evidence that Dama's feelings toward the Randalls were still unchanged after his return from the east, and this inference of error on Dorn's part is borne out by the testimony of Reverend Joseph Worcester, a gentleman whose character for veracity cannot be questioned. Mr. Worcester says that when Mr. Dorn spoke to him about a Will he inferred it was one that must have been executed about two years prior—that is, in 1885. Mr. Worcester is a Swedenborgian minister, a resident of San Francisco for upward of twenty years; he knew Luigi Dama for about fifteen years; he purchased the Jackson street property for him in 1885, at the time Dama was in the east. Dama made repeated trips to the east; the bonds he had in Boston he disposed of to pay for that property, and he sent to Mr. Worcester the full purchase price, \$14,500, the proceeds of the sale of the bonds. Mr. Worcester describes Dama as a careful and particular man, a close man to the world, but liberal where he took a fancy. Mr. Worcester learned of Dama's death the day he died, about noon, Friday, January 20, 1888, from Miss Belle Harris, who told him in the professor's house, where Mr. Worcester had gone to see him when Dama was

sick, and he was there on such a visit when he was told of the professor's death. Mr. Worcester was told by D. S. Dorn that he was an executor in a Will that Dorn had drawn for Dama. Mr. Worcester went to lawyer French's office on Saturday, January 21, 1888, between 3 and 4 o'clock in the afternoon; previous to that hour Mr. Worcester went to the professor's house as a friend to see about his burial. When he went to Mr. French's office there was nobody there that he knew. He was told that Mr. French would be in later; he went out and after a while returned and found there Mr. French and Mr. Burtis. When Worcester went in French was engaged talking with some one and he motioned to Worcester to go into the inner office and he did so and found there Burtis. Worcester told French that he was informed that he (Worcester) had been named executor in a Will of Dama's that might be his last one. French then told Worcester that he had been out to the city hall and had had a special administrator appointed and that Burtis was the person so appointed. It was then suggested that they go to the safe deposit, where there might be found a Will, and the three proceeded to that place. The letters of special administration were presented, and they were conducted to Dama's box. Mr. Worcester could not recollect who applied the key to the box, whether it was Mr. Burtis or the man in charge. The papers were withdrawn from the box and taken to the light where they could be examined; this was on Saturday, January 21, 1888. The papers were taken out and opened. Mr. Worcester went there as a named executor in one or more previous Wills. He had never seen any previous Wills, not even a memorandum. His relations with Professor Dama were both social and intimate; their acquaintance came about through Mr. Worcester's previous and long acquaintance with Mrs. Wealthy B. J. Dama. He had known her and her family in the east, where she was a member of his congregation in the "Church of the New Jerusalem," and she was also a member in San Francisco. Mr. Worcester had seen Mr. Dama write frequently, but was not a close observer, he might identify it, but not with certainty sufficient to satisfy his own mind if there were no doubt thrown upon it. When the paper was taken from the safe

deposit box, the "Short Memorandum" (Respondent's Exhibit No. 1), Mr. Worcester accepted it as Dama's handwriting. The question arose at once as to who was Mrs. Smith. Mr. Worcester remarked that he did not know her, Burtis expressed ignorance of her identity, and French also. Nothing more was done or said then; the papers were done up and put back. He was not sure about the "Short Memorandum"; he had no recollection, and he could not identify Respondent's Exhibits No. 9, Deed of C. E. Royce to Dama, No. 11, Deed of Solomon Sweet, No. 12, Abstract of Title, No. 55, Agreement of Sale Phelps Real Estate; there were papers similar in appearance, but a thicker bundle. Mr. Worcester was at the safe deposit with French and Burtis but once, and that on the occasion specified. Mr. Worcester's impression was that they examined the papers by daylight; it may have been by gaslight. It was about 5 o'clock of a Saturday afternoon, on the 21st of January, 1888. Mr. Worcester was with Professor Dama when he rented the box at the safe deposit; he introduced Dama there. Worcester did not know until lately that Dama had a substitute who could go to the box. He supposed that Columbus Waterhouse was the substitute, but recently, since this trial began, Mr. Worcester had been told that he himself was the substitute, but he never had a key to the box. (Judge's manuscript notes of testimony, pages 47, 48, 86, 89.)

Witness Worcester wrote to Benjamin Randall a letter on the 23d of January, 1888 (Contestant's Exhibit G-33). He had a conversation with French after receipt of telegram from Randall on that day. He asked him who the executor was and French declined to inform him. When he went to French's office Worcester stated to him that he had been informed by Mr. Dorn that he (Worcester) was in one or more of the Wills made by Dama coexecutor with Columbus Waterhouse, and that as Waterhouse was absent from the city he must act. French said that he had obtained from the court the appointment of a special administrator and that presently they were going, he and Mr. Burtis, to the safe deposit to examine the papers. The three went there. Mr. Worcester saw no one break the seal, he saw the papers withdrawn, but recalled only one, the "Short Memorandum,"

or Respondent's Exhibit No. 1. After the reading of that paper Mr. Worcester felt himself discharged. The first time Mr. Worcester learned that Burtis was appointed special administrator was when he went to Mr. French's office; Mr. Worcester had a conversation with Mr. French at Halsted's undertaking establishment on Sunday, January 22, 1888. French told him he had seen the Will, but Worcester could not recall what he said upon that occasion. Worcester received a letter from French notifying him of the time of the funeral. He was not requested to officiate at Mr. Dama's funeral. Mr. Worcester could not recall who made the suggestion that he should officiate at the funeral. There were present Mr. French, Mr. Burtis, Dr. Brigham, the undertaker or his assistant, and the two ladies, Miss Harris and Mrs. Waterhouse. The suggestion may have proceeded from the latter or either of them. Worcester did not directly decline, but simply turned the suggestion aside. (See pages 89, 90, 91, judge's MS. notes.) There was a general conversation at the professor's house on the Friday evening in which Mr. French and Mr. Worcester took part, also Mr. Burtis, Dr. Brigham, Miss Harris, Mrs. Johnson, the undertaker, and perhaps others. Dr. Brigham said that if the body was to be embalmed, the sooner the better. Mrs. Columbus Waterhouse may have spoken of the embalming, she was present. All of his pupils and friends knew of the professor's wishes in that regard. When Mr. Dorn spoke to him about a Will, Mr. Worcester inferred that it was one that must have been executed about two years prior. (See page 48, judge's manuscript notes testimony.) When Mr. Worcester went with professor Dama to the safe deposit it was several years ago, after the death of Mrs. Dama in 1883. Mr. Worcester thinks he may have been a little precipitate in assuming at the time he was with French and Burtis at the safe deposit that he was not executor, but when no Will was found and the memorandum referring to papers in hands of a person whom he did not know, he felt that he was discharged of any duty and that he had no further business there. (See page 91, judge's manuscript notes testimony.) Mr. Worcester had no recollection of visiting the safe deposit vaults as testified to by Mr. Curtis, superintend-

ent of the safe deposit (who said that Mr. Worcester called the next morning after Dama died between half-past 8 and 9 o'clock, just as Curtis was going off watch, Worcester called for a special purpose according to the information received by Curtis. See page 102, judge's MS. notes testimony). Mr. Worcester says that it is entirely unlikely that he made this visit, for his habit was to remain at home until 10 o'clock in the morning, unless some especial reason exist for going out before that hour; but this habit was not invariable and it is possible for him to have gone out on some occasion and then forgotten it. (Judge's manuscript notes testimony, page 164.)

### **Dama's Character and Environment.**

That Luigi Dama was a quaint exotic there can be no doubt. In the language of Counsel Russell J. Wilson, Dama was an eccentric old Italian music master, with a vein of cynicism, yet not altogether out of touch with nature, surrounded by self-seekers and self-servers expectant to be made the beneficiaries of his bounty, while he himself was always looking for a friend and ever mourning his deceased wife, for whom he entertained an extraordinary affection and whose nature and character he portrayed in striking contrast to that of her relatives, the Randalls. He had no one to open his heart to; he never wrote to any of the family to let them know, because their nature was so different from his wife (see letter to Mrs. Gibbons, March 7, 1884. Respondent's Exhibit 34). Two years after this letter he wrote to Jennie Forbes (March 28, 1886, Contestant's Exhibit C—3), that the reason he did not write often was that he lived in a state which nobody could realize; he had no pleasure to live, no amusement, no friends who could relieve his sorrow—a state of mind which he could not tell. Sometimes he was in the mood to take his own life and go to join his dear beloved one, the only one which he felt the pure divine love in this world. She was everything in this world for everybody, and the angel, and consolation, and guide of all. His feelings did change toward Columbus Waterhouse, as appears from his letter to Benjamin Randall, December 25, 1886 (Contestant's Exhibit 1—9), in which he

spoke of having stopped altogether calling at his house, giving the reason therefor.

### **Inception of Dama's Attachment for Mrs. Smith.**

Now, it is said that at about the time that Dama underwent a change of feelings toward his deceased wife's relatives, the Randalls, he became more friendly toward Mrs. Sara Barker Smith, the respondent herein. He became attached to her and warmly interested in her welfare, and felt proper resentment toward the Randalls for having through technicality taken from him what his wife's Will devised, and there is no doubt that he suffered a change of heart toward Columbus Waterhouse, although he may have dissembled in his presence. There is ample evidence in the record that Dama was a dissimulator, and he practiced upon Columbus Waterhouse as he did upon other pupils, "most of whom were there for their health," according to the evidence of Mr. Waterhouse. What were his feelings towards Mrs. Smith at that time? The letter from Chicago, May 14, 1885, shows appreciation of her kindness toward him, and is a gauge of friendly feeling (Respondent's Exhibit No. 97); his feelings were then and remained friendly toward Mrs. Smith. In that letter he expressed a hope that she would remember to not sing at all and enjoy the summer vacation, and let the voice rest and let nature act and gain more power, so that on his return there would be no trouble at all and they would begin to work in the art of the use of the voice.

### **Was Dama Sincere in Regard to Respondent?**

If he was sincere in this expression it cannot be said, as counsel for contestant contend, that the purpose of the bequest was a burlesque on common sense, or that there was no basis for such a legacy, nor that this bequest alone, because of its absurdity, establishes the proposition that the alleged Will is false and fraudulent in its conception and concoction. This letter showing faith in her vocal capacity was dated May 14, 1885, and the "Altered Will" was dated November 1, 1885, so that, assuming the authenticity of the

latter, there was some reason for the bequest at that date. Counsel for the contestant deride the object of this bequest and say, with some show of sarcasm, that if we listen to the witness, Mrs. Helen Cushman, it was the great object of Professor Dama's ambition to make of Mrs. Smith the great exponent of his theory of voice culture.

### **What was Dama's Theory of Voice Culture?**

He was alone in his views; he had studied medicine and surgery in order to ascertain accurately the anatomy of the throat, to more thoroughly treat his pupils and enlarge their vocal power; he believed in no other system; he taught that all other teachers were impostors, and that the money they exacted for teaching was extortion; that they were not versed in the true science and art of vocal development, and that he alone knew it all. It is not reasonable to believe, urge counsel for contestant, that such a man, with so strong and invincible a prejudice against other teachers, would bestow his fortune upon a woman with a voice of so light a volume and limited a compass for the purpose of enriching those whom he considered incapable of imparting instruction according to the only true method, his own unique system.

Mrs. Sara Barker Smith did not have the natural conditions to make a singer, nor did Professor Dama believe that she could ever make a singer, because she had natural inherent defects, as he said to Dorn and others, and so we have it, quoth counsel for contestant, that the more we study Clause Sixthly of the alleged Will, the more we view it from every side, the more absurd does it appear; it turns the whole case to ridicule, and it is too great a tax upon credulity to believe that a court accustomed to consider and construe questions of this grave character will accept seriously this absurd clause as an authentic creation. It never emanated from the hand or brain of Luigi Dama; but, say the counsel for respondent, the purpose of his bequest to Mrs. Smith was reasonable in itself and characteristic of the testator, who was inclined to give a reason, no matter how whimsical; but this was not whimsical—it was according to his theory of voice culture and progres-

sive development; and this sharp attrition of argument of opposing counsel brings us to the consideration of the testimony of Mrs. Helen M. Cushman, a witness for the proponent and respondent, who was also a witness on the original probate, March 27, 1888.

**Mrs. Helen Cushman.**

Mrs. Cushman is a resident of Alameda, who confesses to half a century of life. She came to California in 1871, the year of the Chicago fire. She lived at one time for four years teaching in Janesville, Wisconsin, at Miss Scribner's Young Ladies Seminary, where Mrs. Sara Barker Smith, then Miss Sara Barker, was a pupil. She knew Julius P. Smith, who is now Sara's husband. She taught Sara piano and vocal culture. In this state Mrs. Cushman has been employed as piano and organ teacher; taught at Benicia Seminary, and also at Mills Seminary, and has been playing the organ in different churches and is now engaged in the town of Alameda. Her first husband's name was C. C. Cushman (he is now dead), and her second was J. W. Yarnley, from whom she was divorced. Mrs. Cushman knew Professor Luigi Dama quite well; made his acquaintance in 1877 and formed the acquaintance of his wife at the same time. She had heard of him as a successful treater of clergyman's sore throat and called upon him to learn of his system, as she had a chronic sore throat trouble herself and was always ambitious to learn something more of voice culture. She took lessons of Dama for four years; her husband (Mr. Yarnley) also took lessons. Mrs. Cushman introduced Mrs. Sara Barker Smith to Professor Dama. One day Mrs. Smith said to Mrs. Cushman that she wished she knew a good teacher of vocal culture and Mrs. Cushman said that she knew just the man, and she took Mrs. Smith to the professor's house and he tried the voice of Mrs. Smith; it was a mezzo or a medium voice. He said there were great possibilities in it, more than Mrs. Cushman understood. Dama said that Mrs. Smith might become a great artist, she had a very sweet voice. Mrs. Cushman took lessons, three or four a week about that time. Mrs. Smith was also then taking lessons at a different hour. The professor and Mrs. Cush-

man had many conversations about the character and quality of Mrs. Smith's voice and the prospects of her making a singer. This was in 1884. Dama told Mrs. Cushman of Mrs. Smith's ability to become a dramatic artist and a great singer. In one conversation particularly, in which Mrs. Cushman criticised Mrs. Smith's rendering of a song, the professor said that the critic knew very little about it, that Mrs. Smith had the making of a great artist, and that if his life were prolonged they should see what he could do for her. After Mrs. Smith took lessons for a while Mrs. Cushman noticed great improvement in her voice. The professor always treated Mrs. Smith with great respect and courtesy, and in the time of flowers he always had for her a little bouquet, but not any for Mrs. Cushman. The professor sometimes dined with the Smiths; Mrs. Cushman was there often. Dama came early and they always had "a little sing" before dinner. Mrs. Cushman knew Dr. Tisdale for four years and was very well acquainted with him and his family. She recommended him to Professor Dama, because she had confidence in him as a reputable physician. Mrs. Cushman also recommended Mrs. Fannie Johnson as a nurse, because she thought her to be just the person for the purpose; she felt interested in Mrs. Johnson because she seemed to be superior to her station, and she felt sorry for her and sent her with a letter to Professor Dama and stated the amount of pay—twenty dollars per month and board for herself and little girl—and Mrs. Johnson went over to San Francisco from Alameda and was engaged by him. Mrs. Cushman attended the funeral of Professor Dama. Her first notification of his death was by a letter from Miss Harris; she had no other notice from anyone else. She was one of Professor Dama's warm friends; she was also a very dear friend of Mrs. Smith, who first told her that she was the custodian of the Will two days after it was opened. Mrs. Smith told her that she was greatly surprised by the contents of the Will, but Mrs. Cushman was not surprised, because Professor Dama was so eccentric in his ways and methods of life. Mrs. Cushman could not remember how often the professor presented Mrs. Smith with flowers, but he never gave any to Mrs. Cushman, although she was such a "warm friend," but she did

not feel aggrieved at this slight; she did not think anything about it. They were very inferior roses that grew in his garden. Mrs. Smith sometimes took them home, sometimes gave them away, or threw them away. The professor would say, "I present you a few flowers"; Mrs. Smith would say, "Thank you." Mrs. Cushman knew of no reason why the professor was more demonstrative to Mrs. Smith than to her, except that Mrs. Cushman was older and she did not look for any gallantries. Professor Dama had great hopes of Mrs. Smith that she would extend his theory, which he could not have had in Mrs. Cushman's case. When Mrs. Smith threw the roses away she said that she did not know what to do with them as they were troublesome when they were shopping.

### **The Flower Bouquet Incident.**

This incident counsel for contestants considers of inferential importance, and says that if Mrs. Smith should prevail in this court upon this false paper we shall see many documents of this description propounded for probate, for there are many other Mrs. Smiths in this world, millions of such women, hypocrites and traitresses, false to the memory of their friends, betrayers of benefactors, and hollow in their hearts, as she proved herself when she took his little gift of flowers plucked from his uncultivated house garden, given to her with such grace and feeling, and threw that graceful tribute on the pavement to be trampled upon by street-walkers, and footpads—trivial as this incident was, it betokened her false and hypocritical character; but it is attaching too much importance to this act to hinge upon it the issue of so grave a controversy. It illustrates the kindness and courtesy and preference of Dama when he bestowed a little faded flower, "a very inferior rose," according to Mrs. Cushman, who was not so favored, upon a lady pupil, who did not care to pack it in public, but it does not prove nor tend to prove her a felon.

### **The Respondent, Sara Barker Smith.**

We come, now, to the consideration of the testimony of the respondent. Mrs. Sara Barker Smith has resided in Cali-

fornia since 1874; was married in Edinboro', Erie county, Pennsylvania; born in Lewis county, New York; wife of Julius P. Smith; thirty-nine years old; studied music first in Janesville, Wisconsin, at Miss Scribner's Academy for young ladies; first lived in California at the Grand Central Hotel in Oakland, afterward at the Palace Hotel in San Francisco, then took house on Clay street; in 1881 she and her husband took a European trip, returned in 1883, visited England, Belgium, Spain, Italy, Morocco, Algiers, went over the entire country of Italy and Austria; did not study music while there; visited Scotland and Ireland, but did not kiss the Blarney Stone, although they saw it; it was her intention to take lessons in music in Paris from Madame Marchesi, but concluded that upon their return the same object could be accomplished by securing the best vocal foreign instructors resident in San Francisco; upon returning here, through her old and warm friend, Mrs. Cushman, who had been her vocal teacher in Janesville, at Miss Scribner's school, made the acquaintance of Professor Dama, of whom she spoke in the most enthusiastic terms; visited him together with Mrs. Cushman, he tested her voice, and said she had an exceptional voice; at that time Mrs. Smith's voice was a light soprano, an octave and a half; she probably sang not higher than A and in F, probably to C, but she had no chest tones at that time; in his method of teaching he claimed that everyone had an impediment; Mrs. Smith's he claimed to be in the musical or vocal cords and the cricoid cartilage; she took three or four lessons a week until he told her to take six until his death, with the exception of the summer months which the Smiths spent at their country home; Mrs. Smith's progress was very rapid; the lesson consisted mostly only of tones; Dama played accompaniment; her voice was high soprano; he praised the quality and compass of her voice; Dama went east on the 7th of May, 1885; Mrs. Smith made provision for his comfort while on the way, put up lunch for him in basket (see letter of Dama from Chicago, May 14, 1885); Mrs. Smith and the professor talked of Italy and of the places she had visited, and of his native place in Naples; Mr. Smith was eager to hear her sing and they invited Professor Dama to the house, 2120 Jackson street, and Dama frequently dined

with them; he usually came an hour or an hour and a half before dinner; he played accompaniment and Mrs. Smith sang until dinner; Dama sometimes gave Mr. Smith and herself a lesson in Italian; Mrs. Cushman was almost always present; Dama frequently in the spring-time, in his own house when she would go to take lessons, would place a little bouquet of flowers on the table in front of his piano upon a square piece of paper so that the ends might be inclosed to prevent soiling of her gloves; the lessons were three dollars each, an hour; frequently her lessons extended over an hour, but the professor made no extra charge; she had some pictures taken and the professor saw one and she gave him one (Respondent's Exhibit 95 is the one she gave him, Cabinet Photograph); this photograph was found among his effects, after his decease, and Mr. French, the attorney, gave it to her; the professor had three other pictures of Mrs. Smith, a tintype and two photographs. After Professor Dama returned in 1885 she resumed lessons with him; on Christmas, 1884, she made a present to him, a solid silver-handled umbrella; on Christmas, 1885, she gave him a gold-headed cane; on Christmas, 1886, a satin laundry list and handsome bouquet of flowers; on Christmas, 1887, a dressing gown, a double gown, long quilted gown; she had a great deal of trouble in fitting him as he was very large then on account of dropsy; she put some gores in and altered it to suit him; he presented her an ivory boat, a model in ivory, which she took home, a maid was sent for it, and put it in a box; Mrs. Smith has never looked at it since; he did not make her any present until the day he was operated on, when he said he was going to make his "toilet for death," he did not expect to live; he said if the operation proved unsuccessful in two days he would be dead—at all events he said it was only a question of a short time when he would die; he brought out a gold watch and wished her to accept it, and also a diamond pin; he said he wished her to have them as souvenirs of him, that the pin was made of a diamond ring he used to wear; he gave her three diamond studs, three pearl studs, and a cluster of diamonds, and she accepted them. A short time before the professor went east in 1887 one morning before her lesson he brought her an envelope and wished her to take charge of it; it was marked

"Will and Testament"; she said that as he had a box in the safe deposit it would be better for him to keep his Will there, but he said that he had reasons of his own for not keeping his Will there; he told her that Mr. Columbus Waterhouse had the key to his box and that was the reason he did not wish to put his Will in the safe deposit; he said that in 1885 he left the key of his safe deposit box with other papers in Mr. Waterhouse's safe, and Mrs. Smith immediately proposed his calling for the key, and the professor said that he did not wish to do so, and that he preferred her to take charge of it, and she assented to this proposition; the first thing was to put it in an envelope and mark it "Private Paper," instead of "Will"; it was already marked "Will," but she requested him to put it in another paper and mark it "Private Paper," and she then requested him to wrap it and tie it, which he did; then she took charge of the Will. At that time in front of the fireplace in the front room over the cuspidor he held a paper, it looked to her to be a paper about legal-cap size, about the size of the Will; the professor took a match, lighted this paper, and said that was good-by to the Waterhouses or Waterhouse Will; she took the Will home and placed it in her laces, in a large trunk, and locked it, for the reason that she always carried the laces with her, and it impressed her that it was the safest place to keep it; when he returned from the east in August, 1887, she carried the Will back to him and asked him if he wanted to take it back; the professor said that he was not well, was feeling wretchedly, and wanted her to retain charge of it; she took it back and replaced it among the laces; on the morning that he was operated upon, Wednesday, January 18, 1888, Mrs. Smith asked him in case anything happened to him what she should do with the Will; he said that whenever she opened it she should see that there were three witnesses present; this conversation occurred on the morning of Wednesday, January 18, 1888; Mrs. Smith remembered that date because it was the last day of lessons; when Mrs. Smith was taking lessons of the professor after practicing until she was fatigued they sometimes sat and chatted, and at other times they would devote perhaps fifteen minutes to Italian lessons; the professor usually spoke very kindly of his pupils and—she dis-

liked to say it except in self-defense—he referred to Miss Belle Harris as the one with a queer brain; it amused him to hear her talk; he would frequently lean back in his chair to listen to Miss Harris to see how long she would talk and what she would say; Mrs. Smith usually sat on a chair at the end of the piano; before Dama went east he was feeling very poorly and when he came back it was very similar; after his return he did not improve, he gradually grew larger with dropsy; the professor told Mrs. Smith that he studied medicine in Italy prior to teaching so as to understand anatomy of the throat so that he might teach comprehensively; Mrs. Smith read several books on the voice and conversed with him about their contents; he thought that the work of Charles Lunn of London was perfect in its method if the author taught as he wrote; Mrs. Smith told the professor he was a very ill man and ought not to go longer without attendance, and finally at her instance, through Mrs. Cushman, Dr. Tisdale, Senior, called to see him; she called on the professor the morning of the day he died, Friday, January 20, 1888; he was in a very weak condition, in bed, reclining on pillows in a semi-recumbent position; Mrs. Johnson, the nurse, admitted her; as Mrs. Smith entered the hall she heard the professor calling and she, not wishing to take command herself, told Mrs. Johnson that he wanted her; Mrs. Smith went in and found him in a very feeble condition, very weak; he asked her how he looked; she answered “Very well,” not wishing to say, as was the fact, that he was looking very bad; he asked her to water some flowers for him; she did so; they were in moss under his wife’s picture; he said that Mrs. Johnson did not know how to do it; Mrs. Smith watered the flowers and then returned to the room; she said to him “talking tires you”; he assented by a nod; he settled back, with a deep sigh, on his pillow, and Mrs. Smith asked him if he wished her to go and he nodded and she left. Mrs. Smith never saw him again alive; she first heard of his death from Miss Myers, a cousin of Miss Belle Harris; she received the announcement as she was about leaving her house, attired for the street, preparatory for her usual morning visit to the professor; her bell rang and Miss Myers appeared and made the announcement. Miss Myers testifies that at the request

of her cousin she went to Mrs. Smith's house the next morning after Professor Dama died to inform her of his death. Mrs. Smith was about going out as Miss Myers entered the house and informed her of the sad news. Mrs. Smith seemed very much affected; she asked who was the last person with him and Miss Myers said "You were." Evidently that was the first Mrs. Smith heard of the event. Mrs. Smith said when the lessons were given to her by Professor Dama when he was ill he sat by the fire and she sat on a stool near the piano; he directed her tones and she produced them. She suggested that he ought to have nourishing food; her maid prepared coffee and she took it to him. Professor Dama claimed that a woman sixty years of age might under his system obtain a fresh, sweet voice, and once obtained it would remain through life. After Miss Myers told Mrs. Smith of the professor's death she went immediately to his house, 317 Mason street. The door was opened by either Mrs. Johnson or Miss Belle Harris, she was not sure which. After some conversation between herself and Miss Harris, Mrs. Smith stated that she had the Will and asked Miss Harris if Mr. Adley Cummins was to be the attorney for the estate. Miss Harris said "no"; she also said that the professor had told her that his Will was made and was in good hands. On Sunday, the 22d, Mr. Burtis and Mr. French came to the house of Mrs. Smith and spoke of having been at the safe deposit vaults, and learning that she was in possession of the Will, and that Mr. Burtis was the special administrator; they had some general conversation about the Will, which was produced by her as she had received it in the envelopes and opened and read by Mr. French, who was finally agreed upon to take charge of it and act as attorney. The first time that Mrs. Smith saw Mr. Burtis to know him was on this Sunday, January 22, 1888, when he came to her house with Mr. French. This is the substance of the statement of Mrs. Smith on direct examination, but counsel for contestants says she appears very differently under the camera of cross-examination. On the direct examination it would appear that she was born with a silver spoon in her mouth, that her origin was of a superior sort and that she

was not of such lowly birth as most others, but it turned out on cross-examination, according to this counsel, that her pretensions were spurious and her aristocratic assumptions simply and solely shoddy. Her early years were not spent in such surroundings as she would have people believe, and her social aspirations and ambitions were founded upon a false basis. Her armor of aristocracy was pierced, and her claims to especial consideration and social caste have been proved worthless by the crucial test of cross-examination. Mrs. Smith and Burtis would have the court believe that they did not know each other originally; that until after Dama died they were not acquainted, but the evidence of Mr. Dorn is that Mrs. Sara Barker Smith and Mr. R. W. Burtis were acquainted with each other, and Mr. Dorn was not cross-examined.

### **Life History of Sara Barker Smith.**

Mr. Dorn testified that he knew that Mr. Burtis and Mrs. Sara Barker Smith were acquainted with each other. The history of the respondent, as given in her cross-examination, is that she was born August 11, 1851, in Collinsville, Lewis county, New York, where her father, James Barker, was a merchant; her father went to Pike's Peak during the excitement before the war; he had failed in business prior to his departure; after he went away her mother procured a divorce from him and married a Mr. Burnham, from whom she was divorced; he brought suit, but she gave occasion for it by throwing something at him to give cause of action, so the respondent had been informed by her brother; Mr. Burnham was at one time a grocer, afterward a lawyer; he died a violent death—it was not certain whether it was suicide or not; her mother is still living; her brother, George P. Barker, is now dead; he died in Canada; he left Chicago because the north was distasteful to his wife; his wife was not of a pronounced Southern type, a Creole; she had blue eyes, hair almost black, or dark hair, slender face, not round, rather sharp features; her name was Emma Hook; Mrs. Smith did not know that her brother left Chicago because he was suspected of sympathizing with the

Southerners; he settled in Canada during the war, and died there; her father died in San Rafael; he came to California for his health; it was in 1887 or 1886 that he came here; it was on the afternoon of January 22, 1888, that Mr. Burtis and Mr. French came to her house; her father and his wife were in the house but not present at the interview; her father died October 11, 1888; on the occasion when Dama gave to her his Will Mrs. Smith asked him to tie it with his peculiar knot; she had no particular reason for the remark except to say something or show that she had no curiosity to look within it; it was, perhaps, an idle remark; her idea about putting it in a second envelope was that it would not be so easy to open it, she had no other reason; when the Will was put in the second envelope it was then inclosed in some wrapping paper; Professor Dama said that it was his Will, but he did not tell her of the contents; there could be no mistake about that; Mrs. Smith knew Mrs. Anna Herbert Barker; she never stated to her and her own father—Mrs. Barker's husband—on the 22d of January, 1888, that she had his Will all the time without knowing what it was until the gentlemen called; she never said to them, "Well, pa, I am the heir to all Professor Dama's property; I have had his Will all the time without knowing what it was until the gentlemen called and read it"; she never made any such statement; there is not a particle of truth in that; nor was she commended by her father or her husband for keeping a secret so long, and they did not say it was an unusual circumstance for a woman to keep a secret; it is a fact that she did not tell her husband or Mrs. Cushman; no hand ever touched that Will but her own from the time Professor Dama gave it to her, nor did she say a single word to a soul on that subject from the time he gave it to her until the 22d of January, 1888, when it was opened and read; after the reading she told her father and his wife of the contents of the Will, and that she was the chief legatee, and also told of the present that the Professor gave her before his operation; when Mrs. Smith went to the country she took some of the papers with her; the more valuable, deeds and the like, she kept in the Safe Deposit Company; some of his letters that she thought of no particular use were destroyed; Miss Harris' letters were all returned to

her. Mrs. Smith called upon the professor the morning of his operation, and he told her he was going to make his toilet for death and that he was going to send for a barber; she asked him for a lock of his hair and he told her to take a scissors, and she cut a lock of his hair and she still retains it; he said that even though he were tapped he would fill up again and he would not live more than three days; he said he could already feel the water around his heart; he gave her then the studs and diamonds and the gold watch to retain as a souvenir; when he gave her the Will she told him that the proper place for his Will was in his safe deposit box; she could not tell how she knew that he had a safe deposit box but she did know it; she could not recollect when or whether he told her; she consented to take charge of the Will; she told him if he really wished to have her take charge of it she wished he would put it in another envelope and mark it "Private Paper"; she did not remember where he got that second envelope, the yellow one; the white envelope was closed when she saw him put it in the yellow envelope; she did not remember whether he had any trouble in getting it inside the second envelope; the professor said when he gave her the Will that he wished her to take charge of it because Mr. Columbus Waterhouse had the key of the safe deposit box and he was east; she placed the Will in her laces in her trunk and kept it there; took it with her when she went to "Olivina," the vineyards of the Smiths near Livermore; she always carried her laces with her; after the knot was tied around the papers she proceeded with her lesson and then went home; she placed the paper within the folds of her dress, which were pinned together, as her pocket was not large enough for it; in the course of time the professor asked her where she kept the Will; she told him with her laces; she did not remember how often he asked her; on the 18th of January, 1888, he told her if anything happened to him to have three witnesses to whomever she handed it; she went direct to her house with the Will; it was not raining; she put it in her laces immediately on arriving at home, placed it in the package of laces, then sewed the package up; she brought most of the laces from abroad in July, 1883, in the "Alaska"; they were not noted at the custom-house in

New York; her husband had no box in the safe deposit; he had a safe in his office; Mrs. Smith kept the Will among the laces because she thought it was safe there, that was the reason that she did not put it in her husband's safe. Professor Dama told her that Miss Belle Harris was nearing a change of voice and that she would gain flesh and good looks and that he was in hopes she would get a beau. Mrs. Smith did not repeat this to Miss Lowrey and Mrs. Cummins and Miss Harris, the ladies that were in the dining-room, because she thought it would be rude in her to say so. Professor Dama did not say so to Miss Harris, but then, said Mrs. Smith, "We do not always express our opinions of others to their faces." Miss Harris had given Mrs. Smith no occasion to love her, and Mrs. Smith had no particular liking for Miss Harris. in fact she thought she disliked her. When Mrs. Smith had a conversation with Miss Harris upstairs in the bedroom of the professor's house after his death, Mrs. Smith did express sorrow that she had not remained longer on the morning of his death, and Miss Harris said it was just as well that Mrs. Smith had not, because the Knights Templar had asked many questions concerning the professor's death; the conversation was to that import or purport; Mrs. Smith had testified that she knew that Professor Dama had trouble with Wills before, for he had told her that his wife had made a Will in his favor and for lack of a date it had been denied probate; the professor told her of his trouble in probating that Will, that his wife's relatives had prevented the Will from being admitted to probate and had probated a former Will; he said that most of the property—about half of it—was his, had been given by him to her; he had given her the Boston property and the lots in San Mateo county were his, and that when he was east they did not give him even a souvenir of hers; she kept from her husband the fact that she had possessed the Will, because she used her own judgment, which she had frequently found by events to be better than that of her husband; she never had experience of this kind before and hoped never to have it again; she had most certainly watched the progress of this trial and was interested in the result; she had not caused any articles to be published in the papers nor paid for the

publication of any articles except indirectly, when Mrs. Ella Sterling Cummins told her that a newspaper reporter had been very kind in publishing some article and she gave her for him a box of cigars. This is the story of Mrs. Sara Barker Smith as told by herself, in substance, on direct and cross-examination. She was a woman, according to counsel for contestants, reared in peculiar circumstances, with infelicitous parental surroundings, traveling two years under an assumed name until married to Mr. Julius Paul Smith; she traveled abroad, purchased laces—dutiable articles—brought them into the United States, avoiding the custom officers, defrauding the government, and necessarily committing perjury. Is such a person, asks this counsel, in a position to enforce belief in her bare statement as to the manner in which she obtained possession of that paper, the Will? It is intrinsically improbable and circumstantially incredible. The counsel for contestants discredits her testimony that she left Dama on the morning of his death after watering the flowers under his wife's portrait, and after doing other acts at his instance leaving him to rest in his feeble condition, and asks, Is this story to be believed? Is it not rather probable that she gave him the potion prepared by the nurse, Mrs. Fannie Johnson, whose knowledge of subtle poisonous essences, acquired in the apothecary shop, enabled her to concoct and compound the ingredients for the chalice presented to the lips of her revered and loved preceptor by the respondent, Mrs. Sara Barker Smith? Is this inference incredible? Counsel asks, How can counsel for respondent claim that the character of his client is such as to render improbable so monstrous a charge? Why is Mr. French so proof against assault that his connection with this case may not be attacked as founded in a criminal conspiracy? Many a man as eminent as he has fallen from high estate even in this community, after having for years posed as models of rectitude and imposed upon the public as examples of morality. Not long ago a lawyer, prominent professionally, a scholar of exceptional attainments, socially in the most exclusive circle, trusted by thousands, was suddenly found to have been for years engaged in the most extensive

peculations from the estates and trusts confided to his care, reducing many of his clients from affluence to penury and misery. And many other examples may be cited, at home and abroad, of violation of trusts and dual lives, to illustrate the text that the parties implicated in this charge were not protected from suspicion by reason of repute alone. All the circumstances surrounding this case point to the probability that Dama's death was precipitated by mysterious means, and justify the intimation that Mrs. Fannie Johnson's knowledge of the occult effect of certain drugs was made available in the emergency.

Counsel commented severely on the several and discrepant stories told by Mrs. Sara Barker Smith concerning the manner in which she obtained possession of the Will. How did she know that that Will was made in May 1887? How was she concerned as to whether or not there was a later Will? She always knew what were the contents of that Will; she helped to organize it, and was the mother of this Will; that is how she knew that it was made in May, 1887; this cannot be controverted, asserts this counsel. The evidence of Miss Belle Harris is true, he asserts; notwithstanding the acrimonious assailment of Miss Harris, her testimony is insusceptible of impeachment and stands unaffected by the acerbity of the assaults of the adverse advocates. With regard to the testimony of witnesses who are sometimes discrepant in dates or forgetful as to details, counsel for respondent remarks that no one has a perfect memory; the best memory will be confused in some particular, deficient, or defective, and it would be unfair to deny credit to a witness merely because of some error as to the date of an event, incident, or transaction, when the witness on the whole possesses the elements of credibility. Contestant claims that the court must credit the statement of Miss Belle Harris or else find her guilty of perjury. Why should she perjure herself? She had no possible motive for perjury, and her whole manner and demeanor were convincing arguments in her favor as a witness; she was precise in detail and circumstantial in narration, with no effort to impress the court, but with every appearance of truthfulness;

she is entitled to full credit, not a single contradiction in all her testimony; the evidence of Miss Belle Harris was clear, concise, consistent throughout, and was in no particular contradicted; Burtis, who was called upon to overthrow it, was one of the strongest props in its support, and shorthand reporter Knox's statements were retracted or modified by him before he left the stand and shown by Miss Belle Harris' testimony in rebuttal to have been physically impossible. Her testimony is truthful beyond peradventure, and must enforce absolute conviction in the mind of the court, according to this argument. With reference to the will, Miss Harris testified that she first learned of its contents when it came out in the papers; she did not make any search for a Will because she thought the Knights Templar would look out for everything; she did not infer from what the professor said the day before he died that he left her everything in a Will; there were others connected with that Will; she had not made a statement to Mr. Thomas R. Knox, as he testified, that Professor Dama was a "magnesia fiend" or any such conversation with him. Mr. Knox testified that he first heard of the death of Dama a few hours after the event; it was on a Friday in January, 1888; could not remember the day of the month; he related how he came to be informed of the death and what he did thereafter; he sat up all Friday night in the house of the deceased; his recollection was that the body was removed some time Saturday; he returned to Dama's house on Saturday afternoon and he thinks that he came back in the evening; he met Mr. French and Mr. Burtis there in the afternoon; Mr. Knox knew Mrs. Sara Smith, frequently saw her in the house of Mr. Dama, but not to form her acquaintance; he had met her once after that and made her acquaintance; he never knew Julius Paul Smith in Dama's lifetime; Knox met Miss Belle Harris for the first time after the professor died, that was the first time to converse with her; had some conversation with her about the professor's death; she said he was a "magnesia fiend." that he was a great indulger in magnesia, that she would frequently resort to expedients to correct this practice or

habit, as she had learned by inquiry that it was very injurious to the intestines, and she thought his intestines were ruined in that way, and that that was what brought about his death. Miss Belle Harris called at Knox's house No. 2004 Bush street on the Sunday morning following Dama's death; generally she spoke of his death, she said he was a great consumer of magnesia, that he was inordinately fond of it, and that he consumed it as opium fiends did that drug; not in the same manner, but with equal avidity; Miss Harris also spoke of the professor's liking for herself and of his dislike for the Waterhouses and others—the Rev. Joseph Worcester, among others; she spoke so much, she was the principal speaker, that it was hard for Mr. Knox, according to his own statement, to segregate portions of her remarks; she said that Mrs. Sara Barker Smith had been long a pupil of the professor's, that she was not a remarkable pupil, and that the professor did not expect to make much out of her; Miss Harris said that the object of her visit to Mr. Knox was to tell him, as he had long been an official of the courts, that she thought there was something wrong; she said she believed there must be another Will, and that the only persons who possessed his genuine confidence were herself, her sister and family, Mr. Knox's wife, and Mr. Knox himself; she said the professor had taught her gratis and that she procured pupils for him, and she told of her close intimacy with him and of his great confidence in her; she said nothing about the suddenness of his death; Mr. Knox averred in his testimony that he had no interest in the controversy; that he looked at the Will about the time it was admitted to probate, just from curiosity, to satisfy his mind, as he was acquainted with the deceased; nothing occurred to whet his appetite or curiosity; his curiosity was original in this case from the fact of there being such a Will; he had testified that he had learned of the death of Professor Dama on his way to the house of the deceased from Rev. Mr. Worcester; when Knox arrived at Dama's house the nurse opened the door. Mr. Armstrong may have informed Knox, but he had already learned of the fact; Armstrong was a relative of Knox, a third cousin, he believed. The "magnesia conversation" took place both at the professor's house and at Knox's residence; the conversation in

the house came about in talking about the professor's demise, decease or death, and the professor's theory that by pursuing his method one could live to a great age and yet Dama himself did not so live, and then the reason of that was discussed, and reference was made to his habit, and Miss Harris spoke of his being addicted to the habit of using magnesia, she did not use exactly the term "magnesia fiend," but said he had that habit; in regard to her statement that he had made another Will, Miss Harris said there was or had been another Will in the possession of the Waterhouses made in their favor while he was in their house, and she said that she knew and that Knox knew that the professor entertained a strong prejudice against Mr. Columbus Waterhouse and his family and his brother, and that therefore there must be another and a later Will; she said that in that Waterhouse Will Columbus Waterhouse was named as an executor. Mr. Knox disclaimed attempting to give the exact words of Miss Harris; in relation to the bedroom incident she said that she did not at the time quite understand what Dama wanted, but had no reason to distrust him as he had always treated her as a perfect gentleman, but as she was a young lady alone in the house, she thought she ought to be cautious in the circumstances; Mr. Knox had said when he learned of the contents of the Will that he thought he ought to have left something to William T. Cummins, and as Dama had no relatives here and did not like his wife's relatives, Knox thought he might have remembered his friends here, among others Knox himself or his daughter, and considering what Dama had said about his inability to accomplish in the case of Mrs. Sara Barker Smith what he had done for other pupils, notwithstanding her diligence and industrious efforts to succeed, Knox thought and said that the bequest to Mrs. Smith was an absurdity, a strange Will. Dama had often told Knox that Mrs. Smith and her husband were very wealthy, and that and the other circumstances made Knox remark the strangeness of the Will. Knox related in his testimony what the professor said concerning the difficulties of developing the voice of Mrs. Smith, and that by reason of those difficulties he could not "finish" her, notwithstanding her arduous endeavor and earnest anxiety to succeed; by reason of her

nature he was unable to do anything. Miss Harris says that she told Knox that she thought granulated citrate of magnesia was not good, but she said nothing to the effect testified to by him as above set forth, and denied the statements imputed to her by Mr. Knox; she declared that she made no such statements to him on that Sunday as he testifies to about the Waterhouses or others, including the Rev. Mr. Worcester; nothing of the kind occurred at that time or place; she once called at his house on Sunday morning, the 12th of February, 1888, and stated to him the object of her call, that Mr. William T. Cummins was very nervous and would like him to go and stay with him in court the next day, February 13, 1888, when the contest was coming up; she meant when the hearing of the probate of the Will was to come up; Miss Harris arrived at Knox's house at about half-past 8 and stayed until almost 10 o'clock; she had to wait there at least fifteen minutes; parts of the conversation sworn to by him as taking place at the other time occurred on this occasion, February 12, 1888, some in relation to the movements of the gentlemen on the evening of Mr. Dama's death, and that she doubted Mrs. Smith's Will of May 8th, and of Mr. Dama's liking Mr. Knox's little girl. Miss Harris did not suggest to Mrs. Smith going downstairs on the occasion of her coming to 317 Mason street after Professor Dama's death, and she denies the truth of Mrs. Smith's testimony in that regard. Mrs. Smith asked Miss Harris on that occasion who would be attorney for the estate; Miss Harris did not tell Mrs. Smith that Mrs. Waterhouse had been searching for a Will; Miss Harris did have a conversation with Mr. French but not such as he says in his testimony; French asked her to call at his office; the suggestion did not proceed from her, and she denied the truth of the testimony of Mr. French with respect to that interview. Mr. French had testified that he recollected meeting Miss Belle Harris on the street one day and telling her she might come into his office in response to her suggestion; he had entirely forgotten the circumstance of meeting her until the cross-

examining counsel mentioned the matter and then Mr. French recalled it; Miss Harris called at French's office after that accompanied by another lady, a stranger to French; Miss Harris requested this lady to withdraw from the room; the lady did so; French said to Miss Harris then and there, "I think there is no occasion for an interview between us, I do not desire to have an interview"; soon after Miss Harris arose and withdrew from French's office; French had no recollection of any such conversation as was implied in the questions of counsel for contestants; Miss Harris declared that Mr. French spoke to her about Mr. Smith being a millionaire; she denied that she said to Mr. French that she was Professor Dama's confidential friend and that she wished to be placed in charge of the house; she denied also that she said to Mr. French that Mrs. Waterhouse claimed to be Dama's best friend, but that she was not such, as the professor disliked the Waterhouses very much; Miss Harris said that she did not "rummage" about in the house on the night of the professor's death nor was she "desirous" of overhauling things there, as Mr. French testified; she did not throw herself across the professor's body when she went into his room after his death, as Mrs. Fannie Johnson testified; Miss Harris declared that Mrs. Johnson's statements as to her examining papers and rummaging drawers were false; when Miss Harris came into the house at 317 Mason street after the professor's death Mr. Burtis and Miss Lola Lowrey, a pupil of the professor's, were in there. Miss Harris testified that Mr. French said to her that he once had a housekeeper for whom he put in a claim against an estate for \$2,000 for services as such housekeeper, whereas otherwise she would only get \$200; this was said to Miss Harris December 11, 1888, at his office at 528 California street, San Francisco; Miss Harris was in that office at that time about half an hour and Mrs. Mary Cover was with her there; Mr. Brandon, a clerk for Mr. French, was in and out; Miss Harris had read over Mr. French's testimony in this case and also Mrs. Johnson's more than once; Miss Harris had written out some questions to be put to witnesses, Mr. French, Mrs. Smith, and Mrs. Johnson; Miss Har-

ris had read over testimony of Mr. Burtis, but did not prepare questions to be propounded to him; she had been at Mr. Kowalsky's office perhaps five times about the case; she had also seen Mrs. Waterhouse, Mrs. Bradstreet, Miss Kate Myers, and her sister Mrs. William T. Cummins; she had not seen Mr. Bellini; when Miss Harris read over the testimony in presence of Mrs. William T. Cummins they discussed the evidence; Mrs. Cummins assisted Miss Harris in preparing questions; she suggested questions more than once, could not say how many times; Miss Harris did know Captain Gibbons, first in 1885, on the "John R. Kelly"; afterward saw him in Mr. Dama's house on Saturday afternoon, 21st of January, 1888; did *not* tell him that Mr. Dama had made a Will and had left it in good hands, did *not* so remark to Mrs. Captain Gibbons in the Lick House; Miss Harris was at the professor's house all day Saturday, the day after his death; she should judge it was before 4 o'clock of that day that she saw Mr. French there; Miss Harris said that she may have taken some writings out of Professor Dama's house after his death and prior to his funeral, two little cases with writing on the outside; when Miss Harris was in Mr. French's office he was in the inner office; Mrs. Cover was with her; Mr. Brandon, the clerk, was in the outer office; the door between the two offices was closed during their conversation; Mr. Brandon was in and out at times.

#### CIRCUMSTANCES OF THE DEATH OF DAMA.

With regard to the statement of Miss Harris in conflict with the testimony of Mrs. Fannie Johnson, the nurse, and Mr. French, the attorney, this may be a proper point at which to consider the contrary testimony: Mrs. Fannie Johnson testified that her name in German is Johanson and that she was born in Hamburg; she was engaged by Luigi Dama as his housekeeper through Mrs. Helen Cushman of Alameda; she went to Dama's house on the 14th of January, 1888, at 317 Mason street; nobody but he occupied that house, he was very sick with the dropsy, almost helpless, so much so that she had to dress and undress him; he was completely gone in; he had both Doctors Tisdale, senior and junior, in attendance upon him; Mrs. Johnson knew them in Alameda by

seeing them in various houses; she went to Dama's on Saturday and he died the following Friday; the young Doctor Tisdale was there on Tuesday, the old doctor only came on Sunday; after young Tisdale left, Dr. Brigham came Tuesday afternoon the first time to consult with him; Mrs. Johnson recommended Dr. Brigham; he tapped Dama on Wednesday; Mr. Burtis was present; they took two bucketsful of water from him, then was put to bed and bandaged up; he stayed in bed until the middle of the night of Thursday; from Thursday to Friday he had no one but the nurse to wait upon him; prior to his being tapped he said to her that if he should stand that pain and agony any longer he would rather than endure it take his own life; when Mr. Burtis went away after the tapping he left her his address so that if anything should happen she might know where to find him; Dama felt very weak Friday morning; he ate nothing; he died at twenty minutes to 12; from the time of the tapping until he died he was visited by Miss Belle Harris, she came every day, also Mrs. Sara Barker Smith; she left about twenty minutes or half an hour, perhaps, before he died; Mrs. Johnson gave him the medicine that Dr. Brigham prescribed; the medicine was cream of tartar and gin mixed, which he was to drink whenever he was thirsty, according to the Doctor's directions; shortly after Mrs. Smith went away the nurse went out of the room for a little while and when she came back she thought he had fainted and found that he was dead; she tried to revive him but could not; she sent for a messenger and sent for Mr. Burtis; he came and then he sent her with a note to his store; she returned and after she was home a little while Miss Harris came in, and when the nurse told her Dama was dead Miss Harris rushed into the room and threw herself across his body; then Miss Harris came out and said she was glad Mrs. Johnson was there; the nurse did not hear any conversation between Mr. Smith and Miss Belle Harris; they were conversing, but she did not hear the words, she did not know what was the subject matter of their talk; Mr. Burtis dined with Mr. Dama every night while the nurse was there except the night Dama was tapped; Miss Harris was not there at all on Friday morning; she did not tell her that he said that morning that he

felt so well that he could dance in the ballet, and she denied the other statements imputed to her in the testimony of Miss Belle Harris; Mrs. Johnson had some lunch spread in the dining-room on the evening of the day Dama died; Miss Harris partook of some, Mrs. Smith did not; Mrs. Smith came on Saturday for the first time after he died; Mr. Burtis told the nurse next day, Saturday, that she had better get some tea for the ladies, nobody else said anything about it. At the time Mrs. Johnson went to Professor Dama's house there was a woman there who did not stay long and she did not know her name; Mrs. Johnson remembered seeing Miss Belle Harris before the date of her testimony (March 19, 1891) at the drug store or patent medicine store of R. R. Hay, 1019 Market street, but she denied the testimony of Miss Harris as to what occurred there; Mrs. Johnson called subsequently at Miss Harris' house on Geary street and Miss Harris told her she thought the Will was a forgery, that the Knights Templars were after her (Mrs. Johnson), and that she should not go to see Mr. French and Mrs. Smith, if she were to see them she would get herself into trouble, while if she stood by her (Miss Harris) she would be all right; Mrs. Johnson contradicted in detail the statements testified to by Miss Harris in regard to their interviews; Mrs. Johnson cooked dinner for Mr. Dama the evening before he died; dinner was served in his room, he being in bed; the table stood by the side of the bed; Mr. Burtis was there; Mr. Dama ate heartily and said to Mr. Burtis that he would have a dance next week if he continued to feel so well; next morning he complained that the dinner did not seem to agree with him; he was restless during the night; he asked what he had eaten and he and the nurse counted over the things and among others was preserved apricots; he asked where they had been procured; the nurse said that Miss Belle Harris sent them; he said that that was what hurt him, the apricots; on the Sunday previous the nurse had prepared for dinner roast suckling pig sent by Mrs. Sara Barker Smith; the Rev. Mr. Worcester was at the dinner but declined to partake of the pig on account of religious scruples, as he did not eat meat on Sunday. On cross-examination Mrs. Johnson testified that she was born in Hamburg the 24th of July, 1848; her maiden

name was Johanson; she worked for her living there, taught school at seventeen years of age, afterward worked in a lace store, and went to London, and left there for New York on the steamer "Canada" in 1874. She was questioned with reference to her coming to San Francisco, where she lived and what she did after arriving in the city, and gave many details of her history down to the time that she left the employ of Mr. Hay, 1019 Market street, when she went to Alameda and worked for various families; among others she worked for a Mrs. Ackley, where she made the acquaintance of Mrs. Cushman, through whom she learned of Dama's wanting a nurse; she did not meet Mrs. Smith there; did not know of her then, but subsequently was informed by Mrs. Cushman that Mrs. Smith used to visit Professor Dama every day to take lessons. Mr. Dama engaged her as his housekeeper at twenty dollars a month and she could keep her little girl; she was to cook his food, prepare his meals, and render other domestic services, but after she was there awhile she found that he was very sick and she attended upon him; Mrs. Smith sent some articles of food, extraet of coffee, and such like things; a young girl brought them, Mrs. Smith never brought them; after Mr. Dama's death the first ones to be there together were Miss Harris and Mr. Burtis; Mrs. Smith never took any tea in the house. Being questioned as to her handwriting, Mrs. Johnson said that she signed her name "Mrs. Johnson" because she had always gone by that name; she was not a married woman. At the request of cross-examining counsel she wrote at his dictation on the judge's desk the contents of the disputed Will, her writing being marked Contestant's Exhibit D-56. After she left Mr. Dama's house she did not have any work for quite awhile, then she worked off and on in Mr. Hay's store, and also opposite Mr. Dama's house for a Mrs. Murphy, and worked for others here and in Alameda, where she worked for Mrs. Mahoney for three months and attended her during confinement, and then she came over and took the house where she is now living in San Francisco; she does not remember to whom she took the note from Mr. Burtis at 317 Mason street to his store on the day of Mr. Dama's death; it was raining that day; it was after 12 o'clock, but she could

not remember the hour; she did not take any note at that time; she knew Mr. Castelhun, the attorney, and did not say to him at his office, 502 Montgomery street, about two years ago, that an awful crime had been committed at Professor Dama's house on Mason street, and that if she were to tell what she knew it would make a sensation that would shake society; she did not say anything of that kind, but she had been told by counsel for contestants, in his office, that she had so said to Mr. Castelhun and she denied it, and the counsel told her that he would not believe anything she said by way of denial; she knew Mr. Astorg; she worked for him for about three weeks, taking care of the house, going there in the morning and coming back in the evening; his wife was there the first week; she is now in the east; she was a friend of hers to a certain extent; if she talked to her about the Dama case she really did not remember; Mrs. Astorg sometimes came to 317 Mason street, after Dama's death; on one occasion she was inebriated, and Mrs. Johnson told the lady who came with her that she could not come in; she never told Mrs. Astorg that she had been with a man who had died suddenly, and did not tell her that he had been poisoned or that she knew all about poisons, nor how to administer slow poison; she had no understanding of the use of medicines; never studied Latin nor chemistry; when Mr. Dama was dead Mrs. Johnson sent a note to Mr. Burtis by a messenger boy; when Burtis came he did not do anything, he walked up and down the room; she told him how it occurred; Dama was alone at the time of his death; the nurse was in the front room; when she came into his room she thought he had fainted and tried to revive him, but found he was dead; she was not in the room all the time while Burtis was there; in the note she sent to him she told him to come to the house, that it was all over with Mr. Dama, meaning that he was dead; on the night that Dama was tapped Burtis gave her his address, his business card, and said if anything happened to Dama to send for him; when she went to the drug store at the corner of Geary and Mason streets she called for a messenger; her little girl remained in the house; no one else was there with the body of Dama; when Burtis came and while she went on the message from him to his

store her daughter remained in the house with him and the body; Mrs. Johnson had not read nor seen Burtis' testimony; when Burtis came Mrs. Johnson felt bad, but she did not think she was agitated or excited; she did not say to Mr. Burtis when he came on that morning that this lady had called and when she left the professor called to her and when she reached his bedside he was dead; Burtis remained there a couple of hours, she could not say the exact time; she never wrote but one note to Burtis, and could not be mistaken about that fact; she could not tell how many times she had met Burtis since Dama's death; she met him once on the ferry-boat when she was coming over from Alameda; he had not been there to see her; she was four or five times at his office; may have spoken about Dama's affairs, but she could not remember; Burtis was very busy and they only spoke about work that he gave her; she thinks she gave him her address; it was a year after Dama's death before she began doing work for Burtis; it was in the winter that she did the work, but she could not tell the month. Mrs. Johnson, at request of counsel for contestants, wrote from dictation certain words and also the contents of "Short Memorandum" (Contestant's Exhibit E-57, F-58, G-59). Mrs. Johnson was in Mrs. Smith's house about two months before the date of her testimony (March 24, 1891); went there for no particular purpose; just went to call upon her; had not seen her for two years; she did not send a letter to her; Mrs. Johnson was there perhaps fifteen minutes to half an hour; had been to see Mr. Lloyd four or five times, he wanted to see her to know what she knew about the case; she told him all she knew; she did not go to see Mr. French. Mrs. Johnson said that she felt deeply interested in this case as she had been falsely accused. The gist of the false accusation against Mrs. Johnson seems to be that she was criminally concerned in the death of Mr. Dama, and that she had prepared a potion which was administered to him which precipitated his exit from this earth, and counsel for contestants compared her attitude with that of a recent confessor of crimes, the uxoricide Zwald, who, in such strange circumstances, overcome by the stings of conscience, confessed that he had poisoned his first wife and strangled a second, and yet no one ever suspected

that by arsenic he consummated the death of one and by strangulation the other, and counsel read from a daily journal an article on "Crimes that Lie Hidden," taking for a text the case of Zwald: Why did Mrs. Johnson weep if she was innocent? Why shed tears and ask for forgiveness? Forgiveness for what? Was it because conscience forced tears from her eyes? Why could she not contain herself in presence of that dead body? Was it because of the crime that lay hidden in her breast, and which if she had unbosomed and unburdened herself would have exposed the criminal conspiracy and bring to light the criminal conspirators? The counsel for contestant says that she told the story of her shame coldly and callously.

Mrs. Johnson is a woman of unusual intelligence and good education, the revelation of the misfortune of whose life came involuntarily as a result of cross-examination rather than as a callous confession of shame; she may be the possessor of a guilty secret, and, if so, it is to be hoped that it will become evident in time for the reparation of any wrong her concealment may have caused; but the impression her demeanor on the stand made upon the mind of the court was that she thought she was entitled to more consideration than she had received in a pecuniary sense from those whose interests her evidence was calculated to advance. Mr. Kelly, for contestant, dilated graphically upon the facts that occurred just prior to the death of Dama, the employment of the nurse, Mrs. Johnson, suggested by Mrs. Cushman, the lifelong friend of Mrs. Smith, and the engagement of the Dr. Tisdale, senior, through the direct agency of the same Mrs. Cushman; the refusal of Tisdale to tap Dama on the ground that he did not want to have Dama's death on his hands; the employment of Dr. Brigham and the operation; the subsequent visit of Mrs. Smith; Dama's elation immediately after the tapping, afterward his statement that he was preparing his toilet for death; the testimony of Dr. Brigham—to which a considerable degree of discredit must attach, notwithstanding his high professional reputation, because he testified without invoking the protection of the law as to those confidential matters. Who was the last person with the deceased prior to his death? Mrs. Smith, the respondent in this case. That is the evidence, argued Mr.

Kelly, and yet Mrs. Smith has sworn that she first learned of his decease on Saturday when Miss Myers called at her house to inform her.

WHAT OCCURRED IMMEDIATELY AFTER DEATH OF DAMA.

As soon as Professor Dama dies Mr. Burtis is there within a few minutes after, on that very Friday morning; the utter improbability of Mrs. Johnson's statements that she sent a messenger boy with a note to Mr. Burtis' store is apparent, for Mr. Bjolstad and Mr. O'Connell, who were employed there, testify that Mr. Burtis was not at the store that morning. Mr. Burtis must have received secret information, argued this counsel, because he was one of the conspirators in that combination; when Mr. John T. Harris went to Dama's house there he met Burtis, who said, the very first thing, "Here are two notes I want you to deliver." The meeting of Mr. Burtis and Mr. French, their sending for Mr. Booth and Mr. Sumner, and the refusal of Mr. Booth to act as attorney, and the conference in which this occurred counsel considered as remarkable in several aspects; the example set by Mr. Booth in refusing to act as attorney was approved, and Mr. French's conduct in consenting to act as attorney criticised and denounced as a preconceived plan; the consent of Burtis to act as special administrator was also criticised; the visit of French and Burtis to the house of the deceased professor, the rifling of the drawers and conduct at the house and the circumstances of that occasion were called to the especial attention of the court. Mr. Burtis testified that Exhibit No. 3 was found in that drawer; that is the "Altered Will." How was it, asked Mr. Kelly, that Mr. Burtis and Mr. French testified that they had never heard of Mrs. Sara Barker Smith, when her name is in this very paper, Exhibit No. 3, which they swore they had looked over with the other papers which they found in the drawer? This is a fact in itself, he argued, which shows that the Will was forged; and, in this connection, this counsel called the court's attention to the very peculiar manner in which Mr. Burtis testified in regard to that matter (see page 189, judge's manuscript notes argument; also page 70 of the official reporter's transcript of testi-

mony): "Q. Did you make a search for a Will before you applied for special letters? A. No, sir; because I did not care to; I did not feel sufficient interest, I never heard anything about a Will; I did not know anything of the existence of a Will." Now, the petition of R. W. Burtis for special letters contains the recital that the petitioner had made due search and inquiry for a Will but had found none, and had reason to believe there was one in the safe deposit vaults. What further took place there that day, their actions and conduct were enough to make Miss Belle Harris suspicious that there was something wrong, claims the counsel; their actions showed that they were actuated by some sinister purpose that could only be accomplished by securing possession of all the effects and papers of deceased. What is Mr. French's testimony? As to Mr. French's connection with this case he testifies that he knew Luigi Dama very slightly; met him in Golden Gate Commandery; did not know him previously, what his business was or where his house was. Dama died January 20, 1888; on Friday afternoon of that day, while sitting in his office at 528 California street, French received a note from R. W. Burtis informing him that a member of their Commandery died at 317 Mason street; French was the Commander, and in such case it was the custom for the Commander to attend to the matter; French could not leave his office at the time, being engaged with a client, and he sent word to Mr. Burtis that he might see him in his office at half-past 4 of that day; French also sent word to F. W. Sumner and A. G. Booth, of the Commandery, to confer as to what he should do; about half-past 5 or 6 o'clock French went to Dama's house with Burtis and Sumner and found there a Miss Belle Harris, Rev. Joseph Worcester, Dr. Brigham, Mrs. Columbus Waterhouse, and the undertaker, Mr. Halsted; the body was taken charge of by Mr. Halsted and his assistant; Mrs. Waterhouse said that Dama had left instructions to have his body embalmed and sent east to be buried by the side of his deceased wife, in Bath, Maine; this was said also by Miss Harris and Rev. Mr. Worcester and several others present; French gave no directions; Miss Belle Harris said that she was Dama's confidential friend and wished to be placed in charge of the house; she said that

Mrs. Waterhouse claimed to be his best friend but that she was not such, as Professor Dama disliked the Waterhouses very much; French told Miss Belle Harris that she might be in charge of the house, and he asked Mr. Burtis to remain there that night and see that no one interfered with the house or the effects; French did this in pursuance of the custom of the Commandery and so informed Miss Harris; French did not know at the time that the deceased Professor Dama was a member of the "Blue Lodge," and he believed at the time that Dama was not a member of any lodge in San Francisco; French subsequently discovered that Dama was a member of a lodge here, the Mission lodge, and called upon the Master of that lodge, Dr. W. E. Price, and the Master declined to act because he preferred the funeral ceremonies to be in charge of the Commandery; after French told Miss Harris that she might have charge of the house, and at his suggestion Mr. Burtis went to Professor Dama's clothing and took out and laid on the desk what he found in his pockets; French made a list of the articles and had it in court; this is the list: Cash two ten-dollar pieces, silver coin, watch chain, Templar cross, Neapolitan charm, locket, two bunches keys, eye-glasses, medicine envelope Drs. T. P. & C. L. Tisdale. French noticed the keys because of what Miss Harris told him of Dama's having a box in the California Safe Deposit Company; there was a key similar to one for French's own box in that deposit company; French said if Dama had any valuable papers or effects there was where they would be found; Miss Harris said that the professor had some money in a cigar box and she was suspicious some one might take it; Burtis searched a cigar box, several boxes, but found nothing; French asked Miss Belle Harris to give him a list of the names of Dama's relatives so that he might telegraph to them; she said that she knew where all his papers were and she took out a slip of paper and wrote down some names: Mrs. E. Randall, 59 Blackstone street, Boston, Massachusetts; Mrs. Benj. Randall, 31 Monmouth street, East Boston, Massachusetts, daughters of Mrs. Benj. Randall, Miss Emily Randall, Miss Anna Randall, Miss Jennie Randall, Mrs. A. W. Forbes. French noticed two ordinary deposit books in the desk and told Mr. Burtis to take them out and he would take

the numbers and then he might replace them, as French did not wish to touch anything himself; when French was asking Miss Harris if there were any other names she said yes, and Mr. Burtis took down the name of Captain Gibbons, care of J. F. Chapman & Co., 22 California street, San Francisco, Captain Edward Randall, send all in care of John Ballou. French had never been in Dama's house before and never knew where he had lived until this time; French never told Miss Harris that he had been there before, and he contradicted her testimony as to what passed between them upon this occasion; there was no occasion for any winking between Burtis and him; the next day, Saturday, at about 10 o'clock, his clerk, F. D. Brandon, was instructed by him to prepare petition for special letters of administration in the estate, French had previously requested Mr. A. G. Booth to act as attorney, but he declined, and so French acted in the matter; Mr. Brandon, his clerk, got up the form, except the clause about a Will, which he told him to put in the petition for special letters; French sent Mr. Brandon down to the store of Mr. Burtis, 41 Second street, to have it signed; he had not seen Mr. Burtis that morning; when it was returned signed French took it out to the New City Hall with an order of appointment which the judge signed, January 21, 1888; French came out to the courtroom and found Mr. E. J. Casey, the courtroom clerk, at his desk writing up the minutes; he inquired for Judge Coffey, but he was not in; this was about 11 o'clock, and French waited until nearly 1 o'clock, then French went to lunch and returned at about half-past 1 o'clock, but the judge was not in and he waited about one hour before he came, and then the judge signed the order; then he telephoned to Mr. Burtis to come out and he arrived a little before 4 o'clock; Burtis gave his bond, got special letters; by that time it was after 4 o'clock; Burtis and French came, took the cars, rode down to Mason street, and went to 317 Mason street, thinking they might find the Rev. Mr. Worcester there, but did not find him there; found Mr. Thomas R. Knox outside the house; they went to French's office at 528 California street, and after they came in the Rev. Mr. Worcester came in; French was in the outer office and asked Mr. Worcester to step inside to his private

office where Mr. Burtis was; French then went in, and after some conversation the three went to the Safe Deposit Company and produced the special letters and examined the box; it was for that purpose that they got the special letters; French narrated the proceedings at the safe deposit office when the box was opened; Burtis carried the box out to the outer room where Mr. Worcester and French were and there in their presence the box was opened and the papers were taken out and examined in presence of the four—Mr. Burtis, Mr. Worcester, French, and Mr. Curtis, the manager of the Safe Deposit Company; they first looked to see if there was a will, but found none; they found an envelope marked "Private Paper," and Burtis cut the edge open with his knife; French watched closely for he expected it would contain a Will; they found there Respondent's Exhibit 1, "the Short Memorandum," also the paper called "the Long Memorandum," Respondent's Exhibit 2; Mr. French did not then know Mrs. Sara Barker Smith and never had heard of her; Burtis then put back all the papers without further examination; it was then after 5 o'clock, the gas was lit; French inquired of both Mr. Worcester and Burtis if they knew of a Mrs. Smith and they both said "No," had never heard of her; they then separated and French went home; the next morning Burtis and himself met at his office and examined the City Directory but found no name of Sara Barker Smith nor clue to her identity; they went to 317 Mason street and the nurse, Mrs. Johnson, told them that Mrs. Smith had been there and said that there was a package of papers at her house, 2505 Washington street, and that she was prepared to deliver it to the proper party representing the estate of Luigi Dama, deceased; they went there and met Mrs. Smith, and announcing their errand, she, after some conversation, produced a package encased in brown wrapping paper and tied with a knot which was difficult to untie, and Mrs. Smith said that Mr. Burtis would find it hard to unloose as Professor Dama told her at the time that he tied it with his peculiar knot; Burtis finally cut the string with his knife, and there was taken out the paper in the yellow envelope marked "Private Paper" (marked Plaintiff's Exhibit 28), which was then in the same condition as it was at the time

it was exhibited to the witness upon the trial (February 10, 1891), except the opening at the edge where Burtis slit it open; in that yellow envelope was inclosed a white envelope (Respondent's Exhibit 29, marked "Will and Testament"), and that was slit open by Burtis and out of it was taken the Will which was read aloud in presence of them all; after the reading Mrs. Smith said, "This Will is a surprise to me, I had no need of it, as we have enough without it, and I wish he had left it to somebody needing it more," and Mr. Smith said he was sorry that it had ever been made; Mrs. Smith said she did not know what to do, as she had no experience in such matters; French told her she should have to file it within thirty days and with it a petition for probate, and that she ought to consult her attorney; she said she had no attorney as she had no occasion for one, and asked if he, French, would not act; he told her he had a delicacy on account of his official position in the Commandery, but finally he consented to take charge of the papers for the time; after reading the Will they considered the clause about testator's wishing to have his body embalmed, and at the request of Mrs. Smith. French and Burtis consented to attend to that; Burtis and French then went to the residence at 317 Mason street and reached there about 2 o'clock in the afternoon, stopped there but a moment, and then went to the undertakers on Mission street, Halsted & Co., arriving there about half-past 2 or 3 o'clock, and inquiry being made for a professional embalmer, Halsted mentioned Dr. Lyford and Dr. Kenyon; he telephoned for the latter and they waited, and Dr. Kenyon came in in about fifteen minutes and undertook the work of embalming; French told him that the remains were to be shipped east for interment: Burtis and French then went to the telegraph office and sent telegrams to the east, one to Benjamin Randall and one to John W. Ballou, Bath, Maine; French sent his telegram to Ballou signing his name as "Commander Golden Gate Commandery," because Ballou was occupying a similar position in Bath, and French assumed that the remains would be consigned to the care of the Commandery at Bath, Maine, and they were so shipped; French received no response from Randall, but a letter came from Ballou; French wrote to Randall on the 31st of Jan-

uary, 1888; he also sent other telegrams; French thinks he received a letter from Ballou; French had nothing more to do with the body until the Sunday subsequent, when with his Commandery he went to the undertakers and they escorted the body to the First Congregational Church, Rev. Dr. Barrows, Mason and Post streets, where the funeral took place; French sent another telegram to Bath, Maine, to Frank A. Palmer, Eminent Commander, Dunlap Commandery, Knights Templar, on January 31, 1888, announcing that the body had been sent east by express on Sunday evening and to notify the Randalls.

Mr. French contradicted certain statements of John T. Harris, a witness whose evidence is here given substantially in full: Mr. Harris is a real estate dealer; the father of Miss Belle Harris, Mrs. Ida Cummins and Mrs. Lillian P. McElroy; he knew Luigi Dama; last saw him alive on the evening of Thursday, January 19, 1888; Dama had an operation performed a few days previous; on the 20th of January, when Harris saw Dama again, he was dead; at that time Harris was selling merchandise for R. W. Burtis, 41-43 Second street, San Francisco; Harris saw Burtis between 11 and 12 o'clock in the morning at Dama's house; Harris went there because the nurse, Mrs. Johnson, came to him at the store, stopped on the threshold, beckoned to him and said, "The Doctor (Dama) is dead"; Harris went to the house and saw there R. W. Burtis; he was the first and only person Harris saw there at the time; Burtis said, "Well, Mr. Harris, the professor is gone, I suppose in Heaven with his wife, one that he much loved"; Burtis was walking the floor at the time with his hands in his pockets; after a little while Burtis said, "Mr. Harris, I would like you to deliver two notes for me, one to Mr. French, an attorney on California street, and one to Mr. Knox, a reporter in Judge Sullivan's court"; Harris delivered the note to French in person and to a man in Mr. Knox's office, Knox being absent, a Mr. Armstrong, who volunteered to give it to Knox; Harris frequently dined with the professor at the house of his daughter, Mrs. W. T. Cummins; Professor Dama was a very careful man; in stature he was medium in height, about one hundred and seventy-five or one hundred and eighty pounds in weight; Harris met French

again two or three days previous to Professor Dama's funeral; Harris went there to inquire as to the time of funeral; French wished Harris to say to his daughter Belle to be as quiet as possible and if asked any questions to say nothing; Harris delivered the message to his daughter; Harris had a talk with Burtis about the same time; Burtis made the same request as coming from French; a short time afterward Harris asked Burtis what he meant, and he said he thought that Mrs. Smith would remember Belle kindly out of her legacies from the professor; Harris left Mr. Burtis' employ January 30, 1889; it was after that when he entered another employment; he ceased to be an employee of Mr. Burtis on that date, although he was in and out for some time thereafter; Harris did not profess to know anything about the handwriting of Dama; he was on fairly friendly terms with Mr. Burtis; had had no disagreement with him; the conversations with him were mostly before Harris left his employ; one was at about the time of the probate of the Will (February 27, 1888), something about receiving his pay—Harris could not recollect distinctly. Mr. French testified that he had heard on the Friday night when he went to the house of Dama some talk about a Will from which he inferred that there was a Will; it was distinctly stated that Dama had left instructions as to embalming his body and French inferred therefrom that there was a Will, but it was not said in tenor or in terms; French inferred also that Columbus Waterhouse and Rev. Joseph Worcester were coexecutors because of their intimacy with Dama; French professed to have always felt kindly toward Professor Dama and always treated him courteously; never had any conversation with Dorn or Waterhouse in which either said that Dama disliked French; French came out to the New City Hall on Saturday, January 21, 1888; he could not recollect who were the bondsmen without referring to the bond itself, and upon that being produced and examined by him he said he could then tell all about it; that bond was prepared by him before he came out to the New City Hall at 10 o'clock in the morning of Saturday, January 21, 1888; and was acknowledged by him before Notary George T. Knox; the bond was prepared in advance and in anticipation of its approval by the judge; French said

that when they went to the safe deposit there was a seal on the box; Mr. Curtis, the manager, took the seal off; French received the \$100 mentioned in his account of the special administrator settled June 8, 1888, for services rendered as attorney for Special Administrator Burtis; French declared that he was interested in the outcome of this controversy only as to the proper disposition of the property of the estate, and such reasonable attorney fees as might be allowed him by the court; he had no contract with the proponents of the Will; never told anybody that he was to receive \$5,000 if the Will should be sustained; at the time that the Will was probated, French declares that he did not hear of its being a forgery; Mr. Naphtaly was then present in court; ex-Judge M. A. Edmonds was there also and engaged in interrogating the witnesses, but French did not know that Edmonds was prevented by his illness from undertaking the contest; French did not counsel or advise with Mrs. Smith or Mr. Burtis as to the production of the alleged Will which is charged to be a forgery, nor with regard to the memoranda found in the safe deposit box; he was present in court when the Will was offered for probate on February 13, 1888, when Mr. Naphtaly was there, but he could not at the time of testifying upon the contest state from memory what occurred at the original probate; he remembered being angry when the witness Antonio Bellini refused to swear that he had signed the instrument, because Bellini's refusal was at variance with a statement he had made to French on the Saturday before; French had no recollection of having heard on the day of probate in the courtroom that the will was a forgery; subsequently he heard some rumors to that effect and saw something in the newspapers to that effect; he heard the witness Antonio Bellini testify on that occasion of the hearing in this court on February 13, 1888, and believed the official report of the testimony which was read to him to be correct. The counsel for contestants animadverted strongly upon the circumstances connected with the execution of the bond of the special administrator, and referred to the testimony of Mr. Jellison, one of the sureties, as to the visit of Mr. Burtis and Mr. French to his place of business on the morning that the bond was signed, and the counsel also called attention to Mr. Bur-

tis' evidence as to his visit to the Safe Deposit Company's office, and his first statement that he visited that office at 2 o'clock upon that day, which statement corresponded with the memorandum made by Mr. Kowalsky from information received by him from Mr. Niss, clerk at the safe deposit office (Contestant's Exhibit R-44 "Jan. 21, '88, Burtis 2 P. M.")). Burtis started in to tell the truth about this visit, according to the theory of counsel for contestant, but he afterward varied his statement and contradicted himself over and over again.

#### TWO WITNESSES COMPARED.

Counsel for contestant compared Burtis' statements with the testimony of Rev. Mr. Worcester in relation to the same matter. Mr. Worcester, said the counsel, stands head and shoulders over any witness here produced; no man can question his veracity; if he have any fault it is that of underestimating the force of the fact testified to by himself; there can be no doubt, according to the argument of counsel for contestant, that the visit of Burtis was made at 2 o'clock, as he testified at first. The testimony of Burtis is not trustworthy as a whole; it is a mass of contradictions; the insertion of the "Short Memorandum" in the safe deposit box is claimed to have been effected through his agency; as soon as this paper was discovered they asked each other, "Who is Mrs. Sara B. Smith?" They all responded each to the other that they had never known nor heard of her; Mr. Worcester did not, neither did Mr. French, nor Mr. Burtis, but how was this professed ignorance of Burtis and French reconcilable with the finding of the "Altered Will," Exhibit 3, in the drawer of decedent when they were looking over his papers? Burtis is the solitary exception of the old pupils of the professor who had never heard of Mrs. Sara Barker Smith, but she confessed that on one occasion she had heard Dama mention the name of Burtis at the time the professor gave her the ivory boat. Dama's last visit to the safe deposit was May 20, 1887; this was before he went east. The last date of a visit before the date of the alleged Will (May 8, 1887) was May 3, 1887. Between May 3 and May 20, 1887, there is no record of a visit to the Safe Deposit Company. The "Long Memorandum" is dated Novem-

ber 1, 1885, and that is the date of the "Altered Will." The counsel for contestant contends that this goes to show that the forger intended to have these two go together to bolster up each other; so the alleged Will and the "Short Memorandum" were dated the same day and intended by the forger to support each other; this was doubtless the design of the forger. Counsel asks the court to read and compare the testimony of Mrs. Sara Barker Smith at the original probate of the Will and upon this contest. At the probate she testified that she did not see what was on the envelope inclosed in the other marked "Private Paper," and yet here, only a short time prior to the submission of the case, she swore that she did know what was on it. Counsel for contestant claims that this is a most material variance. The words "Private Paper" is an emanation of her own; it is not an expression of Dama; it was her peculiar phrase; she testified that she gave the expression to him; it is by these little things that forgeries are detected; it is such "trifles light as air" that aid in the detection of crime and contribute to the conviction of the criminal. (See Article "Forgery as a Fine Art," San Francisco "Law Journal," Wednesday, January 6, 1892.) To show that everything was not straight, as it should be, counsel calls attention further to the testimony of Burtis. (See page 108, official reporter's transcript of testimony concerning the letter dated at San Jose, February 4, 1888, to Benjamin Randall from O. A. Hale, the brother in law of Burtis.) What prompted Mr. Hale "in the interest of justice" to write to Benjamin Randall? Why was this letter written, if there were nothing sinuous in the conduct of these persons and nothing crooked in the circumstances of the case? Was the conscience of Burtis beginning to smite him, or was he growing weak-kneed because of his connection with this crime? Why otherwise inspire such a letter? Reverting to the circumstances and incidents connected with

#### THE FUNERAL ARRANGEMENTS FOR DAMA.

the counsel considered the embalming especially significant, the extraordinary desire for unusual embalming methods, the employment of Dr. Kenyon to do work ordinarily and efficiently done by undertakers at a smaller cost, and he asks, What was

the reason for this precaution, and particularity, and eagerness even before the certificate of death was obtained? Counsel returns for a moment to regard the behavior of Mrs. Johnson, the nurse, her curious demeanor, and her imploration to Miss Belle Harris for forgiveness, her shedding tears, and her dolorous deportment generally as indicative of a guilty knowledge that would haunt her to her dying day. Where did Mrs. Johnson come from? At whose instance did she come upon the scene? Through Mrs. Helen Cushman, the lifelong and warm friend of Mrs. Sara Barker Smith. And Dr. Tisdale comes in, likewise as the others, introduced on the commendation of Mrs. Cushman.

#### DOCTOR TISDALE'S TESTIMONY.

Thomas Price Tisdale is a physician by profession who has practiced over thirty-five years—for over five years in Alameda; he knew Luigi Dama and attended him in 1887 at 317 Mason street, on December 25, 1887, and January 1, 8, and 15, 1888; he has a son practicing medicine with him as partner, Dr. Charles L. Tisdale; Dama was suffering with general dropsy complicated with heart disease, and as in all such cases his kidneys sympathized; Dama asked Dr. Tisdale to tap him, and the doctor told Dama that it would not benefit him and it might hasten his death; the doctor asked Dama upon the third visit if he had settled his affairs, and Dama said he had made a Will and placed it in the hands of Mrs. Sara Barker Smith, in whose favor it was made, and that he left a memorandum and other papers concerning it in the safe deposit box; Dama said that Mrs. Smith had been very kind to him, and in fact if it were not for her he did not know what he should do, as she had cooked his food and attended to him, and he felt grateful to her. The doctor had more conversation with Dama; felt interested in him as Dama was very intelligent; he seemed to understand the medical terms, and the doctor conversed with Dama about his general condition. Dr. Tisdale testified that at the time of giving his testimony he was about sixty years old; a married man with four children; he had made a little memorandum from his books, knowing that he was to come over here to San Francisco to testify, to give the exact dates; his first visit to Dama was on December 25, 1887, his last one was

on January 15, 1888; he was not then practicing in San Francisco, but in Alameda; the doctor prescribed for Dama but performed no operation upon him; in prescribing the doctor asked Dama to whom he was to give his directions in reference to the medicine and Dama said, "Give them to me; there is nobody else to take them; I have no family; there is nobody in this house but me." On the last visit of Dr. Tisdale he saw a housekeeper or nurse there; he told Dama what he thought of his condition; he said to him upon his first visit that while he was not sure he could do him any good he would try to and hoped that he might; on the next visit the doctor said to Dama, "Professor, you are no better, and I am afraid you are not going to be any better; you don't seem to yield to treatment"; the doctor found Dama an unusually intelligent gentleman and understanding technical terms, medical terms, so the doctor became interested in him and talked with him quite a good deal. Upon the third visit the doctor asked him if he had made any disposition of his business, if he had settled his business as a man would who might not recover; Dama told the doctor he had made a Will; the doctor then said, "Where is your Will?" Dama answered, "It is in the hands of Mrs. Smith, in whose favor it is made"; that was on January 8, 1888, on his third visit to Dama. Dama said then that he had put all his papers in the safe deposit accompanied by a memorandum of all his business and a Will. Dama then spoke of the kindness of Mrs. Smith to him. Tisdale had no social relations with the deceased Dama; never knew him until he was called in to see him professionally; knew him only in that capacity. Dr. Tisdale testified upon cross-examination that he was born in Norfolk, Simcoe county, Upper Canada, June 30, 1830; his father was a farmer and lumber dealer. Tisdale was about twenty-five years old when he permanently left there, but he returned from time to time; he did not remember when he began going to school; he went to Oberlin College, Ohio, when he was fourteen years old, about the year 1845; he was there four academic years; afterward he traveled for some time with Dr. Dio Lewis, the celebrated physiculturist, who was delivering lectures on physiology and anatomy, illustrated by the use of papier maché manikins.

Tisdale used to take tickets and assist him that way. He also studied medicine in the Western College, Cleveland, Ohio, and graduated when he was about twenty-eight years old, and afterward practiced at different places in the United States and in Canada; he came to California fourteen years ago; arrived first at Sacramento, stayed there one day and came to Oakland; after staying there six months went to the Sandwich Islands. Dr. Tisdale could not remember when he had last seen Mrs. Cushman prior to testifying (March 9, 1891); he had not seen her in some time, could not approximate the time; had not seen her recently, for he had no cause to see her; she lives probably four blocks from his house; she is friendly with his family; the doctor had never known her to visit his wife; his son, Dr. Charles L. Tisdale, is married; he lives in his own house in Alameda and has an office hour in the senior doctor's house in the morning. To the best of the senior Dr. Tisdale's remembrance he first met Mrs. Sara B. Smith at Professor Dama's house when she was visiting there; he met her there but did not think he was introduced by anyone. Dr. Tisdale moved to Alameda on May 1, 1886; he prescribed for Dama *cannabis indica*, Indian hemp, prepared by himself, and he gave it to the patient on the last occasion of his visit to him; it was probably the usual dose in such cases; the doctor administered to Dama the usual remedies in such cases as his; he charged from five to eight dollars per visit in this case and sent the bill to Dama before his death; the doctor did not remember what he said to Mrs. Smith or she to him on his first seeing her in Professor Dama's house; he thinks he saw her on the second visit; met her in the hall but could not remember the particulars of her personal appearance.

#### DAMA IN A CRITICAL CONDITION.

Dr. Tisdale told Professor Dama upon his first visit that he was in a critical condition and that he did not know whether he could help him, but he would try; the doctor did not say anything to Dama about making a Will; upon the second visit the doctor told Dama in substance that he had not improved any; upon the first visit the doctor saw Mrs. Smith in the hall after he got through; upon the second visit the same way; cannot

remember what she said to him or he to her; upon the third visit the doctor said, after declining to tap Dama, to perform the operation of *parasentesis abdominalis*, "Professor, I hope you will get well, but I fear you will not; it is wise for every man to have his business settled; have you got your business settled?" Dama replied, "I have made my Will; it is in the hands of Mrs. Smith, in whose favor it is made, and a memorandum of all my business is in the safe deposit," and Dama went on to say that she had been very kind to him, in fact he did not know what he would have done for food except for her. Dama said "a memorandum of his Will and all his business" was in the safe deposit; "she had not only cooked his food, but had sent it and brought it to him"; that is all that the doctor remembered; the doctor asked Dama nothing further about his business; the fourth and last visit made by the doctor to Dama was on January 15, 1888; he was no better—in fact worse; the doctor told Dama as much in substance; Dama wanted the doctor to tap him but he refused, giving him the same reasons as before, that it was not wise for him to do so; the doctor and Dama discussed it pro and con, and the doctor declined as already stated, and made his prescription and went away. Mr. French paid the doctor his bill. Contestant's counsel, Kelly, says that it is utterly improbable that any such conversation occurred between the doctor and the decedent Dama as this physician testifies; and the zeal with which Tisdale vouchsafed this information was enough to condemn it as untruthful. The counsel commented severely on the unprofessional manner in which the doctor testified as to knowledge acquired only in his office and character as a physician; and alluded to the doctor's marvelous feat of memory in recalling these details that occurred years ago, and yet failing to recollect matters which took place in his testimony only a few days before. Counsel contended that the conversation Tisdale testified to never took place, but was a scheme concocted to bolster up the case of respondent, and the counsel asks, Why did Professor Dama confide solely in Dr. Tisdale the making of the Will and yet never have alluded to such a fact to any of his intimate friends, not one of whom was made the recipient of his confidence, and yet so important a revelation

was imparted to this Dr. Tisdale, an acquaintance of a few weeks' duration, called in only as a doctor and in no sense a friend, his employment purely professional and no social relations existing between them?

#### THE CONDUCT OF DR. TISDALE,

according to the counsel, is explicable only on the theory that he had his part to play in this conspiracy and combination and he was anxious to fulfill it; his remark to a young man in the apartment adjoining the courtroom, while he was excluded from the court during the argument on the motion to strike out his testimony, that it made no difference anyhow, even if the motion prevailed, that his evidence was before the court and would have its effect, illustrates the character of the man.

Reverting to the testimony of Mrs. Sara Barker Smith about the incident of Dama giving her the Will, counsel declares that her statement is inherently improbable, her remarks, attributed by her to Dama, about Waterhouse having the key of the safe deposit box could not have been made, as they were not in accordance with the fact as has been proved in this case. Counsel claims that Mrs. Smith is contradicted as to the whereabouts of the Will and its having been continuously kept among her laces, never having been taken out, by her own statements and by the testimony of her husband, who said she told him it was kept between the mattresses. Julius Paul Smith, the husband of Sara Barker Smith, the respondent in this case, had been also a pupil of the deceased Professor Luigi Dama, with whom he became acquainted in 1884 at Mr. Smith's house on Jackson street in the summer of that year; Smith was introduced to Dama at his house by his wife; the object of the professor's coming was to let Smith become familiar with his method and to illustrate it, and Smith began to take instructions shortly after and continued for a few months; the last time that Smith was at Professor Dama's house was in that summer he attended Dama's funeral, the second Sunday after his death, about eight days after his death, with his wife; Smith followed the procession as far as the ferry, and after the remains were sent by express east, returned home; he first

learned of Dama's death on January 21, 1888, at his office in the Nevada block; it was Saturday, the 21st of January, 1888, that he learned of it from his wife, who called at his office and informed him; Smith became acquainted with Mr. French on the succeeding day, about 1 or 2 o'clock, Sunday, January 22, 1888; a gentleman named Burtis was with him—they came together to his house; there were present these gentlemen, his wife and himself; it was between 12 and 2 o'clock; they remained about one hour; Mr. French introduced himself as the Commander of the Commandery to which Dama belonged, French then introduced Burtis as special administrator of the estate of Dama; it was Mr. French who stated that they had learned from an examination of the papers at the safe deposit that his wife was the custodian of the Will of deceased; she then left the room, was absent about a minute and returned with the Will wrapped up in wrapping paper, tied with a cord, saying she was glad to surrender it; then Burtis cut the cord and found a package within it and Mr. French told him to cut it; he did so and found within it another envelope marked "Will and Testament"; Burtis cut it open as he had done the other and there was therein disclosed the Will which Burtis proceeded to read; the first envelope was indorsed in ink "Private Paper," lengthwise, according to the recollection of Smith; the envelope was cut lengthwise, he thinks, but he might be mistaken; Smith's impression was that the paper in the white envelope contained about four pages or two sheets; he thinks the writing terminated on the fourth page; that was a mere matter of detail that did not interest him, but his memory was that it was foolscap; it seemed now to him as though the signatures of the witnesses were on the fifth page, and he recognized and identified the alleged Will as the paper found within the envelope; Burtis read it first aloud and then French read it also aloud; then French or Burtis took possession of it; French said he had a box at the safe deposit in which there were several Wills and he could put it in there; Smith appealed to his wife that that might be done until it could be brought out to the court for probate, and he never saw it in court until it came up for probate; Smith denied that he made any such statement as was im-

puted to him in the deposition of Benjamin Randall, and said that it was only under very earnest solicitations that he had the interview therein adverted to; he was requested to make a statement of all his knowledge of Luigi Dama and what he knew about his affairs; Mr. Russ made the request, Benjamin Randall being then and there present; Smith related to them all the circumstances of Dama's death as he had been first apprised of it and told them that he was sorry when he learned of the contents of the Will; Randall said something about "the alleged Will," that there were some suspicious circumstances about it and that it was forged; Smith then became indignant and irritated and arose and said that he would not listen to what was an imputation upon him and his wife, and he left, the interview terminated; this interview may have lasted fifteen or twenty minutes, possibly longer; since that time he had not seen Benjamin Randall. Mr. Smith recalled that it was Mrs. Helen Cushman who accompanied himself and wife to the funeral ceremonies at Dr. Barrow's Church on Sunday, January 29, 1888, and he also recalled that when at his house the professor used to spend an hour or an hour and a half in giving instructions and imparting a knowledge of his method to himself and his wife.

WHEN MRS. SMITH TOLD HER HUSBAND ABOUT THE WILL.

His wife first told Smith that she possessed the Will on Saturday, January 21, 1888; she came in and told him at his office; he was at home during that week; his wife told him that she had just come from the professor's residence where she learned of his death; if she had any other information she did not impart it to him; he was in the house with her the night before and every other night that week; she told him she had just learned of the professor's death and came to tell him about it; Smith was in his office when she came; he thought she was a little discomposed in manner; she did not shed any tears so far as he could recall; his wife informed him that she had the last Will of Dama and asked him what she should do; he said to her that he supposed the proper party would call for it; Smith remembers reading in the newspaper reports of the evidence given in this case that Miss Belle Harris called at his house on that Saturday morn-

ing; when his wife called at his office she remained but three or four minutes; she did not take a seat but went away when he told her that he could not see what she had to do except to wait until the Will was called for; she told him that when the professor gave the paper to her to keep she expressed surprise and asked why he did not deposit it in his safe deposit box, but the professor told her that there was another person who had a key to the box and it was just as well that it should be in her custody; she told her husband that Dama gave it to her just prior to his going to Boston the last time; she put it between two mattresses of her bed; Smith saw it on the morning she produced it and showed it to French and Burtis; she then said she had kept it there between the mattresses; it was about May, 1887, that she obtained custody of the document, and from that time until January 21, 1888, she never disclosed her possession of the Will to her husband; he should not have favored her keeping custody of that Will had he known it; the reason of her not disclosing her custody of the Will had never been the subject of discussion between Smith and his wife, and they did not discuss the subject on Saturday evening; on the next morning, Sunday, they had a conversation about the matter; she told how she came into possession of it, how she had declined to accept the custody and Dama insisted and then she took it—he said he thought it would be safer in her hands; she said that she did not want the responsibility and it resulted in her retaining the package; the name of the party who he said had the key of the box was Columbus Waterhouse; Smith would not be positive that his wife told him that that was the name, but that was his impression, and he had never understood since as a fact that the Rev. Joseph Worcester was the gentleman who had the box key; his wife told Smith that Dama said that if she went east, as she contemplated, to take the package with her; this conversation occurred on Sunday morning, not on Saturday at his office; Smith recalled that he said at the time of the conversation between them and French and Burtis that he did not want any publicity about any bequest of that kind, and that French said that it would be more seemly not to have the Will probated until after the funeral; French spoke of the reasons why special letters of administration had been

obtained because in the absence of any known relatives the Commandery took charge; Smith went east in the early part of May, 1888, after the Will was probated in San Francisco; when he went to Boston he called upon the acting probate officer and presented his papers of authorization from the executrix here, his wife, and made a demand on the Safe Deposit Company for effects, but did not succeed in obtaining them; Smith met Mr. Russ in his office in Boston; he went there at the instance of Mr. Tisdale; Russ desired him to make himself known and give references and show who he was, but Smith declined to acquiesce (see page 35, judge's manuscript notes deposition of Augustus Russ, attorney at law); his attorney in Boston, Joseph R. Smith, advised him to do so; he was employed by him in that matter only; Mr. Tisdale and his attorney, Mr. Smith, advised him that it would be policy to have an interview with Randall and his attorney, Russ; Smith went there and made a statement as has been already narrated; it was a foolish interview in his opinion, and has been misrepresented; Mr. Smith had always been very much interested in the cultivation of his wife's voice; the lessons were for the cultivation of her voice, for her own delectation and the pleasure of her friends and the benefit of her health; he did not recall that he ever paid directly for her lessons, but he was cognizant of the fact that she paid, from her statements, but he did not know how much she paid; all he knew was that he gave her money to pay and she told him that she did pay; the period of her taking lessons from Dama covered an interim of four years to a day. Smith's wife's maiden name was Sara Barker; she was temporarily living with her mother, on a visit, when he married her; she had resided with her sister in Janesville, Wisconsin, who was in prosperous circumstances. Smith could not recall the material on which the Will was drawn or written, he had only seen it on two occasions; the matter of the paper cut but little figure with him; it was the characteristic handwriting and the signatures; he did not recall the scroll or rubric under the words "Private Paper"; Smith was thoroughly familiar with that writing and said that there was an individuality about it that would make it very difficult to imitate; it impressed him that way. Smith declared

himself decidedly interested in the result of this trial with respect to the aspersions and defamation, but with regard to the monetary consideration, no; he repeatedly said that he looked at it as a mistake that Dama should have made that bequest. Smith denied that he had advanced any money directly or indirectly for the witness Godard, but he had advanced money, but did not know to what purpose it was applied; he had had conversations with some of the witnesses connected with the case; he had spoken to Mr. William T. Cummins in the corridor of the courtroom but not about the case, only about the peculiarities of Dama; Smith knew Mrs. Helen Cushman in Janesville, Wisconsin; her maiden name was Wilson; she had been twice married, and was a warm personal friend of his wife.

#### JULIUS PAUL SMITH'S RECORD.

Smith was married to his wife in 1870 in Edinboro', Pennsylvania; he went to college when he was thirteen years of age, remained there at Milton College until he was seventeen or eighteen, when, during vacation, he volunteered in the Union army and served for three years; he was afterward engaged in merchandising in the south and elsewhere until he came to the state of Nevada in 1873; he went to Europe in the autumn of 1881, remained there until near the summer of 1883; was in England on two occasions, but not long on either; the first time late in the autumn of 1881, when he remained about a week; the second time, prior to his return to this country, possibly for a month, as he recalls. Smith brought his account books into court containing the Dama account in this case, and it appeared therefrom that his disbursements, exclusive of counsel fees in the case, had been up to this date (April 1, 1891) \$1,350, of which \$1,000 were paid, as he was informed, for expert witnesses; Gumpel he had known for years; he knew Mrs. Johnson only by sight; he had seen her in the courtroom; he heard from his wife that Mrs. Johnson had visited their house; in regard to what his wife said about placing the package containing the Will between the two mattresses, that was merely temporary—the usual place was among her laces in her trunk.

Counsel for contestant contended that the testimony of Miss Belle Harris is truthful, and, in contrast to that of Mrs. Smith, must have favorably impressed the court, that Miss Harris was a disinterested witness, and her statements were made in a manner that inspired confidence and compelled credence; her testimony should be noticed with regard to the demeanor of Mrs. Smith when the latter called at the professor's house after his death; and he also directed the court's attention to the transaction at the house of Mrs. Smith when the attorney French and the Special Administrator Burtis called on Sunday after Dama's death, her singular conduct in delivering up the Will and taking no receipt nor any copy nor doing anything else to preserve inviolate the document; this he considered a curious mode of dealing with the document, if Mrs. Smith's testimony be true. In speaking of the meeting that took place at French's office the counsel said it had the appearance of preconcert, and he glanced at the testimony of Burtis concerning the way in which that meeting was brought about. This counsel claimed that Burtis and French had a thorough understanding before they called up the convocation of the members of the Commandery as to what they should do; their plan was already perfected; they had no doubt that Mr. F. W. Sumner and Mr. A. G. Booth would decline to act either as administrator or attorney, and French and Burtis were then prepared to execute their project; this, in the opinion of the counsel, is clearly the way in which they co-operated.

#### DAMA PREJUDICED AGAINST OLOGRAPHIC WILLS.

There was another reason, in the opinion of counsel, to show that Professor Dama never made this Will; Dama had a prejudice against olographic Wills, because of the failure, on account of the omission of a date, to secure the probate of his wife's Will, and the consequent deprivation of what he was entitled to under that instrument. It does not seem probable or possible to counsel for contestant, in view of this, that Dama would have adopted such a form of

testament for himself. And again, consider his change of sentiment toward the Randalls after his visit to the east, according to the testimony of Dorn. It is necessary to make a brief reference to the testimony of Henri Wigger, the notary, a witness for respondent, who drew up a Will for Dama, a fragment of which is here (Respondent's Exhibit 78), written by Wigger in 1882 in his office. Wigger testified that he knew Luigi Dama, and the paper marked Respondent's Exhibit 78 was written by him in 1882 for Dama in his office at 240 Montgomery street; that is a part of the Will drawn by him for Dama. Dama was in a great hurry and John C. Hall, the attorney, told Wigger to draw up a Will for the old gentleman. Mr. Dama gave him the ideas for the Will and he made the rough draft which is the Exhibit 78, then he made a clean copy of it. Mr. Columbus Waterhouse came with Dama and when Waterhouse left Wigger was alone with Dama. Another fact of vital importance, in the estimation of this counsel, was the disappearance of the paper which Mr. D. S. Dorn testified he saw in the courtroom and which was drawn by him as a Will for the decedent Dama. Counsel concedes that there is no doubt that there was a Will drawn or executed by Dama. This was in May, 1887, but that Will so executed and attested was a different instrument from the one here in question.

#### CHARACTERISTICS OF THIS WILL.

This alleged Will is clothed in all the conceivable habiliments of crime; it bears upon its face the stamp of falsehood and the impress of fraud and all the indicia of forgery, and those who forged it, who conceived, concocted, and consummated this crime, were in possession of the Will actually executed in May, 1887, attested in presence of Dellasanta, who did not sign as a subscribing witness, as Dama told him it was not necessary, as three were enough, Mathieu, Godard, and Bellini having already attested, and the conspirators and forgers used that document as a pattern in the execution of their pernicious purpose.

## AN ALLEGED CONSPIRACY.

Counsel for contestant contended that the evidence would show that the statements of Mr. French were not to be relied upon; his own confrère, Mr. Burtis, unconsciously revealed in his testimony that there was a gigantic conspiracy in this case of which he and French were the main manipulators. French and Burtis had a thorough understanding as to what should be done about taking possession of the property of decedent Dama before they called up Sumner and Booth for the star chamber convocation at French's office; there is every element of preconcert here; French is contradicted by his colleague in this conspiracy, Burtis, and he is also contradicted flatly by the witness Jellison; he is also contradicted by Miss Belle Harris in regard to what she told of his having said about magnifying a claim of a nurse from \$200 to \$2,000 against an estate. There is another fact to which William T. Cummins testified, that the employment of French was caused by the fear that he would use some papers which he possessed; there was no need of another attorney's service, for Adley Cummins was competent and sufficient, but Adley told William T. Cummins that Mrs. Smith was afraid that if she did not employ French the latter would use to her damage certain papers that he held in terrorem over her. What were those papers? Wherein could they have imperiled the interests of Mrs. Sara Barker Smith? This is another evidence, asserts this counsel, that there was here an outrageous conspiracy and combination to secure possession of this property. This testimony came from one of the respondent's own witnesses, for William T. Cummins was a witness for the respondent's side, and a very zealous witness, although he said he was not a partisan; he was a witness impeached by his own wife, a lady who came upon the stand at what must have been so great a sacrifice of feeling in response to a sense of duty.

Counsel also dealt with shorthand reporter Thomas R. Knox, who was so completely broken up on cross-examination, and was compelled to confess that he had, when he first heard of the Will, expressed incredulity because of the absurdity of its "perfectly ridiculous" provisions with respect to the development of Mrs. Smith's vocal organs; and counsel also reverted

to the testimony of the respondent, Mrs. Sara Barker Smith, to expose its inherent improbability, inconsistencies, incongruities, contrarieties and contradictions. Counsel, in summing up the case, adverted to the promise in his opening statement that he would prove, that this alleged Will was false, forged and fraudulent, and said that the question for the court to consider was whether he had kept his promise, and if the answer be in the affirmative, he should expect a judgment in favor of the contestant, and if in the negative, he would submit with respect to an adverse decision, and his colleague and himself would try to reflect and study and learn wherein they had been blinded for three years and a half.

He said that before coming into the case he took it on probation for more than thirty days until he was fully convinced of all the facts alleged, and he realized the importance of the issue and the

#### SERIOUSNESS OF THE ACCUSATIONS

and implications upon the integrity of persons of hitherto high standing in social and professional life, and no consideration of self-interest moved him to action—nothing but the conviction that here there was a great crime committed which it was his duty to disclose to the court and to wrest from its perpetrators the fruits of their act and to restore to the rightful heirs their estate. The case made by the evidence, in his opinion, more than justified the promise, and the defense attempted fully substantiated by its weakness the incapacity of respondent to answer the allegations and to account for the circumstances so incriminatory which surrounded the entire transaction from its inception to the time and to the termination of this trial. Truth is never a coward; it can be told at all times, but a falsehood can never be told with safety, and that is the trouble, counsel claimed, with the excuse given by Mr. French, the Eminent Commander, for not having communicated the facts in his possession concerning this Will to the relatives of decedent; his conduct and that of those concerned with him at the time immediately subsequent to the death of Dama savor strongly of suspicion, and afford ground for inference of iniquity and infamy and moral and legal turpitude in the transaction. The circumstances all tend to the same conclusion, and lead as by demonstration to the de-

duction that crime was committed. Who was among the first to suggest sinister methods in this matter? William T. Cummins, respondent's own witness, who stated that his deceased brother, Adley H. Cummins, had said that the Smiths were forced to employ the attorney French because they were in fear of him and that he had them in his power, and Adley Cummins was finally taken in as an attorney of record to silence him in his speech consequent on chagrin at first being set aside for French, but the Cumminses were not the only ones to set an alarm. The nurse, Mrs. Fannie Johnson, and Burtis also struck the alarm, as is shown by the letter of O. A. Hale to the Boston relative, Benjamin Randall. The conduct of the nurse, and the declaration of her counsel, Castelhun, which was excluded under objection of professional privilege, was significant. Why should respondent's attorneys have shut out that conversation, if they were conscious of their client's innocence? What have they to fear, if innocent? Why close the door to truth by the plea of privilege, if they had nothing to fear from disclosure? The same counsel adverted to the haste on the part of the conspirators, as he called them, to obtain possession of the property of decedent, the rush for special letters. It was a part of their scheme to possess themselves of Dama's papers and effects, so that they could cull out what they wanted and dispose of what they did not care to retain to serve their purpose; he called particular attention to the statement of French in his letter to Rev. Joseph Worcester that the friends of Mr. Dama desired a Templar funeral and that the Rev. Mr. Worcester would not be expected to officiate. (Contestant's Exhibit H-34, letter of F. J. French to Joseph Worcester, January 26, 1888.) Who were the friends that desired a Templar funeral? Was it Mr. Waterhouse? No; the Knoxes, or any of those who had been the friends or familiars of the deceased? Not one of them made such a request or was called into counsel. The counsel claims that this was a part of the conspiracy to gain possession, not only of Dama's property, but of his very remains. The calling in of the Past Eminent Commanders at the office of Mr. French was a part of the plan of the perpetrators of this crime, a contrivance by the conspirators to connect with their conduct the names of respectable men like F. W. Sumner and A. G. Booth, men of

irreproachable character in the community and exalted rank in Masonry, so by association with them the conspirators French and Burtis could claim credit for honesty and uprightness of motive; but it was a shallow scheme, as counsel claims to have shown, and too transparent to withstand intelligent scrutiny; their plot was too patent to be aided by such device. Mr. Kowalsky criticised Mr. French's conduct particularly. Mr. French is an attorney, was once the attorney for the public administrator, and knew very well what was his duty in regard to the property and effects of the decedent in the absence of kin resident here. French had no excuse for honestly evading this duty, but to carry out this scheme, this counsel asserted that it was essential that French obtain and retain charge of the custody of the effects of the deceased. If French had been consistent as a lawyer and as an honest man he would have no care for criticism nor have need to shun slander, which never harms an innocent man. The counsel for contestant asked, Why was French in such haste to obtain special letters? Was it a mere mistake of judgment? Did he not know that if the Rev. Joseph Worcester were in time advised of his duty as one named as executor in a Will he would, if he acted as a sensible man, apply for special letters? Was it a mere mistake again for Mr. French to act as attorney for the special administrator? No, answers this counsel, these were not mistakes of judgment; they were acts of design in conformity with the conspiracy already concocted. Every act of French shows deliberation and design. Why was he lurking all day, that Saturday, a short business day, around the New City Hall? Why such haste to reach the safe deposit office, to which he and Burtis repaired at 2 o'clock? Counsel claims that the visit of Burtis to the safe deposit office at 2 o'clock in the afternoon of Saturday, 21st of January, 1888, is clearly established, and says that if there be a fact in this case proved, it is that Burtis was there at that very hour, and in this connection the counsel criticised the testimony of Curtis, the manager of the safe deposit, and said that the explanation that the first memorandum made of Burtis' visit at 2 o'clock and given to him, the counsel, was the result of a mistake made by Curtis in "calling off" to the bookkeeper, is absurd; and the counsel says that Manager

Curtis, in furtherance of this "accidental" error, had to make another "mistake." and had to have a seal on the safe deposit box, and for that purpose information should have been received of the owner Dama's death, and therefore they had to make it appear that Rev. Mr. Worcester called early on that Saturday morning and talked to old ex-Chief Whitney, then the nominal superintendent, not to Curtis; but Worcester's testimony is that he never leaves his home at that time in the morning, and that he has no recollection of visiting the safe deposit vaults as testified to by Curtis, and that it is entirely unlikely that he did so visit. The fact and truth is, claims the counsel, that Curtis' first information came from Burtis at the 2 o'clock visit of the latter to the safe deposit vaults, and then when the conspirators had their plan perfected they notified the Rev. Mr. Worcester to go down with them to see if there was a "bird in the box," and so they took Worcester down and took him in to see what they already knew was there.

#### THE VISIT TO THE SAFE DEPOSIT.

This is a severe reflection upon Mr. Curtis, the superintendent of the Safe Deposit Company, who has been connected with that concern for over ten years, and who in his testimony described the *modus operandi* of obtaining access to the boxes and vaults of the Safe Deposit Company, and produced the books of record of which he had control, including the original agreement (May 5, 1885) with Luigi Dama at the time when ex-Chief Whitney was superintendent and Curtis assistant. These books show that Dama visited safe 1638 on May 3, 1887, at 9:02 A. M., and on May 20, 1887, at 8:45 A. M., and that Burtis visited the same safe January 21, 1888, at 5 P. M. Curtis said that Burtis called the day after Dama died. Mr. Worcester called the next morning after Dama died between 8:30 and 9 o'clock, just as Curtis was going off watch; Worcester came there for a special purpose according to the information received by Curtis. When Burtis came he produced a certified copy of the letters of administration as special administrator; Mr. French and Mr. Worcester were with him. When they hear in the safe deposit of the death of a box-holder they put a seal on his box, and that seal remains until they receive an

order from the probate court. It was just about getting dusk when French, Burtis and Worcester called; no one else called for that box that day to his knowledge. Curtis recollected when Mr. Kowalsky brought an order to him from the court (Contestant's Exhibit T-46) to furnish information, and the paper (Contestant's Exhibit Q-43) was furnished by the safe deposit bookkeeper. (Mem. on paper: May 3-87 Dama 9:02 A. M.; Jan. 21-88, Burtis 2:00 P. M.; Jan. 21-88, Burtis 5 P. M.; May 20-87, Dama 8:46 A. M.) Curtis did not remember who was with Mr. Kowalsky at the time he brought the order; it was about a week after that paper (Contestant's Exhibit Q-43) was sent to the counsel that Curtis saw him; counsel was passing by the office and Curtis saw him and called him down into the office and told him that the bookkeeper had made a mistake in the memorandum in calling off the numbers. Curtis said that he was calling and called off the wrong number, he was at the time doing two men's work in opening safes, entering in his own book, and calling off to the bookkeeper, and thus the mistake occurred. Curtis did not see the memorandum when it went out and so did not discover the error in time to correct it before they received it. The witness Curtis was examined closely with reference to alterations in his record books of visits to the safe. Mr. Whitney was not present when the gentlemen, Rev. Mr. Worcester, Mr. French, and Mr. Burtis, called on the 21st of January, 1888. Curtis was on watch all day that day except about two hours in the morning; all the day except from about 9 o'clock until 10:35 A. M. The witness Niss, the safe deposit bookkeeper, testified that the entry on Contestant's Exhibit Q-43 was an error.

#### THE WITNESS BURTIS CRITICISED.

The counsel desired the court to carefully examine the testimony of Burtis and to consider his demeanor on the witness-stand; the counsel said that the appearance and demeanor of the witness Burtis was as important as his words—nay, more, for words are often used to conceal thoughts, but the secret and sensitive nerves unconsciously reveal the thoughts, and the novice in crime vainly strives to dissemble, and the lie on his lips is discovered in the countenance of the criminal neophyte, who is unable to master his emotion or disguise his

duplicity. Burtis' whole behavior as a witness, his hesitating and halting answers, his expression and shuffling in examination, all tend to discredit his testimony. Mrs. Johnson's visit to the store of Burtis on the day of Dama's death was a mere subterfuge, and her story was false. What was it that occurred in Dama's house on the day of his death to require the manufacturing of so many fabrications? Why pile falsehood upon falsehood, unless there was crime to conceal? Honesty requires no prevarication to support it, but crime and dishonesty demand to be sustained by falsehood and equivocation. Who were in that house on the morning of the day of the death of Dama, that very sudden death—so sudden that the old professor had no time to turn his thoughts heavenward or look once more upon the picture of that wife whom he loved so well? Who were there? Mrs. Fannie Johnson, nurse, Burtis, and Mrs. Sara Barker Smith; these three and no more. Why should these persons prevaricate and equivocate concerning what transpired that morning, if there were no crime to cover? Burtis was there, and the counsel asserts that he proceeded to rifle the pockets of the deceased Dama immediately after his death and to ransack the drawers and examine the effects. Consider in this connection the recitals in the petition for special letters drawn by Mr. French and subscribed by Burtis with the denials of the latter. The petition for special letters was written at length by Mr. F. D. Brandon, then engaged in the office of F. J. French, and contains a recital that deceased had a box in the safe deposit office, and this petition was signed by Burtis, and yet he swore on the stand in this trial that he did not know that Dama had a safe deposit box. That due search and inquiry had been made for a Will, and that the petitioner believed there was one in the box of the Safe Deposit Company, is a recital in the petition for special letters. How did Burtis obtain that information? Counsel says that it was from his fraternal friend French, from Sara Barker Smith, and from Fannie Johnson; these were the informants of Burtis, according to the theory of contestants.

#### POSSIBILITY OF CRIMINAL COMBINATION.

The counsel for the respondent claimed that it is impossible that such a combination could have been formed or existed,

but counsel for contestant assert that there is now, as a part of the history of juridical contests in California, an instance of a greater combination, the Sharon case, supported as it was in court in the very courtroom in which this trial was in progress, at the very bar at which counsel were standing, by numberless forged documents and papers, by perjuries some of which were disclosed only by death-bed confessions, and other retractions and revelations of conscience-smitten witnesses, and counsel said that that case was curiously coincident with this one in many particulars, which the counsel undertook to point out. Both cases had many points of contact, according to counsel for contestant, but as that case is shattered into fragments, ground into dust, and is another example of justice finally triumphant, and is a proof of the maxim that truth is great and will ultimately prevail, so it will be here. The conduct of French and Burtis in connection with the funeral arrangements for Dama was severely censured by counsel for contestant as contrary to Masonic obligations. It was their duty to communicate first with the local lodge of which the deceased was a member, the Commandery being no part of Masonry proper, and the counsel contends that this action of French and Burtis is an additional proof of their criminal complicity, and that the earmarks of conspiracy are present from the time of its conception; from the moment they conceived the idea the conspirators closed in on the decedent and made their corporation so close that no one else had opportunity of access to him, and so they contrived to exclude everyone from viewing his body after it was hurried to the undertaker's rooms.

#### TRACES OF COMBINATION AND CONSPIRACY.

They refused to Mrs. Columbus Waterhouse, herself a physician, the privilege of looking at the body during the time it was in the rooms of the undertaker—all through are traces of combination and conspiracy unmistakable and ineffaceable. Mrs. Amelia A. Waterhouse testified that she was the wife of Columbus Waterhouse, was a doctor by profession, and had lived with her husband in California about thirty years and in the city of San Francisco twenty-five years before the date of her testimony, which was December 16, 1890; she knew Professor Luigi Dama very well and her acquaint-

ance began with him about the year 1880. He first lived at O'Farrell and Powell streets; after his return from the east he boarded opposite, and subsequently he moved to 317 Mason street about 1882, at the time her daughter married. Dama was a very careful man, very precise; he was very particular about his money matters. Mrs. Waterhouse saw him the Tuesday before he died; she was there on Friday after he died, saw there Mr. Burtis, also the nurse Mrs. Johnson, Miss Harris, Dr. Brigham, Mr. French, and several other gentlemen and a group of ladies. Mrs. Waterhouse had a conversation with Mr. Burtis, who asked her to come in and see the professor. Burtis said the professor died at 10 that morning. Mrs. Waterhouse went to the undertaker at the time the body was being embalmed and she asked permission to see the body, which permission was not granted; Halsted, on Mission street, was the undertaker; she saw the body after it was embalmed and in the coffin. Mrs. Waterhouse was a graduate of the Hahnemann Homeopathic Medical College; graduated in October, 1890. Mrs. Waterhouse visited Mr. French's office the day after Mr. Dama's death. Mr. French was out but she saw Mr. Burtis there, and he said that Mr. French had gone to see Judge Coffey, to procure permission to examine the safe deposit box; this was on Saturday noon, at about 1 o'clock; she left word with Mr. Burtis for Mr. French that Mr. Waterhouse and Mr. Worcester were executors of the Will that she knew was drawn up. Mrs. Waterhouse recollected that on the night of the day of Mr. Dama's death at his house, in the presence of Mr. French, she said in her usual tone of voice that Mr. Dama had left a Will in which Mr. Waterhouse was named as executor; it was on the next day that she visited Mr. French's office; he was not in; his clerk was in the outer office; she went into the inner office to write a note to him; she found there Mr. Burtis sitting behind the door; she asked him why he did not tell her he was there. Mrs. Waterhouse made a memorandum of what she did so that she could write to her husband, who was then in Mexico; she kept a sort of diary for that purpose; it was between 1 and 2 o'clock on Saturday, January 22, 1888, in the afternoon, when she visited Mr. French's office; she remained perhaps ten or fifteen

minutes in the office; Mr. Burtis was in plain sight all the time.

#### THE FUNERAL ARRANGEMENTS.

Concerning the funeral arrangements, undertaker J. L. Halsted testified that he remembered the funeral of Luigi Dama and the time when Burtis and French came to his establishment about the embalming and when they sent for Dr. Kenyon; Halsted was engaged for a part of two separate days; Dr. Kenyon was also engaged for the same time in the process of embalming; no one was excluded except one day when Mrs. Waterhouse called and Halsted told her that the body was not then in a presentable condition; no one gave Halsted instructions to exclude anybody; the body of Dama remained in Halsted's place during a week longer, and very many persons visited the place to view the body while it lay there; Halsted's firm embalms bodies; Dr. Kenyon may have embalmed other bodies there, but Halsted's son was the regular embalmer for the firm and is considered a good embalmer.

William Augustus Halsted, the son of James L. Halsted, corroborated his father, and said that he did not know Sara Barker Smith and never saw her to his knowledge; the father was a member of the Golden Gate Commandery, but the son was not; William A. Halsted was an embalmer and had had very good success; thought he could have made a good job in this case, but Mr. French put so much stress upon its being a "first-class job," and seemed to be so very particular, that Halsted wished to shift responsibility and suggested Dr. Curtis G. Kenyon, who was then making a specialty of embalming; the junior Halsted charged, according to the character of the case, from \$150 to \$400 for embalming. Dr. Curtis G. Kenyon, the physician, described the operation of embalming the deceased. Dr. Charles B. Brigham testified that he performed an operation upon Luigi Dama to relieve him from dropsy. Dama was far gone with Bright's disease; it was impossible to cure him of that; he was an old man and his heart was very weak; he probably died of heart failure; there was a great deal of pus and much albumen in the urine; this was on the 17th of January, 1888, at 317 Mason street; Dr. Brigham continued to visit Dama until he

died; Dama seemed very much pleased after the operation and Dr. Brigham left him comfortable in his bed; Dr. Brigham first saw Dama the day before he performed the operation. Dama was a feeble old man; his pulse was intermittent and feeble; he was instructed to stay quietly in bed; when Dr. Brigham returned he saw Dama sitting up in a chair by the fire; the doctor did not see him on Friday—Dama was dead before he got there; in the doctor's opinion, the result of Dama's disregard of Dr. Brigham's directions was that he died. So far as the conduct of the nurse, Mrs. Fannie Johnson, in engaging the services of Dr. Brigham is concerned, it is not blameworthy, because when Tisdale refused to tap Dama and the latter desired another doctor, a better selection could not have been made than the choice of Dr. Brigham, a gentleman foremost in the ranks of his profession, entirely competent to deal with the most complicated case of bodily disease, and doubtless he did all possible for his patient, skillfully and conscientiously, although the disease was beyond the reach of human science or skill, according to his testimony.

WAS THE CONDUCT OF FRENCH AND BURTIS CONTRARY TO MASONIC CUSTOM?

It is charged that in assuming control of the funeral arrangements, French and Burtis acted contrary to Masonic customs; but, although both contending counsel and some of the witnesses are well advanced in Masonry, it is not quite clear to the court from their arguments or from the evidence whether there was a culpable breach or a strict observance of custom on this occasion. Counsel for contestant asks, Why did Burtis send for French? Counsel for respondent says this is easy to answer—simply because French was the Commander of the Commandery to which both belonged and it was his duty to attend to the matter. Counsel Kelly in speaking of the conversation at Mr. French's office, where were assembled Burtis, French, F. W. Sumner and Booth, says, "French was eager to snatch the plum," and asks, Why did he not go to the public administrator's office? It was said in reply that this was because there was an aversion to go to a public administrator, for it is as much as to say that the deceased has no friends, and in such a case as this, where the decedent was a member of a Commandery, it was or

seemed to be proper to do as French did, and it is claimed that Mr. French's evidence explains fully and fairly his conduct, and that his testimony in regard to the funeral arrangements is corroborated by Frank W. Sumner and Andrew G. Booth. Booth made, he thinks, the suggestion of a special administrator and declined himself to act because he thought it was the duty of French, as Commander, to act, and Booth "was glad to shift the burden upon him." It is said that French acted with unseemly haste in taking control of the affairs, but it appears in evidence that Mr. Sumner called up the undertaker, Mr. Halsted, and that the expedition evinced in embalming the corpse was due to the advice of Dr. Brigham, who said that if the body was to be embalmed, the sooner the better. It does not appear that Mr. French had anything to do with the employment of the undertaker or the securing of the services of Dr. Kenyon as embalmer. French had nothing to do with either except generally to suggest the propriety and necessity of having the operation performed in the most skillful and scientific manner—"a first-class job." It was necessary that the body should be treated as speedily as possible, because the deceased was a victim of "Bright's disease," and it was essential that the process should be perfect, as the corpse had to be transported to the Atlantic states and no risk could be run as to inadequate treatment—therefore French was solicitous on the subject; the condition of the corpse demanded instant attention, as it was in danger of decomposition, and that had to be arrested at once. What was it that these "conspirators" who constituted the "convocation" convened in the office of French did in consummation of their conspiracy? Counsel for respondent argued that they went about the business in a manner that was free from suspicion of irregularity. The testimony of Frank W. Sumner was that he recollected receiving a telephone message about Dama's death late in the afternoon, just before dark, and went to French's office and found there French, Burtis, and Booth. Sumner had known Mr. Dama, he was a member of his Commandery of Knights Templar, and he had also taken lessons of Dama about a year before his death for about a month; he did not see French go to the desk or table in the room where Dama's body was laid out and get some papers and show them to a

lady and then put them back; Sumner was there all the time; he was a military officer at the funeral at Dr. Barrows' Church; Sumner knew the customs of the Commandery in regard to burial of deceased members and was especially familiar with reference to the details in connection with the deceased Dama. During the year that Sumner was Commander no funerals were conducted by the Commandery; Dama was a member of the Commandery and had joined at the earnest solicitation of Columbus Waterhouse, who was more his friend than anyone else in the Commandery; Sumner was requested by French to act as special administrator, but refused; Burtis was requested to act in that capacity; Sumner did not remember who made the request, but it was in the course of a general conversation; Sumner was not aware at the time of Professor Dama's funeral that he had belonged to any local lodge, the "Blue Lodge" at the Mission, or any other, and said that Dama's petition did not show his "Blue Lodge," nor did it show to what lodge he belonged; they believed at the time that the deceased Dama belonged to a lodge east, and that he had no relatives or friends in San Francisco to take charge of his remains; afterward Sumner learned that he was a member of the Mission "Blue Lodge"; Sumner was not particularly interested in the event of this case, but was an especial friend of Frank J. French, and had been so for several years, and he was not interested otherwise than in a friendly way. Andrew George Booth testified that he was a member of Golden Gate Commandery, knew there was such a person as Luigi Dama, a member of that body, but was not personally acquainted with him; he had been consulted with reference to the details of arrangements for the funeral of Dama; he did not know that Dama had any relatives here, or that he was a member of any local lodge, and in such case it was the duty of the Commandery to take charge of the remains and conduct the funeral ceremonies; Booth thought that *he* made the suggestion of a special administrator at the meeting where French, Sumner, Burtis, and himself were present discussing the situation, it was simply a meeting of members of the Commandery to discuss as to what should be done about the burial of the deceased brother member who died in the circum-

stances related; Booth was then second officer—Generalissimo of the Commandery; Booth was not requested to act as special administrator; he did not recollect anything of that kind; he was requested to draw up the papers, but not for himself; but he declined and said that French might more appropriately act, he being the Commander, and Booth was glad to shift the burden upon French; during the time Booth was Commander he did not act as attorney for the estates of deceased members. William Edmund Price testified that he was a member of Mission Lodge, No. 169, F. and A. M., he did not know Luigi Dama, was not aware that he was a member of that lodge until after his death, he identified the application of Dama for admission to that lodge, dated January 2, 1882; Dama was admitted by affiliation and had the same standing as other members; Dr. Price thinks he first learned of Dama's death from the secretary of the lodge, James R. Buscelle; after that Mr. French waited upon Price and told him that he had supposed Dama was a member of an eastern lodge, and upon that assumption had undertaken for the Commandery to conduct the funeral, but having afterward learned that deceased was a member of a local lodge, of which Price was Master, French desired him to take charge, but Price urgently solicited French to do so, as the Mission Lodge had had several funerals then recently and Price assured him that they all should be pleased to have the Commandery conduct the ceremonies and assume or continue control of the obsequies—moreover, as Price had never witnessed a funeral under the auspices of the Templars, he would be glad of the opportunity of participating upon this occasion; Mr. French acquiesced finally, and at the time of the funeral Price walked with French to the church at the head of the procession. Columbus Waterhouse testified that he was Commander of Golden Gate Commandery for one year and knew the custom of that Commandery in reference to the burial of deceased brethren, and it was *not* the custom to take charge of the body and effects of deceased members, and Dama could not become a member unless his petition showed that he was a member of a "Blue Lodge," and Professor Dama's petition did show that he was a member of Mission Lodge 169, located in San Francisco. At that time Mr. French was not an officer of

the Commandery nor a member; W. O. Gould was then the Commander but he was absent, and Tristram Burges, now deceased, was acting in his absence. Mr. Waterhouse had been a "Blue Lodge" Mason since 1856; he took all his three degrees at that time—that is the first, second and third degrees, entitling him to become a member of the "Blue" Lodge, and that was the time that Waterhouse became initiated as a Mason. Dama was made a member of the Commandery during Mr. Burges' term in 1883 and Gould presided in absence of Mr. Burges. Columbus Waterhouse was Commander in 1884; elected in December, 1883; during his term General George W. Deitzler was buried by the Commandery, which was the only burial during his term; the Commandery has a burial service; General Deitzler was the first burial in that Commandery; Theodore F. Tracy was buried by Commandery during Waterhouse's absence; Waterhouse had never seen a Knights Templar funeral until that of General Deitzler, although he had been a Knight Templar then about twelve years, having joined in Sacramento in 1872. Charles F. Brown, a resident of San Francisco for upward of forty years, a Mason of high degree, thirty-third degree, Scottish Rite, R. A. M., F. and A. M., and other branches, testified that there was a Masonic custom where there is no expressed desire to the contrary by the decedent, in the absence of any immediate family of the deceased or any relatives, for the Master of his lodge to take charge of the effects of the deceased brother and if necessary to apply for letters of administration and to look after the funeral; Mr. Brown was speaking of the "Blue Lodge."

#### DIVERSITY OF OPINION AS TO MASONIC CUSTOM.

There seems to be a diversity of opinion between these eminent Masons as to the custom of the Commandery, but upon the whole, while, in the light of the present controversy, it would have been wiser on the part of Mr. French to have gone to the public administrator, the chosen instrument of the law, in cases where there were no resident relatives, or to have obtained a special permit from the court to have examined the safe deposit box with reference to the existence of a Will, as has been the custom for many years including the time of Dama's death, yet

French's conduct had sanction in the circumstances existing and the apparent necessity of immediate action and the relation of decedent to himself, as a member and Commander of the Golden Gate Commandery. The evidence of Dr. Price, the Master of the Mission Lodge, also tends to corroborate the testimony of French, showing that as soon as he ascertained the local Masonic relation of the decedent he applied to the Master of his lodge to take charge of the ceremonies, and it was only upon the latter's insistence that French proceeded with the management of the affair.

THE APPLICATION FOR SPECIAL ADMINISTRATION CONSIDERED.

The proceedings in connection with the application for letters of special administration, while informal in their character, were such as had been justified by a practice of long existence, but which the present judge of this court has materially modified by requiring all such applications to be made in open court and upon notice, and if illustration or example were necessary to show the propriety of such modification, it could not be more strongly supplied than in this instance, although the judge who made the modification is the same who made the order in the case which furnishes the example. Had that application been made in open court, and the order granting it been inscribed upon the minutes, and the time of such action noted therein, as it should have been, there could now be no confusion of recollection as to the circumstance or the point of time of the transaction which has been so important and perplexing an item of dispute in this controversy. I am satisfied from the evidence that that order was made after 2 o'clock on Saturday, January 21, 1888. The visit to the safe deposit vaults occurred on the same day after the order was granted. This is verified by the little memorandum-book of Curtis, the superintendent, notwithstanding the apparent alteration in that book upon which counsel for contestant lays so much stress, and which is explained by the testimony of Niss and Curtis as having occurred through a mistake in "calling off the wrong number."

NO REASON TO DISCREDIT CURTIS.

I know of no reason why the court should reject the testimony of Curtis except that he has confessedly made a mistake which

undoubtedly misled the counsel for contestant in the first instance, but, so far as the court can judge from the evidence, Curtis is entirely disinterested, responsible, upright and trustworthy, and occupying a position which requires for its successful administration the possession of all of these qualities, and in addition to this the court's own knowledge of the custom of the company is in conformity with Curtis' testimony, for it is an every-day experience that prior to granting permission to open or examine the box or vault of any deceased person the company requires the written order or permission of the judge or letters of administration, and within the knowledge of the judge this order has been so strictly adhered to that in the case of the death of the manager of the corporation itself, the late General Washington L. Elliott, the company refused permission to his relatives to examine his box until they had obtained the written sanction of the court. That being the custom of that company, the court cannot conceive of any reason arising from an examination of the evidence why, in the particular instance in question, it should have been departed from. The testimony of Curtis has already been abbreviated in the course of this opinion in connection with the evidence of the Rev. Mr. Worcester. Among other things, Curtis testified that the Rev. Mr. Worcester visited the Safe Deposit Company vaults early on the morning of Saturday, January 21, 1838, and the book of records shows this, although Rev. Mr. Worcester has totally forgotten it. It was after that visit and the information of the death of Dama that Curtis put the seal on the safe according to the custom in such cases; it is not strange that Mr. Worcester forgot these matters after his interest had ceased in making any further inquiry. When Mr. Worcester found that another person was named in the memorandum taken from the box he considered that he was discharged from any duty that might have devolved upon him in any former Will; then his interest ceased in the subject matter of that paper and in the contents of the box. Mr. Worcester's character is entitled to the highest commendation; there is no doubt that his testimony is given in good faith, but his recollection is infirm, indeed lacking with reference to the particular visit on the morning of that day, and his testimony

upon that point is based upon a habit which he thinks it utterly unlikely he should have departed from on that occasion, although he says it is possible he did so depart, and the testimony of Curtis is clear, positive and precise to that fact of that visit.

THE "SHORT MEMORANDUM."

I take it, therefore, that the testimony of Curtis as to the occurrences at the Safe Deposit Company is truthful, and that so far as the contents of that box were concerned they were first exposed subsequent to the death of Dama at the time when Worcester, French and Burtis were present, and that no opportunity had existed prior thereto by any sleight-of-hand process to introduce the "Short Memorandum" or any other paper into that box. This is a very important item of evidence, for, if the theory of contestant be sustainable by the record, that the visit of Burtis was made at 2 o'clock on that day, Saturday, January 21, 1888, and that then the "Short Memorandum" (Respondent's Exhibit 1) was surreptitiously inserted in the box, there is an end of the case. This "Short Memorandum," a crude tracing of which is inserted in this opinion, is one of the most puzzling papers in this case, and, if a forgery, has been aptly described by counsel for contestant as the "most vicious forgery of them all." It has been subjected by me to the severest scrutiny that I am capable of exercising. Its authenticity must be determined by comparison and by circumstances. The reason of its existence is difficult to understand, its necessity by no means clear, and its authenticity not readily determinable on its face, for its countenance is most uncanny. Counsel for respondent says that the letter to Miss S. Buhne (Respondent's Exhibit 89) compared with the "Long Memorandum" (Respondent's Exhibit 2) are exactly alike, on the same paper, identical water-mark, line for line, mark for mark. This is not so; they are both on sheets of note paper; they tally line for line, but the appearance of the paper, to an almost imperceptible degree, differs in size and superficial quality, and while there is a water-mark in the Buhne letter (Respondent's Exhibit 89) there is none discernible in the "Long Memorandum" (Respondent's Exhibit 2) except the longitudinal water lines which, although they are the same number—ten—in each paper, do not cor-

respond when superposed; but the "Short Memorandum" is on paper identical with that of Contestant's Exhibit M-13, an undoubtedly genuine document written by Luigi Dama, the copy of Mrs. Dama's Will attached to the Randall deposition; both these documents are on foolscap, the pages exactly the same length and breadth, no water-mark in either except the stamp on the upper left-hand corner "Congress" with the figure of a building "Niantic Mills." Counsel for contestant contended that they had met the proposition as to the physical paper upon which the Will was written and had shown the fallacy of the adverse counsel's contention that it was the same as the ordinary "legal cap" to be found in any stationer's shop and used for a score or more of years in the courts and law offices, and directed the attention of the court to the water-mark "Niantic" in the sample of common and ordinary legal cap (Respondent's Exhibit 96) introduced to show the identity of the quality or kind of paper, whereas, in the "Altered Will" and in the alleged Will there is no water-mark at all; hold up to the light and examine and compare both and observe the difference; this the court has done, and considers, as counsel contends, that it is remarkable that Dama should have departed from his usual habit of using foolscap, for the "Altered Will" of November, 1885, and the alleged Will of May 8, 1887, were written on the same kind and quality of paper, and these are the only two instances in which we have examples of his using legal cap, and neither is identical with Respondent's Exhibit 2 either in quality, kind or water-mark. This "Short Memorandum" is a peculiar paper, and its claim to acceptance by the court is largely dependent upon the improbability of its having been placed in the safe deposit box by anyone but the decedent Dama. The preponderance of positive proof is that no one visited that box except Dama on May 3, 1887, and again on May 20, 1887, his last visit, until January 21, 1888, when the box was opened and its contents exposed and examined in presence of Worcester, French, Burtis, and Curtis; therefore, whatever the perplexities arising from an examination of the paper itself, and an endeavor to account for its contents, it would seem to be established that that paper was placed in the box prior to the death of Dama and by him.

## THE "LONG MEMORANDUM."

The draft of the "Long Memorandum" (Respondent's Exhibit 31), a paper of two pages, half-sheet note paper, has been pronounced genuine by the experts Piper and Young and also by Columbus Waterhouse, all witnesses for contestant, and both the experts Piper and Young say that the man who wrote the Will wrote this "Draft of Long Memorandum" (Respondent's Exhibit 31), and, after a very careful examination, I am prepared to accept this opinion, coming from a hostile source, as correct. I have, in compliance with the strenuous request of the counsel for the contestant, compared this draft (Respondent's Exhibit 31) with the "Long Memorandum" (Respondent's Exhibit 2), without being able to agree with him in the conclusion that it is "another of the decoys" furnished by the respondent. The counsel desired the court to note the second page of the draft, and asked, What is the word "acre's" doing there, and why is the word "Memorandum" at the bottom instead of at the top? He admits that it is true that some of the experts upon a casual inspection said it was genuine, or rather that it looked like Dama's writing, which, of course, it did upon superficial view, but the momentary deception could not alter the fact that this paper is a decoy; it only more strongly established that fact; and the hurried opinion extorted from the expert Dr. Piper on the stand should not weigh against it or against him as an expert; but, notwithstanding this contention of counsel, I am unable to conform my views to his conclusion, and feel obliged upon the evidence to pronounce this paper, "Draft of Long Memorandum" (Respondent's Exhibit 31), to be in the handwriting of Dama, and I believe that the same hand wrote the "Long Memorandum" (Respondent's Exhibit 2). Among the items of identity between the disputed and undisputed papers should be particularly noticed the mistakes of spelling and of grammar that are common to all; take, for instance, his spelling of valuable, "valueable," influence, "influece," "a ring with a large solitaire diamonds," "acre's," his use of the sign of the possessive case in plural words, for example, "acre's" for "acres"; this is conspicuous in all his compositions; and notice the word "market" for "marked" in the "Short Memorandum"

(Respondent's Exhibit 1); and other coincidental peculiarities might be pointed out in controversion of the contention of counsel for contestant. Some of the exhibits illustrating these peculiarities came from the custody of, or have been introduced in evidence by, contestant. A noteworthy example of this may be found by comparing the word "influece" in line 18 of Contestant's Exhibit L-12 with the same word "influece" at the end of line 83 of the alleged Will. The peculiar use of the apostrophe in plural words has numerous examples in authentic documents.

#### THE "F" IN THE WILL.

The *F* in the alleged Will is always in one form in that paper, and is a remarkable departure from his usual authentic writing, although as a part of the capital

*M* it commonly occurs in the same instrument. The only examples I have found in the writings assumed to be authentic are in Respondent's Exhibit 27, (memorandum of amounts to be received from Benjamin Randall), and in Respondent's Exhibit 128, one of the many copies in Dama's handwriting of his circular, a very carefully written copy, evidently prepared for the printer.

This exhibit 128 merits minute inspection in connection with the respondent's theory of the testator's manner of constructing the Will. It is well to note here that Contestant's Exhibit H-60, a copy of the same circular, is written on exactly the same kind of note paper, same trademark, "Live Oak," impressed on an oak leaf, and this is also true of Respondent's Exhibit 128,—all these exhibits are identical in characteristics, excepting the

one letter *F* in the Will form, at the end of the tenth line of the second page of Respondent's Exhibit 128. This point seems to have escaped the attention of experts and counsel on both sides.

It is plain from an examination of these several circulars that Dama was very slow in English composition, and always made drafts of every paper he considered important, and

his process of preparation from the initial draft to the completed document is nowhere better illustrated than in these undisputed writings, from Respondent's Exhibit 20 through Contestant's Exhibit II-60 to Respondent's Exhibit 128, the final copy for the printer, which should be closely compared with the Will in dispute.

#### DAMA'S METHOD OF COMPOSITION AND WRITING.

This shows that Dama was careful and painfully laborious in his methods of composing and writing in a language that was foreign to him. There are several instances of his method. See draft of his answer to Miss Buhne's letter of September 3, 1883, on the back of that letter, Respondent's Exhibit 44, in which he alludes to his "great effort to write english," and in which also occurs a sentence significant in connection with the "Second Draft Will," Respondent's Exhibit 4, "I will try to do my best to make you indipented [independent] from everybody else." This sentence is significant to my mind because in this "Second Draft Will" he seemed to contemplate bestowing the bulk of his fortune upon Miss S. B. (Sophie Buhne), his "dear friend"; thus making her, according to my inference and interpretation, "independent from everybody else." His habit is also observable in the draft of his letter to his "sincere friend," Martha E. Chase, Respondent's Exhibit 43, written on the inside blank pages of that letter; and the letter as received by his "dear friend," Mrs. Chase, shows the fastidious care with which he produced his perfected work, Respondent's Exhibit 73.

The earlier processes applied and pursued by the fabricator of the disputed document may be traced by comparison with the Will of Wealthy B. J. Dama (the paper refused probate by this court for want of a complete date), and the fragment of the Will drawn by the Notary Wigger in 1882, Respondent's Exhibit 78. This fragment is most important to illustrate the mode in which the disputed document was wrought out, and it undoubtedly served as a model for the form of the Will in question. The first, second and third clauses are almost identical, even the word "desease" was so originally spelled in the Wigger Will, third clause, and the correction so made as to leave the "c" over the orig-

inal "s" in "decease" difficult to distinguish. The Notary Wigger calls this a "rough draft of the Will." (Respondent's Exhibit 78; another paper, apparently a fragment of an engrossed copy of the Wigger Will, Respondent's Exhibit 48, was not admitted in evidence and has not been considered by the court.) The peculiar misspelling of the word *decease*, "desease," is found in clause "Thirdly" of the "Altered Will" and of the alleged Will.

The introductory clause of the disputed Will is copied literally from the unprobated Will of Wealthy B. J. Dama, except the word "expenses" in the latter is spelled with a "c" in the former—thus, "expences." (See Contestant's Exhibit M-13, the Randall Will, and Respondent's Exhibit 23, the "Blue Will.")

The First Draft Will and the Second Draft Will, both on opposite sides of one-half sheet of foolscap paper, "Congress Niantic Mills" (Respondent's Exhibit 4), are plainly studies in testator's preparation for the Will finally drawn and executed.

#### WHY DID DAMA HAVE THREE SUBSCRIBING WITNESSES?

The Second Draft suggests the vagrant fancy of testator with respect to the beneficiary of his bounty; he leaves a sum of \$15,000 to be paid to a "dear friend" in San Diego and all the rest to his "dear friend, Miss S. B.," and he appoints that same "dear friend S. B." executrix, and requests that this "beloved friend" be not required to give bonds; and at the end is the instruction—"sign 3 witnesses for the law of California." Mr. Lloyd, of counsel, in commenting upon this unusual instruction, says that D. S. Dorn's testimony about having drawn a *Will* could not have referred to this instrument and cannot be applied to any original from which this instrument was imitated, because that instruction as to the necessity of three witnesses could not have emanated from Dorn, as he is a lawyer, and Dama must have imbibed the idea from some other source, since no lawyer would give such erroneous instruction. Perhaps not; yet on the very day that I am writing this page (Monday, January 25, 1892), a Will was admitted to probate by me in the Estate of Alonzo Newell, No. 11,848, to which there were three subscribing witnesses, the form being copied by a layman from a book called

"Every Man His Own Lawyer"; and the legal firm of Mastick, Belcher & Mastick, with exceptionally long and large experience in this jurisdiction, habitually secure the attestation of three witnesses, not because it is the law of California, but as a measure of wise precaution in the event of the inability to prove by two, the testimony of the third may be most probably accessible. (See the probated will in Estate of George F. Bening, No. 11,743.) This was the reason given to me by Mr. George H. Mastick upon inquiry as to the cause in the last-named matter. But Dama may have imbibed his idea while he was resident in the New England states, for it appears that in Maine three subscribing witnesses are required, also in Massachusetts, and in Connecticut, New Hampshire and Vermont, and formerly in Rhode Island: 3 Jarman on Wills, 5th Am. ed., note on pages 771, 772.

#### HOW THE WILL WAS DEVELOPED.

I have dealt so extensively with the expert evidence in the first part of this opinion that I do not care to revert to it, except in connection with a few points which impressed me originally against the genuineness of these disputed documents. I viewed with distrust at first the testimony concerning the large yellow envelope marked "Private Paper," Respondent's Exhibit 28, and the large white envelope marked "Will and Testament," Respondent's Exhibit 29, but, on comparing these two papers respectively, Respondent's Exhibit 28 with the yellow envelopes, Respondent's Exhibits 61 and 21, the first containing contract between Luigi Dama and William T. Cummins and the second the lease from Luigi Dama to Owen McMullen, March 23, 1887, and the large white envelope, Respondent's Exhibit 29, with Respondent's Exhibit 22, also large white envelope marked on the outside "Contract and Deed Horace Davis to Luigi Dama, May 26, 1885," all superscriptions assumed to be authentic, have found them to be identical, and so conclude that the testimony that he had these envelopes, the yellow one marked "Private Paper" and the white one marked "Will and Testament," is at least credible.

The paper called the "Altered Will," Respondent's Exhibit 3, was undoubtedly the last paper used in the preparatory process of fabricating the alleged Will. Counsel for

the contestant has adjured the court to consider with caution this "decoy," which, he declares, in itself furnishes ample internal evidence of the scheme of forgery of which the alleged Will was the ultimate sequence, and it is asserted that if the court examine with care and circumspection this "cripple," this "decoy," the "Altered Will" of pretended date November 1, 1885, and compare and construe it clause by clause, it affords indubitable proof that the alleged Will was the culmination of a series of forgeries, the crown and apex of the structure of fraud. I have perused this paper again and again with no prepossession in its favor, but, on the contrary, with a doubt of its honesty so far as superficial indications afforded basis for opinion, yet, notwithstanding my many misgivings, the result of repeated examinations and comparisons is in its favor. The form

of the capital letter *D* common to both the Altered Will and the alleged Will occasioned as much perplexity

as the form of the capital *J*, but I have found sufficient similarity in some of the papers produced in evidence, the authenticity of which is either assumed or not assailed, to warrant me in saying that this form was not unknown to or unused by Dama. See Respondent's Exhibit 68, Story receipt, where it occurs in the initial letter of D. W. C. Story, and also in the signature "Luigi Dama," and perhaps less palpably in two or three other of these receipts, and also in Respondent's Exhibit 6, lease from Luigi Dama to Owen McMullen of Redwood City lots. It seems to me that this alleged Will was developed in very much the same manner as the circulars, Contestant's Exhibit II-60 and Respondent's Exhibit 128, the last named being an absolutely perfect manuscript, and II-60 being scarcely less so, and both seem to be the culmination of the incipient draft, Respondent's Exhibit 20. It is worth while critically to compare this exhibit 20 with the "Altered Will" and the alleged Will, particularly with respect to the alterations in the "Altered Will" and in the exhibit 20. There are, it seems to me, many peculiarities common to both.

## PECULIARITIES OF DAMA'S WRITING.

The expert Professor Young claimed that the crowning characteristic and prominent peculiarity in the writing was "the lifting of the pen," but, in taking selections from the alleged Will, the "Altered Will," the "Blue Will," Respondent's Exhibit 23, and the Randall Will, Contestant's Exhibit M-13, we find, by comparing them one with another, out of sixty-nine words, forty-five are exactly alike and twenty-four different. As to the slope, a peculiarity testified to by Professor Young, and the stroke at the end of the signature of Dama, the flourish or rubric, the first loop of the rubric, to which Professor Young attaches definitive importance, and which both experts Piper and Young say is sufficient in and of itself to condemn the disputed documents, because, according to their theory, it was not Dama's habit to make loops, it seems to be sufficient to allude to a few instances which appear to negative and nullify their conclusion. The slope is illustrated in the Story receipts and in various other exhibits, Respondent's Exhibits 104, 105, 106, and the yellow envelopes, exhibits 21 and 61, and the large white envelope, exhibit 22, and the Contestant's Exhibit H-60, all show the slope of the Will, the change of slope is to be seen in all the papers. Observe the envelope on Contestant's Exhibit M-13, the formation of the word "Boston" in "East Boston," and notice the dashes = before and after and under the word

= Mass = and the hook at the end of the first

dash under that word — . In connection with Professor Young's deductions may be examined the signatures brought from the German Bank, where will be found the formation of the circle or loop, the first, in the rubric or flourish under Dama's signature, and we may observe particularly in Respondent's Exhibit 12, where the first circle or loop is much larger than the second, thus showing the incorrectness of this expert's universal inference; this also appears notably in Respondent's Exhibit 36, Cummins Contract. Much discussion was expended by the experts upon Dama's habit of making loops, but it would seem that this habit increased according to the care which he bestowed upon his writings; in other words,

the more care he took the more loops he made. The First Draft Will appears to have been written with rapidity, very few loops; a like observation applies to the Second Draft Will; the "Randall Will," Contestant's Exhibit M-13, appears to have been written with more care, and shows an increased proportion of loops, the "Blue Will," Respondent's Exhibit 23, with still more care and a larger ratio of loops; and so with others, showing a gradual increase of care and a proportionate increase of loops until the alleged

Will is produced; the small *hs* and *ls* may be taken as illustrations which serve to show that as the writer of the Will went on progressively he made more and more loops until he finished the final paper, in the writing of which he exercised the greatest care, bestowing unusual pains upon every letter, large and small. It is not written in Dama's usual hand, and that gives force to the proposition that if a man wanted to forge the Will, he would have taken the ordinary and every-day hand of the writer, so that it would not attract especial attention. If this Will were copied from some original, then its main provisions, as presented in this disputed document, must have been in that original instrument.

#### DAMA'S PERSONAL PECULIARITIES.

It cannot be doubted from the evidence that Dama was a very singular and curious man and did many odd and peculiar acts, and one knowing the facts and not knowing the man would find it difficult to account for his conduct, and we have an illustration in his treatment of the Rev. Mr. Worcester, who never did aught but kindness for him, and who really troubled himself greatly to serve him, particularly in the purchase of the Jackson street property, wherein Worcester's part in the transaction was productive of great pecuniary profit to Dama and of no advantage to Worcester, and yet Dama became suspicious and acquired an aversion apparently toward Worcester, and also, without ostensible reason, toward Columbus Waterhouse, although in their presence he concealed his sentiments. The Rev. Joseph Worcester described Dama, not inaptly, as a "preposterous man," and he marveled not that he should have made a "pre-

posterous" Will. Dama was a notional man; he had no stability of mind; he took notions to persons and then changed them without cause; took a fancy to Waterhouse and changed, and so with others, and gave them the impression that he would leave to them his property, and finally he fixed his mind on Mrs. Sara Barker Smith and made his Will in her favor, but, had he lived much longer, he might have forsaken this fancy for some other object of his capricious choice. I think this judgment of his character is fairly inferable from an examination, not only of his correspondence, but of the First Draft Will, Respondent's Exhibit 4, wherein he leaves to his "beloved ———," and of the Second Draft Will in which he names "his beloved friend, Miss S. B.," and of Respondent's Exhibit 78, and of the many expectations which he seemed to have inspired in the breast of nearly every one of his pupils, including Miss Belle Harris, who testified that she had a conversation with Professor Dama, in which he told her that those people who expected to get his money would be disappointed, and that he was now a poor man and would have to depend on her, as he had left her all his fortune; although she did not infer from what he said that he left her everything in a Will, for she thought there were others connected with that Will. In my examination of the evidence in this case I fail to find any example of abnegation among the friends and pupils of Professor Dama; even Thomas R. Knox expected, as Dama had no relatives here and did not like his wife's relatives, that he would have remembered his friends, among others Knox or his daughter. It would seem that he had as good reason to select Mrs. Smith as his beneficiary as any other of his friends, or so-called friends; she was very friendly with him; there were many elements of sympathy between them; he taught her Italian; they had both been abroad and were accustomed to converse about many places in which they had been, and it seemed to be natural in so notional a man that he should have chosen her as his legatee, as it would have been natural, had he lived long enough, to have substituted someone else who had usurped her place in his fancy. It is claimed that his bequest to her was absurd, because of her age and his inability to accomplish, through his method, in her case what he had

done for other pupils, but, so far as I can gather from his circulars and from the evidence of the pupils, his method was principally, if not purely, hygienic; as Mr. Thomas R. Knox said, Dama's theory was that by pursuing his method one could live to a great age.

#### DAMA NOT MERELY A MUSIC MASTER.

Dama was not merely a music master, but a physician and a hygienist, whose business it was "to know the arrangement of these modifiable conditions, such as are capable of being indefinitely modified by our own actions, and how to influence them toward the maintenance of health and the prolongation of life" (Professor Huxley in *Popular Science Monthly*, Volume XI, page 669) and, according to this theory of voice culture and progressive development, there is no reason to doubt the evidence of another of his "warm friends," Mrs. Helen Cushman, that notwithstanding her mature years, his system would find in Mrs. Smith an example and an exponent, hygienically if not artistically, and that in the process of development she would extend and perpetuate his theory of voice culture. The reason of Dama's bequest to Mrs. Smith would seem, therefore, to have had some basis in his system, which, according to the testimony of Mrs. Cushman, recognized the validity of the proposition that while life remained hope would survive, and that through the use of his legacy to her, "for the purpose of further study and development of her vocal organs and cultivation of the voice," Mrs. Smith might be greatly benefited; and to justify this view of the subject matter I think it not out of place to here insert a copy of the circular of the decedent, which succinctly states his theory of voice culture. The one I choose to copy herein is Respondent's Exhibit 128, which is identical in terms with Contestant's Exhibit II-60, as follows:

"Prof<sup>r</sup>. Luigi Dama, graduate of the Royal Conservatory of Naples, Italy, a resident of this City for the last eight years, but recently returned from a visit East, again offers his services to the Public.

"Prof<sup>r</sup>. Dama has made the cultivation of the voice the study and practice of his life both physiologically and in vocal training, and feels assured that he understands and

can overcome the difficulties which obstruct the free use of the voice by public and private singers and speakers and by all who are compelled to prolonged vocal expression. He has satisfied many of our intelligent citizens through their experience that the right use of the voice is the free use of it, and that the sound properly formed, can be made in any required volume and as tirelessly as the birds sings. Prof<sup>r</sup>. Dama has also traced many of the most obstinate and baffling disease, not only of the throat and lungs but of the liver, stomach, and other organs closely connected with them to the misuse of the voice. For the right use of the voice is the right and active use of the lungs, and the full and complete action of the lungs involves the right action of all the organs of the chest and abdomen, but especially does it involve the proper aëration of the blood, its lively circulation, and the ample supply of pure blood to the vital organs and prompt removal of the waste particles. Cases of chronic disease of the throat, even malformation through misuse, also of long impaired digestion and assimilation, of obstinate headache and nervous prostration have been cured or so greatly helped by Prof<sup>r</sup>. Dama as to win for him the warm gratitude of his pupils.

“Prof<sup>r</sup>. Dama has observed what all thoughtful travelers are familiar with, the extraordinary prevalence of all diseases incident to the wrong use of the voice and imperfect action of the lungs in our own country.

“He finds it to be due in part to the practice of lingering upon the consonants notably upon the *r*, and the incomplete enunciation of the vowels, he knows that he can correct this to the great and delightful increase of life and activity to all.

“There are many in this vicinity who would be glad to be referred to for the substantiation of this from their own experience.

“Prof<sup>r</sup>. Dama’s residence is No. 317 Mason Street, just below Geary, where he may be found.”

I have said all that seems to be necessary concerning Clause Sixthly of the alleged Will.

#### THE SIGNATURES OF THE SUBSCRIBING WITNESSES.

Now, as to the signatures of the subscribing witnesses to the Will: Jules Mathieu made oath in this court, on the

original probate of this Will, that that was his signature, but, apart from that, a comparison with his writings herein proved shows the genuineness of the signature attached to the Will, and of these writings there are numerous examples which I do not deem it necessary to recount. In the strong light of the adverse criticism expended upon the testimony of the witness Henri Godard, I can see no reason to reject his evidence that he witnessed and subscribed the alleged Will in the manner and circumstances sworn to by him on February 13, 1888, and on November 21, 1890. The witness Antonio Bellini was the occasion of more dispute and doubt than perhaps any other, but I think now, as I thought at the time when he first appeared and testified in this court, that, either through ignorance or design, he did not in his testimony state the facts as they existed at the time of the execution of the Will, May 8, 1887. It was difficult, indeed, to bind this witness to any intelligible statement; he was evasive and contradictory in his manner, and it was apparent to the court, as was stated on February 13, 1888, that while this witness Bellini can talk English well enough to make himself understood, yet, when the court told him, on that last-mentioned date, to tell all he knew about the making of the Will, and asked him if he talked English in his business, he answered, "Yes, sometimes I talk something that is no good, and nobody knows what I talk but myself." I think now, as I thought and said then, that when Bellini wanted to make himself understood he was capable of doing so in English. On the examination here on November 20, 1890, it was quite plain that he was determined to deny, and to adhere to the denial, that he had signed the paper presented to him, and that he had never seen it before that day, and that it was not the paper the judge showed him on February 13, 1888, that his signature was not on the same paper; that it was nearer the bottom of the page, about four fingers from the bottom, although, of course, it was the same paper; and upon redirect examination he affirmed again that it was not the same paper (indicating the Will admitted to probate February 27, 1888), although, when an interpreter was called in, he corrected his statement and said that it was the paper but with one difference, that at the former hearing, February 13, 1888,

it was fresher and newer than at the time of his testimony, November 20, 1890. Bellini swore that the paper he signed in Dama's house had a stamp on it, but the color he could not remember, whether it was black, or red, or blue, and again he said that he did not know that paper, the alleged Will, never saw it before the day of testifying, November 20, 1890; the paper he signed was a similar paper; and then again he affirmed that this probated paper was the one shown to him by the judge on February 13, 1888. Upon the same day in his testimony he swore positively that the word "Antonio" and the words "222 Ofarrelle" were in his handwriting, and he also added, voluntarily and impressively, "I swear it," but the next day he explained this by saying that he was excited and did not clearly understand it and subsequently he understood it better. It has been stated here, in the course of argument, that this witness swore that there was a red seal in the paper to which he subscribed after the signature of Luigi Dama; but this is an error, as appears from the official report of his original testimony, February 13, 1888, in which he swore that the paper that he signed had a stamp on it, "it was evening and he did not look very well but he knew it was stamped paper," and in answer to the question, "Was it a seal, or an impression without a seal?" he said, "It was an impression"; and to the further question, "Was it a wafer, or a paper seal, or just some impression made by a press in the paper?" he made answer, "It was an impression on the paper itself." The troublesome feature of this signature is the unique mode of writing "Bellini," but it is extraordinary, if a forgery were attempted to be perpetrated in this signature, that so remarkable a departure from the common hand of the witness should have been taken. It is more reasonable to believe that the witness himself wrote this for some reason unaccountable to anyone else, and there are certain characteristics of the letters in that word which are reproduced in the specimens of the witness' handwriting given on page 3 of the judge's manuscript notes, written Thursday, November 20, 1890, and on the paper marked Respondent's Exhibit 30, written in court, at the instance of the judge, on February 13, 1888. Reference is here made to the figures "222" in the alleged Will, in the judge's notes,

and in Respondent's Exhibit 30, to the "rr" in "O'farrell" in these papers, and it seems to me that those specimens of the writing show similarities with the Will signature, and when we take the photographic enlargement (Respondent's Exhibit 115) of portions of those specimens and compare with the photographic enlargement of the Will signature (Respondent's Exhibit 116), we find identities in literal formation.

#### WHAT THE LAW REQUIRES IN ATTESTED WILLS.

Now, assuming that the evidence of this witness is in itself uncontradictory and contains no inherent element of improbability, it is at variance with the positive testimony of the two other witnesses, and the probate of a Will is not to be denied or revoked upon such testimony, nor is the action of the court dependent on the recollection or the veracity of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud; but, if the forgetfulness or falsehood of a subscribing witness can invalidate a Will, it would be easy, in many cases, to use such artifices or corruption as would render the best Will nugatory. The evidence of a subscribing witness is not conclusive either way, nor does the law presume that he is either more or less truthful than others; it does presume that he had, when he signed, full knowledge of what he was doing, and, in case he is dead, his attestation, when proved, is *prima facie* evidence that all was done as it should have been; but in all contested Will cases the case is open for general witnesses, and when the testimony is all in, each witness is credited according to the impression he leaves of candor and intelligence, and not according to his being, or not being, an attesting witness: *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810. Neither failure of memory nor the corrupt or false swearing of attesting witnesses will be allowed to defeat a Will if its due execution can be shown by other testimony. Mere failure of the attesting witnesses or their denial of the facts will not defeat it if it can be established by other evidence: *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579; 3 Redfield on Wills, c. 3, sec. 3, p. 9, and 1 American Probate Reports, p. 271, and cases there cited.

Other evidence of a valuable character as to what occurred at the moment of the execution of the Will is supplied by the testimony of Gaetano Dellasanta, who seemed to me to be a fair witness, and who told the story of how he came to be present, upon the occasion and what took place at the time, and why his signature was not required or given, in a plain and straightforward manner. Dama told him he need not sign, because three witnesses were enough, and they had already signed. Dellasanta said that after Bellini wrote his name everybody made a remark, because of the way he signed his name, and the paper signed then and there the witness believed to be the same paper here in question, although "he was not judge enough to swear that no man could imitate the paper, and would not swear positively that it was the same paper," but it appeared to him to be the same.

#### UPON WHOM RESTS THE BURDEN OF PROOF.

Counsel for contestant in his opening statement said that he would show that this alleged Will was forged, and if he should not succeed in identifying the forger in person or place his finger upon him, the burden would rest upon those who caused the instrument to be probated. I do not understand this last proposition to be the law. The burden of proof is not upon the defense, but upon the prosecution.

While the contestant is not called upon to indicate the forger, he is compelled in a civil contest to establish by a preponderance of proof the charge laid in his complaint.

It is certainly not incumbent upon the respondent to do more than hold the balance. "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side": Code Civ. Proc., sec. 1981. "Each party must prove his own affirmative allegations": Code Civ. Proc., sec. 1869.

I do not think that either Henri Godard or Mrs. Fannie Johnson had the capacity to execute, even had they the talent to conceive, the concatenation of forgeries which must have preceded the culmination of this crime, if the alleged Will were forged.

### Conclusion.

I have striven in the preceding pages to present a full and a fair view of the evidence on both sides and of the opposing views of counsel, desiring by process of redaction to compress the mass of matter into manageable dimensions without eliminating an atom necessary to a just judgment. It may be that I have not succeeded in my earnest endeavor. Some witnesses may have received too much attention, some not enough, other some none at all. Mrs. Ann Herbert Barker and Mrs. Anna B. Bradstreet have been passed by, not through discourtesy, but because treatment of their testimony was hardly justified by its tenor. This remark may apply also to others. But I am conscious of no omission or oversight that was necessary to a correct conclusion, and so far as human judgment applied to human testimony can secure a right result, I think it has been reached.

The importance of this controversy is not to be measured by the magnitude of the estate. It matters not whether that be large or small, the crime here charged to have been committed is great; it involves forgery and implies murder; and if the court have erred in judgment, and that error should be perpetuated or remain uncorrected, it will be an error of grave character and grievous consequence. One of the counsel has said that this case is one of importance paralleled only by the famous Broderick Will Case (No. 1079 old Probate Court), and many circumstances conspire to raise it beyond that in importance. It is important, also, because of the number and character of the persons implicated in the criminal conspiracy alleged, for at least a dozen persons of hitherto high standing in this community are concerned in complicity, and if they be guilty as charged, the penitentiary should be their portion, if not the gallows. I have appreciated its importance intensely, and have felt an unusually acute sense of responsibility because of the frequency of forgery asserted or attempted, and perhaps sometimes successful, in courts of probate, and because of the experience that has been my fortune to endure in this class of cases. It is not necessary to enumerate or specify the cases that in the

course of now nearly ten years it has been my lot to investigate and decide; I am certain that in one case at least this court was constrained by testimony of experts and others to admit a false and fabricated paper to probate, although the well-grounded distrust and unreserved expression of the court in that case prevented the successful issue of a fraud by the same parties in another cause tried in a co-ordinate department.

I have deemed it, therefore, my duty to bestow the greatest pains and most rigorous analysis in the examination of the evidence in this case; and yet it may be that, after all, the court has, because of the fallibility of human judgment, aided in fastening a fraud upon the record and assisted in the dishonest diversion of the estate of decedent. But as I have reviewed the premises, line by line and letter by letter, I can perceive no reason upon all the facts in evidence to sustain the contest, and, therefore, order judgment for defendant.

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IN THE MATTER OF THE ADOPTION OF MARY REICHLE, A  
MINOR.

**Adoption of Minor—Petition, Covenant and Order.**—In this case are set forth in full a petition for the adoption of a minor, the written consent of the institution having the child in custody, the covenants of the adopting parents and the order of the court authorizing the adoption.

To the Hon. J. V. Coffey, Judge of the Superior Court of said City and County, Department No. 9 of said Court:

The petition of James T. Hume and Louise Hume, his wife, respectfully shows:

That they are husband and wife, and are residing together, in said city and county.

That both of your petitioners are over the age of thirty (30) years and have no children or child of their own.

That they are desirous of adopting a child, named Mary Reichle, now aged seven years and about two months, and the daughter of Charles Reichle and Mary Reichle and born to them in lawful wedlock.

That said child is now and for more than one year last past has been an inmate of and in the care of the asylum in said city and county, called "Little Sisters Infant Shelter," a duly organized and incorporated asylum or place of shelter for helpless children of tender years, under the law of California.

That Charles Reichle, the father of said child, Mary Reichle, was, on the 18th of June, 1887, adjudged and declared to be insane by this honorable court, and sent to the State Insane Asylum at Stockton, this state; that he remained there until the 25th of November, 1888, when he was transferred to the State Insane Asylum at Agnew, Santa Clara county, this state, where he now is a hopeless, demented, or utterly incompetent person.

That the mother of the child, Mary Reichle, took charge of said child after the father was adjudged insane and sent to Stockton as aforesaid and maintained her until the 16th of December, 1892, when she put her, the child, in charge of said "Little Sisters Shelter," where she has ever since been.

That the mother, neither at that time nor since, paid anything to said Shelter toward the expenses of the maintenance of said child; nor has she been near the child since she left her in charge of said Shelter; nor has she been seen, or heard of or from, since the sixteenth day of December, 1892; but, as your petitioners are informed and believe, she, at that time, or about that time, left the state of California and went to parts unknown.

That the officers and managers of said "Little Sisters Infant Shelter" consent to said proposed adoption by your petitioners.

That your petitioners are ready and willing to sign an agreement that the said Mary Reichle, minor, shall be adopted by them, and treated in all respects as their own child should be treated, and are desirous that the said child shall take the family name of your petitioners, and shall, when adopted, be known by the name of "May Violet Hume."

Wherefore your petitioners pray that your honor will make an order declaring that the said Mary Reichle shall henceforth be regarded and treated in all respects as the child of your petitioners, and that said child be henceforth known by the name of May Violet Hume; in accordance with the provisions of chapter 11, title 11 of the Civil Code of the state of California.

JAMES T. HUME.

LOUISE HUME.

State of California,  
City and County of San Francisco,—ss.

James T. Hume and Louise Hume, being severally duly sworn, depose and say that they are the petitioners named in the foregoing petition; that they have heard read the above and foregoing petition and know the contents thereof; that the same is true of their own knowledge, except as to the matters which are therein stated on their information or belief, and as to those matters, that they believe it to be true.

JAMES T. HUME.

LOUISE HUME.

Subscribed and sworn to before me this 29th day of December, 1893.

G. W. F. COOK,

Justice of the Peace of the City and County of San Francisco.

#### HOME OF LITTLE SISTERS INFANT SHELTER.

San Francisco, January, 1894.

Whereas, on the 16th of December, 1892, a child was placed in the Home of the Little Sisters Infant Shelter, this city of San Francisco, by a woman who claimed to be its mother, and who gave the name of the child as Mary Richley or Reichle, and claimed to be herself, Mrs. Charles Richley or Charles Reichle. She brought no clothing with the child beyond the clothes the child at the time wore, which were very poor in quality and very limited in amount; and

Whereas this shelter has never, since the last-mentioned day, heard of, or from, the woman, the reputed mother of the

child, except to hear from some of the acquaintances of the woman that she had not been seen or heard of in San Francisco since about that time; and whereas the child has outgrown the advantages and facilities of the shelter, being, according to the mother's statement, about six years old when placed here, and having been here ever since; and whereas Mr. James T. Hume and his wife, Louise Hume, are desirous to adopt the child, and they, it appears, are worthy people and in every way competent to receive said child in adoption.

Therefore resolved by the Board of Directors, here present, this day, that the consent of this shelter be, and hereby is, accorded to them for the adoption of said child, Mary Richley, or Mary Reichle, and further resolved, that Mrs. H. N. Tilden, recording secretary of the board be, and hereby is, empowered to appear before any judge, before whom the proceedings for the adoption of said child may be had, and certify such consent of the Little Sisters Infant Shelter to the adoption of said child by said James T. Hume and Louise Hume, his wife.

MRS. WILL E. FISHER,  
President.

Mrs. H. N. TILDEN,  
Recording Secretary.

*In the Superior Court of the City and County of San Francisco, State of California.*

IN THE MATTER OF THE ADOPTION OF MARY REICHLE, A  
MINOR.

Know all men, that we, James T. Hume and Louise Hume, his wife, of said city and county of San Francisco, state of California, in consideration of the making of an order by the Hon. J. V. Coffey, Judge of said court, declaring that Mary Reichle, the infant daughter of Charles Reichle and Mary Reichle, his wife, may be adopted by us, as our child, in accordance with the provisions of chapter 11 of title 11 of the Civil Code of California, and for other valuable and sufficient considerations moving us hereunto, do hereby covenant with the said Mary Reichle, and agree that she, said Mary

Reichle, shall be by us adopted as our child, and shall be treated by us in all respects as our own lawful child should be treated; and we hereby covenant and agree with the said Charles Reichle and Mary Reichle, his wife, the parents of said Mary Reichle, said minor, that they shall henceforth be relieved of all parental duties toward, and all responsibility for the maintenance and support of the said Mary Reichle, said minor.

In witness whereof, we have hereunto set our hands and seals this eighteenth day of January, A. D. 1894.

JAMES T. HUME. [Seal]

LOUISE HUME. [Seal]

Witness: MOSES G. COBB.

*In the Superior Court of the City and County of San Francisco, State of California.*

IN THE MATTER OF THE ADOPTION OF MARY REICHLE, A MINOR.

Know all men by these presents, that the "Little Sisters Infant Shelter," of the city and county of San Francisco, State of California, an asylum for the care and protection of children of tender years, duly incorporated and organized under the laws of the state of California, by Mrs. H. N. Tilden, its recording secretary, hereto duly authorized by a resolution of the Board of Directors of said "Shelter," a copy of which is herewith submitted, and which "Shelter" has cared for, protected and maintained an infant child, reputed to be now about seven years and two months old, called Mary Reichle, since the sixteenth day of December, 1892, in the home of said "Shelter" in said city and county, without any assistance, pecuniary or otherwise, from either of its parents, or any other source outside, or independent of said "Shelter," does hereby consent and agree, in pursuance of said resolution, that said infant child, Mary Reichle, the reputed daughter of one Charles Reichle, and Mary Reichle, his wife, both lately of said city and county, may be adopted by James T. Hume and Louise Hume, his wife, of said city and county, as their child, and such order be made by the Hon. J. V. Coffey,

Judge of said court, as may be necessary, legally to effect such adoption, in accordance with the provisions of chapter 11, title 11 of the Civil Code of the State of California.

In witness whereof, the said "Little Sisters Infant Shelter's" name is hereto subscribed, and its seal (common seal having no corporate seal) hereto set, by its recording secretary, Mrs. H. N. Tilden, hereunto duly authorized by the resolution above mentioned, this eighteenth day of January, eighteen hundred and ninety-four.

LITTLE SISTERS INFANT SHELTER. [Seal]

By MRS. H. N. TILDEN,  
Recording Secretary.

Witness: MOSES G. COBB.

*In the Superior Court of the City and County of San Francisco, State of California.*

IN THE MATTER OF THE ADOPTION OF MARY REICHLE, A  
MINOR.

**Order Authorizing the Adoption of Minor, etc.**

The petition of James T. Hume and Louise Hume, his wife, praying for an order, that they may be permitted to adopt as their child the above-named Mary Reichle, in accordance with the provisions of chapter 11 of title 11 of the Civil Code of this state, coming on regularly to be heard, at this day; the above-named James T. Hume and Louise Hume, the above-named minor, Mary Reichle, and Mrs. Caroline M. Olney and Mrs. H. N. Tilden, the president and secretary of the "Little Sisters Infant Shelter," appeared before the judge of this court, department No. 9, at the courtroom of said court, New City Hall, in said city and county, and each of them were separately examined by said judge, the said petitioners and officers of said "Shelter"—under oath in relation to the matters alleged in said petition.

And it appearing from said examination to the satisfaction of said judge, that said James T. Hume and Louise Hume, his wife, are residents of said city and county; that they are both over the age of thirty (30) years, and are respectively

more than ten years older than the child, Mary Reichle; that the age of said child is seven years and about two months; that she is the daughter of Charles Reichle, who is an incompetent person, and now confined at the State Insane Asylum at Agnew, Santa Clara county, an asylum for the hopeless insane, and of Mary Reichle, his wife, who is not now a resident of this state, but is in parts unknown; that the officers and managers of the "Little Sisters Infant Shelter," an asylum, incorporated and organized under the laws of this state, for the protection and shelter of infant children, which has had the care and maintenance of said child, for more than one year now last past consent to the adoption of said child by said James T. Hume and Louise Hume, his wife; that said James T. Hume and his wife are of high respectability and ample means, and have no children of their own; and being further satisfied, that the interests of said child will be promoted by its adoption as prayed for in said petition; therefore,

It is hereby ordered that said Mary Reichle, infant child of said Charles and Mary Reichle, may be adopted, as the child of said James T. Hume and Louise Hume, his wife; that said child, Mary Reichle, henceforth, be regarded and treated in all respects as their child; that it be henceforth known by the name of May Violet Hume, and that the parents of said child be henceforth relieved of all parental duties toward, and all responsibility for, the said child, and have no right whatever over it.

Dated, January 18, 1894.

J. V. COFFEY,  
Judge.

IN THE MATTER OF THE ADOPTION OF LILLIE DALE, A  
MINOR.

**Adoption—Petition, Consent, and Order of Court.**—In this case are set forth in full the petition for the adoption of a minor, the consent of the father, the agreement by the petitioners, and the order of court.

**Petition for Adoption.**

To the Honorable James V. Coffey, as Judge of the above-entitled Superior Court.

The petition of Wm. J. Dale and Eliza Jane Dale, his wife, for the adoption of the above-named minor, respectfully shows: That your petitioners are husband and wife, having intermarried on the thirteenth day of August, 1894, at the city of Philadelphia, Pennsylvania. That your petitioner, William J. Dale, is aged thirty years and upward, and has resided in the above-named city and county of San Francisco, continuously and uninterruptedly for nine years last past, and your petitioner, Eliza Jane Dale, is aged thirty years and upward, and is a resident of and has resided for nine years last past in the aforesaid city and county of San Francisco. That the above-named minor is a female child of the age of two years and upward, being born on or about January 25, 1892, and your petitioner and each of your petitioners is more than ten years older than the said minor; that said minor is a resident of the aforesaid city and county of San Francisco, and has been since January 25, 1892. That Jane Dale, the mother of said child died in the city and county of San Francisco, on January 28, 1892. That James Dale, the father of said child, resides in the said city and county of San Francisco, and gives his consent to the adoption of said minor by your petitioner. That it is for the best interests and welfare of said minor, that your petitioners adopt her; that the said minor is the niece of your petitioner, William J. Dale, the father of said minor being said petitioner's brother. That your petitioners are well able and anxious to care for, maintain and educate the said minor, and are willing and anxious, each and both of them, to adopt the said minor and to treat the said minor in all respects as if the said

minor was the lawful child of each and both of them, and as such lawful child should be treated; and your petitioners are willing and anxious that the said minor when adopted should take the family name of each and both of them, and should sustain toward each and both of petitioners the relation of child, and have all the rights and be subject to all the duties of that relation; and your petitioners, each and both of them, should sustain upon and after such adoption, toward the said minor, the relation of parent, and have all the rights and be subject to all the duties of that relation; and your petitioners, each and both of them, hereby agree to all and singular the matters and things set forth and promised hereinabove, and to the legal effect and consequences of the same. Wherefore, your petitioners, each and both of them, pray that your honor, and as judge aforesaid, upon examination of the matter as required by law, make an order that the above-named child and minor may be adopted, and be thereby declared adopted by your petitioners and each of them, and that the said child shall henceforth be regarded and treated in all respects as the child of the person and persons adopting, to wit; as the child of your petitioners, and that said child take the family name, to wit, Dale, and be thenceforth known as Lillie Dale, the child of William J. Dale and Eliza Jane Dale, your petitioners aforesaid.

Wednesday, April 25, 1894.

WM. J. DALE.

ELIZA JANE DALE.

Witness: W. E. WHITE.

*In the Superior Court in and for the City and County of San Francisco, State of California—Department Nine—Probate.*

IN THE MATTER OF THE ADOPTION OF LILLIE DALE, A  
MINOR.

State of California,

City and County of San Francisco,—ss.

**Consent of Father.**

James Dale, being first duly sworn, deposes and says that he is the father of said minor child, Lillie Dale; that he resides in said city and county, and that the said child is a girl of two years old; that the mother of said child is dead; that William J. Dale is the uncle of said child; that said William J. Dale and Eliza Jane Dale, his wife, desire to adopt said minor as their own child, and deponent hereby consents to said adoption.

JAMES DALE.

Witness: W. E. WHITE.

Subscribed and sworn to before me this 25th day of April,  
1894.

J. V. COFFEY,

Judge.

*In the Superior Court, in and for the City and County of San Francisco, State of California—Department Nine—Probate.*

IN THE MATTER OF THE ADOPTION OF LILLIE DALE, A  
MINOR.

**Agreement of Adoption by Petitioners.**

We, the undersigned, the petitioners who have presented and signed the above petition for adoption, make the following agreement for the purpose of complying with the statutes as to the adoption, and being bound thereby, and therefore we, and each of us, agree that the child above named, to wit, Lillie Dale, shall be adopted by us and each of us in all respects as our child and the child of each of us should be

treated; and further that an order of adoption may be made by the judge as prescribed by law and prayed for hereinabove, and that upon such order being made the legal consequences provided by the statutes of adoption, and set forth in the prayer to the petition hereinabove, shall follow; and that the child take the family name of the undersigned, to wit, the family name of Dale.

Wednesday, April 25, 1894, 3 o'clock, P. M.

WILLIAM J. DALE.

ELIZA JANE DALE.

Witness: W. E. WHITE.

Witness: J. V. COFFEY.

*In the Superior Court, in and for the City and County of  
San Francisco, State of California.*

IN THE MATTER OF THE ADOPTION OF LILLIE DALE, A  
MINOR—No. 137.

### Order of Adoption.

In the above-entitled matter a petition for adoption of the above-named minor having been presented by Wm. J. Dale and Eliza Jane Dale, husband and wife; and the said petitioners and the said minor and all persons whose consent is necessary having appeared before the undersigned judge of the superior court of the county where the person and persons adopting, to wit, said petitioners, reside, the necessary consent being thereupon signed and an agreement having been executed by the said adopting persons and petitioners, to the effect that the child shall be adopted and treated in all respects as their and each of their own lawful child should be treated. And the undersigned, as judge of the above court, having examined the persons appearing as aforesaid, each separately, and upon and after such examination, being satisfied that the interests of the child, the aforesaid minor, will be promoted by the adoption; and all and singular the facts set forth in the petition for adoption being established as true, to my satisfaction; and the said child and the petitioners being all residents of this city and county and state, and the persons adopting being each and both more than ten

years older than the person adopted. It is therefore hereby ordered, that the said minor child, Lillie Dale, be and she is hereby declared adopted by the said petitioners, William J. Dale and Eliza Jane Dale, as the child of each and both of them; and that the said child shall henceforth be regarded and treated in all respects as the child of each and both of them, and that the said child and the said William J. Dale and Eliza Jane Dale shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation; and that the said child take the family name of the said persons adopting, to wit, Dale, and be henceforth known as "LILLIE DALE," the child of each and both of said persons adopting.

Dated, San Francisco, April 25, 1894.

J. V. COFFEY,  
Judge.

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IN THE MATTER OF THE ADOPTION OF ADELAIDE GRIFFIN,  
A MINOR.

**Adoption—Petition, Consent, Agreement, and Order of Adoption.—**

In this case are set forth in full the petition for the adoption of a minor, the consent of the surviving parent, the agreement of the adopting parents, and the court's order of adoption.

**Petition for Adoption.**

To the Honorable Superior Court of the City and County of San Francisco, State of California.

The petition of James A. Bohan and Ann Bohan, his wife, for the adoption of the above-named minor respectfully shows:

That they are now and for fifteen years last past have been husband and wife, and during all of said period have been and are now residents of said city and county. That they are now and during all of said period have lived together as husband and wife at their home, No. 921 Howard street, in said city and county.

That said Adelaide Griffin is a female child and was born in said city and county on July 20, 1890, and ever since

August 17, 1890, has resided with and been cared for by your petitioners at their home.

That each of your petitioners is more than ten years older than said child.

That the parents of said child were Wellington A. Griffin, who now resides in said city and county, and Katie T. Griffin (daughter of petitioner, Ann Bohan), who died in said city and county on the fourteenth day of August, 1890.

That since her death your petitioners have had the legal custody, care, and control of said minor by and with the consent of her father, Wellington A. Griffin. That said father is willing, and even desirous, that said child should be adopted by your petitioners.

That your petitioner, Ann Bohan, is the grandmother of said child.

That it is for the best interest and welfare of said child that your petitioners adopt her. That her said father has not contributed anything toward her support since April, 1892. That said father of said child married again in the month of May, 1892, and is now living with his second wife in said city and county.

That he is willing that said petitioners should adopt said minor.

That your petitioners are well able and anxious to care for and maintain and educate said minor and to adopt said minor and to treat said minor in all respects as if the said minor was the lawful child of said petitioners. That they are willing that said minor when adopted should take the family name of each and both of them, and should sustain toward petitioners the relation of child and have all the rights and be subject to all the duties of that relation and your petitioners are willing to sustain to said child, after adoption, the relation of parents and have all the rights and be subject to all the duties of that relation, and said petitioners hereby agree to all the foregoing matters, promises and legal consequences of the same.

Wherefore, your petitioners pray that your Honor make an order that the above-named minor may be adopted and be thereby declared adopted by your petitioners; and that said

child shall thenceforth be regarded and treated in all respects as the child of said petitioners and that said child take their family name, to wit, Bohan, and be thenceforth known as Adelaide Bohan, child of James A. Bohan and Ann Bohan, petitioners herein.

Dated at San Francisco, October 10, 1893.

ANN BOHAN,  
921 Howard St., San Francisco,

J. A. BOHAN,  
921 Howard St., San Francisco, California.

Witness: W. F. STAFFORD.

### Agreement of Adoption.

We, the undersigned, the petitioners who have presented and signed the above petition for adoption, make the following agreement for the purpose of complying with the statutes as to adoption, and being bound thereby, and therefore we and each of us agree that the child above named, to wit, Adelaide Griffin, shall be adopted by us and each of us, and treated by us and each of us in all respects as our child and the child of each of us should be treated; and further that an order of adoption may be made by the judge as prescribed by law and prayed for hereinabove, and that upon such order being made the legal consequences provided by the statutes of adoption, and set forth in the prayer to the petition hereinabove, shall follow; and that the child take the family name of the undersigned, to wit, the family name of Bohan.

Dated, October 10, 1893.

ANN BOHAN.  
J. A. BOHAN.

Witness: W. F. STAFFORD.

*In the Superior Court of the City and County of San Francisco, State of California.*

IN THE MATTER OF THE ADOPTION OF ADELAIDE GRIFFIN,  
MINOR.

**Consent of Surviving Parent.**

To the Honorable Superior Court of the City and County of San Francisco, State of California:

I, Wellington A. Griffin, father of Adelaide Griffin, a minor of three years of age and upward, do hereby give my consent to the adoption of my said child, Adelaide Griffin, by James A. Bohan and Ann Bohan, and I hereby respectfully request that said superior court make an order herein permitting them to adopt my said child.

Dated at San Francisco, October 10, 1893.

WELLINGTON A. GRIFFIN,  
Father of Adelaide Griffin.

Witness: W. F. STAFFORD.

*In the Superior Court of the City and County of San Francisco, State of California.*

IN THE MATTER OF THE ADOPTION OF ADELAIDE GRIFFIN,  
MINOR—No. 126.

**Order Declaring Adoption of Minor.**

In the above-entitled matter a petition for adoption of the above-named minor having been presented by James A. Bohan and Ann Bohan, husband and wife; and the said petitioners and the said minor and all persons whose consent is necessary having appeared before the undersigned judge of the superior court of the county where the person and persons adopting, to wit, said petitioners, reside, the necessary consent being thereupon signed and an agreement having been executed by the said adopting persons and petitioners, to the effect that the child shall be adopted and treated in all respects as their and each of their own lawful child should be treated.

And the undersigned, as judge of the above court, having examined the persons appearing as aforesaid, each separately,

and upon and after such examination being satisfied that the interests of the child, the aforesaid minor, will be promoted by the adoption, and all and singular the facts set forth in the petition for adoption being established as true to my satisfaction, and the said child and the petitioners being residents of this city and county and state, and the persons adopting being each and more than ten years older than the person adopted.

It is therefore hereby ordered, that the said minor child, Adelaide Griffin, be and she is hereby declared adopted by the said petitioners, James A. Bohan and Ann Bohan, as the child of each and both of them; and that the said child shall henceforth be regarded and treated in all respects as the child of each and both of them, and that the said child and the said James A. Bohan shall sustain toward each other the relation of parent and child, and have all the rights and be subject to all the duties of that relation; and that the said child and the said Ann Bohan shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation; and that the said child take the family name of said persons adopting, to wit, Bohan, and be henceforth known as "ADELAIDE BOHAN," the child of each and both of said persons adopting.

J. V. COFFEY,

Judge of the Superior Court.

Dated, San Francisco, November 2, 1893.

ELIZABETH LULL COCHRANE AND RICHARD SWAN  
LULL, v. J. WADE McDONALD, J. S. CALLEN  
MARIA A. BURTON, HENRY H. BURTON, ADMINIS-  
TRATOR OF THE ESTATE OF HENRY S. BURTON, DE-  
CEASED, ET AL.

[No. 44,368; decided Jan. 22, 1895.]

**Court—Exclusive Jurisdiction of First Court.**—When any court has acquired jurisdiction of the parties to and the subject matter of an action, whatever may be the nature of the proceedings or the subject matter thereof, the jurisdiction thus acquired is exclusive, and no other court of co-ordinate jurisdiction can, in any form, review, reverse, nullify, restrain, or in any way control any of the orders, judgments, proceedings or process of the first court.

**Court—Exclusive Probate Jurisdiction.**—The superior court sitting in probate has full jurisdiction to hear and determine every matter necessary or proper in the proceeding.

**Court—Conclusiveness of Orders in Probate.**—All final orders or judgments of the probate branch of the superior court in one county are conclusive and binding upon all persons and upon all other courts and tribunals, including the superior court of another county.

**Bill of Review—Court in Which must be Brought.**—A suit analogous to a bill in the nature of a bill of review can be brought only in the court wherein the judgment or order complained of was made or rendered.

Suit in equity to set aside proceedings in probate. There was a demurrer to the bill on the ground of want of equity and of lack of jurisdiction.

W. J. Hunsaker, for the demurrer.

Joseph M. Nougues, contra.

COFFEY, J. This is a suit in equity brought by the plaintiffs as heirs at law of General Henry S. Burton, deceased, for the purpose of having certain stipulations entered into between the plaintiffs, by their attorneys, J. S. Callen, Mrs. McNealy, formerly Maggie Leach, and the other defendants, as to certain proceedings in the superior court of the county of San Diego in the matter of the estate of General Burton, and

the orders made by that court in pursuance of such stipulations, annulled and set aside; restoring the plaintiffs to the position in which they were before the making of such stipulations, and the entry of such orders; vacating and annulling all orders made by denying motions for a new trial, or withdrawing the same; enjoining the defendants, other than Dore and McNealy, from applying for or recovering payment of any sums allowed as counsel fees, administrator's commissions and widow's allowance; restraining Henry S. Burton, as administrator, from paying over to either of the defendants any portion of the money received by him from the sale of the Jamul Rancho, and for general relief.

The complaint, as grounds for equitable relief, alleges that the widow, administrator, and certain of the defendants, for the purpose of having exorbitant sums allowed as counsel fees, administrator's commissions, and family allowance, caused an appraisal to be filed in which the Rancho Jamul was fraudulently overvalued; that the superior court of San Diego county allowed excessive and unreasonable sums for attorney's fees; that, in pursuance of a fraudulent combination between the widow, administrator and certain of the defendants (one of whom was the attorney for the plaintiffs), the stipulations sought to be annulled were entered into; that the plaintiffs, although they did not prepare any bill of exceptions, or put themselves in a position to have the action of the court making the several allowances reviewed, have a right to the benefit of the proceedings taken for that purpose by Mrs. McNealy, formerly Maggie Leach.

The defendants other than Mrs. McNealy and Maurice Dore have filed amended demurrers assigning as grounds of demurrer that the complaint does not state facts sufficient to constitute a cause of action, and that this court has no jurisdiction of the subject matter of the action.

The superior court of San Diego county has exclusive jurisdiction of the administration of the Estate of Henry S. Burton, deceased: Code Civ. Proc., secs. 1294, 1295.

The superior court of San Diego county having acquired jurisdiction of the persons and subject matter thereof before the commencement of this action, the superior court of the

city and county of San Francisco has no jurisdiction to review, set aside, or enjoin any judgment, order or proceeding given, made, or had, by or in, the superior court of San Diego county in or about the administration of said estate.

It is a well-settled rule that when any court has acquired jurisdiction of the parties to, and subject matter of, an action, whether the subject matter be probate, law or equitable cognizance, or a special proceeding, the jurisdiction thus acquired is exclusive, and no other court, of co-ordinate jurisdiction only, can, in any form, review, reverse, nullify, restrain, or, in any way, control, any of the judgments, orders, proceedings, or process of the court first acquiring jurisdiction: Civ. Code, sec. 3423, subd. 1; Spelling on Extraordinary Relief, p. 96, note 2; High on Injunctions. sec. 265; *Anthony v. Dunlap*, 8 Cal. 26; *Rickett v. Johnson*, 8 Cal. 34; *Revalk v. Kraemer*, 8 Cal. 66-71, 68 Am. Dec. 304; *Chipman v. Hibbard*, 8 Cal. 268-271; *Phelan v. Smith*, 8 Cal. 521; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 608-614; *Crowley v. Davis*, 37 Cal. 268; *Flaherty v. Kelly*, 51 Cal. 145; *Judson v. Porter*, 51 Cal. 562; *Wilson v. Baker*, 64 Cal. 475, 2 Pac. 253; *Brooks v. Delaplaine*, 1 Md. Ch. Dec. 272 (351); *Brown v. Wallace*, 4 Gill & J. (Md.) 479-496; *Withers v. Denmead*, 22 Md. 135; *Jenkins v. Simms*, 45 Md. 532-537; *Platto v. Deuster*, 22 Wis. 460 (482); *Orient Ins. Co. v. Sloane*, 70 Wis. 611, 36 N. W. 388; *Coon v. Seymour*, 71 Wis. 340, 37 N. W. 243; *Cardinal v. Eau Claire Lumber Co.*, 75 Wis. 427, 44 N. W. 761; *Dodge v. Northrup*, 85 Mich. 243, 48 N. W. 505; *Griffin v. Birkhead*, 84 Va. 612, 5 S. E. 685-687; *Gilbert v. Renner*, 95 Mo. 151, 7 S. W. 479; *Bank v. Railroad Co.*, 28 Vt. 470-477; *Stearns v. Stearns*, 16 Mass. 170; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 239; *Mason v. Piggott*, 11 Ill. 88; *Peck v. Jenness*, 7 How. 624, 12 L. Ed. 846; *Randall v. Howard*, 2 Black, 585, 17 L. Ed. 269-271; *Taylor v. Taintor*, 16 Wall. 370, 21 L. Ed. 290; *Nougue v. Clapp*, 101 U. S. 551, 25 L. Ed. 1026; *Sharon v. Terry*, 36 Fed. 337, 13 Saw. 387, 11 L. R. A. 572. See, also, *Freeman on Judgments*, 4th ed., sec. 118a, and the last paragraph of section 485; *Guardianship of Danneker*, 67 Cal. 643, 8 Pac. 514.

The superior court, while sitting in matters of probate, has full jurisdiction to hear and determine every matter neces-

sary or proper in the proceeding: *In re Burton*, 93 Cal. 464-465, 29 Pac. 36; *Pennie v. Roach*, 94 Cal. 521, 29 Pac. 956, 30 Pac. 106; *Finnerty v. Pennie*, 100 Cal. 404, 34 Pac. 869; *In re Moore*, 96 Cal. 522, 31 Pac. 584.

And all final judgments or orders of the superior court of San Diego county are and will be conclusive and binding upon all persons and all other courts and tribunals whatsoever: *Sharon v. Sharon*, 84 Cal. 430, 431, 23 Pac. 1100, and authorities there cited.

This is a suit analogous to a bill in the nature of a bill of review, and such a suit must always be brought in the court in which the judgment or order complained of was made or rendered: *Story's Equity Pleading*, sec. 403; *Beach on Modern Equity Practice*, sec. 863, notes 2, 3 and 4; *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968, 969; *Fenske v. Kluender*, 61 Wis. 602, 21 N. W. 796-798.

The superior court of San Diego county, in the exercise of its probate jurisdiction, had full power and authority to make every order complained of by the plaintiffs, and if such orders were made in pursuance of stipulations or other acts on the part of the attorney for the Lulls, in excess of his powers as such attorney, the plaintiff either had actual knowledge, or knowledge of facts from which constructive knowledge of such acts on the part of their attorney is imputed to them, and within time sufficient to have enabled them to move for relief under the provisions of section 473 of the Code of Civil Procedure, and failing in that, they cannot be relieved in equity: *Hope v. Jones*, 24 Cal. 93, 94; *Gurnee v. Maloney*, 38 Cal. 87-89, 99 Am. Dec. 357; *In re Griffith*, 84 Cal. 107-112, 23 Pac. 528, 24 Pac. 387; *Dougherty v. Bartlett*, 100 Cal. 496-499, 35 Pac. 431; *Wiggin v. Superior Court*, 68 Cal. 398, 9 Pac. 646; *Tobelman v. Hildebrandt*, 72 Cal. 313-316, 14 Pac. 20.

The complaint does not state facts sufficient to constitute a cause of action, for the reason, among others, that, if the prayer of the complaint were granted, the plaintiffs would not be enabled thereby to present on appeal to the supreme court the question which they seek to have reviewed. A court of equity will not do, or attempt to do a vain thing. It will only act where it can afford to the parties some substantial relief.

The complaint shows that the plaintiffs did not prepare a bill of exceptions, or otherwise put themselves in a position to have the action of the superior court reviewed upon appeal, but the complaint is framed upon the theory that the plaintiffs, but for the stipulation, would have been entitled to avail themselves of the use on appeal of the bill of exceptions presented by Mrs. McNealy. A recent decision of the supreme court of this state disposes of this theory of the plaintiffs adversely to their contention: *Houghton v. Trumbo*, 103 Cal. 239, 37 Pac. 152.

Demurrer sustained.

### **Additional Observations.**

The complaint, according to the allegations thereof, is grounded in fraud; and the fraud asked to be relieved against affects certain judicial proceedings, as well as various proceedings of the parties interested, had and taken in the matter of the estate of Henry S. Burton, deceased, the administration of which is still pending before the superior court of San Diego county, the proper and domiciliary forum for such administration.

The proceedings attacked in the complaint or bill are not alleged to be void on their face, or to have been made or had in the administration without jurisdiction in the court or in the premises; but the entire infirmity of the matters challenged rests upon certain acts of the administratrix as such and in her individual right as heir, and her attorneys, and the attorneys for the plaintiffs in this action.

The complaint is very voluminous, comprising over fifty typewritten pages, but the substance of it is that the widow of decedent willfully omitted from the records of the administration for a long period of time the fact of plaintiff's heirship; that after such heirship was entered in the records the said widow, who was also administratrix of the estate, did, with the confederation of her attorneys, conspire to have excessive sums allowed for family allowance and attorneys' fees for the purpose of procuring a sale of the decedent's property and rendering valueless the interest of the plaintiffs as heirs at law. It is alleged that an over-valuation of the estate was procured for the purpose of securing a large

family allowance and large attorneys' fees; that such purpose was successful and the allowances made were excessive.

It is also alleged that an attorney appeared in the estate on behalf of the plaintiffs here, under authority given through misleading statements and promises held out to the plaintiffs; but that subsequently the authority was in fact revoked (although such attorney continued to act concerning the interests of plaintiffs with their knowledge). It is further alleged that an order of sale of estate's property was made in the administration, and that certain others of the heirs at law, including plaintiff (through said attorney), appealed therefrom, and thereafter such appeal was dismissed by stipulation upon consideration of a modification of the order of sale, but that such agreed modification did not advantage these plaintiffs, but only the other heirs at law, who had appealed; in all of which matters the attorney representing the plaintiffs disregarded the interest of his clients and looked only to the procurement of an excessive allowance by the court in his own favor for attorneys' fees, which were established against the estate as an expense of administration. (The appearance of plaintiffs in person or by attorney in the administration was unnecessary to the jurisdiction therein; the court's decrees would be equally efficacious whether plaintiffs were known or unknown, or appeared or failed to appear.)

It is finally alleged that a sale of the estate's property is about to be proceeded with under the modified and amended order of sale, and that a vacation of such order and of the family allowance and allowances of attorneys' fees, and stipulation on appeal and all orders in the premises can be made without injury to the interests of the various parties as such interests existed previous to the doing of the aforesaid acts in the administration. The prayer of the complaint is in express terms that all such orders and acts in the administration be vacated, annulled and set aside, and the execution of the order of sale be prevented, and that if a sale be consummated, the fruits thereof be controlled by this action as against the administrator or other person interested in the estate to whom the same or any part may come, and for general relief.

The relief asked—and this is the entire and ultimate relief—concerns the administration of a decedent's estate, as to which not only is this court void of jurisdiction, but such jurisdiction is complete and existent in the superior court of San Diego county to the exclusion of every other tribunal, subject only to the ordinary review of the supreme court.

No other superior court of this state can interfere with the superior court of San Diego county in the administration of said estate, or of any act done, being done or to be done in the matter of such administration. This results from two principles: 1. That a court cannot restrain or interfere with the acts of another court of co-ordinate jurisdiction; 2. That the jurisdiction of the San Diego court is exclusive in the premises.

The first principle was settled before the codes, and has been adopted into them. (Civ. Code, sec. 3423, subd. 1, and Deering's note and citations; with sections 3384, 3420, 3421, 3422.) The second principle states itself and carries its own conclusion.

Both these principles were announced and followed by this department and judge in the matter of the estate of W. P. Fuller, deceased, against an injunction of another department issued in a civil action and running against an attorney appointed in the administration to represent minor heirs.

The bill in this case is directed against an administration of a decedent's estate, now pending—a judicial proceeding in fieri—but even if it were assumed or claimed to attack only judicial acts which had passed into judgment, and therefore as a suit to set aside or grant relief against a judgment upon the ground of fraud, still the conclusion must be the same. In the leading case of *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118 (affirmed in *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599), it was held that equity could not set aside a decree admitting a will to probate; the jurisdiction of the probate forum was special and exclusive, and the remedy of parties interested was confined to the probate law and jurisdiction (with the right of appeal when and where given). The language of the opinion and the reasons stated for the decision would apply to all decrees in probate (Cral

v. Poso Irr. Dist., 87 Cal. 140, 147, 148, 26 Pac. 797) and this case has been many times followed and referred to by our supreme court. In the case at bar we believe the reasoning of the McGlynn case particularly applicable from the fact that all the acts complained of in the bill here are peculiarly matter concerning the administration of the estate.

A distinction might be drawn between a decree in probate which confessedly concerns only the administration of the estate, and a decree which technically is a distribution of the estate, and therefore *ex vi termini* implies that the administration has been completed or satisfied. As to a decree of distribution it might be claimed that the ordinary rules as to judgments in other special proceedings and in civil actions should be applied as to which no opinion is necessary for the case. But as to matters purely of the administration—those various and numerous proceedings required to be had and adjudged as a part of the due administration and necessarily a condition precedent to a distribution—they pointedly illustrate the inherent exclusiveness of the jurisdiction and functions of probate tribunals, and would seem to forbid the suggestion that they could be treated like ordinary final judgments in civil actions. Indeed, if they could be so treated, the character of probate decrees as proceedings in rem binding on the whole world, would be destroyed.

Treating the bill (or that part of it which might be so claimed) as if it were one to set aside an ordinary judgment in personam, it cannot be said that the allegations clearly justify the exacting rule laid down in the leading case of *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, followed in our own recent case of *Pico v. Cohn*, 91 Cal. 129, 133-135, 25 Am. St. Rep. 159, 25 Pac. 970, 13 L. R. A. 336.

## IN THE MATTER OF THE ESTATE OF J. F. PLUMEL, DECEASED.

**Olograph—Aiding Date by Codicil.**—Assuming that the printing of the figures “190” in the date “January 12, 1904,” vitiates an instrument as an olograph, a codicil thereto written on the reverse side of the paper entirely written, dated, and signed by the hand of the testator remedies the defect.

In this case two instruments written on different sides of a single sheet of paper were offered for probate as the will and codicil of the decedent. The will was entirely written, dated, and signed by the hand of the decedent, with the exception of the figures “190” in the year 1904, which figures were printed. Upon the back of the same sheet of paper the codicil was written, which complied with the legal requirements regarding olographic wills. It was in the following form:

## “CODICIL.

“Jan. 14, 1904.

“In case of railway or steamship disaster in which both myself and wife should be killed, I will and bequeath all property real or personal to my sisters resident in France, share and share alike.

“J. F. PLUMEL.”

P. A. Bergeret and W. I. Brobeck, for opponents.

H. W. Bradley and J. C. McKinstry, for proponent.

COFFEY, J. In this matter I have come to the conclusion, after grave consideration, that this instrument should be taken as a single proposition. As I have looked at the decisions of the supreme court, it seems to me that we should construe the will and codicil in such a case as one entire document. The date of the codicil, taken in connection with the preceding part or page—it is a single sheet, the will on one side, the codicil following on the other side—should be construed as the date of the will.

Now, the very word “codicil” implies an addition to the former instrument, and the testator by executing this codicil has in plain terms as possible set up not only the codicil, but the will, which speaks as of the date of the codicil.

It seemed to me that at the time of the submission of the case the proponents were inclined to allow the will to be rejected, but the court intimated that if it were possible to sustain the two writings as a testamentary instrument the intention of the testator ought to be carried out. Now, it is possible to sustain the will and the intention of the testator can be carried out. It is one complete paper and the tendency of the supreme court decisions has been to maintain such an instrument. There is only one point against it, and that is the extremely restricted interpretation of the statute—1287—which reads: The execution of the codicil referring to a previous will has the effect to republish the will, as modified by the codicil.

There is not any change in this codicil to the will, there is not any modification, there is not any revocation; there is altogether a confirmation of it.

In the first writing, where the day of January 12, 1904, the "4" written, occurs: "In the event of our joint death in railway or steamship accident, I hereby appoint as the joint executors of my will E. Rochat and Louis Benard, both of San Francisco."

"J. F. PLUMEL."

After that is the codicil, January 14, 1904, all written: "In case of railway or steamship disaster in which both myself and wife shall be killed, I will and bequeath all property, real or personal to my sisters in France share and share alike.

"J. F. PLUMEL."

If the word "will" includes "codicil," that publication must comprehend and by implication incorporate another instrument.

It seems to me that the term "codicil" in itself includes a reference to the previous will. It cannot stand alone. If it stands at all, it must stand by reason of its relation to the preceding instrument and therefore must be part of it.

I shall sustain the will as a whole, the two writings constituting one testamentary paper.

MEMORANDUM.—This case was carried to the supreme court and affirmed: Estate of Plumel, 151 Cal. 78. Decided April 10, 1907.

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### ESTATE OF CHARLES W. SNOOK, DECEASED.

[No. 8,337; decided September 20, 1897.]

**Resulting Trust—Parol to Establish.**—When real estate has been conveyed by a deed reciting a consideration, parol evidence, in the absence of fraud or mistake, is not admissible in behalf of heirs of the grantor to show that a resulting trust arose in his favor.

The opinion in this case was destroyed in the great fire of 1906, but the point decided being an important one, the syllabus above is now published, and the question is further elucidated in the following note:

### CREATION OF TRUSTS IN LAND BY PAROL.

**Classes and Kinds of Trusts in General.**—By an express trust in land is meant one that is created by express agreement of the parties: *Learned v. Tritch*, 6 Colo. 433; *Oberlender v. Butcher*, 67 Neb. 410, 93 N. W. 764. In England, before the adoption of the statute of frauds in 1676, express trusts in land possessed the same force and validity when created by parol, or, in other words, orally, as when created in writing. By that act, however, in order that an express trust in land might be enforceable, it was made requisite that it be manifested in writing. Only trusts by implication of law and resulting trusts were excepted from this requirement. This statute, in connection with quite similar exceptions, has been adopted in most of the states of the Union, and in some of them the further requirement has been added that express trusts in land must not only be manifested, but must also be created, in writing: See *Learned v. Tritch*, 6 Colo. 433.

The class of trusts excepted from the requirement of writing has been variously named in various jurisdictions as trusts by implication of law, trusts by operation of law, implied trusts, constructive trusts, resulting trusts, or trusts arising or resulting by operation of

law. In the light of judicial discussion of these terms it may now be said that the phrases "trusts by implication of law," "trusts by operation of law," "implied trusts," and "trusts arising or resulting by operation of law" are all synonymous, and embrace all trusts where a transaction of equitable cognizance is inseparably connected with the creation of trust. The terms "constructive trusts" and "resulting trusts," on the other hand, signify the two kinds of implied trusts. (The question of terminology is somewhat discussed in *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640, and by Brown, P. J., in *Hutchinson v. Hutchinson*, 84 Hun, 482, 32 N. Y. Supp. 390.)

A resulting trust is one which results from the conduct and relation of the parties to a transfer of land, independently of any agreement whatsoever between them: *Learned v. Tritch*, 6 Colo. 433. It is a pure creation of equity to promote what is conceived by the law to be good faith between the parties, and exists only in the absence of an agreement between them in relation to its subject matter: *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852; *Benson v. Dempster*, 183 Ill. 297, 55 N. E. 651; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Pollard v. McKenney*, 69 Neb. 74, 96 N. W. 679, 101 N. W. 9; *Jamison v. Miller*, 27 N. J. Eq. 586; *Wiser v. Allen*, 92 Pa. 317. Thus where land is deeded to one person by absolute deed while another pays the consideration therefor, in the absence of any agreement between the parties, the law raises a resulting trust in the land, so that the apparent grantee holds the title as trustee for the person who paid the consideration: *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526.

A constructive trust, on the other hand, is merely an express trust wherein some transaction of equitable cognizance is inseparably connected with the creation of the trust, so that a court of equity has jurisdiction to administer relief to the parties on the whole transaction, including the express agreement between them, notwithstanding that agreement is oral and would not be cognoscible in a court of justice in the absence of the equitable elements connected with it. A constructive trust can never arise in the absence of an express agreement of trust between those concerned in the transfer of the legal titles of land, but is always superimposed upon and could not exist without an express oral trust, which in turn would be unenforceable without the constructive trust. A person who holds land subject to a constructive trust is often termed in the decisions a trustee *ex maleficio*.

It is appropriate, therefore, to divide all express oral trusts in land into two classes: Constructive trusts, and those in which no transaction of equitable cognizance is involved, which may properly be called simple trusts. Resulting trusts are not, however, in any view, express trusts. Indeed, a resulting trust does not arise where there is

an express agreement of trust between the parties, although such agreement is invalid.

In the absence of a statute of frauds prohibiting oral trusts in land, the distinction between simple and constructive trusts is mostly immaterial, for in such case, except as affected by the necessity of consideration to support simple trusts, the validity and effect of simple and constructive trusts is substantially the same; but in jurisdictions where simple trusts are required to conform to the requirements of a statute of frauds, from the operation of which constructive trusts are excepted, a wide divergence becomes manifest between the validity and effect of simple and constructive trusts.

Conceding that the statute of frauds is a wise and salutary enactment, there is fair ground for the distinction which it recognizes between simple and constructive oral trusts. If the rule requiring at least a written memorandum, in case of dealings with land, was to have any efficiency at all, it is manifest that a mere careless indifference to or negligent disregard of its requirements, as is shown in an attempt to create a simple verbal trust, must be interdicted. Where, however, there is some equitable excuse for neglect of the requirements of the statute, as where, for instance, that neglect was induced by inadvertence, mistake, imposition, or fraud, either of which has always been a ground for equitable interposition, a constructive trust arises, and courts of equity are ever ready to intervene, the statute law permitting.

#### Simple Trusts.

**Necessity of Writing in General.**—In most states a simple trust in land, to be enforceable, must be in writing: *Oden v. Lockwood*, 136 Ala. 514, 33 South. 895; *Salyers v. Smith*, 67 Ark. 526, 55 S. W. 936; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Hayden v. Denslow*, 27 Conn. 335; *Walker v. Brown*, 104 Ga. 357, 30 S. E. 867; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Brown v. White*, 32 Ind. App. 100, 67 N. E. 273; *Gregory v. Bowlsby*, 115 Iowa, 327, 88 N. W. 822; *Wright v. King*, Har. Ch. 12; *Cameron v. Nelson*, 57 Neb. 381, 77 N. W. 771; *Elder v. Webber* (Neb.), 92 N. W. 126; *Eaton v. Eaton*, 35 N. J. L. 290; *Sturtevant v. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371; *Wheeler v. Reynolds*, 66 N. Y. 227. In some of these states the language of this rule in substance is that such trust must be manifested or proved by some writing signed by some party enabled to create the trust: *Learned v. Tritch*, 6 Colo. 433; *Horne v. Ingraham*, 125 Ill. 198, 16 N. E. 868; *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323; *Mohn v. Mohn*, 112 Ind. 285, 13 N. E. 859; *McClain v. McClain*, 57 Iowa, 167, 10 N. W. 333; *Andrew v. Concanon*, 76 Iowa, 251, 41 N. W. 8; *Brown v. Barngrover*, 82 Iowa, 204, 47 N. W. 1082; *Dunn v. Zwilling*, 94 Iowa, 233, 62 N. W. 746; *Hoon v. Hoon*, 126 Iowa, 391, 102 N. W. 105; *Heddlleston v. Stoner*, 128 Iowa, 525, 105 N. W. 56; *Ingham v. Burnell*, 31 Kan. 333, 2 Pac. 804; *Dorsey v. Clarke*, 4 Har. & J. 551; *McElderry v. Shipley*, 2 Md. 25, 56 Am.

Dec. 703; *Wolf v. Corby*, 30 Md. 356; *Northampton Bank v. Whiting*, 12 Mass. 104; *Green v. Cates*, 73 Mo. 115; *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Smith v. Howell*, 11 N. J. Eq. 349; *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426; *Jackson v. Moore*, 6 Cow. 706; *Jeremiah v. Pitcher*, 20 Misc. Rep. 513, 45 N. Y. Supp. 758; *Dilts v. Stewart* (Pa.), 1 Atl. 587; *Pinney v. Fellows*, 15 Vt. 525; but in other states the more stringent language is used that such trust must be created or declared in writing signed by such party: *Patton v. Beecher*, 62 Ala. 579; *White v. Farley*, 81 Ala. 563, 8 South. 215; *Brackin v. Newman*, 121 Ala. 311, 26 South. 3; *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Smith v. Peacock*, 114 Ga. 691, 88 Am. St. Rep. 53, 40 S. E. 757; *Eaton v. Barnes*, 121 Ga. 548, 49 S. E. 593; *Ellis v. Hill*, 162 Ill. 557, 44 N. E. 858; *Monson v. Hutchin*, 194 Ill. 431, 62 N. E. 788; *Peterson v. Boswell*, 137 Ind. 211, 36 N. E. 845; *Patterson v. Mills*, 69 Iowa, 755, 28 N. W. 53; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11; *Thompson v. Marley*, 102 Mich. 476, 60 N. W. 976; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Hansen v. Berthelson*, 19 Neb. 433, 27 N. W. 423; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Fleming v. Donahue*, 5 Ohio, 255. It would seem, however, that both expressions of the rule have been interpreted by the courts as a statement of a rule of evidence preventing the proof of a simple trust by parol rather than as one of substantive law wholly invalidating it, and no clear difference in the application of the statutory rule, based on this difference of language, can be discerned. There nevertheless are some decisions wherein the courts have declared that where such trusts are not duly manifested in writing they are void (*Moore v. Campbell*, 102 Ala. 445, 14 South. 780; *Champlin v. Champ- lin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 523; *Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930; *Monson v. Hutchin*, 194 Ill. 431, 62 N. E. 788; *Hain v. Robinson*, 72 Iowa, 735, 32 N. W. 417; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255; *Dorsey v. Clarke*, 4 Har. & J. 551; *Wolf v. Corby*, 30 Md. 356; *Renz v. Stoll*, 94 Mich. 377, 34 Am. St. Rep. 358, 54 N. W. 276; *Luse v. Reed*, 63 Minn. 5, 65 N. W. 91; *In re Ryan's Estate*, 92 Minn. 506, 100 N. W. 380; *Coffery v. Sullivan* (N. J. Eq.), 49 Atl. 520; *Salter v. Bird*, 103 Pa. 436), in equity as well as at law (*Wheeler v. Reynolds*, 66 N. Y. 227), and this language is also found in some of the statutes; but in the decisions this language has usually been used merely in repetition of the statutory language or else in cases where it was immaterial whether the oral trust was void or merely unenforceable, and in the statutes its force is generally modified by the context. In *McCormick Harvesting Machine Co. v. Griffin*, 116 Iowa, 397, 90 N. W. 81, however, it is said

with strict accuracy that an oral trust in land is not void, but merely unenforceable by reason of the inability of the cestui que trust to prove it. For oral evidence is not admissible for that purpose, but only documentary: *Maroney v. Maroney*, 97 Iowa, 711, 66 N. W. 911; *Luckhart v. Luckhart*, 120 Iowa, 248, 94 N. W. 461; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Graves v. Graves*, 29 N. H. 129; *Farrington v. Barr*, 36 N. H. 86; *Moore v. Moore*, 38 N. H. 382; *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178; *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426; *Rathbun v. Rathbun*, 6 Barb. 98; *Jeremiah v. Pitcher*, 20 Misc. Rep. 513, 45 N. Y. Supp. 758.

It follows from this rule requiring documentary evidence of a trust in land that an absolute deed of land cannot be changed by oral testimony into a deed of trust: *Jones v. Van Doren*, 18 Fed. 619; *Skahen v. Irving*, 206 Ill. 597, 69 N. E. 510; *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66. Thus an oral agreement by the grantee of land to hold it in trust for the grantor or to reconvey it to him upon the happening of a certain event is not enforceable: *Patton v. Beecher*, 62 Ala. 579; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; *Fenney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Lawson v. Lawson*, 117 Ill. 98, 7 N. E. 84; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Campbell v. Brown*, 129 Mass. 23; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *O'Brien v. Gashin*, 20 Neb. 347, 30 N. W. 274; *Dailey v. Kinsler*, 31 Neb. 340, 47 N. W. 1045; *Thomas v. Churchill*, 48 Neb. 266, 67 N. W. 182; *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982; *Doying v. Chesebrough* (N. J. Eq.), 36 Atl. 893; *Pusey v. Gardner*, 21 W. Va. 469; *Fairchild v. Rasdall*, 9 Wis. 379. This is equally true, although the grant was made without consideration: *Gregory v. Bowlsby*, 115 Iowa, 327, 88 N. W. 822; *Gee v. Thraikill*, 45 Kan. 173, 25 Pac. 588; *Farrington v. Barr*, 36 N. H. 86. Thus an oral promise by the grantee to will certain other property to the grantor (*Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 346, 5 South. 572), or to support the grantor for life (*Salysers v. Smith*, 67 Ark. 526, 55 S. W. 936), or to hold the deed as an escrow (*Stevenson v. Crapnell*, 114 Ill. 19, 23 N. E. 379), or to permit the grantor to repurchase it at a given price (*Harper v. Harper*, 5 Bush, 176), or to reconvey to the grantor in case of failure to pay the purchase price (*Gallagher v. Mars*, 50 Cal. 23), is not enforceable. Moreover, where the grantee in violation of the trust sold the land and appropriated the proceeds, the grantor cannot maintain an action to recover the proceeds: *Mohn v. Mohn*, 112 Ind. 285, 13 N. E. 859. And where a grantor of land claims that the grantee obtained the grant by fraud, and such grantee had in turn granted it to a third person on an oral trust to hold for herself, and the first grantor brought an action to compel a reconveyance of the land wherein a default judgment was obtained against the latter grantee, even if it appeared on a trial subsequent to the entry of

the default that the first grantee did not obtain the deed by fraud, she is not entitled to relief against the first grantor, the trust by which the land was held for her being oral and the default against the latter grantee not having been set aside: *Dailey v. Kinsler*, 31 Neb. 340, 47 N. W. 1045.

Similarly, where the grantor of land by absolute deed conveys it to the grantee under a verbal trust on his part to hold the land in trust for a third person, the trust is unenforceable: *Lantry v. Lantry*, 51 Ill. 451, 2 Am. Rep. 310; *Prouty v. Moss*, 111 Ill. App. 536; *Green v. Cates*, 73 Mo. 115.

Again, an oral agreement by a grantee of land to take and hold for another land, the purchase price of which was paid for by the other, is within the statute of frauds: *Coleman v. Bowles' Admr.* (Ky.), 56 S. W. 651.

Likewise a declaration by a person on his deathbed that he desired that one-half of certain land should be the property of a certain person does not, he having made no will, create a trust in the land as against his heir: *Campbell v. Brown*, 129 Mass. 23.

And where land subject to an oral trust passed by mesne conveyances to a certain grantee, who, dying, the property passed to her heirs, the trustor cannot enforce the trust as against her heirs: *Lawson v. Lawson*, 117 Ill. 98, 7 N. E. 84.

Finally, in *Farrand v. Beshoar*, 9 Colo. 291, 12 Pac. 196, the court held that where a simple trust in land rests in parol, a decree sustaining the trust cannot be sustained.

**What Constitutes Trust in Land Within Rule.**—In some states the rule requiring a trust to be manifested in writing is directed not alone at trusts concerning lands, but also at trusts in any manner relating to lands: *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Pollard v. McKenney*, 68 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696. It is therefore held that where by a will certain land was devised to a devisee under an oral trust that the devisee would give five hundred dollars to a certain beneficiary, the fact that the executor of the estate was required by the will to sell and convert into money all the estate before distribution does not validate the trust as one relating to moneys: *Moore v. Campbell*, 102 Ala. 445, 14 South. 780. And where a grantor conveys land to another for a part present consideration and on the agreement that the grantee shall hold one-half of the land in trust for the grantor, and upon the sale of the land pay the grantor one-half the net avails thereof, an action to recover from the grantee one-half thereof cannot be maintained: *Cameron v. Nelson*, 57 Neb. 381, 77 N. W. 771.

In *Betchel v. Ammon*, 199 Pa. 81, 48 Atl. 873, however, the court holds that an oral trust to sell lands and account for the proceeds, where the lands have been sold and the proceeds are in the hands of the trustee, is not within the statute of frauds. And in New York,

where the statute of frauds has the broad language mentioned in the preceding paragraph, the court held that where land is conveyed under an oral trust to hold for a certain cestui que trust, and the grantee conveys all the land to purchasers and receives the purchase money and pays over all except the last portion of it to the cestui que trust, but refuses to pay over such residue, the cestui que trust may maintain an action to recover it and the statute of frauds is no defense therein, the trust having been performed so far as it concerned realty. "If the defendant should say that he now can keep the money because he once could keep the land, still the plaintiff can say with better justice that he is not entitled to the money because it was originally his, and though he voluntarily suspended his right to it for a season, he did so without lawful consideration and in confidence that when it could be restored to him it would be. That time has come, and there is no obstacle to its restoration": *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584.

Again, the fact that a chose in action was secured by a mortgage on land does not render a trust in the chose in action subject to the provisions of the statute of frauds relating to trusts in land: *Patterson v. Mills*, 69 Iowa, 755, 28 N. W. 53.

**Manifestation of Oral Trust in Writing.**—It is not requisite that the writing whereby a simple trust in land is manifested be made contemporaneously with the creation of the trust, but it may be established by a writing signed by the alleged trustee and setting forth the trust made at any time, whether long thereafter or in anticipation and contemplation thereof: *Jackson v. Moore*, 6 Cow. 706; *Rathbun v. Rathbun*, 6 Barb. 98; *Hutchinson v. Hutchinson*, 84 Hun, 482, 32 N. Y. Supp. 390; *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178; *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426. Thus where the grantee of land took the same on a verbal trust to convey a portion thereof to the value of five hundred dollars to her daughter upon her arrival at the age of twenty, and five years afterward put this verbal agreement in writing, there is a valid enforceable trust in her daughter's favor: *Pendleton v. Patrick* (Ky.), 57 S. W. 464. So where the grantee of land under an oral trust put the same in writing in strict accordance with the oral declaration a long time after the title to the land had vested in him, the trust is valid against a creditor of the trustee: *Jauch v. De Socarras*, 56 N. J. Eq. 538, 39 Atl. 370.

This written evidence of the trust "may be found and deduced from one or more writings if they bear a relation to each other and import a trust. The writing need not be of a formal character, but a trust may be imported and proved by letters, deeds, and other writings signed by the party to be charged": *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426. It may thus be deduced from a writing made ten years after the creation of the trust, which writing the trustee had signed merely by writing his initials in the body: *Smith v. Howell*, 11 N. J. Eq. 349.

Moreover, "while parol evidence of an express trust is to be rejected, yet, when an instrument is claimed to be an acknowledgment and proof of such a trust, the circumstances under which it was made may be used to elucidate its construction": *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426.

**Depositions and Pleadings as Manifestation of Trust.**—In some decisions it is held that a simple oral trust is sufficiently manifested in writing by a deposition signed by the alleged trustee and clearly setting out the terms of the trust: *McIntire v. Skinner*, 4 G. Greene, 89; *Pinney v. Fellows*, 15 Vt. 525. Moreover, an answer in chancery admitting the trust, although not responsive to the bill in the cause, sufficiently manifests the trust to satisfy the statute of frauds: *Jamison v. Miller*, 27 N. J. Eq. 586. And where a verified petition to enforce an oral trust in land sets up the trust and the verified answer avers that defendant has no reason to doubt the averments of the petition, and is signed by the defendant in the verification, the trust is sufficiently manifested in writing: *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178.

In *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170, however, the court held that where a defendant in a suit to enforce a simple oral trust in lands claimed the benefit of the statute of frauds by his answer, neither an admission of the existence and character of the trust contained in his deposition, nor a similar admission in his answer, is sufficient to satisfy the requirements of the statute, for the reason that "a party who insists upon his statutory right and does not submit to waive it cannot be legally bound by a declaration or creation of trust which the statute declares to be utterly void and of no effect."

**Part Performance of Trust.**—"Acts of part performance, such as will furnish a foundation for enforcing a verbal contract respecting land otherwise void under the statute of frauds, must be such as are done in pursuance, or according to the terms, of the contract, and which in some manner affect or change the relation of the parties so that they would be defrauded if the contract were not enforced. . . . Actual possession in furtherance of the terms of the contract, especially when accompanied by the making of permanent and valuable improvements upon the premises, may be made the foundation for a decree of specific performance; but mere possession will not be deemed a part performance sufficient to justify such relief when it may be fairly referable to some other cause than the execution of the contract": *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883. "Acts to be deemed a part performance of a parol agreement, so as to estop a party from insisting upon the statute of frauds, should be so clear, certain, and definite in their object and design as to refer exclusively to a complete and perfect agreement of which they are a part execution. . . . And they must be a part

performance of the precise agreement set up": *Rathbun v. Rathbun*, 6 Barb. 98. So where a party purchases land under a verbal agreement to hold the same in trust for another, and the latter on the faith of the agreement thereupon advances a part of the purchase money and comes from another state and takes possession of the premises, there is such part performance and execution of the trust as takes it out of the statute of frauds: *Oberlender v. Butcher*, 67 Neb. 410, 93 N. W. 764. This same principle is also applicable where the cestui que trust of land takes possession or remains in possession thereof pursuant to a verbal agreement made at the time of the creation of an oral trust therein: *Spies v. Price*, 91 Ala. 166, 8 South. 405; *Simonton v. Godsey*, 174 Ill. 28, 51 N. E. 75; *Dorsey v. Clarke*, 4 Har. & J. 551. Where, however, the trustee charges the cestui que trust in possession with rent, entering the same in his books, the effect of the possession as part performance is annulled: *Dorsey v. Clarke*, 4 Har. & J. 551. And where after title to land is taken in the name of another the cestui que trust merely remains in possession without any agreement that such possession was in pursuance of the verbal trust, the case is within the statute of frauds: *Wentworth v. Wentworth*, 2 Minn. 277 (Gil. 238), 72 Am. Dec. 97. Similarly, where the cestui que trust goes into possession pursuant to the terms of a subsequent verbal agreement, independent of the agreement of trust, he cannot defend his right to continue possession thereof on the ground of the oral trust existing in his favor: *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883.

Finally, a verbal promise by the owner of land, not founded on a valuable consideration, to convey certain land to one who was in possession thereof by his permission, cannot be enforced against him or his heirs: *Tolleson v. Blackstock*, 95 Ala. 510, 11 South. 284.

**Execution of Trust.**—"The statute of frauds is an insuperable bar to an action to enforce a parol contract within its provisions, but it does not make the transaction illegal, and parties are at liberty to act under such contracts if they see proper": *Eaton v. Eaton*, 35 N. J. L. 290. It was enacted, not that parties might avoid trusts that were executed, but rather to enable them, in case of an attempt to enforce such trusts while they remained executory, to insist on certain modes of proof in order to establish them: *Hays v. Regar*, 102 Ind. 524, 1 N. E. 386. Thus a person who holds land subject to a simple oral trust has a right to recognize his moral obligation and convey the land to such person as his grantor intended, and on the conditions the latter thought fit to impose, and when such conveyance is made the trust is executed, and it becomes immaterial whether or not its performance could have been compelled: *Robbins v. Robbins*, 89 N. Y. 251. So where lands that were in fact the separate property of a wife, but stood in the names of herself and husband, and they joined in a deed of the lands to a third person under a verbal trust on his part to reconvey to the wife individually, such

trust is not void, but only voidable, and if the property was in fact reconveyed before any equities attached to it in the hands of the third person, the reconveyance would put an unimpeachable title in the wife: *Gallagher v. Northup*, 215 Ill. 563, 74 N. E. 711, Cartwright and Hand, JJ., dissenting, reversing 114 Ill. App. 368. And where a party receives a conveyance of lands from his brother on the oral understanding that in case of the brother's death he would convey to his daughters, which conveyance, the brother having died, he makes, such conveyance would be regarded as made in performance of such agreement, and would be upheld as not affected by the statute of frauds: *Collins v. Collins*, 98 Md. 473, 103 Am. St. Rep. 408, 57 Atl. 597.

The trust, when executed, is also valid against third parties as well as between the parties. It does not lie in the mouth of a third party in whose favor no estoppel is shown to exist to say that the contract creating the trust was void and conferred no rights: *McCormick Harvesting Machine Co. v. Griffin*, 116 Iowa, 397, 90 N. W. 84. So where a widow who held land under an oral trust for her children conveyed to each his respective share, a second husband is not entitled to claim dower in such land: *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245. And where such trust is executed, it is valid against a judgment creditor of the trustee: *Hays v. Regar*, 102 Ind. 524, 1 N. E. 386.

The validity of a simple oral trust, when fully executed, is also affirmed in many other cases: *Polk v. Boggs*, 122 Cal. 114, 54 Pac. 536; *Church v. Sterling*, 16 Conn. 388; *Hayden v. Denslow*, 27 Conn. 335; *Stringer v. Montgomery*, 111 Ind. 489, 12 N. E. 474; *Barber v. Milner*, 43 Mich. 248, 5 N. W. 92; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584. And in support of a conveyance made pursuant to such oral trust in land, the parol agreement creating may be proven: *Brown v. White*, 32 Ind. App. 100, 67 N. E. 273.

**The Exceptional Rule—Creation Contemporaneously with Transfer of Land.**—In a few states there is no statutory provision requiring a trust in lands to be manifested in writing, and an express simple trust may be created by an oral declaration of trust made contemporaneously with, or in contemplation and anticipation of, the transfer of the legal title to land by absolute deed: *Cohn v. Chapman*, 62 N. C. 92, 93 Am. Dec. 600; *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61, 11 L. R. A. 456; *Dover v. Rhea*, 108 N. C. 88, 13 S. E. 614; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93; *Sykes v. Boone*, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645; *Haywood v. Ensley*, 8 Humph. 460; *Thompson v. Thompson* (Tenn. Ch.), 54 S. W. 145; *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227; *Renshaw v. First National Bank* (Tenn.), 63 S. W. 194; *James v. Fulrod*, 5 Tex. 512, 55 Am. Dec. 743; *Mead v. Randolph*, 8 Tex. 191; *Bailey v. Harris*, 19 Tex. 108; *Leaky v. Gunter*, 25 Tex. 400; *Gardner v. Russell*, 70 Tex. 453, 7 S. W. 781. Compare *Mathews v. Massey*, 4 Baxt. 450. So where a person, being in

default in the payment of the installments of the purchase price of certain land, accepted the offer of a third person to pay the amount due and hold the land for him, and assigned to him his contract of purchase of the land but continued in possession of it, he may compel the transferee of the land to execute the trust: *Cloninger v. Summit*, 55 N. C. 513. See, also, *Cohn v. Chapman*, 62 N. C. 92, 93 Am. Dec. 600. Where, in consideration of receiving a power of sale from the mortgagor of land, the mortgagee agreed to buy the same in at the sale thereof under the power and to convey a certain portion thereof to a trustee for the mortgagor's wife, but afterward, after his purchase of the land, refused to make such conveyance to the wife, equity will enforce the agreement: *Blount v. Carroway*, 67 N. C. 396. Where a person sold land under an oral agreement that the grantee would transfer the land to another for a certain consideration on the grantor's request, such trust is enforceable: *Sykes v. Boone*, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645. A parol contract under which two or more persons buy land for their joint benefit, but take the title in the name of one, may be enforced against the holder of the legal title: *Gardner v. Rundell*, 70 Tex. 453, 7 S. W. 781. Moreover, where the intending purchaser of land at judicial sale agreed previously and in contemplation of the sale, or at the time of bidding, that he would hold the land subject to redemption by another person (*Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241), or held out to other intending bidders at the sale that he was purchasing for some certain person by reason whereof they were deterred from bidding against him (*Haywood v. Ensley*, 8 Humph. 460; *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227), the cestui que trust may enforce the oral trust.

In Tennessee, however, it is held that it is not competent to set up a parol trust in opposition to the provisions of a deed. Indeed, if the deed upon its face and by its terms is absolute and conveys to the grantee a fee simple estate without more, the trust character can be shown by oral evidence, because this would not, in the contemplation of the law, in any way contradict the terms of the deed, but would only complete it. But if the deed contains provisions which expressly or by clear implication give the grantee a power or discretion to defeat the trust, or are inconsistent with it, then the trust does not exist in such shape as to be mandatory upon the grantee. Thus if the deed by its express terms gives the grantee the right to dispose of the land in such way as she may see fit, and for such purpose as she may deem best, a parol trust to convey the property to certain persons cannot be shown: *Mee v. Mee*, 113 Tenn. 453, 106 Am. St. Rep. 865, 82 S. W. 830.

The full validity of parol trusts in land of the type just described was also formerly recognized in several other states, but they have since been done away with by the extension of the statutes of frauds in those states: *Patton v. Beecher*, 62 Ala. 579; *Church v. Sterling*,

16 Conn. 388; *Fleming v. Donahue*, 5 Ohio, 255; *Kisler v. Kisler*, 2 Watts, 323, 27 Am. Dec. 308; *Murphy v. Hubert*, 7 Pa. 420.

A consideration is not necessary to support a simple oral trust in lands, made at the time of, or in contemplation and anticipation of, the transfer of the legal title: *Sykes v. Boone*, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645. See, also, *Gardner v. Rundell*, 70 Tex. 453, 7 S. W. 781.

The fact that the cestui que trust under such an oral trust, as a condition precedent to his right to receive a conveyance of the land, was required not only to reimburse the purchaser of the legal title for his advances in purchasing it, but was also to pay a certain debt he owed the purchaser's wife, does not invalidate the trust: *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93.

In order that a court may give effect to an alleged oral trust in land, the evidence offered to sustain it must be clear and convincing: *Hamilton v. Buchanan*, 112 N. C. 463, 17 S. E. 159; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *Renshaw v. First National Bank (Tenn.)*, 63 S. W. 194. Moreover, in North Carolina at least, the subsequent declarations of the alleged trustee in support of the trust are not by themselves alone sufficient evidence to sustain a judgment enforcing the trust; but while they are admissible in evidence for that purpose, there must be evidence of other facts and circumstances inconsistent with the idea that there was an absolute purchase by the alleged trustee: *Taylor v. Taylor*, 54 N. C. 246; *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61, 11 L. R. A. 456; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241.

**Creation Independently of Transfer of Land.**—A trust in land cannot, however, be created by parol independently of a transfer of the legal title to the land, although for a valuable consideration, for such transaction is in effect only the sale of an interest in land by parol, and transgresses the provision of the statute of frauds requiring such a sale to be evidenced in writing: *Frey v. Ramsour*, 66 N. C. 466; *Blount v. Carroway*, 67 N. C. 396; *Dover v. Rhea*, 108 N. C. 88, 13 S. E. 614; *Hamilton v. Buchanan*, 112 N. C. 463, 17 S. E. 159; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *Kelly v. McNeill*, 118 N. C. 349, 24 S. E. 738. Thus a parol agreement made by the purchaser of land, after the purchase was consummated, to hold the land in trust for others, is unenforceable: *Hamilton v. Buchanan*, 112 N. C. 463, 17 S. E. 159; *Kelly v. McNeill*, 118 N. C. 349, 24 S. E. 738. And where the legal estate in lands is not conveyed, a trust cannot be raised by a parol declaration, even though founded on a valuable consideration and followed by actual occupancy and the erection of valuable improvements: *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241.

#### Constructive Trusts.

**In General.**—As stated in the first division of this article, constructive trusts are not subject to the statutory provisions requiring an

express trust to be manifested in writing, but are in almost all, if not all, jurisdictions expressly excepted from that requirement: *Patton v. Beecher*, 62 Ala. 579; *White v. Farley*, 81 Ala. 563, 8 South. 215; *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Hayne v. Herman*, 97 Cal. 259, 32 Pac. 171; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Church v. Sterling*, 16 Conn. 388, 401; *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852; *Peterson v. Boswell*, 137 Ind. 211, 36 N. E. 845; *Patterson v. Mills*, 69 Iowa, 755, 28 N. W. 53; *Dorsey v. Clarke*, 4 Har. & J. 551; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Graves v. Graves*, 29 N. H. 129, 141; *Farrington v. Barr*, 36 N. H. 86; *Moore v. Moore*, 38 N. H. 382; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Salter v. Bird*, 103 Pa. 436.

While it has been declared that a constructive trust will arise whenever by any mistake an instrument of conveyance of land is made absolute instead of expressing the trust intended (*Fairchild v. Rasdall*, 9 Wis. 379), yet the ordinary ground of equitable interposition to enforce an oral trust in land is fraud, actual or constructive, and whenever actual or constructive fraud is inseparably connected with the creation of such a trust, a court of equity will take cognizance of the matter and grant appropriate relief against the trustee: *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Fairchild v. Rasdall*, 9 Wis. 379. In such case, however, the court does not act upon the oral agreement as the primary thing, but the fraud gives it its jurisdiction, and the oral agreement is cognizable by it as an element in the fraudulent transaction: *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Perkins v. Cheairs*, 2 Baxt. 194. In *Parker v. Catron*, 27 Ky. Law Rep. 536, 85 S. W. 740, the court says that constructive trusts are held not within the statute of frauds because they rest in the end on the doctrine of estoppel, and the operation of an estoppel is never affected by the state of frauds.

As in the case of simple trusts in states where they are recognized, so constructive trusts arise only upon the actual transfer of land and not upon an executory contract to hold land in trust: *Perkins v. Cheairs*, 2 Baxt. 194.

In order that a constructive trust may be established, the fraud or mistake involved in it must be shown by clear and convincing proof. Loose, indefinite, and unsatisfactory evidence is never sufficient: *Laughlin v. Mitchell*, 14 Fed. 382; *Broek v. Broek*, 90 Ala. 86, 8 South. 11, 9 L. R. A. 287; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Lantry v. Lantry*, 51 Ill. 451, 2 Am. Rep. 310; *Wilson v. McDowell*, 78 Ill. 514; *Hammond's Admx. v. Cadwallader*, 29 Mo. 16.

**Actual Fraud.**—In order that a trust in land may arise by reason of actual fraud, the title must be obtained by the alleged trustee by false and fraudulent promises to hold and use the same for designated uses, and must subsequently be converted to other purposes or claimed by the grantee as his own. Mere subsequent fraud is not sufficient. There must be fraud in the original transaction of such a character as to constitute a fraudulent contrivance for the purpose of acquiring the legal title, and the title must have been obtained through the fraudulent contrivance: *Patton v. Beecher*, 62 Ala. 579; *Moseley v. Moseley*, 86 Ala. 289, 5 South. 732; *Spies v. Price*, 91 Ala. 166, 8 South. 405; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Walter v. Klock*, 55 Ill. 362; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255; *Luce v. Reed*, 63 Minn. 5, 65 N. W. 91; *Wheeler v. Reynolds*, 66 N. Y. 227; *Salter v. Bird*, 103 Pa. 436; *Braden v. Workman (Pa.)*, 1 Atl. 655; *Perkins v. Cheairs*, 2 Baxt. 194.

Thus the mere failure or refusal of an alleged trustee to comply with the terms of an oral trust is not such fraud as will authorize a court of equity to enforce the trust: *Patton v. Beecher*, 62 Ala. 579; *Moseley v. Moseley*, 86 Ala. 289, 5 South. 732; *Broek v. Broek*, 90 Ala. 86, 8 South. 11, 9 L. R. A. 287; *Brisson v. Brisson*, 75 Cal. 585, 7 Am. St. Rep. 189, 17 Pac. 698; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Perry v. McHenry*, 13 Ill. 227; *Rogers v. Simmons*, 55 Ill. 76; *Walter v. Klock*, 55 Ill. 362; *Scott v. Harris*, 113 Ill. 447; *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170; *Dunn v. Zwilling*, 94 Iowa, 233, 62 N. W. 746; *Gregory v. Bowsby*, 115 Iowa, 327, 88 N. W. 822; *Heddeston v. Stoner*, 128 Iowa, 525, 105 N. W. 56; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *In re Ryan's Estate*, 92 Minn. 506, 100 N. W. 380; *Hammond's Admx. v. Cadwallader*, 29 Mo. 166; *Wheeler v. Reynolds*, 66 N. Y. 227; *Perkins v. Cheairs*, 2 Baxt. 194; *Fairechild v. Rasdall*, 9 Wis. 379. Nor does the denial by the trustee of the existence of such trust amount to such fraud: *Scott v. Harris*, 113 Ill. 447; *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170; *Gregory v. Bowsby*, 115 Iowa, 327, 88 N. W. 822. For "when the original transaction is free from the taint of fraud or imposition, when the written contract expresses all the parties intended it should, when the parol agreement which is sought to be enforced is intentionally excluded from it, it is difficult to conceive of any ground upon which the imputation of fraud can rest, because of its subsequent violation or repudiation, that would not form a basis for a similar imputation, whenever any promise or contract is broken. . . . It is an annihilation of the statute [of frauds] to withdraw a case from its operation, because of such violation or repudiation of an agreement or trust it declares shall not be made or proved by parol. There can be no fraud if the trust does not exist, and proof of its existence by parol is that which the statute forbids. In any and every case in which the court is called to enforce a trust there must be a repudiation of it,

or an inability from accident to perform it. If the repudiation is a fraud which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident and no reason can be assigned for the limitation": *Patton v. Beecher*, 62 Ala. 579. "If the refusal to comply with a parol agreement constitutes such fraud as to take a case out of the statute, then no case is within it. For a party has only to allege that a person contracting by parol fraudulently refuses to comply with the terms of his parol agreement, which he must do in every case, or there would be no necessity for resorting to a court of equity to enforce it, and a case is made to which the statute does not apply": *Perry v. McHenry*, 13 Ill. 227. See, also, *Broek v. Broek*, 90 Ala. 86, 8 South. 11, 9 L. R. A. 287; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Fairchild v. Rasdall*, 9 Wis. 379.

Likewise the breach of the mere oral promise of a purchaser of land to buy the same or to hold the title therefor in trust for another, though made at the time of or in contemplation of the transfer of the title to him, does not constitute such fraud as to invest a court of equity with jurisdiction to enforce the trust, where the purchaser buys in his own name and with his own means: *Robbins v. Kimball*, 55 Ark. 414, 29 Am. St. Rep. 45, 18 S. W. 457; *Grayson v. Bowlin*, 70 Ark. 145, 66 S. W. 658; *Stephenson v. Thompson*, 13 Ill. 186; *Perry v. McHenry*, 13 Ill. 227; *Wilson v. McDowell*, 78 Ill. 514; *McDearmon v. Burnham*, 158 Ill. 55, 41 N. E. 1094; *Fowke v. Slaughter*, 3 A. K. Marsh. 56, 13 Am. Dec. 133; *Miazza v. Yerger*, 53 Miss. 135; *Hammond's Admx. v. Cadwallader*, 29 Mo. 166; *Henderson v. Hudson*, 1 Munf. 510. And the same rule is generally applicable where the purchase is made at judicial sale (*White v. Farley*, 81 Ala. 563, 8 South. 215 (foreclosure sale); *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685 (sheriff's sale, where it did not appear that bidders were deterred by the promise); *Walter v. Klock*, 55 Ill. 362 (Breese, Scott and Sheldon, JJ., dissenting); *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. 177 (foreclosure sale); *Graves v. Dugan*, 6 Dana, 331 (execution sale, where the cestui que trust had actually paid the trustee the consideration on payment of which the trust was conditioned); *Bourke v. Callahan*, 160 Mass. 195, 35 N. E. 460 (foreclosure sale); *Cobb v. Cook*, 49 Mich. 11, 12 N. W. 891 (execution sale); *Walker v. Hill's Exrs.*, 22 N. J. Eq. 513, affirming 21 N. J. Eq. 19 (execution sale); *Sherrill v. Crosby*, 14 Johns. 358 (execution sale); *Bander v. Snyder*, 5 Barb. 63 (foreclosure sale); *Lathrop v. Hoyt*, 7 Barb. 59 (foreclosure sale); *Wheeler v. Reynolds*, 66 N. Y. 227 (foreclosure sale); *Haines v. O'Connor*, 10 Watts, 313, 36 Am. Dec. 180; *Fox v. Heffner*, 1 Watts & S. 372; *Appeal of McCall (Pa.)*, 11 Atl. 206; *Salsbury v. Black*, 119 Pa. 200, 4 Am. St. Rep. 631, 13 Atl. 67; or at a tax sale (*Hain v. Robinson*, 72 Iowa, 735, 32 N. W. 417), or at a sale under a power contained in a mortgage (*Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273, 43 N. E. 93), or in a trust deed in the

nature of a mortgage (*Mansur v. Willard*, 57 Mo. 347), or generally at public auction (*Farnham v. Clements*, 51 Me. 426).

Where, however, the purchaser of land at public auction, by reason of his oral promise to buy the same or to hold the title therefor for the use of some person whose interest in the property is about to be sold, is enabled to obtain the land at a price greatly below its market value, it is a fraud for him to attempt to hold it in violation of said promise, and he may be held as a trustee *ex maleficio* of the land for the benefit of the cestui que trust: *Woodruff v. Jabine* (Ark.), 15 S. W. 830; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696, Hunt, J., dissenting, reversing 25 Barb. 440. Contra, *Lamborn v. Watson*, 6 Har. & J. 252, 14 Am. Dec. 275, where the decision seemed to be based somewhat on the form of the pleadings: *Miltenerberger v. Morrison*, 39 Mo. 71. Compare, also, *Sherrill v. Crosby*, 14 Johns. 358, where a bystander at a sale bought the land on the suggestion of the officer conducting it, who intimated that he would like some one to buy it for the benefit of the execution debtor, but where the bystander made no promise to hold for the benefit of the judgment debtor. Moreover, in some decisions, it is further held that the mere repudiation of such agreement after the cestui que trust has relied upon it and refrained from taking part in the sale and from redeeming the land from the sale if redemption is allowable, is such fraud as to warrant equitable relief therefrom: *Wright v. Gay*, 101 Ill. 233; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Parker v. Catron*, 27 Ky. Law Rep. 536, 85 S. W. 740; *Soggins v. Heard*, 31 Miss. 426; *Rose v. Bates*, 12 Mo. 30; *Leahey v. Witte*, 123 Mo. 207, 27 S. W. 402, *Brace and Gantt, JJ.*, dissenting; *Wolford v. Herrington*, 74 Pa. 311, 15 Am. Rep. 548, *Agnew and Williams, JJ.*, dissenting. Contra, *Donohoe v. Mariposa Land & Min. Co.*, 66 Cal. 317, 5 Pac. 495. In *Walker v. Hill's Exrs.*, 22 N. J. Eq. 513, affirming 21 N. J. Eq. 191, the court states the reason for the rule itself in the following language: "It is the precedent contract with the defendant in execution for a reconveyance and the fraudulent conduct of the purchaser in connection with the sale which have enabled him to acquire the debtor's property at an unconscionable advantage, that the court seizes hold of as a ground of equitable relief." "The jurisdiction over transactions of this nature rests on the ground of fraud and oppression on the part of the purchaser, by means of which he has obtained the property of the debtor at an inadequate price, under the assurance of a contract to reconvey to him or to hold the same subject to future redemption." The reason for the extension of the rule is said, in *Soggins v. Heard*, 31 Miss. 426, to be that the execution debtor "on the faith of such an agreement may have ceased his efforts to raise the money for the purpose of paying off the execution and thus preventing a sale of the property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations, and may, therefore, at his option, decline a compliance with his

agreement. Such considerations constitute the foundation of almost every trust, and the trustee should be held to account as nearly as possible in the same spirit in which he originally contracted."

Again, where at the time a grantee of land took the legal title he orally promised to hold the same on certain trusts, but then and there had no intention of performing the trusts but made them with intent to get and hold the legal title to his own use, a constructive trust arises and he becomes a trustee *ex maleficio*: *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235; *Gregory v. Bowlsby*, 115 Iowa, 327, 88 N. W. 822. See, also, *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572. Similarly, where one actively procures a transfer of land to himself on an oral promise to hold for another, and afterward repudiates the trust, a constructive trust arises on the ground that the transferee had an active fraudulent agency and by false promises diverted to himself the conveyance of the land: *Lantry v. Lantry*, 51 Ill. 451, 2 Am. Rep. 310; *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170; *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852. Contra, *Walker v. Locke*, 5 Cush. 90. Likewise, a person who takes the legal title to land in himself subject to an oral trust and to the further contemporaneous oral agreement that he would put the trust in writing, but who afterward repudiated the trust and agreement, becomes a trustee of the land *ex maleficio*: *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641, where the grantee was a creditor of the grantor, and received the grant for the benefit of creditors; *Wolford v. Herrington*, 74 Pa. 311, 15 Am. Rep. 548, *Agnew and Williams, JJ.*, dissenting. Contra, *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883, holding that the mere breach of the promise to put the oral trust in writing did not by itself amount to fraud, though it was of weight, in connection with other facts and circumstances, as an element in fraud.

Furthermore, where the absolute character of a deed of land was not known to or designated by the person paying the consideration therefor, and another was named therein as grantee, it will be presumed that the deed was so written by fraud or mistake and without intent to violate the statute of frauds, and oral evidence will be admissible to show such facts to raise a trust in behalf of the person paying the consideration: *Siemon v. Schurek*, 29 N. Y. 598, affirming *Sieman v. Austin*, 33 Barb. 9. In *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032, affirmed without opinion, 158 N. Y. 697, 53 N. E. 1122, the court, however, said: "It is not enough that one person has relied upon the promise of another with regard to the purchase of a piece of property. The party seeking relief in such case must go further, and show a change of position on his part, due to such reliance. He must, in fact, prove the elements of an estoppel in pais."

**Constructive Fraud in General.**—Where confidential relations prevail between the parties to an oral trust and the trust is violated,

the law presumes that the influence of the confidence upon the mind of the person who confided was undue, and a case of constructive trust arises, not, however, on the ground of actual fraud, but because of the facility for practicing it: *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Blount v. Carroway*, 67 N. C. 396. See, also, *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323. In *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9, the court says: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the benefits, out of such circumstances or relations a court of equity will raise a trust by construction, and fasten it upon the conscience of the offending party, and convert him into a trustee of the legal title." So where a person occupying a fiduciary relation to the owner of real estate takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance thereof without consideration, through a verbal agreement which he promises to reduce to writing, as, for example, that the land conveyed to him is to be held in trust for some legitimate purpose, a refusal under such circumstances to reduce the verbal agreement to writing, or to reconvey the land to the real owner, is such an abuse of confidence as to vest a court of equity with jurisdiction to inquire thoroughly into the entire transaction, and to set aside the conveyance or administer other proper relief: *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 796.

Moreover, the statute of frauds "does not cover the cases where equity has always implied a trust from the proved relations and acts of the parties, often accompanied by their oral declarations and agreements as material facts, in order to prevent frauds": *McCahill v. McCahill*, 11 Misc. Rep. 258, 32 N. Y. Supp. 836. Thus the rule that the breach of an oral agreement to hold lands in trust for another is not of itself alone such a fraud as to take the case out of the statute of frauds, applies in its full force only where the parties sustain no trust or confidential relations to each other, or where they are simply contracting parties in the ordinary sense: *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032, affirmed without opinion, 158 N. Y. 697, 53 N. E. 1122.

**Domestic Relation of Husband and Wife.**—In California the relation of husband and wife is a confidential relation, and when this confidence is violated by the refusal of one spouse to execute an oral trust on which land was transferred to him or her, as a trust to reconvey the land to the other spouse on request (*Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689), or to hold the land for the joint use of the two spouses (*Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122), or to so hold it during their joint lives and afterward to hold one-half thereof for the use of their daughter (*Hayne v. Hermann*, 97

Cal. 259, 32 Pac. 171), a constructive trust arises which a court of equity will enforce and to establish which parol evidence is admissible. So in *Thompson's Lessee v. White*, 1 Dall. 424, 1 Am. Dec. 252, 1 L. Ed. 206, where a wife, desiring her husband to have the use of her separate lands during his life, conveyed them to a third party, who reconveyed them to herself and husband as joint tenants under a parol promise on the part of the husband by will or other means to settle the lands on her sisters and children, but the husband died after the wife without having made such settlement, the court enforced such oral trust in behalf of the beneficiaries thereof against the heirs of the husband and a grantee of them with notice. In *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, the court said: "If the relief cannot be granted in this case, we do not see how it could be granted if an attorney should, by his parol promise, induce his client to put the property in his name for some temporary purpose, and then refuse to reconvey on the ground of the absence of a written acknowledgment; and so of principal and agent, parent and child, trustee and cestui que trust, etc."

In other states, however, where the title to land is put in the name of a wife on a verbal trust to hold the whole or a part thereof for her husband, the courts have overlooked the principle on which the foregoing cases are decided and have refused to enforce the trust: *Murray v. Murray*, 153 Ind. 14, 53 N. E. 946; *Andrew v. Andrew*, 114 Iowa, 524, 87 N. W. 494; *Fitzgerald v. Fitzgerald*, 168 Mass. 488, 47 N. E. 431; *Gibson v. Foote*, 40 Miss. 788. Similarly, where a party conveyed land to his son in law on an oral trust to hold for his wife, the grantor's daughter, the courts refused to enforce the trust: *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235; *Dilts v. Stewart* (Pa.), 1 Atl. 587. And where a husband conveys land to his wife under a parol agreement that she should hold for the benefit of their children, the trust is invalid and cannot be enforced: *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152.

**Relation of Parent and Child.**—In some decisions it is intimated that an oral trust is enforceable as between parent and child on the ground of constructive fraud: *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790. This has also been directly held. Thus where a son, to enable his mother to act as a redemptioner of certain land of his which had been sold on execution, permitted her to take a judgment against him by confession for certain moneys which she had advanced to him, and she thereupon redeemed the land on an oral agreement to transfer it to her son upon payment of the amount advanced by and owing to her, which transaction the son entered into on the advice of his mother's attorney, his former guardian, a court will compel the mother to fulfill the trust: *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640. Where a mother conveyed the family homestead to one son without consideration on a verbal trust that he would hold it for

himself and the other children of his mother, and pay the taxes and interest on the mortgage, receiving in return the rentals accruing on the homestead and free board and lodging, and where all parties acquiesced in and fulfilled the arrangement until more than a year after the death of the mother, when the grantee repudiated it, the other heirs may compel a conveyance by him to them of their respective shares: *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067.

In other decisions, however, the courts have failed to recognize the existence of constructive trusts in similar cases. So where a woman buys a lot and builds a residence thereon under an oral agreement with her son that he shall enter into possession with his family and live with her on the premises and have the title thereto after her death, provided he would pay taxes and insurance and keep the house in good repair and furnish her with all necessary care, board and lodging during life, which he does, no trust arises in his favor: *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300. Where a person at the time of buying land made an oral declaration that he purchased it for his son, and his son was in exclusive possession during his lifetime, and after his son's death reaffirmed the trust orally in favor of his son's children who were not, however, in possession, the children cannot enforce the trust as against the devisees of the purchaser: *Sherley v. Sherley*, 97 Ky. 512, 31 S. W. 275. Also, *Smith v. Williams*, 89 Ga. 9, 32 Am. St. Rep. 67, 15 S. E. 130. Where land is conveyed without consideration to a man under a verbal trust to hold for his children, in an action to enforce the trust, parol evidence thereof cannot be received to establish it: *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11. Where land was conveyed to a father and mother without consideration under an oral trust that the remainder in one-third should be conveyed to a certain son of theirs, reserving a life estate to themselves, but in violation of the trust the spouses conveyed the whole land to certain other persons without consideration, a court of equity will not enforce the trust: *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608. A verbal agreement between two sisters at the time of purchasing a homestead that they would hold it for the use of their mother during her life, created no enforceable trust: *Wormald's Guardian v. Heinze*, 28 Ky. Law Rep. 1022, 90 S. W. 1064. Where a son conveyed land to his father by absolute deed and immediately afterward orally declared a trust therein in favor of one of his brothers to whom he was largely indebted, no trust was created therein which could be enforced against the grantee's heirs, nor would the fact that the trust was declared at the instance of certain of the heirs bind such heirs: *Bartlett v. Bartlett*, 14 Gray, 277.

**Guardian and Ward.**—While it is said in some decisions that constructive fraud is assumed in case of dealings between guardian and ward, warranting the interposition of a court of equity (*McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. Supp. 208, affirmed without opinion, 181 N. Y. 581, 74 N. E. 1119; *Blount v. Carroway*, 67 N. C.

396. Compare, also, *Kisler v. Kisler*, 2 Watts, 323, 27 Am. Dec. 308), yet in *Rogers v. Simmons*, 55 Ill. 76, where a person represented to the owner of certain lands that he desired to purchase them as guardian for certain minors, and the owner accordingly sold them to him at a reduced price, the court held that a trust could not be enforced in the minor's favor.

**Brothers or Sisters.**—"The relationship existing between brothers is not in itself a confidential relation to which the equitable doctrine of constructive trusts is applicable": *Hamilton v. Buchanan*, 112 N. C. 463, 17 S. E. 159. Thus oral trusts existing between brothers or sisters are held not to be enforceable: *Hasshagen v. Hasshagen*, 80 Cal. 514, 22 Pac. 294; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Peterson v. Boswell*, 137 Ind. 211, 36 N. E. 845; *McClain v. McClain*, 57 Iowa, 167, 10 N. W. 333; *Loomis v. Loomis*, 60 Barb. 22.

**Priest and Parishioner.**—Where a woman conveyed land to her spiritual adviser subject to the verbal trust that if her absent son should turn up he would convey the land to the son, the son may compel the execution of the trust: *McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. Supp. 208, affirmed without opinion, 181 N. Y. 581, 74 N. E. 1119.

**Attorney and Client.**—It seems that there is such confidence existing between an attorney and his client, that the refusal of an attorney to execute an oral trust in lands affords ground for relief against him as a trustee *ex maleficio* on the ground of constructive fraud: *McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. 208, affirmed without opinion, 181 N. Y. 581, 74 N. E. 1119; *Blount v. Carroway*, 67 N. C. 396. So where an attorney bought in land at an insolvent sale under a verbal agreement with his clients to buy for their use and with money furnished by them, the cestui que trust may enforce the trust as against the attorney: *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513. Where a grantor gave orders to his attorneys to make a deed of certain land to his wife, and after he left their office they made the deed to a certain third person instead, adding in explanation that they did so to avoid any suspicion of the deed's being made to defraud creditors, oral evidence is admissible to show that the grantee held the land in trust for the grantor's wife to whom he had intended to grant it: *Fischbeck v. Gross*, 112 Ill. 208.

**Principal and Agent.**—Where a man employs an agent by parol to buy land, who buys it accordingly, and no part of the consideration is paid by the principal and title is taken in the agent, and there is no written agreement between the parties, the principal cannot compel the agent to convey the estate to him: *Dorsey v. Clarke*, 4 Har. & J. 551. A contrary intimation, however, is found in *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

**Partners and Copartners.**—A parol agreement for a partnership in real estate as such cannot be shown to create a trust in land held by one of the partners under an absolute deed for the benefit of the other partners; and the fact that the parties making the agreement were at the time engaged in a mercantile partnership does not take it out of the statute of frauds: *Bird v. Morrison*, 12 Wis. 133. So where one partner conveys land to his copartner with a covenant of warranty, parol evidence is not admissible to rebut the presumption that the estate is held by the grantee for his own use: *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66.

**Cotenants or Joint Tenants.**—Where tenants in common convey to each other certain portions of the common lands, and to one of them was conveyed a larger portion than to the other under a parol trust that the former would hold the excess of the part transferred to him over his proper share in trust for the other, such trust is unenforceable: *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429. Similarly where one joint tenant conveys land to his joint tenant with a covenant of warranty, parol evidence is not admissible to rebut the presumption that the estate is held by the grantee for his own use: *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66. Furthermore, where one who has been a cotenant of lands which had been sold on foreclosure purchased them from the purchaser at foreclosure under a verbal trust to hold them in trust for his former cotenants as well as for himself, the trust is unenforceable: *Watson v. Watson*, 198 Pa. 234, 47 Atl. 1096.

In New York, however, in *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032, affirmed without opinion, 158 N. Y. 697, 53 N. E. 1122, the court holds that the statute of frauds "does not apply where there is a trust or confidential relation with regard to the property itself, where there is a community of interest between the owners, and where the promise of one relates to the vested interests of all," and that therefore where in a suit in partition the land involved was ordered sold and it appeared to the cotenants that their interests would be prejudiced by a sale at the time ordered, and one of them offered to and did bid in the property for the benefit of the whole and coupled this offer with the suggestion that the remainder do not bid against him, which suggestion was heeded at the sale, he holds the title in trust for the other cotenants and they may enforce the trust against him.

**Debtors and Creditors.**—In most states parol evidence is always admissible to show that an absolute deed of land was taken merely as security for the performance of an obligation, and is in fact a mortgage: *Patton v. Beecher*, 62 Ala. 579; *Spies v. Price*, 91 Ala. 166, 8 South. 405; *Buckman v. Alwood*, 71 Ill. 155; *Wright v. Gay*, 101 Ill. 233; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Barber v. Milner*, 43 Mich. 248, 5 N. W. 92; *Morrow v. Jones*, 41 Neb. 867,

60 N. W. 369; *Hodges v. Tennessee Marine & F. Ins. Co.*, 8 N. Y. 416; *Sturtevant v. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 39 N. E. 584; *Appeal of Sweetzer*, 71 Pa. 264. So where an absolute deed of lands is made to grantees to indemnify them against any loss by reason of a contract of suretyship on which they were sureties, it is a mortgage, and parol evidence is admissible to show that fact and that the liability to indemnify against which the mortgage was given has been discharged without damage to the mortgagees: *Moore v. Wade*, 8 Kan. 380. Where a person acquires the legal title to the land of another through legal proceedings—first by writ of summons and attachment, and then by writ of entry—pursuant to an understanding that he would hold the property as security for what should upon final settlement appear to be due him, parol evidence is admissible to show such understanding and that he therefore held as mortgagee: *Potter v. Kimball*, 186 Mass. 120, 71 N. E. 308.

Parol evidence is also admissible to show that an absolute transfer of land from one person was in fact intended as a mortgage of land by and in behalf of another person. Thus a sheriff's deed to a purchaser at a sheriff's sale of lands may be shown to be a mortgage by parol: *Reigard v. McNeill*, 38 Ill. 400. And where a person, pursuant to an oral agreement in that behalf, advanced the money requisite to make the first payment for land and took the title in his own name, but made such payment jointly for himself and another, and took the title as security, thus in effect loaning one-half of the money paid to such other person and paying it to the vendor as the other's money, a trust in the land arose in favor of the other person: *Towle v. Wadsworth*, 147 Ill. 80, 30 N. E. 602, 35 N. E. 73. And where the purchaser of land on credit, being afraid that he would be unable to pay his notes given when due, procured another person to pay the residue of the price and take the title to the land in trust, to reconvey upon payment of the moneys advanced with interest, the latter may be compelled to reconvey as agreed: *Jones v. McDougal*, 32 Miss. 179. But where a person promises another to purchase certain land for him at foreclosure sale and to hold the title in trust for him and actually does so, but afterward refuses to reconvey, the mere fact that the purchaser agreed to buy for the other person will not convert the advances he made of his own money into a loan, and thereby indirectly create a trust: *Bourke v. Callanan*, 160 Mass. 195, 35 N. E. 460. *Allen and Knowlton, JJ.*, dissenting.

The courts have on many occasions discussed the rationale of the rule admitting parol evidence to show that an absolute deed is a mortgage. While it has sometimes been declared that this rule is a mere arbitrary exception to the statutes of frauds founded on long established usage, yet by the better opinion it is founded on the idea that the violation by the mortgagee of the oral agreement pursuant to which he holds the property is a constructive fraud, giving

rise to a constructive trust. Thus in *Patton v. Beecher*, 62 Ala. 579, the court says: "The relation of debtor and creditor affords the latter so many opportunities of taking advantage of the necessities of the former that transactions between them are narrowly watched. . . . Once a mortgage, always a mortgage, is the maxim, and however broad is the power of contracting or of disposing, restraints upon the equity of redemption, though deliberately imposed, are not tolerated. The principle cannot be violated by putting the conveyance in the form of an absolute deed. If the creditor accepts the deed on no other consideration and for no other purpose than as a security for a debt, a case of fraud and trust is made out, which requires the interference of a court to give effect to the equity of redemption if it is denied." And in *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671, the court, although with less clearness, follows the same line of reasoning.

In a few states parol evidence is not admissible to show that an absolute deed was given for security only and is in fact a mortgage (*Thomas v. McCormack*, 9 Dana, 108; *McElderry v. Shipley*, 2 Md. 25, 56 Am. Dec. 703), whether the deed was given directly from the alleged mortgagors to the alleged mortgagee (*Wolf v. Corby*, 30 Md. 356), or was given by some third person to the alleged mortgagee pursuant to an oral agreement between the alleged mortgagee and the alleged mortgagor (*Benge v. Benge* (Ky.), 23 S. W. 668). This rule is based on the ground that neither public interest nor the established principles of equity jurisprudence will allow a court of justice to admit parol evidence to show that an absolute deed was intended as a mortgage: *Thomas v. McCormack*, 9 Dana, 108.

**In Miscellaneous Relations.**—In conclusion a few instances may be mentioned where a constructive fraud has been declared, and one where it has been denied, which do not come within any of the particular classes of confidential relations before discussed, but where the relation of confidence seems to have been a matter of fact rather than an assumption of law.

Where a woman conveyed land to another by absolute deed without consideration, on the parol promise of the latter to reconvey after her impending marriage was accomplished, and this conveyance was urged by her betrothed husband and the person to whom she conveyed it in order to avoid the operation of the law protecting a woman's separate property owned by her at the time of her marriage, and where she resided with and was on terms of intimate confidence with such grantee, upon refusal to perform the trust, the marriage having been solemnized, a court of equity will enforce the trust: *Catalani v. Catalani*, 124 Ind. 54, 19 Am. St. Rep. 73, 24 N. E. 375. So where a creditor of married people voluntarily assumed a confidential relation toward them and represented that to protect their homestead against their other creditors they should mortgage it to

him and he would cause it to be sold and bought in for their benefit, and they, relying upon his representations, allowed it to be so mortgaged and sold and bought by the creditor, whereupon he repudiated his promise to hold it for their benefit, a trust by construction arises in the grantors' favor: *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18.

But where an administrator bought at execution sale land belonging to the decedent under a verbal promise to hold for the heirs and apply the rent and profits to the liquidation of the amount advanced by him, the heirs are not entitled to any relief by virtue of the promise: *Maroney v. Maroney*, 97 Iowa, 711, 66 N. W. 911.

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IN THE MATTER OF THE WILL OF MARY A. MAYNARD,  
DECEASED.

[No. 8,459; decided October, 1909.]

**Fraud and Undue Influence.**—In Pleading Fraud and Undue Influence, it is not sufficient to state their nature, but the facts should be alleged; and they should be stated with certainty and expressly connected with the testamentary act.

**Fraud and Undue Influence.**—Allegations of Fraud and Undue Influence should be as positive, precise, and particular as the nature of the case will allow.

**Undue Influence.**—The Mere Fact that the Beneficiary in a Will had an opportunity to procure a will in his favor, or that he had a motive for the exercise of undue influence, does not raise a presumption of its exercise.

**Undue Influence—Pleading.**—The Exercise of Undue Influence must be directly pleaded as bearing upon the testamentary act.

**Undue Influence, 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 act.

**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.

William O. Minor and Richard B. Bell, for the contestant.

Morrison, Cope & Brobeck, for the demurrer.

COFFEY, J. 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.

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.

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.

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: *Estate of Clara Harris*, 3 Cof. Pro. Dec. 1.

The kind of undue influence that will destroy the instrument must be such as in effect destroyed the testator's free agency, and overpowered his volition at the time of the making of the will: *Estate of Motz*, 136 Cal. 558, 69 Pac. 294.

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#### ESTATE OF J. C. G. STUART, DECEASED.

[Decided April, 1909.]

**Estate of Fifteen Hundred Dollars—Setting Apart to Widow.**—Section 1469 of the Code of Civil Procedure, as it now stands, does not authorize the court to set apart an estate under fifteen hundred dollars for the joint benefit of the widow and children; but the whole estate must be assigned to the widow, if there is one.

Aitken & Aitken, John R. Aitken, Frank W. Aitken.

Power of court to set apart estate under fifteen hundred dollars to the widow and children under section 1469, Code of Civil Procedure.

COFFEY, J. Until 1897, the section provided that the court should assign the estate "for the use and 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."

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IN THE MATTER OF THE ESTATE OF CELEDONIO ORTIZ,  
DECEASED.

[No. 6,270; decided October 1, 1888.]

**Distribution—Death of Heir Pending Administration.**—Manner of distribution where an heir or devisee dies pending administration and his estate is unsettled at the time of distribution.

**Distribution.—Form of Decree for Partial Distribution** where an heir or devisee dies pending administration.

Edward J. Pringle, Sr., for Applicant.

COFFEY, J. Where an administrator dies pending administration, and a new administrator is appointed, and the

first administrator is one of the heirs, should this estate be kept open until the estate of the deceased administrator's estate is administered and distributed and let his heirs go with the decree of distribution to the first estate, or let the first estate continue and distribute the share of the deceased administrator to "his estate"?

Answer: If, while the administration of the estate of A is pending, B, an heir, legatee or devisee, should die, the general practice in department No. 9 was to administer the estate of B, and to distribute the interest which B had in the estate of A to the persons entitled thereto. Those persons then apply in the estate of A for distribution to them of the share to which they are entitled as successors in interest of B. The last estate should be distributed first; otherwise the court cannot, without a decree of distribution in the estate of B, know who are the successors in interest of B. This was the rule declared and adopted in the Estate of Cronin, Myr. Pro. Rep. 252.

One exception to this rule was in the estate of Dr. Levi C. Lane, founder of the Lane Hospital. He left a will by which he gave all his estate to Pauline C. Lane, his wife, and appointed her and Dr. Taylor executrix and executor. She died pending the administration, leaving a will in which she appointed Thomas I. Bergin and R. H. Lloyd executors. These gentlemen claimed that the distribution of the estate should be to them as executors of the last will and testament of Pauline C. Lane, in trust for the persons beneficially entitled thereto, and this was agreed to by the court, department 9: Estate of Levi Cooper Lane, No. 26,571.

The Cronin case was decided December 31, 1879. John Cronin died testate April 1, 1872, seised of real estate. A portion of the estate was devised to his wife, Johanna Cronin, who subsequently died testate, and administration of her estate was also pending. Both estates were ready for distribution. The direction of the court was asked as to the proper mode of distribution; that is whether the interest of the estate of Johanna Cronin in the estate of John Cronin, acquired by her through the will of her husband, should be

distributed, in the distribution of the estate of John Cronin, to the executor of the will of Johanna Cronin, or to the devisees named in the will of Johanna Cronin.

On these facts Judge Myrick rendered the following opinion: "It is not the province of an executor or administrator to take title on distribution; he administers upon the title of the testate or intestate, and the object of his administration is to pay the debts and ascertain who is entitled to the surplus. The proper course to pursue in these cases is, to close the estate of Johanna Cronin, by having distribution of her estate, including her interest in the estate of John Cronin, to her devisees, and then let those devisees go with the decree of distribution to the estate of John Cronin, and apply to have the interest of Johanna Cronin in the estate of John Cronin distributed to them as successors in interest of Johanna Cronin as found in the decree of distribution of her estate."

This course was pursued, and thus both estates were disposed of.

The same principles would apply, as well to the estates of intestates as of testates.

The judge who decided the Cronin case, in an opinion written by him while he was on the supreme bench, suggested that it was impracticable to carry out the course he indicated in the Cronin case.

The practice now pursued in the probate department was adopted after discussion in the Estate of Celedonio Ortiz (old number 6270), the question arising on the death of heir pending settlement of father's estate.

*Must the share be distributed to heir's estate, or await final distribution in the heir's estate, that the latter's heirs at law may be first ascertained?*

The probate department held in accord with the argument of the late Edward J. Pringle, subsequently supreme court commissioner, that partial distribution might be made to the personal representatives of the decedent in the junior estate to be held pending its administration for the persons ascertained therein to be entitled to succession.

The same view was adopted in the Estate of McLaughlin, wherein the Hon. A. L. Rhodes, former chief justice of the supreme court, subsequently judge of the superior court of Santa Clara county, and now practicing therein, contended that the Cronin case enunciated an incorrect, as well as an inconvenient, if not impracticable, principle, and that the true rule was that applied in the Ortiz case. The points and authorities and opinion in these cases were published in the old "Law Journal" of September 28, 1890, and republished September 29, 1891, and the decree of partial distribution in the Estate of Ortiz to the heirs at law of a daughter dying pending the settlement of the father's estate, prepared by Mr. Pringle, October 1, 1888, was published in "The Recorder" December 16, 1903, as a precedent.

*Decree of Partial Distribution to the Heirs at Law of Virginia Ortiz Turner.*

Daniel Turner, administrator of the estate of Virginia Ortiz Turner, deceased, having heretofore filed herein on the tenth day of July, 1888, a petition for partial distribution of the share or portion of the said Virginia Ortiz Turner of the personal property of the estate of the said Celedonio Ortiz, deceased, in the state of California, upon his giving bonds with security for the payment of the due proportion of the debts of the estate of the said Celedonio Ortiz.

And said petition for distribution coming on this day regularly to be heard, proof having been made to the satisfaction of the court that due and legal notice of the said hearing of the said petition for partial distribution had been given in the manner and for the time heretofore ordered and directed by this court, and it appearing that on the twenty-sixth day of September, 1887, letters testamentary were duly issued to Vicente Cagigal y Pezuela, as the executor of the last will and testament of the said Celedonio Ortiz, deceased, thereinbefore duly admitted to probate, that an inventory of said estate of Celedonio Ortiz had been filed by the said Vicente Cagigal y Pezuela, and appraisement made and filed herein, and it appearing that the publication of notice to the creditors of the said estate of Celedonio Ortiz to present their claims against the said estate was made in accordance with

the order of this court in that behalf duly made herein; and that the first publication of said notice to creditors was made on the fifth day of October, 1887, and it appearing that the said estate of Celedonio Ortiz is but little indebted in the state of California, and that the share of the estate of Virginia Ortiz Turner, as hereinafter described, may now be distributed, without loss to the creditors of the estate of the said Celedonio Ortiz, and it appearing that more than four months have elapsed since the issuance of said letters testamentary to the said Vicente Cagigal y Pezuela, as aforesaid, that the said Virginia Ortiz Turner, a daughter of the said Celedonio Ortiz, deceased, died intestate on the sixteenth day of April, 1887, in the republic of Mexico, being at the time of her death a resident of the city and county of San Francisco, state of California, and leaving estate in said city and county, and that the said estate consists of the interest of the said Virginia in the estate of her father, the said Celedonio Ortiz, who died on the fifth day of April, 1887, that heretofore, to wit, on the eleventh day of June, 1888, Daniel Turner, the husband of the said Virginia, upon due application to this court, was appointed the administrator of the estate of the said Virginia Ortiz Turner and that the said Daniel Turner thereupon duly qualified as such administrator and entered upon the duties of the said administration, and is still the duly qualified and acting administrator of the estate of the said Virginia Ortiz Turner, deceased.

That the said Virginia Ortiz Turner is the same person named in the will of said Celedonio Ortiz, deceased, as an heir and legatee of the said decedent under said last will and testament, and was under the said will entitled to one-eighth ( $\frac{1}{8}$ ) of the estate of the said Celedonio Ortiz, deceased.

And it appearing that a bond in the penal sum of \$2,500 is sufficient to protect creditors of the said estate of Celedonio Ortiz, deceased, from any injury that may arise from the distribution of the hereinafter described personal property.

And it appearing that partial distributions have heretofore been made to all the other devisees of the said Celedonio Ortiz, deceased, of their respective shares of the personal property of the estate of said Celedonio Ortiz, deceased, in the state of California, and that the share of the said per-

sonal property to which the estate of the said Virginia Ortiz Turner is entitled consists of moneys to the amount of \$556.67, and seventy-five (75) shares of the capital stock of the Spring Valley Waterworks, and nine (9) and three-eighths ( $\frac{3}{8}$ ) shares of the capital stock of the California Powder Works, and one-eighth ( $\frac{1}{8}$ ) part of forty (40) shares of the capital stock of the Security Savings Bank or certificate for installment No. 1 on subscription for forty shares of the capital stock of the said Security Savings Bank, and it appearing that there has accrued upon such distributive shares of the said Virginia Ortiz Turner since the said partial distribution to the other devisees dividends on stock as follows, viz.:

Of the Spring Valley Waterworks the sum of.....	\$225.00
Of the California Powder Works the sum of.....	56.34
Of the Security Savings Bank the sum of.....	21.87

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all amounting to the sum of.....\$303.21  
 which have been received and are now held by the said Vicente Cagigal y Pezuela, as the executor aforesaid:

Now, therefore, it is hereby ordered, adjudged and decreed that the said personal property, viz.: The sum of \$556.67, and seventy-five (75) shares of the capital stock of the Spring Valley Waterworks, and nine (9) and three-eighths ( $\frac{3}{8}$ ) shares of the capital stock of the California Powder Works, and one-eighth ( $\frac{1}{8}$ ) part of forty (40) shares of the capital stock of the Security Savings Bank, or certificates for installment No. 1 on subscription for forty shares of the capital stock of the said Security Savings Bank and the following dividends of stock, viz.:

Of the Spring Valley Waterworks the sum of.....	\$225.00
Of the California Powder Works the sum of.....	56.34
Of the Security Savings Bank the sum of.....	21.87

be and the same is hereby distributed to the heirs at law of the said Virginia Ortiz Turner, deceased, and that the possession of the same be given by the said executor to the said Daniel Turner, administrator of the estate of the said Virginia Ortiz Turner in trust for the purpose of the administration of the estate of the said Virginia Ortiz Turner, de-

ceased, and for the heirs at law entitled thereto, upon the said Daniel Turner, administrator, giving the said bond of \$2,500 for the protection of the creditors of the estate of the said Celedonio Ortiz, deceased.

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### ESTATE OF JOEL NOAH, DECEASED.

[No. 2,769; decided November 27, 1885.]

**Homestead—Examination of Title in Setting Apart.**—The superior court, sitting in probate, has power to examine into the title to real estate, so far as to enable it to determine whether property sought to be set aside as a homestead is community or separate property.

**Husband and Wife—Validity of Separation Agreement.**—Deeds for the separation of husband and wife are valid and effectual, both at law and in equity, providing their object be actual and immediate, and not a contingent or future, separation.

**Husband and Wife—Effect of Articles of Separation.**—Articles of separation having been carried into effect in good faith by the husband, and they having been freely entered into, and there being nothing objectionable in them, the wife has no right, upon the husband's death, to claim in character of his widow, it being against equity and good conscience to set up such a claim.

**Homestead—When Waived by Articles of Separation.**—An agreement amounting to a waiver, upon valuable consideration, of every right a wife could have in her deceased husband's estate, is conclusive against all her pretensions, and estops her from claiming a probate homestead as well as any other property right.

**Family Allowance—Test of Widow's Right.**—The right of an applicant for a family allowance may be tested by reference to her relations with the deceased and her right as wife to call on him for maintenance during his lifetime.

**Family Allowance—Relinquishment by Widow.**—When there are no children, the right of a widow to a homestead or family allowance may be treated as a personal privilege, which she can relinquish.

**Family Allowance—Right to, Purely Statutory.**—The right to a family allowance is founded upon the statute alone.

**Family Allowance—Who are Members of Family.**—The statute embraces those who were the immediate family of the deceased—

those who were by law entitled, up to his death, to look to him for support and protection.

**Family Allowance—Waiver by Separation Agreement.**—A wife having by her own act in entering into and carrying out an agreement for separation abdicated her right as a surviving spouse is in no sense a member of her deceased husband's family, and is not in a position to invoke the bounty of the law.

**Homestead—Purpose and Construction of Statute.**—The object of the law creating a homestead is of a humane character, and should be held to apply fairly to all such cases as are within the equity and spirit of the act, but not beyond this.

**Homestead—Statutory Requisites.**—Intended use, adaptation for use, and actual residence, are essentials of a statutory homestead.

**Homestead—What Property may be Set Apart.**—A probate homestead cannot be set apart out of property that could not have been dedicated as a homestead by the parties while living.

**Homestead—Indivisible Property—Separate Estate.**—Where the property out of which it was asked to select a homestead was a building entirely devoted to business purposes, not susceptible of partition, of the appraised value of \$25,000, and the separate property of the deceased husband, it was held that the property not being capable of division would have to be sold, and \$5,000 of the proceeds set apart for the use of the widow; that the property, being separate estate, could be set apart only for a limited period, the title vesting in the heirs, subject to the order; that it does not appear what security the heirs would have for the return of the amount upon the expiration of the period limited, and that for these reasons the application should be denied.

The estate of Noah was in the supreme court in 73 Cal. 590, 2 Am. St. Rep. 834, 15 Pac. 290, and in 88 Cal. 468, 26 Pac. 361. All of the above propositions announced by Judge Coffey were affirmed by the supreme court.

IN THE MATTER OF THE ESTATE AND GUARDIANSHIP OF CHARLOTTE A. LYNCH, AN INCOMPETENT PERSON.

[No. 12,890; decided August 1, 1894.]

**Incompetent Person—Allowance to Adult Son.**—It is competent for the superior court sitting in probate to grant an allowance from the estate of an incompetent person for the support of her adult son.

Petition for allowance to the adult son of an incompetent person under guardianship.

Seth Mann, for the petitioners.

COFFEY, J. The facts set forth in the petitions of Eugene J. Lynch and C. S. Benedict, the guardian of said incompetent, are taken as proved. It is established that Eugene J. Lynch is unable to support himself and is a poor person without any property of his own; that he is the only child of the incompetent, and is twenty-four years of age. That he has always been supported by his mother, and it is her present desire that he continue to be supported out of the funds of her estate, which is ample to provide for her support and for his also, the surplus of annual income after providing for the incompetent being from \$6,000 to \$8,000.

The sole question presented is: Has the court authority to make such an allowance under the laws of this state?

The general rule under which the obligation to support arises is stated in section 206 of the Civil Code. "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding."

The powers and duties of guardians, so far as they are concerned in this question, are defined by sections 1768 and 1770 of the Code of Civil Procedure as follows:

Section 1768: "Every guardian appointed under the provisions of this chapter, whether for a minor or for any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, if suffi-

cient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title for the sale of real estate of decedents."

Section 1770: "Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any."

In the absence of statute and under the original practice when the estates of lunatics were under the jurisdiction of courts of equity, no question could arise as to the propriety of the allowance in the present case. The chancellor was guided by the natural justice of the circumstances and by what the lunatic himself would have done had he been of sound mind. Not only was support granted to his next of kin and those who had a right to look to him for support, but also out of the surplus income of his estate others were granted maintenance who had no legal claim upon him, if it satisfactorily appeared to the chancellor that the lunatic himself would have provided for the support of such persons had he been of sound mind: *In re Willoughby*, 11 Paige Ch. 257; *In re Heeney*, 2 Barb. Ch. 326.

(Adopted adults.) In these cases it usually appears that the lunatic has before the period of his incompetency assumed the duty of support toward the needy persons and by words or actions has indicated an intention to continue such support.

The case of *Ex parte Whitbread*, 2 Mer. 99, is frequently cited. In that case allowances were made to brothers and sisters upon the ground that the lunatic himself would have done so. To the same effect: *In re Frost*, L. R. 5 Ch. App. 699 (needy collateral relatives for whom the lunatic while sane had expressed an intention to make provision).

In *Ex parte Haycock*, 5 Russ. Ch. 154, an allowance was made for illegitimate children.

In these cases the question has always been whether an allowance may be properly granted to collateral kindred and persons whom the lunatic is not legally bound to support. It is conceded without question that a needy adult child or person whom the lunatic is under obligation to support should be maintained out of the surplus income of the estate: See *In re Willoughby*, 11 Paige Ch. 257, *Hambleton's Appeal*, 102 Pa. 50, 55, and cases *supra*. In the absence of statute, therefore, it must be concluded that the allowance in the present case would be an eminently proper one, and far within the powers of the court.

Under the statutes, courts have evinced a disposition to be liberal in construction and to be guided as far as possible by equity rules.

The statute of Pennsylvania is similar to and perhaps more limited and stringent than our own. It provides that the committee of a lunatic "shall, from time to time, apply so much of the income thereof as shall be necessary, to the payment of his just debts and engagements, and the support and maintenance of such person and of his family; and for the education of his minor children": 2 *Brightly's Purdon's Digest*, p. 1128, par. 25.

Under this statute, in *Hambleton's Appeal*, 102 Pa. 50, 53, the facts were as follows: An old man, a widower and without children, having a large estate, took a nephew and his family to live with and take care of him and his estate, paying the nephew a salary, and supporting the nephew and his family as part of his household. Subsequently he became afflicted with senile dementia, though retaining sound physical health, and he was adjudged a lunatic. A committee of his estate was appointed by the court, and the nephew was appointed committee of the person. The latter fulfilled his duties satisfactorily, and, by order of court, received from the committee of the estate a sufficient monthly allowance to continue the household in the same manner as before the lunacy, and also to pay his salary as before. Upon the audit of his account, the auditor and the lower court surcharged him with one-half the cost of food for the household and the

wages of one servant. On appeal the supreme court held that the committee had done what it might reasonably be supposed the lunatic would have continued to do if he had retained his sanity, and what was apparently best adapted for the peace and comfort of the lunatic; and that it was, therefore, error to surcharge the committee with any cost of so maintaining the lunatic's household, including the committee and his family. In this case Gordon, J., in delivering the opinion, said:

"It was the duty of the court of common pleas to appropriate, in accordance with the directions of the act of assembly, so much of the income of the estate of William Neal, the lunatic, as might be sufficient, not only for his own support, but also for the support of his family, and as the income of his estate was ample, sufficient to meet any demand that might be reasonably made upon it, so should the allowance have been large enough to meet both his and their wants. Under such circumstances, it is not the business of the court to arbitrarily interfere and determine who shall constitute the lunatic's family, or what shall be its appointments, for, ordinarily these things have been previously fixed and settled by the lunatic himself at a time when he had both the power and ability to adjust his own affairs. . . .

"What, then, under the circumstances, was the duty of the court? We answer, simply to maintain and carry forward the affairs of William Neal as they were when his mind failed him; to do that which it might reasonably suppose he would have continued to do had he retained his sanity."

And he cites, with approval, the case of *Ex parte Whitbread*, 2 Mer. 99. Thus even under the statute the doctrine of the leading cases is invoked; that is, that the court will do what it may be reasonably supposed the lunatic would have continued to do had he retained his sanity.

In the present case it is plain that Mrs. Lynch would have continued to support her son as she always had done. She has constantly expressed her intention to do so. Before becoming incompetent and in her letter to Mr. C. S. Benedict, her guardian, which is only one of several of the same import, she requests that Eugene be allowed to want for nothing. Eugene is her only child, dependent upon her for sup-

port, and with herself constituting the family which she maintained and supported prior to her insanity.

The statute authorizes the continuance of this support by the guardian (Code Civ. Proc., sec. 1770), and enjoins it generally as a duty upon all persons: Civ. Code, sec. 206. It is to be presumed that Mrs. Lynch, if sane, would have performed this legal and moral duty; and the court under the doctrine of Hambleton's Appeal, *supra*, and *Ex parte Whitbread*, *supra*, will see that the duty is performed after her affliction has rendered her legally incompetent to perform it herself.

The provisions of the code are to be liberally construed with a view to effect its objects and to promote justice: Code Civ. Proc., sec. 4. Such a construction will hardly exclude a helpless son from the "*family*" of his mother: See *Spencer v. Spencer*, 11 Paige Ch. 160.

In *Halsey's Appeal*, 120 Pa. 209, it is said that the family of the lunatic should be supported although they consist of the mistress and illegitimate children of the lunatic. And in *Elwyn's Appeal*, 67 Pa. 367, 369, an allowance of \$240 per annum was made for the support of a helpless sister of the lunatic whom he had always maintained, and although she was not a member of his family in the stricter sense, the allowance is recognized as a just and proper one. These decisions are all rendered under the statute above cited, which provides for the support of the "*family*" of the lunatic.

Family allowances in estates of decedents are specially restricted to minor children: Code Civ. Proc., sec. 1464. They are not so restricted in guardianship matters: Code Civ. Proc., sec. 1770. And the provisions concerning estates of decedents should not be imported into the special provisions concerning guardianship except so far as they relate to practice (Code Civ. Proc., sec. 1808), unless some particular provision is made to that effect: See Code Civ. Proc., sec. 1789.

Comfortable and suitable maintenance and support is provided for by the statute: Code Civ. Proc., sec. 1770. And where the estate is ample, the *comfort* of the ward should be the chief care of the guardian and of the court rather than the hoarding of the income for the heirs of the unfortunate: *Hambleton's Appeal*, 102 Pa. 50, 54.

Will the comfort of Mrs. Lynch be promoted if Eugene is deprived of the means of support she has always given him? If she should learn that he was in want, would it not tend to increase her malady? Her state of mind is clearly shown by the letter written by her to Mr. C. S. Benedict. Her comfort can be secured only by making this allowance to her son. If it is denied, the effect upon her mind and health may be very serious.

There is still another provision of our statute which enjoins the payment of an allowance for his support to Eugene Lynch. Section 1768, Code of Civil Procedure, provides that every guardian "must pay all just debts due from the ward." The words "debts due," like nearly all words, have both a general and special meaning, and are capable of a broad and liberal, or of a narrow and restricted, construction. The construction to be given these words must depend upon the context (Code Civ. Proc., sec. 16), bearing in mind the general rule of liberal construction: Code Civ. Proc., sec. 4.

In its restricted sense a debt due is a fixed sum of money owed upon contract; in its general sense it signifies something owed; all that is due a man under any form of obligation or promise: Bouvier's Law Dictionary. Coke says that *debitum* signifies not only a debt for which an action of debt lies, but generally any *duty* to be yielded or paid: Anderson's Law Dictionary, tit. "Debt." It is any kind of a just demand. One who is under obligation to discharge some *duty*, or to pay damages for its nonperformance, is a debtor, as really as one who is under obligation by bond to pay a sum of money: New Haven Sawmill Co. v. Fowler, 28 Conn. 108. See, also, Newell v. People, 7 N. Y. 124; Kimpton v. Bronson, 45 Barb. 625; Leggett v. Bank of Sing Sing, 24 N. Y. 290; Carver v. Braintree Mfg. Co., 2 Story, 432. See, also, Code of Civil Procedure, section 1643, where the phrase "debts of the estate" is made to include "all other *demands* against the estate." In section 1768, Code of Civil Procedure, the words "debts due" cannot be confined to mere contractual obligations, for then if the guardian's authority is to be measured by this section he could not discharge a claim for damages for the lunatic's tort, although the lunatic is civilly liable therefor: Civ. Code, sec. 41. The guardian's only statutory authority

to pay such a claim is contained in section 1768, Code of Civil Procedure. Therefore, construing these two sections together, we must conclude that the words "debts due" are to be given their broader and more liberal meaning.

Why may we not also construe section 206, Civil Code, and section 1768, Code of Civil Procedure, together? The former imposes a plain legal and moral duty, which has been the law of England since the reign of Queen Elizabeth: Schouler on Domestic Relations, sec. 237.

This duty of parent to a poor and helpless child is a debitum as "justly due" to the child as any obligation evidenced by indenture and seal.

Let us suppose a case: A weak and sickly child, blind, and utterly helpless, has lived to the age of majority under the fostering care of a wealthy mother. The child has no other relatives. She has been, with maternal care, placed in an institution at some distance from her mother's home, in the hope that she may be benefited by expensive medical treatment in a scientific environment. She is the sole heir apparent to her mother's large wealth. Her mother becomes insane. Do the laws of this state declare that this helpless person shall become a beggar, dependent upon public charity, and destined to mental torture perhaps worse than death? The legislature of this state could never have intended such a narrow and stringent construction of the words "debts due" and "family."

A liberal construction "with a view to effect its objects and promote justice," will never effect such an object nor promote such injustice.

In conclusion, a thorough search of the authorities has been made, but the decisions are few. All of the American and most of the English cases are herein cited, and no cases have been found which in the slightest degree weigh against the making of the allowance in question, all of the decisions being based upon or influenced by the liberal doctrine of equity.

## ESTATE OF JOSEPH EMERIC, DECEASED.

[No. 8,672; decided November 8, 1890.]

**Charity.**—A Legacy for the Restoration of an Old Church and a town hall is a charitable use.

**Charity.**—The Term "Charity" is a Broad One, and may be applied to almost anything that tends to promote the general well-being and well-doing of the human race.

**Charity—Gift Within Thirty Days of Death.**—A legacy for a charitable use, contained in a will executed within thirty days of the testator's death, is void under section 1313 of the Civil Code.

E. J. Pringle, for the executors.

COFFEY, J. The question is whether the bequest in Joseph Emeric's will to the town of Neoules, Department of Var, France, for the restoration of the old Roman Catholic Church and the Town Hall, is valid under the laws of California.

Section 1313 of the Civil Code of California contains a restriction upon the power of devising property or money to charitable uses, and reads as follows: "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. . . . 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."

Joseph Emeric died on the twenty-second day of June, 1889, and his will bears date of June 7, 1889. If, therefore, the legacy to the town of Neoules comes within the meaning of "charitable uses" under this section of the code, it is void, and would not be upheld by our courts. From an examination of the authorities I am satisfied that the legacy in question is a "charitable use," and therefore falls within the inhibition of the statute.

The term "charity" is a broad one, and has been held to mean any general public use. It may be applied to almost

anything that tends to promote the general well-being and well-doing of the human race: *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. ed. 450.

To ascertain the scope and meaning of the term "charity" recourse is usually had to the statute of 43 Elizabeth, chapter 4, which enumerates various kinds of charitable uses. Whether or not that statute was adopted as the common law in California, it is referred to by the American courts as throwing great light on the question of what bequests are to be considered as charitable within the meaning of the American codes and statutes, and most of the objects denominated therein as charitable had been recognized by the common-law cases decided before the statute. Among the things declared to be charitable uses we find—beside hospitals, homes, refuges and other obviously charitable objects—schools of learning, scholarships in colleges, education and assistance of tradesmen; the repair and maintenance of bridges, causeways, highways, harbors, forts, *churches* and *public buildings*. And in *Am. Asylum v. Phoenix Bank*, 4 Conn. 172, 10 Am. Dec. 112, it was said that this enumeration contained in the statute of Elizabeth is not exhaustive, and that "charity" extends to all objects within the spirit and policy of the law.

In two English cases it has been held that gifts of money to be expended in the "general improvement of particular towns" comes under these bequests for charitable purposes: *Howse v. Chapman*, 4 Ves. 542; *A. G. v. Heelis*, 2 Sim. & S. 67.

In a recent case the United States supreme court held that where a sum of money was given to trustees "to keep and preserve as a public edifice" a house of the testator containing books and works of art, "to be opened on certain days to the general public as a library and art-room," the bequest was one for charitable uses: *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

In *Coggeshall v. Pelton*, 7 Johns. Ch. 292, 11 Am. Dec. 471, a legacy was left to the town of New Rochelle, for the purpose of erecting a town hall for the transaction of the general town business; held, this was a "charity" in the legal sense of the word.

From an examination of these and other authorities I feel that there can be no doubt that the legacy in Joseph Em-

erie's will to the town of Neoules "to be expended as follows, to wit: \$5,000 thereof to be expended under the directions of the majority of the members of the Town Council in restoring and repairing the old Roman Catholic Church and the building used as a Town Hall in said town, and the other \$5,000 to be paid out and distributed among the most worthy and deserving poor of the said town according to the voice of the majority of the Town Council," is a bequest for charitable uses; and, as the will was not executed thirty days before his death, this clause is clearly void under the provision of the code above quoted, and would not be enforced in our courts.

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**As to What Constitutes a Charity**, see the note in 63 Am. St. Rep. 248. Section 1313 of the California Civil Code, restricting testamentary gifts to charities, applies to gifts to religious societies: *Estate of Hewitt*, 94 Cal. 376, 29 Pac. 775; and also to the state university: *Estate of Royer*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; *People v. Jeffers*, 126 Cal. 296, 301, 58 Pac. 704.

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#### ESTATE OF DAVID GOODALE, DECEASED.

[No. 1,029; decided April 6, 1891.]

**Homestead.—It is Because of Her Status that a Widow becomes the object of the law's beneficence.**

**Homestead.—A Widow Failing to Apply for a Probate Homestead Before Remarrying loses her right to a homestead out of her first husband's estate upon marrying a second time.**

Application by Ellen E. Stouder, formerly widow of David Goodale, and subsequently married to John Stouder, also deceased, for a homestead. Opposed by children of Goodale.

J. H. Gove, for the petitioner.

Wm. A. Plunkett and E. H. Wakeman, for Goodale children.

COFFEY, J. Mrs. Ellen E. Stouder, the widow of John Stouder, petitions for a homestead in the estate of David Goodale. Mrs. Stouder was the widow of David Goodale before her marriage to Stouder.

Petitioner claims that statutes, such as that under which a probate homestead is given, should receive a broad and liberal construction. This is admitted; but the construction for which petitioner contends would be a perversion. We must construe the statute as it stands; not substitute a statute by a strained and false construction. To pursue the latter course would be to perpetrate a dangerous and vicious piece of judicial legislation.

To show the liberality with which our supreme court have interpreted the homestead law, petitioner quotes a passage from Smyth on Homesteads, in which a case (probably *Clements v. Stanton*, 47 Cal. 60) is alluded to, where it was decided that a declaration of homestead by a married woman was properly acknowledged, although not acknowledged as a conveyance of her separate real property by a married woman was required to be acknowledged. But the homestead law did not require a *declaration* to be acknowledged by a married woman, as she was required to acknowledge a conveyance of her separate real property. The same law, however, did require the abandonment of homestead to be so acknowledged. The court's construction of the law seems to be the only reasonable construction.

Petitioner's second point is a contention that any construction of the statute which bases the widow's right to a (probate) homestead upon her status as widow is too narrow. But it is because of her status that she becomes the object of the law's beneficence. It must be remembered that we are now considering a widow's right to a probate homestead. Unless the status of widow is established, the court is powerless.

As the court is compelled to set apart a homestead to the widow when her status is proved, so the court is compelled or constrained to refuse a homestead when that status cannot be shown to exist.

While the petitioner was the widow of David Goodale she had an unquestionable right to apply for a homestead. It

is not the fault of the law or of the court that she neglected to exercise that right.

Petitioner now, as the widow of John Stouder, has an indisputable right to apply for a homestead from the estate of Mr. Stouder.

Whether Stouder has left a large estate, a small estate, or any estate at all, cannot affect the decision of the legal question involved in petitioner's application.

In petitioner's brief it is claimed by counsel that the principle enunciated by this court in the Estate of Pickett, and which principle was followed in two decisions by our supreme court, has no application to the case at bar.

But this court decided in the Estate of Pickett (1) that "widow" and "surviving wife" are synonymous terms; and (2) that when a widow marries a second time she ceases to be the widow of her first husband. The decision in the Estate of Pickett on these two points is directly applicable to the case at bar.

Petitioner's brief claims that there is nothing in section 1465, Code of Civil Procedure, or in any other section of the code, basing the right to a homestead on the status of widow.

But our supreme court has decided that a woman's right to apply for a probate homestead depends upon her status of widow: Estate of Boland, 43 Cal. 642; Estate of Moore, 57 Cal. 442-444.

Petitioner's point that the same condition of things exists now which existed at the death of David Goodale, and that "petitioner is clearly entitled to her homestead," is answered by the suggestions already made and the authorities already cited.

Petitioner assumes that a widow's right to hold more than one homestead is questioned in this proceeding. It is not asserted here that the same woman cannot receive more than one homestead. The law gives her the right to apply for a homestead whenever she is a widow. But the application must be made each time in the estate of the last husband.

Petitioner's counsel cites *Miles v. Miles*, 46 N. H. 261, 88 Am. Dec. 208, to show that "surviving wife" and "widow" are terms of description only, not terms of limitation. *Miles*

v. Miles is not in point. It is a decision construing a statute very unlike ours. But if it were in point it would be overcome by the decisions in the Estate of Pickett, in the Estate of Moore and in the Estate of Boland, already cited.

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**A Widow Who Remarries** thereby loses her right to have a homestead carved out of the property of her deceased husband, as well as her right to any further allowance: Estate of Still, 117 Cal. 509, 49 Pac. 463; Estate of Boland, 43 Cal. 640. If a wife whose husband has been absent and not known to be living for more than five years, and whom she believes to be dead, contracts a second marriage, it, until annulled, is valid and prevents her from having a homestead set aside to her out of the estate of the first husband after his decease, although, upon hearing that he was not dead, she ceased cohabiting with her second husband: Estate of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000, 74 Pac. 136.

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IN THE MATTER OF THE ESTATE OF ANNIE COLLINS, DE-  
CEASED.

[No. 2,341; decided April, 1909.]

**A Homestead Selected by the Husband** in his lifetime from the community estate vests absolutely in his surviving wife, under the provisions of section 1474 of the Code of Civil Procedure.

**Homestead—Continuance on Death of Husband.**—The homestead as selected by the husband continued so long as it remained a homestead. It ceased to exist upon the death of the widow, leaving no issue and became subject to her testamentary disposition, and she having died intestate, passed to her heirs, under the laws of succession.

**Homestead—Who are Heirs of Survivor.**—The homestead, upon vesting in the survivor, becomes her separate estate, subject to the homestead protections, and she having died intestate, the homestead ceased and the title to the property passed to her heirs under the provision of subdivision 3 of section 1386 of the Civil Code, and not under the

provisions of subdivision 8 of said section of the Civil Code as it was in existence at the time of the death of the survivor.

Eugene D. Sullivan, for the heirs of decedent.

John Cotter Quinlan, for the heirs of predeceased spouse of decedent.

Edward J. Lynch, for the public administrator.

Judge Coffey rendered no written opinion in this case, but the syllabi, approved by him, state the points adjudicated.

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ESTATE OF EUGENE ZEILE, DECEASED.

[No. 5,125 (N. S.); decided February 1, 1910.]

**Olographic Will—Attesting Witnesses.**—A will properly executed in olographic form is entitled to probate as such, although it is witnessed and although the testator believed attestation necessary and intended the execution to be in the attested form.

**Will.—The Term "Subscribing Witness"** as used in Civil Code 1282, is synonymous with "attesting witness," as used in Civil Code, 1276, and has no reference to olographic wills.

**Olographic Wills were First Permitted in California** by the Civil Code of 1872, the provisions being adopted from the civil law.

**Olographic Will—Legatee as Witness.**—A gift to a legatee by an olographic will is not invalidated by his signing the instrument as a witness. Section 1282 of the Civil Code has no application to olographic wills.

Nathan M. Moran, for assignee of a legatee whose name was subscribed as a witness to an olographic will.

COFFEY, J. A will properly executed in the olographic form is entitled to probate as such, even though witnessed, and even though the testator believed the attestation essential and intended the execution to be in the attested form: Estate of Fay, 1 Cof. Pro. Dec. 428, and note; Estate of Soher, 78 Cal. 477, 21 Pac. 8; Estate of Dama, ante, p. 24.

The will of Eugene Zeile was not attested in due form of law and was admitted to probate solely as an olographic will: (See Certificate of Proof of Will; Order Admitting Will to Probate.)

The record in this proceeding therefore shows that there were no subscribing witnesses to this will in the sense in which that term is used in Civil Code, 1282.

The term "subscribing witness," as used in Civil Code, 1282, is synonymous with "attesting witness," as used in Civil Code, 1276, and has no reference whatever to olographic wills.

The words "subscribing witness," used exclusively in Civil Code, 1282, suggest that the legislature intends a broader operation to be given that section in contradistinction to the terms "attest" and "attesting witness" employed throughout Civil Code, 1276.

A glance at the history of the legislation, however, shows the opposite to be true:

Civil Code, 1282, is a verbatim re-enactment of section 5 of "An act concerning wills," passed April 10, 1850: Stats. 1850, page 177; Code Commissioner's note to Civ. Code, 1282; Hammond & Burch's Annotated Code of 1872.

The term "subscribing witness" has reference to section 3 of the same act, which is as follows:

"§ 3. No will, except such nuncupative wills as are mentioned in this act shall be valid, unless it be in writing and signed by the testator or by some person in his presence, and by his express direction, and *attested* by two or more competent witnesses *subscribing their names to the will*, in the presence of the testator."

It is here to be noted that our statutes at that date *made no provision for olographic wills*.

Olographic wills were first permitted in California by the Civil Code of 1872, the provisions being adopted from the civil law, as shown by the code commissioner's note to Civil Code, 1277.

"1277. An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed. (NOTE—Code Civil, p.

970; 5 Toullion, N. 357; 1 Stu. Low., c. 327; 2 Bouvier Inst., N. 2139; La. Civ. Code, art. 1581. The tendency of the courts to recognize the desires of decedents, however informally expressed, as shown in note to sec. 1317, post, is one reason for the adoption of this section; and while it obviates many difficulties and annoyances, may not, and, indeed, it is confidently claimed in those countries where olographic wills are recognized, does not give rise to as many attempts at fraudulent will making and disposition of property as where it does not exist; simply because the testator's intentions are unknown.)”

In framing their provision for the attestation of wills, the code commissioners adopted with slight changes the more detailed provisions of David Dudley Field's Proposed Civil Code of New York, in which the term “attesting” is in each instance applied to the witnesses, in place of the less technical term “subscribing” used in section 3 of the act of 1850 quoted above: Proposed Civil Code of N. Y. (1865), sec. 550. The Field Code made no provision for olographic wills.

Civil Code, 1282, having therefore been preserved intact from a statute enacted over thirty years before olographic wills were recognized, it is plain that there was no intention on the part of the legislature *ex industria* to make that section applicable to a superfluous witness to an olographic will. *On the contrary, the intention of the framers of the Civil Code was “to recognize the desires of decedents, however informally expressed.”*

The history of the disability of a witness to a will to take as a legatee or devisee thereunder, as having its basis in the common-law rule excluding an interested witness from testifying, leading to the result of invalidating many wills until legislation in England and in this country altered the situation by invalidating the gift and thus restoring the competency of the witness—is a familiar one, fully treated in the standard text-books, and need not be further noted here.

The next step in legislation and decision was *to remove the witness' disability to receive the gift provided the will could be proved by other competent evidence*: *Caw v. Robertson*, 5 N. Y. 125; *Cornwell v. Woolley*, 1 Abb. Ct. of App. Dec. 441, 43 How. Pr. 475, 47 Barb. 327; *Matter of Owen*, 48 App.

Div. 507, 62 N. Y. Supp. 919; 26 Misc. Rep. 179, 56 N. Y. Supp. 853.

From the brief history of legislation in California noted above, it is evident that the intention of our lawmakers was to accomplish the result reached in New York and nothing more.

Testation in the present case was complete when the instrument had been entirely written, dated and signed by the hand of the testator himself. Nothing subsequently done by the legatee would add anything to its provisions or validity. It is no less reasonable to contend that an act of his could invalidate a gift to him any more than that he could invalidate the testator's whole will.

A minute search among the authorities fails to bring to light any exact precedent which would control the present case. This is undoubtedly due to the fact that olographic wills have been permitted in comparatively few jurisdictions.

An exactly parallel case is, however, to be found among the decisions on nuncupative wills.

The analogy is so strong in every particular that a portion of the decision (*Smith v. Crotty*, 112 Ga. 905, 38 S. E. 110) may be quoted with advantage: "This case, as here presented, turns upon the question whether or not a legacy given by a nuncupative will is void when the legatee is one of the essential witnesses by whose oaths the making of such will must be proved in conformity to the requirements of section 3349 of the Civil Code. Where a nuncupative will embraces nothing except a bequest of the testator's entire estate to a single person, it would of course result that, if the legacy be void, the will itself should be regarded as a nullity, and therefore not entitled to probate. The determination of the question stated depends upon whether or not section 3275 of the Civil Code applies to nuncupative wills. That section embraces the following provision: 'If a subscribing witness is also a legatee or a devisee under the will, the witness is competent, but the legacy or devise is void.' If the language just quoted is applicable to a nuncupative will, a legacy or devise in such a will is void if the testimony of the legatee or devisee is indispensably necessary to proving the making of the will; and, as above indicated, if the will contains nothing but a declara-

tion that such person shall be the sole beneficiary thereof, it cannot be admitted to probate. On the other hand, if the section just mentioned has reference exclusively to written wills, it will follow, as we shall presently undertake to show, that a nuncupative will may be good even though a legatee thereunder is an essential witness to prove the making thereof; and also that he cannot be deprived of his legacy. After careful consideration we have reached the conclusion that this section applies to written wills only. The use of the words 'subscribing witness' strongly indicates that this is so. What is a 'subscribing witness'? Clearly, one who writes his name under an attesting clause: Black's Law Dictionary, 1131; 2 Bouvier's Dictionary, 1059; 2 Abbott's Law Dictionary, 512; 2 Rapalje and Lawrence's Law Dictionary, 1230, and Law Dictionary, 985": *Smith v. Crotty*, 112 Ga. 905, 38 S. E. 110.

Incompetency of a witness by reason of interest save in respect of attested wills has been expressly abolished in California: Code Civ. Proc. 1879.

If, therefore, the legacy to the witness Fargue is to be invalidated in the present case, it will be solely on the authority of Civil Code, 1282. This section, as we have seen from the history of its enactment, has no possible application to olographic wills. The reasoning of the supreme court of Georgia in the case last cited based on construction of terms alone leads most forcibly to the same conclusion.

Distribution decreed to assignee.

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**Olographic Wills** are discussed in the note to *Estate of Fay*, 1 Cof. Pro. Dec. 432.

**Attestation and Witnessing of Wills** are discussed in the note to *Estate of Fleishman*, 1 Cof. Pro. Dec. 24.

## ESTATE OF JEAN CLAUDE LE CLERC, DECEASED.

[No. 961; decided February 5, 1887.]

**Claim Against Estate—Presentation and Adjudication.**—After presentation and allowance by the administratrix, and approval by the judge, a claim in this case was, upon order to show cause, ordered paid. The administratrix contested this order upon the ground that since the allowance of the claim judgment had been recovered against her by a third person for part of the claim. The claim not having been paid, a second application for an order for its payment was made. The administratrix contested this application and alleged that since the first order she had paid the judgment before mentioned, and she sought to set up this payment as a counter-claim. It was held that the former order covered the subject matter of the claim, was a full and final determination thereof, and a bar to the application to allow the setoff.

Dunne &amp; Morbio, for Le Maitre.

Edward C. Harrison, for the administratrix.

**STATEMENT OF CLAIMS AGAINST ESTATES OF DECEDENTS.****Form and Requisites of Statement.**

**General Requisites of Statement.**—The law does not prescribe any special form in which claims against the estate of a decedent must be stated. A statement is sufficient, without any particular formality, which will distinguish the claim from other similar claims, and inform the executor or administrator and the probate judge of the nature and the amount of the claim so as to enable them to act and pass advisedly upon it. The facts on which the claim is founded may be stated in general terms; and while they should be stated clearly, distinctly and concisely, they need not be recited with the precision and particularity of a complaint: *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *Appeal of Mead*, 46 Conn. 417; *Henderson v. Ilsley*, 19 Miss. (11 Smedes & M.) 9, 49 Am. Dec. 41; *Lenk Wine Co. v. Caspari*, 11 Mo. App. 382; *Walker v. Gay's Estate*, 73 Mo. App. 89; *Douglass v. Folsom*, 21 Nev. 441, 33 Pac. 660; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; *Little v. Little*, 36 N. H. 224; *Goltra v. Penland*, 42 Or. 18, 69 Pac. 925; *Trigg v. Moore*, 10 Tex. 197. Other cases supporting these rules are *Halfman's Exr. v. Ellison*, 51 Ala. 543; *Appeal of Merwin*, 72 Conn. 167, 43 Atl. 1055; *Hannum v. Curtis*, 13 Ind. 206; *Noble v. McGinnis*, 55 Ind. 528; *Stapp v. Messeke*, 94 Ind. 423; *Culver v. Yundt*, 112 Ind. 401, 14 N. E. 91; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 241; *Worley v. Hineman*

(Ind. App.), 29 N. E. 570; *Pickrell v. Hiatt*, 81 Iowa, 537, 46 N. W. 1062; *Hayner v. Trot*, 46 Kan. 70, 26 Pac. 415; *Schlee v. Darrow's Estate*, 65 Mich. 362, 32 N. W. 717; *Coots v. Morgan's Admr.*, 24 Mo. 522; *State v. Seehorn*, 139 Mo. 582, 39 S. W. 809; *In re Weeks*, 23 App. Div. 151, 48 N. Y. Supp. 908; *Hansell v. Gregg*, 7 Tex. 223.

Nevertheless, the law requires that claims be stated and described with such fullness and certainty as to apprise the personal representative of the decedent and the probate court of the facts involved, to the end that they may properly discharge their trust and defend the estate against unjust demands: *Floyd v. Clayton*, 67 Ala. 265; *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466; *Carter v. Pierce*, 114 Ill. App. 589; *Dorsey v. Burns*, 5 Mo. 334; *Corson v. Waller*, 104 Mo. App. 621, 78 S. W. 656. It is said that the statement should so describe the claim that it may be distinguished from all similar claims: *Bibb v. Mitchell*, 58 Ala. 657. In Connecticut there is a rule requiring, in case of appeal from the proceedings of commissioners on estates in passing upon claims, "a statement of the amount and nature of the claim, and of the facts on which it is based," to be filed. Under this rule it has been held that a simple statement of a claim as an indebtedness, "To cash, \$1,700," is in proper form: *Appeal of Corr*, 62 Conn. 403, 26 Atl. 478.

The rule prevailing in Indiana is, that the statute does not require a regular complaint constructed according to the ordinary rules of pleading, but merely a succinct statement sufficient to advise the executor or administrator of the nature of the claim and the amount demanded, and sufficient also to bar another action on the same demand: *Crabb v. Atwood*, 10 Ind. 322; *Thompson v. Ristine*, 13 Ind. 459; *Post v. Pedrick*, 52 Ind. 490. The creditor is required to file only a succinct and definite statement of his claim, embracing therein those facts essential to make a *prima facie* showing of a subsisting indebtedness against the estate. But such a showing, at least, he must make. He must set forth such facts as are essential to constitute a *prima facie* claim, such as *prima facie* show the estate lawfully indebted to him: *Huston v. First Nat. Bank*, 85 Ind. 21; *Moore v. Stephens*, 97 Ind. 271; *Walker v. Heller*, 104 Ind. 327, 3 N. E. 114; *Culver v. Yundt*, 112 Ind. 401, 14 N. E. 91; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455; *Stanley's Estate v. Pence*, 160 Ind. 626, 66 N. E. 51, 67 N. E. 411; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Cooper v. Griffin*, 13 Ind. App. 212, 40 N. E. 710.

Indefiniteness and uncertainty in the statement of a claim may be aided by the accompanying affidavit: *Stewart v. Small*, 11 Ind. App. 100, 38 N. E. 826; *Hyatt v. Bonham*, 19 Ind. App. 256, 49 N. E. 361.

**Necessity of Following Rules of Pleading.**—The law does not contemplate that the technical rules of pleading shall be observed in stating claims against estates of decedents. No formal complaint

or pleadings are necessary. It is enough that the requirements stated in preceding paragraphs are observed: *Flinn v. Shackleford*, 42 Ala. 202; *Floyd v. Clayton*, 67 Ala. 265; *Stewart v. Cantrall*, 6 Blackf. 74; *Hannum v. Curtis*, 13 Ind. 206; *Ginn v. Collins*, 43 Ind. 271; *Wright v. Jordan*, 71 Ind. 1; *Davis v. Huston*, 84 Ind. 272; *Hileman v. Hileman*, 85 Ind. 1; *Davis v. Watts*, 90 Ind. 372; *Stapp v. Messeke*, 94 Ind. 423; *Windell v. Hudson*, 102 Ind. 521, 2 N. E. 303; *Stricker v. Barnes*, 122 Ind. 348, 23 N. E. 263; *Wolfe v. Wilsey*, 2 Ind. App. 549, 28 N. E. 1004; *Brown v. Sullivan*, 3 Ind. App. 211, 29 N. E. 453; *Sheeks v. Fillion*, 3 Ind. App. 262, 29 N. E. 786; *Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709; *Parrett v. Palmer*, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713; *Cooper v. Griffin*, 13 Ind. App. 212, 40 N. E. 710; *Gibbs v. Ely*, 13 Ind. App. 130, 41 N. E. 351; *Thornburg v. Buck*, 13 Ind. App. 446, 41 N. E. 85; *Woods v. Matlock*, 19 Ind. App. 364, 48 N. E. 384; *Hyatt v. Bonham*, 19 Ind. App. 256, 49 N. E. 361; *Walker v. Gay's Estate*, 73 Mo. App. 89; *Monumental Bronze Co. v. Doty*, 99 Mo. App. 195, 73 S. W. 234, 78 S. W. 850; *Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994. It has been said that statements of claims in probate courts are on a footing with complaints in causes originating before justices of the peace: *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456.

A claimant need not aver in what capacity, whether as a corporation, a partnership, or person, it acts in presenting the claim, as is required by statute of Iowa in ordinary actions, at least not unless objection is made by motion: *University of Chicago v. Emmert*, 108 Iowa, 500, 79 N. W. 285.

**Necessity of Writing.**—Administration statutes contemplate that claims against the estate of a decedent shall be presented in writing, and have a tangible form and substance which will enable the executor or administrator to act intelligently upon them. A mere verbal statement of a claim does not satisfy the requirements of the law: *Millett v. Millett*, 72 Me. 117; *Williams v. Gerber*, 75 Mo. App. 18; *King v. Todd*, 27 Abb. (N. C.) 149, 15 N. Y. Supp. 156; *In re Morton's Estate*, 7 Misc. Rep. 343, 28 N. Y. Supp. 82. Although the statutes may not positively demand that claims shall be put in writing, nevertheless there obviously is no other proper manner for placing them before the personal representative of the decedent and the probate judge: *Pike v. Thorp*, 44 Conn. 450.

**Itemizing Accounts.**—It is said that an executor may allow a claim against the estate which he is satisfied is just if found to be correct, although it is not made out in an itemized form: *Lancaster v. Gould*, 46 Ind. 397; *Kinnan v. Wight*, 39 N. J. Eq. 501. And an account stated may be presented without specifying the items: *Estate of Swain*, 67 Cal. 637, 8 Pac. 497. Yet it has been affirmed that a claim based upon an account should give the items in detail, and not simply a statement of the balance: *Roethlisberger v. Caspari*, 12 Mo. App.

514; and that in case of an open account, the items composing it, with the respective dates and amounts, should be stated: *McHugh v. Dowd's Estate*, 86 Mich. 412, 49 N. W. 216. A statement in a plain and formal manner of the items of an account, duly verified, is sufficient: *Dodds v. Dodds*, 57 Ind. 293; *Ramsey v. Fouts*, 67 Ind. 78. A demand consisting of several items must be presented in its entirety for allowance, and not piece-meal: *Pfeiffer v. Suss*, 73 Mo. 245. But if one item is well stated, the complaint is not demurrable because of the insufficiency of other items of the claim: *Sheeks v. Fillion*, 3 Ind. App. 262, 29 N. E. 786.

**Stating Claims for Services.**—A statement for work and labor which sets forth that the services were rendered, by whom and for whom rendered, the nature, extent and value of the services, together with an affidavit that the amount stated is justly due and owing is sufficient: *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Wood v. Land*, 35 Mo. App. 381. A claim presented for services rendered, stating the number of days' service in each month, the total for each year, and the grand total for all, with the wages per day, stating the full amount, and then crediting the amounts received on account during each year, leaving a certain balance, is sufficient: *Ducan v. Thomas*, 81 Cal. 56, 22 Pac. 297. A claim showing to whom it is payable, and that it is for board, washing, fuel and attention during certain years at a specified amount per month for a specific number of months, is sufficiently definite: *Borum v. Bell*, 132 Ala. 85, 31 South. 454. To the same effect, see *Stewart v. Small*, 11 Ind. App. 100, 38 N. E. 826. A statement in a claim for "services in the care and aiding and supporting" the decedent's sister and minor children, is sufficiently broad to embrace a contribution of money: *Grimm v. Taylor's Estate*, 96 Mich. 5, 55 N. W. 447. If the claim is for services rendered to the decedent under an agreement for payment when she sold certain land which has not been sold, the claim is not defective because it does not describe the land: *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24. Presenting a claim "for services rendered the decedent at her request" is not a presentation of a claim for services rendered in consideration of the promise of the deceased to make a will in the claimant's favor: *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45.

A claim for services rendered by a married woman while living with her husband is community property, and should be presented in his name. But where such a claim, verified by the wife, is presented in her name by the husband, and is rejected, and an action is subsequently brought thereon by them, a judgment in their favor will not be reversed on account of the informality in the manner of the presentation: *Smith v. Furnish*, 70 Cal. 424, 12 Pac. 392; approved in *Sixta v. Heiser*, 14 S. D. 346, 85 N. W. 598.

A claim for medical services need not allege that the physician who rendered them was licensed as required by law: *Cooper v. Griffin*, 13 Ind. App. 212, 40 N. E. 710.

**Waiver of Insufficiency of Statement.**—Where no objection is made by the executor or administrator against the sufficiency of the form in which a claim is stated he may be deemed to have waived the insufficiency. If he relies on defects in form in refusing to allow a claim, he should make known his objection seasonably: *Brown v. Forst*, 95 Ind. 248; *Waltemar v. Schnick's Estate*, 102 Mo. App. 133, 76 S. W. 1053; *Ross v. Knox*, 71 N. H. 249, 51 Atl. 910; *Merino v. Munoz*, 99 App. Div. 201, 90 N. Y. Supp. 985; *Aiken v. Coolidge*, 12 Or. 244, 6 Pac. 712. As to the waiver of the absence or insufficiency of the verification of a claim, see post, p. 306. To quote from *Britain v. Fender*, 116 Mo. App. 93, 92 S. W. 179: "The demand must be in writing and must state the amount and nature of the claim with a copy of the instrument of writing or account, upon which the claim is founded. These requisites are all jurisdictional, and, if the claimant fails to perform any of them, neither the probate court in the first instance, nor the successive courts to which an appeal may be prosecuted, obtains jurisdiction over the cause. But, to confer jurisdiction, no more is required of the claimant than the identification of his claim, in the exhibition thereof, to the extent that the administrator may be apprised of its amount and origin and thus be enabled to investigate it intelligently, and that a recovery upon it may operate as a bar to any other action based upon the same cause. With these purposes accomplished, the court acquires jurisdiction over the demand, and notwithstanding it may be meager, and to some extent indefinite, in statement, if the administrator is satisfied to go to trial upon the merits without first moving to have it made more definite and certain, he waives all such defects, and will not be heard to object to them, especially after verdict."

#### **Matters Necessary to Set Forth.**

**Justness of Claim.**—The statutes generally provide that a claim which is due when presented to the executor or administrator must be supported by an affidavit of the claimant or some one on his behalf that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same: Cal. Civ. Code, sec. 1494; Ariz. Rev. Stats., sec. 1743; Idaho Rev. Stats., sec. 5464; Mont. Code Civ. Proc., sec. 2604; Okl. Rev. Stats., sec. 1620; Wyo. Rev. Stats., sec. 4750. Without an affidavit of the justness of the claim it is not properly authenticated nor duly presented: *Green v. Brooks*, 25 Ark. 318; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 52 S. W. 87; *Thurber v. Miller*, 14 S. D. 352, 85 N. W. 600. In Kentucky the claim must also be verified by another person than the claimant, who must state in his affidavit that he believes the claim to be just and correct and give the reasons for his belief: *Dewhurst v. Shepherd's Exr.*, 102 Ky. 239, 43 S. W. 253. An affidavit to a claim which is actually owing, but not then payable, is not false in stating that the claim is "due," since the word is

here used in its primary sense of "owing": *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 Pac. 951.

**Credits, Payments, Offsets, Security and Usury.**—Administration statutes usually provide that a claim presented to an executor or administrator, must be supported by affidavit that no payments have been made thereon which are not credited and that there are no offsets to the same: See statutes cited in preceding paragraph; *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97. This statutory requirement must be at least substantially complied with in order to entitle the claim to allowance: *Perkins v. Onyett*, 86 Cal. 348, 24 Pac. 1024; *Cecil v. Rose*, 17 Md. 92; *Walters v. Prestidge*, 30 Tex. 65; but a substantial compliance with the statute is enough: *State v. Collins*, 16 Ark. 32; *Griffith v. Lewin*, 129 Cal. 596, 62 Pac. 172; *Merchants' Bank v. Ward's Admr.*, 45 Mo. 310; *Gaston v. McKnight*, 43 Tex. 619. The rule, as expressed in some jurisdictions, is that the affidavit must show what amounts, if any, have been paid, and any debts due from the claimant to the estate: *Brown v. Brown*, 45 S. C. 408, 23 S. E. 137. A verification stating that the sum is justly due, that no payments have been made thereon which are not credited, and that there are no offsets except some small items the exact amount of which is not known to the affiant, but which she is willing to have credited upon the same, is sufficient, since the exception is as definite as the claimant can truthfully make it: *Guerin v. Joyce*, 133 Cal. 405, 65 Pac. 972. An affidavit presenting a note with credits indorsed thereon is not defective in not stating the amount claimed to be due: *Waltemar v. Schniek's Estate*, 192 Mo. App. 133, 76 S. W. 1053.

An affidavit to a claim presented by an administratrix is insufficient if it does not state that no payments have been made: *In re Clapsaddle's Estate*, 4 Misc. Rep. 355, 24 N. Y. Supp. 313.

A claimant is not required to specify in his affidavit an independent demand due from him to the estate which the administrator may or may not plead as a counterclaim at his option: *Osborne v. Parker*, 66 App. Div. 277, 72 N. Y. Supp. 894. And the Missouri statute requiring a claimant to make affidavit that all just credits and offsets have been allowed does not apply in case the claim is made as a counterclaim by the creditor in an action in another court than the probate tribunal to establish a claim against him in favor of the estate: *Stiles v. Smith*, 55 Mo. 363.

The statutory provision that the credits to which the estate is entitled shall be set forth in the claim is complied with where the credit is not itemized but is stated in gross: *Miller v. Eldridge*, 126 Ind. 461, 27 N. E. 132. But in Delaware, under the rule that the claim must disclose all credits within the plaintiff's knowledge, it has been held not sufficient to make a general reference to the defendant's books for credits: *Lolley v. Needham's Exrs.*, 1 Harr. 86.

The statutes of some states require that the affidavit shall state that there is no setoff or discount: *Worthley's Admr. v. Hammond*, 76

Ky. (13 Bush) 510; *Ex parte Hanks*, Dud. Eq. 231; or any usury therein: *Leach v. Kendall's Admr.*, 76 Ky. (13 Bush) 424; *Cheairs' Exrs. v. Cheairs' Admrs.*, 81 Miss. 622, 33 South. 414. A "setoff" is not a "discount" within this rule, and hence the claimant must swear both that there is no setoff and no discount, otherwise his claim is not well presented: *Trabue's Exr. v. Harris*, 58 Ky. (1 Met.) 597.

In some of the states the affidavit should state, if such is the case, that no security has been received for the payment of the debt: *Smoot's Admr. v. Bunbury's Exr.*, 1 Har. & J. 136; *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97.

**Particulars of Unmatured or Contingent Claims.**—Some states have a statutory provision that if the claim is not due when presented, or is contingent, the particulars of the claim must be stated, but no affidavit is necessary: *Verdier v. Roach*, 96 Cal. 467, 31 Pac. 554. Where a decedent had contracted to take certain shares of stock at a certain time, the presentation to his administrator of a verified claim for the price agreed, including a copy of the contract, and an offer to surrender the certificate, is a sufficient statement of the "particulars of the claim": *Maurer v. King*, 127 Cal. 114, 59 Pac. 290. And where a claim is for services rendered to the decedent under an agreement that they should be paid when she sold certain land, which she did not sell, the claim is not defective because it fails to describe the land: *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24. A promissory note, whether matured or not, requires no statement of particulars other than that found upon its face. Hence a claim based thereon is sufficient if it contains a copy of the note followed by the statutory affidavit: *Landis v. Woodman*, 126 Cal. 454, 58 Pac. 857; *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 Pac. 951. An affidavit to a claim, actually owing but not then payable, is not false in stating that the claim is "due," for the word is here used in its primary sense of "owing": *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 Pac. 951.

**Production of Instrument or Copy Thereof.**—If a claim against the estate of a decedent is founded upon a written instrument, a copy thereof must accompany the claim. The original instrument, however, need not be exhibited, unless demanded; the copy is sufficient. In case the original is demanded, it must be exhibited unless lost or destroyed: *Posey v. Decatur Bank*, 12 Ala. 802; *Estate of McDougald*, 146 Cal. 191, 79 Pac. 878; *Pulley v. Perfect*, 30 Ind. 379; *Bryson v. Kelley*, 53 Ind. 486; *Baker v. Chittuck*, 4 G. Greene, 480; *Kentucky Title Co. v. English*, 20 Ky. Law Rep. 2024, 50 S. W. 968; *McKinney v. Hamilton's Estate*, 53 Mich. 497, 19 N. W. 263; *Waltemar v. Sehnick's Estate*, 102 Mo. App. 133, 76 S. W. 1053; *Britain v. Fender*, 116 Mo. App. 93, 92 S. W. 179; *Dorias v. Doll*, 33 Mont. 314, 83 Pac. 884; *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239; *First Nat. Bank v. Root*, 19 Wash. 111, 52 Pac. 521. In Indiana, it is sufficient to file a note against the estate without accompanying it with

a formal complaint: *Garrigus v. Home Frontier etc. Soc.*, 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009. See, too, *Price v. Jones*, 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683. In a statement based upon a note so torn and mutilated that the signature of the maker does not fully appear thereon, and alleging that the torn portion is lost, it must also be alleged that the mutilation was done innocently and was the result of accident or mistake: *McCullough v. Smith*, 24 Ind. App. 536, 79 Am. St. Rep. 281, 57 N. E. 143.

Where a note secured by mortgage given by the decedent has been assigned to the administratrix, the filing of a copy of the note with the claim is sufficient without a copy of the assignment: *Estate of McDougald*, 146 Cal. 191, 79 Pac. 878.

**Reference to Lien or Security.**—If the claim is secured by a mortgage or recorded lien it is sufficient, according to the statutes of some states, to describe the lien or mortgage, and refer to the date, volume and page of its record: *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 469; *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624; *Estate of McDougald*, 146 Cal. 191, 79 Pac. 878. But either this must be done, or the claim be accompanied by a copy of the mortgage; it is not enough to present the note, which recites that it is secured by mortgage: *Bank of Sonoma County v. Charles*, 86 Cal. 326, 24 Pac. 1019; *Evans v. Johnston*, 115 Cal. 180, 46 Pac. 906; *Estate of Turner*, 128 Cal. 388, 60 Pac. 967. In case the mortgage is ineffectual because the decedent had no interest in the encumbered property, the note is properly presented without making any reference to the mortgage: *Otto v. Long*, 127 Cal. 471, 59 Pac. 895. According to some authorities, the affidavit should state, if such is the case, that no security for the debt has been received: *Smoot's Admr. v. Bunbury's Exr.*, 1 Har. & J. 136; *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97.

### Verification of Claim.

**Necessity of Verification.**—The statutes usually require that claims presented to an executor or administrator for allowance must be supported by affidavit that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same: *Perkins v. Onyett*, 86 Cal. 348, 24 Pac. 1024. Other decisions on this question are: *Winningham v. Holloway*, 51 Ark. 385, 11 S. W. 579; *Smith v. Denman*, 48 Ind. 65; *Clawson v. McCune*, 20 Kan. 337; *Leach v. Kendall's Admr.*, 76 Ky. (13 Bush) 424; *Hood v. Maxwell*, 23 Ky. Law Rep. 1791, 66 S. W. 276; *Swift Iron & Steel Works v. Schulte*, 8 Ky. Law Rep. 787; *Watson v. Watson*, 58 Md. 442; *Walker v. Nelson*, 87 Miss. 268, 39 South. 809; *In re Baker*, 27 Misc. Rep. 126, 57 N. Y. Supp. 398; *Terry v. Dayton*, 31 Barb. 519. It is sometimes said that the statutory requirement that the claim be verified is imperative: *Worley v. Hineman* (Ind. App.), 29 N. E. 570; or that the verification is a step preliminary

to the conferring of jurisdiction on the court, and a condition precedent to the authority of the court to allow the claim: *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97; *Cheairs' Exrs. v. Cheairs' Admr.*, 81 Miss. 662, 33 South. 414; *Fitzpatrick v. Stevens*, 114 Mo. App. 497, 89 S. W. 897; *Clancey v. Clancey*, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 163; modified, if not overruled, in *Gutierrez v. Scholle*, 12 N. M. 328, 78 Pac. 50. Some courts, however, regard the statute prescribing verification as merely directory: *Wile v. Wright*, 32 Iowa, 451; *Wise v. Outtrim*, 139 Iowa, 192, 130 Am. St. Rep. 301, 117 N. W. 264; and we shall presently see that other courts hold that the affidavit may be waived, and that an insufficient verification does not necessarily vitiate the allowance of the claim.

In Arkansas a plaintiff who sues an executor without first making the affidavit authenticating his claim prescribed by statute will be nonsuited: *Ross v. Hine*, 48 Ark. 304, 3 S. W. 190. But in Kentucky where there is a failure to make affidavit of the justness of the claim as required by statute, before suing an heir thereon, the petition should not be dismissed absolutely, but simply without prejudice: *Teeter v. Anderson*, 8 Ky. Law Rep. 108.

Under the Alabama statute claims presented directly to the executor or administrator need not be verified, but only those filed with the judge of probate. A valid presentation of a claim, therefore, may be made to the executor or administrator directly without verification: *Peevey v. Farmers' & Merchants' Nat. Bank*, 132 Ala. 82, 31 South. 466; *Nicholas v. Sands*, 136 Ala. 267, 33 South. 815. This rule appears to be recognized also in *Rayburn v. Rayburn*, 130 Ala. 217, 30 South. 365.

Only those demands created by the decedent, not those created by his administrator, need be verified by the claimant: *Polly's Exr. v. City of Covington*, 10 Ky. Law Rep. 361; *Berry v. Graddy*, 58 Ky. (1 Met.) 553. And no verification seems to be required in Arkansas of a claim on which action was pending at the time of the death of the decedent: *State Bank v. Tucker*, 15 Ark. 39; but in other states such claims must be authenticated as required in other cases: *Faulkner v. Hendy*, 123 Cal. 467, 56 Pac. 99; *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885.

An affidavit seems unnecessary to support a judgment claim: *Goodrich v. Fritz*, 9 Ark. 440; *Cullerton v. Mead*, 22 Cal. 95; *Crane v. Moses*, 13 S. C. 561. But in Kentucky, before a judgment can be admitted as a claim against a decedent's estate, it must be verified: *Curry's Admr. v. Bryant's Admr.*, 70 Ky. (7 Bush) 301.

Under the Texas statute specifying the manner in which "claims for money," etc., shall be verified before presentation to the executor or administrator, it has been decided that a mortgage is not a "claim for money": *Simpson v. Reily*, 31 Tex. 298. But in Kentucky a judgment for the enforcement of a mortgage lien on the land of a decedent should not be rendered without a verification of the claim

as prescribed by statute: *Tatum v. Gibbs*, 19 Ky. Law Rep. 695, 41 S. W. 565.

The Arkansas statute requiring that claims shall be authenticated by affidavit has been held to have no application where a bank seeks to enforce a lien conferred by the statutes of that state on a deceased debtor's stock: *McIlroy Banking Co. v. Dickson*, 66 Ark. 327, 50 S. W. 868.

A judgment cannot be rendered on a claim against the estate of a decedent on an indebtedness for an express trust fund for which he failed to account, if the claim is not authenticated by affidavit that it is just and has not been paid: *McIlroy Banking Co. v. Dickson*, 66 Ark. 327, 50 S. W. 868.

**Waiver of Verification.**—Undoubtedly, the executor or administrator or the probate judge may object to a claim and decline to allow it if it is not supported by the affidavit prescribed by statute, or if the affidavit is defective and does not fulfill the statutory requirements. But it would seem that the omission to verify a claim may be waived, and without doubt defects in the affidavit not seasonably objected to may be regarded as waived: *Hollinger v. Holly*, 8 Ala. 454; *Albertson v. Prewitt*, 20 Ky. Law Rep. 1309, 49 S. W. 196; *Lyon's Exr. v. Logan County Bank's Assignee*, 25 Ky. Law Rep. 1668, 78 S. W. 454; *Seymour v. Goodwin*, 68 N. J. Eq. 189, 59 Atl. 93. In New Mexico a judgment allowing a claim against an estate which is not sworn to is not void for want of jurisdiction: *Gutierrez v. Scholle*, 12 N. M. 328, 78 Pac. 50. And in California the rule is that the allowance of claims, upon a defective verification, is not void; it is a judicial act, which entitles the claims to rank as acknowledged debts of the estate, to be paid in due course of administration, although the heirs, not being parties, are not concluded, and have the right to question the allowance at the settlement of the estate: *Estate of Swain*, 67 Cal. 637, 8 Pac. 497; *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 469. But in Texas the statutes seem to contemplate that the allowance of an unverified claim is of no force and effect: *Anderson v. Cochran*, 93 Tex. 583, 57 S. W. 29.

In *Alter v. Kinsworthy*, 30 Ark. 756, it is said that the omission to verify a claim may be taken advantage of at any time before trial and final judgment. And in *Guerin v. Joyce*, 133 Cal. 405, 65 Pac. 472, it is said that when no objection to a verification is raised in an action to recover thereon by demurrer or answer, the defendant should not be allowed to make such objection at the trial.

**Sufficiency of Verification.**—The affidavit to support a claim against the estate of a decedent is only a verification: *Empire State Min. Co. v. Mitchell*, 29 Mont. 55, 74 Pac. 81. In making it the requirements of the statute must be substantially complied with: *Pico v. De La Guerre*, 18 Cal. 422; *Perkins v. Onyett*, 86 Cal. 350, 24 Pac. 1024; but a substantial compliance is all the law demands: *Griffith v. Lewin*, 129 Cal. 596, 62 Pac. 172; *Taggart v. Tevanny*, 1 Ind. App. 339, 27

N. E. 511; *Thompson v. Bailey*, 1 Ky. Law Rep. 321; *Cochran v. Germania Nat. Bank*, 8 Ky. Law Rep. 790; *Foster v. Shaffer*, 84 Miss. 197, 36 South. 243. It is not necessary to use or aver in the affidavit the exact words of the statute, but only the substance: *Story's Admr. v. Story*, 32 Ind. 137; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Crosby v. McWillie*, 11 Tex. 94. Still the affidavit must contain the substantial requisites prescribed by the statute: *Gilmore v. Dunson*, 35 Tex. 435. In *Beddow v. Wilson*, 28 Ky. Law Rep. 661, 90 S. W. 228, a verified answer, containing the proper statutory averments, is held a sufficient affidavit of a claim.

An affidavit to an account that it is correct according to the claimant's best knowledge and belief is declared insufficient in *Dennis v. Coker's Admr.*, 34 Ala. 611.

In some of the earlier cases it is decided that the omission of the affiant's signature to the affidavit is not a fatal defect, at least if the jurat is properly authenticated: *Mahan v. Owen*, 23 Ark. 347; *Alford's Admr. v. Cochrane*, 7 Tex. 485. But the statutes now generally contemplate that a claim cannot be duly presented unless the affidavit is signed by the affiant, and it is held that the omission of such signature is not cured by a properly signed jurat: *Anderson v. Cochran*, 93 Tex. 583, 57 S. W. 29; *Lanier v. Taylor* (Tex. Civ. App.), 41 S. W. 516.

When it appears from the affidavit that the same person is "claimant" and "affiant," the use of one of these words rather than the other is immaterial: *Davis v. Browning*, 91 Cal. 603, 27 Pac. 937; *Warren v. McGill*, 103 Cal. 153, 37 Pac. 144; *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884. And the omission of the word "dollars," in stating the amount of the claim, is not fatal: *Hall v. Superior Court*, 69 Cal. 79, 10 Pac. 257.

Claims must be accompanied by the original affidavit, rather than copies: *Ash v. Clarke*, 32 Wash. 390, 73 Pac. 351.

Under the early probate practice in some jurisdictions the affidavit to a claim could be made ore tenus. If the claimant stated as a witness on oath the necessary facts required in an affidavit under the statute, it would supply the absence of the affidavit: *Overly's Exr. v. Overly's Devises*, 58 Ky. (1 Met.) 117; *Kincheloe v. Gorman's Admr.*, 29 Mo. 421. But the statutes now very generally demand a written affidavit to support claims against the estate of a decedent.

If a statute requiring the verification of claims is regarded as merely directory, then the oath may be administered after the claim has been filed: *Goodrich v. Conrad*, 24 Iowa, 254. But if the statute is regarded as mandatory, perhaps an affidavit given after the filing of the claim comes too late: *Hanna v. Fisher*, 95 Ind. 383. In Indiana, if a claim has been properly verified, acceptance of an additional unverified statement subsequently filed in open court, with leave first obtained, is no ground for reversing a judgment for the claimant: *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511. And

in Arkansas, if a creditor presenting a claim for services rendered the testator rendered an account for the same services to the testator, in which the amount was smaller, the smaller account may be allowed without being sworn to, the original account having been properly authenticated: *Clark v. Bomford*, 20 Ark. 440. The statutory requirement of verification is not fulfilled by an affidavit, made within the lifetime of the decedent, to the effect that he was then justly indebted to the affiant and had paid nothing toward the satisfaction of the demand: *Wikerson v. Gorden*, 48 Ark. 360, 3 S. W. 183.

**Persons Verifying Claim.**—The affidavit to a claim should ordinarily be made by the claimant himself, not by his attorney, agent or other representative: *Beirne v. Imboden*, 14 Ark. 237; *Macoleta v. Packard*, 14 Cal. 178; *Zachary v. Chambers*, 1 Or. 321. An affidavit by the husband of the creditor is insufficient: *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97. And an attorney cannot prove a claim by swearing that he has it for collection; he must prove it in the name of the owner of the claim: *Westfield v. Westfield*, 13 S. C. 482.

The statutes of many states now recognize that a claim may be verified by another person than the claimants, provided he is cognizant of the facts: *Mason v. Bull*, 26 Ark. 164; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62; *Hansell v. Gregg*, 7 Tex. 223; *McIntosh v. Greenwood*, 15 Tex. 116; *Heath v. Garrett*, 46 Tex. 23. The rule expressed in some states is that when the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant; and under this rule it has been held that an affidavit by an agent must state why the principal does not make it: *Perkins v. Onyett*, 86 Cal. 348, 24 Pac. 1024; and that an affidavit by an officer of a corporation must assign an excuse for his company not making it when it does not disclose that the claimant is a corporation: *Empire State Min. Co. v. Mitchell*, 29 Mont. 55, 74 Pac. 81. An affidavit by one of the attorneys of the claimant, reciting that the claimant is a corporation and none of its officers except such attorneys reside in the county, is sufficient: *Empire State Min. Co. v. Mitchell*, 29 Mont. 55, 74 Pac. 81. A form of verification of a claim presented by a corporation will be found in *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 469. An affidavit to support the claim of a corporation must, under the Arkansas statute, be made by its cashier or treasurer, not by its president: *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62. And according to *Cox v. Higginbotham's Admr.*, 25 Ky. Law Rep. 1057, 76 S. W. 1079, where the president of a bank is administrator, its claim against the estate may be properly sworn to by its cashier, who is familiar with its books and accounts, and by its managing agent. The sufficiency of the affidavit of the treasurer of a corporation is passed upon in *Deringer's Admr. v. Deringer's Admr.*, 5 Houst. 528; *Fidelity Ins. Trust & Safe Deposit Co. v. Niven*, 6 Houst. 64.

According to *Gregory v. Bailey's Admr.*, 4 Harr. 256, the acting partners of a firm must all join in probating a demand, but dormant or retired partners, or partners permanently absent from the country, need not join. Generally, however, the affidavit of one joint claimant is sufficient to authenticate the claim: *Ashley v. Gunton*, 15 Ark. 415. But it has been held that a debt due from the estate of a decedent to six persons in severalty cannot be verified by the oaths of three alone: *Cecil v. Rose*, 17 Md. 92.

The affidavit of a third person to a claim must state that the affiant has knowledge of the correctness of the claim, and that it is due: *Pickle's Admr. v. Ezzell*, 27 Ala. 623. An affidavit by an agent that "he knows the within claim is just, true, and unpaid, as charged against the estate of Jesse Beene, deceased," is sufficient: *Beene's Admr. v. Collenberger*, 38 Ala. 647.

It has been said that an affidavit supporting a claim, made by an agent, is not invalid because it does not show the agency: *Heath v. Garrett*, 46 Tex. 23. But if the affidavit of an agent is defective for failure to show that it is made by an agent, the defect may be cured by amendment: *Dawson v. Wombles*, 104 Mo. App. 272, 78 S. W. 823.

In an early Missouri case it was said that an affidavit to a claim can be made by an agent of the creditor only when he has the management and transaction of the business out of which the demand originated: *Peter v. King*, 13 Mo. 143. But more recently in that state it has been decided that an affidavit by an agent is not defective for not stating that he had such management, or had means of knowing the verified facts. Those matters may be shown by evidence aliunde: *Dawson v. Wombles*, 104 Mo. App. 272, 78 S. W. 823.

In Arkansas, where a claim is properly authenticated when presented to the executor or administrator, and is thereafter assigned, it is not necessary for the assignee to verify the claim: *Collier v. Trice*, 79 Ark. 414, 96 S. W. 174.

The Kentucky statute requiring the verification of claims against deceased persons has been held not to apply to the commonwealth: *Arnold's Exr. v. Commonwealth*, 80 Ky. 135.

#### Amendment of Claim.

**Right to Amend in General.**—An improper attempt to present a claim against the estate of a decedent does not estop the claimant from again presenting it in due form within the proper time: *Warren v. McGill*, 103 Cal. 153, 37 Pac. 144; *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800. And a statement may be amended to supply any deficiency or omission in order to promote substantial justice, provided a different claim or a new cause of action is not added by the amendment. In fact, courts are liberally disposed to permit the amendment of claims as to formal or technical matters: *Appeal of Merwin*, 72 Conn. 167, 43 Atl. 1055; *Belleville Sav. Bank v. Borman* (Ill.), 7 N. E. 686, 10 N. E. 552; *Wolfe v. Wilsey*, 2 Ind. App. 549,

28 N. E. 1004; *Wise v. Outtrim*, 139 Iowa, 192, 130 Am. St. Rep. 301, 117 N. W. 264; *Simmons v. Tongue*, 3 Bland, 341; *Corson v. Waller*, 104 Mo. App. 621, 78 S. W. 656. But "while it is proper," said the court in *Carter v. Pierce*, 114 Ill. App. 589, "to permit an amended claim, or an amendment to an original claim, to be filed for the purpose of correcting the same, or making it more specific, or increasing or reducing the amount thereof, the identity of the claim with the original must appear. The substitution of one cause of action for another entirely foreign thereto cannot be treated as an amendment."

The omission of the Christian name of the plaintiff in his statement of a claim may be cured by amendment: *Peden's Admr. v. King*, 30 Ind. 181. And where a claim is filed by the administrator of another state, the court may subsequently allow an amendment introducing the real claimant as plaintiff instead of the administrator: *McCall v. Lee*, 24 Ill. App. 585, affirmed in 120 Ill. 261, 11 N. E. 522.

**Effect of Statute of Limitations.**—Where a claim is so stated that it apparently is barred by the statute of limitations, the allegation of additional facts preventing the bar of the statute does not destroy the identity of the claim. And after the expiration of the period limited for presenting claims, a creditor should be permitted in furtherance of justice to amend his claim as to formal or technical matters: *Wise v. Outtrim*, 139 Iowa, 192, 130 Am. St. Rep. 301, 117 N. W. 264; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; but it is then too late, by amendment or otherwise, substantially to change his demand or substitute another therefor: *Estate of Sullenberger*, 72 Cal. 549, 14 Pac. 513. It is erroneous to allow one who has filed a claim for a loan of money to the decedent to amend it, after the expiration of the time prescribed for filing claims, by substituting a claim for a different loan, although the claim is for the same amount: *Dickey v. Dickey*, 8 Colo. App. 141, 45 Pac. 228. And a creditor will not be allowed to amend his claim by adding that it is secured by mortgage, after the expiration of the time for the presentation of claims, and a refusal to permit the amendment is not appealable: *Estate of Turner*, 128 Cal. 388, 60 Pac. 967.

## ESTATE OF CLAUS SPRECKELS, DECEASED.

[No. 6,977 (N. S.); decided February 15, 1910.]

**Void Trust.**—A Devise and Bequest of All the Real and Personal estate of a testator to designated trustees "in trust," with directions to pay over the net annual income to his widow for life, and upon her death "to divide the estate into three equal parts, when one of the parts shall be forthwith assigned, transferred, set over and delivered" by such trustees to one of the sons of the testator, whercupon "the same shall be and become his absolutely and forever," and another part to another son in the same manner, and the remaining part to be continued to be held in trust by such trustees and the net annual income paid to the daughter of the testator for life and upon her death "to pay over the principal" of such part to her children or grandchildren, as the case may be, "when the same shall become theirs absolutely and forever," is as to the real estate a void trust.

**Void Trust.**—Such Devise and Bequest is Also a Void Trust as to the personal property, it appearing therefrom and from the whole will that the realty and personalty are united in one inseparable trust scheme.

**Void Trust.**—Such a Devise and Bequest is also invalid as a devise, notwithstanding the trustees and beneficiaries are the same persons and the words therein that "the same shall become his absolutely and forever."

**Void Trust.**—Such Devise and Bequest in so far as attempting to create a trust in the daughter's part avoids the whole trust scheme, being an undue suspension of the power of alienation, owing to the uncertainty of the persons who ultimately are to take such part.

**Will—Intention of Testator.**—If a Testator Misapprehends the legal effect of his expressed intent, the court is not authorized to enter into his mind to ascertain his intention, but must gather his meaning from his words.

**Equitable Conversion.**—In Order to Work an Equitable Conversion of real property disposed of by will into personalty, the direction to sell must be positive, irrespective of all contingencies and independent of discretion.

**Void Trust—Preservation as Power.**—A void trust cannot be preserved as a power, as powers are no part of the statutory scheme of trust in this state.

**Trust—A Beneficiary may be a Trustee for himself.**

**Definitions.**—The Term "Transfer" has an application in California to the transmission of title to real property and is of equivalent signification and effect to "grant."

**Devise and Legacy—Definition and Distinction.**—The Term "Devise" is confined exclusively to real, and the term "legacy," to personal, property.

**Trust.**—The Limitation of Suspension of the Power of Alienation expressed in section 715 of the Civil Code applies to all trusts, whether of real or personal property.

Application by Claus A. Spreckels and Rudolph Spreckels, as trustees, for partial distribution. Demurrers by John D. Spreckels and Adolph B. Spreckels, as heirs and persons interested in the estate.

Cushing & Cushing, O. K. McMurray and William Grant, for applicants.

Morrison, Cope & Brobeck, Peter F. Dunne, Samuel M. Shortridge and W. M. Hohfeld, for demurrants.

COFFEY, J. This is an application by Claus A. Spreckels and Rudolph Spreckels, as trustees of the trusts created by the will of Claus Spreckels, deceased, asking that their respective shares in the property described in their petition be distributed to them in accordance with law and the provisions of said will.

It appears by the petition that Claus Spreckels died in San Francisco, of which place he was a resident, on December 26, 1908, leaving real and personal estate therein, and a will which was in regular course admitted to probate, and letters testamentary issued thereupon to the persons named therein as executors. The testator left him surviving his widow, Anna Christina Spreckels; Claus A. Spreckels and Rudolph Spreckels, sons and petitioners herein; a daughter, Emma C. Ferris; and sons, John D. Spreckels and Adolph B. Spreckels, the demurrants.

#### THE WILL.

The will is in these terms:

"I, Claus Spreckels, a citizen of the State of California, and a resident of the City of San Francisco in said State, now present in the City, County and State of New York, being of sound and disposing mind, and not under restraint or undue influence, do make, publish and declare this to be my

last will and testament, hereby revoking all other wills by me made.

“First: I declare that all the estate, whereof I may die possessed, is the community property of my wife, Anna Christina Spreckels, and myself.

“Second: I hereby give, devise and bequeath unto my Trustees hereinafter named, all my estate, real, personal and mixed, of every nature, kind and description, wherever situate and however held, which is or may be subject to my testamentary disposition at the time of my death, to have and to hold the same, in trust, nevertheless, for the uses and purposes, with the powers and in the manner hereinafter mentioned, namely, to wit:

“(a) To pay over the net annual income thereof to my wife during the term of her natural life.

“(b) Upon the death of my said wife, or upon my death if she be not then surviving, to divide said estate into three equal parts, when one of said parts shall be forthwith assigned, transferred, set over and delivered by my said Trustees to my son Claus A. Spreckels, and the same shall be and become his absolutely and forever, and another of said equal third parts shall be forthwith assigned, transferred, set over and delivered by my said Trustees to my son Rudolph Spreckels, and the same shall be and become his absolutely and forever.

“(c) To pay over the net annual income derived from the remaining equal third part of my estate to my daughter Emma C. Ferris of Kingswood, England, wife of John Ferris, during her natural life, upon her receipt without anticipation, and the same shall not be liable for her debts.

“Upon the death of my said daughter Emma, to pay over the principal of said one-third part of my estate, with all accumulations of the income therefrom, to her children then living, and so that each child shall receive an equal share thereof, and the same shall become his or hers absolutely and forever.

“Children of her deceased children shall, however, take the share which the parent would have taken had he or she survived my said daughter, and the same shall be divided between said children share and share alike. Upon the death

of my said daughter without child, children or grandchildren her surviving, the Trustees shall pay over the principal of said one-third part of my estate, with all accumulations of income therefrom, to my said sons Claus A. Spreckels and Rudolph Spreckels, share and share alike, and the same shall become theirs absolutely and forever.

“Third: If my said son Claus A. Spreckels shall not be living at the time of my death or surviving me be not living at the time of my wife's death, then all the legacies and devises given to him by this will shall go to his issue, to him in lawful wedlock born, share and share alike, and the same shall be and become theirs absolutely and forever. If my said son Rudolph Spreckels shall not be living at the time of my death, or surviving me be not living at the time of my wife's death then all the legacies and devises given to him by this will shall go to his issue, to him in lawful wedlock born, share and share alike, and the same shall be and become their absolutely and forever.

“Fourth: I make no provision in this will for my sons John D. Spreckels and Adolph B. Spreckels for the reason that I have already given to them a large part of my estate.

“Fifth: I hereby authorize my Trustees hereinafter named, to invest and re-invest the trust funds hereinbefore provided for in any securities which are approved by my said wife and by them during her lifetime, in case she survives me, and after her death, in any securities which said Trustees deem best, whether the same are or are not investments to which Executors and Trustees are by law limited in making investments, and to change or vary investments from time to time as they may deem best. I authorize and empower my Executors and Trustees hereinafter named, to hold and continue in their discretion, any security in which any of my property may be found invested at the time of my death, my intent being that they shall be absolved and discharged from the absolute legal duty of converting my estate into money, and that they shall not be liable for any shrinkage in value by reason of the exercise of the discretion hereby reposed in them.

“Sixth: I authorize and empower my Executors and Trustees hereinafter named in their discretion to sell and dispose

of any and all of my property, real or personal, wherever situate and however held, either at public or private sale, and at such time or times and upon such terms as may seem to them meet and advisable, and to give to the purchaser or purchasers of any of my said property all deeds, bills of sale and other muniments of title which may be expedient or necessary.

“Seventh: I nominate, constitute and appoint my sons Claus A. Spreckels and Rudolph Spreckels as Executors of this my last Will and Testament, and as Trustee of any and all trusts herein created, and I direct and request that no bond or other security be required of them as such Executors or Trustees, or in any capacity in which they may act under this Will.

“In Witness Whereof, I, Claus Spreckels, the Testator above named, have to this my last Will and Testament, consisting of five pages of paper, hereunto subscribed my name and set my seal this 11th day of May, 1907.

“CLAUS SPRECKELS.

“The foregoing instrument consisting of five pages of paper was here now at the date thereof signed, sealed, published and declared by Claus Spreckels, the above-named Testator as and for his last Will and Testament, in the presence of us, who, at his request and in his presence and in the presence of each other have hereunto signed our names as subscribing witnesses.

“WILLIAM W. COOK,

“327 W. 75th St., New York.

“THOMAS B. JONES,

“471 Stealford Road, Brooklyn, New York.

“RICHARD T. THOMPSON,

“147 Park Avenue, Brooklyn, New York.”

#### THE ISSUE INVOLVED.

To this petition separate demurrers were interposed, both presenting the same points, reducible to the one issue involving the validity of the testamentary trust.

The applicants are here not in their individual capacity as beneficiaries, but as trustees, asserting their right to distribution under what they claim to be a valid trust created by this will.

If their contention be correct, they are entitled to the distribution of this property, or to so much thereof as to which the trust may be declared valid; otherwise they cannot receive a decree in this proceeding.

In construing this will, it is not necessary to repeat the familiar rules of construction and interpretation. That a will is to be liberally construed so as to carry out the intention of the testator, and that a construction which involves intestacy will not be favored; that the duty of the court is to construe and not to construct; that the important item is the intention of the testator; that the judicial endeavor should be to uphold the will and not to break it down; that the intention is the paramount rule; and that every word in the instrument should be given full meaning, and no word rejected unless absolutely necessary,—all these constitute the canons of construction that need no citations for their support.

What did testator intend? He certainly intended and expressly said that the two sons who are here demurring to this petition should receive nothing, for the reason that he had already given them a large share of his estate. (Clause Fourth in the will.)

What was in his mind when testator made his will? The terms of the instrument show that he had in mind six persons primarily: his wife, his daughter, and his four sons; two of these latter were excluded from his consideration because of previous provision. His intention or his state of mind as to these two sons may be conceded, but it must be effectuated according to the law of the land, which he is presumed to know, for, as was said in the *Estate of Young*, 123 Cal. 343, 55 Pac. 1011, if he have misapprehended the legal effect of his expressed intent, the court is not authorized to enter into his mind to ascertain his intention but must gather his meaning from his words.

#### SUMMARY OF THE TERMS OF THE WILL.

By his will, testator declared, first, that all the estate of which he might die possessed was the community property of his wife and himself; second, he gave, devised, and bequeathed unto his trustees all his estate, real, personal, and

mixed, of every nature, kind and description, wherever situated and however held, which was or might be subject to his testamentary disposition at the time of his death, to have and to hold the same, *in trust*, nevertheless, for the uses and purposes, with the powers and in the manner thereafter mentioned, to provide income for his wife; upon her death, or upon his own death if she be not then surviving, to *divide* said estate into three equal parts, when one of said parts should be forthwith assigned, transferred, set over and delivered by his said trustees to his son Claus A. Spreckels, the same to be and become his absolutely and forever, and another of said parts to go in the same manner to his son Rudolph; to pay over the net income of the remaining third part to his daughter Emma, during her natural life, and upon her death to pay over the principal with accumulations of the income therefrom to her children then living, so that each child shall receive an equal share thereof, and the same should become his or hers absolutely and forever. Children of her deceased children should, however, take the share which the parent would have taken had he or she survived his daughter Emma, and the same should be divided between said children share and share alike. Upon the death of his daughter Emma without child, children, or grandchildren her surviving, the trustees should pay over the principal of said one-third part of the testator's estate, with all accumulations of income therefrom to his said sons Claus A. and Rudolph Spreckels, share and share alike, and the same should become theirs absolutely and forever; third, that if his said son Claus A. should be not living at the time of testator's death or surviving be not living at the time of testator's wife's death, then all the legacies and devises given to him by the will should go to his issue, to him in lawful wedlock born, share and share alike, and the same should be and should become theirs absolutely and forever; a like provision in the case of Rudolph; fourth, he excludes his sons John D. and Adolph B. Spreckels; fifth, he authorizes his trustees to invest and reinvest the trust funds thereinbefore provided for in any securities which are approved by his said wife and by them during her lifetime, in case she survived testator, and after her death, in any securities which said trustees deemed best,

whether the same were or were not investments to which said executors and trustees were by law limited in making investments and to change or vary investments from time to time, as they might deem best; and the testator authorized and empowered the said executors and trustees to hold and continue in their discretion any security in which any of his property might be found invested at the time of his death, his intent being, as he declared, that they should be absolved and discharged from the absolute legal duty of converting his estate into money, and that they should not be liable for any shrinkage in value by reason of the exercise of the discretion reposed in them; sixth, he authorized and empowered his executors and trustees, in their discretion, to sell and dispose of any and all of his property, real or personal, wherever situate and however held, either at public or private sale, and at such time or times and upon such terms as might seem to them meet and advisable, and to give to the purchasers all deeds, bills of sale, and other muniments of title which might be expedient or necessary.

The foregoing is a summary of the terms of the will which the court should endeavor to execute, and it should not depart from the directions of the testator unless constrained thereto by the obligations of the law. Where his meaning is manifest it should be carried out, if that meaning be expressed in the terms of the law governing the subject matter. In the language of a recent case we must not fly in the face of the testator's express direction, as this would be violative of the first duty of the court, namely, to effectuate his intention: *Estate of Washburn* (Cal. App.), 106 Pac. 415. It may be said in this case, as was said in that, that the will bears the earmarks of skilled professional workmanship; and that it was drawn with a view to have its provisions faithfully followed cannot be doubted. In that case the testator selected near of kin as his trustees and devised the property to them in trust with power to manage and control the property and pay over the incomes to his widow and daughter for their support and maintenance and to the successor of either of them.

In the case just cited there is a discussion of the question of vested and contingent remainders and of the doctrine of merger which may be considered in point.

## CIRCUMSTANCES EXISTING AT DATE OF WILL.

In construing this instrument, the petitioners as well as the demurrants advert to the circumstances existing at the date of the will, May 11, 1907, and the local conditions resulting from the then recent conflagration. These circumstances and conditions are too vividly impressed upon the memory to need recital; but it is argued that they must have operated upon the mind of testator and affected the testamentary act. When decedent executed this instrument he possessed, in round numbers, ten millions of dollars in property, realty more than fifty per cent, and of the remaining personalty more than a million in cash. In view of the necessity of the situation confronting him, it was natural that he should contemplate a scheme whereby this vast property should be preserved as long as possible, and increased rather than diminished and dissipated. By his energy and ability he had established a great estate, and it was his ambition and design to secure and shield the results of a long lifetime of labor by a provision protecting the fruits of his toil and maintaining the memory of his name. He was the architect of his own fortune, and he indulged the fancy that he could do what he willed with his own. Acting upon this assumption, he set about making a will to carry out his cherished idea, to administer his entire estate through the instrumentality of a trust. This idea pervades and permeates the will; it is its constant theme.

By the very first dispositive provision he devises and bequeaths his entire estate to his trustees, "to have and to hold the same *in trust*." This language is clear and explicit; no amount of argument can divest these terms of their meaning. This document was drawn with great care and by a lawyer skilled in the use of words, and it is, therefore, to be presumed that the expressions employed were intended to have a legal signification. It is not the case of a layman writing his own will, without adequate attorney's aid, but that of a testator invoking professional assistance of a high grade to discharge a task implying expert knowledge united with readiness and dexterity in its application.

It must be considered, if this be conceded, that every word used in this instrument meant what it said, and by these words and phrases, as judicially defined, we shall ascertain the in-

tention of the testator. He started out to create a testamentary trust. That was his primal purpose, as we have seen. He then provides, through this trust, (a) for an income for his wife; (b) upon her death for a division of the estate, by the trustees, into three equal parts, each one to be segregated and transferred to each of the beneficiaries, Claus A. and Rudolph each to have his part absolutely and forever; and (c) Emma's share of the corpus to remain intact for the benefit of her children living at the time of her death, she to have an income meanwhile, paid out of the principal, through the trust, and failing children or grandchildren, the trustees to pay over the principal to themselves as beneficiaries.

It appears to be admitted that the first trust purpose declared by the will, to provide an income for the wife, is valid; but it is asserted that the second and third trust purposes are void, because neither is authorized by the statute: Civ. Code, sec. 857. Testator directs that upon the death of his wife the trustees are to "divide" said estate into three equal parts, and hereby hangs the discussion as to the meaning of this word "divide" in a legal sense. Petitioners maintain that the demurrants have misconceived the meaning of this word, and that it is susceptible of no such interpretation as they have assumed; that it does not signify "partition" in the narrow, restricted sense of physical separation into parts, which, in the circumstances of this case, would be impracticable, if not impossible, but it is a "division" or "partition" to be accomplished by a sale, and division of the proceeds; and, in that event, it is a valid trust under the provisions of the Civil Code; for a physical division could not have been contemplated by testator, and the testament may be construed as disposing of the entire estate as personal property; and, hence, an equitable conversion of the whole is worked as of the date of the death of the testator or, at least, as of the date of the death of his widow. It is argued that testator never intended a physical partition, and that he used no such word nor any term of synonymous import; yet we find, according to Webster, that "divide" means to make partition, and that "partition" means to "divide into shares," as, "to partition an estate"; but petitioners contend that even if demurrants be correct in their view that it is a trust to partition and con-

vey, still the will may be sustained, if it shows that it was the intention of the testator to create a trust to sell his property and apply or dispose of the proceeds. Was this the intention of the testator? Does this instrument exhibit an intention to convert into cash his real estate and to treat all as personalty? Is it correct to conclude that if clause (c) in paragraph second may be construed as meaning personalty, so must all the remainder of the will? What is equitable conversion? It is that change in property by which, for certain purposes, real estate is considered as personal, and personal as real. How is this change to be effected? Section 1338 of the Civil Code of California says that when a will *directs* the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death; and the supreme court, in commenting upon this section in the Estate of Walkerly, 108 Cal. 652, 49 Am. St. Rep. 97, 41 Pac. 772, says that the rule of equitable conversion amounts merely to this, that where there is a *mandate to sell* at a future time, equity, upon the principle of regarding that as done which ought to be done, will, for certain purposes and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not.

#### THE THEORY OF EQUITABLE CONVERSION.

Petitioners insist that testator contemplated a conversion and quote from a New Jersey case, Wurts' Exr. v. Page, 19 N. J. Eq. 365, where the testator authorized and empowered his executors, in case it should at any time be deemed advisable by them, to sell and convey any part of his real estate. Chancellor Zabriskie said in that case that wherever a testator has positively *directed* his real estate to be sold and distributed as money, it will be considered for the purposes of succession as personal. But in that case, there was no such direction. The direction to sell was contained in the fourth item of the will, and simply *authorized* and *empowered* his executors to sell any part of his real estate in case they should *at any time* deem it advisable. This was not a direction to convert, but on the contrary a seeming direction to let it remain as real estate, until it became advisable from time to time to sell it.

If this were the only part of the will to guide the court, the real property could not be considered as converted into personal property until actually sold; but the question of conversion is a question of intention; and the real question was, Did the testator intend that his lands should be converted into money at all events before distribution? In a Pennsylvania case, *Fahnestock v. Fahnestock*, 152 Pa. 56, 34 Am. St. Rep. 623, 25 Atl. 313, it was said that while a mere naked power of sale will not work a conversion of a testator's real estate, yet where it is clear from the face of the will that it was testator's intention that the power should be exercised, it will be construed as a direction to sell and will operate as an equitable conversion. Where it *plainly appears* that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will as if it contained a positive direction to sell.

Petitioners contend that the grammatical context of the will shows that the intention was to protect the trustees in the exercise of their discretion; that not only do the words of the will lead to such a construction, but it is difficult to see how a "partition" could be made without a sale and a division of the proceeds; the main object of the testator was to provide an income for his widow during her life; and, if it should be necessary to sell during her lifetime, that is within the power of the trustees. Upon this point both parties rely upon the general doctrine of equity jurisprudence, touching this subject matter, as stated by Professor Pomeroy in his work, third volume, sections 1159, 1160: "Equity regards that as done which ought to be done. The true test in all such cases is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the realty should be turned into personal, or the personal estate be turned into real. The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a duty. For, unless the equitable 'ought' exists there is no room for the operation of the maxim 'Equity regards that as done which ought to be done.' The rule is, therefore, firmly settled that in order to work conversion while the property is yet actually unchanged in form

there must be a clear and imperative direction in the will, deed, or settlement, or a clear imperative agreement in the contract to convert the property, that is, to sell the land for money, or to lay out the money in the purchase of the land. If the act of converting, that is, the act itself of selling the land, or of laying out the money in land, is left to the option, discretion or choice of the trustees or other parties, then no equitable conversion will take place because no duty arises to make the change, no duty to make the change rests upon them."

It is by the law of California, and by the interpretative decisions of our supreme court, that we are to construe this will, when those decisions are sufficiently illuminative without recourse to other sources.

We have seen what the statute says: Civ. Code, sec. 1338. Its language is too clear and explicit to admit of a doubt as to its meaning. In the absence of a *direction* by the testator for a sale of the property we are not concerned with the doctrine of equitable conversion: *Campbell v. Campbell*, 152 Cal. 207, 92 Pac. 184. It is not to be inferred from the language employed nor from the circumstances existing at the time of the execution of the will, that the testator intended a conversion in the absence of imperative directions, expressed or necessarily implied, to the executors to sell the real estate. In the circumstances of this estate to command a sale might be to compel a sacrifice, but a discretionary power might meet the exigencies of the situation and such a power was reposed in the trustees. To work a conversion the direction to sell must be positive, irrespective of all contingencies and independent of discretion. The citations are cumulative on this point, and all tend to the same conclusion, as stated by Story: 2 Equity Jurisprudence, sec. 1214. The inclination of courts of equity upon this branch of jurisprudence is not generally to change the quality of the property, unless there is some clear intention or act by which a definite character, either as money or as land, has been unequivocally fixed upon it throughout; and if this intention do not clearly appear, the property retains its original character: *Janes v. Throckmorton*, 57 Cal. 382. Petitioners urge that if there be any doubt about the intention or the inter-

pretation in this respect in the mind of the court, it should be resolved in favor of trustees. But such is not the law as laid down in this state, if it be so anywhere else. All cases upon this subject recognize that conversion of real estate is not favored, and in many it is stated in so many words. The intention must be clear and the necessity absolute. A mere discretionary power of sale is not sufficient. This is the sum of all the decisions upon this proposition; but each case of this kind must stand for itself and, as has been many times said, no two are so close akin that similar cases may not be differently decided. It is as true to-day as it was over a century since, when it was remarked by Mr. Justice Washington, that it seldom happens that two cases can be found precisely alike, and that, except for the establishment of general principles, we receive little aid from adjudged cases in the construction of wills. The difficulty is in the application of these principles to a given case, and in resolving that case the judicial investigation must be limited to the terms of the testament: *Estate of Granniss*, 142 Cal. 1, 75 Pac. 324.

The will itself we must have constantly before us; its very words must be ever present to our physical and mental eye; it is the written law for our guidance, and from its text we may not depart with impunity. It is only in this manner and by this method that we can ascertain the intent of the testator.

Guided by the general principles of construction, and aided to such extent as we may be by authorities, we cannot find in the will of Claus Spreckels an intent to compel a conversion of his real estate into cash. There is not only no duty imposed upon the trustees in this respect, but there is an exemption from any legal obligation of making such conversion and an absolution from liability for loss by reason of the exercise of the discretion reposed in them.

#### WHAT IS SOUGHT IN THIS PROCEEDING.

What is it that the petitioners seek in this proceeding? They do not demand a decree that the property be distributed to them as devisees individually, but as trustees maintaining the validity of the trust. Their prayer is that their respective shares in the property of the estate be distributed to them in

accordance with law and the provisions of the will, and that the executors be required to deliver to them the possession of the real and personal property of which distribution is sought, and that in the event that their shares in and to the whole of the property cannot be distributed to them, that their shares in and to so much of it as can be distributed be so distributed.

This prayer is comprehensive. If it be not lawful to give them what they ask, then they desire to obtain what the law may authorize the court to grant. We have already said that the will furnishes the rule for the court, and we must abide by its text and terms. The will is the immediate and proximate muniment of title; the interest to be decreed is given by that instrument, not by the formal conveyance, which is the mere conduit of transmission. The will provides, in clause (b) of paragraph second, that upon the death of the wife the trustees shall divide the estate into three equal parts, when one of said parts shall be assigned, transferred, set over and delivered by said trustees to the son Claus A., "and the same shall be and become his absolutely and forever," and another of said equal third parts to be in like manner and terms set over to Rudolph. Upon this sentence "and the same shall be and become his absolutely and forever," repeated in clause (c) and in paragraph third, the petitioners contend that testator designed to convey to them an absolute fee, notwithstanding the language of the first part of paragraph second in which he gave, devised, and bequeathed to them as "trustees" "to have and to hold the same in trust, nevertheless, for the uses and purposes, with the powers and in the manner" mentioned in clauses (a), (b) and (c). But in their petition, they ask to have the property distributed to them as *trustees*; they do not pray a distribution to them as direct devisees, but rest upon the proposition that this is a valid trust and desire a decree to that effect. In their argument, however, petitioners claim that the language imports a clear and distinct devise; that when clause (b) says that upon the death of his wife the trustees are "to divide the said estate into three equal parts" the words mean merely a direction as to what to do in the event indicated, to determine the disposition the trustees shall make; that they are not intended

to convey the title; that it was not the intention of the testator to make the trustees his conveyancers, but he intended to convey to them absolute fee, not to engage in the idle form of conveying as trustees title to themselves as individuals, but they took directly from testator, "the same shall be and become his absolutely and forever"; the testator was his own conveyancer.

#### THE MANICE CASE CONSIDERED AND COMPARED.

Petitioners cite *Manice v. Manice*, 43 N. Y. 303, a citation also relied upon by demurrants. This is a handy case, both sides asserting that it is on "all-fours" with their respective contentions. It has been alluded to as absolute authority forty-five times in this controversy, and petitioners claim that it is to be superimposed upon the facts of the case at bar, and that the law and the facts absolutely dovetail, and that this case in that respect comes exactly within the principles laid down by the court in the *Manice* case, and that the language there may be applied appropriately to the situation here. In the *Manice* will, it is asserted in this argument, the language is very similar to the *Spreckels* will, "I hereby give, devise, and bequeath," in clause (b), "and the same shall be and become his absolutely and forever," in clause (c), "and the same shall be and become his or hers absolutely and forever," and like words in paragraph Third, "and the same shall be and become theirs absolutely and forever." Petitioners in argument contend that these words are apt words of devise in the will under consideration as are the words in the *Manice* case, and that in each instrument they were inserted for the same purpose and in each they have the same effect. In the *Manice* case the court said: "By reference to the language of the gifts of these shares, it will be seen that each share is given by words of present gift. In respect to the sons the words are: 'And upon the further trust to convey, transfer and pay over to my son William De Forrest Manice in fee simple, to whom I give, devise and bequeath the same, or in case of his death to his then living lawful issue, three of said equal twelfth parts.' " In the case of the son, Edward Augustus Manice, again he says: "I give, devise and bequeath" the same to him, and in case of

the trusts for the daughters again he says: "I give, devise and bequeath" to them accordingly. And as the supreme court of New York, the court of errors, said in *Hobson v. Hale*, 95 N. Y. 613, in the *Manice* case the dispositions of the testator to his sons, and to the trustees for his daughters, proceeded by words of direct present gift, bequest and devise.

"Thus it will be seen that the testator in each case makes a present gift directly to each of his sons or their issue, and to trustees for each daughter, of a specified share of his residuary estate, to be ascertained and meted out to them respectively by the executors, pursuant to the process which he has prescribed."

In the sentence quoted the court declared that the words imported direct present gift, bequest and devise, but, as will appear by a comparison of testamentary texts, these words "give, devise, and bequeath" are not found in the same relation in the *Spreckels* will, and the petitioner, in qualifying his first contention as to identity of terms and tenor, says that he does not intend to claim more than that words of similar import are found in this instrument, and that he relies upon the *Manice* case for its principle and not necessarily for its language. In the *Manice* case the court found direct devises under the words of the will. Such words are not found here, nor can such intent be imputed to testator unless it is so clearly and unequivocally expressed that no other construction can be placed upon his language: 43 N. Y. 368.

The case of *Manice v. Manice* involved the construction of a long and complicated will, and it would serve no purpose, except to lengthen this opinion, to undertake to analyze it to the extent that was done in argument. That it was difficult to deal with may be understood by quoting the remarks of Mr. Justice Sutherland, when he thought he had found finally and forever the correct interpretation:

"I think it right to say in conclusion, that this will was evidently drawn by an intelligent lawyer, who has read the statutes, and knew the meaning of words, for a persistent client, who was determined to have his own way, by paying for it; and though the examination of the questions relating to the sixteenth clause of the will has cost me some labor,

yet I have the charity to wish, that if the lawyer who penned and worded the sixteenth clause of this will should ever pen or word another like it, that it may never be his judicial duty to say whether it, or any part of it, is valid, under or by the statutes": *Manice v. Manice*, 1 Lans. (N. Y.) 348, 380.

The *Manice* case does not aid the petitioners; its language and its principle seem to be contrary to their contention.

In the New York case there were words of direct devise and bequest, as we have seen in the quotation; and afterward, when the trust was declared void, these words operated to vest the estate in the children. The court of final appeal declared that the testamentary trusts were not authorized by the statute, but were proper subjects of a power, "and are not void because the testator has attempted to put them in the form of trusts, but can be executed as powers." Thus under the Revised Statutes of New York the testamentary intention was carried out through the artifice of a statutory "power." Void as a trust, valid as a power, by virtue of the strict terms of the statute. In California the decision might have been different, for declaring the trust void, the court could not have recouped by calling it a power; because powers are no part of the statutory scheme of trusts in this state: *McCurdy v. Otto*, 140 Cal. 54, 73 Pac. 748.

#### POWERS IN TRUST DO NOT NOW EXIST IN CALIFORNIA.

For a short period such powers existed, but the statute was repealed, and since that time a void trust may not be preserved as a power: Civ. Code, 860, 861 (see *Deering's* ed. 1909); *Kerr's Cyc. Codes*, Civ. Code, p. 782. See California Commissioners Annotated Code, 1872; *Estate of Fair*, 132 Cal. 557, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

Petitioners assert that the rule laid down in the *Manice* case is the law in California. If that be so, then, as we have seen, the citation does not serve them, because it held the trust term void, the power taking its place, and here we have no power; but the petitioners insist that the literal construction of the language in this will demands a decision in their favor; that there is no room for doubt as to what testator meant when he said that if his son should not be living at the time of his own death or that of his widow, then all the

legacies and devises given to him should go to his issue, "and the same shall be and become theirs absolutely and forever." The intention is always the guide where the words are apt. In this will, it is asserted by applicants that the language clearly indicates the intent of the testator; if the son should die without descendants there is no substitution; it is only in the event of leaving issue in the contingency provided in the instrument that there is a substitution; otherwise it remains in the estate. It is claimed that the testator intended that the sons should take title before any partition; and, if he intended that his estate should vest in his sons at the time of his death or at the time of the death of his widow, then he could not have intended that they would take title only under a partition. Numerous cases and text-books are cited to support these propositions; but they are all reducible to the one formula, that it is an established rule that his words must determine his intent. He did not devise and bequeath by apt words directly to his sons individually, but he gave to them as trustees, "in trust," for certain purposes, and, in a certain contingency "to divide" the estate so given into parts each to be by them as such trustees, "assigned, transferred, set over, and delivered" to each of themselves individually.

This is the language of the will. Is it to be taken literally? "To divide the estate into three equal parts." Petitioners assert that it is absurd to contend that he intended that the estate should be physically partitioned, there was no such idea in the mind of testator; that it is inconceivable that he contemplated such a contingency; it would be unreasonable and impracticable; not only unreasonable but unlawful; that he could not make his trustees do this and at the same time carry a valid trust because of the relation in which they would be placed with respect to the beneficiary under the remaining trust; such a project could not have been accomplished; there is no trust beyond life of widow; the vesting of title in the two sons was not dependent upon any other event than the death of widow, at which time, "then," the title in the sons became complete *as a devise*; that there was no intestacy possible in the mind of testator, that this is clear from the language employed by him, it was plainly his pur-

pose that the title should vest in his two sons immediately upon his own death; they took a vested remainder, not a contingent remainder; nor "a contingent equity to enforce a performance of the trust"; no such construction is reasonable and will not be maintained unless the court is constrained thereto; the testator never intended to create a trust, but to devise absolutely to the two sons here petitioning: *Estate of Fair*, 132 Cal. 529, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

It is persisted by petitioners that the testator never intended to create a trust, but to make to them individually an absolute devise, and it is repeated that it would be absurd, unreasonable, impracticable, and unlawful, that he should at the same time make them trustees and beneficiaries, notwithstanding what he says, in the language quoted. It is certainly not unlawful, even under some of the authorities cited by petitioners: *Lewin on Trusts*; *Perry on Trusts*.

Our own supreme court, in a very recent case—*Cahlan v. Bank of Lassen County* (Cal. App.), 105 Pac. 765—decided October 22, 1909, decided that even a beneficiary might be made trustee of the fund created for his own benefit, and cited *Nellis v. Rickard*, 133 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. 32, which said that it is undoubtedly true, as a general proposition, that where an equitable estate and a legal estate meet in the same person, the former is merged in the latter, if the two estates are commensurate and coextensive, and if the merger is not contrary to the intention of the parties: *Lewin on Trusts*, 14, 665; *Perry on Trusts*, secs. 13, 347. And, ordinarily, a cestui que trust should not be appointed trustee. But the authorities hold that a cestui que trust is not absolutely incapacitated from being a trustee, "as the court itself, under special circumstances appoints a cestui que trust a trustee. The question is one merely of relative fitness": *Lewin on Trusts*, 665; *Perry on Trusts*, secs. 59, 297, and cases cited; *Tyler v. Marye*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196, where a trustee was also a beneficiary. It was contended that there could be no merger in that case because the beneficiary took no interest, the entire legal and equitable estate passing to the trustee, the beneficiary having only the right to have the trust enforced (*In re Walkerly*, 108 Cal.

627, 49 Am. St. Rep. 97, 41 Pac. 772); but the court said that it was not necessary to decide that point; and it is inferred that it was not necessary so to decide because there was no absolute or intrinsic impossibility or impracticability in the beneficiary and the trustee being the same person.

The Civil Code says that technical words are not necessary to give effect to any species of disposition by a will, and that the term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited: Civ. Code, secs. 1072, 1328, 1329.

#### MEANING OF THE WORD "TRANSFER."

Particular attention is directed to the Estate of Dunphy, 147 Cal. 95, 81 Pac. 315, in which it is said that the word "transfer" does not necessarily import a passing of title to land by a trustee's conveyance, and that it would not have that meaning even if there had been a direction to the trustees to transfer; and the words "shall be paid," while inapt as applied to real property, simply mean, unless we are to defeat the testator's will by holding them to have no meaning, that the property is devised to the remaindermen.

In the same case, the Estate of Dunphy, Mr. Justice McFarland said:

"The principal contention of appellant is, that by this will the testator undertook to create an invalid trust to convey real property to beneficiaries; that its terms are in this regard substantially the same as those of the attempted trust which was held void in the Estate of Fair, 132 Cal. 533, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000, and that the said Fair case is determinative of the question here under discussion in favor of appellant. We do not think that this contention is maintainable.

"Now, in the Fair case it was held by the court that the testator devised all his property to his trustees and provided no way by which it could vest in any other person except by a conveyance of said trustees, and moreover, clearly expressed his intent that it should so vest only by a conveyance by the trustees. The only words used on the subject in that will constituted express directions to the trustees to 'transfer

and convey.' That express direction was used many times, and, in the opinion of the majority of the court, the will contained no language that could possibly be construed into a direct devise to the beneficiaries or any intent to make such devise, and that, on the contrary, it clearly appeared that he did not intend to make such a devise, but did intend that no title should pass to a third person except by a conveyance by the trustees."

Petitioners contend that this language supports their proposition that the testator by the use of the expressions had but one design in mind; that the meaning of the words was clear and applicable to only one idea, that of an absolute devise to his sons to take effect in a certain event, and that it was never intended by them to create a trust. The construction contended for by demurrants demands that before Claus and Rudolph can take title to the property they must do so as trustees and divide into three equal parts and must assign, transfer, set over, and deliver two of these parts to themselves. Such a construction as this, assert petitioners, will not be adopted by the court, if any other consistent with testacy can be placed upon it. In this case, it is claimed, everything conspires to the conclusion that it was *not* the testator's intention that the estate should go to the sons by way of trust; and it is just exactly the converse of the situation in the Fair case, where the court found that everything pointed to the fact that it was the testator's intention that the property should go to the persons designated, but by way of trust. Upon this point petitioners are very emphatic, and it is worth while to dwell upon the matter, because the Estate of Fair seems to be considered as the leading authority. Petitioners assert that there is as much difference between the two cases as there is between daylight and darkness, and that one is diametrically the opposite to the other; that they are antipodal; that the expressions used in the Fair case do not import a direct devise, and that in the Spreckels case the words used can have no other meaning. On the other hand, it is claimed with confidence that the Spreckels trust is governed by the decision in the Estate of Fair.

In respect to the use of the word "transfer," the Estate of Peabody, 154 Cal. 173, 97 Pac. 184, is cited to show the sense

in which the word is used, but it is sufficient to say of that case that the will was that of a person unfamiliar with technical terms, and unacquainted with the technical sense. It was within the rule of the statute which says that technical words in the statute are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense: Civ. Code, sec. 1327. In the Peabody case such was the showing, and, hence, it does not apply where the circumstances are contrary.

As to the meaning of terms we are cited to the common dictionaries. Webster defines "transfer," as a *noun*, "the conveyance of right, title or property, either real or personal, from one person to another, either by sale, by gift, or otherwise."

The Century defines "transfer," verb, "to *convey* as a right from one person to another"; as a *noun*, "the conveyance of right, title, or property, either real or personal, from one person to another, either by sale, by gift, or otherwise. In law it usually implies something more than a delivery of possession. *Transfer* in English law corresponds to *conveyance* in Scots law, but the particular forms and modes under the two systems differ very materially." In the same dictionary we find the word "convey" defined, "*in law*," to transfer; pass the title to by deed, assignment, or otherwise; as to *convey* lands to a purchaser by bargain and sale. The word "conveyance" is likewise defined: (a) *In law*, the act of transferring property from one person, as by lease and release, bargain and sale; *transfer*; (b) the instrument or document by which property is *transferred* from one person to another; specifically a written instrument *transferring* the ownership of real property between living persons.

In the proposed New York Civil Code, chapter 2, is headed "Transfer of Real Property." Article 1 speaks of "mode of transfer"; section 483 treats of "requisites to *convey* certain estates": "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by

his agent, thereunto authorized by writing": 2 Rev. Stats. 134, sec. 6.

In the Peabody case, Mr. Justice Shaw said that outside of this state it cannot be said to have a well-defined legal meaning, especially when used as a *verb*. But within this state we find its definition in the Civil Code.

"Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another": Civ. Code, sec. 1039.

"Property of any kind may be transferred, except as otherwise provided by this article": Civ. Code, sec. 1044.

"Grant," "conveyance," or "bill of sale": Civ. Code, sec. 1053.

Redelivery of real property: Civ. Code, sec. 1058.

Transfer used as the synonym of convey.

In this section the statute seems to assume retransfer as the synonym of reconvey.

Mode of transfer of real property: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing": Civ. Code, sec. 1091.

Effect of transfer: "A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer": Civ. Code, sec. 1108.

"Where a grant is made upon condition subsequent and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record": Civ. Code, sec. 1109.

Recording transfers of real property: "Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter": Civ. Code, sec. 1158.

Under this head: "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for

record is constructive notice of the contents thereof to subsequent purchasers and mortgagees; and a certified copy of any such recorded conveyance may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as though it was the original conveyance, and where such original conveyance has been recorded in any county wherein the property therein mentioned is not situated a certified copy of such recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in such county": Civ. Code, sec. 1213.

Unlawful transfers: "Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof": Civ. Code, sec. 1227.

Now, what does all this mean?

It means simply that whatever the mode, by succession, by will, or by deed, the title is transmitted. Future interests pass by succession, will, and transfer, in the same manner as present interests: Civ. Code, sec. 699.

What is a joint interest? It is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants: Civ. Code, sec. 683.

When is a trust presumed?

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made": Civ. Code, sec. 853.

In section 863, Civil Code, it is prescribed that, except as afterward otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust; notwithstanding

this, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust: Civ. Code, sec. 864.

Thus it should seem that in California the term "transfer" has an application to the transmission of title to real property.

THE WORD "TRANSFER" APPROPRIATELY APPLIED.

It would seem from the instances cited from the statutes that the word "transfer" has an appropriate application to the transmission of title to real estate, and the citations from other states seem to reinforce this inference. In *Thompson's Estate*, 1 N. Y. Supp. 215, the court said: "A power of sale with respect to his real estate, discretionary in form, was given to the executors. This clause, taken in connection with the other dispositions of the will, evinces no design on the part of the testator to have his real estate absolutely converted into money, either upon the discontinuance of the trust created for the widow, or upon the son reaching majority, when the trust instituted for his benefit would end. The terms 'to pay' and 'deliver over,' used in the clause referred to, are more appropriately applied to a disposition of personal estate, and would ordinarily have some influence in determining whether or not that is the character of the fund which the testator intends the beneficiary should receive. Here, however, the testator has also used the term 'transfer,' and obviously, I think, with reference to the real estate mentioned in the clause, and to evidence a purpose to have his real estate, or such part of it as it might be possible to transfer to his son in specie, so transferred to him, and to preclude the notion that he intended, at all events and under all circumstances, to have it converted into money."

In a New Jersey case, *Lembeek v. Kelly*, 63 N. J. Eq. 408, 51 Atl. 794, there is this observation: "It is urged that the revision of 1898 is confined in its scope, by its title—'An act respecting conveyances'—to that class of written instruments known in legal language as 'conveyances,' and that assignments of leases of land are not included therein. But a perusal of the act will show that this construction, if adopted,

is most destructive in its consequences. Granting, for argument's sake, however, that it must be confined to conveyances of land, I think that an instrument which '*transfers*' an interest in land '*conveys*' such interest, and that it matters not how small in quantity and how short in time of duration that interest may be."

In *Whalon v. North Platte Canal Co.*, 11 Wyo. 347, 71 Pac. 995, it was declared that "No prescribed form of words is essential to convey real estate; but the instrument must contain sufficient words to show an intention to convey.

"In one of the instruments the operative words used are, transfer, sell, release. In the others, 'transfer, sell, assign and set over.' These words are sufficient in the case of each instrument to constitute a conveyance. They show an intention to sell and transfer. The words 'transfer' and 'sell' are employed in each instrument. We think it clear that the instruments are sufficient and operative to convey the interest and title of the grantors to the water right described."

In a Colorado case the court observed that the word "convey," or "assign," or "transfer" might be sufficient to operate a grant. Any one of these words showing intention to convey would be sufficient: *Leadville v. Coronado Min. Co.*, 29 Colo. 34, 67 Pac. 289.

In Utah the supreme court declared that "Contracts of sale, before being such, must contain mutual obligations of full payment and absolute conveyance. Consequently the only inquiry is as to the meaning of the word 'transfer' in this lease. The word 'transfer' may mean either a conveyance of title or merely a delivery of possession; and, if the construction of a written contract is questioned, we must look to the document itself, to the entire transaction and the surrounding circumstances, to ascertain the true intent of the parties.

"We think that, considering all the circumstances of this case and the document itself, the word 'transfer' was used in its ordinary sense as applicable to real property. When used in that connection, the word 'transfer,' unless otherwise restrained or limited, is either synonymous with the word 'sale,' or it imports something more than or subsequent to sale; selling being but one mode of transferring property. Property may be voluntarily transferred from one person to another by

sale or gift, or it may be voluntarily transferred by operation of law. In this case we are of the opinion that the reasonable construction to be placed upon the word 'transfer' is that of a transfer of title rather than a mere transfer of possession": *Ober v. Schenck*, 23 Utah, 619, 65 Pac. 1073.

In Oregon in the case of *Lambert v. Smith*, 9 Or. 193, the court said: "What, then, is to be done with the word 'convey,' and is it the equivalent of grant? In a conveyance the word 'convey' means to transfer the title of property: *Burrill's Dictionary*. And in *Edelman v. Yeakel*, 27 Pa. 27, Judge Black says: 'The word "convey" means to transfer title from one person to another.' This is giving the same legal effect to the word 'convey' as 'grant' which has 'become a generic term, applicable to the transfer of all classes of real property.'

"In New York the operative word of conveyance is 'grant'; but Chancellor Kent says: 'As other modes of conveyance operate equally as grants, any words showing the intention of the parties would be sufficient,' and in the note it is said that the word 'convey,' or the word 'transfer,' would probably be sufficient; that is, as we understand, would have the force and effect of 'grant.'"

Chaplin on Express Trusts says: "In construing both deeds and wills and all instruments creating, transferring, assigning or surrendering, or authorizing the creation, transfer, assignment or surrender of any estate or interest in lands, the intent, as gathered from the entire instrument, controls.

"A transfer by covenant to stand seised to uses, which method of conveying the legal estate will be hereafter explained, required a deed for the raising of a use or trust."

Reeves on Real Property uses this language in sections 311, 318: "And it seems to be safe to assert, though upon no direct authority, that a writing was necessary to the declaration of a trust in incorporeal hereditaments, because the creation and transfer of legal estates in them must be by deed or grant."

Throughout his book he uses the word "transfer" in the same way.

So it should seem from all these citations of codes and cases and text-books that the word "transfer," equally with the

word "convey," is of equivalent signification and effect to "grant."

THE FAIR CASE PARALLEL.

In the Fair case a trust to convey was held to be void. The language of that will was "in trust to transfer and convey." In the argument of the case under consideration, the petitioners drew a parallel of the alternative provisions in these two cases, as follows:

*FAIR CASE.*

(132 Cal. 526, 84 Am. St. Rep. 70,  
60 Pac. 442, 64 Pac. 1000.)

In case either of my daughters die leaving no children or descendants, the one-fourth part of

SAID TRUST PROPERTY  
AND ESTATE HEREIN  
DIRECTED TO BE TRANS-  
FERRED AND CONVEYED  
to her children or descend-  
ants

SHALL BE TRANS-  
FERRED AND CON-  
VEYED TO the children or  
descendants of my other  
daughter and if there be  
none

THE SAME SHALL  
BE TRANSFERRED AND  
CONVEYED to my brothers  
and sisters, etc.

It is argued from the fact that these words "transfer" and "convey" or "shall be transferred and conveyed" were the only words that were found in that will by which title could have passed, that it could not be passed in any other way, and that that distinction was important in the mind of the court as decisive of that case; and since in this will there is no trust to "convey," the word not being used, as seen

*SPRECKELS CASE.*

If my said son Claus A. Spreckels shall not be living at the time of my death or surviving me be not living at the time of my wife's death, then

ALL THE LEGACIES AND  
DEVISES  
GIVEN to him BY THIS  
WILL

SHALL GO TO  
his issue, to him in lawful  
wedlock born, share and share  
alike and

THE SAME SHALL  
BE AND BECOME THEIRS  
ABSOLUTELY AND FOR-  
EVER.

above, nor any other word of identical import, therefore, there is no direction, nor even an implication, that the trustees are to "convey" or give title. Further the petitioners contend, in commenting on the Fair case, that there is not a single word in the Spreckels will, with respect to the duties of the trustees that, properly construed, can be said to require that the title should be given by the trustees to the persons who are to take the title on the expiration of the prior trust; the only words, it is asserted, that can be seized upon as implying this are the words "to divide" and the directions to "assign, transfer, set over, and deliver," in clause (b) and these words have no such just implication; they cannot be fairly construed as demanding that the title pass only through the trustees, but may be interpreted as words of direct devise.

Again, in the Fair case, attention is called to the language found on page 529 (132 Cal., 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000), where the court said that the case would have been different if there had been an independent devise followed by a direction to the trustees to convey to the devisees, in which case the words of devise would have created an estate and the conveyance would have been unnecessary, except, perhaps, as convenient and additional evidence of title; and, further, the court said that, of course, the precise technical word "devise" is not necessary; any other word or language expressive of the same action or design would be sufficient, but in the Fair will there was no such language, it was barren of any words of direct devise, for not even by a slip of the pen was Fair betrayed into using any language that might be construed into a direct devise, as, for instance, that the property should "go to," or "belong to," or "vest in" the classes of persons enumerated. It is contended that words of the same legal effect as those mentioned by the court in the Fair case, as words that would have been sufficient words of devise, in fact some of the very words that are so specified, are found in the will here under construction. It is further contended that there are clear words of direct devise used in the Spreckels will, and that the language of the third paragraph is plain, and if we take the second and construe it with the third paragraph, we find an undoubted devise to the two sons.

## DOMINANT AUTHORITIES IN CALIFORNIA.

The case of *How v. Waldron*, 98 Mass. 281, is cited as holding in effect that a direction to divide property among children worked a direct devise to them; but we are called back to California to find the dominant authorities upon this point. In the *Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315, the court held that there was no trust to convey under the language of the will. The testator in that case devised his estate to his wife and daughter in trust; to convert his personal property in the county of Monterey, and also all of his real property and personal property in the state of Nevada, into cash, and to divide the net income into five equal parts; one-fifth of the net income thereof was to be paid quarterly to his wife, during her life, and upon her death one-fifth of the principal of his said estate shall be transferred and distributed as she may by will direct; if she shall make no direction, the one-fifth was to go to his heirs at law; similarly as to his daughter, Jennie C. Dunphy, he directed that one-fifth of the income should be paid to her during her lifetime annually, and upon her death one-fifth of his estate was to be distributed as by her directed, and if she shall make no such direction it shall go to her children, and if she shall leave no child it shall go to testator's heirs at law; and in the case of *James C. Dunphy*, he directed that one-fifth of the income should go to him for life, and that upon his death one-fifth of the principal of his estate shall be paid as he shall by will direct; if he shall have made no such direction then such one-fifth shall go to his children, and if he shall leave no child then it shall go to testator's heirs at law. In regard to his other daughter, *Mary Flood*, there was no question about there being a direct devise; it was simply a direction to pay the income to her during life, and after her death it was to go to her children, but if she left no children then to testator's heirs. Similarly as to the granddaughter, *Viola Percy*, there was no question there of any trust; it was simply a direct devise.

It was held that the will should not be held to create an unwarranted trust to convey unless its language clearly showed that there is an intent to create such a trust and it could not be reasonably construed otherwise. But the court held that the only trust created by Mr. Dunphy was a trust

during the lives of his wife and children, and that after the death of the wife and these children, in each case, the trust purpose ceased, and the property was left in the hands of the trustees and, of course, it had to be distributed to get it out of their hands.

In the Estate of Heywood, 148 Cal. 184, 82 Pac. 755, the testator created a trust for the life of his wife from whom he was separated by articles of agreement, and he was bound under this agreement to pay her a certain sum of money during her life, and he created a trust during her life to provide for such payment, providing in the will that at the end of the trust estate, that is, upon the death of the widow, one-half of his property vested absolutely in his daughter; and upon the same event, also, the other half vested absolutely in his brothers and sisters and their issue.

The language is: "Upon the death of my wife one-half of the residue of my estate shall vest absolutely in my said daughter and the remaining one-half shall vest absolutely, as follows, to wit"—enumerating the persons in whom it is to vest.

The controversy in the Heywood case arose over the clause of the paragraph of his will, called clause 4, in which he said: "In case my said daughter should die before my said wife, without any child or children, then the whole of said residue shall be divided among my said brothers and sisters, and niece and nephew, in the proportions named in the last preceding subdivision."

It was claimed that those words created a trust to convey, in line with the Estate of Fair, and therefore that the whole will must fall.

It was held that the trust was not invalid, and that the principle of the decision in the Fair case had no application, because the provision of the Heywood will was radically different from the provisions construed in the Fair will. It did not provide that trustees should transfer or convey the trust property to the relatives designated as the only method whereby title to the trust property should pass to them should the specified contingency occur; in fact, no active duty was cast upon them in this regard; they were not mentioned in the

section; there was no express direction to them to "divide" the trust property; nor was there any direction in any other provision of the will that they should make any transfer, conveyance, or division of the trust estate among the beneficiaries, or that they should do anything at all so as to vest title to it in them. In this respect the Heywood case should seem to be the antithesis of the Spreckels will, in which, according to his words, the testator contemplated that the division should take place through the trust.

In commenting on the Estate of Dunphy, Mr. Justice Lorigan said: "In that case a trust clause in the will provided that upon the death of one of the beneficiaries one-fifth of the principal of the estate 'shall be transferred and distributed' as such beneficiary might by will direct. There was no express direction to the trustees to transfer or distribute. It was insisted that the language used meant that the title to such fifth could only pass by the trustee's conveyance, and that it was a trust to convey and void under the decision in the Fair case. This court held otherwise, and declared the provision valid, holding that the use of these words evidenced no intention that the trustees should execute a conveyance, and that the provision contained no direction at all to the trustees to transfer, distribute or convey, nor did it interfere with the apparent intention of the testator that the disposition of the trust estate authorized by the beneficiary to be made should operate as a direct devise. As the direction in the Dunphy case that a portion of the trust estate 'shall be transferred and distributed' did not amount to a trust to convey, but operated as a direct devise, certainly the provision in the present trust that the 'whole of said residue shall be divided' did not create a trust directing the trustees to divide or transfer the title by conveyance on partition, but operated as a direct devise in favor of beneficiaries. We are satisfied that it was the intention of the testator, in using the language in subdivision 4 that the 'whole of said residue shall be divided,' to indicate the persons and proportions in which, in the event of his daughter's death, the share otherwise absolutely devised to her should vest, and that no trust of any kind was imposed upon the trustees under said provision."

It is contended by demurrants that this decision is authority for two propositions in the case at bar: (1) that *a trust to divide* is an invalid trust under section 857 of the Civil Code:

"Express trusts may be created for any of the following purposes:

"One. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust.

"Two. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.

"Three. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of title two of this part; or,

"Four. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same title";

—and (2) that where there is a substantial legacy, or a legacy giving a substitutional devise, that it is the same as the original devise, which goes to the substituted devisee.

In the Estate of Heberle, 153 Cal. 275, 95 Pac. 41, decided March 24, 1908, which is much counted on by both sides, the trust was conceded to be void under the decision in the Fair case, but by reason of words of direct devise in other parts of the will the property passed to the beneficiaries.

The only question in that case was whether or not from a construction of the will intestacy resulted. It was an appeal from an order sustaining demurrers to the petition of heirs at law of a portion of the estate, it being the contention of petitioners that as to this portion he died intestate. The court said:

"The deceased by his will, after directing the payment of his debts and funeral expenses, devised and bequeathed to trustees all the rest and residue of his estate upon specified trusts. By the seventh paragraph of his will he directed certain real property upon Spring street in the city of Los

Angeles, called for convenience the Spring street property, of the estimated value of sixty-five thousand dollars, to be held by the trustees for the term of five years 'and then the same by said trustees to be conveyed to the children of my deceased brother Martin Heberle, late of Miamisburg, Montgomery county, state of Ohio, share and share alike.' It is conceded by all parties to this litigation that this trust is void: Estate of Walkerly, 108 Cal. 628, 49 Am. St. Rep. 97, 41 Pac. 772; Estate of Cavarly, 119 Cal. 408, 51 Pac. 629; Estate of Fair, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 6 Pac. 1000; Estate of Dixon, 143 Cal. 511, 77 Pac. 412; Estate of Sanford, 136 Cal. 97, 68 Pac. 494. At the time of his death, the testator still owned the Spring street property. The question to be answered is what disposition is to be made of it. Admittedly, if intestacy results as to this property, the petitioners are entitled to share in it.

"Reading the whole will, we find, next, this clause: 'In case I should dispose of said property, then it is my will that my trustees pay over to the said children or grandchildren of my said deceased brother the amount received by me for said property. It being my will that the said children and grandchildren of my deceased brother shall receive from my estate the said real estate or its value.' By the fourteenth paragraph the testator empowers the trustees to convert real estate into money by sale. The seventeenth paragraph, however, is a limitation of this general power, and reads as follows: 'That the power to sell my real estate, as set forth in the fourteenth subdivision, shall not affect my said Spring street property, which is not to be sold, but is to be kept and distributed to the children of my said deceased brother, Martin.' The trust created by paragraph 7 being void in its creation, no estate as to the Spring street property passed to the trustees. If in the will there are no other apt words disposing of the property upon the failure of this trust, intestacy as to it must be the result. The trial court found those words in the seventeenth subdivision of the will above quoted, and in view of the fact that a *construction* which favors testacy is always preferred to one resulting in intestacy (Dunphy's Estate, 147 Cal. 96, 81 Pac. 315), it may not be said that the

interpretation is not a permissible one. The seventeenth paragraph contains a direction for the 'distribution' of the Spring street property to the children and grandchildren. While it may be argued that the word has reference to distribution by the trustees under the trust, yet it is not a word aptly used for such purpose, while it is apt in its application to a direct devise. It is equally open to the construction, therefore, that the distribution to the children is to be at the hands of the court. As is said in *Estate of Dunphy*, 147 Cal. 96, 81 Pac. 315, the word 'distributed' is not a technical word in conveyancing and is not usually found in deeds. 'If it have any legal technical meaning it has such meaning with reference to decrees of distribution in probate courts.' It appears that while the testator designed, in case he died possessed of the Spring street property, that that property should be held for five years, yet that if the Spring street property had been sold, they were to receive in money the amount obtained from such sale directly, and not through the medium of trustees. The paramount idea in the testator's mind, therefore, was not that the property should descend to his beneficiaries through a trust, but that, with or without a trust, they should with certainty receive property to that value from his estate. Under the wording of this instrument, therefore, the trial court was correct in holding that its conclusion that the trust was void did not, in contemplation of the other language employed in the will, so defeat the testator's intent as to render imperative a finding of intestacy."

I have deemed it proper, at the expense of space, to present this opinion in full, on account of the importance attached to its expressions. Petitioners ask particular attention to this case because of the reason that it goes far from the *Fair* case. The language that the court below and that the appellate tribunal found as sufficient to operate as words of devise there was "the power to sell my real estate as set forth in the fourteenth subdivision shall not affect my Spring street property, which is not to be sold, but which is to be kept and distributed to the children of my deceased brother, Martin."

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## THE PARAMOUNT IDEA OF TESTATOR.

The court said that the paramount idea in the mind of the testator was *not* that the property should descend to his beneficiaries through a trust, but that with or without a trust the designated persons should with certainty receive property to that value from his estate. Is not that the paramount idea? Is it not obvious from every part of the will at bar, from the words of exclusion as well as from the words of inclusion, that Claus A. and Rudolph Spreckels are to receive this estate, and that the other sons are to receive nothing?

Petitioners submit that this Estate of Heberle is alone ample justification for their position, and that it is sufficient to justify this court in sustaining their contention without any other case at all; and they call attention to the fact that it was there necessary to disregard a part of the language, namely, that which under the rule in the Fair case became ineffective—the trust to convey—and also to carry out the intent of the testator the court took other language designed for another purpose and construed it as language of devise. This language, which petitioners say perplexes demurrants, is where the testator said: “In case I should dispose of said property, then it is my will that my trustees pay over to the said children or grandchildren of my said deceased brother the amount received by me for said property. It being my will that the said children and grandchildren of my deceased brother shall receive from my estate the said real estate or its value.”

This was not the provision upon which the court below based its decision sustaining the limitation in favor of Martin Heberle’s children. The opinion proceeds: “By the fourteenth paragraph the testator empowers the trustees to convert real estate into money by sale. The seventeenth paragraph, however, is a limitation of this general power, and reads as follows: ‘That the power to sell my real estate, as set forth in the fourteenth subdivision, shall not affect my said Spring street property, which is not to be sold, but is to be kept and distributed to the children of my said deceased brother, Martin.’ ”

But it is difficult to accept the conclusion of petitioners that this Heberle case is sufficient to support their proposition.

The important question in the cited case was the sufficiency of a disposition as obnoxious to the doctrine of trusts to convey and the court held that while the dispositive provision was void under the Fair case it might be maintained as a direct devise. "The seventeenth paragraph," said the court, "contains a direction for the *distribution* of the Spring street property to the children and grandchildren. While it may be argued that the word has reference to distribution by the trustees under the trust, yet it is not a word aptly used for such purpose, while it is apt in its application to a direct devise. It is equally open to the construction, therefore, that the distribution to the children is to be at the hands of the court. As said in Estate of Dunphy, 147 Cal. 96, 81 Pac. 315, the word '*distributed*' is not a technical word in conveyancing and is not usually found in deeds. If it have any legal technical meaning it has such meaning with reference to decrees of distribution in probate courts."

"It appears that," says the court, "while the testator designed in case he died possessed of the Spring street property, that that property should be held for five years, yet that if the Spring street property had been sold they were to receive in money the amount obtained from such sale directly, and NOT THROUGH THE MEDIUM OF TRUSTEES."

These last words point the distinction between the two cases.

Petitioners say that the purpose of the testator was to create a trust for the widow and daughter, and after that a devise for the two sons, who take as primary devisees, their title vesting immediately upon the death of testator; it is repeated that it is clear upon principle and authority that testator designed a devise. We have here two valid trusts (a) (c), one for the widow, one for the daughter, remainder a devise to sons. It was not upon a partition that the title was to vest, but upon the death of the testator to take effect in the events indicated in paragraph second of will; and absolute vesting of title in the two sons upon the death of testator, postponement of possession only.

WHAT IS MEANT BY TERMS "DEVISE" AND "LEGACY."

Now, we recur to legal terminology. We have considered the meaning of the word "transfer" and its synonymity with

the word "convey," the former a most comprehensive term applying to real and personal property, the latter only to real property, but, of course, included in the former, and the word "assign," peculiar to personal property, meaning according to the Century Dictionary "to set apart; to make over by delivery or appropriation; apportion, or allot."

We come, then, in natural sequence, to ascertain what is meant by the terms "devise" and "legacy" and their cognates.

The word "transfer" in this will is not isolated; it is associated with other words of legacy and devise. Testator "gives devises, and bequeaths" unto his trustees, all his estate, real, personal, and mixed, to have and to hold the same in trust, to be assigned, "transferred," set over, and delivered to his son, and so on. The word, therefore, seems to be woven in the verbal texture of legacy and devise.

The original section of the Civil Code of California differed from its present text, and from its prototype, the statute of New York, in an important particular, which was sought to be corrected by amendment in 1905, the law as it now stands.

"When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator": Civ. Code, sec. 1310.

In the Estate of Ross, 140 Cal. 289, 73 Pac. 976, the court said that in the whole chapter on wills the legislature has with extreme care and technical accuracy, used the terms "devise" and "legacy" in their well-recognized common-law sense and distinction; the one as a testamentary disposition of land, the other a like disposition of personalty. And, to accentuate the proposition that the term "devise" is technically used, it is provided by section 1343 of the same code that: "If a devisee or legatee dies during the lifetime of a testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section 1310." It is obvious that the terms "devisee" and "legatee" are used in this section with legal accuracy and distinctiveness, and with the same accuracy the exception is

limited in section 1310 to a devise. In that case the supreme court dealt with section 1310 as it stood prior to the amendment of 1905, and it is with reference to its then terms that the court remarked that under section 1343 all devises or legacies lapse, if the devisee or legatee dies before the testator, except as protected and secured by section 1310 to the lineal descendants of any child, or other relation of the testator. This protection, however, by the explicit language of section 1310, is extended solely to devises; legacies are not within its terms. The use of these terms, "devise" and "devisee," "legacy" and "legatee," all through this chapter, with legal exactness, exhibits the intention of the legislature to employ them precisely as defined at common law. Where clear, direct and explicit terms are used by the legislature, which have had a definite meaning since the beginning of common-law terminology, there can be no room for discussion as to their meaning. Time has marked them too distinctly not to be clearly recognized and understood. This decision was delivered in 1903; the controversy arose prior to the amendment, the lower court having decided the matter in May, 1901: 3 Cof. Pro. Dec. 500, 511.

The legislature subsequently made the distinction manifest by amendment sharply defining the difference between "devise" and "legacy," the former being confined exclusively to real and the latter to personal property.

It may be assumed that the testator, charged with a knowledge of the law, had this distinction in mind when he made his will, and that the lawyer whom he employed to mold in legal form the communicated idea of his benefaction expressed his concreted conception in the terms of this instrument, when he used the verbs "devise" and "bequeath" and the substantives "devise" and "legacy." It should seem quite clear that when the testator used these expressions he meant that the trustees were to take realty as well as personalty. As the petitioners say, every word in the will must be given full meaning.

In *Thompson v. Hart*, 58 App. Div. 439, 69 N. Y. Supp. 223, the court said, commenting on *Delafield v. Barlow*, 107 N. Y. 535, 14 N. E. 498: "In that case as here there was a devise both as to real and personal property, the directions to

divide into shares. And in this respect the cases are quite parallel; in other respects there is a radical difference. In the Delafield case the language of the gift is, 'I give and bequeath,' and the court held that this language was strictly applicable to a bequest of personal property. In the present case the language of the will is, 'I give, devise and bequeath,' language which excludes the idea that personal property only was to pass, and which is peculiarly appropriate to the character of the property which in fact passed to the trustees."

It may be proper here to insert the syllabus of the Delafield case: "S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the use of the testator's wife during her life; after her death the rents and profits of said parts to the use of each of his said children during life, and upon her death 'to pay over,' transfer and deliver the principal of said one-fourth part, together with any arrears of income to her heirs, or to such person or uses as said daughter 'may by her will appoint.' The other half he directed his executors also to divide into four parts and to give one to each of the testator's said children. The will also provided that any moneys advanced to either of said children and charged in the testator's books of account against her share in the estate, should be deducted 'from the sum bequeathed to such daughter in this section.' The will also empowered the executors, 'for the purpose of carrying into effect' the will and trusts therein created, to sell 'in their discretion' any and all of the real estate. In an action for partition of certain real estate of an interest in which the testator died seised, and which was included in said residuary clause, held, that an infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (section 1538); that she never could take the real estate, and had no title thereto, or interest therein as realty, but that the whole title vested in the executors and trustees; that, construing all the provisions of the will together, the direction to sell the real estate was *im-*

*perative* and there was, therefore, an equitable conversion thereof into personalty."

This is said by both sides to be a case precisely in point. In *Scholle v. Scholle*, 113 N. Y. 272, 21 N. E. 84, the court said: "It is observable that the language of the testator is very carefully employed to rebut the theory of a conversion. In each of five articles when giving income he merely uses the phrase 'I give and bequeath,' appropriate to a mere gift of personal property; but when he creates the remainders the language changes uniformly and in every instance becomes 'I give, devise and bequeath.' The change of phraseology seems not to be accidental, but intentional, and to indicate the testator's expectation that land as such would pass in the remainders and their gift required the added word devise."

It is not necessary to transcribe passages from these and other cited cases to explain repetitively that there was not here a careless or accidental use of terms, but an intelligent purpose to execute testator's intention: *Matter of Coolidge*, 85 App. Div. 304, 83 N. Y. Supp. 299.

While the petitioners pray as trustees for a distribution to them as such, in argument they contend that the clause under which they claim is not a valid trust, but a devise, and that the court must sustain the valid and reject the void. This is an anomaly in argument. "The purposes of the testator as outlined in clause (b) were not intended by him to be accomplished through the medium of a trust or by the intervention of trustees." "No man can be a trustee for himself": *Greene v. Greene*, 125 N. Y. 506, 21 Am. St. Rep. 743, 26 N. E. 739. But we have seen that in California this may be the case: *Nellis v. Rickard*, 133 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. 32.

#### THE TRUSTEES TAKE THE WHOLE TITLE, LEGAL AND EQUITABLE.

It is conceded that clause (b) is bad as a trust, and we are asked to separate it from its context and make it good as a devise. We are told about the mechanism, the geography, the physiognomy and the mathematics of this instrument, and even the classics are not neglected in discussion, but we come finally to the point at which we began, What were the trust purposes under this will? They are clearly recited in that

document. All his property is given, devised and bequeathed unto his trustees, for the trust purposes indicated (a), (b), (c) in second paragraph. In this paragraph there are five trust purposes, (1) to pay income to widow, (2) to divide the property into three equal parts after her death, (3) to assign, transfer, set over and deliver one of these parts to Rudolph, when the same shall be and become his absolutely and forever, (4) a similar trust purpose as to Claus A, and (5) to hold the remaining one-third part during the life of Mrs. Emma Ferris, in trust, to pay over to her the net annual income during her life, and at her death to pay over the principal of said third part to her children or grandchildren, as the case may be, when the same shall become theirs absolutely and forever. If she should leave no child, children or grandchildren her surviving, then the trustee is to pay over the principal of said equal third part to said Claus A. Spreckels and to Rudolph Spreckels, and the same shall become theirs absolutely and forever.

Purposes 2, 3 and 4 are included in clause (b) of paragraph "Second" of the will.

It is admitted that the first trust, for the life of the widow, is valid, and does not exhaust the fee; but it is asserted by demurrants that the second and third trusts, the trust to divide the property into three equal parts, and the trust to transfer these parts, require that the full fee shall be vested in the trustees; therefore, they take the full fee as trustees. Now, if this be so, and if it be not contrary to the statutes, it is a perfect trust. It must be considered as a whole; as an entirety. We sometimes speak of "real trusts" and "personal trusts," but these phrases are not accurately descriptive. The trust operates upon a collective entity, composed of real and personal estates, but for convenience the old and familiar terms continue to be used.

That the fee was cast in the trustees, by the terms of the trust, is apparent from the provisions of the will. A trust to sell confers a fee, for if they had no fee they could convey none: Estate of Fair, 132 Cal. 549, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000. The sixth paragraph of the will at bar authorizes and empowers the trustees *in their discretion* to sell and dispose of any and all of testator's property, real

or personal, and to give all deeds, bills of sale, and other muniments of title expedient or necessary to purchasers. In such cases the trustees take the whole title legal and equitable.

"Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust": Civ. Code, sec. 863.

The title being in the trustees, the process of taking it from them must be by transfer to the beneficiaries; and that process is provided by the will. It is idle to say that this is absurd, to transfer from one person to himself; for it is for the court to follow the law, and the will is the law; besides, as has been shown, we must treat the trustees and beneficiaries as distinct legal entities, notwithstanding their individual identity.

The only way in which these petitioners come into possession of their parts is through the transfer from the trustees to them upon the death of the widow of testator. It is *then* only, after the division into three equal parts, that they take title "absolutely and forever." So, also, in the case of Mrs. Ferris, trustees are to pay the income to her during her life and at her death they are to pay over the principal of the remaining equal third part to her children or grandchildren, as the case may be, and in default of children or grandchildren they are to pay over the principal to Claus A. and Rudolph.

In the case of the death of either of the sons named, then all the legacies and devises "given to him by this will shall go to his issue." Neither is named as a direct devisee or legatee; each is mentioned only as a trustee, and his share comes to him testamentarily only after the death of the widow and through the medium of trustees. No title whatever vests in these beneficiaries except as a result of the transfer from the trustees. The fee remains in the trustees as such to feed the limitation to vest at the distributive epoch; it continues to abide in them until the event occurs upon which it is contingent. This is substantially the language of *Savage v. Burn-*

ham, 17 N. Y. 566, in unison with the Estate of Steele, 124 Cal. 539, 57 Pac. 564.

In the Estate of Dixon, 143 Cal. 513, 77 Pac. 412, the testator provided that the trustees should "pay over and transfer" to the beneficiary the trust estate with the income and the accumulations. The word "convey" does not occur in the instrument. The court said that the testatrix clearly intended the title to remain in the trustees until the termination of the trust, for she directs the trustees, upon the happening of the event, to pay over and transfer the trust estate to him. In the will at bar the testator provides that upon the division of the estate into three equal parts, one of the parts shall be assigned to Claus A. and one to Rudolph, and the same shall be and become his absolutely and forever. Until that transfer, there is no complete investiture of title. The Dixon case is authority for the proposition that until the transfer the fee abides and vests and persists in the trustees. It has been decided that under the California statute the beneficiary takes no estate except by conveyance from the trustee. The Estate of Fair is cited for the doctrine that where a testator, as in clause (b) of this will, instead of making a direct devise, makes a devise through the medium of trustees, who are to transfer, and marks the time for the vesting of the property after the division, and in consequence of the transfer, that such a dispositive attempt upon the part of a trustee is futile, that the trust is void.

#### THE FAIR CASE A RULE OF PROPERTY.

Whichever way we turn we seem to be confronted with the Fair case. It has become a rule of property in this state and it is dangerous to depart from its doctrine, and it has not been departed from hitherto by our appellate court. In *Keating v. Smith*, 154 Cal. 186, 97 Pac. 300, there were provisions similar to the Fair will, and the court said that the original testamentary trust was invalid, but the estate had been distributed and the time for appeal had elapsed, and, therefore, no remedy remained, for the decree could not be disturbed, although the trust itself was void, and this was conceded. In that case the supreme court said the will made no direct devise to anyone but the trustees and gave to the

beneficiaries only the right to receive new estates created by the transfer from the trustee; but the decree of distribution was, for the reason stated, final. Upon a like point in *Hofsas v. Cummings*, 141 Cal. 527, 528, 75 Pac. 110, the court said that there appeared to have been designedly created a trust to convey, whereby the title to the property should vest, and could only vest, in Lewis upon the execution of the deed from the trustees; and, further, that in the trusts over there were apt words granting and conveying title by the act of the trustees under the instrument itself, while in the case of Lewis the only title which he was to receive was from the trustee, and none whatever from the act of the trustor.

It is asserted by petitioners that the Estate of Fair differed radically from the case at bar; in fact, that it was precisely opposite to the situation here. In that case, it is argued, there were words in the will, in addition to the direction to convey, which showed affirmatively that the testator desired the estates of the remaindermen to be taken under a conveyance from the trustees. There was the direction that the trustees should transfer and convey; here the proposition is that the property shall be divided, shall be and become absolutely and forever the property of these two sons; in the other part of the will, showing where the same property is, in a certain event, to go to other persons, it is to go to them. Certainly, it is claimed, the testator could not have intended that there must have been a trust to partition or convey in the case of his sons, but a direct devise in the case of his grandchildren. Now, what did the supreme court say in this connection in that case? It declared that the principle which the testator has clearly expressed in his will must be followed, and that the instrument cannot be construed as intending a direct devise where the clearly expressed intention is otherwise, and that there cannot be a devise without operative words sufficient to create it, as illustrated in *Estate of Young*, 123 Cal. 337, 55 Pac. 1011. In the same case the court said (132 Cal. 548, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000) that if the words "transfer and convey" were eliminated from the will, then the beneficiaries would "not take the estate at all, for the heirs of Fair would be entitled to inherit it. Hence the interest of the beneficiaries in the estate can

only come to them through the words 'transfer and convey'; and if the beneficiaries are to take the fee and take it only through the medium of these words, the trustees must have the fee vested in them, in order that they may transfer and convey it."

#### WHAT THE FAIR CASE DECIDED.

These words may be adapted to the case at bar. According to this authority the trust as to real property is invalid. Many of the questions there discussed may not be essential here, but some are appropriately considered. In one particular the justices seemed to be agreed that a trust to convey in this state would be invalid. At common law such trusts were recognized, but our code provisions were designed to abolish and have abolished them. Therefore the Fair trust was declared void. In that case (132 Cal. 527, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000), the court said that our provisions are clearly taken from those of New York on the same subject. Section 857 of the California Civil Code is practically the same as section 55 of the Revised Statutes, the main difference being that subdivision 1 of that section merely provides for an express trust "to sell lands for the benefit of creditors," and it was held in that state, both before and after the adoption of the California codes, that there could be no express trusts as to land, except those enumerated. In *Hawley v. James*, 16 Wend. 147, Bronson, J., said "there can no longer be any express trusts, except such as are enumerated and defined by the statute." In *Gilman v. Reddington*, 24 N. Y. 15, the court say: "Trusts to convey land to a beneficiary are not enumerated in the statutes of uses and trusts"; and in *Hotchkiss v. Elting*, 36 Barb. 44, the court say: "The trust therein mentioned is simply to convey the premises, subject to the reservation, to such person or persons as the wife of the plaintiff should by writing appoint. This is not one of the trusts authorized by law, and is therefore absolutely void." The foregoing are merely a few of many other New York cases to the same point. The New York statutes contain provisions for "powers in trust" which are not authorized by our code.

Our supreme court further quotes from Bronson, J., in *Hawley v. James*, in which he said: "The rule that the

intent of the testator is to govern in the construction of wills has no necessary connection with the inquiry whether the devise or bequest is consistent with the rules of law. When we have ascertained what particular disposition the testator intended to make of his estate, then, and not before, the question arises whether the will is valid. If the disposition actually made is not inconsistent with the rules of law, the will is good, and must be carried into effect, whatever the testator may have thought about the legality of the act; and, on the other hand, if the disposition actually made is contrary to law, whether it happened through design or the want of accurate information, the will is worthless, and we have no choice but to declare it void.' The Fair will is clearly within these declared principles; for here the intent was clear, that the whole estate was to go to the trustees, to be by them conveyed, and there are no operative words to create an estate in remainder. Of course, if an estate be created subject to several trusts, one of which is void, and the latter is legally separable from the others, the estate vests, unaffected by the void trust; but if the creation of the estate depends upon the execution of a void trust, then it can never come into existence": 132 Cal. 532, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

In construing the language of the will it was said in the same case it must be kept in mind that the court is not allowed to force the construction of a sentence, or even a word, in order that a particular result may be reached; and this is the rule, even though such construction be absolutely necessary to save the document from complete condemnation.

In the Walkerly case it is said: "Where the language of the provisions of the will is plain and unambiguous, the courts are not permitted to wrest it from its natural import in order to save it from condemnation. It may be said of all wills that the testator's intent is to make a valid disposition of his property. But a court is not therefore authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court, had he known his own attempt was invalid."

Chief Justice Beatty, upon the rehearing of the Fair case, modified his original opinion and corrected his conclusion that the intent of the testator might be given effect as a direct devise. Wherever a testator attempts to convey his estate by a method clearly unlawful, the attempt must fail; in such case the intent cannot be effectuated. The chief justice became satisfied, on reflection, that the lawful intention of the testator could not be carried into effect by disregarding the unlawful means chosen by him for its accomplishment. For other reasons, however, he adhered to his original view that the trust created by Fair was valid. Mr. Justice Harrison, in the course of his dissenting opinion, said:

“It is sometimes provided in the instrument creating the trust, that after the execution of the trust specifically prescribed the trustees shall **DIVIDE** the trust property, and upon such **DIVISION** convey it to certain beneficiaries then to be ascertained. In such cases the trust is executory, and the beneficiaries take no interest in the property, except by virtue of the conveyance. The trustees are clothed with a discretionary power, which can be exercised only by themselves, or under the supervision of a court of chancery: *Gilman v. Reddington*, 24 N. Y. 9; *Manice v. Manice*, 43 N. Y. 303; *Cooke v. Platt*, 98 N. Y. 35; *DeKay v. Irving*, 5 Denio, 646. So, too, when the conveyance is to be made in accordance with the appointment of a designated beneficiary or a third person. the trustees have an active duty to perform for the purpose of completing their trust, and the author of the trust is not his own conveyancer. In the present case, however, the trustees are not directed or authorized to divide the trust property, and any attempted division by them would be in excess of their power and nugatory”: 132 Cal. 565, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

It is not necessary to extract more from the opinion in this regard, as it seems to reflect the unanimous sentiment of the supreme court. In the *Estate of Sanford*, 136 Cal. 100, 68 Pac. 494, the court followed the principle of the Fair case.

In the *Estate of Pichoir*, 139 Cal. 682, 73 Pac. 606, the will contained a direction that the trustees should, upon the death of the sister of the testator, convey and pay over such of his

estate as should then be remaining in their hands unto William Mooser, or if he should not be then alive then to his wife, or if she should not be then alive then to and among his children who should then be living, to be divided among them share and share alike. The supreme court said that the will clearly contained a trust to convey all the real property of the estate to the Moosers. It had no words of devise to them. It contained neither the word "devise," nor any equivalent. If it were not for the words "trust" and "convey," there would be no operative words in the instrument by which the title to the real property would in any way pass to them; and the manner provided for the vesting of title in them being unlawful and forbidden, the real property was not disposed of by the will and vested at the death of the testator in the heir at law. The case, in this respect, the court could not distinguish from the Estate of Fair.

#### THE WORDS "DIVIDE" AND "DIVISION" INTERPRETED.

In *Hawley v. James*, cited above, the direction was to the trustees "to divide" into so many "equal parts," and thereupon to "convey" the same to the beneficiaries. Bronson, J., considered this an obligation upon trustees to divide the estate into so many equal parts and called it a "partition," and declared it invalid.

In *De Kay v. Irving*, 5 Denio, 646, the direction by the testator was that at a certain time his estate should be "divided," and provisions were made for details "until the said division of my estate shall be made." "Divide" and "division" are the words. In his opinion, Beardsley, J., said that the direction in the will to make partition of the same did not require the title to be vested in the executors, as it might be done by the exercise of a naked power, and created no suspense of the power of alienation. In effect, this was to say the trust to divide was void under the statute of New York, and the judge understood by the terms "divide" and "division" a testamentary direction to make a "partition," using these words as synonyms. In commenting upon this case in *Manice v. Manice*, Rapallo, J., uses these words interchangeably; repeatedly in the same sense: 43 N. Y. 365, 369.

In *Cooke v. Platt*, 98 N. Y. 35, testator gave, devised and bequeathed to his executors all of his real and personal estate upon trust to *divide* and distribute his said estate, or its proceeds after the payment of his debts, to and among his four children, naming them, in equal proportions, the children of any deceased child to take its parent's share. The court said that it was of opinion that no trust estate in the testator's land was created in the executors of the will; that the main purpose of the testator was to give his estate remaining after payment of his debts equally to his four children. He imposed upon his executors the duty of making the division, and this was the declared purpose of the trust. If there was nothing further in the will there could be no question. The statute does not authorize the creation of a trust for the *partition* of lands.

*Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814, cites and supports this case, saying that the declared purpose in that case was to *divide* the estate among the children through the executor, conferring a discretionary power to sell, and it was, therefore, ineffectual to create a valid trust, though it might be upheld as a power.

#### THE PICHOIR CASE DISTINGUISHED.

If the trust as to real property becomes void, what becomes of the personalty? The rules applicable to trusts of real property are generally applied to trusts of personal property. Petitioners contend that the valid trusts may be separated from the void, and that the doctrine of severability may be invoked in this case, and that it is the proper and salutary course for the court to follow in construing the will; that the contrary contention is novel and involves a strained construction foreign to the intent of testator, and that it is the judicial duty to disregard it as tending to a defeat of his plain purpose; and that the peculiar consequences flowing from the strange and strained interpretation of demurrants forbid that their claim of inseverability should be seriously regarded, and cite the *Estate of Pichoir*, 139 Cal. 682, 73 Pac. 606, wherein a trust was held severed as to real and personal property.

In the *Pichoir* case it is pointed out by demurrants that the trustees had a mere naked trust, simply to convey the realty

and personalty in undivided shares, as in the Estate of Fair, but in the case at bar the trustees are clothed with a discretionary duty to "divide" the estate among the two sons and the daughter. In this respect the cases may be distinguished. The main trust in the Pichoir will was as to personal property, the realty was comparatively insignificant. It would seem that the trustees had no discretion in the premises. In the case at bar it is claimed to be different, and it is argued by demurrants that it is clear that the testator intended that the trustees should retain the property in its original form, as appears from the fifth paragraph in which he authorizes and empowers his trustees to invest and reinvest the trust funds in any securities approved by his wife and by them during her lifetime, in case she survive him, and after her death in any securities which the trustees may deem best, whether the same are or are not investments to which executors and trustees are by law limited in making investments, and to change or vary investments from time to time as they may deem best; and the trustees were authorized to hold and continue, in their discretion, any security in which any of the property might be found invested at the time of his death, his intent being that they should be absolved and discharged from the absolute legal duty of converting his estate into money, and that they should not be liable for any shrinkage in value by reason of the exercise of the discretion reposed in them.

#### INSEVERABILITY OF THE SPRECKELS TRUST.

Now, it is claimed that we have but one trust here, a trust involving an inseparable fund, composed of interblended realty and personalty, and that the testator contemplated nothing else in the administration of his estate, and that the trust as to personal property is void because to sustain it would be to mutilate and maim his testamentary scheme. "It is a familiar principle," said the supreme court, in *Carpenter v. Cook*, 132 Cal. 625, 84 Am. St. Rep. 118, 64 Pac. 997, "that if several trusts are so inextricably interwoven, so mutually interdependent, that the destruction of one mutilates and maims in essential particulars the trust scheme, the whole must fall." In the Estate of Fair, 132 Cal. 541, 84 Am. St.

Rep. 70, 60 Pac. 442, 64 Pac. 1000, the court say: "The appellants invoke the aid of the principle, that where several trusts are created by will, which are independent of each other, and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trust may be cut off and the legal one permitted to stand. This rule is of frequent application in the construction of wills, but it can only be applied in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purposes of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property."

In the second decision of the same case (136 Cal. 81, 68 Pac. 306) it is said that the general rule is well settled that where "there are valid and invalid clauses in a will, the question whether 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." Again it was said, quoting from an authority: "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."

In this will there is no distinction between the realty and the personalty; they are united in one inseparable trust. The trustees are given full control over both kinds of property. They could use the personal property to pay the expenses of maintaining and improving the real property. They are expressly given power "in their discretion" to sell any and all property, real *or* personal, and to invest and reinvest, as in the Fair case: 136 Cal. 82, 68 Pac. 306. "It is, therefore, obvious, indeed too clear for reasonable controversy on the point, that the realty and personalty are so inseparably interwoven in the trust scheme that the destruction of the fabric as to the realty inevitably destroys it as to the personalty." It must be considered as a unit. To undertake to treat it as a trust of personalty and realty separably would be destructive of the purpose of the testator, the essential feature of which was, division into three parts, his entire estate, real and personal, to be divided into three equal parts; that is his

language; there is no escape from it. We have no right to assume that he meant more or less than what his words mean. We are to ascertain his real meaning from the words that he has used. Giving effect to all his language, it is manifest that he designed to impose upon the trustees the duty of dividing all of his estate in the manner and on contingency specified. They are given the power and duty of making the division and are charged with an active trust. There is a clear intent to dispose of all the testator's property, including both real and personal, and both species are to go to the beneficiaries merely through the hands and by the action of the trustees. For this purpose there was a special trust and confidence reposed in them by testator. In his mind the entire estate was blended and the court should not attempt a separation. He did not so direct. The language of *Palms v. Palms*, 68 Mich. 365, 36 N. W. 419, is in point: "Had the will directed the real estate to be converted into personalty it would in equity have been so treated and the tenth clause would in that event have been valid. But the testator did not so direct. It authorizes investments to be made as the trustees shall deem for the best interests of the estate, and to lease, repair and improve the property confided to their management, and contemplates that certain property may remain real estate. Neither do I think it proper that the real estate and personal property devised to the trustees as it came to their hands should be kept separate in order to apply to each the rules controlling their disposition. The testator has placed it all in one trust and subjected it to the same disposition. He has made no distinction, and I think it clear that we can make none for him. If, therefore, the trust as to any portion of the will must fail because unauthorized, it must fail as to both classes of property": *Fisher v. Butz*, 224 Ill. 379, 115 Am. St. Rep. 160, 79 N. E. 659; *Story v. Palmer*, 46 N. J. Eq. 1, 18 Atl. 363; *Savage v. Burnham*, 17 N. Y. 570.

In the *Estate of Naglee*, 52 Pa. 160, Mr. Justice Strong said, in answer to the objection urged that the personal estate was not liable to the division under the terms of the will and that the intention was that the real estate should also remain undivided, that he dissented entirely from this view, for, in his opinion, both realty and personalty were given to the

trustees. The two kinds of property were blended, and formed constituents of one fund, and as one estate they were made subject to partition on a specified contingency. The testator's intention was as clear as language could make it, that division of both should be made in that contingency. The realty and personalty were united in the same trust to be held together, for the subject of the will was one, though composed of different parts. It is the estate given to the trustees to be treated as one fund and contemplated by the testator to be distributed in one partition. Justice Strong uses interconvertibly, "division" and "partition."

It is said by petitioners that to maintain the integrity of these trusts is a strange doctrine and would lead to peculiar consequences violative of the testamentary intention; but it should seem from the foregoing that it is not of novel impression, but is supported by weighty authority, at home and abroad. As to the consequences, we must meet the will face to face, and take it at its face value. The consequences of inseparability may be such that with the fall of the realty trust, the personalty trust must go down—that the provisions of the will are futile, and the estate real and personal is intestate. If the vicious proposition may not be separated from the valid, both fall together, and the defeat of the entire trust is encompassed by this vitiation. We are concerned *not* with its consequences, but with its commands. We must obey its orders, its express mandate, be the result what it may. We cannot reconstruct this will in an attempt to construe it. The trustees are vested with an important function, if the trust be valid, and this tribunal may not enlarge nor diminish their power; it may, perhaps, regulate its exercise; it cannot add to nor subtract; it must pursue the testamentary provisions to the point of final distribution when the will shall be merged in the decree.

#### THE FUNCTION OF THE TRUSTEES.

Now, what are the functions of these trustees, conceived to be so important, and of the substance of the trust? These functions are described very clearly in the instrument. The whole fee is vested in the trustees to carry out certain purposes declared in paragraph second, as already recited. That

fee remains vested in them until transferred pursuant to the trust. There can be no transfer until the division shall be made. This is of the substance of the trust. It is a trust in terms to divide and transfer to the sons. In respect to the daughter, it is to pay her the net annual income from the principal of the remaining one-third part and upon her death to pay over the principal to her children *then* living, or to their issue if no children be then surviving. There is here no gift except in certain contingencies. The element of time is now attached to the testamentary disposition. Upon the death of Emma without child or grandchild surviving, the trustees shall pay over the principal of that third with accumulations to the two sons, and, in that contingency, it shall become theirs absolutely and forever. There is no present gift; it is a direction to the trustees to do something at a future time dependent upon conditions then to be ascertained. A future interest is contingent, when the person in whom, or the event upon which, it is limited to take effect remains uncertain: Civ. Code, sec. 863. Where the only gift is found in a direction to divide at a future time, the gift is future and not immediate, contingent and not vested. It is the uncertainty as to the precise persons who are ultimately to take that introduces the element of contingency: *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805. Unquestionably the interest of the unborn children is contingent, because it is uncertain whether they will ever come into existence: *Estate of Washburn* (Cal. App.), 106 Pac. 415. The persons who come within this category cannot be ascertained prior to the date when the division or distribution is to be made: *In re Baer*, 147 N. Y. 353, 41 N. E. 702. Meanwhile there cannot be a vesting; consequently the gift is contingent. In such a case, says the authority just cited, the gift is contingent upon survivorship, liable to be divested by the death before that time of a person presumptively entitled to share in the distribution. It should seem quite clear, then, upon the authorities, that this is a contingent limitation; that the gift is future, not immediate; that the persons who would finally be entitled to the remainder could not be determined until the death of the daughter, because until that event it could not be known whether any of those coming within the category would be

living at that time, and unless living the gift would entirely fail.

AN UNDUE SUSPENSION OF ALIENATION.

If these propositions be accepted, that the trust is inseverable, and that the fee vests in the trustees until the contingency contemplated happens, then there is an undue suspension of the power of alienation, and the trust is, on that account, void. It contravenes the code provisions prohibiting the suspension of the power of alienation: Civ. Code, secs. 715, 716, 749; Estate of Walkerly, 108 Cal. 647, 49 Am. St. Rep. 97, 41 Pac. 772. In the Walkerly case the court said that such a trust cannot be terminated during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries. An attempt by the trustees to convey before that time would contravene the trust and be a void act: Civ. Code, sec. 870. "So even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted": 108 Cal. 649, 49 Am. St. Rep. 97, 41 Pac. 772. What is a perpetuity? It is, according to the Estate of Steele, 124 Cal. 537, 57 Pac. 564, any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee: In re Walkerly, 108 Cal. 647, 49 Am. St. Rep. 97, 41 Pac. 772. This is but a paraphrase of section 716, *supra*, which declares "void in its creation" every future interest which, "by any possibility, may suspend," etc. The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument "by any possibility may suspend" the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustee. If the trust is valid, being an express trust, the beneficiaries take no estate or interest in the property, but may enforce the performance of the trust: Civ. Code, sec. 863; Bouvier's Dictionary; Estate of Hineckley, 58 Cal. 457.

This language is substantially a repetition of the Atlantic authorities which hold, in interpreting the statute, that to render such future estates valid, they must be so limited that in every possible contingency they will absolutely terminate at such period, or such estate will be held void: *Schettler v. Smith*, 41 N. Y. 328; *In re Wilcox*, 194 N. Y. 238, 87 N. E. 497.

THE RULES APPLY ALIKE TO REAL AND PERSONAL PROPERTY.

It does not matter whether it is a trust of real or of personal property—in this case it is both—the rules apply alike. In *Mills v. Husson*, 140 N. Y. 105, 35 N. E. 422, the court said that it has been uniformly held that the rules governing estates or interests in lands, whether founded upon statutes or upon general principles of law, should, as far as practicable, be applied to estates of a like character in personal property. The court further said that even if the provisions of the statute were not sufficiently comprehensive absolutely to require, as a peremptory injunction of statute law, their application in all their length and breadth, and in the same degree to both classes of property, the argument to be derived from the general similarity of legislative enactments, in regard to both classes of property, from the similar if not equal mischiefs to be remedied, and from the general policy of the law, would authorize a court of equity in the exercise of its acknowledged powers, to apply the same rule of construction to both.

There is certainly “much force in the position that one body of law should not declare a different rule for two kinds of property, when there is nothing in the nature of either kind of property, or in the nature and effect of the rule that calls for it.”

There is a manifest propriety, said the court in *Cochrane v. Schell*, 140 N. Y. 534, 35 N. E. 971, in assimilating the rules governing trusts and limitations of real and personal property, and the tendency in this direction has been very marked in the decisions. This view seems to have been taken in *Toland v. Toland*, 123 Cal. 144, 55 Pac. 681. In the *Walkerly* case, 108 Cal. 627, it was pointed out that the essential difference in California between trusts in real property

known as express trusts, and those in personal property are: 1. The former can only be of the kinds permitted by the statute, and no others (Civ. Code, sec. 857), while the latter may be created generally for any purpose for which a contract may be made (Civ. Code, sec. 2220); 2. The former must be created and declared by writing (Civ. Code, sec. 852), while the latter may rest upon parol: Civ. Code, sec. 2222. But to all trusts, whether of real or personal property, the limitation upon the suspension of the power of alienation expressed in section 715 of the Civil Code directly applies. The section is found in division 2, part 1, title 2, of the code where the lawmakers are dealing, as expressly declared, with the modifications of ownership and restraints upon alienation of property in general.

That the same rules govern both kinds of property would seem to be the deduction of our own supreme court in the case just cited wherein it is remarked that section 771 of the Civil Code demonstrates the applicability of the law to personal property. That section reads:

“The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section seven hundred and fifteen”: Civ. Code, sec. 771.

“For if,” says the supreme court, “it be only the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust operates to suspend the power of alienation, under section 715 of the Civil Code. And finally, the applicability of section 715 to trusts in personal property has often been recognized, and never questioned: *Estate of Hineckley*, supra; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636.”

So far we have dealt with the second paragraph of the will and have arrived at the conclusion that it does not create a valid trust. Indeed, this is conceded by petitioners, despite

their prayer for a distribution to them as trustees, but they insist upon the severability of the trust as to real and personal property, and maintain that it is the duty of the court to sever the trust if possible. But the authorities do not sustain this contention. The same cases and text-books are cited with confidence by both sides, but they do not seem to support the position assumed by petitioners, as has been sufficiently shown in this opinion. It is not a correct construction of this will to conclude from its terms, as argued by petitioners, that there are but two trusts; one trust for the benefit of the widow and one for the benefit of the daughter; that those are the only trusts here, and that the disposition of the property upon the termination of those trusts is made by way of devise and not by way of trust, and that the testator intended that the two sons should take title before any division. This is a contradiction of the very words of the will, which it is unnecessary to repeat.

Up to the time of the event indicated in clause (b) of paragraph second the estate was to be held intact by the trustees, to hold jointly for certain specified purposes. These purposes need not be restated. In the third paragraph of his will it is provided that if his son Claus A. be not living at the time of the death of the testator or his widow, then all the legacies and devises "given to him by this will" shall go to his lawful issue, share and share alike, and the same shall be and become theirs absolutely and forever. He repeats literally the same provisions as to Rudolph. That is all there is of the third paragraph. What is meant by its terms? It is not an original gift. It is a short method of stating what is already contained in paragraph second. When he speaks of what is "given to him by this will" it plainly refers to the preceding paragraph. The issue therein alluded to take by substitution the estate devised to the trustees as it shall be divided by them according to the provisions of paragraph second. The right of the trustees to take anything individually is dependent upon their being alive at the death of their mother, and there must be a precedent division and segregation of the estate; their interests or equities are purely contingent; the ultimate limitation shows that the title must remain in the trustees; and the trust does *not* ter-

minate with the life of the widow of the testator: *Paget v. Melcher*, 156 N. Y. 399, 51 N. E. 24; *Fargo v. Squiers*, 154 N. Y. 250, 48 N. E. 509.

The trust does not cease, because the trustees are still charged with duties that they may not neglect upon penalty of removal. If they fail to perform their functions they are liable to extrusion, and successors may be appointed to complete the testamentary trust purpose. Until this work is finished, title remains in the trustees. Before that time it cannot be known who are the beneficiaries; in the interim both the legal and equitable estates are in the trustees, and the vesting in the beneficiaries must await the expiration of the prescribed period; whatever interests they may have must remain in abeyance, and, it is possible, may never take effect; for the provisions of the will leave the persons who may ultimately take possession quite uncertain: *Fargo v. Squiers*, 154 N. Y. 260, 48 N. E. 509.

#### NO DIRECT DEVISE TO INDIVIDUALS IN THIS WILL.

It cannot successfully be maintained, as this court understands the authorities, that there is any direct devise to individuals in this will. What is given by paragraph second constitutes a clear and direct devise to the trustees as such and cannot be reduced or modified by any subsequent provision of a less certain and distinct character: Civ. Code, sec. 1322. It is not in accord with this rule of construction to assume that testator meant to qualify in the third what he so distinctly declared in the second paragraph. It is more consonant with reason to infer that the intention of the testator in the third paragraph was that the beneficiaries were to hold individually and separately after the transfer from the trustees; and that the original and substitutionary gifts were the same; that the trustees as such take jointly by the second but individually by the third paragraph. Petitioners protest, however, that there was no such intention in the mind of testator, and that he certainly intended and expressly declared that the two sons here opposing this application should receive nothing for the reason that he had already given them a large share of his estate; but the Civil Code says, section 1322, that a clear and distinct devise or bequest cannot be affected

by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital or reference to its contents in another part of the will. No matter what reason testator assigned for the exclusion of the two sons mentioned in paragraph fourth, it cannot affect the general scheme of the will.

Paragraph third is dependent upon paragraph second. If in this second paragraph an absolute estate has been conveyed, the authorities all agree that it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by the words creating the estate: *Estate of Marti*, 132 Cal. 672, 61 Pac. 964; 64 Pac. 1071. It follows that if the estate attempted to be created by the second paragraph be void, there is nothing whereby the subject matter of the third can be supported. The thing must fall to the ground if once its support can be severed from it: 2 Blackstone, 168. The third paragraph is simply a succinct summation of conditions contingent upon the failure of precedent provisions.

The trustees have no power to deal with this property by process of alienation until the death of the widow of testator, and even then only to transfer to the beneficiaries in fulfillment of the trust.

This necessarily involves a suspension of the power of alienation, under the statute, and it has been held that the mere possibility of such a suspension vitiates the trust: *Hawley v. James*, 16 Wend. 62; *Estate of Hendy*, 118 Cal. 656, 50 Pac. 753.

In this latter case the supreme court said that it was held in the *Walkerly* case, as uniformly it has been held under laws similar to our own, that the utmost limit of the period of suspension of the power of limitation by any trust or future estate must not by any possibility exceed existing lives, or the trust or estate will be void in its creation. "No absolute or certain term, however short, can be supported": *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38.

It is claimed by petitioners that the mere creation of a trust does not suspend alienation, and that the statute is aimed at the creation of inalienable estates; and that there is

no unlawful perpetuity unless the power of alienation is suspended; and that the provisions of his will do not illegally suspend that power. These contentions have been already answered by the authorities cited. There is a trust term created and during that term the trustees may not alienate. No matter how brief or inappreciable the duration of the term, it is sufficient to destroy the trust. The estate is tied up in the trust, and until the widow of testator dies, there can be no alienation. A bare possibility that the condition upon which the estate is to vest may *not* happen within the prescribed limits is all that is required to bring the devise within the rule, and, therefore, it follows necessarily that it offends the statute and is void: *Johnson v. Preston*, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A., N. S., 564; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. 585.

#### AN INTEGRAL TRUST NOT SEVERED OR SEVERABLE.

It is assumed and asserted by the petitioners that the trust for the benefit of the widow ceasing with her death thereupon title vests in the two sons, but this assertion is not well based, since it assumed two trusts in the will, whereas there is but one and that a continuing trust, that is not severed or severable, but persists until the happening of the contingent event mentioned in the will. Petitioners say that if the sons should die without issue, there is no substitution; it is only in case of leaving the issue in the contingency provided in the will that there is a substitution; but this is not clear; rather, it should seem, that the design of the testator was to place the issue of the son or sons in the precise position the father would have occupied if the latter had survived. The original purpose or intent of the testator cannot be affected by any accident to the object of his bounty; the event cannot always be foreseen as to time of happening, as in case of death, or other circumstance, which renders the devise or bequest contingent. As was said in *Shipman v. Rollins*, 98 N. Y. 323, any other construction would impute to the testator a design to effect an object contrary to the plain meaning of the language employed. "It should be borne in mind that the fund out of which the legacies in question were to be paid had no legal existence until the decease of the testator's

widow." Where there is no gift but by a direction to executors or trustees to pay or divide, and to do that at a future time, the vesting in the beneficiary will not take place until that time arrives: *Warner v. Durant*, 76 N. Y. 136. Where the gift is found only in a direction to the trustees to pay at a future time, time is deemed to be of the essence: *Clark v. Cammann*, 160 N. Y. 325, 54 N. E. 709; *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184.

We have said that this testamentary trust is a unit and a continuing trust, and that it does not end with the death of the widow; that on her demise the estate is to be divided by the trustees into three equal parts, when one of said parts is to be transferred by the trustees to Claus A., one to Rudolph, and one to be held upon a further trust during the life of Mrs. Ferris. This is an integral trust. It is plain that it does not end with the death of the widow, but continues indefinitely beyond, for after that event obligations of an onerous character are cast upon the trustees. Prior to that time their duties may be light and perfunctory, but after that they become difficult and delicate, requiring great skill and business capacity of an unusual order. It is apparent that the administration of this trust, consequent upon the division and transfer, demands an uncommon degree of ability, knowledge and experience, and that it cannot be accomplished in a mechanical manner. It is a task of magnitude and complexity, an estate of many millions in value, of multiform character, the evolution of years of labor and commercial genius, obviously necessitating extraordinary care and prudence in its management and a reasonable time to carry out testator's purpose, for the will does not execute itself; it must be executed by the trustees. Testator was not his own conveyancer. His purpose could not be executed automatically, but through the activities of his nominated trustees. It is an active, not a passive, trust. The trustees have something to do, and to do it properly, they have to call into exercise high qualities of integrity and sagacity. Time is needed for consideration, and sufficient time should be allowed them for deliberation as to the wise execution of the trust. It is to be expected that trustees, especially where the estate is large and diversified, will have temporary disagree-

ments as to the methods of executing the trust. Reasonable time must be given them to ascertain and consider all elements that should influence and control their judgment: *Fischer v. Butz*, 224 Ill. 379, 115 Am. St. Rep. 160, 79 N. E. 659; *Story v. Palmer*, 46 N. J. Eq. 1, 18 Atl. 363. While the trustees are so engaged, necessarily the trust term continues current. The possibility of issue is always present. Either of the sons or the daughter may have a child or grandchild born subsequent to the death of the testator or during the life interest of the widow in the trust. Such issue would be persons not in being at the date of the death of testator. It is possible, also, that the three named children of testator might not survive the widow; but still the trust continues for the benefit of the afterborn children. Hence a possibility of division among persons not in being at the death of testator, and a failure thereby of the trust, according to the authorities cited: *Smith v. Edwards*, 88 N. Y. 92.

It is impossible to ascertain in advance who will ultimately take.

Until the happening of the future event it must remain uncertain whether it be anyone in existence at testator's death, and it might be a grandchild born twenty years later. This is decisive of the question discussed: *Andrews v. Rice*, 53 Conn. 566, 5 Atl. 823; *Hobson v. Hale*, 95 N. Y. 615. It cannot be said to be known who may be the issue, because the possibility exists of the birth of a posthumous child, and while that possibility continues the estate cannot be divided, and must, therefore, be held by the trustees: *In re Bergdoll's Estate*, 18 Pa. Co. Ct. Rep. 665. Such a trust necessarily suspends the absolute power of alienation of the whole trust estate.

No matter how well convinced the court may be of the interior intention of the testator, it must say finally, as it did at first, that the result must be determined by the language in which he chose to clothe his purpose; and if that language be not consistent with legal rules, this court has no choice but to declare it void as a testamentary trust under our statutes and the decisions constituting the law of the case.

Demurrers sustained.

## ESTATE OF EDWARD BARRETT, DECEASED.

[No. 21,229; decided June 24, 1899.]

**Administration—Whether Relatives Entitled to.**—The relatives of a decedent are entitled to administer only when they are entitled to succeed to the personal estate or some part thereof.

**Administrator—Right to Nominate.**—In the case of a surviving husband or wife the right to nominate an administrator under section 1365 of the Code of Civil Procedure is absolute, while in the case of other persons contemplated by section 1379 the right is at most a mere power to address a recommendation to the discretion of the court.

**Administrator—Relation Toward Heirs and Estate.**—An administrator sustains to the estate, the heirs and other persons interested the relation of trustee. He takes neither an estate, title nor interest in the lands of the intestate, but a mere naked power to sell for specific purposes.

**Administrator—Death of Nominor.**—If the Daughter of a deceased person gives a third person authority to apply for letters of administration in her behalf, the power so granted ceases and determines at her death.

**Descent—Vesting of Estate in Heir.**—Immediately upon the Death of an ancestor his estate, both real and personal, vests at once by the single operation of law in the heir.

**Descent—Law Purely Statutory.**—The Descent of Estates of deceased persons is purely a matter of statutory regulation.

**Descent—Husband as Heir of Wife.**—If a Widower Dies Intestate leaving collateral relatives and one child, a daughter, and she, before the estate is administered, dies intestate without issue, leaving neither father, mother, brother, nor sister, the estate vests in her surviving husband as her heir under subdivision 5 of section 1386 of the Civil Code.

**Administration—Husband as Relative of Wife.**—A husband is of "kin" to his wife and her "relative," so as to be entitled to administer on her estate under section 1365 of the Code of Civil Procedure.

**Administration of Wife's Estate by Husband.**—If a widower dies intestate leaving collateral relatives and one child, a daughter, and she, before the estate is administered, dies intestate, without issue, her surviving husband is entitled to administer her estate as against the collateral relatives of her father.

**Administration Follows Property.**—The Right to Administer follows the property.

**Administration—Statutory Kinship.**—The Law of Administration contemplates a legal or statutory kinship as well as a kinship by blood.

**Administrator—Competency Determined of What Time.**—It is the status of the petitioner at the time of the grant of administration that determines his competency.

**The Public Administrator must Always Give Way to the Relatives** who are entitled to succession, provided they are qualified to assume the functions of administration.

The opinion in Estate of Barrett was destroyed in the great fire of 1906.

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#### AUTHORITY OF ONE OF SEVERAL EXECUTORS OR ADMINISTRATORS.

##### Powers in General.

**At Common Law.**—Where two or more executors or administrators are appointed, the common law esteems them as one person representing the decedent. Hence each has authority to perform any act, in the ordinary course of administration, that all can do; the acts of one are deemed the acts of all, and bind all and the estate accordingly, inasmuch as corepresentatives have a joint and entire authority over the assets of their decedent. Each has full authority in matters of administrative detail: *Willis v. Farley*, 24 Cal. 490; *Wilkerson v. Wootten*, 28 Ga. 568; *Scruggs v. Gibson*, 40 Ga. 511; *Alerding v. Allison*, 170 Ind. 252, 127 Am. St. Rep. 363, 83 N. E. 1006; *Clark's Exrs. v. Farrar*, 3 Mart. (O. S.) 247; *Bodley v. McKinney*, 9 Smedes & M. (17 Miss.) 339; *Bank of Port Gibson v. Baugh*, 9 Smedes & M. (17 Miss.) 290; *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq. 328; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537; *In re Bradley*, 25 Misc. Rep. 261, 54 N. Y. Supp. 555; *Arkenburgh v. Arkenburgh*, 27 Misc. Rep. 760, 59 N. Y. Supp. 612; *Chapman v. City Council of Charleston*, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311; *Boudereau v. Montgomery*, 4 Wash. C. C. 186, Fed. Cas. No. 1694; *Edmonds v. Crenshaw*, 14 Pet. 166, 10 L. ed. 402; *Owen v. Owen*, 1 At. 494, 26 Eng. Reprint, 313; *Ex parte Rigby*, 19 Ves. Jr. 463, 2 Rose, 224, 34 Eng. Reprint, 588. This is an exception of the rule that where a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is requisite to its due execution; and distinguishes executors and administrators from technical trustees, who in equity are regarded as forming one collective trustee, and must therefore execute the duties of the office in their joint capacity: *De Haven v. Williams*, 80 Pa. 480, 21 Am. Rep. 107; *Fesmire v. Shannon*, 143 Pa. 201, 23 Atl. 898.

"Coexecutors, however numerous, constitute an entity and are regarded in law as an individual person. Consequently the acts of any one of them in respect to the administration of estates are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. Thus one of two executors may assign a note belonging to the estate of the testator, or make sales and transfers

of any personal property of the estate. He may release or pay a debt, assent to a legacy, surrender a term or make an attornment without the consent or sanction of the others. 'If a man appoints several executors, they are esteemed in law as but one person representing the testator, and acts done by any one of them which relate to the delivery, gift, sale or release of the testator's goods are deemed the acts of all.' It would seem to follow from this principle that they have the power of joint and several agents of one principal and that any act done or performed by one within the scope and authority of his agency is a valid exercise of power and binds his associates": *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677.

A modification of the general rule that the act of one executor is the act of all would seem to arise where the will requires special acts to be performed outside the common course of administration, and confides their performance to several executors at their discretion, as where power is conferred to raise money by mortgaging the property of the estate (*Port Gibson Bank v. Baugh*, 9 Smedes & M. (Miss.) 290), or where power is given to make investments (*Holecomb v. Holecomb's Exrs.*, 1 N. J. Eq. 281; *Holecomb v. Coryell*, 1 N. J. Eq. 476), or where power is given to continue the mercantile business of the testator for the benefit of his estate: *Werborn v. Austin*, 77 Ala. 381.

**Under Statutes.**—How far the common-law rule as to the authority of one executor or administrator to act independently of his associates has been modified, if at all, by statute, does not appear from the adjudicated cases. It would seem, however, that from the terms of some statutes the legislature has intended some modification. Section 1355 of the California Code of Civil Procedure provides: "When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his coexecutor or coadministrator authority in writing to act for both; and where there are more than two executors or administrators, the act of a majority is valid." Other states have statutes substantially the same as the California: *Ariz. Rev. Stats.* 1642; *Idaho Rev. Stats.* 5346; *Mont. Code Civ. Proc.* 2406; *N. D. Rev. Code*, 8016; *Okl. Rev. Stats.* 1527; *S. D. Pro. Code*, 75; *Utah Rev. Stats.* 3910; *Wyo. Rev. Stats.* 4633. But in Texas the statute provides that "should there be more than one executor or administrator of the same estate at the same time, the acts of one of them as such executor or administrator shall be as valid as if all acted jointly," except in the conveyance of real estate: *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268.

**Distinction Between Executors and Administrators.**—Some authorities have attempted to distinguish between executors and administrators, conceding that one executor can bind his associates in matters

of administration, but denying that one administrator can bind his. The reason advanced for this has been that an executor derives his authority from the appointment of the testator, whereas an administrator derives his authority from the appointment of the law: *Mangrum's Admrs. v. Simms*, 4 N. C. 160; *Gordon v. Finlay*, 10 N. C. 239; *Jordan v. Spiers*, 113 N. C. 344, 18 S. E. 327. This reason has little force under the present law of administration whereby executors and administrators both substantially derive their authority from the court of probate, the former being designated by the testator, the latter by statute, and both must receive the approbation of the court before they qualify. The distinction is not generally recognized, and the more approved doctrine is that executors and administrators stand on the same footing in regard to their power to act singly: *Willis v. Farley*, 24 Cal. 490; *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Herald v. Harper*, 8 Blackf. (Ind.) 170; *Douglas v. Satterlee*, 11 Johns. 16; *Gage v. Johnson's Admr.*, 1 McCord. 492; *Jacomb v. Harwood*, 2 Ves. 265, 28 Eng. Reprint, 172. "Though it was formerly held otherwise, it seems to be now the settled law that joint administrators stand on the same footing, and are invested with the same authority in respect to the administration of the estate as coexecutors. Like them, they are regarded in law as one person; and consequently the acts of one of them, in respect to the administration, are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property": *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108.

#### **Collection of Assets, Payment of Debts, and Other Administrative Acts.**

**In General.**—It is elementary that an executor or administrator is entitled to the possession and control of the effects of his decedent for purposes of administration until the estate is settled or delivered over by order of the court to the heirs or legatees: *Page v. Tucker*, 54 Cal. 121; *Freese v. Hibernia Sav. & Loan Soc.*, 139 Cal. 392, 73 Pac. 172; *Butler v. Smith*, 20 Or. 126, 25 Pac. 381; *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451. When there are two or more executors or administrators, each is, as a rule, equally entitled to possession and control: *Abila v. Burnett*, 33 Cal. 658; *Gates v. Whetstone*, 8 S. C. 244, 28 Am. Rep. 284; *Edmonds v. Crenshaw*, 39 U. S. (14 Pet.) 166, 10 L. ed. 402; and each is entitled to receive or collect any assets belonging to the estate, and to collect any debts owing thereto and discharge the debtors. They are not bound to act jointly in such matters: *Bagby v. Hudson*, 11 Ky. Law Rep. 581; *Bryan's Exrs. v. Thompson's Admrs.* 7 J. J. Marsh. (30 Ky.) 586; *Shaw v. Berry*, 35 Me. 279, 58 Am. Dec. 702; *Mitchell v. Williamson*, 6 Md. 210; *Duncan v. Davison*, 40 N. J. Eq. 535, 5 Atl. 93; *Wood v. Brown*, 34 N. Y. 337; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537; *Hoke's Exrs. v. Fleming*, 32 N. C. 263; *Stone v. Union Sav. Bank*, 13 R. I. 25; *Gates v. Whetstone*, 8 S. C. 244, 28 Am. Rep. 284; *Hyatt v. McBurney*, 18

S. C. 199; *Gage v. Johnson's Admr.*, 1 McCord, 492; *Waring v. Purcell*, 1 Hill Eq. 193; *Gleason v. Lillie*, 1 Aik. (Vt.) 28; *Mills v. Mills' Exrs.*, 28 Gratt. 442. Ordinarily one executor has no power to exclude his associates from the possession of assets or to deprive them thereof: *Hall v. Carter*, 8 Ga. 388. Yet where an executor jeopardizes the funds of the estate by his mismanagement or insolvency, equity may compel him to restore the funds: *Elmendorf v. Lansing*, 4 Johns. Ch. 562; or in a proper case appoint a receiver: *Jenkins v. Jenkins*, 1 Paige, 243. In order to obviate a resort to a court of equity in such an emergency, the New York statute provides that where two or more executors or administrators disagree as to the custody of the money or property intrusted to their care, the surrogate may give directions in the premises: *Matter of Adler*, 60 Hun, 481, 15 N. Y. Supp. 227; *Matter of Eisner*, 6 App. Div. 563, 39 N. Y. Supp. 718; *In re Hoagland*, 51 N. Y. App. Div. 347, 64 N. Y. Supp. 920.

When a daughter and her father are appointed executrix and executor of her mother's will, she has the same right to receive, control and disburse funds of the estate, including a legacy to her, as he has: *In re Russell*, 110 N. Y. Supp. 706, 126 App. Div. 607. But it has been doubted that two executors may, against the protest of a third one, check out of bank the succession funds: *Allen v. Louisiana Nat. Bank*, 50 La. Ann. 366, 23 South. 360.

Under a statute providing that an executor or administrator may institute a proceeding to discover property, one of two administrators may proceed alone: *In re Ten Eyck*, 3 Dem. Sur. (N. Y.) 1; and a distress warrant in favor of one of two administrators may issue on the affidavit of one of them: *Scruggs v. Gibson*, 40 Ga. 511. One administrator may release a cause of action: *Bryan's Exrs. v. Thompson's Admr.*, 30 Ky. (7 J. J. Marsh.) 586.

The title and right of access of each executor to the books and papers of the decedent are equal. Either is entitled to inspect them and to know for himself what they contain: *Matter of Stein*, 33 Misc. Rep. 542, 68 N. Y. Supp. 933. It is probably competent, however, for the several executors to determine which one of them shall have the manual custody of the books and papers of the estate: *Bronson v. Bronson*, 48 How. Pr. 481.

**Confession of Judgments.**—It seems that one of two or more executors cannot, without the knowledge or consent of the others who are acting, confess a judgment which would bind the estate or the other executors. The law gives to each executor the right to plead a separate plea to protect himself, and the other cannot deprive him of that right, or the estate of his judgment and assistance. Although each executor may sole control and dispose of the chattels of the estate, he cannot by his sole act affect or bind his coexecutors, so as to make them personally responsible, which he might do if he could admit debts or confess judgments without their knowledge or consent: *For-syth v. Ganson*, 5 Wend. 558, 21 Am. Dec. 241; *Hall v. Boyd*, 6 Pa. 267; *Heisler v. Kipe*, 1 Browne, 319; *Karl v. Black*, 2 Pitts. Rep. 19.

**Allowance of Claims.**—Since the act of one executor or administrator, when there are two or more acting, is the act of all, the allowance of a claim against the estate by one of the representatives binds the estate: *Willis v. Farley*, 24 Cal. 490; *Cross v. Long*, 66 Kan. 293, 71 Pac. 524; and his rejection is likewise binding on the estate so that an action may then be maintained to enforce the claim: *Coburn v. Harris*, 53 Md. 367; *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108. But when the will authorizes the executors (where the law permits such a procedure) to administer without the intervention of the probate court, it has been decided that all must concur in allowing a claim: *McLane v. Belvin*, 47 Tex. 493. And it has been held that where the claim of one executor against the estate is disputed by his coexecutor, the orphans' court cannot allow it: *Middleton v. Middleton*, 35 N. J. Eq. 115.

**Arbitration and Compromise.**—One of several executors may enter into an amicable action and submit to arbitration, and thereby bind the estate: *Lank v. Kinder*, 4 Harr. (Del.) 457. And where two joint executors have obtained a decree of the probate court, under the statute provided therefor, to compromise claims against the estate in a certain manner, the settlement of the claims by either is valid and binds the other: *Gilman v. Healy*, 55 Me. 120.

**Execution of Contracts.**—The general rule is, that an executor or administrator cannot, except as expressly authorized by the will or statute, create an obligation which will give a cause of action against an estate. By virtue of his authority as personal representative, he ordinarily cannot create such an obligation. But unless he stipulates to the contrary, such a contract may bind himself personally: *Renwick v. Garland*, 1 Cal. App. 237, 82 Pac. 89; *Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *First Nat. Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499. A coexecutor or coadministrator stands in a no more favorable position in this respect than a sole executor or administrator; and it has been held that one administrator or executor cannot bind the estate or his associates by an agreement to borrow money: *Bryan v. Stewart*, 83 N. Y. 270; nor by a note for an alleged claim against the estate: *Boyer v. Marshall*, 5 N. Y. St. Rep. 431; nor by an indorsement of a note: *Bailey v. Spofford*, 14 Hun, 86.

**Removal of Bar of Statute of Limitations.**—If it is conceded that a sole executor or administrator can, by an acknowledgment or new promise, remove from the debt of the decedent the bar of the statute of limitations so as to bind the estate (a question upon which the law varies in different jurisdictions), it would seem to follow that one of several executors or administrators may do so: *Hord's Admr. v. Lee*, 20 Ky. (4 T. B. Mon.) 36; *Northcut v. Wilkinson*, 12 B. Mon. (Ky.) 408; *Head's Exr. v. Manner's Admr.*, 5 J. J. Marsh. 255; *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417; *Briggs v. Starke's Exrs.*, 2

Mill (S. C.), 111, 12 Am. Dec. 659. Some courts appear to limit this rule to cases where the acknowledgment or new promise is made before the debt is barred: *McCann v. Sloan*, 25 Md. 575; *Pole v. Simmons*, 49 Md. 14. The law is positive in some states that debts barred before the death of the decedent cannot be revived by his representatives: *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45; *Barelay v. Blackington*, 127 Cal. 189, 59 Pac. 834; *Reay v. Heazelton*, 128 Cal. 335, 60 Pac. 977; *Estate of Mouillerat*, 14 Mont. 245, 36 Pac. 185; *Jones v. Powning*, 25 Nev. 399, 60 Pac. 833; *Clayton v. Dinwoodey*, 33 Utah. 251, 93 Pac. 723; but the presentation and allowance of a claim arrests the running of the statute, if it has not already run its course, pending administration: *Nally v. McDonald*, 66 Cal. 530, 6 Pac. 390; *German Sav. etc. Soc. v. Hutchinson*, 68 Cal. 52, 8 Pac. 627; *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064; *Estate of Tuohy*, 33 Mont. 230, 53 Pac. 486; *Frew v. Clark*, 34 Wash. 561, 76 Pac. 85.

Said the supreme court of Massachusetts in *Haskell v. Manson*, 200 Mass. 599, 86 N. E. 937: "It is the rule in this commonwealth, in England, and in most of the American states, that an executor or administrator is not bound to plead the general statute of limitations: *Scott v. Hancock*, 13 Mass. 162; *Baxter v. Penniman*, 8 Mass. 133; *Emerson v. Thompson*, 16 Mass. 429; *Slattery v. Doyle*, 180 Mass. 27, 61 N. E. 264; *Field v. White*, L. R. 29 Ch. Div. 358; *Midgly v. Midgly*, [1893] 3 Ch. 282; *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417; *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Hord's Admr. v. Lee*, 4 T. B. Mon. (Ky.) 36. So, too, it is a general doctrine that payment by one of two or more just executors will have the same effect as payment by all. Such is the usual effect of an authorized official act of an executor, so far as it relates to the property of the estate. But the rule that an executor or administrator is not bound to plead the statute of limitations is an exception to the general rule that it is his duty to protect the property and interests of the estate under his charge. It is universally agreed that it ought not to be extended. An executor or administrator is liable for a devastavit, if the estate suffers through his failure to plead the statute of frauds: *Field v. White*, L. R. 29 Ch. 358. An executor has no right to create a liability against the estate by making a new and independent contract to pay an alleged debt.

"The above-mentioned exception relative to the statute of limitations is founded upon the theory that an acknowledgment and new promise does not create a new liability, but continues in force an old one that otherwise might not be enforceable. There is some ground for holding that, where a debt has been barred by the statute before the death of the debtor, an administrator or executor should not be permitted to revive it, by a partial payment, or a new promise or acknowledgment of any kind. Although the distinction has not been established in this commonwealth between the effect of a payment and acknowledgment by an executor or administrator of a debt which was

not barred at the time of his appointment, and the payment of a debt that was barred in the lifetime of the debtor; and although theoretically the nature of such a new undertaking by the original debtor may have been treated as the same in reference to a debt already barred as in reference to a debt against which the time of limitation has not expired, it is a significant fact that, in every case that we have found in Massachusetts in which a payment or acknowledgment by an executor or administrator was held to have extended the time, the debt was not barred in the lifetime of the debtor. The executor or administrator was simply continuing in force a debt which was collectible from him after his appointment. In *Pole v. Simmons*, 49 Md. 14, a promise by an executor, after the statute had fully run in the lifetime of the debtor, was treated as a new promise, made without authority, and insufficient to create a liability: See, also, *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Cayuga County Bank v. Bennett*, 5 Hill, 236. In many of the states of this country, either under statutes or the decisions of the courts, a debt which was barred in the lifetime of the debtor cannot be revived by his representative after his death: *McLaren v. McMartin*, 36 N. Y. 88; *Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39; *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 484; *Patterson v. Cobb*, 4 Fla. 481; *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Smith v. Pattie*, 81 Va. 654; *Bambrick v. Bambrick*, 157 Mo. 423, 58 S. W. 8; *O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525; *Jones v. Powning*, 25 Nev. 399, 60 Pac. 833; *In re Mouillerat's Estate*, 14 Mont. 245, 36 Pac. 185; *Rector v. Conway*, 20 Ark. 79; *Moore v. Hardison*, 10 Tex. 467.

"It has never been decided in Massachusetts that a payment made by one of two executors against the objection of his coexecutor, upon a note which was barred by the statute in the lifetime of the testator, would revive the note, nor has it been so decided in England. The lords justices of the court of appeal, in a late case, preferred to leave this subject open for future consideration: *Midgly v. Midgly*, [1893] 3 Ch. 282."

### Sales, Conveyances, and Other Transfers of Property.

**Sales of Personal Effects.**—One of two or more executors or administrators may, at the common law, by virtue of his authority over the entire personal estate of the decedent, sell or assign the personal assets of the estate as fully as though his associates joined in the transfer. This rule includes assignments of choses in action: *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Dwight v. Newell*, 15 Ill. 333; *George v. Baker*, 85 Mass. (3 Allen) 326; *Wheeler v. Wheeler*, 9 Cow. 34; *Chapman v. Charleston*, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311. In England one of two executors cannot make a transfer of railway stock, registered in the names of both, under the companies clause act: *Barton v. North Staffordshire R. Co.*, 57 L. J. Ch. 800, 38 Ch. D. 458, 58 L. T. 549, 36 W. E. 754.

**Indorsement or Transfer of Notes.**—One of two executors or administrators may transfer a note payable to the decedent, since they are considered as holding one office, and the act of one, in settling the estate, is equivalent to the act of all: *Dwight v. Newell*, 15 Ill. 333; *Sanders v. Blain*, 6 J. J. Marsh. (29 Ky.) 446, 22 Am. Dec. 86; *Wheeler v. Wheeler*, 9 Cow. 34; *Geddes v. Simpson*, 2 Bay (S. C.), 533; *Moseley v. Graydon*, 4 Strob. (S. C.) 7. A number of authorities, however, are to the effect that a note payable to two or more executors or administrators, rather than to their decedent, cannot be transferred by one of them only: *Clark v. Gramling*, 54 Ark. 525, 16 S. W. 475; *Sanders v. Blain*, 6 J. J. Marsh. (29 Ky.) 446, 22 Am. Dec. 86; *Smith v. Whiting*, 9 Mass. 334; *Johnson v. Mangrum*, 65 N. C. 146. But it has been affirmed that a note given to two joint administrators may be transferred by one of them where it is given for a debt due the estate: *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881, 23 Atl. 108. In this case the court said: "Can a note given to two joint administrators be transferred by one of them? There is no question that one of two executors or administrators may transfer notes held by the deceased, for the reason that the several persons are considered as holding one office, and in the settlement of the estate, the act of one is equivalent to the act of all; the power of the office may be fully exercised by one, for each takes the whole in his representative capacity, and not a moiety: *Stone v. Union Savings Bank*, 13 R. I. 25. When, therefore, administrators, in collecting assets, take a note payable to themselves as administrators, though the form of the obligation be changed, its character is the same; it is still a debt due to the estate, not to them personally, and its proceeds are assets of the estate. We see no reason, therefore, why the same rule should not apply as though the obligation remained in its original form. The case is quite different from the ordinary case of joint payees, who may have adverse interests, and where each is entitled to hold his moiety of the obligation until he sees fit to part with it. In the ordinary cases of joint payees, excepting, of course, copartnerships, neither one represents the other; one alone, therefore, cannot transfer a note without the other. But where one represents the whole, as a partner or an administrator, the rule should follow the reason. And thus it has been held in *Bogert v. Hertel*, 4 Hill, 492, where the cases upon this point were carefully examined: See, also, 1 *Daniel on Negotiable Instruments*, sec. 268; and 1 *Parsons on Notes and Bills*, 159. Most of the cases to which we have been referred by the defendant are cases of individual joint payees and cases of partners after dissolution. In *Sanders v. Blain's Admrs.*, 6 J. J. Marsh. (29 Ky.) 446, 22 Am. Dec. 86, the court said that the administrator and administratrix might have sued jointly or individually, but as the administrator had undertaken to act individually, not as administrator, he could not transfer the note without the other payee. *Smith v. Whiting*, 9 Mass. 334, is commented on in *Bogert v. Hertel*, 4 Hill, 492. In the present case, the notes were given for different amounts,

and in different tenor, for a debt due to the estate represented by the administrators. They were, therefore, assets of the estate, and as such we hold that they could be dealt with as other assets of the estate by either administrator."

**Sale of Real Estate.**—It was a rule of the early common law that when a power, not coupled with an interest, was given by will to two or more persons as executors to sell land, it could not be executed unless all the executors joined. In case one died, or renounced the executorship, or declined to join in the execution of the power, the surviving or acting executors could not make a valid sale. This rule, however, has long since been departed from, both in England and the United States, and the law now is that if one or more of the persons named as executors dies, refuses to act, renounces the executorship or fails to qualify, the others who do qualify and act may make a valid execution of the power. Even when only one of several executors qualifies and acts, he alone may make a good conveyance: *Stewart v. Mathews*, 19 Fla. 752; *Wolfe v. Hines*, 93 Ga. 329, 20 S. E. 322; *Clinefelter v. Ayres*, 16 Ill. 329; *Wardwell v. McDowell*, 31 Ill. 364; *Anderson v. Turner*, 10 Ky. (3 A. K. Marsh.) 131; *Herrick v. Carpenter*, 92 Mich. 440, 52 N. W. 747; *Bartlett v. Sutherland*, 24 Miss. 395; *Phillips v. Stewart*, 59 Mo. 491; *Holcomb v. Coryell*, 11 N. J. Eq. 476; *Corlies v. Little*, 14 N. J. L. 373; *Weimer v. Fath*, 43 N. J. L. 1; *Cushman v. Cushman*, 116 App. Div. 763, 102 N. Y. Supp. 258, affirmed in 191 N. Y. 505, 84 N. E. 1112; *Roseboom v. Mosher*, 2 Denio, 61; *Bunner v. Storm*, 1 Sand. Ch. 357; *Matter of Bull*, 45 Barb. 334, 31 How. Pr. 69; *Correll v. Lauterbach*, 12 App. Div. 531, 42 N. Y. Supp. 143, affirmed in 159 N. Y. 553, 54 N. E. 1089; *Wood v. Sparks*, 18 N. C. 389; *Taylor v. Galloway*, 1 Ohio, 232, 13 Am. Dec. 605; *Zebach's Lessee v. Smith*, 3 Binn. (Pa.) 69, 5 Am. Dec. 352; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; *Jennings v. Teague*, 14 S. C. 229; *Love v. Love*, 4 Tenn. (3 Hayw.) 13; *Fitzgerald v. Standish*, 102 Tenn. 383, 52 S. W. 294; *Bedford v. Bedford*, 110 Tenn. 204, 75 S. W. 1017; *Johnson v. Bowden*, 43 Tex. 670. But if two of the executors qualify and act in the administration, a power of sale in the will cannot be exercised by one of them alone: *Smith v. Moore's Heirs*, 36 Ky. (6 Dana) 417; *Smith v. Shackelford*, 39 Ky. (9 Dana) 452; *Brown v. Doherty*, 93 App. Div. 190, 87 N. Y. Supp. 563; *Wasson v. King*, 19 N. C. (2 Dev. & B.) 262; *Flieschman v. Shoemaker*, 2 Ohio C. C. 152; *Neel v. Beach*, 92 Pa. 221; *Carroll v. Stewart*, 4 Rich. 200; *Hart v. Rust*, 46 Tex. 556. Where a will confers a power of sale upon two executors and they both qualify, it has been held that the power must be exercised by both, although one has moved to another county and ceased actively to participate in the administration: *Board of Education of Glynn County v. Day*, 123 Ga. 156, 57 S. E. 359. Renunciation may be presumed, after the lapse of a long period of time, in order to sustain the validity of a conveyance made by less than the whole number of executors named in the will:

*Eskridge v. Patterson*, 78 Tex. 417, 14 S. W. 1000; *Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519.

Where a will authorizes the executors, or a majority of them, to sell land, a deed made by less than a majority is ineffectual: *Carmichael v. Elmendorf*, 7 Ky. (4 Bibb) 484. And where a will directs the executors to convey real estate, and there are three of them who all qualify, a conveyance executed by only two is ineffectual: *McRae v. Farrow*, 4 Hen. & M. (Va.) 444. But many statutes now provide that in case there are more than two executors or administrators, the act of a majority is valid; and under such statutes it would seem that a majority of the executors or administrators who qualify may execute a power of sale contained in the will: Cal. Code Civ. Proc., 1355; Ariz. Rev. Stats., 1642; Idaho Rev. Stats., 5346; Mont. Code Civ. Proc., 2406; Nev. Comp. Laws, 2818; N. D. Rev. Code, 8016; Okl. Rev. Stats. 1527; S. D. Pro. Code, 75; Utah Rev. Stats., 3910; Wyo. Rev. Stats., 4633; *Stockdals v. McKown*, 1 Nott & McC. 41.

"At common law, if a naked power was given by will to two or more persons as executors to sell lands, it was incapable of valid execution, unless all on whom it was conferred joined. If one died, or renounced the executorship, the surviving or acting executors could not make the sale. It was also the rule that if the power was coupled with an interest, then, if one or more died, or renounced, it would survive, and was capable of execution by the acting executors. If there was a devise to executors by name, with directions to sell, the descent to the heir was intercepted, and the freehold passed to the donees, coupling an interest with the power; and it was capable of execution by such of the executors as accepted the trust or remained alive. The interest feeding the power and keeping it alive was not a personal interest in the trust; it was the possession, *virtute officii*, of the legal estate over which the power was to be exercised. A mere devise that executors should sell lands, not intercepting the descent to the heir, nor passing any estate to the executors, was a naked power to sell, which could not be satisfied, unless all joined in its execution": *Tarver v. Haines*, 55 Ala. 503.

**Leases for Years** are assets in the hands of administrators, and an assignment thereof by one binds the others: *Lewis' Heirs v. Ringo*, 10 Ky. (3 A. K. Marsh.) 247. If one of several administrators believes the continuance of a lease reserving rent for the payment of which his decedent has bound himself as surety to be injurious to the estate, he may make an agreement for the determination and giving up of the lease without joining the coadministrators: *Reber v. Gilson*, 1 Pa. 54. Where a statute requires a lease for more than one year to be in writing, and when made by an agent requires his authority to be in writing, and another statute provides that where there are more than two executors or administrators, the act of a majority is valid, one of six executors, without any written authority from the others, cannot make a lease for more than one year: *Utah Loan & Trust Co. v. Garbutt*, 6 Utah, 342, 23 Pac. 758.

**Pledges and Mortgages.**

**Pledge of Notes or Bonds.**—The authority of an executor or administrator over the assets of the estate empowers him to pledge, as security for the debts of the estate, its notes or bonds: *Bailie v. Kinchley*, 52 Ga. 487; *Wheeler v. Wheeler*, 9 Cow. 34; *Appeal of Wood*, 92 Pa. 379, 37 Am. Rep. 694.

**Mortgages and Their Release or Payment.**—Where a will directs that the executors shall “exercise their powers jointly,” and authorizes them to raise money by a mortgage of the estate, all must unite in executing the instrument, and a note and mortgage made by one alone does not bind the estate: *Bank of Port Gibson v. Baugh*, 17 Miss. (9 Smedes & M.) 290.

One of two executors may assign a mortgage given to the testator (*George v. Baker*, 85 Mass. (3 Allen) 326), or a mortgage given to them: *Bogert v. Hertell*, 4 Hill, 492. The foreclosure of a mortgage may be made by the executors who alone qualify: *Alexander v. Rice*, 52 Mich. 451, 18 N. W. 214; *Steinhardt v. Cunningham*, 55 Hun, 375, 8 N. Y. Supp. 627.

Since the acts of one executor in relation to the delivery, gift, sale or release of the testator's personal property are regarded as the acts of all and bind the estate, he may consent that the lien of a mortgage be postponed to the lien of another mortgage: *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq. 328. One of several executors has authority to receive payment of a mortgage and satisfy it: *D'Isvilliers v. Abbott*, 12 Phila. 462; *Fesmire v. Shannon*, 143 Pa. 201, 22 Atl. 898; *Weir v. Mosher*, 19 Miss. 311; or he may release a portion of the mortgaged premises from the lien of a mortgage given to the testator: *Stuyvesant v. Hall*, 2 Barb. Ch. 151. A mortgage payable to the executors, as such, may be satisfied by one of them: *People v. Miner*, 37 Barb. 466, 23 How. Pr. 223; although perhaps the case of *Pearce v. Savage*, 51 Me. 410, may be construed to hold otherwise.

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**ESTATE OF FREDERICK TILLMANN, DECEASED.**

[No. 5,816 (N. S.); decided November 10, 1909.]

**Legacy—When not Adeemed.**—A Bequest of eighteen shares of stock in a designated corporation is not adeemed where, between the date of the will and the death of the testator, a securities corporation is organized which is merely a holding company for the first corporation, owning all stock issued by it and no other property, and the testator exchanges his stock in the first corporation (twenty-one shares in all) for two thousand one hundred and twenty-one shares in the securities company.

Petition for partial distribution.

Morrison, Cope & Brobeck, for the petitioners.

COFFEY, J. Testator made his will May 25, 1905. In it he provided as follows:

"After my demise eighteen (18) of my shares of Tillmann & Bendel shall be distributed as follows:

"(1) One share to each of my grandchildren, namely: Annie, Emilie and Nanny Schmelzkopf; Frederick Wilhelmine and Henry Hohwiesner; Frederick and Agnes Tillmann; Lieschen, Hans, Kurt, Erika, Rita and Heinz Ludwig Rohlwink.

"(2) Four shares to my son Carl Heinrich, who although without issue, has a vocation in which he cannot acquire a fortune."

Tillmann & Bendel is a corporation with a capital stock of sixty (60) shares, of which fifty-six (56) shares are issued and outstanding. At the time of the execution of his will the testator owned twenty-one shares of Tillmann & Bendel.

Between the date of the will and the death of the testator, the United Securities Company was incorporated under the laws of the state of Nevada, with an authorized capital of \$1,500,000, of which \$1,000,000 was in common stock, and \$500,000 in preferred stock.

The United Securities Company is, up to this time, merely a holding company for Tillmann & Bendel.

The stockholders of Tillmann & Bendel exchanged their stock for stock in the United Securities Company. Some took preferred stock and some took common stock. The testator exchanged his stock for preferred stock of the United Securities Company, getting two thousand one hundred and twenty-one shares for his twenty-one shares in Tillmann & Bendel, or at the rate of one share of Tillmann & Bendel for one hundred and one shares of the United Securities Company.

The United Securities Company owns all of the issued stock of Tillmann & Bendel, but it owns no other property.

The par value of Tillmann & Bendel stock is \$10,000 per share. In the exchange it was estimated at \$10,100, and the

preferred stock of the United Securities Company was taken at par.

Did this transaction work an ademption of the specific legacies? It did not do so, for the reason that the property dealt with has not changed in the least. The corpus of the material property dealt with was the property known as Tillmann & Bendel. The owners are exactly the same as they were before; their proportions are the same; only their title is evidenced by a different piece of paper. The property is the same, though called by a different name.

The decided cases seem to bear out this view: *In re Peirce*, 25 R. I. 34, 54 Atl. 588.

Testatrix bequeathed certain stock in a bank. Subsequently, but during her lifetime, the bank consolidated with other banks, the new concern taking over the liabilities and assets of the several banks without a formal liquidation, and their stockholders being entitled to exchange their shares for shares in the consolidated bank. Testatrix made the exchange, making a small additional payment in cash.

It was held that as the transfer was not a sale, but an exchange, the legacy of the stock was not adeemed.

*Oakes v. Oakes*, 9 Hare, 666: Testator by his will bequeathed as follows: "I give and bequeath all my Great Western railway shares, and all other the railway shares, which I shall be possessed at the time of my decease, unto my nephew, Arthur Oakes, for his own absolute use and benefit."

Afterward, before the death of testator, by a resolution of the company made under the authority of an act of parliament, the shares of the company were converted into consolidated stock. It was held that the legatee took the consolidated stock into which the shares were converted; although he did not take other consolidated stock which the testator bought afterward and which he held at the time of his death.

This case was overruled as to the matter of the additional stock in *Morrice v. Aylmer*, L. R. 10 Ch. App. 148, L. R. 7 H. L. 717.

The vice-chancellor in *Oakes v. Oakes*, 9 Hare, 666, held that "shares" and "stock" were different; but in *Morrice v. Aylmer*, they were held to mean practically the same thing, and therefore a bequest of shares would carry stock. But as

to the point involved in this present case, *Oakes v. Oakes* has never been overruled: *In re Slater*, *Slater v. Slater* (1907), 1 Ch. 665, affirming same case (1906), 2 Ch. 480; 8 Am. & Eng. Ann. Cases. 141.

A specific legacy of stock in a corporation was held adeemed where, after the execution of the will, the testator exchanged the stock for stock in another corporation which succeeded to the rights, duties and property of the first corporation. The succession (water companies) was made by virtue of an act of parliament. But the new company was not identical with the old company. It took in other properties and derived its revenues from additional sources, and, in fact, there was a sale of the old stock made upon a cash basis, and a purchase of the new.

The *M. R.*, Cozens-Hardy, however, cited *Oakes v. Oakes*, 9 Hare, 666, with approval, where shares were converted into stock; and where Turner, V. C., said: "The testator had this property at the time he made his will, and it has since been changed in name or form only. The question is, whether the testator has at the time of his death the same thing existing, it may be, in a different shape—yet substantially the same thing": *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049.

Testatrix gave to her three sisters "provided they are all alive, or to the survivors of them, whatever of my money now on deposit" in four banks of New York City (naming them) "which may be on hand, and not otherwise disposed of, share and share alike." During the life of the testatrix, she drew her money from the four New York banks. She told a friend that she intended to deposit the money in the Hoboken Bank, which she did; and it remained in the latter bank until her death.

The vice-chancellor held that this was a gift of a specific legacy, and that it was not adeemed.

"It is 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 a deposit, as money or cash, differs from the gift of an ordinary debt. It will pass by a gift of all the testator's ready money or cash. Sir Launcelet Shadwell in the case of *Parker v. Marchant*, 1 *Younge & C.* 290-307, affirmed by Lord Chancellor Lyndhurst on appeal (1 *Phil. 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. . . .

"The thing she bequeathed she drew from the bank. It remained the identical thing bequeathed, until disposed of in some way by her. She could have disposed of it by consuming it in living, or turning it into other property, or devoting it to a purpose inconsistent with the bequest. She did neither of these things, but, on the contrary, took the specific thing which she got from the bank, and kept it until April 1st, following, and then with a slight addition placed it in the Hoboken Bank": *In re Pilkington's Trust*, 13 *L. T., N. S.*, 35.

Testator in his will dated September 25, 1860, made a bequest of "all his Lake Erie bonds and debentures" and other property to certain persons upon certain trusts, "according to the values and qualities thereof respectively." On October 5, 1861, he made a codicil, but did not in any manner refer to the above specific request. He died November 27, 1861. At date of will he had five \$1,000 unsecured bonds of the "New York and Erie Railroad Company." This company becoming insolvent, a new company was formed, called the "Erie Railway Company." By the arrangement made on that occasion, the holders of the bonds of the "New York and Erie Railroad Company" became entitled, upon surrendering their un-

secured bonds, to shares in the preferred capital stock of the "Erie Railway Company" in request to those bonds.

The testator accordingly surrendered his said bonds, and received in exchange fifty-eight shares of the preferred capital stock of the "Erie Railway Company," and seventy-five dollars in the same stock. Of the fifty-eight shares and the seventy-five dollars the testator was at the time of his death possessed, for which he held two certificates of the company, dated New York, July 20, 1861; and he was not at the time of his death possessed or entitled of or to any bonds or debentures answering to the term "Lake Erie bonds and debentures," or to any debentures, bonds, stock or other securities in any railway in North America except the shares and stock above mentioned.

The contract by which the property of the "New York and Erie Railroad Company" was transferred to the "Erie Railway Company" was dated October 22, 1859. By that contract the bondholders of the former company agreed to exchange their bonds for preferred stock of the latter. It did not appear that the testator at the date of his will was aware of the negotiation and contract; but it was abundantly clear that he assented to it, because he paid to the "Erie Railway Company" on or before the twentieth day of July, 1861, his share amounting to \$145 of an "assessment" or contribution of two and one-half per cent, upon the holders of unsecured bonds, assenting to the contract, for cash necessary to complete the purchase, as appeared by a receipt which was produced.

Vice-Chancellor Stuart held that the legacy was not adeemed. "No doubt there is this difficulty (and I wish it to be understood that I do not overlook it), that these bonds were for a specific sum defined by the language of the bonds themselves. By the quality impressed upon them at the time when the testator made his will, it was necessary for him to pay more money to acquire that other specific thing, which seems to me sufficiently to answer the description of the subject matter of the gift. But it seems to me that that cannot alter the construction to be put upon the will, for I think there is here a sufficient description of that specific thing into which it was the testator's wish these bonds, which he had specifically given, should be converted (though not by his own act), and

that he intended they should pass by the description in his will. The shares, therefore, must be declared to have passed by the description of the bonds and debentures."

Ademption, in strictness, is predicable only of specific, and satisfaction of general, legacies: *Beck v. McGillis*, 9 Barb. 35, 56; *Langdon v. Astor*, 3 Duer, 477, 541.

Where the owner of land devises the same, together with the business and buildings 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: *Estate of Garratt*, 3 Cof. Pro. Dec. 394.

"Ademption is the technical term used to define 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*, 75 Conn. 683, 55 Atl. 171; *Estate of Garratt*, 3 Cof. Pro. Dec. 403, note.

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. Hayden*, 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. Herman*, 21 Pa. 301; *Stanley v. Potter*, 2 Cox, 180; *Humphreys v. Humphreys*, 2 Cox, 184. See note to *Estate of Garratt*, 3 Cof. Pro. Dec. 415, for a full discussion of this topic.

Application granted.

Ademption of Legacies is discussed in *Estate of Garratt*, 3 Cof. Pro. Dec. 394, and note.

## ESTATE OF MARY JANE HOLMES, DECEASED.

[No. 14,215; decided July 22, 1897.]

**Expense of Litigation—Allowance to Executor.**—The expense of necessary litigation involving the estate of a decedent is a part of the expense of administration for which the executor is entitled to allowance.

**Expense of Litigation—Reimbursement by Devisee.**—If the amount of moneys bequeathed to the legatees in a will exceeds the amount left by the testatrix, a devisee of land involved in litigation should be required, before distribution to him, to reimburse the executor to the extent of his outlay in such litigation, it not appearing from the will that the testatrix intended the devisee to take the property intact at the expense of the legatees.

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**ALLOWANCE TO ADMINISTRATOR FOR INTEREST ON DISBURSEMENTS.**

The question as to whether the superior court in probate has power to allow interest to an administrator on disbursements made by him as expenses of administration (including the administrator's commissions and counsel fees allowed by law) when it is shown conclusively that the estate consists entirely of an undivided interest in unproductive real property, and that a probate sale of same would be most disadvantageous and to the detriment and injury of the estate, and would cause pecuniary loss, arose in the Matter of the Estates of Drouaillet and Thomas, Nos. 3146 and 3147, new series, respectively, department nine, Coffey, J.

The precise question above involved seems never to have been presented to the supreme court of this state, but the question of charging an administrator or executor with interest for different reasons on sums collected or paid out by him, which is practically the converse of the question herein involved, has been frequently passed on by that court, which has held in a line of cases, commencing with *In re Moore*, 96 Cal. 522, 31 Pac. 584:

"In settling the accounts of the administrator, and in ascertaining the distributive share of those entitled to succeed to the estate of a deceased person, and in adjudging what shall satisfy the decree of distribution, the superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity, and may so frame its judgment as to do exact justice in regard to all matters properly entering into the account of the administrator, and which, in the application of equitable rules, affect the distributive shares of the estate."

This decision then goes on to cite several New York cases, especially *In re Niles*, 113 N. Y. 556, 21 N. E. 687; *Hyland v. Baxter*,

98 N. Y. 610, and others in support of this principle, and quotes at some length from the decision in 113 N. Y.

Again, in *Re Clos*, 110 Cal. 501, 42 Pac. 971, the same doctrine is clearly enunciated, and in the same New York cases again cited and quoted from.

In the matter of *In re Clary*, 112 Cal. 294, 44 Pac. 569, the supreme court in enunciating the same doctrine went further, and charged the administrator with interest on sums withheld by him from the legatee. This case, of course, is considerably stronger than the question here involved by reason of the element of fraud which was charged to the administrator therein. However, in that case it was said "that the award of the interest is but an incident to the right to award the principal, and proceeding as it does in accordance with the equity, the probate court must be held to have jurisdiction to afford complete and adequate relief in the premises, since equity does nothing piecemeal."

It is well established in California that a claim against an estate of a deceased person, which has been passed upon on the settlement of the final account of the administrator, has the effect of a judgment against the estate and bears interest at the rate of seven per cent per annum from the date of the decree settling the account, although the demand upon which the claim was founded did not bear interest: *Estate of Olvera*, 70 Cal. 184, 11 Pac. 624; *Estate of Glenn*, 74 Cal. 567, 16 Pac. 396.

Section 1915 of the Civil Code defines interest and section 1920 of the same code provides that all judgments shall bear simple interest, and section 1914 of the Civil Code provides that an advance of money is presumed to be made upon interest unless otherwise expressly stipulated.

Pursuing the investigations on this question outside the state of California, it appears that this question has been presented before several courts of sister states, some of which, however, are not courts of final resort.

In the case of *Liddel v. McVicker*, 11 N. J. L. 44, 19 Am. Dec. 369, the very question here involved was presented to the court, which, after discussing the matter, decided that interest may be allowed by the probate court on advances made by the executor or administrator where they were made in good faith and were meritorious and beneficial to the estate. The discussion of this matter on pages 372-374 of volume 19 of the American Decisions is interesting and the court there says: "There is no rule of law or principle of equity sanctioned or adopted in our country which unqualifiedly and under all circumstances denies interest to an executor or administrator upon moneys actually and in good faith advanced for the use of the estate."

In a Pennsylvania probate court it was held that when an adjudication upon an executor's account has been confirmed absolutely, the awards whether to creditors or legatees become final judgments and

if not promptly paid bear interest from that date: *In re Wainwright's Estate*, 37 Leg. Int. (Pa.) 374.

In the case of *Billingslea v. Henry*, 20 Md. 282, it was held that if an executor has not assets sufficient, and is compelled to resort to the land, the executor is treated as a creditor, and subrogated to the rights of creditors whose claims he has paid and is entitled to interest thereon.

In another Pennsylvania court of first instance it was held that when an executor advances money to pay decedent's debts, he is entitled to interest where the estate is the gainer: *Hobson's Estate*, 25 Pa. Leg. Jour. 456.

From the foregoing decisions it was argued that it was clearly within the sound discretion of the probate department to allow interest on the disbursements made by the administrator in the two estates first above mentioned on final distribution. It was claimed that the moneys advanced by the administrator were necessary expenses of administration and were for the benefit of the estate. Likewise, the moneys advanced for the collateral inheritance taxes, which bear interest under the statute at ten per cent per annum. Sections 1618, 1619 of the Code of Civil Procedure, provide for the payment of administrator's commissions and counsel fees, and under these sections counsel for administrator argued that these commissions and counsel fees have the same standing as the other costs of administration, and that interest should be allowed on them likewise, asserting that as the administrator in these estates, under the law, is entitled to his commissions immediately upon final distribution, as also the allowance for his counsel fees, both of these terms should be classed in the same category with the other expenses of administration. When these two amounts have been advanced by the administrator clearly for the benefit of the estate, that under the decisions above cited the administrator may be considered a creditor of the estate to the extent of his advancements, which may be made a lien on the real property of the estate (*Finnerty v. Pennie*, 100 Cal. 404, 34 Pac. 869), and it was here argued that it is discretionary with the probate court in the exercise of its equitable powers to do absolute justice to allowing legal interest on the whole of the said lien.

Judge Coffey, however, held that the citations were not authorities on the points raised, and that commissions, counsel fees and inheritance taxes did not come within the scope of the cases cited.

An allowance to an attorney is not a judgment or claim which bears interest: *Welsh v. Pennie*, 103 Cal. 350, 37 Pac. 392.

The same reasoning would cover commissions of an administrator, and, indeed, other expenses of administration.

## ESTATE OF RICHARD ADAMSON, DECEASED.

[No. 9,013 (N. S.); decided March 21, 1910.]

**Estate of \$1500—Estimating Value by Excluding Homestead.**—Where a statutory homestead from community property has been set apart in probate to the widow, its value is not considered in determining whether the estate exceeds \$1500. Hence, the petition of the widow to assign to her personal property valued at \$500 should be granted, although the homestead is valued at over \$3,000.

**Estate of \$1500.—The Publication of Notice to Creditors** is unnecessary where the court assigns the whole estate to the widow under section 1469 of the Code of Civil Procedure.

R. L. Husted, for the petitioner.

COFFEY, J. Richard Adamson died leaving a widow. His estate consisted of personal property amounting to \$523.38, and a statutory homestead from community property, valued at \$3,500.

Two questions arise: 1. Can the court assign the personal property to the widow (the homestead having been set off to her), under section 1469 of the Code of Civil Procedure? 2. If the estate is so assigned, must notice to creditors be published?

Section 1469 of the Code of Civil Procedure provides: "If on the return of the inventory it shall appear therefrom that the value of the whole estate does not exceed fifteen hundred dollars, and if there be a widow, the court or judge thereof, shall by order require all persons (to appear and show cause, etc.). If upon the hearing the court finds that the value of the estate does not exceed fifteen hundred dollars, it shall by decree *assign* to the widow (or minor children, as the case may be) 'the whole of the estate,' subject to encumbrances, and *after* payment of expenses of last illness, expenses of administration and funeral charges, and the *title thereof* shall vest absolutely in the widow, or minor children."

In the case in hand, if the homestead is to be considered by the Court when finding that the value of the estate does, or does not, exceed \$1,500, then the petition of the widow to

assign the whole of the estate must be denied. If it is not to be considered, then the petition should be granted.

The widow acquires her title to the homestead by right of survivorship, and not by the decree setting apart the homestead, the decree only withdrawing the homestead from administration. The inventory and appraisement was made and returned, the homestead had ceased to be part of the intestate's estate and was not subject to any procedure of administration: *Estate of Tompkins*, 12 Cal. 114; *Estate of Hardwick*, 59 Cal. 292.

Section 1443, Code of Civil Procedure, provides that in the inventory and appraisement of an estate to be returned to the court, that said appraisement must include the homestead. This would seem at first glance to have intended to include the homestead as part of the assets of the estate of the deceased, but construing it along with section 1476, it seems that the sole purpose of including the homestead in the appraisement is for the purpose of ascertaining whether or not it was declared in compliance with the code provisions relating to declarations of homesteads, and when, from the return of the appraisement, it is found that the homestead is valued at an amount not exceeding the limit prescribed in the code, it is removed from further consideration by this court, and is in no proceeding considered part of the estate of the deceased, and for the purposes of administration the court can proceed as if no such estate was mentioned in the appraisement.

The question has arisen in this case whether publication of notice to creditors should not have been made. The easiest method of arriving at an answer to this question seems to be to inquire what benefit could accrue to said creditors by such publication, or what rights of theirs would be impaired by failure to order such publication. The law cannot be construed as ordering a useless proceeding where absolutely no result can be obtained therefrom. In the case at bar, the homestead is exempt from the claims of creditors, and the only property upon which they can have any claim whatever is the personal property mentioned in the inventory and appraisement. This personal property, amounting to less than \$1,500, can be administered upon under section 1469 of the Code of Civil Procedure, and when such proceedings are had,

the creditors receive the full protection intended to be given them by the code. It seems to be the settled policy of the courts of this state to discourage attempts to prolong the course of administration and to restrain the tendency to incur useless expenses where they can neither afford any relief nor bestow any benefit upon any party concerned in the administration.

In *Estate of Atwood*, 127 Cal. 427, 59 Pac. 770, while the facts were not similar to the facts here presented, nor did the decision decide the point in controversy in the present case, yet the language of the court is applicable to the case at bar.

"Publication of notice to creditors could have no possible effect except to diminish and to help to eat up the very small pittance left to the widow by the deceased. It could not possibly benefit creditors. Then why should notice be given to them? The costs of publication, the commissions of the administrator, and the fee of his attorney would have to be paid out of the widow's mite. It might benefit the administrator, his attorney and the publisher of a newspaper, but the object of the law is to protect the widow and minor children, and not to pay out of the estate useless expenses to persons in no way interested in the estate except to the extent they may be able to get money out of it": *Saddlemire v. Stockton S. etc. Soc.*, 144 Cal. 653, 79 Pac. 381.

The homestead is not a part of the estate for distribution, or for payment of debts, expenses of administration, expenses of last illness, or funeral expenses. The "estate," as such, has no title to it. Hence, when section 1469 uses the words "whole estate" it means the estate which is for distribution. This view is strengthened by the provision that "whole estate" can be assigned, *after* payment of expenses of last illness, etc.; whereas a homestead must be set apart without reference to those expenses.

Hence, where the value of the estate, without reference to the statutory homestead, is found by the court not to exceed \$1500, the "whole estate" can be assigned under section 1469 to the widow, or minor children, if there be no widow.

It is not necessary that notice to creditors be published if the court assigns the whole estate: *Estate of Palomares*, 63 Cal. 402; *Estate of Atwood*, 127 Cal. 427, 59 Pac. 770.

## QUESTIONS AND ANSWERS IN PROBATE.

A. "Where the husband and minor children survive, the inventory and appraisement presented and filed, and the court is asked to set aside property exempt from execution, does the order made by the court in the premises eliminate the publishing of notice to creditors, and all further procedure, and close the estate?"

The Code of Civil Procedure of California—the statutes of Arizona being the same—provides that every executor or administrator shall immediately after his appointment cause a notice to creditors to be published, etc. (sec. 1490), and if he neglects to do so for two months, his letters must be revoked (sec. 1511). While these provisions may not be mandatory, but directory, yet no exception to the general rule above mentioned is made, except in cases in which the entire estate is set apart, as in section 1469, Code of Civil Procedure, and the first clause in Arizona Revised Statutes, 1730, and that exception in California is made by judicial construction: Estate of Atwood, 127 Cal. 427, 59 Pac. 770; Estate of Palomares, 63 Cal. 402.

When property exempt from execution is set apart, the order only determines (1) that the property is exempt from execution and is set apart, and (2) the persons to whom it is so set apart. There is no adjudication (as under "summary administration") that the property exempt from execution is the entire estate. That issue cannot be presented in the proceedings to set aside property as exempt.

The notice to creditors should be published in the case mentioned in "A."

B. "Or can a summary administration be had, when the survivors are as mentioned?"

The law of California (Code Civ. Proc., sec. 1469) provides that there may be a summary administration when the estate does not exceed \$1500, where there is a widow or minor children of the deceased. The statute of Arizona (Rev. Stats., 1730) in the first clause (we leave the second clause out, as notice to creditors is provided for) fixes the value of the estate at \$2,000, and directs that (on proper proceedings) the court must assign for the use of the widow and minor children, or if there be no widow, then for the use of the minor children, if any, the whole of the estate, etc.

Under the law of California, the whole estate is set aside to the widow, and if there be no widow, to the minor children, to the exclusion of the surviving husband, if any: Estate of Leslie, 118 Cal. 72, 50 Pac. 29.

And in such case publication of notice to creditors is not required: Estate of Atwood, 127 Cal. 427, 59 Pac. 770.

While Arizona Revised Statutes, 1730, authorizes "summary administration" in estates of intestates (our section 1469 being applicable to estates of both testates and intestates), the rule will be the same—that the estate set apart shall go to the minor children to the exclu-

sion of the surviving husband, if any, and that the publication of notice to creditors is not required, if the decisions of our supreme court are good law.

C. "Where the wife and minor children survive, the inventory presented and filed and the court proceeds under the summary administration section setting aside the estate, can the widow encumber the property by mortgage or otherwise, the entire estate, or must she resort to guardianship proceedings to encumber the children's portion?"

The widow cannot encumber the entire estate when set apart under "summary administration," as, under Arizona Revised Statutes, 1730 (first clause), in the case mentioned the property vests in the widow and minor children. The interests of the minors can only be encumbered by taking proceedings under Revised Statutes, 1816, and then only to pay the debts of the minors, or for the other purposes mentioned in the law: *Howard v. Bryan*, 133 Cal. 264, 65 Pac. 462.

D. "Where the husband survives, the procedure being under the exemption statutes, husband administrator, is it mandatory that he publish notice to creditors? The entire estate appraised at less than the amount of exemption provided by the Arizona statutes."

When, on the return of the inventory in an intestate estate, it appears that the value of the whole estate is less than \$2,000, the probate court must, after certain notice and proceedings, assign for the use and support of the minor children, if there be no widow, the whole of the estate, after payment of certain expenses enumerated in the statute, and there must be no further proceedings unless further estate be discovered: *Ariz. Rev. Stat.*, sec. 1730. In such case, the administrator is not required to publish notice to creditors: *See Estate of Atwood*, 127 Cal. 427, 59 Pac. 770.

E. "(Being a case where the husband survives, and minor children, the estate being inventoried as separate of wife.) The husband administrator, through his attorney, presents a petition praying that the estate, consisting solely of real estate, be assigned to the surviving husband upon his paying to the children a sum equal to the financial value of their interests therein. I contend that the husband cannot take an equitable interest in the property, it being the separate estate of the estate and being impressed that a life estate is about equal to mortgage or lien on the property."

Where, in the estate of an intestate, property is assigned for the use and support of minor children (the property being the separate estate of a deceased wife), under Arizona Revised Statutes, 1730, the property becomes the property of the minor children, and the surviving husband has no interest therein. Section 1730 provides a special rule for this class of cases, which prevails over the general rule provided in section 1729—at least such is the settled law under the California decisions.

The property being vested in the minor children, they can only be divested of it by appropriate proceedings in guardianship. In the proceedings in the estate of the deceased wife now pending, the probate court has no jurisdiction to assign the property of the minors to the surviving husband, as that would be nothing more nor less than a sale, which, as before observed, can only be made in guardianship proceedings. It cannot be contended that, in the estate now pending, the court could assign the property of the minors to a stranger. The surviving husband, in the matter in hand, stands on the same footing as a stranger, as he has no interest, legal or equitable, in the property.

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### ESTATE OF JOHN R. HITE, DECEASED.

[No. 13 (N. S.); decided 1906.]

**Attorney Fees—Allowance to Executor.**—Section 1616 of the Code of Civil Procedure, as amended in 1905, gives no right to an attorney for an executor to fees which he did not possess before. Prior to the amendment his fee might be an allowance to the executor as part of the expenses of administration; that is still the case.

**Attorney Fees—Allowance to Executor.**—Under the amendment of 1905 to sections 1616 and 1619 of the Code of Civil Procedure, attorney fees are still an allowance to an executor or administrator to be accounted for by him in his accounts.

**Attorney Fees—Allowance Directly to Attorney for Executor.**—Under section 1616 of the Code of Civil Procedure the attorney for an executor or administrator may in his own name petition for an allowance of fees; but attorney fees that cannot properly be allowed the executor or administrator in his accounts cannot be allowed directly to the attorney.

**Executor—Forfeiture to Commissions by Misconduct.**—An executor does not forfeit his right to commissions or allowances by misconduct in office.

COFFEY, J. In June, 1906, F. A. Berlin petitioned this court for admission to probate of the will of John R. Hite, alleging that the will consisted of three documents: 1. The original will dated July 29, 1902, which nominated him as executor; 2. The first codicil dated March 29, 1906; and 3. A second codicil dated April 16, 1906.

The paper presented as the original will, among the other legacies, bequeathed \$5,000 each to Alexander Mathews, Etta

Gross and Mrs. Libbie Stearns, and bequeathed \$10,000 to his sister Lucretia V. Grove. The residuum of the estate was bequeathed and devised, one-third to Lucretia V. Grove, one-third to J. Claude Riley, and one-third to the children of Martha E. H. Cupp, a deceased sister.

The paper presented as the first codicil revoked the legacies of \$5,000 each to Alexander Mathews, Etta Gross and Mrs. Libbie Stearns, and bequeathed to each of them instead the sum of \$2,000.

Two new legatees appear in the codicil: Mary Grove to the amount of \$5,000, and the Central Trust Company, as trustee of a minor, was left a promissory note for \$3,758.72 dated July 26, 1903. It does not appear whether the note bore interest, or what, if any, interest was unpaid.

The interests of the residuary legatees was but little, if at all, affected by this codicil.

The paper presented as the second codicil bequeathed to Lucretia V. Grove \$200,000 in lieu of the legacy of \$10,000 left her by the original will.

On July 16, 1906, Etta Gross filed a contest to the first codicil, and on the same day Etta Gross and J. Claude Riley filed a contest to the second codicil.

Titus, Wright & Creed filed answers as to both contests as attorneys for F. A. Berlin, executor, and also filed answer as to the contest of the second codicil for Lucretia V. Grove, and performed work in preparing for trial. There was finally a compromise between Lucretia V. Grove and the contestants, and the contest was dismissed. The will and codicil were admitted to probate and F. A. Berlin was appointed and qualified as executor, and thereafter petitioned this court for an allowance to him as executor for fees earned by his attorneys, Titus, Wright & Creed, for services in maintaining the will and codicils as against the attacks of contestants.

J. C. Riley filed written objections to the allowance of any attorney's fees on the following grounds: 1. That the alleged services were rendered prior to the probate of the will and issuance of letters testamentary; 2. That the alleged services were rendered for the benefit of Lucretia V. Grove, not for the benefit of the estate of John R. Hite; 3. That the court has no power to allow to the executor attorney's fees in con-

test of a will before probate thereof; 4. That if the court has such power this is not a proper case in which to exercise it.

The court sustained the objection and denied the petition for allowance.

Prior to the decision of the court it was ascertained that F. A. Berlin, executor, had appropriated large sums of money of the estate to his own use and was unable to replace them. He was suspended from his office as executor and a special administrator appointed. Thereupon Titus, Wright & Creed filed a petition on their own behalf for an allowance for attorney's fees, setting up the same facts as to services rendered as were contained in Berlin's petition, and alleging in addition the suspension of said Berlin for violation of his trust, and claiming that they were entitled to an allowance under section 1616, Code of Civil Procedure, and that they should not be deprived of their fees by reason of the misconduct of Berlin after their services had been rendered and their employment ended. To which petition J. C. Riley filed a demurrer. Before the filing of the demurrer an order had been made revoking the letters testamentary issued to Berlin. The court sustained the demurrer and denied the petition.

The court declines to pass upon the question whether or not it is in the power of the court to make an allowance to the person named in a will as executor for attorney's fees contracted for by him, in resisting a contest to a will proposed for probate and before probate thereof, such decision being unnecessary to the decision of this case. Where, as in this case, a contest of a will is inaugurated by one residuary legatee against another residuary legatee, it is a controversy in which a person named as executor in the proposed will, and the estate of the decedent, is not interested. In such case it would be improper to allow the nominated executor fees of an attorney employed by him to resist a contest. Section 1616 of the Code of Civil Procedure, as amended in 1905, gave no right to an attorney for an executor to fees which he did not possess before. Prior to the amendment his fee might be an allowance to the executor as part of the expenses of administration. That is still the case. Section 1616, prior to 1905, read thus: "He shall be allowed all necessary expenses in the care, management, and settlement of the estate,

*including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts."*

In the amendment of 1905 the portion of the section italicized as above was omitted, but the omitted portion was in effect incorporated in the new section 1619 passed on the same day as the amendment to section 1616 and in *pari materia* with it. Attorney's fees are still an allowance to an executor or administrator and to be accounted for by him in his accounts. Under section 1616, as amended, the attorney may in his own name petition for allowance of fees, which he could not do previously, but the fees to be allowed are the fees which would have been properly allowed to an executor or administrator in the settlement of his accounts. This court, having decided in the matter of the petition of Berlin that the fees of these attorneys could not properly be allowed to him in his accounts, cannot allow such fees directly to the attorneys. An executor does not forfeit his right to commissions or allowances by misconduct or embezzlement. The decision of these petitions has not been influenced by the official misconduct of Mr. Berlin.

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Estate of Reddy was before the supreme court in 155 Cal. 390, 436, 448, 101 Pac. 8, 443, 448.

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### ESTATE OF PATRICK REDDY, DECEASED.

[No. 23,438; decided September 29, 1906.]

**Estate of Decedent—Title of Heirs and Administrator to Land.**—An administrator is in no sense the owner of the real property of his intestate; the title thereto vests in the heirs, and the administrator has only a lien thereon for the payment of debts and the costs of administration, and he acts only as agent or trustee for the heirs, who are the owners of the property.

**Estate of Decedent—Sale of Land by Administrator or Heirs.**—An administrator cannot, even under an order of court so authorizing him, relinquish the title of his intestate to land within the forest reserve and select other land in lieu of it; but if the administration has so far advanced as to be clear of liabilities, then a deed by the sole heirs and devisees for this purpose will be valid.

**Estate of Decedent.—The Title of Devisees to the Land** of the ancestor comes instantly upon his death; and, subject to the liens of creditors and the temporary right of the administrator, they may at once dispose of the property.

**Estate of Decedent—Sale of Land Pending Administration.**—Where, pending administration, the sole devisees, who are also the heirs and administrators, make a conveyance of a part of the land, as devisees and as administrators, the land remaining unsold should, if a probate sale afterward becomes necessary or expedient, be sold before the land that has been thus conveyed, and the grantees may contest a petition to sell the entire property.

**Judicial Sale—Estoppel to Deny Validity.**—One who causes property to be sold under a void judicial proceeding, and retains the proceeds, cannot question its validity to the prejudice of others who have in good faith relied and acted upon it as valid.

C. H. Oatman, for the executor applicant.

Cushing, Grant & Cushing, for the opponents.

Galpin & Bolton, also, for opponents.

COFFEY, J. This is an application by the executor of the will of Patrick Reddy, deceased, for an order of sale of all of the property of the decedent upon the ground that the sale is for the advantage, benefit, and best interests of the estate and those interested therein.

It is opposed by the contestants, R. M. Cobban and T. B. Walker, on the ground that it is not necessary to pay family allowance, debts, expenses or charges of administration or legacies, and that it would be prejudicial to their interests to the extent of many thousands of dollars, and they assert that since no heir or devisee of the deceased has asked for a sale of the property, and as the executor has no interest in the matter, it is clear that if there be the slightest doubt as to the granting of the petition, it should be resolved in favor of the contestants, who will be irreparably injured if the sale be made, and no one will suffer injury if the petition be denied.

The executor denies that Cobban and Walker have any interest in the premises; and they have no right to be heard in the proceeding.

Patrick Reddy died leaving as his sole devisees and heirs at law his widow, Emily M. Reddy, and his brother, Edward A. Reddy, both since deceased. He left creditors whose claims are still unpaid. While his estate was in course of

administration, the widow and brother being administrators, they undertook to convey a portion of the land of which he died seised to the United States for the purpose of obtaining the right to select other lands belonging to the government in the place and stead of the lands so conveyed. The conveyance was executed by them as devisees and also as administrators. Preceding this transaction certain steps were taken by the administrators, which it may be well to recount, as detailed by the counsel for petitioner. The land described in the deeds had been owned by Patrick Reddy and Mollie Conklin, an undivided one-half interest by each. During his lifetime it appears that he had contemplated selling his interest for use as "base" or forest reserve "scrip" for the selection of other lands under the act of Congress of June 4, 1897, and had given his word to John A. Benson for a sale to him of the selection right pertaining to these lands for a certain price, Benson being a dealer in "scrip" of this character. After Patrick Reddy's death his widow and his brother considered that no better disposition could be made of the lands than that which had been verbally agreed upon by the deceased; and, with this end in view, they filed a petition for an order of sale which came on for hearing on September 18, 1900, when it was granted and an order made for a probate sale by them.

Nothing more was done under this order, but on the next day, September 19, 1900, the court, upon application of the administrators, made an order authorizing them to surrender these lands to the government, to select other lands in lieu thereof, and to sell the lands so selected. This order is conceded to be void and is so treated by the parties to this discussion. Thereafter and on the same date the conveyance referred to was executed. The deeds were accompanied by blank selections, executed by the administrators of the estate of Patrick Reddy, of the lieu lands, and also powers of attorney in blank purporting to authorize the person whose name might be filled in to represent the selectors in the land office, and to convey the lieu lands when the selections had been approved by the land office. All of these instruments, the deeds of surrender of the Monache lands, the applications to select lieu lands, and the powers of attorney were

executed also by Mollie Conklin, owner of the other undivided half of the lands. The executor calls attention to the fact that although the deeds of surrender to the government of the Monache lands were executed by Mrs. Reddy and Edward Reddy in their individual capacities as well as administrators, the applications to select other lands and the powers of attorney were executed by them solely in their capacity as administrators, and not as individuals, and all the proceedings in the entire transaction subsequent to the execution of the surrender deeds were conducted in their names as administrators of this estate alone, and the money which was paid on account of the purchase price of this scrip was received by them in their official capacity as administrators and applied and accounted for as the property of this estate, and not otherwise.

After making the conveyance to the government they sold to John A. Benson their rights in these lands and to locate lands, and he in turn sold portions thereof to the contestants herein and they located thereunder. The deeds convey the title of Emily M. Reddy and Edward A. Reddy individually as devisees under the will of Patrick Reddy, deceased, and, in addition, Emily M. Reddy, as widow of Patrick, and Caroline S., as wife of Edward, each signed a relinquishment of all rights in said property. The contestants contend that it cannot be disputed that all the right, title, and interest of the grantors passed by these deeds, and it is admitted by the stipulation in evidence that the deeds were executed with that purpose; but it is insisted by the executor that the whole transaction was conducted as an affair of the estate of Patrick Reddy and for its use and benefit and that the only purpose in having the surrender deeds for the Monache lands executed by Mrs. Emily M. Reddy and Edward A. Reddy was to confirm and make valid the surrender of these lands to the government by the estate of Reddy in order that that estate, acting through its administrators in their official capacity, might exercise the selection right given by the act of Congress. So, it is claimed by the executor, that it having been established by evidence on this hearing that Benson was acting as a purchaser and not as an agent, the contestants

did not purchase from the Reddy estate, but from Benson, what he had himself already purchased from that estate.

It is asserted, therefore, that Cobban and Walker, whatever payments they may have made to Benson on account of their purchase, or even if they had paid him in full, did not stand in any better position than Benson himself as against the Reddy estate.

As to the situation after all these papers had been executed and delivered to Benson and the surrender deeds put upon record and the "scrip" or supposed rights represented by the blank applications and powers of attorney sold and delivered by him to contestants, the executor says that neither Benson nor Cobban and Walker through him had acquired any title to or interest in the Monache lands because the deeds for these lands ran to the government, and from the very nature of the case it was never contemplated that Benson or his vendees should ever acquire any title to or interest in those lands, nor that anything should pass to him or to them except the selection right based upon a valid surrender of those lands to the government, and this attempted surrender was not valid, for it was not a surrender by the "owner" as required by the act of Congress; although the surrender deeds were valid as conveyances by the devisees, but as devisees they were not the "owners" of the lands. Although the legal title was vested in them under our code, it was so vested subject to administration, and might be defeated by a sale of the lands in course of administration for any of the purposes authorized by the code.

After the contestants made their locations, the government approved a part of the selections made by Cobban, but as to the remainder, and the lands located by Walker, it was claimed that the creditors of Patrick Reddy, deceased, have a lien upon the lands conveyed, and that until that is removed the application cannot be approved. Therefore, the contestants ask that the lands belonging to deceased at the time of his death and which passed to Emily M. and Edward A. Reddy, subject to the liens of the creditors, and which they have not conveyed, be first sold before the Monache lands. The contestants contend that Emily M. Reddy and Edward A. Reddy, being the sole devisees and owners of all

the lands, the same were owned and held by them subject to the liens of creditors of Patrick Reddy; that they having sold a part of the lands and thereby created the rights claimed by contestants, the remainder of the land which they have not sold must first be resorted to to satisfy the claims of creditors. If this be not done and the lienholders resort to the property conveyed to the government, the contestants will lose whatever rights they acquired by purchase from Emily M. and Edward A. Reddy, and this will be an irreparable injury and contrary to conscience and at variance with every principle of expediency and equity, which demands the recognition of the claims of those who have acted in good faith, giving valuable consideration, for what they esteemed a good title.

In the deeds to the government were the words, preceding the description, and after the preamble, "We, Mollie Conklin, a widow, of Bakersfield, County of Kern, State of California, and Edward A. Reddy, of the City and County of San Francisco, State of California, devisee under the last Will and Testament of Patrick Reddy, deceased, also Administrator of the Estate of Patrick Reddy, deceased, do hereby release, remise, quit-claim, grant and relinquish to the United States of America, the said land." Contestants insist that this conveyance passed all the interest which they had in the land; but the executors respond that they were not the owners of the land, and upon this premise seems to depend the contention.

After the papers were executed and placed in the possession of Benson, the contestants, acting in good faith and with the intention and for the purpose of acquiring a good title to said selection right paid to him large sums of money, and in consideration thereof he delivered to each of them papers covering large tracts of Monache lands. It is said that over \$2,000 was paid by Cobban and 7,000 by Walker. Over \$8,000 of the money thus paid over was used in paying family allowance claims and expenses of administration in this estate. After patenting to Cobban several thousand acres of land based on said surrender of the Monache lands the land department refused to issue further patents, holding that the order of this court of September 19, 1900, was void, and that

it was not apparent from the record that the administration of the estate had proceeded far enough to show that the claims against it had been paid so that the conveyance which the devisees and heirs had made would be effectual.

In the letter of the commissioner he says that by the act of June 4, 1897, the right of exchange is given to the owner of patented land within the limits of a forest reserve, and it is settled that the owner only has the right of selection in lieu of land relinquished; but an administrator is, in no sense, the owner of the real estate of the intestate. In California the title to real estate vests in the heirs and the administrator has only a lien thereon for the payment of debts of the decedent and costs of administration, and he acts only as agent or trustee for the heirs, who are the owners of the property. The commissioner concludes that it is clear, therefore, that an administrator cannot be recognized as having, even under an order of the court thereunto authorizing him, the right under the law to relinquish the title of an intestate to land within a forest reserve, and to select other land in lieu of it, and that the land selected could not be accepted; but while the selection, as it stands, is clearly the act of Edward A. Reddy and Emily M. Reddy, in their fiduciary capacity as administrator and administratrix, the several deeds of relinquishment were signed by them also as devisees under the will of Patrick Reddy, deceased; and if as to the decedent's title to this land they were the sole devisees under such will, and if the administration of that estate had so far proceeded that the title was free from liability for other legacies, debts, or costs of administration, it would appear that their deeds, as such devisees, were sufficient to vest title to the undivided one-half in the United States; but, the commissioner said, the record did not disclose this fact; and so, in the circumstances, the selectors were allowed sixty days from notice within which to present satisfactory evidence that, as devisees, they had the title to one-half of the land free and clear of all liens or encumbrances, and, if that should be satisfactorily shown, they would be permitted to so amend their application that the selection would be their individual act and not as administrator and administratrix. So, it would appear from this that the land department recognizes the heir

and not the administrator as the owner who, under the act of June 4, 1897, is entitled to make the surrender and selection; and contestants argue that it is apparent, therefore, that conveyances to them by the administrators would have been worthless, while, on the other hand, the conveyances of the heirs are good as against all but creditors of the estate. The lands involved herein were relinquished and surrendered to the government for the purpose of enabling Edward A. Reddy and Emily M. Reddy to sell the right to acquire other government lands in lieu thereof and the consideration for the conveyance was the money to be received from the sale of the selection right based thereon. Edward A. Reddy and Emily M. Reddy received large sums of money in return for the papers thus executed by them, and this money was used for purposes of administration. These documents were executed for the purpose of transferring their title to the lands and conveying the selection right incident thereto. The purchasers paid their money with view of acquiring that right. The minds of the parties met; the conveyance was completed; and contestants contend that neither the grantors nor their successors can now set it aside, as they are estopped in law and in equity by their own conduct to deny the title of the contestants.

The contention of the executor that the devisees were not the owners of the land does not seem to be supported by the authorities, nor was it the view taken by the commissioner in his letter referred to hereinabove, page 8, lines 10-15. The executor asserts that the attempted surrender of the Monache lands was not valid, because it was not by the "owner," according to the act of Congress, but the government, through its commissioner, said that if it appeared on the record that the administration had so far advanced as to be clear of liabilities their deeds as devisees would be sufficient to vest title in the United States. The act of the administrators would be void, but that of the devisees valid. It is contended, therefore, by the executor, that the attempted surrender by the administrators being void no selection right ever arose or existed which could be the subject of a sale to Benson or by him to his vendees. How, then, the executor asks, have the contestants any interest in this estate, or any of its property,

and how have they been prejudiced except by their own folly in attempting to purchase from Benson something which had no existence? It is not alleged that there was any fraud in the transaction, but that it was the result of a mutual mistake of the law, and that no title passed thereby, and the money paid might be recovered upon the rescission of the contract, which could not have operated to vest in contestants any interest in this estate.

The devisees and the administrators here were identical in person, although, of course, distinguishable in law, and some confusion occasionally occurs from this material identity. As devisees they divested themselves of their title, but as administrators their act was a nullity. Benson bought from them as administrators and then he sold to contestants, who insist that they acted in good faith, believing that they were acquiring a valid title, and upon belief that such was the fact they paid the price. Of this amount over \$8,000 was used in paying family allowances, claims and costs of administration. The same persons that executed the conveyance to the government were the recipients of these moneys that came from contestants. It is true that not all of the money paid to Benson reached the administrators; but so far as contestants were concerned the transaction was consummated. They parted with their money upon the assumption that they were securing a right that the vendor was competent, by reason of his purchase from the Reddys, to sell, and now, if the theory of the executor be true, they have neither money nor title. The same persons who sought to sell the selection right were the sole devisees, and it was natural to assume that they were possessed of the power of parting with their own property, although acting nominally in an official or administrative capacity. The title came to them instantly upon the death of their ancestor; subject to the liens of creditors and the temporary right of possession of the administrator, they might at once dispose of the property. Such is the law as declared by our supreme court.

It seems to be shown by this rule of law that Emily M. Reddy and Edward A. Reddy were the absolute owners of all the lands of which Patrick Reddy died seised, subject, however, to the liens already indicated; the deed to the United

States passed the title to the land described, subject to those liens. The creditors, through the executor, are now seeking to enforce their liens. The devisees having taken all the property of the decedent disposed of a part, and the question now is, Shall the unsold part, which was subject to the same liens as that which they sold, be first sold before that part which they did sell is subjected to the lien? The authorities appear to answer in the affirmative. If this view be correct, the contestants have a right to interfere in this proceeding, and to insist that their interests be protected by postponing a sale of the lands conveyed by the devisees to the United States until it shall be ascertained that the other lands are insufficient to satisfy the liens.

The contestants paid full value to Benson, but he turned in less than half to the administrators, and the executor says that the court should bear in mind, here and at all times, that Benson did not purchase this selection right from the devisees, but from the estate of Reddy, and contestants are at most but successors of Benson; and if he or they come forward with an offer to pay the balance of the purchase money due the estate, they will then stand in better position to demand protection from this court for their supposed rights as purchasers. To this it may be answered, that logically, legally, and equitably their position could not be improved by an additional or a double payment.

If, as contended by the executor, they bought something which had no existence, how could their situation be bettered by the proportion of their payment to the whole purchase price? They paid once and in full, and if they have any right at all, it is by virtue of that payment. The record shows that Benson was to pay the devisees about \$18,000; it seems that the administrators received but a margin more than \$8,000, although the contestants paid him a great deal more than he stipulated to pay his vendors; and the executor declares that it is not just or equitable that for this amount, less than half the agreed purchase price, the estate should be deprived of this valuable property. It is a case of hardship either way it is regarded, but are the contestants to be deprived of what they were the innocent purchasers, for full consideration, and without notice, because of the dereliction

of Benson? He was placed in a position which enabled him to sell to contestants, and they treated him as holding title derived from the Reddys. If the full amount he received from the contestants had been used in discharging his debt to the devisees, it seems to be conceded by the executor that the estate would not be qualified to deny the claim here asserted; that is to say, if Benson had not made default in his obligation to the devisees, or the administrators, or the estate, all being in this case virtually convertible terms, the contestants would be in perfect form to protest this petition; but he did make default, and therefore, the contestants are without remedy.

It is difficult to conceive how, in equity, his failure to keep his bargain with the Reddys to its full extent could affect the character of the transaction with contestants. The Reddys trusted Benson with the title which he conveyed to contestants, and for which they paid in full; but he failed to pay likewise those who had placed faith in him. If anyone should lose, in these circumstances, should it be the contestants, who acted upon the hypothesis that Benson was the owner by right of purchase from the Reddys? It does not seem equitable that they should be called upon to make up the deficit between the amount he actually paid the Reddys, or their representatives as administrators, they acting, in a manner, in a dual capacity; nor does it seem logical that if they derived no title at all, because of the inherent legal vice of the attempted transfer, that vice could be cured by paying twice over, or answering for the miscarriage of Benson in his dealings with the Reddys. If the transaction was valid, it matters not, as to the rights of contestants, what Benson did or failed to do in the performance of his contract with the Reddys; if it was invalid, it could not be aided by the contestants paying several thousand dollars more than they had already paid in complete discharge of their agreement with and to Benson. This is the dilemma presented by the executor's contention; but the law seems to be summed up in the proposition that one who causes property to be sold under a void judicial proceeding and receives and retains the proceeds cannot question its validity to the prejudice of others who have in good faith relied and acted upon it as valid, and this seems to be the situation here. If

this be the law, the contestants have an interest to appear in this matter.

It follows, from an acceptance of this conclusion that the petition of the executor should be denied so far as it applies to the sale of all the property; that is to say, that before resorting to the lands in which the contestants claim to be interested, recourse should be had to the other property to satisfy the claims against the estate. As to the amounts of those claims, the schedule is merely an estimate, and may be accepted for the purpose of this application, except the Benson item. As to the items of attorney's fee and commissions of administrators and executor, there is no occasion for present comment.

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#### ESTATE OF PATRICK LANNON, DECEASED.

[No. 17,778; decided August 24, 1897.]

**Devise—Whether Specific or Residuary.**—If in subdivision 18 of his will a testator gives all the rest and residue of his property to his brothers and sisters, share and share alike, and in subdivision 22 he directs that certain real estate be sold and the proceeds "distributed pursuant to the eighteenth subdivision thereof," the devise in subdivision 22 is specific, and therefore cannot abate, the reference to subdivision 18 being only to identify the devisees.

The opinion in Estate of Lannon was among those destroyed in San Francisco by the conflagration of 1906.

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#### PERSONAL LIABILITY OF DEVISEES FOR CHARGES IMPOSED BY THE WILL.

**For Payment of Legacies.**—It is a well-recognized rule that when real estate is devised with directions to the devisee to pay a legacy, an acceptance of the devise carries with it the personal obligation on the part of the devisee to pay the legacy as directed. This personal liability may be created by the testator directly, without charging the property: *Mason v. Smith*, 49 Ala. 71; *Olmstead v. Brush*, 27 Conn. 530; *Mahar v. O'Hara*, 9 Ill. 424; *Spearman v. Foote*, 126 Ill. App. 370; *Appeal of Haworth*, 105 Pa. 362; *Anderson v. Hammond*, 2 Lea (Tenn.), 281, 31 Am. Rep. 612. But most frequently, perhaps, the charge is imposed upon the estate devised. In the latter case the devisee, upon acceptance, may none the less be personally liable, although the property is also bound; for the rule is that when realty is devised, charged with the payment of legacies, the devisee is personally liable to pay the legatees if he accepts the devise:

Dunne v. Dunne, 66 Cal. 157, 4 Pac. 441, 1152; Olmstead v. Brush, 27 Conn. 530; Burch v. Burch, 52 Ind. 136; Duke of Richmond v. Milne's Exrs., 17 La. 312, 36 Am. Dec. 613; Eskridge v. Farrar, 30 La. Ann. 718; Chew v. Farmers' Bank of Maryland, 2 Md. Ch. 231; Gridley v. Gridley, 24 N. Y. 130; Redfield v. Redfield, 126 N. Y. 466, 27 N. E. 1032, affirming 59 Hun, 620, 12 N. Y. Supp. 831; Larkin v. Mann, 53 Barb. 267; Birdsall v. Hewlett, 1 Paige, 32, 19 Am. Dec. 392; Dodge v. Manning, 11 Paige, 334; Fox v. Phelps, 17 Wend. 393, 20 Wend. 437; Dill v. Wisner, 23 Hun, 123, affirmed 88 N. Y. 153; Decker's Exrs. v. Decker's Exrs., 3 Ohio, 157; In re Lobach, 6 Watts, 167; Shobe's Exrs. v. Carr, 3 Munf. 10; Kenny's Admrs. v. Kenny, 25 Gratt. 293; Merton v. O'Brien, 117 Wis. 437, 94 N. W. 340. But his personal liability does not discharge the real estate from the lien of the legacies charged thereon by the will: Lofton v. Moore, 83 Ind. 112; Mitchell v. Mitchell, 3 Md. Ch. 71; Hoover v. Hoover, 5 Pa. 351. Said Justice Story: "I understand it to be a general rule in the construction of clauses of this sort that where the testator devises an estate to a person, and in respect thereof charges him with the payment of debts and legacies, the charges are always treated as charges in rem, as well as in personam, unless the testator uses some other language, which limits, restrains or repels that construction. Upon no other principle can many cases in the books admit of any rational explanation": Sands v. Champlin, Fed. Cas. No. 12,303, 1 Story, 376.

To quote from the New York court of appeals: "It is well settled that when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is the devisee of real estate. If the devisee, in such case, accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound, even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility, he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy, which he is directed to pay": Brown v. Knapp, 79 N. Y. 136; approved in Williams v. Nichol, 47 Ark. 254, 1 S. W. 243; Hunkypillar v. Harrison, 59 Ark. 453, 27 S. W. 1004.

And to quote from the supreme court of Vermont: "It is settled law that a devisee who accepts a devise charged with the payment of a legacy thereby becomes personally liable to pay the legacy, although the land is worth less than the amount of the legacy. This liability is put upon the ground of an implied promise arising from the fact of acceptance; for the doctrine is that he who accepts a benefit under a will must conform to all its provisions, and renounce every right inconsistent with them": Hodges v. Phelps, 65 Vt. 303, 26 Atl. 625. And to quote from the supreme court of Ohio: "Thus,

in *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310, it is held that where land is devised charged with the payment of a legacy, and the devisee accepts the devise, he is personally and absolutely liable for the legacy; and he has no right to require of the legatee, before payment, a security to refund, in case of a deficiency of assets to pay debts. And in *Fuller v. McEwen*, 17 Ohio St. 288, this court stated the rule in substantially the same language, and held that, in an action to enforce such personal obligation, the fact that the devisee or legatee is or is not also the executor of the will makes no difference in the case. The rule is also recognized and stated in *Yearly v. Long*, 40 Ohio St. 27. The rule is thus stated in *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704: 'Where lands are devised to one who, by the will, is directed to pay a legacy, the legacy is charged upon the land devised; and, when payment of the legacy is made a condition of the devise, its acceptance creates also a personal liability to the legatee, which may be enforced without resorting to the land, the lien still remaining as a security.' Many other cases might be cited to the same effect, and are sustained by text-writers of standard authority: *Woerner on Administration*, 1099; *Williams on Executors*, 1272, 1704. The rule rests upon the reasonable principle that he who takes a benefit under a will must take it subject to its provisions. Any other construction would necessarily defeat the intention of the testator. So that, where a devisee is required to pay legacies to others, an acceptance of the devise imports a promise to pay the legacies; and the legatees have the right to maintain an action thereon for its nonperformance as though the promise had been made to themselves": *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766.

The reason, then, for the personal liability of a devisee for legacies, the payment of which is charged upon him or the devise, is apparent. If he were permitted to evade this liability he would thereby defeat the intention of the testator, and moreover would enjoy benefits under the will without conforming to its provisions. He must take the devise cum onere; he will not be allowed to disappoint the will under which he accepts a benefit: *Glen v. Fisher*, 6 Johns. 33, 10 Am. Dec. 310. His liability, as stated in the preceding paragraphs, has been put upon the ground of an implied promise arising from the fact of acceptance: *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. The legacy stands upon the footing of an ordinary debt which he has promised to pay: *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192.

**For Support of Relative.**—Where a testator devises land, directing the devisee to support a relative or other specified person for life or for some other period of time, making such support a condition of the devise, the devisee, upon accepting the devise, is personally liable for such support: *Porter v. Jackson*, 95 Ind. 210, 48

Am. Rep. 704; *Pickering v. Pickering*, 15 N. H. 281; *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490, affirming 48 N. Y. Supp. 792; *Sommers v. Sommers*, 59 App. Div. 340, 69 N. Y. Supp. 866; *Snyder's Appeal*, 75 Pa. 191. The liability accrues and may be enforced without demand: *Watt v. Pittman*, 125 Ind. 168, 25 N. E. 191; *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192; *Johnson v. Cornwall*, 26 Hun, 499; *Dickson v. Field*, 77 Wis. 439, 46 N. W. 668, 9 L. R. A. 537. While it may be enforced without resort to the land, still such resort is permissible if necessary when the will imposes a charge thereon: *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; although it has been held that a personal charge upon a devisee to furnish support to a designated person cannot be enforced against the land devised, unless there are words in the will warranting such a construction: *Appeal of Haworth*, 105 Pa. 362. The devisees may be bound for the support, even beyond the value of the land devised: *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704. Devisees who accept land given them by will, which lays on them the duty of supporting their sisters and mother, become jointly and severally liable for the support, and one of them who bears the whole burden is entitled to contribution from the others: *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637.

**For Payment of Debts.**—Where a will directs devisees to pay the debts of the testator as a condition of the testamentary gifts, the devisees become personally bound for the debts by accepting the devise: *Harland v. Person*, 93 Ala. 273, 9 South. 379. And by accepting a devise charged with the payment of a debt the devisee becomes personally liable for the debt: *Gridley v. Gridley*, 24 N. Y. 130, reversing 33 Barb. 250; *Dill v. Wisner*, 23 Hun, 123, affirmed in 88 N. Y. 153; *Baylor's Lessee v. Dejarrette*, 13 Gratt. 152. But in *Hayes v. Sykes*, 120 Ind. 180, 21 N. E. 1080, it is declared that a will, charging the debts of the testator, on a deficiency of personal assets, upon land therein devised, does not impose a personal liability on the devisees upon their acceptance. "By the terms of the will," said the court, "they took title to the real estate subject to the encumbrances and charge that was placed upon it. . . . In cases referred to by counsel for the appellant, a personal liability was imposed upon the devisee. The provisions of the will were such in each of these cases that by an acceptance of its terms a personal liability was assumed." The theory of this decision seems to be that the testator did not intend to impose a personal liability for the charge, and that in the absence of such an intention there could be no personal obligation. Clearly, a testator cannot, by any direction to devisees to pay his debts, prevent his creditors from reaching his estate if they desire: *Carpenter v. Carpenter*, 14 N. Y. St. 284.

#### General Rules of Nonliability.

The fact that a devise is merely subject to the payment of a legacy does not render the devisee personally liable on accepting the

devise. Said Justice Mitchell, in *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020, "It is undoubtedly true that where real estate is devised with a naked direction to the devisee to pay a legacy, or upon condition that he pays it, the legacy is a charge on the person of the devisee, and if he accepts the devise he is personally liable for its payment. But it is equally well settled that where the devise is merely subject to the payment of the legacy, the latter is not a charge on the person of the devisee, and the acceptance of the devise does not render him personally liable."

The general rule that where a devisee accepts a devise charged with the payment of debts or a legacy, he becomes personally liable, is modified by the paramount rule that the intention of a testator as disclosed by the will must govern its interpretation and effect: *Hunkypillar v. Harrison*, 59 Ark. 453, 27 S. W. 1004. Other authorities supporting this proposition are *Haskett v. Alexander*, 134 Ind. 543, 34 N. E. 325; *Eskridge v. Farrar*, 34 La. Ann. 709; *Nudd v. Powers*, 136 Mass. 273; *Cronkhite v. Cronkhite*, 1 Thomp. & C. 266; *In re Taber*, 116 N. Y. Supp. 960; *Worth v. Worth*, 95 N. C. 239; *Estate of Semple*, 189 Pa. 385, 42 Atl. 28. The Arkansas court, in the above case, decided that under a will requiring the sole legatee to "pay out of the proceeds of the property, real and personal," specified annuities, the legatee is not personally bound therefor on accepting the gift. The court, in the course of its opinion, said: "There are innumerable instances in which the testators, in making devises with charges thereon, have in terms given direction as what manner and out of what funds the general devisee is to pay off the special legacies made a charge upon the property devised. In all these cases the personal liability of the devisee is more or less affected, even to the extent in many cases of being entirely wanting. And this is so simply from the fact that the obvious meaning of the testator, as gathered from the language of the will, is to the effect that he does not wish the devisee to pay the special legacy at all events, but only as far as the property devised to him will enable him to do. This principle is illustrated in numberless cases. Thus, in *Hayes v. Sykes*, 120 Ind. 180, 21 N. E. 1080, the following provision of a will was under consideration in the supreme court of Indiana: 'I will that, in case there is not enough money in the hands of the executor of my father's will to pay all my just debts, I then devise that the property herein devised to my wife, Anna, and to my mother, Mary Ann Sykes, shall be held liable, in equal proportion, to pay the same; and to this end I make a charge upon my estate so devised, to perform the same.' Here is a charge upon two legacies to pay debts, and under the general rule . . . the legatees would be personally bound to pay these debts, whether the property devised to them is sufficient or not. But the court, from a consideration of the language of the will, held the real and true meaning of the testator to be otherwise."

In *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136, a bequest subject to legacies with a direction that the legacies should be paid "out of" the bequest is held not to make the payment of the legacies a personal charge on the devisee.

#### **Circumstances Affecting Liability.**

**Acceptance of Devise.**—A charge imposed by a testator to pay debts or legacies does not become the personal obligation of the devisee unless he chooses to accept the devise: *Wilson v. Moore*, 86 Ind. 244; *Miltenberger v. Schlegel*, 7 Pa. 241. The authorities all recognize that the acceptance of the devise is a condition precedent to any personal liability on the part of the devisee for legacies or debts. And if the land is sold under order of court to pay debts, the devisee has no personal liability, although he had taken pro forma possession: *Carpenter v. Carpenter*, 14 N. Y. St. 284. Said the court in this case: "All the cases reported, holding the devisee liable for the payment of the debts and legacies upon accepting the devise cum onere, are where the proof showed that the devisee had taken and appropriated the subject of the devise, had the full benefit of it, and had not been interfered with in the enjoyment of it. There is no case holding that when the devisee had taken pro forma possession of the thing devised, but was in turn evicted and the property taken away to meet the lawful demands of the estate, by lawful proceedings in settlement of the estate, that nevertheless the devisee, although foiled in his attempt to get the benefit of the devise, was held liable to pay the debts and legacies."

**Value of Devise.**—The general rule is that the personal liability of a devisee for the payment of legacies charged by the testator is absolute, upon acceptance of the devise, whether or not the land devised is adequate for their payment. By accepting the devise the legacies become the personal debt of the devisee, which he must pay, although the property devised to him is of less value than the legacies: *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Spencer v. Spencer*, 4 Md. Ch. 456; *Brown v. Knapp*, 79 N. Y. 136; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. In *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310, it was held that a devisee had no right to require of the legatee, before payment, security to refund in case of a deficiency of assets to pay debts. In *Dunham v. Deraismes*, 166 N. Y. 607, 59 N. E. 903, it is held that when a legacy is charged on all the land devised, a devisee of part of the land becomes personally liable, upon accepting the devise, for only his proportionate share of the legacy.

**Death of Devisee.**—In the event of the death of a devisee on whose devise the payment of a legacy was a charge, it would seem that the devised estate would still remain subject to the liability for the payment of the legacy: *Mitchell v. Mitchell*, 3 Md. Ch. 71. In *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766, it is held

that where land is devised in fee, with directions to the devisee to pay certain legacies as each legatee attains the age of twenty-one years the devisee, on accepting the devise, becomes personally liable to pay the same as directed by the testator; and where the devisee dies before all the legatees attain the requisite age, his estate, as an entirety, remains liable to such as thereafter become of age, and it is the duty of his administrator to pay the same. And in *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979, where a man devised a farm on condition that the devisee should pay an annuity to the widow for life and furnish certain products from the farm, secured by a lien thereon, it is held that the devisee takes the property charged with the conditions imposed, and is personally liable to perform them as upon a contract, express or implied, that the land is charged with the performance thereof during the life of the annuitant, and that the estate of the devisee after his death is liable for past due payments which are not barred. If accepting the devise is regarded as an implied promise to pay the legacy, then an action lies against the executor or administrator of the devisee for any breach of the contract in his lifetime: *Pickering v. Pickering*, 15 N. H. 281; *Shannon v. Howell*, 36 Hun, 47.

**Conveyance of Devised Land.**—When the devisee conveys the land subject to the charge, the vendee, it is said, stands, in respect of personal liability for the legacy, much like one who purchases mortgaged premises subject to the mortgage, who does not become personally liable for the mortgage debt without a contract of assumption evidenced in some way, though no particular form of words is necessary to create such liability: *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625. In this case it was decided that persons acquiring title by quitclaim to devised land took with notice of provisions in the will charging the land with a legacy, and were personally liable for the full amount of the legacy without regard to the value of the land; they were held liable also because by the terms of the deed, they assumed the payment of the legacy and promised to pay it according to the provisions of the will. The personal liability of a grantee of the property to the legatee seems to be recognized in *Andrews v. Sparhawk*, 30 Mass. (13 Pick.) 393; *Phillips v. Humphrey*, 42 N. C. 206. In *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852, it is held that where a will charges with a legacy land devised to a person who conveys it to a third person, and the latter retains in his hands out of the purchase money a sum to pay the legacy, promising his grantor to pay it, the grantor may maintain a bill in equity against the grantee, making the legatees parties, to compel the payment of such fund on the legacy and to enforce the charge on the land. It is clear that when land is charged with payment of a legacy, it remains subject to the charge when conveyed to a purchaser with notice, actual or constructive, until the legacy is paid: *Wilson v. Piper*, 77 Ind. 437; *Gardenville Permanent Loan Assn. v. Walker*, 52 Md. 452;

Pickering v. Pickering, 15 N. H. 281; Copp v. Hersey, 31 N. H. 317; Hoyt v. Hoyt, 17 Hun, 192, affirmed in 85 N. Y. 142; Nellons v. Truax, 6 Ohio St. 97; Appeal of Steele, 47 Pa. 437; Scott v. Patchin, 54 Vt. 253.

#### Manner of Enforcing Liability.

**In Equity—Sale of Land.**—Equity will entertain a suit to compel a devisee to pay a legacy for which he is personally liable, and will enforce its decree by a sale of the land devised: Williams v. Nichol, 47 Ark. 254, 1 S. W. 243; Mahar v. O'Hara, 9 Ill. 424; Cornish v. Willson, 6 Gill, 299; Sherman v. Sherman, 86 Mass. (4 Allen) 392; Horning v. Wiederspallen, 28 N. J. E. 387; Degraw v. Clason, 11 Paige, 136; Collister v. Fassitt, 163 N. Y. 281, 78 Am. St. Rep. 586, 57 N. E. 490; Dunning v. Dunning, 82 Hun, 462, 31 N. Y. Supp. 719, affirmed in 147 N. Y. 686, 42 N. E. 722; Bird v. Stout, 40 W. Va. 43, 20 S. E. 852. And it is said that the fact that an action at law will also lie to enforce the liability does not preclude a court of chancery from assuming jurisdiction: Cady v. Cady, 67 Miss. 425, 7 South. 216. Speaking of an annuity made a charge upon real property devised, the New York court said: "It being an express charge thereon, the devisees, upon accepting the devise, became personally bound to pay such annuity, and its payment could be enforced by a suit in equity against the real estate, or by an action against the devisees upon the promise to pay implied by the acceptance of the devise": Redfield v. Redfield, 59 Hun, 620, 12 N. Y. Supp. 831, affirmed in 126 N. Y. 466, 27 N. E. 1032. The Wisconsin court, in the principal case, recognizes the power of a court to proceed to a foreclosure sale of the property, in that case a life estate with remainder over, to satisfy the legacy charged thereon.

**At Law—Action of Debt or Assumpsit.**—In the early cases there seemed some doubt as to whether assumpsit would lie against a devisee to enforce his personal liability for the payment of legacies. But the theory has prevailed that the acceptance of the devise implies a promise on the part of the devisee to pay the legacy, and that the legatee has the right to maintain an action thereon for its nonperformance and recover a personal judgment: Porter v. Jackson, 95 Ind. 210, 48 Am. Rep. 704; Stringer v. Gamble, 155 Mich. 295, 118 N. W. 979; Case v. Hall, 52 Ohio St. 24, 38 N. E. 618, 26 L. R. A. 766. That assumpsit will lie to enforce the personal liability of a devisee to pay legacies charged by the will is recognized in Willis v. Roberts, 48 Me. 257; Doolittle v. Hilton, 63 Me. 537; Wiggin v. Wiggin, 43 N. H. 561, 80 Am. Dec. 192; Tole v. Hardy, 6 Cow. 333; Gridley v. Gridley, 24 N. Y. 130; and that an action of debt will lie to enforce such liability is recognized in Etter v. Greenawalt, 98 Pa. 422; Renner v. Headley, 129 Pa. 542, 18 Atl. 549. In case the devisee is also executor, the remedy is nevertheless assumpsit, and not an action on his bond: Olmstead v. Brush, 27 Conn. 530. In Red v. Power,

69 Miss. 242, 13 South. 586, it is held that where property is devised with a direction to the devisee to give a certain person \$200 a year as long as he lives, the devisee, upon accepting the provisions of the will and entering into the enjoyment of the property, becomes the debtor of the person to whom the money is to be paid, and that the indebtedness is subject to garnishment.

**Limitation of Actions.**—The relation between devisee and legatee, where the devisee is personally liable to the legatee for a legacy charged by the will, is not a trust relation which prevents the running of the statute of limitations against an action to enforce the liability. Thus in *Etter v. Greenawalt*, 98 Pa. 422, where it is held that an action of debt will lie against a devisee to compel him to pay a sum which the will directs him to pay to the plaintiff, it is decided that the statute of limitations precludes a recovery if more than six years have elapsed since the death of the testator. And in *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340, it is held that the devisee of land, subject to the payment of a legacy charged as a lien thereon, is not "a trustee of an express trust," and hence that an action by the legatee to enforce the lien against the property may be barred by the statute of limitations.

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### ESTATE OF MARY JANE TURNER, DECEASED.\*

[No. 2,360; decided February 11, 1884.]

**Funeral Expenses.**—When the Question of Liability for Funeral Expenses is at issue in a suit to recover them, the probate court will not entertain a petition that involves an adjudication of the question.

**Funeral Expenses.**—A Claim for Funeral Expenses must be Presented as other claims are, and if disallowed be sued upon in the ordinary way.

**Disputed Claims.**—The Probate Court is not a Trial Court to Settle disputed claims.

Drown & Barton, for the petitioner.

Stetson & Houghton, for the administrator.

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\*The opinion in this case, and the opinions in the cases to follow, were destroyed in the great fire that visited San Francisco April 18-20, 1906. The syllabi, fortunately, were preserved, and are here presented in full.

## ESTATE OF MARY ANN GREENWOOD, DECEASED.

[No. 1,873; decided June 28, 1884.]

**Contempt by Attorney.—In Concealing Facts from the Court** which an attorney is bound in candor to communicate, he is wanting in that respect to courts and judicial officers which it is the duty of an attorney to maintain. Subdivision 2, section 282 of the Code of Civil Procedure.

**Contempt by Attorney.—An Attorney Who, in Seeking to Effect His Purpose,** employs means other than such as are consistent with truth, and calculated to mislead the judge, through artifice and suppression of facts essential to be known to the court, is guilty of misbehavior in his office and of willful violation of duty constituting a contempt of court. Sections 282, 1209 of the Code of Civil Procedure, subdivisions 4 and 3, respectively.

**Contempt by Attorney in Deceiving Court as to Sale of Property.—**Where the attorney for an administrator reports to the court and the administrator that he has sold property of the estate for a less sum than he has actually received, converts the difference between the two amounts to his own use, and obtains a confirmation of the sale at the sum reported by him, he is guilty of a contempt of court for which he should be punished.

M. B. Blake, for absent heirs.

J. D. Sullivan, for the administrator.

Calhoun Benham, for J. W. Carter.

## ESTATE OF EDWARD FLAHERTY, DECEASED.

[No. 2,798; decided February 11, 1884.]

**Administrator—Nomination by Nonresident Widow.**—The second marriage of a woman who has a husband living is void, and she becomes his widow upon his death. Hence she has a right to nominate an administrator of his estate, although she is a nonresident and is cohabiting with and bearing the name of the second husband.

Wright & Cormac, for the public administrator.

C. W. Bryant, for Kimball.

J. E. Jarrett, for the widow.

George N. Williams, for Patrick Flaherty.

A. H. Loughborough, for absent heirs.

## ESTATE OF THOMAS FALLON, DECEASED.

[No. 4,716; decided 1886.]

**Will.**—A Request to Sign a Will as Witness may be express or implied; anything that conveys to a person the idea that the testator desires him to be a witness is a good request.

**Will.**—An Attesting Clause is not Essential to the validity of a will, beyond the fact that the witnesses signed as such.

**Will.**—A Person may be of Sound and Disposing Mind who is capable of fairly and rationally considering the character and sense of his property, the persons to whom he is bound by ties of blood, affinity or friendship, or who have claims upon him, and the persons to whom and the manner and proportions in which he wishes the property to go.

**Will.**—Weakness of Mind is not the Opposite of Unsoundness, but of strength of mind, and unsoundness is the opposite of soundness; hence a weak mind may be sound and a strong mind unsound.

**Will.**—It is not the Weakness or Strength of Mind which determines its testamentary capacity, but its soundness—that is, its healthy condition and action.

**Will.**—Partial Insanity or Monomania does not Affect Testamentary capacity in general, but only as to the persons or subjects in regard to which the unsoundness exists.

**Will.**—Monomania Consists in a Mental or Moral Perversion in regard to some particular subject or class of subjects, while in regard to others the person seems to have no such morbid affection.

**A Will Which is the Direct Offspring of Monomania or Partial Insanity** should be regarded as invalid, although the general capacity of the testator is unimpeached.

**Will.**—Undue Influence Consists 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; in taking an unfair advantage of another's weakness of mind, or in taking a grossly oppressive or unfair advantage of his necessities or distress.

**Will.**—Undue Influence is that Kind of Influence which prevents the testator from exercising his own judgment and substitutes in the place thereof the judgment of another.

**Will.**—Undue Influence is Entirely Distinct from Unsoundness of mind.

**Will.**—Circumvention by Means of Fraud is considered in the same light as constraint by force, and has the same effect in vitiating a will.

**Jury.**—A Jury Exercises a Judicial Function, and Its Verdict must be based purely upon the evidence submitted to it under the instructions of the court.

**Jury.**—Any Statement by the Court Affecting the Weight of Testimony or the credibility of a witness, or any matter within the province of the jury, should be disregarded by the jurors and banished from their minds.

**Trial.**—One having the Burden of Proof is not Relieved Therefrom by the anticipation of his case by the opposing party with negative averments.

James L. Crittenden, for the contestants.

William Matthews, for the proponent.

Daniel Titus, for the minors.

## ESTATE OF HENRY WOLTERS, DECEASED.

[No. 17,941; decided October 21, 1897.]

**Executor—Whether may Purchase at His Own Sale.**—Section 1576 of the Code of Civil Procedure does not prevent an executor, with the permission of the court, from purchasing at his own sale.

**Executor—Whether may Purchase at His Own Sale.**—Section 1576 of the Code of Civil Procedure, which prohibits an executor from purchasing at his own sale, is to be construed as was the rule in equity which it enacts.

**Probate Court—Equity Jurisdiction.**—A superior court sitting in probate may, in a proper case, exercise its equity powers.

Application by George Wolters, an executor, to purchase land at his own sale.

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## ESTATE OF WILLIAM BROWN, DECEASED.

[No. 15,983; decided 1899.]

**Wills—Due Execution—Evidence of Scrivener's Experience.**—On the issue of due execution of a will, the testimony of an attesting witness who drew the instrument that he has had experience in drawing wills is admissible.

**Wills—Competency of Testator—Evidence.**—On the issues of mental competency of a testator and undue influence in the execution of his will, evidence of the pecuniary circumstances of a legatee and of her husband is inadmissible.

**Will—Failure of Memory of Witness.**—The fact that an attesting witness to a will cannot remember the details of the transaction does not cast a cloud upon the due execution of the instrument established by other direct evidence and circumstances.

**Will—Competency of Testator—Age and Physical Infirmities.**—Evidence of the advanced age of a testator and of his physical infirmities, if they did not impair the operation of his mind in the making of his will, does not establish testamentary incapacity.

Petition by Sarah J. Brown et al. to revoke the probate of the will of William Brown. On the trial of the issue of

due execution of the will, the testimony of Mr. Sonntag, who was the scrivener and also an attesting witness, that he had had experience in drawing wills, was stricken out of the record; and on the issue of undue influence by Mrs. Talford, a legatee, on the testamentary act, evidence of the pecuniary circumstances of herself and husband was admitted. The present decision is on a motion for a new trial.

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ESTATE OF ANN CALLAGHAN, DECEASED.

[No. 16,170; decided August, 1897.]

**Devise to Executor in Trust by Implication.**—Devises of land to executors in trust, by implication, are not favored, and are tolerated only where the probability of the testator's intention to that effect is so strong that a contrary presumption cannot be entertained.

**Devise—Invalid Trust—Restraint on Alienation.**—Where a testatrix, after describing certain real estate, states, "I have great faith in the future value of said piece of property, and my desire is that my share in it shall not be sold until it is absolutely necessary so to do," and then adds, "When said land is sold, a sum equal to sixty thousand dollars shall be invested by my executors in bonds or dividend stocks or loans secured by good mortgages, and the net income received therefrom shall be distributed as above directed," such provisions are bad as a trust in the land, and as a power in trust, and as in restraint of alienation.

## ESTATE OF ANN CALLAGHAN, DECEASED.

[No. 16,170; decided August, 1897.]

**Probate Court—Jurisdiction to Try Title.**—The superior court, sitting in probate, has no jurisdiction to determine questions of title to real estate.

**Will—Omission of Child, What is.**—The words, "when any testator omits to provide in his will for any of his children," as used in section 1307 of the Civil Code, mean: "When a testator says nothing of a provision," or "does not insert a provision," or "fails or neglects to speak of a provision for any of his children."

**Will—Omission of Child, What is not.**—A testatrix does not omit to provide for her child, so that it will inherit under section 1307 of the Civil Code, when she devises to it land to which her title is imperfect, or to which she has no title at all.

**Will—Omission of Child—Extrinsic Evidence.**—Courts will not look to matters dehors a will to ascertain that the omission to provide for a child is unintentional.

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Estate of Callaghan was before the supreme court in 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689.

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## ESTATE OF MARY CLANCY, DECEASED.

[No. 17,292; decided August 31, 1898.]

**Separate Property of Wife—Admissions of Husband.**—Where it appears that the purchase price of real estate was paid from the separate property of a married woman, and the deed was taken in her name, and the husband, upon her death, avers in his petition for letters of administration that such property was the separate property of the decedent, and swears to the same effect on the hearing of the petition, and also in the inventory and appraisalment, his admissions are, when unexplained, conclusive of the character of the property.

**Separate Property of Wife—Expenditures by Husband.**—A husband cannot recover payments voluntarily made by him for repairs, improvements, and the like on the separate property of his wife, nor can he, by making advances for the benefit of such property, acquire any interest therein.

## ESTATE OF TIMOTHY CAFFREY, DECEASED.

[No. 17,772; decided November, 1898.]

**Computation of Time—Fractions of Days.**—In the legal computation of time there are no fractions of a day, and the day on which an action is done must be entirely excluded or included.

**Computation of Time—First and Last Days.**—The time in which an act provided by law is to be done is computed by excluding the first day and including the last.

**Computation of Time—Service of Citation.**—A citation served on the defendants September 3d, and requiring them to appear at ten o'clock A. M. on September 8th, is sufficient under section 1711 of the Code of Civil Procedure, which declares that citations must be served at least five days before the return day thereof. The statute does not require the lapse of five full days between the day of service and the day of appearance.

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## ESTATE OF MARY A. CLUTE, DECEASED.

[No. 19,516; decided May 31, 1899.]

**Administrator's Account—Trustee in Bankruptcy may Contest.**—A trustee in bankruptcy of an heir has the right to contest an account of the administrator of the decedent.

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## ESTATE OF THOMAS CORNELL, DECEASED.

[No. 18,119; decided January 14, 1898.]

**Nonresident Intestate—Distribution of Estate.**—If a resident of Nevada dies there intestate, leaving personal property in California, leaving creditors in Nevada but none in California, and leaving no heirs in either state, though perhaps some in Canada, the California courts will, in a spirit of comity, direct the residue of the property in that state, after the payment of expenses of local administration, to be paid over to the domiciliary administrator in Nevada, instead of making a distribution.

**ESTATE OF FRANZ H. FRETZ, DECEASED.**

[No. 18,676; decided August 22, 1898.]

**Inheritance Tax—Benevolent Society.**—The German Benevolent Society of San Francisco is not subject to a collateral inheritance tax.

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**ESTATE OF LOUISA C. GOFF, DECEASED.**

[No. 20,255; decided April 12, 1897.]

**Witnesses—Competency of Husband and Wife.**—Subdivision 1 of section 1881 of the Code of Civil Procedure, in disqualifying husband and wife to testify for or against each other, is a declaration of the common law.

**Witnesses—Competency of Husband and Wife.**—In furtherance of justice and for the purpose of exposing fraud, courts are inclined to relax the rule that husband and wife are disqualified to testify for or against each other.

**Witnesses—Competency of Husband and Wife.**—When the executor and proponent of a will is made the defendant in a contest thereof, he and his wife, she being the sole beneficiary under the will, may not refuse to testify because of the relation of husband and wife.

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**ESTATE OF EDWARD D. HEATLEY, DECEASED.**

[No. 13,828; decided September 27, 1897.]

**Will—Revocation by Incomplete Instrument.**—A will is not revoked by an unsigned olographic document of later date.

**Will—Revocation by Alterations.**—Where a testator changes many, though not all, of the provisions of his will by pencil marks and interlineations, but allows his signature and the signatures of the witnesses to stand untouched, the revocation of the instrument is not thereby affected.

## ESTATE OF EDWARD D. HEATLEY, DECEASED.

[No. 18,828; decided July 24, 1897.]

**Olographic Will—Insufficient Signature.**—The fact that a testamentary paper is commenced and also indorsed in the handwriting of the testator, "This is my Will," is unavailing to constitute it an olographic will if not signed.

**Olographic Will—Insufficient Signature.**—A testamentary instrument in the handwriting of the testator, not having any signature, but containing the testator's name in an unwitnessed attestation clause, cannot be given effect as an olographic will.

**Olographic Will—Attestation Clause.**—If one makes a will entirely in his own handwriting, does not sign it, and attaches an attestation clause unsubscribed by witnesses, the presumption is that he intends to acknowledge and publish it in the presence of witnesses, and it is therefore incomplete as a testamentary paper.

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## ESTATE OF EMMET M. HICKEY, DECEASED.

[No. 17,388; decided February 15, 1897.]

**Administrator's Account—Vacation of Settlement—Affidavit of Merits.**—An affidavit of merits is not indispensable upon an application to set aside an order and decree settling an administrator's account, because taken against minors through their inadvertence and excusable neglect, when the merits appear on the face of the record.

**Administrator's Account—Vacation of Settlement—Power to Order.** A superior court has authority to vacate its order and decree settling an administrator's account, when an application therefor is made at once, and it appears from the record that the order has been improperly made against minors who, while represented by attorney, were improperly represented.

**Distribution of Estate—Notice.**—There is No Direction in section 1665 of the Code of Civil Procedure that the distribution of the estate of a decedent should be made without notice.

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Estate of Hickey was before the supreme court in 129 Cal. 14, 61 Pac. 475.

## ESTATE OF ELIZABETH L. MOXLEY, DECEASED.

[No. 16,720; decided October 11, 1897.]

**Broker's Fee—Allowance to Executor.**—The superior court may authorize and direct an executor to pay a reasonable fee to a broker for procuring a loan with which to redeem a large part of the estate from a sale under foreclosure.

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## ESTATE OF A. P. MORE, DECEASED.

[No. 14,070; decided August, 1897.]

**Administrator—Who Incompetent to Nominate.**—A brother and sister of a deceased person who are themselves incompetent to administer his estate are incompetent to nominate an administrator.

**Administration—Rival Claimants for Letters.**—A sister of a deceased person who has a beneficial interest in his estate, who is familiar with the litigation in which it is involved, and who has already had charge of the property for some time as special administrator, has a better right to letters of administration than one (the public administrator) who has no beneficial interest in the estate and who is a stranger to the litigation.

## ESTATE OF CLINTON PATRICK, DECEASED.

[No. 14,233; decided August 31, 1897.]

**Will—Substituting the Word “Devisee” for “Heir.”**—If a testator declares, “I will that A and B shall become my sole heirs, and that they shall equally possess” my property, after all just claims against my estate have been paid, and neither A nor B is of kin to the testator, and A dies before the death of the testator, B will take one-half of the residue of the estate of the testator after the payment of his debts, and the heirs at law of the testator, not the heirs of A, will take the other half.

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## ESTATE OF MARY A. REDFIELD, DECEASED.

[No. 11,451; decided October 1898.]

**Interest on Legacy—Code and Common-law Rule.**—At the common law, and under sections 1368 and 1369 of the Civil Code, a pecuniary legacy bears interest at the legal rate from one year after the demise of the testator.

**Interest on Legacy—Settlement Delayed by Will Contest.**—A pecuniary legacy bears interest from one year after the death of the testator, where the settlement of the estate is delayed, without fault of the administrator, by a contest of the will.

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## ESTATE OF ANNIE SYKES, DECEASED.

**Probate Homestead—Court must Set Apart.**—In a proper case the court must, on the application of a surviving husband, set apart a probate homestead; there is no discretion.

## ESTATE OF CARL J. SWENSON, DECEASED.

[No. 17,780; decided June 24, 1898.]

**Administration—Last Residence of Decedent—Adjudication Respecting.**—In granting administration, the court will be presumed to have based its adjudication respecting the last domicile of the decedent upon sufficient evidence, and such adjudication can be questioned by direct or appellate proceedings only.

**Probate Court—Powers Purely Statutory.**—The proceedings for the administration of the estates of deceased persons and for their distribution are purely statutory. The court has no other powers than those given by statute, and such incidental powers as pertain to it for enabling it to exercise the jurisdiction conferred upon it.

**Nonresident Administrator—Delivery of Property to.**—Where the principal administration on the estate of an intestate has been granted in this state, the court cannot deliver the residue of the estate over to an administrator in another state, to be finally administered and distributed. Section 1667 of the Code of Civil Procedure applies only to testamentary administrations.

**Nonresident Administrator—Rights and Authority.**—An administrator can exercise no right or authority beyond the jurisdiction within which he has been appointed. He cannot carry his official character abroad, nor can his official powers and duties be affected by foreign laws.

Petition by J. M. E. Atkinson for the delivery of the residue of the estate to him as administrator of the estate of Carl J. Swenson at Seattle, Kings county, Washington. Also a petition by Gustaf Albert Larson et al. for the distribution of this estate to the petitioners as the next of kin and heirs at law of the decedent.

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## ESTATE OF JULIA H. TRACY, DECEASED.

[No. 21,316; decided June 24, 1899.]

**Revocation of Letters of Administration—Competency of Parties.**—Where letters of administration with the will annexed have been granted to the public administrator on the estate of a deceased non-resident, a resident brother of the decedent, though not entitled to letters on an original application because of section 1365 of the Code of Civil Procedure, may nominate a stranger to petition for a revocation of the letters granted and for the issuance of letters to the petitioner, and the petition will be granted, both the nominor and the nominee being competent, under section 1369 of the Code of Civil Procedure, to serve as administrators.

**ESTATE OF JAMES WILLIAMS, DECEASED.**

[No. 18,381; decided March 18, 1898.]

**Identity of Name—Presumption of Identity of Person.**—It will be presumed that a petitioner for distribution of the estate of a decedent is the son of a legatee named in the will, when it is proved that the name of the petitioner's father is the same as that of the legatee.

**Declarations of Deceased—Proof of Relationship.**—The declarations of a person in his lifetime concerning his own family are admissible, in probate proceedings, to prove that he was the brother of the testator.

**Death—Presumption from Absence.**—After the lapse of seven years without intelligence concerning a legatee he is presumed to be dead.

**Evidence—Weight and Sufficiency.**—Any competent evidence is sufficient, and makes out a *prima facie* case if undisputed.

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**ESTATE OF FREDERICK ZEILE, DECEASED.**

[No. 3,370; decided May 14, 1886.]

**Annuity—Protection of Residuary Legatees.**—When a Testator gives his brother a specified sum per annum, to be paid during his lifetime from the interest of money to be invested by the executors, and directs the principal sum and the overplus interest to be paid to the residuary legatees when the annuity ceases, the investment of the fund should be made with due regard to the interests of such legatees.

**Annuity—Investment of Fund.**—When a Testator Bequeaths to his brother a specified sum per annum for life, payable quarterly, the principal sum and the overplus interest thereon to be divided among the residuary legatees when the annuity ceases, the court, in order to provide for the required income, will direct the retention of city real property belonging to the estate and yielding an income slightly in excess of the annuity, rather than direct an investment in United States bonds.

**Annuity—Interest and Income.**—Where a Testator Directs His Executors to place funds "at interest" to provide for the payment of an annuity, the investment may nevertheless be made in real estate, if such a course seems preferable to the loaning of money.

**Interest on Money.**—Interest is Only a Synonym for specific income.

## ESTATE OF C. H. STRYBING, DECEASED.

[No. 16,233; decided November 23, 1897.]

**Contracts of Administrators and Their Effect.**—An administrator can make any contract or agreement, but it is simply binding on himself, and is not a charge on the estate until the court allows his expenditures when represented in his account.

**Broker's Commission—Allowance to Administrator.**—Brokers who are under no contract, express or implied, with an administrator, but who, on their own responsibility procure an advance bid on the property which the testator directs to be sold cannot be allowed a commission out of the estate.

**Broker's Commission—Allowance to Administrator.**—If an administrator employs brokers to sell property of the decedent, the will directing it to be sold, and they procure a purchaser, but a sale to him is not consummated because another broker, on his own responsibility, procures an advance bid, the court should approve the payment by the administrator of a reasonable commission to the brokers procuring the first bid and thus laying the foundation for a sale which they did not actually effect.

**Administrator with Will Annexed—Compensation.**—If a will provides a compensation for the executors, administrators with the will annexed may claim the compensation provided by law, although they invoke no renunciation of the testamentary provision until the final settlement of their account.

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## ESTATE OF CAROLINE STEPNEY, DECEASED.

[No. 8,990; decided August 19, 1897.]

**Escheat—Form of Proceeding to Procure.**—To Procure an Escheat, whether of real or of personal property, there must be a proceeding in conformity with sections 1269-1272 of the Code of Civil Procedure.

**Escheat—When does not Occur.**—When There has been a Final Decree of distribution of the estate of a decedent administered by the public administrator, the fact that one heir does not appear and claim his share of the fund, but permits it to remain in the county treasury, does not work a forfeiture of his right, nor authorize a change of the custody of the money from the county to the state treasury.

**Escheat.**—There can be No Escheat, except when the last known owner of the property is dead.

## GUARDIANSHIP OF JOHN FREDERICK RUNGE.

[No. 19,966; decided October 27, 1890.]

**Testamentary Guardianship.—If a Father Provides in His Will,** in reference to a minor son, that the trustees therein are to “take full charge of him and see to his welfare,” he thereby appoints them guardians of the person of the minor, and the court has no jurisdiction to entertain a petition by another person for letters of guardianship.

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## ESTATE OF TIMOTHY CAFFREY, DECEASED.

[No. 17,772; decided June 22, 1897.]

**Succession—Strict Construction of Law.**—The rules governing the law of succession to the property of one who dies without making any disposition thereof are more or less arbitrary, and one who claims to inherit by right of succession must bring himself strictly within those rules.

**Succession—“Child” Does not Include “Grandchild.”**—In its ordinary, popular and legal signification the word “children” does not include grandchildren.

**Succession—Children.**—Section 1386 of the Civil Code does not carry the distribution further than down to and among the children of brothers and sisters; and in default of them, the estate goes back in the ascending line to the ancestors and then down, as per subdivision 6 of the section.

**Succession—Right of Grandniece to Inherit.**—If a person dies without leaving surviving issue, wife, father, mother, brother, or sister, but leaving a niece and a grandniece, the grandniece is not entitled, under section 1386 of the Civil Code, to inherit from his estate.

**Will Contest—Person Interested—Grandniece.**—A person interested, within the meaning of section 1307 of the Code of Civil Procedure, providing that “any person interested may appear and contest the will,” is one who is interested in the estate; a grandniece of the testator who is not entitled to inherit from his estate cannot contest his will.

## ESTATE OF JULIA C. MORAGHAN, DECEASED.

[No. 21,239; decided April 5, 1899.]

**Administrator—Rivals for Appointment.**—The Daughter of the Intestate, who has been granted special letters of administration, is in this case granted general letters, as against the public administrator and a son who, by reason of dissolute habits, is incompetent to act.

**Administrator—Person Incompetent to Act.**—A person who has dissolute, intemperate, and improvident habits is not competent to act as administrator of his father's estate.

**Administrator—Person Incompetent to Nominate.**—One who, by reason of dissolute, intemperate and improvident habits, is incompetent to act as administrator of his father's estate, has no right to nominate his copetitioner, the public administrator, to act as administrator in his place, or to nominate him to act jointly with the public administrator.

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## ACCOUNTS OF EXECUTORS AND ADMINISTRATORS.

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*For other authorities, see Index to Notes, p. 447.*

### 1. Rendition in General.

It is the duty of an executrix to make a showing to the court of the disposition of the difference between what the estate is prima facie entitled to, and what it is claimed was the whole amount received by her.—Estate of McDougal, 1, 456.

Where an "exhibit" and "account" presented by an executor was merely "experimental," to raise certain questions as to previous acts of the administration, the executor will, under instructions as to his rights, be ordered to render another account, which shall have the quality of finality.—Estate of Fisher, 1, 97.

In ordinary estates there is no necessity for more than one account, which is a final or complete account.—Estate of Callaghan, 3, 84.

## 2. Final or Other Accounts.

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, 3, 69.

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, 3, 84.

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, 3, 84.

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, 3, 84.

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, 3, 84.

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, 3, 84.

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, 3, 84.

## 3. 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, 3, 112.

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, 3, 112.

#### 4. Items of Expense Allowable.

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Expenditures of special administrator. See Special Administrator, sec. 4.

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Upon the settlement of the account of an executor containing items of expenditures in executing a lease under authority of the will, which items the heirs contest on the ground of the invalidity of the lease, the court will not consider the lease invalid.—Estate of Murphy, 1, 12.

Where an executor, as an inducement to the heirs to join with him in the execution of a lease, represents to them that the expense of alterations and fitting up for the tenant will not exceed a certain sum, he cannot be allowed for expenditures beyond that sum.—Estate of Murphy, 1, 12.

Expenditures that do not add to the rental value of premises to be leased, and injudiciously made, should be disallowed.—Estate of Murphy, 1, 12.

Where items in an executor's account are payments arising out of mortgages given by the universal devisee and legatee they should nevertheless be allowed, where the moneys were devoted to the maintenance of the widow and family, and paid at her request, she being universal devisee.—Estate of Love, 1, 537.

Items in an executor's account of expense for abstracts of title and driving squatters off of realty should be allowed, when paid for the widow's benefit and at her request, she being the universal devisee.—Estate of Love, 1, 537.

Items in an executor's account of expense of flowers for grave, of insuring personalty never in his possession, examining tax lists and recording a deed to a legatee, should be disallowed.—Estate of Love, 1, 537.

Items of expense in an executor's account for printing a brief, the amount or payees not being shown, interest on a note made by a legatee, for \$100, without voucher, and tax charges without sufficient voucher, were disallowed.—Estate of Love, 1, 537.

An item of expense in an executor's account, for redemption under tax sales, may be allowed.—Estate of Love, 1, 537.

Where an administrator has, in good faith, journeyed to a distant state upon business of the estate, and has incurred an attorney's charge in connection therewith, an allowance will be made to him therefor; and this whether or not he misconceived his legal duty.—Estate of Shillaber, 1, 120.

All proceedings necessary to be taken by the executor in the administration of the estate are part of his duty, and any papers drawn in connection therewith are covered by the statutory compensation provided for his services; and the costs of engrossing or copying the same are not taxable against the estate.—Estate of Shillaber, 1, 120.

When, in a large estate, the impracticability is shown of doing without clerical assistance to collect rents and keep accounts, the court

usually makes some allowance therefor; but guardedly, and never without rigorous proof of necessity, although no objection be interposed.—Estate of Shillaber, 1, 120.

The administrator may be allowed a charge for costs paid in serving notices required by law to oust a defaulting tenant, and although paid to an agent of the estate, receiving a compensation for collection of the rents.—Estate of Shillaber, 1, 120.

An item in an account for "executor's loss of time" will be stricken out.—Estate of Shillaber, 1, 120.

The expense of necessary litigation involving the estate of a decedent is a part of the expense of administration for which the executor is entitled to allowance.—Estate of Holmes, 5, 394.

If the amount of moneys bequeathed to the legatees in a will exceeds the amount left by the testatrix, a devisee of land involved in litigation should be required, before distribution to him, to reimburse the executor to the extent of his outlay in such litigation, it not appearing from the will that the testatrix intended the devisee to take the property intact at the expense of the legatees.—Estate of Holmes, 5, 394.

The superior court may authorize and direct an executor to pay a reasonable fee to a broker for procuring a loan with which to redeem a large part of the estate from a sale under foreclosure.—Estate of Moxley, 5, 434.

#### 5. Estoppel Against Executor.

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 Ford, 2, 342.

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, 3, 112.

An "exhibit and account" presented by an executor does not operate as an estoppel upon the hearing and settlement of a subsequent account by him; the items of the first account are impeachable, and the settlement of such account does not impart a dignity not inherently belonging to the account.—Estate of Fisher, 1, 97.

#### 6. Notice of Hearing.

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, 3, 84.

#### 7. Persons Entitled to Contest.

A trustee in bankruptcy of an heir has the right to contest an account of the administrator of the decedent.—Estate of Clute, 5, 431.

A mortgagee of land inventoried in the estate, under a mortgage made by the universal devisee and legatee of the testator, is a party

interested in the estate, and entitled to be heard upon the executor's accounts, and on any distribution of the estate. Likewise, a judgment debtor of such devisee, who has acquired, under execution upon the judgment, title to a parcel of the realty inventoried in the estate, is also a party interested in the estate; so, also, is a mortgagee of such judgment debtor.—Estate of Love, 1, 537.

### 8. Settlement of Account.

An account, as such, is a matter to be settled by the court without a jury.—Estate of Traylor, 1, 164.

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, 3, 69.

### 9. Vacation of Settlement.

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, 3, 69.

An affidavit of merits is not indispensable upon an application to set aside an order and decree settling an administrator's account, because taken against minors through their inadvertence and excusable neglect, when the merits appear on the face of the record.—Estate of Hickey, 5, 433.

A superior court has authority to vacate its order and decree settling an administrator's account, when an application therefor is made at once, and it appears from the record that the order has been improperly made against minors who, while represented by attorney, were improperly represented.—Estate of Hickey, 5, 433.

## ACCUMULATIONS.

In cases of charitable gifts. See Charities, sec. 3.

Duration of trust. See Trusts, sec. 9.

Provisions of a will for accumulations beyond the period of majority are in this case held void.—Estate of Werner, 3, 225.

A direction to trustees to pay taxes, street assessments, and other charges and expenses incurred in improvements, out of the income of the trust estate, does not provide for an unlawful accumulation.—Estate of Doe, 1, 54.

A provision in a trust for retaining the income of the estate and paying it over to the beneficiaries annually is not void.—Estate of Doe, 1, 54.

## ACQUAINTANCES.

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## ACTIONS.

By and against administrator. See Executors and Administrators, sec. 9.

By and against special administrator. See Special Administrator, sec. 2.

**ADEMPTION OF LEGACIES.**

*For other authorities, see Index to Notes, p. 447.*

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, 3, 394.

Ademption is the extinction of 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, 3, 394.

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, 3, 394.

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, 3, 394.

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, 3, 394.

A bequest of eighteen shares of stock in a designated corporation is not adeemed where, between the date of the will and the death of the testator, a securities corporation is organized which is merely a holding company for the first corporation, owning all stock issued by it and no other property, and the testator exchanges his stock in the first corporation (twenty-one shares in all) for two thousand one hundred and twenty-one shares in the securities company.—Estate of Tillmann, 5, 387.

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, 3, 394.

**ADMINISTRATION OF ESTATES IN GENERAL.**

1. IN GENERAL, 471.
2. IDENTITY OF DECEDENT, 471.
3. DUTY TO CLOSE SPEEDILY, 471.
4. ASSETS OF ESTATE, § 471.
5. ESTATE OF \$1500, 471.

See *Accounts of Executors and Administrators; Executors and Administrators; Family Allowance; Inventory and Appraisement; Sale of Land of Decedent; Special Administrators.*

### 1. In General.

Under the Mexican jurisprudence there are no administrations with respect to the successions of decedents.—Estate of Blythe, 2, 152.

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, 3, 1.

### 2. Identity of Decedent.

The testimony of experts in handwriting as to the identity of a deceased person, depending on the apparent similarity or dissimilarity of signatures, is of little weight.—Estate of Johnson, 4, 455.

The evidence introduced in this case removed all reasonable doubt of the identity of the petitioner's brother, Anders Theodor Jonsson, with the deceased, Andrew Johnson, notwithstanding the testimony of an expert on handwriting to the contrary, and the failure of two witnesses who had personally known the deceased to recognize a tintype as his likeness.—Estate of Johnson, 4, 455.

### 3. Duty to Close Speedily.

It is the duty of the court and executor to close an administration speedily, and as soon as the debts and expenses of administration are paid and there are persons entitled to the possession of the estate.—Estate of Tessier, 2, 362.

### 4. Assets of Estate.

An executory contract is not itself an asset; it is the subject matter of the contract that is. This principle applies to an executory contract with respect to foreign realty, which is not a local asset for administration purposes.—Estate of Blythe, 2, 152.

Where an executor carries out the contract of his decedent to perform legal services, the money received therefor should belong in part to the estate and in part to the executor.—Estate of Love, 1, 537.

### 5. Estate of \$1500.

The publication of notice to creditors is unnecessary where the court assigns the whole estate to the widow under section 1469 of the Code of Civil Procedure.—Estate of Adamson, 5, 397.

Where a statutory homestead from community property has been set apart in probate to the widow, its value is not considered in determining whether the estate exceeds \$1500. Hence, the petition of the widow to assign to her personal property valued at \$500, should be granted, although the homestead is valued at over \$3,000.—Estate of Adamson, 5, 397.

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, 3, 231.

**ADOPTION OF CHILDREN.**

1. PROCEEDINGS FOR ADOPTION, 472.
2. COMPLIANCE WITH STATUTE, 472.
3. RIGHT OF INHERITANCE—CONFLICT OF LAWS, 472.

Contest of will by adopted child. See Contest of Will, sec. 2.

*For other authorities, see Index to Notes, p. 448.*

**1. Proceedings for Adoption.**

In this case are set forth in full a petition for the adoption of a minor, the written consent of the institution having the child in custody, the covenants of the adopting parents and the order of the court authorizing the adoption.—*In re Reichle*, 5, 219.

In this case are set forth in full the petition for the adoption of a minor, the consent of the father, the agreement by the petitioners, and the order of court.—*In re Dale*, 5, 226.

In this case are set forth in full the petition for the adoption of a minor, the consent of the surviving parent, the agreement of the adopting parents, and the court's order of adoption.—*In re Griffin*, 5, 230.

**2. Compliance with Statute.**

The adoption 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*, 3, 519.

**3. Right of Inheritance; Conflict of Laws.**

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*, 3, 519.

**ALLOWANCE.**

To adult son of incompetent. See Guardianship, sec. 11.

To family of decedent. See Family Allowance.

**ANNUITIES.**

Where annuities are payable from the rents of a building and the building is sold during the course of administration, the rights of the annuitants are measured by the rule that when the funds out of which annuities are payable fail, resort may be had to the general assets as in the case of a general legacy.—*Estate of Hale*, 2, 191.

**APPEAL AND ERROR.**

See Bill of Review; Probate of Will, sec. 11.

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*, 3, 127.

The affirmance of a judgment by an appellate court, although without an opinion, is a determination that the objections argued against it are unavailing.—*Estate of Sutro*, 2, 120.

**APPLICATION.**

For distribution. See Distribution of Estate, secs. 2, 3.

For appointment of guardian. See Guardianship, sec. 4.

For appointment of special administrator. See Special Administrator, sec. 1.

For family allowance. See Family Allowance, sec. 5.

For letters of administration. See Executors and Administrators, sec. 7.

**APPRAISERS OF ESTATE.**

1. APPOINTMENT AND QUALIFICATION, 473.

2. DUTIES AND POWERS, 473.

3. COMPENSATION, 474.

See Inventory and Appraisalment.

**1. Appointment and Qualification.**

In the opinion of this court, it would best subserve the interests of estates if in all cases the court actually chose all the appraisers, instead of having the representatives of the estate or their counsel choose some of them.—Estate of McDougal, 1, 456; Estate of McLaughlin, 2, 107.

The court or judge must appoint three disinterested persons to appraise the estate of a decedent, and the three appointees must discharge the duty imposed upon them unless they renounce the trust. Estate of McLaughlin, 2, 107.

Persons in the employment of the executrix should not be appointed appraisers.—Estate of McLaughlin, 2, 107.

**2. Duties and Powers.**

The requirements of the appraisers' duties as to the inventory and appraisalment, and return thereof, set forth in detail.—Estate of McLaughlin, 2, 107.

The extent of an appraiser's duty was called in question where it appeared "he might have received memoranda as appraiser, or had access to, or knowledge of such, showing a statement of property differing from that returned in the official inventory," and it was suggested that our statute, although vague, seems to convey the idea that the inventory of a decedent's estate is not necessarily made up by the executor or administrator alone, but more properly in conjunction with the appraisers.—Estate of McLaughlin, 2, 107.

Appraisers are officers of the court, and, in the execution of their appointment, bound to the performance of a judicial duty, in which the creditors and heirs of the deceased, and the court, are interested and concerned. Whether or not one of the appraisers shall perform his judicial duty cannot depend upon the whim or willfulness of the executor or administrator, or the two other appraisers.—Estate of McLaughlin, 2, 107.

The provision of the statute that "any two" of the appraisers "may act" only means that the valid action by two of the appraisers, where the third appointee refused to, or for some reason not imputable to the acting two did not, act, would be a sufficient execution of the powers invested in and the duties imposed upon the three; and is in-

tended to prevent a failure or invalidation of the whole appointment. Estate of McLaughlin, 2, 107.

The legal status of an inventory and appraisement which is merely the act of two appraisers, without an opportunity given to the third appraiser to act and a failure on his part to do so, is that it is invalid, and an imposition and fraud upon the court. Therefore, in the case of appraisements returned by two appraisers only, a statement should be annexed to and form part of their report, showing the reason for the nonaction of the third appointee.—Estate of McLaughlin, 2, 107.

### 3. Compensation.

It is the duty of appraisers, in all cases where their labor extends over a number of days, to preserve a minute account of their services. Estate of Shillaber, 1, 120.

The compensation of appraisers is regulated and fixed by statute; the maximum allowance is \$5 to each appraiser for every day's service by him, and evidence of a quantum meruit in excess of that amount is inadmissible.—Estate of McLaughlin, 2, 107.

An appraiser's right to compensation is confined to the days actually and necessarily employed in the appraisement; constructive services or charges will not be recognized. An itemized account of each day (by specific date) employed, and the particular service thereon rendered, must be made and returned as a part of the appraiser's report; and if compensation is waived, that fact must be noted.—Estate of McLaughlin, 2, 107.

In the appointment of appraisers, where the circumstances merit gratuitous service, the court will appoint persons to act without charge; and the court's discretion to make such appointment may be invoked in all proper cases.—Estate of McLaughlin, 2, 107.

Where compensation of appraisers has been fixed after notice to all parties interested, the question will be thereafter treated as res judicata.—Estate of Shillaber, 1, 120.

## ASSETS OF ESTATE.

See Administration of Estates in General, sec. 4.

## ASYLUM.

Commitment of lunatic. See Insanity and Insane Delusions, sec. 6.

## ATTESTATION OF WILL.

See Wills, sec. 6.

## ATTORNEY FOR EXECUTOR OR ADMINISTRATOR.

1. RIGHT OF EXECUTOR TO COUNSEL, 475.
2. COUNSEL FEES AND THEIR ALLOWANCE, 475.
3. AMOUNT OF COMPENSATION, 476.

### 1. Right of Executor to Counsel.

An executor, acting in good faith, is entitled to aid of counsel in all litigation concerning the estate.—Estate of Fisher, 1, 97.

An administratrix has power to employ an attorney to institute proceedings to recover damages for the death of her intestate.—Estate of Lund, 1, 152.

An executor is entitled to the assistance of counsel, even when he is himself an attorney; and he will be granted an allowance for counsel employed by him; but in dealing with the question, the court will be mindful of the fact that the executor is an attorney of ability.—Estate of Shillaber, 1, 101, 120.

An administratrix has no power to make a contract with an attorney for the payment of a contingent fee to him out of the assets of the estate. But the employment of an attorney to perform services, and a promise to pay him a contingent fee for such services, are separable. The retainer of the attorney, and rendering of services by him in pursuance of such retainer, may be considered by the court apart from the promise to pay a contingent fee, and the compensation will be adjudged according to the proof of the reasonable value of the services. An attorney accepting employment and rendering services, under such circumstances, must rely upon the subsequent action of the court in adjudging proper compensation, and consents to perform his duty without other compensation than may be so allowed. Estate of Lund, 1, 152.

## 2. Counsel Fees and Their Allowance.

Counsel fees incurred by an executor in applying for letters are a proper charge against the estate, notwithstanding he renounces his trust before letters are issued.—Estate of Chittenden, 1, 1.

It being an executor's duty to defend or prosecute for the estate in all matters where in good faith he believes it necessary, he should be reimbursed though the suit be lost.—Estate of Fisher, 1, 97.

Executors are entitled to have the costs of an appeal allowed them in their account, the prosecution of which is necessary to obtain a final determination of their rights in relation to commissions.—Estate of Ricaud, 1, 220.

The trust imposed upon an executor makes the probate of the will a part of his duty, for which he may employ attorneys and charge their fees against the estate.—Estate of Chittenden, 1, 1.

The administrator was allowed counsel fees, although his counsel was his law partner, it being proved that in this service such counsel was not the business partner of the administrator.—Estate of Shillaber, 1, 101, 120.

There is no authority in the probate court to allow an attorney appointed by the court under section 1718, Code of Civil Procedure, compensation for services performed in a suit brought by the executor. The attorney's remuneration must be restricted to proceedings before the court of administration.—Estate of Fisher, 1, 97.

A claim of an attorney for fees for services rendered an estate is an expense of administration, and is not a proper matter for trial by jury. But the claim of an attorney for fees for services rendered to a decedent during his lifetime differs materially from a claim for services rendered to the estate.—Estate of Traylor, 1, 164.

An attorney who renders services for the benefit of an estate, at the request of the administratrix thereof, is entitled to reasonable compensation therefor. The probate department is the proper forum in which to present his claim for such services; they are "expenses of administration," and the probate department has exclusive jurisdiction to adjust and enforce such demands.—Estate of Lund, 1, 152.

Section 1616 of the Code of Civil Procedure, as amended in 1905, gives no right to an attorney for an executor to fees which he did not possess before. Prior to the amendment his fee might be an allowance to the executor as part of the expenses of administration; that is still the case.—Estate of Hite, 5, 402.

Under the amendment of 1905 to sections 1616 and 1619 of the Code of Civil Procedure, attorney fees are still an allowance to an executor or administrator to be accounted for him in his accounts.—Estate of Hite, 5, 402.

Under section 1616 of the Code of Civil Procedure the attorney for an executor or administrator may in his own name petition for an allowance of fees; but attorney fees that cannot properly be allowed the executor or administrator in his accounts cannot be allowed directly to the attorney.—Estate of Hite, 5, 402.

Compensation of attorney employed on contingent fee.—Estate of Lund, 1, 152.

### 3. Amount of Compensation.

In the consideration of application for fees by attorneys appointed by the court, the appointee and applicant should be especially indulgent to the court which has chosen him in its endeavor to properly adjust the rights of the applicant. The duty of submission to the court, stated in the second headnote above, is especially applicable to these attorneys.—Estate of Blythe, 1, 110.

Whether an estate in probate is large or small, whether it may escheat or not, or go to claimants then unknown, the principals of law governing the compensation of an attorney are the same, and should be applied rigorously by the court.—Estate of Blythe, 1, 110.

In fixing attorneys' fees there are no established rules; the character and circumstances of every case, founded upon general principles of justice, and the reasonable value of a capable attorney's services, must furnish the rule.—Estate of Blythe, 1, 110.

In determining the compensation of an attorney it has been the practice, and has become the rule of the court, that expert testimony as to the value of the services will not be considered. The judge will determine the matter for himself.—Estate of Blythe, 1, 110.

The difficulty and delicacy of the court's duty, in adjusting application of attorneys for allowance of fees, expressed.—Estate of Blythe, 1, 110.

The fees of attorneys employed by an executor in probating the will, being a charge against the testator's estate, can be fixed only by the probate court.—Estate of Chittenden, 1, 1.

Opinions of attorneys as to the reasonableness of demands for compensation for legal services afford no real assistance to the court's judgment.—Estate of Fuller, 2, 521.

### ATTORNEYS.

Compensation of attorney for absent or minor heirs. See Attorneys for Absent or Minor Heirs, sec. 2.

Compensation of counsel for executor. See Attorney for Executor or Administrator, secs. 2, 3.

Right of special administrator to counsel. See Special Administrator, sec. 5.

Whether counsel fees allowable as costs. See Costs, sec. 2.

Among the duties of an attorney is that of submission to the court in the exercise of a discretion not abused, without demur or murmur. He is to advise and counsel simply, leaving the court, in its own way, to come to a conclusion.—Estate of Blythe, 1, 110.

The probate judge is the guardian of all decedents' estates; but the law contemplates an aid in the selection of a competent attorney to protect the court against spurious claimants, or fraudulent devises or practices of any sort.—Estate of Blythe, 1, 110.

It is the duty of an attorney appointed by the court in the administration of a decedent's estate, as the legal representative of the heirs, to discover and demonstrate to the court the true heir, and to expose and denounce all pretenders.—Estate of Blythe, 1, 110.

### ATTORNEYS FOR ABSENT OR MINOR HEIRS.

#### 1. APPOINTMENT, 477.

#### 2. DUTY AND COMPENSATION, 477.

##### 1. Appointment.

Under section 1718, Code of Civil Procedure, the probate court has power to appoint an attorney for absent or unrepresented heirs of a decedent.—Estate of Blythe, 1, 115.

Although the probate court has power to appoint an attorney for unrepresented heirs of a decedent, the power should be prudently and discreetly exercised, in the interests of the estate and of all concerned. The rule is, never to make such an appointment unless the necessity is manifest.—Estate of Blythe, 1, 115.

The probate court generally refrains from appointing an attorney for unrepresented parties when there are no known heirs; not doubting its power, but questioning the expediency of its exercise in such cases.—Estate of Blythe, 1, 115.

The court is authorized, in its discretion, under Code of Civil Procedure, section 1718, to appoint a competent attorney to represent minor heirs, having no general guardian in the county, heirs and creditors who are nonresidents of the state, and other interested parties who are unrepresented. The exercise of this power imports no censure upon the counsel for the administration; it is assistive and not obstructive.—Estate of Blythe, 2, 337.

The court will not exercise the power conferred upon it by section 1718 of the Code of Civil Procedure to appoint an attorney to represent minor heirs, except in cases where it is manifestly necessary; and in no case upon the suggestion of an executor or administrator, or other person in possible adverse interest to the parties sought to be represented.—Estate of Fuller, 2, 521.

##### 2. Duty and Compensation.

It is the duty of an attorney appointed by the court for minor heirs to call to the court's attention the failure on the part of an executor to comply with any requirement of the statute, and it is not

for him to construe or interpret apparently imperative clauses of the statute as merely directory.—Estate of Fuller, 2, 521.

There is no absolute standard by which to fix the compensation of an attorney appointed by the court to represent minor or absent heirs. A small estate may entail greater labor and relatively larger responsibility than an estate of magnitude. The size of the estate is a factor but not the prime one in the question. Each case must therefore depend upon its own circumstances.—Estate of Blythe, 2, 337.

There is a wide difference between the attorney employed for an estate and an attorney appointed by the court to represent minor heirs, and their compensation is not to be measured alike.—Estate of Fuller, 2, 521.

The compensation awarded an attorney appointed by the court to represent minor heirs should be charged against the persons whom he represents and not against the body of the estate, even though the executrix assents to the charge; and such compensation should be in proportion to the interest represented, although the estate as a whole may incidentally benefit by the service.—Estate of Fuller, 2, 521.

An attorney appointed to represent heirs is entitled to an allowance at any time after services rendered, and during the administration. An application for such an allowance before final settlement of the estate is not premature.—Estate of Blythe, 1, 115.

The compensation of an attorney appointed by the court to represent heirs must be paid out of the estate, as necessary expenses of administration. Upon distribution of the estate the attorney's fee may be charged against the party represented by him.—Estate of Blythe, 1, 115.

### **BANKRUPTCY.**

Trustee may contest executor's account. See *Accounts of Executors and Administrators*, sec. 7.

### **BASTARDS.**

See *Illegitimates*.

### **BIBLE.**

Entries of births, deaths and marriages. See *Evidence*, sec. 2.

### **BILL OF REVIEW.**

A suit analogous to a bill in the nature of a bill of review can be brought only in the court wherein the judgment or order complained of was made or rendered.—*In re Burton*, 5, 235.

### **BONDS.**

Of administrator on sale of land. See *Sale of Land of Decedent*, sec. 1.

On partial distribution. See *Distribution of Estate*, sec. 2.

Reduction of guardian's bond. See *Guardian and Ward*, sec. 1.

Undertaking on appeal. See *Appeal and Error*.

### **BOOKS OF ACCOUNT.**

Evidence to establish community property. See *Community or Separate Property*, sec. 5.

**BROKER'S FEE.**

Allowance to executor. See Accounts of Executors and Administrators, sec. 4.

**BURDEN OF PROOF.**

As to testamentary capacity. See Testamentary Capacity, sec. 6.

On will contest. See Contest of Will, sec. 8.

In regard to insanity. See Insanity and Insane Delusions, sec. 5.

To show undue influence. See Undue Influence in Procuring Will, sec. 7.

How avoided. See Trial.

**CERTIFICATE OF PROOF.**

Of probate of will. See Probate of Will, sec. 4.

**CHARITIES.**

1. CHARITABLE BEQUESTS IN GENERAL, 479.

2. DESIGNATION OF TRUSTEE AND BENEFICIARIES, 480.

3. INVALID ACCUMULATIONS, 480.

4. GIFT WITHIN THIRTY DAYS OF DEATH, 480.

5. GIFT OF OVER ONE-THIRD OF ESTATE, 481.

Parties in suit to quiet title. See Quieting Title.

**1. Charitable Bequests in General.**

The term "charity" is a broad one, and may be applied to almost anything that tends to promote the general well-being and well-doing of the human race.—Estate of Emeric, 5, 286.

A legacy for the restoration of an old church and a town hall is a charitable use.—Estate of Emeric, 5, 286.

A testamentary trust which contemplates purposes "charitable or other" cannot be sustained as a charitable trust.—Estate of Sutro, 2, 120.

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, 3, 378.

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, 3, 378.

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.—Estate of Hull, 3, 378.

If some of the purposes of a testamentary trust are charitable, while some are not, no part of it is sustainable as a charitable trust, if the bequest violates the law regulating the validity of private trusts.—Estate of Sutro, 2, 120.

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, 3, 267.

## 2. Designation of Trustee and Beneficiaries.

A degree of vagueness is allowable in charitable bequests.—Estate of Hanson, 3, 267.

A charitable institution which is made a residuary legatee need not be designated in the will by its corporate name.—Estate of Gibson, 1, 9.

If either from the will itself or from extrinsic evidence the object of a charitable bequest can be ascertained, the court will not invalidate the gift or defeat the donor's intention.—Estate of Gibson, 1, 9.

A residuary bequest to "The Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital," is held to have been intended for the "Sisters of Mercy," a corporation embracing, as part of its charitable design, the "Old Ladies' Home."—Estate of Gibson, 1, 9.

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, 3, 378.

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, 3, 378.

## 3. Invalid Accumulations.

Section 723 of the Civil Code, which provides that "all directions for the accumulation of the income of property, except such as are allowed by this title, are void," applies to accumulations for charities. Estate of Sutro, 2, 120.

The testamentary trust involved in this case is found by the court not to evince a "general charitable intent" which will be given effect so far as is consistent with the rules of law, if the mode prescribed is unlawful.—Estate of Sutro, 2, 120.

## 4. Gift Within Thirty Days of Death.

A legacy for a charitable use, contained in a will executed within thirty days of the testator's death, is void under section 1313 of the Civil Code.—Estate of Emeric, 5, 286.

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 restriction imposed by section 1313 of the Civil Code.—Estate of Sharp, 3, 279.

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.—Estate of Sharp, 3, 279.

In this case it is held that the residuary legatees under a former will take the residuum of the estate, which is bequeathed to charities by the residuary clause of a later will, but which they are unable to take by virtue of the restrictions imposed by section 1313 of the Civil Code.—Estate of Jones, 2, 178.

#### 5. Gift of Over One-third of Estate.

Charitable bequests, so far as they exceed one-third the distributable estate, are void.—Estate of Gibson, 1, 9.

The excess of an estate all over and above the one-third to charities goes to the residuary legatee or devisee, preferably to the next of kin or heirs at law, according to the provisions of section 1313 of the Civil Code.—Estate of Jones, 2, 178.

The word "estate," as employed in section 1313 of the Civil Code, means estate in California. The one-third of the estate which may be given to charity is one-third of the distributable assets of the estate.—Estate of Jones, 2, 178.

Where a testator leaves real and personal property in California and real property in other states, and devises one-third of his estate to charities, the courts in this state cannot take into account the property situated beyond their jurisdiction in determining what one-third of the estate is.—Estate of Jones, 2, 178.

### CHILDREN.

See Illegitimates; Guardianship; Minor Heirs; Parent and Child

### CITATION.

Computation of time of service. See Time.

### CLAIMS AGAINST ESTATE.

1. PRESENTATION, ALLOWANCE, AND PAYMENT, 481.
2. PREFERENCE TO JUDGMENTS, 482.
3. SURVIVING PARTNER'S CLAIM, 482.
4. CONTESTED OR DISPUTED CLAIM, 482.
5. REFERENCE OF CLAIM, 482.
6. INTEREST ON DEBT, 483.

Expenses of funeral. See Funeral Expenses.

Expenses allowable in executor's account. See Accounts of Executors and Administrators, sec. 4.

Expenses allowable account of special administrator. See Special Administrators, sec. 4.

Publication of notice to creditors. See Administration of Estates, sec. 5.

*For other authorities, see Index to Notes, p. 448.*

#### 1. Presentation, Allowance, and Payment.

A claim arising during the lifetime of the decedent is a matter which may be segregated from the account of the executors.—Estate of Traylor, 1, 164.

The allowance of a claim against decedent *prima facie* establishes its correctness and validity, and shifts the onus of proving its incor-  
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rectness or invalidity upon the party contesting the same.—Estate of Traylor, 1, 164.

The allowance of a claim does not interfere with the question of the right to a trial by jury.—Estate of Traylor, 1, 164.

After presentation and allowance by the administratrix, and approval by the judge, a claim in this case was, upon order to show cause, ordered paid. The administratrix contested this order upon the ground that since the allowance of the claim judgment had been recovered against her by a third person for part of the claim. The claim not having been paid, a second application for an order for its payment was made. The administratrix contested this application and alleged that since the first order she had paid the judgment before mentioned, and she sought to set up this payment as a counter-claim. It was held that the former order covered the subject matter of the claim, was a full and final determination thereof, and a bar to the application to allow the setoff.—Estate of Le Clerc, 5, 297.

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.—Estate of Finch, 3, 294.

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.—Estate of Finch, 3, 294.

## 2. Preference to Judgments.

The preference given to judgments rendered against a decedent in his lifetime includes the interest due thereon at the time of payment. Estate of Mallon, 3, 125.

## 3. Surviving Partner's Claim.

A surviving partner cannot collect from the general assets of his partner's estate a debt due by the decedent to the partnership, without first complying with section 1585 of the Code of Civil Procedure and ascertaining if the firm assets will pay the firm debts.—Painter v. Painter, 4, 339.

## 4. Contested or Disputed Claim.

The probate court is not a trial court to settle disputed claims.—Estate of Turner, 5, 424.

The parties are entitled to a jury on the trial of a contest which arose during the lifetime of the deceased, and at the trial the claim alone should be submitted, and not as part of an account in which it is set forth.—Estate of Traylor, 1, 164.

## 5. Reference of Claim.

Where an executor or administrator doubts the correctness of a claim presented to him, and a reference is had pursuant to section 1507, Code of Civil Procedure, the reference must be conducted as provided in section 1508 and sections 638-645, Code of Civil Procedure.—Estate of Burns, 2, 39.

The reference of a doubtful claim is "a proceeding prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person," and subdivision 3, section 1880, Code

of Civil Procedure, applies, so that the claimant prosecuting cannot testify "as to any matter of fact occurring before the death of such deceased person."—Estate of Burns, 2, 39.

Assuming that section 1880, Code of Civil Procedure, applies to the case of a referred claim against a decedent's estate, yet unless the objection to the claimant's evidence is taken before the referee, it cannot be urged afterward.—Estate of Wheeler, 2, 32.

Where a claim presented against a decedent's estate is, by stipulation of the executor and claimant, referred to a designated person "to ascertain its accuracy and report the same," and, upon the reference, the referee is notified by the executor that he has no testimony to offer and does not desire to be present at the examination, and the claim is fully substantiated by the oral testimony of the claimant, and bills and memoranda, and witnesses in corroboration of his evidence, an objection to the referee's report on the ground that the claimant's evidence was inadmissible under section 1880, Code of Civil Procedure cannot be sustained.—Estate of Wheeler, 2, 32.

#### 6. Interest on Debt.

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 Mallon, 3, 125.

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.—Estate of Mallon, 3, 125.

### CLINICAL CHART.

As evidence of testamentary capacity. See Testamentary Capacity, sec. 9.

### COMMISSIONS.

See Compensation.

### 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, 3, 519.

### COMMON-LAW MARRIAGE.

See Marriages, sec. 5.

### COMMUNITY AND SEPARATE PROPERTY.

1. SEPARATE PROPERTY IN GENERAL, 484.
2. COMMUNITY PROPERTY IN GENERAL, 484.
3. INTERMINGLING OF SEPARATE AND COMMUNITY FUNDS, 485.
4. CONFLICT OF LAWS, 485.
5. EVIDENCE AS TO CHARACTER OF PROPERTY, 485.

Descent and succession. See Succession, sec. 5.

Setting apart homestead. See Homestead, sec. 3.

*For other authorities, see Index to Notes, p. 449.*

### 1. Separate Property in General.

The changing of the form does not destroy the identity of separate property.—Estate of Leahy, 3, 364.

A husband cannot recover payments voluntarily made by him for repairs, improvements, and the like on the separate property of his wife, nor can he, by making advances for the benefit of such property, acquire any interest therein.—Estate of Claney, 5, 430.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

### 2. Community Property in General.

Money borrowed by a married man and not secured by his separate property is community.—Estate of Hale, 2, 191.

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.—Estate of Grannis, 3, 429.

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.—Estate of Grannis, 3, 429.

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.—Estate of Leahy, 3, 364.

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.)—Estate of McGinn, 3, 26.

Real estate acquired by purchase by a married man is *prima facie* community property, and the burden rests upon one who asserts the contrary to establish his contention by clear and certain proof.—Estate of Foster, 4, 33.

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, 3, 483.

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.—Estate of Henarie, 3, 483.

### 3. Intermingling of Separate and Community Funds.

Separate property does not lose its quality as such by passing through various mutations, so long as it can be identified, and profits therefrom take on the same character; but when profits accrue from separate funds so commingled with the common property that their identity is lost, such profits are community property, if it does not appear what proportion thereof pertains to the separate and what to the common property.—Estate of Foster, 4, 33.

Separate property intermingled with community property so that its identity is lost becomes itself a part of the community.—Estate of Fay, 3, 270.

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.—Estate of Leahy, 3, 364.

### 4. Conflict of Laws.

Where a married man picks orchilla in Mexico from land owned by himself and his copartners and ships the product to market in England, and the returns are remitted to him at a point over one thousand miles from the place of production, these products together with real estate purchased with their proceeds in California are community property.—Estate of Hale, 2, 191.

The rule that property purchased with the rents and profits of land which is the separate estate of the husband becomes likewise his separate property is restricted to cases where the purchase money is the proceeds of land used in the ordinary manner, and does not extend to cases where the products are shipped to a distant country and used in a business venture.—Estate of Hale, 2, 191.

The rents and profits of Mexican land held by a resident of California are subject to the laws of Mexico, and by those laws they are community property.—Estate of Hale, 2, 191.

Lands purchased in a community property state with funds derived from real property acquired in a common-law state become the separate property of the husband, even if the funds were acquired in the other state under circumstances which would have made the land from which it was derived community property.—Estate of Hale, 2, 191.

### 5. Evidence as to Character of Property.

The character of an estate as separate or community property is not affected by any declaration of the testator, but is determined by the mode in which the property was acquired.—Estate of Foster, 4, 33.

The declaration of a testator in his will that the property devised is his separate estate cannot be considered as evidence that it is such. Estate of Hale, 2, 191.

The declarations of a person since deceased are admissible to show that his estate is community property.—Estate of Fay, 3, 270.

Where it appears that the purchase price of real estate was paid from the separate property of a married woman, and the deed was taken in her name, and the husband, upon her death, avers in his petition for letters of administration that such property was the separate property of the decedent, and swears to the same effect on the hearing of the petition, and also in the inventory and appraisement, his admissions are, when unexplained, conclusive of the character of the property.—Estate of Clancy, 5, 430.

Books of account kept by a man and by a corporation of which he was the controlling owner are admissible after his death to show that real estate acquired by him during coverture came from the proceeds or income of property owned by him before marriage.—Estate of Foster, 4, 33.

### COMPENSATION.

Of appraisers. See Appraisers of Estate, sec. 3.

Of attorneys. See Attorneys.

Of executors and administrators. See Compensation of Executors and Administrators.

Of special administrator. See Special Administrator, sec. 4.

### COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

1. RIGHT TO COMPENSATION IN GENERAL, 486.
2. COMMISSIONS AND THEIR COMPUTATION, 486.
3. LOSS OF RIGHT TO COMPENSATION, 487.

*For other authorities, see Index to Notes, pp. 450, 451.*

#### 1. Right to Compensation in General.

When an estate is solvent, the compensation of the executor, fixed by the will in lieu of statutory commissions, should be paid as "expenses of administration."—Estate of Gibson, 1, 9.

Where an executor is himself an attorney, he cannot claim extra compensation for the use of his legal knowledge in administering his testator's estate.—Estate of Love, 1, 537.

Commissions of executors and administrators cannot be apportioned until the close of administration, and an executor must close his account as executor before being charged as trustee.—Estate of Tessier, 2, 362.

#### 2. Commissions and Their Computation.

An executor can be allowed commissions only upon the amount of the estate accounted for by him; and he cannot be said to have accounted for property as part of the estate of his testator, to which it has judicially been determined that the estate has no title.—Estate of Ricard, 1, 212.

An item for commissions of an executor, found in an annual account by him, will be disallowed. Allowance of an executor's statutory commissions is authorized only upon settlement of his final account in the administration.—Estate of Shillaber, 1, 120.

Where an executor claims commissions on the appraised value of the estate, which value is disputed, his commissions should be based

on the true value of the property as proved by experts on the hearing of his account.—Estate of Love, 1, 537.

Where a bank loaned money to a universal devisee on the executor's representation that a speedy distribution could be had and he would obtain it, and the executor filed a worthless petition therefor, he is estopped from claiming commissions as against the bank.—Estate of Love, 1, 537.

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.—Estate of Clark, 3, 214.

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."—Estate of Clark, 3, 214.

### 3. Loss of Right to Compensation.

An executor's right to commissions, given by the statute, is absolute; neglect of duty, or delay in closing the administration, will not take it away.—Estate of Love, 1, 537; Estate of Hite, 5, 402.

A quitclaim of all the executor's interest in his decedent's property will not operate or be construed as a waiver of commissions.—Estate of Love, 1, 537.

The fact that an executor at one time entertained and expressed an intention to renounce his commissions does not bar his right to claim them if he has made no renunciation in writing nor made any agreement prior to appointment to waive compensation.—Estate of Murphy, 1, 12.

### CONDITIONAL.

Bequests or devises. See Wills, sec. 21.

### CONFIRMATION.

Of executor's sale. See Sale of Land of Decedent, sec. 3.

### CONFLICT OF LAWS.

Charitable bequests. See Charities, sec. 5.

Common-law marriages. See Marriages, sec. 6.

Community property acquired in foreign country. See Community or Separate Property, sec. 4.

Descent of property. See Succession, sec. 2.

Right of adopted child to inherit. See Adoption, sec. 3.

Validity of interpretation of wills. See Wills, sec. 1.

Real estate in Lower California is subject to the Mexican laws, even if it belongs to foreigners.—Estate of Hale, 2, 191.

**CONSPIRACY.**

Manner of pleading. See Contest of Will, sec. 6.

**CONTEMPT OF COURT.**

Failure of executor to comply with decree of distribution. See Distribution of Estate, sec. 6.

Where the attorney for an administrator reports to the court and the administrator that he has sold property of the estate for a less sum than he has actually received, converts the difference between the two amounts to his own use, and obtains a confirmation of the sale at the sum reported by him, he is guilty of a contempt of court for which he should be punished.—Estate of Greenwood, 5, 425.

An attorney who, in seeking to effect his purpose, employs means other than such as are consistent with truth, and calculated to mislead the judge, through artifice and suppression of facts essential to be known to the court, is guilty of misbehavior in his office and of willful violation of duty constituting a contempt of court. Sections 282, 1209 of the Code of Civil Procedure, subdivisions 4 and 3, respectively.—Estate of Greenwood, 5, 425.

In concealing facts from the court which an attorney is bound in candor to communicate, he is wanting in that respect to courts and judicial officers which it is the duty of an attorney to maintain. Subdivision 2, section 282 of the Code of Civil Procedure.—Estate of Greenwood, 5, 425.

**CONTEST.**

Of executor's account. See Accounts of Executors and Administrators, secs. 6-9.

**CONTEST OF WILL.**

1. NATURE OF PROCEEDING, 488.
2. PERSONS INTERESTED AND PARTIES, 489.
3. PLEADING—FORM OF OPPOSITION, 489.
4. MOTION TO MAKE MORE DEFINITE, 489.
5. PLEADING UNSOUNDNESS OF MIND, 490.
6. PLEADING CONSPIRACY, 490.
7. PLEADING FRAUD AND UNDUE INFLUENCE, 490.
8. EVIDENCE AND BURDEN OF PROOF, 490.
9. PROVINCE OF COURT AND JURY, 491.
10. EFFECT OF DECREE ADMITTING TO PROBATE, 491.
11. VERDICT AND FINDINGS, 491.
12. LAW OF THE CASE, 492.
13. FOREIGN WILL OR PROBATE, 492.

See Attorney for Executor or Administrator; Costs; Forgery of Will; Fraud in Procuring Will; Undue Influence.

After probate. See Probate of Will, sec. 10.

Revocation of probate. See Probate of Will, sec. 10.

**1. Nature of Proceeding.**

A contest of probate of a will partakes of the nature of a civil action; its issues and results being determined and applied in like manner.—Estate of Tiffany, 2, 36.

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.—Estate of Harris, 3, 1.

## 2. Persons Interested and Parties.

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, 3, 519.

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, 3, 519.

On the trial of a contest of a will before probate, the contestant is plaintiff and the petitioner is defendant.—Estate of Renton, 3, 519.

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, 3, 519.

## 3. Pleading—Form of 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, 3, 519.

The facts constituting the cause of action in a will contest should be stated in ordinary and concise language.—Estate of Harris, 3, 1.

The rule that a complaint must state the cause of action in ordinary and concise language applies to the written grounds of opposition to the probate of a will. The facts should be stated concisely and with certainty, apart from all hypotheses, arguments, and conclusions of law; and when once made the statement should not be repeated.—Estate of Goodspeed, 2, 146.

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, 3, 519.

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.—Estate of Harris, 3, 1.

## 4. Motion to Make More Definite.

A motion to make the statement of contest and opposition to the probate of a will more definite and certain by setting out the several grounds separately will be denied as not the proper procedure for taking advantage of the defective pleading.—Estate of O'Gorman, 4, 354.

### 5. 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, 3, 1.

### 6. Pleading Conspiracy.

Where one is charged in a pleading with conspiracy with other persons, he has a right to have the names of the alleged conspirators made known to him.—Estate of Goodspeed, 2, 146.

### 7. Pleading Fraud and Undue Influence.

When the grounds of a contest embrace duress, 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, 3, 1.

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, 3, 1; Estate of Maynard, 5, 269.

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.—Estate of Harris, 3, 1; Estate of Maynard, 5, 269.

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.—Estate of Harris, 3, 1; Estate of Maynard, 5, 269.

Charges of fraud and duress constitute different causes of action, and should be stated separately.—Estate of Goodspeed, 2, 146.

### 8. Evidence and Burden of Proof.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26; Estate of Solomon, 1, 85.

The burden of proof in a will contest is on the contestant, and he should establish by a preponderance of evidence the issues which he tenders.—Estate of Kershow, 2, 213.

The fact that relatives are ignored and the estate given to a stranger does not shift the burden.—Estate of Tobin, 3, 533.

The proponent of an olographic will has the burden to prove that the instrument was entirely written, dated, and signed by the hand of the testator; the burden does not lie upon the contestants to prove

that it was not so written, dated and signed.—Estate of Martin, 4, 451.

Upon a review of the evidence, it was held in this case that the document offered for probate was executed by the decedent as and for his last will; that it was executed and attested in accordance with the law of this state, and that the testator was, at the time of such execution, of sound mind and competent in every respect to dispose of his estate by will.—Estate of Kershow, 2, 213.

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, 3, 232.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

The probate of a will in this case is sustained as against contesting heirs with whom the testator was not on friendly terms, he being an eccentric old music master, and having given practically his entire estate to a married woman for the cultivation of her voice, who was not related to him, but who had been his pupil.—Estate of Dama, 5, 24.

#### 9. Province of Court and Jury.

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.—Estate of Dolbeer, 3, 232.

In a will contest the jurors are to find the facts, but they must take the law from the court.—Estate of Dolbeer, 3, 232.

#### 10. Effect of Decree Admitting to Probate.

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, 3, 26.

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, 3, 26.

#### 11. Verdict and Findings.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

## 12. 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.—Estate of Dolbeer, 3, 249.

## 13. Foreign Will or Probate.

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, 3, 120.

The judgment of a court of another state admitting to probate as the last will of a decedent a document earlier in date than the one in contest is admissible in evidence under the general issue raised by an allegation that the document propounded as the last will of the decedent is not his will and a denial of this allegation.—Estate of Kershow, 2, 213.

## CONTINGENT.

Devises and bequests. See Wills, sec. 21.

## CONTRACTS.

Particular clauses of a contract are subordinate to its general intent, and the whole of a contract should be taken together so as to give effect to every part if reasonably practicable, each clause aiding in the interpretation of the other.—Estate of Levinson, 2, 325.

## CONVERSION.

See Equitable Conversion.

## CONVERSION AND EMBEZZLEMENT.

The petition in this case held not to state facts bringing it within sections 1459-1461 of the Code of Civil Procedure.—Estate of McTiernan, 4, 472.

## CORPORATE STOCK.

Payment of assessments. See Executors and Administrators, sec. 9.

## CORPORATIONS.

Bequest in trust to corporations. See Trusts, sec. 4.

**COSTS.**

1. FOR OR AGAINST PROPONENTS, 493.
2. COUNSEL FEES, 493.
3. MILEAGE AND FEES OF WITNESSES, 493.
4. OTHER ITEMS OF EXPENSE, 494.
5. FILING COST BILL, 494.

**1. For or Against Proponents.**

Allowance of counsel fees to executor. See *Attorney for Executor or Administrator*, sec. 2.

The opinion in this case consists of a judgment taxing costs against the proponents of the will.—*Estate of Fallon*, 4, 450.

There is a distinction between a successful and unsuccessful contest of a probate of will, as to the proponent's right to expenses incurred. Where a purported will has been refused probate, and so declared invalid, no rights or duties thereunder can be pretended.—*Estate of Tiffany*, 2, 36.

There is no warrant in the statute for an allowance of expenses incurred by the proponent of a purported will which has been refused probate, and jurisdiction in such matters cannot be sought for outside the code.—*Estate of Tiffany*, 2, 36.

**2. Counsel Fees.**

Code of Civil Procedure, section 1021, discriminates between counsel fees and costs.—*Estate of McGinn*, 2, 313.

The probate statutes in speaking of costs mean simply the costs of the court, the expenses incidental to the proceedings in the case, apart from counsel fees.—*Estate of McGinn*, 2, 313.

Counsel fees in a will contest have no proper place in a bill of costs, and may be stricken out on motion.—*Estate of McGinn*, 2, 313.

Item in cost bill of attorney fee of contestant upon revocation of probate of will disallowed as improper; construing Code of Civil Procedure, section 1332 with sections 1716 and 1021.—*Estate of McGinn*, 2, 315.

Section 1332, Code of Civil Procedure, as to costs of a probate contest, if including counsel fees, is applicable solely to contests after probate first had, and does not embrace a contest upon the original propounding of a purported will.—*Estate of Tiffany*, 2, 36.

**3. Mileage and Fees of Witnesses.**

Mileage from San Luis Obispo to San Francisco and return disallowed as costs; it appearing that the residence of witness more than thirty miles distant from place of trial, and that he, although demanding and being refused his fees, nevertheless voluntarily attended.—*Estate of McGinn*, 2, 315.

A witness coming from San Luis Obispo to San Francisco (not obliged to attend) only allowed two days' fees; reduced from claim of six days.—*Estate of McGinn*, 2, 315.

Parties contestant to a proceeding to revoke the probate of a will are not entitled to witness' fees for testimony in their own behalf, nor to mileage.—*Estate of McGinn*, 2, 315.

Fees of "expert" witnesses cannot be taxed differently from those of other witnesses, as the court has no power under the statute to allow other than ordinary witness fee.—Estate of McGinn, 2, 315.

#### 4. Other Items of Expense.

Item in cost bill, service of twenty-seven subpoenas at \$1.50 each, disallowed; no return of service having been made, and it not appearing by whom served, and charge being in excess of fee bill.—Estate of McGinn, 2, 315.

Fees of jury, clerk, sheriff and shorthand reporter taxed as costs of contestants upon revocation of probate of will.—Estate of McGinn, 2, 315.

Items in cost bill for alleged taking of depositions disallowed, upon objections that alleged witnesses appeared at trial, that alleged depositions never returned or filed, and that items were excessive.—Estate of McGinn, 2, 315.

#### 5. Filing Cost Bill.

A cost bill is not filed, if not delivered to the clerk nor received by him.—Estate of McGovern, 1, 150.

Where a cost bill is left in the clerk's office about one hour after the time specified by law for the closing of the office, there being no person present authorized to receive and file it, the paper is not filed; and if the date of the alleged filing is the last day allowed by the statute for filing the bill, a motion to strike it out should be granted.—Estate of McGovern, 1, 150.

### COUNSEL AND COUNSEL FEES.

See Attorneys.

### COURTS.

See Jurisdiction.

It is the duty of courts to administer the statute law as they find it, and not to account for its incongruities.—Estate of Hayes, 1, 551.

### CY PRES DOCTRINE.

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.—Estate of Hull, 3, 378.

### DEATH.

Of heir pending. See Distribution of Estates, sec. 4.

*For other authorities, see Index to Notes, p. 451.*

Death may be presumed within a period less than seven years from the time of the last tidings or trace of an absentee, when the circumstances leave no other probable conclusion.—Estate of Luemann, 2, 531.

In addition to the legal presumption arising from unexplained absence for seven years, certain facts have been noticed by courts

as grounds on which inferences of death may rest. But no general or certain rule can be established; each case must be decided upon the facts, and the probabilities that life has been destroyed.—Estate of Kustel, 2, 1.

The fact of death may be found from the lapse of a shorter period than seven years where one sails in an unseaworthy vessel on the night of a violent storm and the vessel is unheard of for a long time after the voyage should have been accomplished.—Estate of Kustel, 2, 1.

The presumption of law is, that a person absent and unheard of for seven years is dead.—Estate of Ross, 3, 500.

Where a husband and wife perish in a common calamity, such as an earthquake, both being between the ages of fifteen and sixty, he is presumed to survive her.—Estate of Peacock, 4, 321.

See Claims Against Estate.

#### **DEBTS OF DECEDENT.**

#### **DECLARATIONS.**

Evidence to establish community property. See Community or Separate Property, sec. 5.

Of testator as showing unsoundness of mind. See Testamentary Capacity, sec. 3.

*For other authorities, see Index to Notes, p. 452.*

#### **DECREES.**

See Judgments.

#### **DEFINITIONS.**

See Words and Phrases.

#### **DELIVERY OF WILL.**

Failure of custodian to make. See Wills, sec. 3.

#### **DESCENT AND DISTRIBUTION.**

See Distribution of Estate; Succession.

#### **DESTROYED WILLS.**

See Probate of Will, sec. 6.

#### **DETECTIVES.**

Allowance of expense for detective service. See Special Administrator, sec. 4.

#### **DEVICES AND LEGACIES.**

See Lapse of Legacy; Wills.

The term "devise" is confined exclusively to real, and the term "legacy" to personal, property.—Estate of Spreckels, 5, 311.

*For other authorities, see Index to Notes, p. 452.*

**DISTRIBUTION OF ESTATE.**

1. PARTNERSHIP INTERESTS, 496.
2. PARTIAL DISTRIBUTION, 496.
3. APPLICATION AND NOTICE, 497.
4. DEATH OF HEIR PENDING ADMINISTRATION, 497.
5. CONCLUSIVENESS AND EFFECT OF DECREE, 497.
6. FAILURE OF EXECUTOR TO COMPLY WITH DECREE, 498.
7. DELIVERY TO FOREIGN ADMINISTRATOR, 498.

Payment of taxes. See Inheritance Taxes; Taxes.

**1. Partnership Interests.**

A distribution of a partnership interest, owned by the estate, may be ordered without a previous accounting by the surviving partners to the administratrix.—Estate of Wallace, 1, 118.

**2. Partial Distribution.**

A party is not incapacitated to apply for partial distribution of a decedent's estate because she is an executrix of his will.—Estate of Donahue, 1, 186.

The practice of the court since its institution, in recognizing the right of an heir or devisee, although he is also the representative of the estate, to apply for and have partial distribution, referred to and cases cited.—Estate of Donahue, 1, 186.

Assuming that the question of giving a bond upon partial distribution can be considered upon demurrer to an application for partial distribution, and the objection taken that the party to give the bond is both distributee and executrix—obligor and obligee, the answer is that the law is so written.—Estate of Donahue, 1, 186.

Various grounds of special demurrers for ambiguity, presented to a petition for partial distribution of a decedent's estate, are overruled in this case.—Estate of Donahue, 1, 186.

Decedent's widow applied for partial distribution of the estate, alleging that "a portion" of it was separate property, and "the other portion" community property, particularly describing and claiming the portion alleged to be community. Demurrer, on the ground that it appeared from the petition to be necessary to ascertain and determine the title to the property asked to be distributed, and that title could only be determined upon final distribution, or under section 1664, Code of Civil Procedure, overruled. (See Estate of Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, affirming Coffey, J.)—Estate of Donahue, 1, 186.

Where one petitions for partial distribution of an estate, and alleges that she is the widow of deceased, and is desirous of having her share of the community property therein described assigned and distributed to her, it sufficiently appears that the petitioner is an heir. As widow she is included in the statutory term "heir."—Estate of Donahue, 1, 186.

Where the widow of a decedent petitions to have her share of the community property assigned to her, by way of partial distribution, alleging that certain property described in the inventory of the estate, and then particularly describing it, was conveyed to decedent by a particular person named, and on a particular date mentioned, such averments of title in the decedent and seisin at the time of his death, are sufficient.—Estate of Donahue, 1, 186.

An allegation in the petition of a widow to have her share of the community property assigned to her by way of partial distribution, that the property (describing it) "was acquired by the said deceased after his marriage with your petitioner, to wit," on a day named, "and was not acquired by gift, bequest, devise or descent; but, on the contrary, by purchase for a valuable consideration, and as she is advised and insists was, and is the community property," is sufficient, as a statement of the character of the property. It is sufficient treating the petition as a pleading; but especially so as an application for partial distribution.—Estate of Donahue, 1, 186.

Whenever the administration of an estate has advanced so far as to be in a sufficient state of forwardness to authorize distribution, it is the duty of the court, upon petition of any party interested, to proceed to a partial distribution, and for that purpose to make the necessary investigation of facts.—Estate of Donahue, 1, 186.

An application for partial distribution of a decedent's estate in course of administration may be made at any time after the period of administration mentioned in the statute, upon allegations showing the existence of the conditions and circumstances required by the statute.—Estate of Lynch, 1, 140.

A petition for partial distribution of a decedent's estate should not be treated as severely as a common-law pleading. All that it need show is that the person applying has the status of an applicant as described in the statute, and that the administration of the estate is in a sufficient state of forwardness to authorize a distribution.—Estate of Donahue, 1, 180.

Form of decree for partial distribution where an heir or devisee dies pending administration.—Estate of Ortiz, 5, 271.

### 3. Application and Notice.

The application of the husband in this case for distribution, having been filed before the children attained their majority, is premature and must be denied.—Estate of Berton, 2, 319.

There is no direction in section 1665 of the Code of Civil Procedure that the distribution of the estate of a decedent should be made without notice.—Estate of Hickey, 5, 433.

### 4. Death of Heir Pending Administration.

Manner of distribution where an heir or devisee dies pending administration and his estate is unsettled at the time of distribution.—Estate of Ortiz, 5, 271.

### 5. Conclusiveness and Effect of Decree.

Distribution disposes of the subject matter, and nothing remains within the jurisdiction of the court, except to compel obedience to its decree, when necessary.—Estate of Wallace, 1, 118.

An administratrix, as such, is estopped from attacking a decree made upon her request, as widow and as guardian of a minor heir, and concurred in by her as administratrix.—Estate of Wallace, 1, 118.

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.—Estate of Ross, 3, 500.

### 6. Failure of Executor to Comply with Decree.

An executor who refuses to make payment to distributees in accordance with the decree of distribution is punishable for contempt, and he cannot plead inability to pay, when his account on file shows the contrary.—Estate of Treweek, 1, 132.

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.—Estate of Donavan, 3, 452.

### 7. Delivery to Foreign Administrator.

Code of Civil Procedure, sections 1322 and 1667, are, upon an application under the latter section, to be read together, and when so read, the reference in section 1667 to another "state" includes a foreign country.—Estate of Skerrett, 2, 552.

Upon an application, under section 1667, Code of Civil Procedure, for an order for delivery to a foreign administrator with the will annexed of an estate in this state which is treated as personalty, the validity of the will is to be determined by the courts of the domicile of the testatrix, and according to the laws of such domicile, and not by the courts or according to the laws of this state.—Estate of Skerrett, 2, 552.

If a resident of Nevada dies there intestate, leaving personal property in California, leaving creditors in Nevada but none in California, and leaving no heirs in either state, though perhaps some in Canada, the California courts will, in a spirit of comity, direct the residue of the property in that state, after the payment of ancillary administration, to be paid over to the domiciliary administrator in Nevada, instead of making a distribution.—Estate of Cornell, 5, 431.

## DOMICILE AND RESIDENCE.

On application for homestead. See Homestead, sec. 9.

Of testator. See Probate of Will, sec. 5.

Domicile is the place whence a person goes for labor or other temporary purpose and whither he returns in season of repose. It is the place where a person has his home, or his principal home, or where he has his family residence and personal place of business; that residence from which there is no present intention to remove or to which there is a general intention to return.—Estate of Sweet, 2, 460.

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.—Guardianship of Treadwell, 3, 309.

"Inhabitant" and "resident" are synonymous terms in law, and can, strictly speaking, be applied only to persons domiciled in a place with the intent there to remain.—Guardianship of Deisen, 2, 463.

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.—Estate of De Noon, 3, 352.

The acts and conduct of a person are more conclusive in determining his domicile than are his declarations.—Estate of Sweet, 2, 460.

## DRUNKENNESS.

See Intoxication.

**DYING DECLARATION.**

Of mother in regard to guardianship. See Guardianship, sec. 7.

**EMBEZZLEMENT.**

See Conversion and Embezzlement.

**EQUITABLE CONVERSION.**

Equitable conversion may take place by implication as well as by express words.—Estate of Skae, 1, 405.

If a will authorize the executors to sell real estate, and the general scheme of the testament manifests an intention on the part of the testator that there shall be an equitable conversion of the realty into personal property, such a conversion will take place, although the power to sell is not imperative.—Estate of Skae, 1, 405.

In order to work an equitable conversion of real property disposed of by will into personalty, the direction to sell must be positive, irrespective of all contingencies and independent of discretion.—Estate of Spreckels, 5, 311.

Where a person residing in England bequeaths real estate situated in California to the Catholic Archbishop of London, "to be distributed by him at his discretion among such poor people as he may select," the intention of the testator is that the real property should be treated as personalty and its proceeds distributed by the archbishop.—Estate of Skerrett, 2, 552.

**EQUITY POWERS.**

Of probate court. See Jurisdiction, sec. 4.

*For other authorities, see Index to Notes, p. 453.*

**ESTATES OF LIMITED VALUE.**

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**ESTOPPEL.**

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**EVIDENCE.**

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2. ADMISSIBILITY, WEIGHT AND CREDIBILITY, 500.
3. DIRECT AND INDIRECT EVIDENCE, 500.
4. INFERENCE AND PRESUMPTIONS, 501.
5. FAILURE TO TESTIFY OR PRODUCE TESTIMONY, 501.

Credibility of witnesses. See Witnesses, sec. 1.

Consideration of rejected testimony. See Jury, sec. 3.

Expert testimony. See Expert Witnesses.

Jury as judge of weight and credibility. See Jury, sec. 2.

Regarding handwriting. See Handwriting.

Of fraud in procuring will. See Fraud in Procuring Will, sec. 3.

Of insanity. See Insanity and Insane Delusions, sec. 5.

Of testamentary capacity. See Testamentary Capacity, sec. 3.

Of undue influence. See Undue Influence in Procuring Will, sec. 6.  
In will contest. See Contest of Will, sec. 8.

### 1. Opinion Evidence.

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, 3, 232.

### 2. Admissibility, Weight and Credibility.

Evidence is to be estimated not only by its 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.)—Estate of McGinn, 3, 26.

A 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. The rules of evidence favor quality rather than quantity.—Estate of Blythe, 4, 162; Estate of James, 3, 130.

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.)—Estate of McGinn, 3, 26.

There is no presumption or inference of law from the default of a party to be a witness in his own behalf. (Instruction XLVIII.)—Estate of McGinn, 3, 26.

It would be contrary to all rules of evidence to accept testimony that lacks clearness and certainty, and that is without corroboration, as against adverse evidence, positive and particular in its nature, and without successful assaillment, and going to the main fact in issue itself.—Estate of McDougal, 1, 456.

Entries made in an account-book at the request of one person by another, as to the ownership of property, are of no more value than any other verbal admissions which the writer orally testified to, which ought to be received with great caution. An entry in favor and not against the interest of a party dictating it is disentitled to consideration on that account. And a party cannot be affected by the declaration or entry of a party in his own favor, made without the cognition or consent of the former. Evidence of such character, even when admitted without objection, cannot be too carefully scrutinized, for it is in all cases the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse.—Estate of McDougal, 1, 456.

Entries of births, deaths and marriages in a family Bible are competent evidence, though such record does not contain every element in the history of each member of the family necessary to make it perfect.—Estate of Blythe, 4, 302.

### 3. Direct and Indirect Evidence.

Indirect evidence is of two kinds, namely, inference and presumption. (Instruction 4.)—Estate of McGinn, 3, 26.

Direct evidence proves the litigated fact in a direct manner, without (the necessity of) inference or presumption. (Instruction 4.)—Estate of McGinn, 3, 26.

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, 3, 26.

#### 4. Inference and Presumptions.

A presumption is a deduction made by the law from proof of particular facts. (Instruction 4.)—Estate of McGinn, 3, 26.

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, 3, 26.

A jury must find a fact in accordance with a conclusive presumption of law announced by the court. (Instruction XXVIII.)—Estate of McGinn, 3, 26.

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, 3, 26.

#### 5. Failure to Testify or Produce Testimony.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

The failure of a party to produce evidence within his power to produce is a circumstance to be taken against him.—Guardianship of Danneker, 1, 4.

### EXECUTORS AND ADMINISTRATORS.

1. DISTINCTION BETWEEN, 502.
2. RELATION TOWARD HEIRS AND ESTATE, 502.
3. EXECUTOR ACCORDING TO TENOR, 502.
4. NOMINATION OF ADMINISTRATOR, 502.
- 4a. RETRACTION OR RENUNCIATION OF NOMINATION, 503.
5. PERSONS ENTITLED TO LETTERS, 504.
6. COMPETENCY OF PERSON TO ACT, 505.
7. APPLICATION FOR LETTERS, 506.
8. LETTERS WITH WILL ANNEXED, 506.
9. POWERS, DUTIES, LIABILITIES, AND ACTIONS, 506.
10. AUTHORITY AND LIABILITY AS TO FOREIGN ASSETS, 507.
11. DOMICILIARY AND FOREIGN ADMINISTRATORS, 508.
12. DEATH OF EXECUTOR, 508.
13. REMOVAL AND REVOCATION OF LETTERS, 508.

See Administration of Estates in General; Public Administrator; Special Administrators.

Appointment of executor is distinct from probate of will. See Probate of Will, sec. 1.

Accounts of executors. See Accounts of Executors and Administrators.

Compensation of executors and administrators. See Compensation of Executors and Administrators.

Counsel for executor. See Attorney for Executor or Administrator.

Executor may be trustee. See Trusts, sec. 7.

Failure of executor to comply with decree of distribution. See Distribution of Estates, sec. 6.

Sale of decedent's land. See Sale of Decedent's Land.

*For other authorities, see Index to Notes, p. 453.*

### 1. Distinction Between.

An executor is appointed by the will to carry out its provisions and the wishes of the testator, who burdens the executor with the trusts created by the will and charges his estate with the expenses necessary to carry out his views as expressed in his will; but an administrator has no trust imposed upon him by the decedent, and he looks solely to the statute for his duties, authority and compensation.—Estate of Chittenden, 1, 1.

### 2. Relation Toward Heirs and Estate.

An administrator sustains to the estate, the heirs and other persons interested the relation of trustee. He takes neither an estate, title nor interest in the lands of the intestate, but a mere naked power to sell for specific purpose.—Estate of Barrett, 5, 376.

### 3. Executor According to 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, 3, 259.

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, 3, 259.

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, 3, 259.

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, 3, 259.

### 4. Nomination of Administrator.

In the case of a surviving husband or wife the right to nominate an administrator under section 1365 of the Code of Civil Procedure is absolute, while in the case of other persons contemplated by section 1379 the right is at most a mere power to address a recommendation to the discretion of the court.—Estate of Barrett, 5, 376.

The second marriage of a woman who has a husband living is void, and she becomes his widow upon his death. Hence she has a right to nominate an administrator of his estate, although she is a non-resident and is cohabiting with and bearing the name of the second husband.—Estate of Flaherty, 5, 426.

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.—Estate of Griffiths, 3, 545.

As between the nominee of nonresident brothers of an intestate, and the public administrator, the latter is entitled to letters of administration.—Estate of Griffiths, 3, 545.

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.—Estate of Bedell, 3, 78.

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.—Estate of Bedell, 3, 78.

Section 1379 is limited in its operation by subdivision 1 of section 1365 to the particular instance of the surviving husband or wife only.—Estate of Bedell, 3, 78.

A surviving husband or wife, though not competent to serve on account of nonresidence, may, nevertheless, nominate a suitable person for administrator.—Estate of Bedell, 3, 78.

A surviving wife has the right to nominate an administrator of her husband's estate, although she has been removed from her position as executrix of his will because of her permanent removal from the state.—Estate of McDougal, 1, 109.

If the daughter of a deceased person gives a third person authority to apply for letters of administration in her behalf, the power so granted ceases and determines at her death.—Estate of Barrett, 5, 376.

A brother and sister of a deceased person who are themselves incompetent to administer his estate are incompetent to nominate an administrator.—Estate of More, 5, 434.

#### 4a. Retraction or Renunciation of 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.—Estate of Bedell, 3, 78.

Where the executors named in a will request the appointment of another person as administrator, who is appointed and dies during administration, and the executors thereupon apply for letters, such application is based upon the circumstances then existing, and their previous failure to apply for letters does not affect their right to

appointment under such altered circumstances.—Estate of King, 4, 10.

Where petitioners for letters are next of kin of the testator, and would be entitled if he had died intestate to share in the distribution of his estate, they are entitled to administer thereon in preference to the public administrator, without the testator's nomination of them as his executors; and their request for the appointment of another as administrator, who is appointed accordingly and dies during administration, does not deprive them of their right to letters after the death of such administrator.—Estate of King, 4, 10.

Two heirs and legatees of the decedent, who were also named in his will as executors, requested the appointment of a person designated by them as administrator with the will annexed; and, with the expressed intention that such person and no other should be appointed administrator, declined to act as executors. Their nominee was accordingly appointed, but thereafter died. Thereupon the executors petitioned for the issuance of letters testamentary to themselves; the public administrator petitioned for his own appointment as administrator with the will annexed, contending that the executors had renounced their right to letters. It was held that the right of the executors to appointment was affected by their original request only to the extent of preventing them from being appointed as against their nominee, and that such request did not amount to an absolute renunciation.—Estate of King, 4, 10.

### 5. Persons Entitled to Letters.

See ante, sec. 4.

The right to administer follows the property.—Estate of Barrett, 5, 376.

The law of administration contemplates a legal or statutory kinship as well as a kinship by blood.—Estate of Barrett, 5, 376.

The order in which letters of administration are granted is a matter of statutory regulation, and to the statute the court must resort for decision.—Estate of Lane, 1, 88.

The relatives of a decedent are entitled to administer only when they are entitled to succeed to the personal estate or some part thereof.—Estate of Barrett, 5, 376.

Where applicants claim under different classes, the law at the time of the hearing governs; a person may be entitled to letters at the time of filing his petition under the first class, and yet, at the time of hearing, the statute may be so changed that he will be in the second class, and a person who was in the fifth class might, by such change, then be in the first class.—Estate of Herold, 2, 271.

Section 1265 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, 3, 78.

A sister of a deceased person who has a beneficial interest in his estate, who is familiar with the litigation in which it is involved, and who has already had charge of the property for some time as special administrator, has a better right to letters of administration

than one (the public administrator) who has no beneficial interest in the estate and who is a stranger to the litigation.—Estate of More, 5, 434.

A husband is of "kin" to his wife and her "relative," so as to be entitled to administer on her estate under section 1365 of the Code of Civil Procedure.—Estate of Barrett, 5, 376.

If a widower dies intestate leaving collateral relatives and one child, a daughter, and she, before the estate is administered, dies intestate, without issue, her surviving husband is entitled to administer her estate as against the collateral relatives of her father.—Estate of Barrett, 5, 376.

When a widow marries, she ceases to be the widow of her first husband; and then being a married woman, she loses her right to administer his estate, or to nominate an administrator.—Estate of Pickett, 1, 93.

Where a man dies intestate, and subsequently his widow dies before letters are taken out on his estate, her niece is not entitled to administer his estate as next of kin, for she was not such when he died.—Estate of Lane, 1, 88.

Minors are entitled to letters of administration on an equality with persons of full age, except that the letters cannot issue to them directly, but to their guardians for them.—Estate of Herold, 2, 271.

The right of minor children (their father being dead) to letters of administration on the estate of their mother comes into being at the moment of her death, and not at the time their guardian is appointed.—Estate of Herold, 2, 271.

Where minors are the sole heirs to their mother's estate, they are entitled to letters of administration thereon as against the public administrator.—Estate of Herold, 2, 271.

The fact that the public administrator files the first petition for letters of administration does not give him a better right than the guardians of the minor children of the deceased, whose petition is filed a few days later. The statute nowhere provides for or recognizes any superior right for any such reason.—Estate of Herold, 2, 271.

## 6. Competency of Person to Act.

Right of minors to letters. See ante, sec. 5.

It is the status of the petitioner at the time of the grant of administration that determines his competency.—Estate of Barrett, 5, 376.

The unfriendliness of an executrix toward a mother, who is striving to obtain what she can by legal means for her children, will not justify the court in adjudging the executrix incompetent.—Estate of McDougal, 1, 456.

The admissibility in evidence, on the issue of the improvidence of an applicant, of specific acts rather than general reputation, discussed. Estate of Piercy, 3, 473.

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, 3, 473.

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, 3, 473.

Education is not essential to qualify one to act as administrator.—Estate of Piercy, 3, 473.

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, 3, 473.

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 of the hearing of the accusation.—Estate of Piercy, 3, 473.

The court must appoint the next of kin as administrator, unless he is shown to be disqualified by clear and convincing proof.—Estate of Piercy, 3, 473.

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, 3, 473.

#### 7. Application for Letters.

The person to whom letters of administration are issued must apply by his own petition, signed by himself or his counsel; a petition by an heir for the appointment of another person is insufficient, and an order appointing an administrator on such petition must fall. Such petition is in effect no petition, and is not subject to amendment.—Estate of Riddle, 1, 215.

#### 8. Letters with Will Annexed.

If the executor named in a will is incompetent, or renounces, or fails to apply for letters, then letters of administration with the will annexed must be issued as provided in section 1365 of the Code of Civil Procedure.—Estate of King, 4, 10.

Where executors fail to apply for letters testamentary, the court is authorized to appoint an administrator with the will annexed, without any request or renunciation by the executors. It does not follow, therefore, when the executors make a request, that the court, by appointing an administrator with the will annexed, treated such request as an absolute renunciation.—Estate of King, 4, 10.

#### 9. Powers, Duties, Liabilities, and Actions.

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, 3, 219.

An executor who withdraws funds from the capital account of a firm of which the testator was a member, and permits them to lie idle in a bank, is chargeable with interest thereon.—Estate of Murphy, 1, 12.

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, 3, 112.

In the face of objection an administrator will be held accountable for the rental value of realty specifically devised by his testator, which he has placed in the possession of the devisee. But where the premises contained certain articles of personalty, which the testator directed to have left there and which the administrator claimed should be cared for, the court will take into account the care bestowed upon the property by the devisee.—Estate of Shillaber, 1, 101.

Negligence was not, under the peculiar circumstances of the case, held imputable to the executor, notwithstanding the administration of the estate was not closed for nearly sixteen years.—Estate of Love, 1, 537.

It is not only the duty of an executor to seek to recover assets of the estate, but should he forbear the endeavor he would be liable as for malfeasance or nonfeasance.—Estate of Fisher, 1, 97.

Where a suit brought by an executor presented issues of a "serious" and "difficult" character, and occupied many days in trial, a nonsuit being refused, it must have afforded grounds to the executor's judgment in its institution and prosecution.—Estate of Fisher, 1, 97.

Where an executor allowed judgment to go against him for realty which had come into his possession, he having acted in good faith, he should not be charged with the value of the lot, but only for an amount which he received in consideration of his consent to the judgment.—Estate of Love, 1, 537.

Where property of an estate has been taken by the city for a park, the executor should not be charged with the value of the land, but only with the amount received by him from such source.—Estate of Love, 1, 537.

It is an executor's duty to prepare proofs of loss in case of a destruction of insured property, and hence he will not be allowed a charge incurred for having such proofs prepared.—Estate of Shillaber, 1, 120.

#### 10. Authority and Liability as to Foreign Assets.

As there is no obligation upon an administrator to go into a foreign country and deal with lands there, consequently no liability can be claimed on his part to have attached to him officially by reason of his having done so.—Estate of Blythe, 2, 152.

A demurrer to the "Petition of administrator for leave to expend \$10,000, or such other sum as may be sufficient, to preserve the Mexican lands from forfeiture under the conditions of the grants," was sustained on the ground that the order prayed for was beyond the jurisdiction of the court to make.—Estate of Blythe, 2, 152.

A previous ruling of the court, authorizing an administrator to deal with lands situated in a foreign jurisdiction, does not justify an ad-

herence to such ruling if, upon a new application, the true character of the issue, as a jurisdictional one, is exposed.—Estate of Blythe, 2, 152.

An administrator has no legal right to deal with lands situated in a foreign country as if they were within the local jurisdiction.—Estate of Blythe, 2, 152.

A California administrator has no power officially in Mexico over lands there; and the facts in this case show that neither personally nor by virtue of his office can he claim or take title to lands there.—Estate of Blythe, 2, 152.

While an administrator must include in his inventory all estate of his decedent coming to his possession or knowledge, it does not follow that he is bound to account for assets situate in a foreign jurisdiction.—Estate of Blythe, 2, 152.

### 11. Domiciliary and Foreign Administrators.

See ante, sec. 10.

A California court cannot endow its appointee with any official character as administrator beyond the borders of the state, and when he appears elsewhere, he is simply a citizen abroad without any representative faculty whatever.—Estate of Blythe, 2, 152.

Where an administrator has no power beyond the territory of his appointment, he can have no duty with respect to any matter extra-territorium.—Estate of Blythe, 2, 152.

Where there are two administrators of a single estate, one in the place of the domicile of the testator or intestate and the other in a foreign jurisdiction, whether the courts of the latter will decree distribution of the assets collected under the ancillary administration or remit them to the jurisdiction of the domicile is not a question of jurisdiction, but of judicial discretion depending upon the circumstances of the particular case.—Estate of Bergin, 4, 471.

### 12. Death of Executor.

No executor of an executor is, as such, entitled to administer on the estate of the first testator.—Estate of Carlson, 2, 276.

Upon the death of the sole executor of a will, letters of administration with the will annexed of the estate of the testator left unadministered must be granted as designated and provided for in Code of Civil Procedure, section 1365.—Estate of Carlson, 2, 276.

Where an executor died pending administration, and his executor waited until seven months after his death before applying for letters of administration with the will annexed on the estate of the first testator, and the public administrator filed a counter-petition four days later, and where it does not appear that the public administrator was never notified of the death of the executor of the first testator, the contention that the public administrator had waived his right to letters by his laches is untenable.—Estate of Carlson, 2, 270.

### 13. Removal and Revocation of Letters.

Section 1385 of the Code of Civil Procedure applies only to an application 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.—Estate of Griffiths, 3, 545.

Where letters of administration have been granted to a person who is not entitled to them in his own right, and who was not nominated by the person entitled, they will be revoked upon the application of the person entitled to letters.—Estate of Rothschild, 1, 167.

The removal of an executor requires a stronger case than removal of an administrator.—Estate of Graber, 1, 345.

The evidence reviewed and the charge of fraud against the executrix held not proved. The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue, and a court is not justified in placing upon a person charged with fraud the onus of showing that she is guiltless; on the contrary, it is incumbent upon the person making a charge of fraud to maintain it by a preponderance of proof.—Estate of McDougal, 1, 456.

The statutory authority of a court to revoke letters testamentary or of administration, in case the executor or administrator fails to return an inventory within the prescribed time, is discretionary.—Estate of Graber, 2, 345.

A court will not remove executors for failure to file an inventory within the precise time prescribed by statute, when their dereliction arises because of the negligence of their counsel.—Estate of Graber, 2, 345.

The administrator in this case was found guilty of negligence of so grave a character as to justify his removal.—Estate of Robinson, 3, 224.

#### EXPENSES OF ADMINISTRATION.

See Accounts of Administrators and Executors; Attorney for Executor or Administrator, sec. 2; Costs.

The impression, widely prevalent, of the extravagant cost of administering estates, referred to and the court's position stated.—Estate of Blythe, 1, 110.

#### EXPERT WITNESSES AND EVIDENCE.

Allowance for expense of expert. See Special Administrator, sec. 4.  
Opinion evidence as to soundness of mind. See Testamentary Capacity, sec. 5.

Taxing fees as costs. See Costs, sec. 3.

Handwriting experts. See Handwriting.

The present system of retaining expert witnesses is discussed and criticised as not tending to unbiased testimony.—Estate of Dama, 5, 24.

Under the present system of retaining expert witnesses, the true position for them to take is that of persons to whom a question has been presented, and who, having given a certain opinion, are retained by the parties in whose favor they have given it, to carefully prepare the opinion, with the reasons therefor, and state it before the tribunal before which the case is tried. Experts should be considered and treated as advocates, rather than as witnesses.—Estate of Dama, 5, 24.

Expert testimony is frequently unsatisfactory and many times unreliable. The opinions of experts are not entitled to so much weight as facts, especially if there is a conflict between an opinion and a fact.—Estate of Fallon, 5, 426.

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.) Estate of McGinn, 3, 26. (This instruction is hardly in accord with Estate of Blake, 136 Cal. 306, 70 Pac. 171.)

Expert and opinion evidence, contrasted with nonexpert and non-opinion 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, 3, 26.

Expert evidence is really an argument of the expert to the court, and is valuable only with regard to the proof of the facts and the validity of the reasons advanced for the conclusions.—Estate of Scott, 1, 271.

Numbers do not necessarily count in the case of expert witnesses, any more than in other cases. It is quality, rather than quantity, which the law regards, so that the mere fact that numerically the force of sheer experts is stronger on one side than on the other is not a matter of moment in itself.—Estate of Dama, 5, 24.

### FAMILY ALLOWANCE.

1. RIGHT TO AND AMOUNT OF ALLOWANCE, 510.
2. PERSONS ENTITLED—GRANDCHILDREN, 510.
3. VALIDITY OF MARRIAGE, 511.
4. RELINQUISHMENT AND WAIVER, 511.
5. NOTICE OF APPLICATION, 511.
6. ORDER OF ITS CONCLUSIVENESS, 511.

#### 1. Right to and Amount of Allowance.

The right to a family allowance is founded upon the statute alone. Estate of Noah, 5, 277.

It commences from the death of the decedent.—Estate of Hessler, 2, 354.

In determining what is a reasonable allowance, regard should be had to the condition of the estate and the mode in which the family had lived during the lifetime of the deceased.—Estate of Hessler, 2, 354.

The right of an applicant may be tested by reference to her relations with the deceased and her right as wife to call on him for maintenance during his lifetime.—Estate of Noah, 5, 277.

#### 2. Persons Entitled—Grandchildren.

The statute embraces those who were the immediate family of the deceased—those who were by law entitled, up to his death, to look to him for support and protection.—Estate of Noah, 5, 277.

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.—Estate of Fargo, 3, 219.

A grandchild whose mother is living is not entitled to an allowance from the estate of his deceased grandfather.—Estate of Spinetti, 3, 306.

### 3. 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.—Estate of Mackay, 3, 318.

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.—Estate of Mackay, 3, 318.

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, 3, 318.

### 4. Relinquishment and Waiver.

When there are no children, the right of a widow to a homestead or family allowance may be treated as a personal privilege, which she can relinquish.—Estate of Noah, 5, 277.

A wife, having by her own act in entering into and carrying out an agreement for a separation abdicated her right as a surviving spouse, is in no sense a member of her deceased husband's family, and is not in a position to invoke the bounty of the law.—Estate of Noah, 5, 277.

### 5. Notice of Application.

Under section 1464, Code of Civil Procedure, no notice of an application for family allowance is necessary; yet, in the opinion of the court, it would be a salutary rule to require, and the court of its own motion requires, notice to be given to the attorneys for absent or minor heirs, or for persons in adverse interest, in all practicable cases.—Estate of McDougal, 1, 456.

### 6. Order and Its Conclusiveness.

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.—Estate of Welch, 3 303.

The order, though erroneous, becomes conclusive if not appealed from.—Estate of Fargo, 3, 219.

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.—Estate of Welch, 3, 303.

It creates a vested right to all sums that have become due thereunder.—Estate of Welch, 3, 303.

**FEES.**

See Compensation.

**FILES.**

Withdrawing will from files. See Probate of Will, sec. 8.

**FILING PAPERS.**

Cost bills. See Costs, sec. 5.

Filing a paper consists in presenting it at the proper office and leaving it there, deposited with the papers in such office.—Estate of McGovern, 1, 150.

Section 1030 of the Political Code defines and fixes the hours during which public offices shall be kept open; and a paper which is left in a public office, one hour after the time fixed by law for its closing, is left there when the office is legally closed.—Estate of McGovern, 1, 150.

**FINAL ACCOUNTS.**

See Accounts of Administrators and Executors.

**FINDINGS.**

See Contest of Wills, sec. 11.

**FIXTURES.**

The question as to what are or are not "fixtures" depends for its determination upon the circumstances of the construction and intended use of the articles.—Estate of Murphy, 1, 12.

**FLOWERS FOR GRAVE.**

Allowance to executor for expense. See Accounts of Executors and Administrators, sec. 4.

**FOREIGN ADMINISTRATORS.**

In general. See Executors and Administrators, sec. 11.

Delivery of estate on distribution. See Distribution of Estate, sec. 7.

Payment of undertaker's claim. See Claim Against Estate, sec. 1.

**FOREIGN ASSETS.**

Authority and liability of administrator. See Executors and Administrators, sec. 10.

**FOREIGN JUDGMENTS.**

See Judgments and Orders.

**FOREIGN WILLS AND PROBATE.**

Proof of foreign wills. See Probate of Will, sec. 7.

Contest of foreign will or probate. See Contest of Will, sec. 13.

**FORGERY OF WILL.**

See Handwriting.

Where a will is contested on the ground of forgery, the contestant is not called upon to indicate the forgery, but he is compelled to establish by a preponderance of evidence the charge laid in his complaint, while it is not incumbent on the respondent to do more than hold the balance.—Estate of Dama, 5, 24.

The probate of a will is permitted to stand in this case as against a charge that the instrument is a forgery, the charge being based on the theory, which finds some support in the evidence, that the testator was not at the place where the will was executed at the time of its execution.—Estate of O'Brien, 2, 163.

### FRACTION OF DAYS.

See Time.

### FRAUD.

Evidence of fraud in procuring will. See Fraud in Procuring Execution of Will, sec. 3.

Manner of pleading. See Contest of Will, sec. 7.

### FRAUD IN PROCURING EXECUTION OF WILL.

1. WHAT CONSTITUTES FRAUD, 513.
2. SETTING ASIDE WILL FOR FRAUD, 513.
3. EVIDENCE AND PROOF, 514.

#### 1. What Constitutes Fraud.

Circumvention by means of fraud is considered in the same light as constraint by force, and has the same effect in vitiating aside a will.—Estate of Fallon, 5, 426.

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, 3, 26.

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, 3, 26.

The character of materiality essential to a fraudulent misrepresentation must exist notwithstanding that there were no other inducements than the representations charged to cause the party to act as he did. (Instruction XXXVII.)—Estate of McGinn, 3, 26.

#### 2. Setting Aside Will for Fraud.

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, 3, 26.

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, 3, 26.

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, 3, 26.

A testator may be of sound mind, and yet the victim of fraudulent misrepresentation. (Instruction 13.)—Estate of McGinn, 3, 26.

If a testator be circumvented by fraud, the testament is without legal force. (Instruction 14.)—Estate of McGinn, 3, 26.

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, 3, 26.

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, 3, 26.

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, 3, 26.

The actual fraud sufficient to set aside a will must involve the commission by a beneficiary or with its 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.)—Estate of McGinn, 3, 26.

### 3. Evidence and Proof.

Other things being equal, where oath is opposed to oath, on a charge of fraud, the charge must fall.—Estate of McDougal, 1, 456.

Fraud is never presumed, but must always be proved. (Instruction XL.)—Estate of McGinn, 3, 26.

Fraudulent misrepresentations must be proved as they are alleged; and only the acts alleged can be proved. (Instructions XXXIX, XXXVIII, 13.)—Estate of McGinn, 3, 26.

Proof under the issue of fraud in a will contest must be confined to the particular fraud alleged. (Instruction XL.)—Estate of McGinn, 3, 26.

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, 3, 26.

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.)—Estate of McGinn, 3, 26.

**FUNERAL EXPENSES.**

1. IN GENERAL, 515.
2. PROPRIETY OF EXPENDITURES, 515.
3. PRESENTMENT AND PAYMENT, 515.

**1. In General.**

The surviving husband is liable for the funeral expenses of his wife, where he has resources sufficient to respond.—Estate of Fitzpatrick, 1, 117.

When the question of liability for funeral expenses is at issue in a suit to recover them, the probate court will not entertain a petition that involves an adjudication of the question.—Estate of Turner, 5, 424.

**2. Propriety of Expenditures.**

While suitable respect should be shown to the deceased in the matter of a burial place and monument, and while the court in its discretion can make allowance out of the estate therefor, yet large expenditures in this way represent the sentiments of the persons that incur them, rather than the necessary expenditure of trust funds, and courts should be cautious in allowing expenditures of this character.—Estate of Hessler, 2, 354.

An expense of \$147.50 for a wall around a cemetery lot may be allowed as a proper and usual charge against a decedent's estate.—Estate of Love, 1, 537.

The cost of a monument is a part of the funeral expenses, and a reasonable amount for this purpose may be allowed.—Estate of Hessler, 2, 354.

**3. Presentment and Payment.**

A claim for funeral expenses must be presented as other claims are, and if disallowed be sued upon in the ordinary way.—Estate of Turner, 5, 424.

The claim of an undertaker for funeral expenses need not be presented for allowance.—Estate of Finch, 3, 294.

Funeral expenses must be paid by the administrator as soon as he has sufficient funds in his hands.—Estate of Finch, 3, 294.

**GOODWILL OF BUSINESS.**

See Inventory and Appraisalment, sec. 3.

**GRANDCHILDREN.**

Duty of grandfather to provide for grandchild. See Parent and Child, sec. 2.

Right to family allowance. See Family Allowance, sec. 2.

**GUARDIAN AD LITEM.**

*For other authorities, see Index to Notes, p. 454.*

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.—Estate of Harris, 3, 1.

**GUARDIANSHIP.**

1. OF MINORS IN GENERAL, 516.
2. CLASSES AND DUTIES OF GUARDIANS, 516.
3. ELIGIBILITY OF PERSON AS GUARDIAN, 516.
4. VENUE AND JURISDICTION IN APPOINTING GUARDIAN, 517.
5. CHOICE AND NOMINATION OF GUARDIAN BY CHILD, 517.
6. EXAMINATION OF MINOR BY COURT, 518.
7. CONSIDERATIONS IN AWARDING CUSTODY OF CHILD, 519.
8. PERSONS ENTITLED TO APPOINTMENT, 520.
9. REVOCATION OF GUARDIAN'S LETTERS, 521.
10. GUARDIAN OF INSANE PERSON, 521.
11. ALLOWANCE TO ADULT SON OF INCOMPETENT, 522.

Appointment of guardian as negating testamentary capacity. See Testamentary Capacity, sec. 4.

**1. Of Minors in General.**

In the matter of the guardianship of minors, the state is interested in having beneficial influences surround and impress its future citizens.—Guardianship of Hanson, 1, 182.

The custody of minors is always within the discretion of the court; and this discretion is to be exercised in the light of the particular and peculiar circumstances of each case. The court is not bound to deliver the custody to any particular person, not even the father. Estate of Smith, 1, 169.

Where a child is baptized in a particular faith to which its mother belonged, the guardian of the child should secure to her instruction in the faith of the mother, until the child arrives at an age when she is presumptively competent to determine her own doctrine of religion.—Guardianship of McGarrity, 1, 200.

The application of the guardian in this case for a reduction of his bond was granted by the court.—Estate of Dresel, 2, 457.

**2. Classes and Duties of Guardians.**

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, 3, 1.

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, 3, 105.

**3. Eligibility of Person as Guardian.**

Where the mother of a minor is a nonresident, she is legally incapable of obtaining letters of guardianship over the child in this state.—Guardianship of Hansen, 1, 182.

Where the mother of a minor is a married woman, she is ineligible to become guardian.—Guardianship of Hansen, 1, 182.

Where application is made for guardianship of a minor, if there is no person before the court who is legally entitled to the guardianship, it must be shown, to justify a resistance of the application,

even by the nonresident mother, that no guardian is needed for the child, or that the applicant is an unfit person.—Guardianship of Hansen, 1, 182.

#### 4. Venue and Jurisdiction in Appointing Guardian.

The probate court has no jurisdiction to appoint a guardian for a child who has been awarded to a parent in divorce proceedings, while the divorce court retains the right to control the custody of the child.—Guardianship of Murphy, 1, 107.

The statute prescribes two jurisdictional requisites in the appointment of guardians for minors: First, the minor must have no guardian at the time application is made; and second, he must be an inhabitant or resident of the country in which the court is held.—Guardianship of Deisen, 2, 463.

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, 3, 309.

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, 3, 309.

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, 3, 103.

Where minors of tender years are brought into this state for the purpose of being exhibited before the public in song and dance performances, and then taken to another state for the same purpose, the superior court, by virtue of its equity powers, has jurisdiction, although the minors are not strictly inhabitants or residents of this state, to guard their welfare by appointing a suitable person as their guardian.—Guardianship of Deisen, 2, 463.

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, 3, 309.

#### 5. Choice and Nomination of Guardian by Child.

In determining what is for the best interests of a child, in adjudging its custody or guardianship, the court may consider the child's preference, if it is of sufficient age to form an intelligent preference.—Estate of Smith, 1, 169.

It has become the rule, in awarding the custody of a minor, to give the child, if of proper age, the right of election in the matter. In California, fourteen years is the age fixed, when the minor has a right of nomination, subject to the court's approval; and the law also permits a minor, "if of sufficient age to form an intelligent preference," to express such preference, which may be considered by the court.—Estate of Smith, 1, 169.

Mere mental precocity is not the test of a child's capacity to express a choice of custodian; acuteness of apprehension, sharpness of intellect on the part of the child, will not alone be sufficient for the judge. The minor must be capable of exercising a discretion in the

premises; its mere impulses will not weigh. In this case, a child thirteen years and eight months old was held "of a sufficient age to form an intelligent preference."—Estate of Smith, 1, 169.

A child of ten years of age who has been educated carefully and is a bright girl may be capable of expressing "an intelligent preference" for a guardian, which the court will consider.—Guardianship of Hansen, 1, 182.

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.—Guardianship of Treadwell, 3, 309.

A minor, aged sixteen years, who is intelligent and of fair education, is legally competent to nominate her own guardian, subject to the court's approval.—Estate of Zimmer, 1, 142.

Although an intelligent minor over fourteen years of age is competent to nominate its own guardian, and its intelligent preference for a guardian must be considered, yet the court must be guided in its determination by what appears to be for the child's best interests, as to its temporal, mental and moral welfare.—Estate of Zimmer, 1, 142.

The nomination and preference of the minor in this case of her aunt for guardian as against the child's mother, who had remarried after divorce from the child's father to one who was the object of the child's aversion—discussed, but not decided.—Estate of Zimmer, 1, 142.

In this case it was held that an application for guardianship by the minor's nominee should be denied, although the applicant and minor were closely related and affectionately disposed toward each other, having lived and loved as if mother and child for years; it appearing that, from the circumstances of the applicant, a grant of guardianship would not be for the best interests of the child as to its temporal welfare.—Estate of Zimmer, 1, 142.

In this case the court, in determining an application for guardianship upon the nomination of the minor over fourteen years of age—involving the minor's competency and the applicant's rights, with the court's duty in the premises—considered and construed sections 1748, 1749, Code of Civil Procedure, and sections 246, 253 (subdivision 6) Civil Code.—Estate of Zimmer, 1, 142.

Where an applicant for guardianship of a minor, claiming as the minor's nominee, is a nonresident of the state, and only awaits the determination of the application to return home, the court will not be justified in confirming the minor's choice, even if legally permitted to do so.—Estate of Zimmer, 1, 142.

## 6. Examination of Minor by Court.

In this case, in accordance with the practice of the court in matters of guardianship, the minor was examined, separate and apart, at length, first by the respective counsel and the judge, with the official reporter; then by the judge alone, counsel being absent; and finally was requested to express her own wishes in writing, she being alone and without any influence whatever. Her written views, with her transcribed testimony, were then filed as part of the record.—Estate of Smith, 1, 169.

One of the objects of the court's private examination of the minor, in guardianship matters, is to discover the child's capacity; its appreciation of the object of the proceedings; the strength of the natural

affections, and its idea of filial duty and parental right; and the child's freedom of expression, that is, absence of influence or teachings adverse to parents. The court looks with distrust upon any choice of the minor contrary to the natural affections in favor of a parent.—Estate of Smith, 1, 169.

#### 7. Considerations in Awarding Custody of Child.

In the appointment of guardians of minors the court is to be guided by the considerations specified in section 246 of the Civil Code.—Guardianship of Taylor, 3, 105.

The affection of a child for the person seeking its custody as guardian is always given consideration by the court.—Guardianship of Danneker, 1, 4.

In appointing a guardian and awarding the custody of a child, the court is bound to do what in its judgment appears to be for the best interest of the child in respect to its temporal, its mental and moral welfare.—Guardianship of Danneker, 1, 4.

The first point to be considered in adjudging the custody or guardianship of a minor is the best interests of the child with respect to its temporal, mental and moral welfare.—Estate of Smith, 1, 169.

In awarding the custody of a minor, or appointing a general guardian, the court is guided by what appears to be for the child's best interests as to its temporal, mental and moral welfare.—Guardianship of Hansen, 1, 182.

In guardianship matters the court acts for and on behalf of the child, and must regard, as the paramount consideration, the interest and welfare of the child. To this every other consideration must yield.—Estate of Smith, 1, 169.

It is the duty of the court to inquire into the social relations and private life of a person seeking to be appointed guardian of a child, so far as they may affect the child's welfare.—Guardianship of Danneker, 1, 4.

The court must regard the dying declaration of the mother as to her wishes in the premises, when not inconsistent with the welfare of the child.—Guardianship of McGarrity, 1, 200.

Where the best interests of a child require that it should remain in the home where it has been fostered from infancy, that consideration will be deemed paramount to the father's natural right, although the father is in every way competent and suitable.—Estate of Smith, 1, 169.

The welfare of a minor means its permanent, not temporary, welfare. The court is governed by that which, looking to the previous condition, and the future continued residence of the child, will contribute to its permanent happiness and welfare.—Estate of Smith, 1, 169.

It is within the court's sound discretion whether the custody of a child will be given to the father. The court should consider not only the father's fitness, but the condition of the child with its present custodians, its relation to them, the present and prospective provision for its support and welfare; the facts as to its present home—its duration, and whether with the father's consent, and upon understanding of permanency; the strength of the ties formed and the child's wishes if it is of an age of discretion.—Estate of Smith, 1, 169.

In proceedings for the appointment of a guardian for an alleged incompetent and for her estate, the opinion of an alienist as to her mental condition over sixteen years before, when he visited her in a social way and conversed with her, is not too remote for consideration, because in such cases the personal history of the subject and her heredity, temperament and diathesis, are taken into account to enable an intelligent appreciation to be had by the investigator, whose judgment must be instructed as to effect or defect by searching for cause, however far back it may seem necessary to trace it. The concern of the court, however, is not with the condition of the alleged incompetent at such previous times, but with her status as to competency of mind at the date of the application for guardianship and at the time of transactions therein referred to as conceived in fraud with a view to impose upon her and obtain her property through her mental weakness.—Estate and Guardianship of Moxey, 2, 369.

### 8. Persons Entitled to Appointment.

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.—Guardianship of Taylor, 3, 105.

After the mother the next of kin of an infant under fourteen years is entitled to be appointed guardian.—Guardianship of Taylor, 3, 105.

Assuming that a father's right to the custody of his child revives upon the death of the mother who had been awarded the custody under a divorce decree, yet it must be shown that the minor's interest will be conserved by recognizing the father's right.—Estate of White, 1, 128.

Where a husband deserts his wife, who is left to care and provide for their infant child, this will be considered as an abandonment of the child, upon the father's application for guardianship after the mother's death.—Estate of White, 1, 128.

The father is *prima facie* entitled to the custody of his child. But this is not an absolute right; it may be controlled by other considerations; and, if the father is unable or unfit to take charge of the child and educate it suitably, the court will not interfere to take the child from those who are fit and able to so maintain and educate it.—Estate of Smith, 1, 169.

As a general rule, courts assent to the proposition that natural right and public policy, as well as the safety of the social structure, require that the father should have the custody of his child. But this is not imperative upon the court; it bends to the interests of the child.—Estate of Smith, 1, 169.

Reluctant as the court always is to interfere with a father's natural right to his child's custody, it will do so where the child's interest demands.—Estate of White, 1, 128.

In this case the court refused guardianship of a minor of divorced parents to its father, applying after the death of the mother, and granted letters to the maternal grandmother of the minor, for the following reasons: The child had been awarded to the mother by a divorce decree against the father; the father never provided for the child, except when compelled by judicial process; he never showed any interest in the child from the time of his desertion of the mother, and by his continued course of conduct manifested a lack of parental instinct; the maternal grandmother had received the mother and child when deserted by the father, and had ever afterward given them

shelter and assistance, and she was the nominee of the mother, by the latter's dying request.—Estate of White, 1, 128.

Guardianship awarded to aunt rather than to father.—Estate of Smith, 1, 169.

Stranger preferred to mother.—Guardianship of Hansen, 1, 182.

In this case the court found that the best interests of the child required that it should remain with the aunt, with the right of the father to visit and enjoy the society of the child at all reasonable times; and, in awarding the minor's custody to the aunt, the court said that the parties ought to reach an amicable understanding whereby the child should spend part of her time with her father and so allow opportunities for mutual affections and interests to grow up between her and her paternal relatives.—Estate of Smith, 1, 169.

### 9. Revocation of Guardian's Letters.

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.—Guardianship of Taylor, 3, 105.

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 appear for the best interests of the child.—Guardianship of Taylor, 3, 105.

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.—Guardianship of Taylor, 3, 105.

### 10. Guardian of Insane Person.

Where an insane person, while sane, has selected a conservator of her property, the court should regard such selection as the expression of the wishes of a competent person, and where the management of such agent has been prudent and judicious, the best interests of her estate will be promoted by continuing it in his hands.—Estate of Tobelmann, 2, 18.

A divorced husband is a stranger to a proceeding for the appointment of a guardian of his former wife, an insane person, except so far as he is concerned in the succession of the children of the marriage to her estate.—Estate of Tobelmann, 2, 18.

In an application by a divorced husband for letters of guardianship of the person and estate of his former wife, an insane person, the decree of divorce must be taken as correct and conclusive.—Estate of Tobelmann, 2, 18.

A proceeding for the appointment of a guardian for an incompetent person and for his estate, as provided by section 1763 of the Code of Civil Procedure, is not an inquisition in lunacy, but an inquiry as to mental incompetency to manage one's property.—Estate and Guardianship of Moxey, 2, 369.

Whatever doubt existed in former times as to the authority of courts to appoint guardians for incompetent persons, as distinguished from persons actually insane, is now removed in this state by the explicit language of the statute, conferring jurisdiction in this class of cases.—Estate and Guardianship of Moxey, 2, 369.

The claim of the petitioner in this case that the respondent is incompetent, that she is incapable of taking care of herself and her property, and that she is likely to be imposed upon by designing and artful persons is held by the court, upon an examination of the evidence, to be fully made out, and the petition for the appointment of a guardian of her person and estate is granted.—Estate and Guardianship of Moxey, 2, 369.

In determining whether a guardian should be appointed for an alleged incompetent woman, it is important to consider the value and character of her property, the persons by whom she is and has been surrounded, and whether they are not seeking to profit by her mental weakness and to obtain advantages which in other circumstances she might resist, and also whether she has in fact been overreached and imposed upon, and is in the exclusive control and keeping of persons who have acquired absolute dominion over her and deceived her to their own gain.—Estate and Guardianship of Moxey, 2, 369.

### 11. Allowance to Adult Son of Incompetent.

It is competent for the superior court sitting in probate to grant an allowance from the estate of an incompetent person for the support of her adult son.—Estate of Lynch, 5, 279.

### HANDWRITING—EXPERT WITNESSES.

One who has made a specialty in penmanship at college, who has taught it for many years and to thousands of pupils, and who gives evidence of his proficiency in the presence of the court, may be regarded as an expert in the simulation and imitation of handwriting. Estate of Dama, 5, 24.

If the attorneys in a case involving the alleged forgery of a will show themselves possessed of science and skill in handwriting, their argument may be regarded as expert testimony, relieved of the constraint of cross-examination and free from the burden of an oath.—Estate of Dama, 5, 24.

Where an expert on handwriting gives an opinion contrary to what he expressed before the trial, the court said: "The validity of scientific deduction is not to be tested by the tergiversation of scientist in his moral conduct outside the record; his individual deceit and duplicity in dealing with clients may be established or admitted, but the scientific value of his evidence is dependent upon the logical connection between premises and conclusion."—Estate of Dama, 5, 24.

Evidence of the genuineness of an instrument, based upon a comparison of handwritings and the opinion of an expert, is of low order and of an unsatisfactory character.—Estate of Dama, 5, 24.

The strongest evidence of the genuineness of handwriting is the testimony of the alleged writer, and next to this is the testimony of a witness who saw the instrument executed and is able to identify it. There are, however, other and different modes of proof.—Estate of Dama, 5, 24.

In determining the question of authorship of a writing, the resemblance of character is not the only test. The use of capitals, abbreviations, punctuation, paragraphing, erasures, interlineations, idiomatic expression, orthography, underlining, composition and the like, are all elements upon which to form the judgment.—Estate of Dama, 5, 24.

Conclusions drawn from dissimilitude between disputed writings and authentic specimens are not always entitled to much considera-

tion; such evidence is weak and deceptive, and of little weight when opposed by evidence of similitude.—Estate of Dama, 5, 24.

Experts in determining the authenticity of a writing never go beyond an inspection; they do not do as other people ordinarily do—that is, determine the handwriting, not only by inspection of the document itself, but with reference to concomitant circumstances.—Estate of Blythe, 4, 302.

### HEIRS.

See Distribution of Estate; Succession.

Interpretation of terms. See Wills, sec. 12.

### HEIRSHIP.

See Distribution of Estate; Succession.

### HOLOGRAPHIC WILLS.

See Olographic Wills.

### HOMESTEAD.

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12. VACATING ORDER SETTING APART, 528.

Descent of homestead. See Succession, sec. 6.

Setting apart estates under \$1,500. See Administrations of Estates, sec. 5.

*For other authorities, see the Index to Notes, p. 454.*

#### 1. In General.

The right to a homestead is wholly statutory; it cannot be asserted as a natural right. The law-making power is competent to repeal the provisions of the statute regulating the right, and thereafter homesteads would be unknown.—Estate of Green, 1, 444.

The purpose of the statute in giving a homestead right to the surviving spouse out of the decedent's separate estate is to provide a home for the survivor which no one can touch, merely depriving the survivor of the power of alienation.—Estate of Tate, 1, 217.

The right to have a probate homestead set aside is not an estate; it becomes such when a decree is made setting aside the homestead and title then vests in the beneficiaries.—Estate of Hayes, 1, 531.

The object of the law creating a homestead is of a humane character, and should be held to apply fairly to all such cases as are within the equity and spirit of the act, but not beyond this.—Estate of Noah, 5, 277.

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.—Estate of Leahy, 3, 364.

Intended use, adaptation for use, and actual residence, are essentials of a statutory homestead.—Estate of Noah, 5, 277.

There is a distinction between a homestead under section 1262, Civil Code, and the homestead selected by the court in the administration of a decedent's estate. The latter is governed wholly by the provisions of section 1465, Code of Civil Procedure. In the case of a homestead selected in the decedent's lifetime, the claimant's title accrues by survivorship; as to a homestead selected in the administration of decedent's estate, the claimant's title accrues only upon the decree of the court or judge setting it apart.—Estate of Green, 1, 444.

## 2. Loss of Homestead.

See post, sec. 4.

The right to a probate homestead may be lost, and there can be no successor to that right.—Estate of Hayes, 1, 551.

The homestead as selected by the husband continued so long as it remained a homestead. It ceased to exist upon the death of the widow, leaving no issue and became subject to her testamentary disposition, and she having died intestate, passed to her heirs, under the laws of succession.—Estate of Collins, 5, 291.

## 3. Setting Apart Homestead in General.

The superior court, sitting in probate, has power to examine into the title to real estate, so far as to enable it to determine whether property sought to be set aside as a homestead is community or separate property.—Estate of Noah, 5, 277.

When the property is set apart as a probate homestead, the property is then taken out of the jurisdiction of the court.—Estate of Hayes, 1, 551.

In a proper case the court must, on the application of a surviving husband, set apart a probate homestead; there is no discretion.—Estate of Sykes, 5, 435.

The probate court has no discretion to deny an application for a homestead by the family of a decedent, presented under section 1465, Code of Civil Procedure.—Estate of Green, 1, 444.

The court must set apart a homestead upon the application of a widow, if none has been selected in the lifetime of the deceased spouse. There is no discretion in the matter.—Estate of Tate, 1, 217.

The court must, upon proper application, set apart to the widow a homestead, if none has been selected during the lifetime of the decedent. It has no discretion in the premises.—Estate of Maxwell, 1, 126.

## 4. Setting Apart from Community or Separate.

In this case the court ordered that the property, being decedent's separate estate, be set apart only during the applicant's widowhood.—Estate of Green, 1, 444.

If a homestead is selected from the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order.—Estate of Maxwell, 1, 126.

It is only when a homestead is set apart from the separate property of the decedent that it is required to be for a limited period.—Estate of Hayes, 1, 551.

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.—Estate of Leahy, 3, 364.

The requirement of the Code of Civil Procedure, section 1465, that a homestead be set apart for the use of the surviving husband or wife and the minor children out of the common property, is mandatory, and if there is suitable property in the estate for the purpose it must be set aside.—Estate of Hessler, 2, 354.

If a homestead is selected from the common property, it cannot be set apart for a limited period only; it is of no consequence that the widow is old and will not require the homestead for many years, or that she will receive three-fourths of the estate upon distribution. It is plainly the duty of the court, under the statute, to award a homestead to her, and it is then taken out of the estate and becomes her property, with absolute power of disposition.—Estate of Hessler, 2, 354.

On the application of the widow in this case for a probate homestead, it was held that the property of the decedent was his separate estate, and therefore that a homestead could be awarded her for life only.—Estate of Foster, 4, 33.

### 5. Right of Widow to Homestead.

It is because of her status that a widow becomes the object of the law's beneficence.—Estate of Goodale, 5, 288.

Where a husband dies after his wife has filed declaration of homestead on community property, and subsequently she marries again and then dies without petitioning to have the homestead set apart to her in probate, a minor son born of the first marriage is entitled to have the homestead set apart to him.—Estate of Schade, 4, 440.

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.—Estate of Wells, 3, 229.

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.—Estate of Wells, 3, 229.

Where there are no children, the widow constitutes the family of the decedent.—Estate of Hessler, 2, 354.

A widow without minor children is entitled to have a homestead selected and set apart by the court out of decedent's separate estate, there being no community property.—Estate of Tate, 1, 217.

It does not impair or diminish the right of the widow to have a homestead set apart that there are no minor children.—Estate of Maxwell, 1, 126.

The executor's answer to the widow's application for a homestead alleged that two adult daughters (one being married), referred to in the widow's petition, were always considered and treated as part of the decedent's household and family. The court ignored this claim for the daughters, and set apart the homestead to the widow alone.—Estate of Green, 1, 141.

A widow failing to apply for a probate homestead before remarrying loses her right to a homestead out of her first husband's estate upon marrying a second time.—Estate of Goodale, 5, 28.

An agreement amounting to a waiver, upon valuable consideration, of every right a wife could have in her deceased's husband's estate, is conclusive against all her pretensions, and estops her from claiming a probate homestead as well as any other property right.—Estate of Noah, 5, 277.

#### 6. Right of Surviving Husband.

Where a wife declares a homestead upon the community property, and after her death the surviving husband sells such property, he has no right to have a probate homestead set apart to him from her separate estate.—Estate of Ackerman, 2, 269.

The right of the surviving spouse to a homestead in separate estate of the decedent is limited to an estate for years, for life, or until the happening of some event, as the marriage of the survivor, as may be decreed by the court. But the exercise of the court's power is limited by a sound discretion acting upon the circumstances of the particular case; if the survivor is young and likely to remarry, a limitation for life might be indiscreet, otherwise where she is of an advanced age.—Estate of Tate, 1, 217.

#### 7. Right of Minor Child to Homestead.

When application is made by a minor child of a decedent to have a homestead set apart from community property, the surviving widow having died, and the other children having attained majority, without applying for a homestead, the court must grant the application and set aside the homestead absolutely, not limiting it to the period of minority or otherwise.—Estate of Hayes, 1, 551.

#### 8. Date at Which Right Determined.

The right of a widow to have a homestead set apart to her from the estate of her former husband must be determined from the facts as they exist at the date of the action of the court.—Estate of Green, 1, 444.

The right of a probate homestead is tested or considered not as of the date of the death of the decedent but as of the time of the application.—Estate of Hayes, 1, 551.

#### 9. Property Available and Its Value.

A probate homestead cannot be set apart out of property that could not have been dedicated as a homestead by the parties while living.—Estate of Noah, 5, 277.

In determining an application for a homestead, all 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.—Estate of Leahy, 3, 364.

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.—Estate of Grisel, 3, 299.

Where the property out of which it was asked to select a homestead was a building entirely devoted to business purposes, not susceptible of partition, of the appraised value of \$25,000 and the separate property of the deceased husband, it was held that the property not being capable of division would have to be sold, and \$5,000 of the proceeds set apart for the use of the widow; that the property, being separate estate, could be set apart only for a limited period, the title vesting in the heirs, subject to the order; that it does not appear what security the heirs could have for the return of the amount upon the expiration of the period limited, and that for these reasons the application should be denied.—Estate of Noah, 5, 277.

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.—Estate of Wells, 3, 229.

In this case the court held that the value of the premises ordered set apart as a homestead should be taken as of the date of the application; any subsequent increase in value being immaterial.—Estate of Green, 1, 444.

There is no limitation as to the value of property set aside as a probate homestead.—Estate of Hessler, 2, 354.

#### 10. Domicile of Parties.

Where, upon the admission of a will to probate, the legal residence and domicile of a testator is found as a fact, and certified and judicially determined, the question is placed outside the pale of controversy thereafter. So held, upon an executor's opposition to an application for a homestead by the testator's widow.—Estate of Green, 1, 444.

In this case the widow applied to have a homestead set apart to her, and the executor answered, setting up that decedent's residence and home was in England, where he died and left a homestead, which he devised to his wife and daughters. The court found on the probate of the will here that the decedent had a domicile and legal residence in California, and was only temporarily in England for his health; and held that the applicant, being the decedent's widow at the date of the application, and a resident of the state, and there being property suitable for a homestead, all the conditions required by the statute existed to entitle her to a homestead.—Estate of Green, 1, 444.

**11. Testamentary Power Over Homestead.**

Even if the testator devises his entire estate, which was separate property, his widow will still be entitled to a homestead.—*Estate of Maxwell*, 1, 126.

The power or duty of the court to set apart a homestead for the family of a decedent is not limited by the fact that the decedent disposed of his property by will.—*Estate of Green*, 1, 444.

The power of testamentary disposition is given and defined by statute, and is subordinate to the authority vested in the probate court to appropriate property for the support of testator's family, including a homestead, and for the payment of debts.—*Estate of Green*, 1, 444.

**12. Vacating Order Setting Apart.**

Where a homestead is procured to be set apart by fraud, a court of equity has jurisdiction to grant relief against the order.—*Hanley v. Hanley*, 4, 473.

An order in probate setting apart a homestead cannot be collaterally attacked unless the court acted without jurisdiction.—*Hanley v. Hanley*, 4, 473.

**HUSBAND AND WIFE.**

Property rights. See Community and Separate Property.

Competency of witnesses. See Witnesses, sec. 2.

Husband or wife as heir of the other. See Succession, sec. 5; Marriage.

Deeds for the separation of husband and wife are valid and effectual, both at law and in equity, providing their object be actual and immediate, and not a contingent or future separation.—*Estate of Noah*, 5, 277.

Articles of separation having been carried into effect in good faith by the husband, and they having been freely entered into, and there being nothing objectionable in them, the wife has no right, upon the husband's death, to claim in character of his widow, it being against equity and good conscience to set up such a claim.—*Estate of Noah*, 5, 277.

A husband should not allow the duty he owes to his wife to be overcome by his love for his parents. Where one's marital obligation comes into conflict with his filial devotion, the latter should give way to the former.—*Estate of White*, 1, 128.

**IDENTITY OF DECEDENT.**

See Administration of Estates in General, sec. 2.

**ILLEGITIMATES.**

1. RIGHTS OF MOTHER, 529.

2. CONSTRUCTION OF STATUTES PROVING FOR LEGITIMATION, 529.

3. LEGITIMATION IN GENERAL, 529.

4. ACKNOWLEDGMENT BY PARENT, 530.

5. RECEPTION INTO FAMILY, 531.

6. PROOF OF PATERNITY, 531.

Inheritance by or through illegitimates. See Succession, sec. 7.

Issue of void marriage. See Marriage, sec. 4.

### 1. Rights of Mother.

While under the code it is not necessary that the consent of the mother, that is, her affirmative agreement, be given before the legitimation of a child can be effected by the father, yet if the mother successfully prevents the father from exercising paternal authority over the child, and he does not perform the acts required of him under the law, no legitimation takes place.—Estate of De Laveaga, 4, 423.

The mother of an illegitimate child is entitled to its custody under section 200 of the Civil Code, but after its adoption or legitimation by the father under section 230, he is entitled, under section 197, to all the rights he has over a legitimate child. But before he can assert his rights under section 197, and deprive her of hers under section 200, the child must be made legitimate under section 230.—Estate of De Laveaga, 4, 423.

### 2. Construction of Statutes Proving for Legitimation.

The statutory provisions for the legitimation of illegitimate children are to be construed liberally, but liberal construction does not mean the frittering away of the written law.—Estate of De Laveaga, 4, 423.

Section 230 of the Civil Code relates only to minors, who alone are subjects of adoption, and section 1387 provides for giving to illegitimate adults the capacity of inheritance. The latter section is not a limitation on the former one.—Estate of Jessup, 2, 476.

The institution of heirs is the primary object of section 230 of the Civil Code. The succession of property rights is incidental; it is a status that is involved, the relation of the child to society.—Estate of Jessup, 2, 476.

Section 1387 of the Civil Code has no application to a child legitimated by his father under section 230 of the same code without a marriage with the mother.—Estate of De Laveaga, 4, 386.

A child legitimized by his father under section 230 of the Civil Code is as much a legitimate child as one born in lawful wedlock, and it is to be deemed legitimate for all purposes from the time of his birth.—Estate of De Laveaga, 4, 386.

Section 230 of the Civil Code, providing for the adoption of an illegitimate child by its father, is to be liberally construed.—Estate of Blythe, 4, 68.

In examining the claim of the plaintiff to heirship by virtue of legitimation under section 230 of the Civil Code, the court observed: Plaintiff claims, primarily, under section 230 of the Civil Code, which requires the institution of heir or adoption to be made by the father. It must be the father. The institution of heir is the primary object of the statute. The succession of property rights is incidental; it is a statute that is involved; it is the relation of the child to society.—Estate of Blythe, 4, 68.

### 3. Legitimation in General.

It is not essential to the legitimation of a child under section 230 of the Civil Code that his parents should marry.—Estate of De Laveaga, 4, 386.

For a father to legitimate or adopt his child under section 230 of the Civil Code he must perform all the acts required by the statute; his intentions and plans, if not carried out, are not sufficient.—Estate of De Laveaga, 4, 423.

Under section 230 of the Civil Code, there are four essentials to the adoption of an illegitimate child by its father: (1) He shall be the natural father; (2) he shall publicly have acknowledged himself to be the father; (3) he shall have received the child into his family; (4) he shall have otherwise treated it as his legitimate child. The evidence in this case, which, among other elements of proof, embrace oral declarations and letters of the alleged father, is examined by the court and held sufficient to meet the requirements of the statute although the father did not actually take the child into such family as he had.—Estate of Blythe, 4, 68.

When the status of legitimacy is once attained by an illegitimate child, it cannot thereafter be affected by acts of the father in failing to name her in his will, or otherwise.—Estate of De Laveaga, 4, 423.

A father domiciled in California may, under section 230 of the Civil Code, adopt his illegitimate child who, with her mother, is domiciled in England. The law of California governs and bestows on the child the capacity of heir.—Estate of Blythe, 4, 68.

#### 4. Acknowledgment by Parent.

The declarations of a man since deceased are admissible to prove that he was the father of an illegitimate child who claims to have been legitimated by public acknowledgment.—Estate of Jessup, 2, 476.

In order to constitute a public acknowledgment of an illegitimate child by his father, the father must treat, receive or acknowledge the child as if he were his own legitimate offspring; and in order that proof thereof may be made by disinterested parties, and fraud and imposition avoided, all of these must be done openly and publicly, not secretly.—Estate of Jessup, 2, 476.

The evidence in this case is held to establish that the petitioner was the illegitimate child of the decedent (an unmarried man), and that the decedent publicly acknowledged his paternity of the petitioner.—Estate of Jessup, 2, 476.

Admissions of paternity are not equivalent in legal effect to the acknowledgment of the child as the parent's own; mere admissions of paternity by the father are evidence of paternity, but by themselves are not evidence of acknowledgment. By acknowledgment is meant that the father must acknowledge the child as if it were his own legitimate offspring; and his acts and declarations to establish this must be open and not secret; that is, they must have the ordinary and usual publicity attendant upon a legitimate relation and status.—Estate of De Laveaga, 4, 423.

A written acknowledgment by a father of his illegitimate child, under section 1387 of the Civil Code, is not ambulatory in its nature like a will, but, once executed, is irrevocable; it creates a status, and cannot thereafter be changed. The moment the writing is executed in conformity with the statute, the illegitimate child is an heir, and no subsequent act of either party can alter that legal relation.—Estate of Blythe, 4, 68.

The court held on the whole case that the evidence established a statutory adoption and acknowledgment, but that the case of plaintiff, so far as it depended on a so-called "adoption paper" was not made out. The proof was ample otherwise.—*Estate of Blythe*, 4, 68.

Under the former rule of strict construction it was necessary, in order to comply with the law declared in section 1387 of the Civil Code, which provides that an illegitimate child is the heir of a person who in writing acknowledges himself to be the father of such child, there must be a paper formally made and executed. There must be a witness, not a mere spectator; but a witness in such case must be one who sees the execution of the paper, and attests it as a witness to confirm its authenticity, in anticipation of being called to testify to the act; there is an absolute necessity that there should be a witness called for that purpose by the subscriber, and there must be an express intention on the part of the latter to make the acknowledgment of the illegitimate child. These strict rules, however, no longer prevail: See *Blythe v. Ayres*, 96 Cal. 532, 102 Cal. 254.—*Estate of Blythe*, 4, 68.

#### 5. Reception into Family.

The most satisfactory way of establishing that a father has publicly acknowledged his illegitimate child, as required by section 230 of the Civil Code in providing for the legitimation of children, is by proof that the child has been received into the family and given the family name, but this is not necessary where there is sufficient proof of a reason for not having done either.—*Estate of Blythe*, 4, 68.

The most satisfactory way of establishing the paternity and public acknowledgment of an illegitimate child is by proof that he has been received into the family of the father and given the family name; but this is not necessary where there is sufficient proof of a reason for not having done either.—*Estate of Jessup*, 2, 76.

The evidence in this case fails to show an acknowledgment by the father, or a reception into his family, of his alleged illegitimate child.—*Estate of De Laveaga*, 4, 423.

#### 6. Proof of Paternity.

Plenary proof of paternity is required under the code provisions for the legitimation of illegitimate children.—*Estate of De Laveaga*, 4, 423.

Under section 230 of the Civil Code, which provides for the adoption of an illegitimate child by its father, the proof of paternity must be strict and plenary.—*Estate of Blythe*, 4, 68.

After an extended examination of the evidence concerning the adoption of an illegitimate child by her father, the court expressed the opinion that three of the elements of section 230 of the Civil Code were established: (1) There was an illegitimate child; (2) the plaintiff was and is that child; (3) the decedent here was the father of that child.—*Estate of Blythe*, 4, 68.

### IMPROVIDENCE.

As disqualifying administrator. See *Executors and Administrators*, sec. 6.

As disqualifying special administrator. See *Special Administrator*, sec. 3.

**INHERITANCE.**

See Succession.

**INHERITANCE TAXES.**

1. TRANSFERS SUBJECT TO TAX, 532.
2. FORMER ADJUDICATION, 532.
3. LIMITATION OF ACTIONS, 532.

**1. Transfers Subject to Tax.**

The German Benevolent Society of San Francisco is not subject to a collateral inheritance tax.—Estate of Fretz, 5, 432.

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.—Estate of Weise, 3, 374.

Bequests for masses are for charitable purposes, and therefore exempt from the operation of the collateral inheritance tax of 1899.—Estate of Herzo, 2, 165.

A bequest to beautify the altar of a church is for a charitable purpose, and therefore not subject to the collateral inheritance tax of 1899.—Estate of Herzo, 2, 165.

**2. Former Adjudication.**

The establishment by a court of the collateral inheritance tax payable by an estate is an adjudication upon that subject which binds the state as well as the estate, as to all questions passed upon.—Estate of Gordon, 2, 138.

**3. Limitation of Actions.**

The defense of the statute of limitations is applicable to a proceeding against executors for the collection of collateral inheritance tax. Such a proceeding is barred under the provisions of section 338, Code of Civil Procedure, by the lapse of three years after the accrual of the liability; and the liability is complete at or before the close of the administration.—Estate of Gordon, 2, 138.

If the executor occupies the position of a trustee for the state as to the collateral inheritance tax, this relation does not continue in the manner to prevent the running of the statute of limitations after proceedings have been had to fix the tax, and the amount thereof fixed and ordered paid, and the residue of the estate distributed and the administration closed.—Estate of Gordon, 2, 138.

**INJUNCTION.**

Against confirmation of executor's sale. See Sale of Land of Decedent, sec. 3.

**INJUSTICE OF WILL.**

As affecting its validity. See Wills, sec. 5.

As showing want of testamentary capacity. See Testamentary Capacity, sec. 3.

**INSANITY AND INSANE DELUSIONS.**

1. INSANITY AND INCOMPETENCY DISTINGUISHED, 533.
2. LUCID INTERVAL, 533.
3. WHAT CONSTITUTES INSANITY, 533.
4. INSANE DELUSIONS AND MONOMANIA, 533.
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6. COMMITTING TO ASYLUM, 536.
7. ALLOWANCE TO ADULT SON OF INCOMPETENT, 537.

Guardianship of Incompetent. See Guardianship, sec. 10.

Capacity to make will. See Testamentary Capacity.

Pleading unsoundness of mind. See Contest of Will, sec. 5.

**1. Insanity and Incompetency Distinguished.**

The words "insane" and "incompetent" defined and distinguished.—Estate of Hill, 1, 380.

"Insane" and "incompetent" are not necessarily convertible terms; a person may be incompetent by reason of insanity, or from some other cause incapable of caring for his property.—Estate and Guardianship of Moxey, 2, 369.

**2. Lucid Interval.**

A lucid interval is a period of mental clearness enjoyed by an insane person; it is an interval during which the patient is restored so far as to be able beyond doubt to understand and to do the act with such reason, memory and judgment as to make it legal.—Estate of Kershow, 2, 213.

**3. What Constitutes Insanity.**

False logic or faulty ratiocination is far from the manifestation of insanity, so long as the process is formally correct, not incoherent or inconsequential.—Estate of Scott, 1, 271.

Unfounded and unreasonable suspicions are not insanity.—Estate of Scott, 1, 271.

A statement that a person may have had reasoning power and yet have been unsound in mind imports a contradiction in terms, as does the statement that a person had strong will power and yet was unsound in mind.—Estate of Kershow, 2, 213.

**4. Insane Delusions and Monomania.**

See Testamentary Capacity, sec. 8.

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.)—Estate of McGinn, 3, 26.

Monomania consists in a mental or moral perversion in regard to some particular subject or class of subjects, while in regard to others the person seems to have no such morbid affection.—Estate of Fallon, 5, 426.

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.)—Estate of McGinn, 3, 26.

The main character of insanity, in a legal view, is the existence of a delusion.—Estate of Ingram, 1, 222; Estate of McGinn, 3, 26.

It is not the strength of a mind which determines its freedom from delusion; it is its soundness.—Estate of Ingram, 1, 222.

A person is the victim of delusion when he pertinaciously believes something to exist which does not. Belief of things which are entirely without foundation in fact is insane delusion; that is, where things exist only in the imagination of a person, and the nonexistence of which neither argument nor proof can establish in his mind.—Estate of Ingram, 1, 222.

If a person is under a delusion, though there is but partial insanity, yet if it is in relation to the act in question, it will defeat a will which is the direct offspring of that partial insanity.—Estate of Ingram, 1, 222.

Business capacity may co-exist with monomania or insane delusions.—Estate of Scott, 1, 271.

The mistaken belief of a testatrix, when suffering with chronic stomach trouble, that her food has been tampered with, does not, as a matter of law, amount to an insane delusion.—Estate of Scott, 1, 271.

The sanity of the testatrix in this case being questioned because she suspects that her husband was unfaithful to her, and that he was attempting to poison her and to send her to an insane asylum, the court observed: There is a very large class of people whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who upon the most trivial, even whimsical, grounds wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons confessedly sane are to a greater or less degree afflicted with it, to justify us in saying that because the deceased was so afflicted she was insane, or the victim of an insane delusion.—Estate of Scott, 1, 271.

The line between unfounded and unreasonable suspicions of a sane mind and insane delusions is sometimes quite indistinct and difficult to define. However, the legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way.—Estate of Scott, 1, 271.

Suspicion is the imagination of the existence of something, especially something wrong, without proof, or with but slight proof; it is an impression in the mind which has not resulted in a conviction. It is synonymous with doubt, distrust, or mistrust—the mind is in an unsettled condition. Suspicion existing, slight evidence might produce a rational conviction or conclusion; this without evidence, however slight, would be a delusion. Is there evidence, however slight? This is the test. The suspicion may be illogical or preposterous, but it is not, therefore, evidence of insanity.—Estate of Scott, 1, 271.

If a wife has evidence, though slight, on which to base a suspicion of her husband's unfaithfulness, and has no settled conviction on the subject, her suspicion does not amount to an insane delusion.—Estate of Scott, 1, 271.

The contention in this case that the testatrix was afflicted with an insane delusion in that she believed her husband conspired to confine

her in an insane asylum, was found by the court to be unsupported by the evidence, especially in view of the fact that the husband had twitted her of being crazy and threatened to break her will.—Estate of Scott, 1, 271.

Where the vulgarity in behavior and speech of a testatrix is relied upon to establish the presence of insane delusions, her whole conduct, at home and abroad, should be considered, and not merely her conduct within her own house, the alleged acts of immodesty in this case being confined to the home premises of the testatrix while her behavior abroad was not subject to adverse criticism.—Estate of Scott, 1, 271.

Eccentric habits of speech, if not suddenly acquired, are not evidence of insanity.—Estate of Scott, 1, 271.

Where there was at least one instance in the conduct of a husband which might arouse in the mind of the wife a suspicion as to his constancy, the fact that her suspicions may have been unjust and her inference too general, is merely an error of logic, and not an evidence of insanity or of an insane delusion. She has a right to infer, however erroneously, or from inadequate premises, to a universal conclusion.—Estate of Scott, 1, 271.

A person may act on weak testimony, yet be under no delusion.—Estate of Solomon, 1, 85.

A belief based on evidence, however slight, is not delusion.—Estate of Hill, 1, 370; Estate of McGinn, 3, 26.

Belief based on evidence, however slight, is not delusion; delusion rests upon no evidence whatever; it is based on mere surmise. The burden of proof is upon the party alleging insanity or insane delusion.—Estate of Ingram, 1, 222.

Delusion rests upon no evidence, but is based on mere surmise.—(Instruction XLIII.)—Estate of McGinn, 3, 26.

If any fact exists as a foundation for a testator's belief that a child borne by his wife is not his, he cannot be said to be the victim of an insane delusion, however mistaken he may be in his conclusion.—Estate of Solomon, 1, 85.

If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, as far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. So, if a testator labored under such a delusion in respect to his wife and family connections, who would naturally have been the objects of his testamentary bounty, and the court can see that the dispositive provisions of his alleged will were or might have been caused or affected by the delusion, the instrument is not his will.—Estate of Tiffany, 1, 478.

There may be partial insanity, or monomania insanity, as to one or more persons or subjects, coexistent with soundness otherwise. (Instruction 8.)—Estate of McGinn, 3, 26.

In cases of partial insanity or monomania, the testamentary capacity is affected as to the subject matter of such unsoundness. (Instruction 8.)—Estate of McGinn, 3, 26.

An insane delusion is the pertinacious belief in the existence of something nonexistent, and acting upon the belief. (Instructions 15, XLI.)—Estate of McGinn, 3, 26.

Belief in things without foundation in fact, which no sane person would believe, is insane delusion. (Instructions 15, XLI, 38, 42.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 23, 26.

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.)—Estate of McGinn, 3, 26.

## 5. Evidence—Presumptions and Burden of Proof.

See Testamentary Capacity.

It is presumed that a person is sane, and proof of insanity at one time carries no presumption of its past existence.—Estate of Dolbeer, 3, 249.

The legal presumption is in favor of the sanity of a testator, and the burden of proof is on the contestant of his will to demonstrate the contrary and if the contestant prevails, in a case of doubt, it must be by a preponderance of proof, and the number, character and intelligence of witnesses, and their opportunity for observation, should be taken into account.—Estate of Scott, 1, 271.

The value of the testimony of business men and acquaintances, acquired in commercial dealings with a person alleged to be the victim of insane delusions, is favorably regarded by the courts, on the issue of insanity.—Estate of Scott, 1, 271.

Sudden and groundless suspicions of the affections and fidelity of tried and trusted relatives and friends are common symptoms of unsoundness of mind, and so are hastily conceived affections for and confidences in mere strangers and newly made acquaintances.—Estate and Guardianship of Moxey, 2, 369.

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.)—Estate of McGinn, 3, 26.

## 6. Committing to Asylum.

As evidence of insanity. See ante, sec. 5.

In order to commit a person to an asylum for the insane, the court must be satisfied, upon examination, pursuant to section 258, Civil Code, that such person is of unsound mind, and unfit to be at large. The provisions of the codes as to such examination summarized.—Matter of Ingram, 1, 137.

There are no "commissioners of insanity." Physicians are merely summoned to hear the testimony, and to make a personal examination of the alleged insane person; and, if they believe him to be dangerously insane, they make a certificate of certain facts, whereupon it is reserved to the judge, upon whom rests the responsibility, to adjudicate upon the charge.—Matter of Ingram, 1, 137.

Although a person is subject to certain delusions, where the court is not satisfied that he is "so far disordered in mind as to endanger health, person or property," or "unfit to be at large," it is bound to give him the benefit of such reasonable doubt as it entertains upon the whole charge.—Matter of Ingram, 1, 137.

**7. Allowance to Adult Son of Incompetent.**

It is incompetent for the superior court sitting in probate to grant an allowance from the estate of an incompetent person for the support of her adult son.—Estate of Lynch, 5, 279.

**INSURANCE.**

Preparation of proofs of loss. See Executors and Administrators, sec. 9.

**INTEGRITY.**

Want of as disqualifying administrator. See Executors and Administrators, sec. 6.

Want of as disqualifying special administrator. See Special Administrator, sec. 3.

**INTEREST.**

Charging executor with interest. See Executors and Administrators, sec. 9.

On debt against decedent. See Claims Against Estate, sec. 6.

**INTEREST ON LEGACIES.**

At the common law, and under sections 1368 and 1369 of the Civil Code, a pecuniary legacy bears interest at the legal rate from one year after the demise of the testator.—Estate of Redfield, 5, 435.

A pecuniary legacy bears interest from one year after the death of the testator, where the settlement of the estate is delayed, without fault of the administrator, by a contest of the will.—Estate of Redfield, 5, 435.

**INTERLINEATIONS IN WILLS.**

See Wills, sec. 7.

**INTERPRETATION.**

Of wills. See Wills.

**INTESTACY.**

Construction of will to avoid. See Wills, sec. 4.

**INTOXICATION.**

As affecting testamentary capacity. See Testamentary Capacity, sec. 10.

As disqualifying administrator. See Executors and Administrators, sec. 6.

**INVENTORY AND APPRAISEMENT.**

1. IN GENERAL, 537.

2. DUTY TO FILE AND TIME THEREFOR, 538.

3. PROPERTY TO BE INCLUDED, 538.

4. DISPUTED TITLE AND ASSETS ADVERSELY CLAIMED, 538.

Appointment and duties of appraisers. See Appraisers of Estate.

Removal of executor for failure to file. See Executors and Administrators, sec. 13.

**1. In General.**

The appraisers, as well as the executor or administrator, must "give a full description" in the inventory and appraisement of every item of property belonging to and character of claim and interest in the

right of decedent, and whether it be community or separate property, and "make diligent inquiry" in that regard.—Estate of McLaughlin, 2, 107.

In this case an order was made that a copy of the inventory of the estate be filed *nunc pro tunc* in lieu of the original inventory and appraisement, but prior to the entry of the order the original inventory was restored to the files.—Estate of Douglass, 4, 345.

The failure of an executor to affix his affidavit to an inventory of the estate does not render the inventory of no effect.—Estate of Douglass, 4, 345.

## 2. Duty to File and Time Therefor.

An administrator must make a true inventory and appraisement of all estate of the decedent coming to his possession or knowledge; and he is accountable with respect to this duty.—Estate of Partridge, 1, 208.

The statute prescribing the time within which the inventory and appraisement of an estate of a decedent must be filed is directory merely.—Estate of Graber, 2, 345.

An executor should file an inventory at the earliest moment possible, and if other property subsequently comes to his knowledge, he should file supplemental inventories from time to time; it is, however, the application of the law to a particular state of facts that makes a case, and each case must find its justification or exculpation in these peculiar facts.—Estate of Graber, 2, 345.

## 3. Property to be Included.

An executor must return in the inventory everything of value belonging to the estate of his testator, whether it is property owned by or a debt due the estate.—Estate of Levinson, 2, 325.

Assets of a firm include the goodwill of the business and trademarks owned by the firm.—Estate of Levinson, 2, 325.

The goodwill of a business is property, so is a trademark; and where the decedent was a member of a partnership, the goodwill of the business and a trademark owned by it should be embraced in the schedule of assets in the inventory, unless there is a clear provision in the articles of partnership excluding the estate of a deceased partner from a share in the value thereof.—Estate of Levinson, 2, 325.

Even if the question is in doubt and equally balanced, whether an estate is or is not to be deprived of a share of the goodwill of a business trademark, it must be included in the inventory.—Estate of Levinson, 2, 325.

Code of Civil Procedure, section 1443, with respect to the inventory of decedents' estates, does not enlarge the well-settled liability of administrators. That section relates only to estates actually or in legal contemplation within this state.—Estate of Blythe, 2, 152.

## 4. Disputed Title and Assets Adversely Claimed.

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.—Estate of Donahue, 3, 301.

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 memo-

random 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, 208.

An administrator cannot omit to inventory property said to belong to his intestate which is the subject of an adverse claim, on the pretense that he wants to stand neutral between the estate and the adverse claimant, leaving the merits of the controversy to the court's determination. The administrator cannot assume an attitude of neutrality; the statute points out his duty; and for the court to pass upon the merits of the adverse claim would be to assume a jurisdiction which, in probate, it cannot exercise.—Estate of Partridge, 1, 208.

The probate court ought not, it seems, to reject an inventory of a decedent's estate, or order it modified, because it contains property, the title to which is disputed.—Estate of Partridge, 1, 208.

Where part of an inventoried estate of a decedent is in dispute, the adjudication of the title belongs to common-law tribunals; a probate court cannot conclude the question.—Estate of Partridge, 1, 208.

### JUDGMENTS AND ORDERS.

1. OF COURTS OF OTHER STATES, 539.
2. OF ANOTHER DEPARTMENT OF SUPERIOR COURT, 539.
3. CONCLUSIVENESS AND RES JUDICATA, 539.

Conclusiveness and effect of decree of distribution. See Distribution of Estate, sec. 5.

Conclusiveness and vacation of probate of will. See Probate of Will, sec. 9.

Effect of decree admitting will to probate. See Contest of Will, sec. 10.

Order for family allowance and its conclusiveness. See Family Allowance, sec. 6.

Preference to judgment claim. See Claims Against Estate, sec. 2.

Vacating order setting apart homestead. See Homestead, sec. 10.

#### 1. Of Courts of Other States.

The constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of every other state is not designed to extend the jurisdiction of local courts or to extend beyond its limits the operation of a local decree, but to provide a mode of authenticating evidence of the record of a judicial proceeding had in one state, so that a proper general result of it may conveniently be attained in every other state against persons and things justly within the range of the proceeding.—Estate of Ker-show, 2, 213.

#### 2. Of Another Department of 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.—Estate of Griffiths, 3, 545.

#### 3. Conclusiveness and Res Judicata.

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.—Guardianship of Treadwell, 3, 309.

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.—Estate of Welch, 3, 303.

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.—Guardianship of Treadwell, 3, 309.

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.—Estate of Welch, 3, 303.

All final orders or judgments of the probate branch of the superior court in one county are conclusive and binding upon all persons and upon all other courts and tribunals, including the superior court of another county.—*In re Burton*, 5, 235.

### JUDICIAL SALE.

One who causes property to be sold under a void judicial proceeding, and retains the proceeds, cannot question its validity to the prejudice of others who have in good faith relied and acted upon it as valid.—Estate of Reddy, 5, 405.

### JURISDICTION.

1. CONFLICT OF JURISDICTION, 540.
2. PROBATE JURISDICTION IN GENERAL, 540.
3. JURISDICTION OF PROBATE COURT TO TRY TITLE, 541.
4. EQUITY POWERS OF PROBATE COURT, 541.

#### 1. 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.—Guardianship of Treadwell, 3, 309.

When any court has acquired jurisdiction of the parties to and the subject matter of an action, whatever may be the nature of the proceedings or the subject matter thereof, the jurisdiction thus acquired is exclusive, and no other court of co-ordinate jurisdiction can, in any form, review, reverse, nullify, restrain, or in any way control any of the orders, judgments, proceedings or process of the first court.—*In re Burton*, 5, 235.

#### 2. Probate Jurisdiction in General.

The probate jurisdiction of the superior court is essentially under the control of the legislature, which may enlarge or restrict it.—Estate of Sutro, 2, 120.

Prior to the amendment of 1895 to section 738 of the Code of Civil Procedure, jurisdiction to determine the rights of heirs, devisees and legatees, and the validity of testamentary trusts, appears to have been vested exclusively in the superior court sitting in probate.—Estate of Sutro, 2, 120.

The superior court sitting in probate has full jurisdiction to hear and determine every matter necessary or proper in the proceeding.—*In re Burton*, 5, 235.

The superior court, sitting in probate, deals only with administrations, and cannot assume jurisdiction, except the object upon which it is to operate is before it.—*Estate of Blythe*, 2, 152.

The superior court, sitting in probate, cannot exercise other than purely probate jurisdiction; its jurisdiction, as succeeding the powers of the former probate court, is not enlarged.—*Estate of McLaughlin*, 1, 257.

The superior court, sitting in probate, has no greater jurisdiction than the probate court which it succeeds.—*Estate of Maxwell*, 1, 135.

The superior court, while engaged in the exercise of probate jurisdiction, cannot entertain a cause of action to obtain relief upon the ground of fraud, such as a petition to disregard and declare void a devise alleged to have been procured through fraud, and to make distribution to the heirs.—*Estate of Maxwell*, 1, 135.

### 3. Jurisdiction of Probate Court to Try Title.

The superior court, sitting in probate, has no jurisdiction to determine questions of title to real estate.—*Estate of Callaghan*, 5, 430.

The superior court, sitting in probate, has no authority to adjudicate the question of title to personal property in dispute between a third person and the estate of a decedent.—*Estate of Curtis*, 1, 533.

### 4. Equity Powers of Probate Court.

A superior court sitting in probate may, in a proper case, exercise its equity powers.—*Estate of Wolters*, 5, 428.

The superior court, sitting in probate, has no chancery side.—*Estate of Blythe*, 2, 152.

The superior court, sitting in probate, has authority to apply such equitable principles as will promote justice in all matters actually pending before it.—*Estate of Johnson*, 4, 499.

## JURY.

### 1. JUDICIAL FUNCTIONS, 541.

### 2. CREDIBILITY OF WITNESSES AND WEIGHT OF TESTIMONY, 541.

### 3. CONSIDERATION OF REJECTED EVIDENCE, 542.

Province of court and jury in will contest. See *Contest of Will*, sec. 9.

### 1. Judicial Functions.

A jury exercises a judicial function, and its verdict must be based purely upon the evidence submitted to it under the instructions of the court.—*Estate of Fallon*, 5, 426.

### 2. Credibility of Witnesses and Weight of Testimony.

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.—*Estate of Dolbeer*, 3, 232.

Jurors are the exclusive judges of the credibility of each and every witness. (*Instruction 3.*)—*Estate of McGinn*, 3, 26.

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.)—Estate of McGinn, 3, 26.

Any statement by the court affecting the weight of testimony or the credibility of a witness, or any matter within the province of the jury, should be disregarded by the jurors and banished from their minds.—Estate of Fallon, 5, 426.

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 should be error. (Court's Charge C.)—Estate of McGinn, 3, 26.

### 3. 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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

### LAPSE OF LEGACY.

Where a testator bequeaths one-half of the residue of his estate to a sister, and she dies before his death leaving a daughter and three sons, and these sons also died before the testator, one of them leaving a widow and two sons and the other a widow, the bequest does not lapse, but goes to the lineal descendants of the sister. However, the widows of the deceased sons, not being lineal descendants, are not entitled to share in the bequest.—Estate of Crane, 2, 535.

Unless the clear intention of a testator requires it, a construction resulting in the lapse of a gift should be avoided.—Estate of Dager, 4, 22.

The common-law doctrine of lapse or failure as applied to bequests or devises in case the beneficiary predeceases the testator is preserved by section 1343 of the Civil Code, as the general rule, with the special exception, under section 1310, of avoidance in favor of "a child or other relation," provided he leaves "lineal descendants" who survive the testator.—Estate of De Bernede, 4, 486.

A beneficiary who is dead at the making of a will is within the provision of section 1310 of the Civil Code that if a "devisee," who is a "relation," "dies before the testator," the estate devised shall not lapse if the devisee leaves "lineal descendants."—Estate of De Bernede, 4, 486.

Although section 1310 of the Civil Code, creating an exception to the doctrine of lapse in favor of the testator's relation, refers to the latter as a "devisee," the statute applies to a testator who leaves personal estate only, and includes legatees technically so designated as well as devisees.—Estate of De Bernede, 4, 486.

The expression "lineal descendants" in section 1310 of the Civil Code means issue to the remotest degree, in which sense it is used in the title on succession.—Estate of De Bernede, 4, 486.

Where a testator leaves all his estate, consisting solely of personalty, to his three sisters, who were at the time of the execution of the will deceased, their children and grandchildren may claim the estate under section 1310 of the Civil Code.—Estate of De Bernede, 4, 486.

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.—Estate of Hull, 3, 378.

### LEGACIES.

See Ademption of Legacies; Annuities; Interest on Legacies; Lapse of Legacy; Wills.

### LETTERS.

Of special administrator. See Special Administrators, sec. 3.

Of administration. See Executors and Administrators.

Of administration with will annexed. See Executors and Administrators, secs. 8, 12.

### LIMITATION.

Interpretation of term. See Wills, sec. 12.

### LIMITATION OF ACTIONS.

Payment of taxes. See Inheritance Taxes, sec. 3.

Whether trustee may plead. See Trusts, sec. 10.

### LOST OR DESTROYED WILL.

See Probate of Will, sec. 6.

### LUCID INTERVAL.

See Insanity and Insane Delusions, sec. 2.

### MARRIAGE.

1. NATURE AND IMPORTANCE OF INSTITUTION, 543.

2. BUSINESS TRANSACTIONS BETWEEN BETROTHED PERSONS, 544.

3. VALIDITY OF MARRIAGE, 544.

4. ISSUE OF VOID MARRIAGE—CONFLICT OF LAWS, 544.

5. INFORMAL OR CONTRACT MARRIAGES, 545.

6. CONTRACT MARRIAGE—CONFLICT OF LAWS, 546.

See Community Property; Husband and Wife.

Questioning validity on application for family allowance. See Family Allowance, sec. 3.

#### 1. Nature and Importance of Institution.

Mercenary marriages are abhorred in equity, and not favored otherwise where the surroundings point to an unworthy motive, and the conduct of the party who is pecuniarily benefited suggests insincerity or bad faith, and indicates that he has taken undue advantage of the other's weakness of will or confidence in him, springing from intimacy of relation.—Estate and Guardianship of Moxey, 2, 369.

When parties are married, though ceremonially, it is their duty to themselves and their obligation to the state to follow up the rite by living together as husband and wife and affording public evidence of that relation. So far as the immediate interest involved is concerned, it matters little compared with the interests of organized society.—Estate and Guardianship of Moxey, 2, 369.

Marriage is more than a contract; it is a status; it is an institution of society and its foundation; it does not come from society, but contrariwise; it is the parent of society, and it is extremely important that its stability shall be secured, and that its contraction should be surrounded by safeguards and its sanctity upheld; and every solemnization of marriage should be in the face of the public; there should be no secrecy either in ceremony or in connubiation.—Estate and Guardianship of Moxey, 2, 369.

Marriage is more than a contract; it is a status; an institution of society and its foundation; it does not come from society, but contrariwise; it is the parent of society, and it is supremely important that its stability shall be secured; its contraction must be surrounded by safeguards and its sanctity upheld.—Estate of Blythe, 4, 162.

## 2. Business Transactions Between Betrothed Persons.

The relations of betrothed persons being of an extremely confidential character, the law imposes, in case of business transactions between them, the utmost circumspection and care to forefend fraud. If the woman is about to convey property to the man, he should see that she has the assistance of a competent attorney.—Estate and Guardianship of Moxey, 2, 369.

The fact that a deed from a woman to her fiancé purports to be based on a pecuniary consideration, when in fact there is none, is a strongly suspicious circumstance, particularly when she is suspected of mental weakness.—Estate and Guardianship of Moxey, 2, 369.

Where a woman, suspected of mental weakness, gratuitously conveys property to the man to whom she is betrothed, the fact that the deed is prepared and executed in haste; that the gift is excessive; that there is lack of opportunity for calm consideration and reflection; that the deed recites a money consideration, and a covenant of warranty and an agreement to furnish an abstract up to date; that the grantee virtually dictated or supervised the making of the deed, while his intimate friend and associate prepared the instrument; and that the grantee is admitted to have influence over the grantor, through her fatuous fondness for him—all these are circumstances strongly suggestive of fraud.—Estate and Guardianship of Moxey, 2, 369.

## 3. Validity of Marriage.

Where the relation of husband and wife is once established, no subsequent conduct of either spouse, which does not culminate in a legal dissolution, can affect the judicial determination of the question of their status.—Estate of Whelan, 1, 202.

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, 3, 318.

## 4. Issue of Void Marriage—Conflict of Laws.

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 Mackey, 3, 318.

### 5. Informal or Contract Marriages.

*For other authorities, see Index to Notes, p. 457.*

An isolated instance of a man introducing a woman as his wife does not necessarily establish their marriage; the whole conduct and behavior of the parties must be considered.—Estate of Blythe (Case of Alice Edith Blythe), 4, 162.

The defendant claiming marriage by contract or consent, followed by mutual assumption of marital rights and duties under section 55 of the Civil Code, the court remarked: Consent is the pervading principle of the law. Marriage is derived from consent duly authenticated, independent of the *conjunctio corporum*; publicity is the publication of that consent; and that consent must go right up to the moment of their taking up life as husband and wife; it must coexist with the assumption of marital rights, duties and obligations.—Estate of Blythe, 4, 162.

Section 55 of the Civil Code declares that if there is no solemnization of a marriage, there must be consent followed by the assumption of marital rights, duties or obligations. Such assumption should be immediate, or at least, within a reasonable time; if two years intervene between the two events, the agreement to marry will be deemed abandoned.—Estate of Blythe, 4, 162.

There cannot be an assumption of marital rights and duties, within the meaning of section 55 of the Civil Code, without cohabitation, and cohabitation must be a living together as husband and wife. Constancy of dwelling together is the chief element of cohabitation. Therefore, for the parties to live in separate houses is totally incompatible with the notion of matrimonial cohabitation.—Estate of Blythe, 4, 162.

The mere fact that parties who have agreed to become husband and wife thereafter have sexual intercourse is not sufficient in itself to show a consummation of the marriage, or that they have assumed toward each other marital rights, duties and obligations within the meaning of section 55 of the Civil Code.—Estate of Blythe, 4, 162.

Under section 55 of the Civil Code, providing that consent followed by a mutual assumption of marital rights and obligations may constitute marriage, consent and consummation should be consequent and complete.—Estate of Blythe, 4, 162.

The evidence is examined in detail by the court in this case, and is found to be insufficient to establish a marriage by consent followed by an assumption of marital rights and obligations. The claimant's contention presents "a case without legal merit." "She was not the wife and she is not the widow of the decedent."—Estate of Blythe, 4, 162.

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, 3, 318.

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 negating such claim.—Estate of Mackay, 3, 318.

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, 3, 318.

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, 3, 130.

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, 3, 130.

An alleged contract of marriage produced in this case is, in the light of expert and other evidence, held a forgery.—Estate of James, 3, 130.

Where it appears that parties, without the sanction of any ecclesiastical ceremony, agreed between themselves to live together as man and wife, and did live as such in one place of domicile for years, and in other places, and so held themselves out to others moving in the same limited social sphere; and it further appears that each of the parties testified in a legal controversy, wherein they were both called as witnesses, to being, respectively, married persons, and stated their respective places of habitation to be where in fact they lived together at the time, their marriage is proved.—Estate of Whalen, 1, 202.

Where persons called to prove that a man and woman lived as husband and wife and held themselves out as such to others living in the same social sphere are credible witnesses, no matter how circumscribed is their social environment, their testimony is sufficient to establish repute.—Estate of Whalen, 1, 202.

Where it appears that an alleged spouse of an unsolemnized marriage has testified as a witness, subsequently to the alleged marriage, that he was a married man, such declaration is the most important evidence that can be offered in support of such a marriage.—Estate of Whalen, 1, 202.

### 6. Contract Marriage—Conflict of Laws.

A marriage contract is to be construed according to the law where it is made and executed.—Estate of Sweet, 2, 460.

The whole of the foreign law is adopted in a marriage contract under the *lex loci contractus*, except the remedy, and the actual intention is to be interpreted according to that law.—Estate of Sweet, 2, 460.

### MAXIMS.

No one shall derive any profit, through the law, by the influence of an unlawful action or relation.—Estate of Tiffany, 1, 478.

**MILEAGE AND FEES OF WITNESSES.**

See Costs, sec. 3.

**MINOR HEIRS.**

See Attorneys for Absent or Minor Heirs.

The court will endeavor to conserve the interests of minors, and will at all times aid their attorney in obtaining for them their full rights; and any application in that behalf will be welcomed by the court, which regards with the highest favor, the claims of minor heirs. *Estate of McDougal*, 1, 456.

**MONOMANIA.**

See Insanity and Insane Delusions.

**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.—*Estate of Tobin*, 3, 538.

The rule that the lower court on the retrial of a case sent back by the appellate court must follow the law laid down by the superior tribunal can be invoked only when the same facts and questions are presented on the second trial.—*Estate of Jessup*, 2, 476.

**NOMINATION.**

Of administrator. See Executors and Administrators, sec. 4.

Of guardian by child. See Guardianship, sec. 5.

**NOTICE.**

Allowance to executor for costs of serving. See Accounts of Executors and Administrators, sec. 4.

On application for family allowance. See Family Allowance, sec. 5.

Of application for distribution. See Distribution of Estates, sec. 3.

Of hearing of account of executor. See Accounts of Executors and Administrators, sec. 6.

Of probate of will. See Probate of Will, sec. 2.

Publication of notice to creditors. See Administration of Estates, sec. 5.

**OLD AGE.**

See Testamentary Capacity, sec. 9.

**OLOGRAPHIC WILLS.**

1. ESSENTIALS AND VALIDITY IN GENERAL, 547.

2. DATE OF INSTRUMENT, 548.

3. SIGNATURE OF TESTATOR, 548.

4. WITNESSES AND ATTESTATION, 548.

*For other authorities, see Index to Notes, p. 458.*

1. Essentials and Validity in General.

Olographic wills were first permitted in California by the Civil Code of 1872, the provisions being adopted from the civil law.—*Estate of Zeile*, 5, 292.

An instrument testamentary in character, if proved to be entirely written, dated and signed by the author, is established as an olographic will.—Estate of Kustel, 2, 1.

## 2. Date of Instrument.

An olographic will which by mistake bears a date at least twenty-eight years prior to the time of its execution should be denied probate.—Estate of Fay, 1, 428.

Assuming that the printing of the figures "190" in the date "January 12, 1904," vitiates an instrument as an olograph, a codicil thereto written on the reverse side of the paper entirely written, dated, and signed by the hand of the testator remedies the defect.—Estate of Plumel, 5, 243.

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.—Estate of Antoldi, 3, 513.

## 3. Signature of Testator.

The fact that a testamentary paper is commenced and also indorsed in the handwriting of the testator, "This is my Will," is unavailing to constitute it an olographic will if not signed.—Estate of Heatley, 5, 433.

A testamentary instrument in the handwriting of the testator, not having any signature, but containing the testator's name in an unwitnessed attestation clause, cannot be given effect as an olographic will.—Estate of Heatley, 5, 433.

## 4. Witnesses and Attestation.

A will properly executed in olographic form is entitled to probate as such, although it is witnessed and although the testator believed attestation necessary and intended the execution to be in the attested form.—Estate of Zeile, 5, 292.

The term "subscribing witness" as used in Civil Code, 1282, is synonymous with "attesting witness," as used in Civil Code, 1276, and has no reference to olographic wills.—Estate of Zeile, 5, 292.

A gift to a legatee by an olographic will is not invalidated by his signing the instrument as a witness. Section 1282 of the Civil Code has no application to olographic wills.—Estate of Zeile, 5, 292.

If one makes a will entirely in his own handwriting, does not sign it, and attaches an attestation clause unsubscribed by witnesses, the presumption is that he intends to acknowledge and publish it in the presence of witnesses, and it is therefore incomplete as a testamentary paper.—Estate of Heatley, 5, 433.

A testamentary document in the handwriting of the testator and having subscribing witnesses may be proved either as an olographic or as an attested will.—Estate of Dama, 5, 24.

## OPINION EVIDENCE.

See Evidence, sec. 1.

## ORDERS.

See Judgments and Orders.

**PARENT AND CHILD.**

1. IN GENERAL, 549.

2. CUSTODY, SERVICES, AND SUPPORT, 549.

3. ALLOWANCE FROM ESTATE OF INCOMPETENT TO ADULT CHILD, 549.

See Guardianship; Illegitimates.

**1. In General.**

Legitimate children may be classified under our statutes as (1) children born of a lawful marriage; (2) children born of parents who subsequently married; (3) children born of a null marriage; (4) children legitimated by the act of their father, without a marriage of the parents. There seems to be no distinction among these classes as to any right whatever.—Estate of De Laveaga, 4, 386.

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.—Estate of James, 3, 130.

**2. Custody, Services, and Support.**

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.—Estate of Spinetti, 3, 306.

**3. Allowance from Estate of Incompetent to Adult Child.**

It is competent for the superior court sitting in probate to grant an allowance from the estate of an incompetent person for the support of her adult son.—Estate of Lynch, 5, 279.

**PARTIAL DISTRIBUTION.**

See Distribution of Estates, sec. 2.

**PARTNERSHIP.**

Claims of surviving partner. See Claims Against Estate, sec. 4.

Distribution of partnership interests. See Distribution of Estates, sec. 1.

**PAYMENT OF CLAIMS.**

See Claims Against Estate, sec. 1.

**PER CAPITA OR PER STIRPES.**

See Wills, sec. 20.

**PERPETUITIES AND SUSPENSION OF ALIENATION.**

See Accumulations; Charities, sec. 3; Trusts, secs. 5, 9.

The limitation of suspension of the power of alienation expressed in section 715 of the Civil Code applies to all trusts, whether of real or personal property.—Estate of Spreckels, 5, 311.

The trust which the testator attempted to create in this case is void as offending the rule against perpetuity.—Estate of Fay, 3, 270.

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.—Estate of Werner, 3, 225.

Where a testatrix, after describing certain real estate, states, "I have great faith in the future value of said piece of property, and my desire is that my share in it shall not be sold until it is absolutely necessary so to do," and then adds, "When said land is sold, a sum equal to sixty thousand dollars shall be invested by my executors in bonds or dividend stocks or loans secured by good mortgages, and the net income received therefrom shall be distributed as above directed," such provisions are bad as a trust in the land, and as a power in trust, and as in restraint of alienation.—Estate of Callaghan, 5, 429.

**PETITIONS.**

See Applications; Pleading.

**PHYSICIAN.**

Testimony as to execution of will. See Probate of Will, sec. 3.

**PLEADING.**

Manner of pleading unsoundness of mind, fraud, and undue influence.

See Contest of Will, secs. 5-7.

Opposition to probate. See Contest of Will, sec. 3.

Amendment to pleadings should be allowed with great liberality; but an amendment is not permissible which effects a radical change in the cause of action and substitutes new issues already tendered and made by the opposite party.—Estate of Sweet, 2, 458.

Amendment to a pleading is a correction of an error committed in the progress of a cause. It is to correct, to improve, to rectify something deficient or defective in the original, not to substitute new for old. The principle to be regarded is, that where the effect of the proposed "amendment" is to state a proposition contrary to the position assumed in the original pleading, or to the theory upon which the case has been tried or the litigation conducted, then it is not an amendment.—Estate of Sweet, 2, 458.

**PRECATORY WORDS.**

Precatory words are expressions in a will praying or requesting that a thing be done; they are words of entreaty, request, desire or recommendation as distinguished from direct and imperative words.—Estate of Richet, 4, 334.

Precatory words are given only their natural force.—Estate of Whitecomb, 2, 279.

*For other authorities, see Index to Notes, p. 458.*

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.—Estate of Hanson, 3, 267.

Precatory words addressed to a devisee or legatee make him a trustee for the person in whose favor they are used, provided the testator has pointed out with sufficient certainty both the object and subject matter of the intended trust.—Estate of Richet, 4, 334.

Under a clause in a will providing that "all the rest and residue of my estate, real or personal, wheresoever situate, of which I may die seized or possessed, I give, devise and bequeath to my beloved wife. . . . It is my wish that my wife pay a monthly pension of ten dollars to my sister during the latter's lifetime"—the wife is entitled to the entire residue of the estate, free from any limitation or trust.—Estate of Richet, 4, 334.

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.—Estate of Claney, 3, 343.

Where a testator (who is a lawyer) devises property to a nephew and to the nephew's son, and recommends to the nephew to leave his portion thereof, after his own death and the death of his wife, in trust for such son and to his children or descendants, if any are living at the time of the death of the son, and if there are none so living then to Harvard College, the word "recommend" is not equivalent to a direction or command, but is only a suggestion, which the beneficiary is free to follow or ignore.—Estate of Whitecomb, 2, 279.

### PRESENTATION OF CLAIMS.

See Claims Against Estate, sec, 1.

### PRESUMPTION.

Of death. See Death.

Direct and indirect evidence. See Evidence, secs. 3, 4.

In regard to insanity. See Insanity and Insane Delusions, sec. 5.

Of testamentary capacity. See Testamentary Capacity, sec. 6.

Of undue influence. See Undue Influence in Procuring Will, sec. 7.

### PRETERMITTED CHILD.

Relief from decree of distribution. See Distribution of Estate, sec. 5.

The words, "when any testator omits to provide in his will for any of his children," as used in section 1307 of the Civil Code, mean: "When a testator says nothing of a provision," or "does not insert a provision," or "fails or neglects to speak of a provision for any of his children."—Estate of Callaghan, 5, 430.

A testatrix does not omit to provide for her child, so that it will inherit under section 1307 of the Civil Code, when she devises to it

land to which her title is imperfect, or to which she has no title at all.—Estate of Callaghan, 5, 430.

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.—Estate of Ross, 3, 500.

Courts will not look to matters dehors a will to ascertain that the omission to provide for a child is unintentional.—Estate of Callaghan, 5, 430.

It is incumbent upon a person claiming to be the child and pretermitted heir of the testator to establish her claim as such child to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. The question of paternity should be established by strict and plenary proof.—Estate of Ghirardelli, 4, 1.

## PROBATE COURTS.

See Jurisdiction.

## PROBATE OF WILL.

1. IN GENERAL, 552.
2. NOTICE AND HEARING, 552.
3. PROOF OF EXECUTION—TESTIMONY OF WITNESSES, 553.
4. CERTIFICATE OF PROOF, 554.
5. RESIDENCE OF TESTATOR, 554.
6. LOST OR DESTROYED WILL, 554.
7. FOREIGN WILLS AND PROBATE, 554.
8. WITHDRAWING WILL FROM FILES, 555.
9. CONCLUSIVENESS AND VACATION, 556.
10. REVOCATION OF PROBATE, 556.
11. APPEAL FROM ORDER OF REVOCATION, 556.

Will contests. See Contest of Will.

*For other authorities, see Index to Notes, p. 459.*

### 1. In General.

The probate of a will and the appointment of an executor are distinct emanations from the will of the court, usually, though not necessarily embodied in one order, but determined upon entirely different sets of facts.—Estate of McLaughlin, 1, 80.

The admission of wills to probate, whether of residents or non-residents, being a statutory matter, the court must be controlled in that regard by the provisions of the code, and it ordinarily cannot be governed by arguments of convenience or inconvenience or of hardship. Nor can it amplify its jurisdiction nor arrogate any power beyond that expressly given by the statute.—Estate of Dunsmuir, 2, 53.

### 2. Notice and Hearing.

When it is claimed that the clerk did not set a petition for probate for hearing, a notice in fact issued by him and fixing the day is the best evidence that the law was complied with.—Estate of McLaughlin, 1, 20.

Any omission in matters of form in fixing the date for hearing a petition to probate a will may be disregarded by the court or ordered supplied when the proper fact is made satisfactorily to appear.—Estate of McLaughlin, 1, 80.

The publication of the notice fixing the day for hearing the probate of a will, when made in a weekly paper, must appear on at least three different days of publication, but not necessarily in three consecutive weekly issues.—Estate of McLaughlin, 1, 80.

### 3. Proof of Execution—Testimony of Witnesses.

On the issue of due execution of a will, the testimony of an attesting witness who drew the instrument that he has had experience in drawing wills is admissible.—Estate of Brown, 5, 428.

The fact that an attesting witness to a will cannot remember the details of the transaction does not cast a cloud upon the due execution of the instrument established by other direct evidence and circumstances.—Estate of Brown, 5, 428.

If a subscribing witness denies or does not recollect the execution of the instrument, it may be proved by other evidence.—Estate of Blythe, 4, 445.

A subscribing witness is limited in his testimony to all matters connected with the execution of the instrument; it is unnecessary and unusual for a testator to disclose the contents of the will to the witnesses.—Estate of Blythe, 4, 445.

An attorney at law who is a subscribing witness is qualified to testify the same as other subscribing witnesses.—Estate of Blythe, 4, 445.

The comparative powers of remembering legal details in the execution of wills, possessed by professional and laical minds, is commented upon by the court in considering the testimony of subscribing witnesses.—Estate of Williams, 5, 1.

Where there are three witnesses to a will, its probate will not be denied or revoked because one of them, against the positive testimony of the others, fails or refuses to authenticate his signature or the execution of the instrument.—Estate of Dama, 5, 24.

On the contest of a will the testimony of a subscribing witness is not conclusive either way, nor does the law presume that he is either more or less truthful than others, though it does not presume that he had, when he signed, full knowledge of what he was doing.—Estate of Dama, 5, 24.

In case of the death of a subscribing witness to a will, his attestation, when proved, is *prima facie* evidence that all was done as it should have been.—Estate of Dama, 5, 24.

When a will is contested, the case is open for general witnesses, and when the testimony is all in, each witness is credited according to the impression he leaves of candor and intelligence, and not according to his being, or not being, an attesting witness.—Estate of Dama, 5, 24.

Neither the failure of memory nor the corrupt or false swearing of attesting witnesses will be allowed to defeat a will, if its due execution can be shown by other testimony.—Estate of Dama, 5, 24.

In case of a will contest a person who was present at the execution of the testament, but who is not a subscribing witness, may give evidence of a valuable character.—Estate of Dama, 5, 24.

The failure of the attesting witness to the will involved in the present case, they being the nurse and physician attending the alleged testatrix at the time of the execution of the instrument, to recollect whether she acknowledged the paper as her will, is adversely commented on by the court, especially in view of the fact that the instrument purports to have been executed at a recent date and in the presence of impending death.—Estate of Casey, 2, 68.

It seems that in a will contest a physician who attended the testator in his last illness may testify that the testator stated that he executed the will in question.—Estate of Dama, 5, 24.

#### 4. Certificate of Proof.

While it has been the almost uniform practice here from early times to file a certificate of the proof of the will and of the facts found, signed by the judge and attested by the seal of the court and attached to the will, together with the transcript of the testimony of the witnesses, such procedure is not strictly required except in contested cases.—Estate of Dunsmuir, 2, 53.

#### 5. Residence of Testator.

Under the provisions of the code, the words "residence" and "domicile" are used synonymously and interchangeably; and a finding that the testator was a resident of San Francisco at the time of his death is, in effect, a finding that he was domiciled there.—Estate of Dunsmuir, 2, 53.

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.—Estate of De Noon, 3, 352.

#### 6. Lost or Destroyed Will.

*For other authorities, see Index to Notes, p. 456.*

An olographic will destroyed by a friend of the testator in his presence, as being of no further use after a typewritten copy thereof had been made, is not "fraudulently destroyed," within the meaning of these words in the statute providing for the probate of lost or destroyed wills.—Estate of Johnson, 2, 425.

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.—Estate of Devenney, 3, 276.

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.—Estate of Devenney, 3, 276.

#### 7. Foreign Wills and Probate.

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.—Estate of Bergin, 3, 288.

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.—Estate of Bergin, 3, 288.

A will must, in the first instance, be probated in the forum of the domicile, that being the principal, primary and original place of administration. The law of the domicile governs the admission of wills to probate.—Estate of Dunsmuir, 2, 53.

A probate proceeding is a proceeding in rem, and a decree admitting a will to probate is confined in its operation to things within the state setting up the court.—Estate of Kershow, 2, 213.

“Full faith and credit” is given to a probate decree abroad, when the same faith and credit is given to it which it has at home, which is that it is conclusive evidence of the validity of the will as affecting title to things within the jurisdictional limits of the court at the death of the testator, whether such title comes in contest within or without those limits; but *de jure* no evidence whatever of title to things not then within those limits.—Estate of Kershow, 2, 213.

Where a testator's domicile at the time of his death was in this state, and he left personal estate therein, a decree of a court of another state, rendered upon constructive notice, admitting to probate a prior will, is no bar to the jurisdiction of a court of this state to admit to probate a subsequent will presented to it for that purpose.—Estate of Kershow, 2, 213.

Sections 1322–1324 of the Code of Civil Procedure, authorizing the admission to probate of a will upon production of an authenticated copy of the will and the record of its admission to probate elsewhere, have no application to the case of domestic wills, but apply only to foreign wills; that is, those made in other states or countries by persons domiciled outside this state. The heading of the article of the code in which sections 1322–1324 are contained is to be taken in connection with the sections themselves for the purposes of construction. Estate of Dunsmuir, 2, 53.

Where a testator was domiciled in this state at the time of his death, the courts of the forum of the domicile have no authority to admit his will to probate in this jurisdiction, upon the mere production of a duly authenticated copy of the will and the record of its admission to probate in a foreign country or sister state.—Estate of Dunsmuir, 2, 53.

An order admitting a will to probate in this jurisdiction, upon production of a duly authenticated record containing a copy of the will and proving its admission to probate in a foreign country, is, where it affirmatively appears from the record that the testator was a resident of San Francisco at his death, beyond the jurisdiction of the court; and it will, on motion, be set aside as void upon its face.—Estate of Dunsmuir, 2, 53.

### 8. Withdrawing Will 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.—Estate of Michle, 3, 99.

### 9. Conclusiveness and Vacation.

No probate of a will is final until the year has expired which is prescribed by statute within which a contest may be had.—Estate of Renton, 3, 120.

An order admitting a will to probate, void upon its face, may be set aside at any time upon motion in the probate court, there being no limitation upon the time within which such motion may be made and entertained, and it being unnecessary to resort to a bill in equity for the purpose.—Estate of Dunsmuir, 2, 53.

### 10. Revocation of Probate.

The jurisdiction of a probate judge relating to the revocation of probate is wholly statutory, and in exercising it, he can in no way alter or disregard the provisions of the statute.—Estate of Dalton, 2, 97.

A creditor cannot petition for a revocation of the probate of a will. Estate of McLaughlin, 1, 80.

The superior court, sitting in probate, has no jurisdiction to revoke the probate of a will because procured by fraud or artifice; the remedy of the party aggrieved is by independent suit in equity.—Estate of McLaughlin, 1, 257.

It seems the executor is not a necessary party to a proceeding for the revocation of the probate of a will, instituted after a final decree of distribution is made and he has been discharged.—Estate of Dalton, 2, 97.

A proceeding to revoke the probate of a will is a proceeding in rem and not inter partes; the court already has jurisdiction of the res, and the office of citation is not, like a summons, to give jurisdiction, but to give all parties an opportunity to appear and take sides.—Estate of Dalton, 2, 97.

Under sections 1327 and 1328 of the Code of Civil Procedure, providing for the revocation, upon a citation to the executor and others, of the probate of a will within one year after probate, an application therefor may be made notwithstanding a final decree of distribution has been made and the executor discharged. The statute keeps alive ad interim the character of the executor for the purpose of hearing the application for revocation.—Estate of Dalton, 2, 97.

An application to revoke the probate of a will is a "proceeding" and not an "action."—Estate of Dalton, 2, 97.

The subject matter in an application to revoke the probate of a will is the same as the subject matter of the proceeding to probate the will. The ultimate issue, to wit, whether the will should stand as probated, is the same.—Estate of Dalton, 2, 97.

### 11. Appeal from Order of Revocation.

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.—Estate of McGinn, 3, 127.

### PUBLIC ADMINISTRATOR.

The public administrator must always give way to the relatives who are entitled to succession, provided they are qualified to assume the functions of administration.—Estate of Barrett, 5, 376.

Where the public administrator of two counties each file an application for letters of administration, there being a doubt as to which county the decedent was a resident of, and one applicant contests the application of the other, the adjudication of the court that it has jurisdiction is a bar to the contestant's own application in the other county.—Estate of Sealy, 1, 90.

#### QUIETING TITLE.

In a suit to quiet title, which involves the validity of a charitable trust created by will, the court held that, in the circumstances of the case, the primary trustees sufficiently represented the beneficiaries, and that neither the attorney general nor the ultimate trustees in being were necessary parties defendant.—Estate of Sutro, 2, 20.

#### RECORD.

Matters prejudicial to the character of any person will be excluded from the record when not essential to a proper decision.—Guardianship of Danneker, 1, 4.

#### REFEREE.

Reference of disputed claim. See Claims Against Estate, sec. 5.

#### REMOVAL.

Of executor or administrator. See Executors and Administrators, sec. 13.

#### RENTS.

Of land sold by executor. See Sale of Land of Decedent, sec. 4.

#### RENUNCIATION.

Of nomination of administrator. See Executor and Administrator, sec. 4a.

#### REPAIRS.

Allowance to executor for repairs of leased house. See Accounts of Executors and Administrators, sec. 4.

#### RESIDENCE.

See Domicile and Residence.

#### RESIDUARY CLAUSES.

See Wills, sec. 18.

#### RES JUDICATA.

See Judgments, sec. 3.

#### REVIEW, BILL OF.

See Bill of Review.

#### REVOCATION.

Of letters of administration. See Executors and Administrators, sec. 13.

Of letters of guardianship. See Guardianship, sec. 9.

Of probate of will. See Probate of Will, sec. 10.

Of wills. See Wills, sec. 8.

**SALE OF LAND OF DECEDENT.**

1. BOND OF ADMINISTRATOR, 558.
2. CONDUCT AND VALIDITY OF SALE, 558.
3. CONFIRMATION BY COURT, 558.
4. RENTS AND TAXES, 559.

**1. Bond of Administrator.**

The court should require an additional bond from the administrator upon ordering the sale of any real property belonging to the estate.—Estate of Riddle, 1, 215.

**2. Conduct and Validity of Sale.**

When, upon the hearing of a return of an administrator's sale of personal property, the purchaser increases his bid from \$3,000 to \$5,000, it is manifest that the price obtained is greatly disproportionate to the value of the property; and in such case the court will refuse confirmation of the sale, and will order a new sale to be had under circumstances calculated to bring the utmost value of the property.—Estate of Jennings, 1, 155.

If a bidder at a private sale by an administrator states that she has not had time to examine the title because of the shortness of the notice, and does not wish to be bound unless the title is good, to which the administrator assents, she should be released from her bid when her counsel advises against the title, whether or not his view of the law is correct.—Estate of Neustadt, 1, 95.

Section 1576 of the Code of Civil Procedure, which prohibits an executor from purchasing at his own sale, is to be construed as was the rule in equity which it enacts.—Estate of Wolters, 5, 428.

Section 1576 of the Code of Civil Procedure does not prevent an executor, with the permission of the court, from purchasing at his own sale.—Estate of Wolters, 5, 428.

An administrator cannot, even under an order of court so authorizing him, relinquish the title of his intestate to land within the forest reserve and select other land in lieu of it; but if the administration has so far advanced as to be clear of liabilities, then a deed by the sole heirs and devisees for this purpose will be valid.—Estate of Reddy, 5, 405.

Where, pending administration, the sole devisees, who are also the heirs and administrators, make a conveyance of a part of the land, as devisees and as administrators, the land remaining unsold should, if a probate sale afterward becomes necessary or expedient, be sold before the land that has been thus conveyed, and the grantees may contest a petition to sell the entire property.—Estate of Reddy, 5, 405.

**3. Confirmation by Court.**

The superior court, sitting in probate, has jurisdiction of an application to confirm a sale of a partnership interest made by an executrix under a power given in the will.—Estate of Fuller, 2, 467.

One department of the superior court sitting in equity cannot, by enjoining parties to an executor's sale, prevent another department of that court sitting in probate from confirming such sale.—Estate of Fuller, 2, 467.

It is no answer to an application to confirm a sale of a partnership interest, made by an executor under a power in the will, that there

was a contract between the decedent and his surviving partner to sell the decedent's interest to the surviving partner.—Estate of Fuller, 2, 467.

#### 4. Rents and Taxes.

The decree confirming an executor's sale vests title in the purchaser, and entitles him to the rents of the property between the time of confirmation and the delivery of the deed.—Estate of Johnson, 4, 499.

Where an executor makes a sale of property on which taxes are a lien, it is his duty toward the purchaser to remove the lien.—Estate of Johnson, 4, 499.

Where an executor makes a sale of property on which there is a lien for taxes and on which rents accrue between the time of confirmation and delivery of the deed, the superior court sitting in probate has jurisdiction to apply equitable principles as between the vendor and vendee.—Estate of Johnson, 4, 499.

### SEPARATE PROPERTY.

See Community and Separate Property.

### SEPARATION AGREEMENT.

See Husband and Wife.

### SICKNESS.

See Testamentary Capacity, sec. 9.

### SPECIAL ADMINISTRATOR.

1. JURISDICTION AND PROCEEDINGS TO APPOINT, 559.
2. POWERS, DUTIES AND ACTIONS, 559.
3. PERSONS ENTITLED TO LETTERS—DISQUALIFICATION, 560.
4. ACCOUNTS, EXPENDITURES AND COMPENSATION, 560.
5. RIGHT TO COUNSEL, 561.

#### 1. Jurisdiction and Proceedings to Appoint.

The proceedings in an application for letters of special administration, which under the general practice are somewhat informal, have been modified by the court by requiring the application to be made in open court and upon notice.—Estate of Dama, 5, 24.

The issuance of special letters of administration to the public administrator in one county is not a final determination of his right to general letters of administration as against the public administrator of another county.—Estate of Sealy, 1, 90.

The issuance of special letters of administration leaves the jurisdictional facts still to be ascertained prior to the issuance of general letters.—Estate of Sealy, 1, 90.

#### 2. Powers, Duties and Actions.

It is the duty of a special administrator to collect and preserve, for the executor or administrator, all personalty and choses of every kind belonging to the decedent and his estate; also to take the charge of, enter upon and preserve from damages, waste and injury the realty. Estate of Shillaber, 1, 101.

For all purposes of the performance of the duty of a special administrator to collect and preserve the assets, real and personal, of the decedent, and for all necessary purposes, he may commence and maintain or defend suits and other legal proceedings as in the case of a general administrator.—Estate of Shillaber, 1, 101.

### 3. Persons Entitled to Letters—Disqualification.

When a testatrix leaves all her property to her husband, whom she names executor, but he dies before the return day of the application for the probate of the will, the sister of the testatrix, who is the sole heir and who is contesting the probate, is entitled to special letters of administration as against the public administrator.—Estate of Crockett, 4, 328.

In making the appointment of a special administrator, the court must give preference to the person entitled to letters testamentary or of administration, unless he is shown incompetent for the position. The court has no discretion.—Estate of Held, 1, 206.

The evidence in this case is held sufficient to establish improvidence or want of integrity on the part of the applicant for special letters of administration.—Estate of Held, 1, 206.

### 4. Accounts, Expenditures and Compensation.

Where it appeared that a special administrator had been a trustee for the decedent in her lifetime, and there was a large balance at the time of decedent's death, for which he should be held accountable, and he has made no statement of his indebtedness or trust in his account rendered as special administrator, he should be charged with the amount of such indebtedness upon the settlement of his account.—Estate of Armstrong, 1, 157.

The accuracy of a special administrator's account will be tested by strictly legal methods, under the rule of section 1415, Code of Civil Procedure, and his duty as therein found, and as defined in the first and second headnote above.—Estate of Shillaber 1, 101.

Where a special administrator has in good faith journeyed to a distant state upon business of the estate, an allowance will be made to him therefor, but he will be entitled to no greater remuneration than, in the court's opinion, would be proper for the dispatch of the business of such journey.—Estate of Shillaber, 1, 101.

In this case the court allowed the special administrator for clerical help in collection of rents, and keeping the accounts, four per cent upon the collections; but reserved the right in other cases to deal differently with a similar item.—Estate of Shillaber, 1, 101.

An item of expense for detective service claimed to be incurred for the estate's interest, was in this case disallowed by the court.—Estate of Shillaber, 1, 101.

Until distribution, an article of personalty specifically bequeathed by decedent must be treated as part of the estate, and not allowed to deteriorate. Hence, where the special administrator has made an expenditure upon such article to prevent its deterioration, the item should be allowed in his account.—Estate of Shillaber, 1, 101.

Two items for expert witnesses were in this case disallowed in the account of a special administrator.—Estate of Tiffany, 2, 36.

A special administrator is without power to incur expense in and about a will contest.—Estate of Tiffany, 2, 36.

A special administrator has no authority to make expenditures as to claims having their origin in decedent's lifetime.—Estate of Tiffany, 2, 36.

For the compensation of a special administrator, the court can accept no other standard than that furnished by section 1618, Code of Civil Procedure (for general administration). Commissions are here allowed on the amount accounted for, including an additional sum of one-half of such commissions for extra service, as permitted under such section.—Estate of Shillaber, 1, 101.

Special administrators are entitled to compensation for services performed in discharging the duties of their trust.—Estate of Tiffany, 2, 30.

#### 5. Right to Counsel.

Special administrators are entitled to counsel in the administration of their trust.—Estate of Tiffany, 2, 36.

### SPECIAL VERDICTS.

See Verdicts.

### SPECIFIC BEQUESTS.

See Wills, sec. 24.

### STATUTES.

The rule that a statute adopted from another state will be given the construction placed upon it by the courts of that state prior to its adoption, is not absolute, especially where there has been a single decision which has since been questioned or repudiated in the foreign state.—Estate of Doe, 1, 54.

### SUBSTITUTIONAL LEGACIES.

See Wills, sec. 25.

### SUCCESSION.

1. GENERAL RULES, 561.
2. CONFLICT OF LAWS, 562.
3. TITLE OF HEIRS AND ADMINISTRATORS, 562.
4. PERSONS ENTITLED TO INHERIT, 562.
5. HUSBAND AND WIFE AS HEIRS—COMMUNITY, 562.
6. DESCENT OF HOMESTEAD, 563.
7. INHERITANCE BY OR THROUGH ILLEGITIMATES, 563.

See Distribution of Estate.

Inheritance by adopted children. See Adoption, sec. 3.

Pretermitted children. See Pretermitted Child.

#### 1. General Rules.

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.)—Estate of McGinn, 3, 26.

The descent of estates of deceased persons is purely a matter of statutory regulation.—Estate of Barrett, 5, 376.

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**Conflict of Laws.**

The law of the domicile of a deceased person governs the succession to his personal property.—Estate of Sweet, 2, 460.

**3. Title of Heirs and Administrators.**

Immediately upon the death of an ancestor his estate, both real and personal, vests at once by the single operation of law in the heir.—Estate of Barrett, 5, 376.

The title of devisees to the land of the ancestor comes instantly upon his death; and, subject to the liens of creditors and the temporary right of the administrator, they may at once dispose of the property.—Estate of Reddy, 5, 405.

Heirs succeed to the property of their intestate immediately upon his death; then their interest becomes vested, subject only to the lien of the administrator for the payment of the debts of the decedent and the expenses of administration.—Estate of Lane, 1, 88.

An administrator is in no sense the owner of the real property of his intestate; the title thereto vests in the heirs, and the administrator has only a lien thereon for the payment of debts and the costs of administration, and he acts only as agent or trustee for the heirs, who are the owners of the property.—Estate of Reddy, 5, 405.

**4. Persons Entitled to Inherit.**

The next of kin entitled to share in the distribution of the estate of an intestate are such only as are next of kin at the time of his death.—Estate of Lane, 1, 88.

The evidence in this case reviewed and the court concludes that the next of kin are here present in the person of the Williams claimants, and so finds and determines.—Estate of Blythe, 4, 302.

The evidence in this case examined and held not to establish the claim of the Liverpool Blythes or "Blythe Company Claim."—Estate of Blythe, 4, 317.

The evidence in this case is found not to establish the "Gypsy Claim." "It is a Scotch case with a Scotch verdict: 'Not proven.'" Estate of Blythe, 4, 319.

**5. Husband and Wife as Heirs—Community.**

If a widower dies intestate leaving collateral relatives and one child, a daughter, and she, before the estate is administered, dies intestate without issue, leaving neither father, mother, brother nor sister, the estate vests in her surviving husband as her heir under subdivision 5 of section 1386 of the Civil Code.—Estate of Barrett, 5, 376.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.—Estate of O'Keefe, 3, 455.

The widow can claim to own an undivided half only of such property as is distributed in kind. If she receive one-half of the community property, her right as survivor is satisfied.—Estate of Ricaud, 1, 220.

#### 6. Descent of Homestead.

The homestead, upon vesting in the survivor, becomes her separate estate, subject to the homestead protections, and she having died intestate, the homestead ceased and the title to the property passed to her heirs under the provision of subdivision 3 of section 1386 of the Civil Code, and not under the provisions of subdivision 8 of said section of the Civil Code as it was in existence at the time of the death of the survivor.—Estate of Collins, 5, 291.

A homestead selected by the husband in his lifetime from the community estate vests absolutely in his surviving wife, under the provisions of section 1474 of the Code of Civil Procedure.—Estate of Collins, 5, 291.

#### 7. Inheritance by or Through Illegitimates.

A child born illegitimate, but legitimated by his father under section 230 of the Civil Code, may be an heir to his father's brother, though his parents never married.—Estate of De Laveaga, 4, 386.

When illegitimate children are legitimated, their capacity to inherit results as an incident to their status, and the law governing their rights and succession is the general law which establishes the rules of succession applicable to the children born in lawful wedlock.—Estate of De Laveaga, 4, 386.

Section 1386 of the Civil Code contains the rules of succession which govern in the case of legitimate children, while section 1387 is limited in its scope to prescribing rules of succession by and from illegitimate children, who are allowed, in spite of their continuing illegitimacy, to inherit on certain conditions both lineally and collaterally.—Estate of De Laveaga, 4, 386.

Section 1387 of the Civil Code is designed to establish a rule of succession by and from illegitimate as contradistinguished alike from children legitimate by birth and from legitimized children.—Estate of De Laveaga, 4, 386.

#### SUICIDE.

Suicide is never presumed by the law from the mere fact of death.—Estate of Dolbeer, 3, 232.

#### TAXES.

Succession taxes. See Inheritance Taxes.

Land sold by executor. See Sale of Land of Decedent, sec. 4.

A tax is due immediately after it is levied, within the rule that distribution must not be made until all taxes due from the estate are paid.—Estate of Whartenby, 2, 509.

Section 3752 of the Political Code and section 1669 of the Code of Civil Procedure should be construed together as simultaneous expressions of the legislative will; the former section does repeal the latter by implication.—Estate of Whartenby, 2, 509.

**TENOR.**

Executor according to tenor. See Executors and Administrators, *sec.* 3.

**TESTAMENTARY CAPACITY.**

1. PERSONS COMPETENT TO MAKE WILL, 564.
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10. INTOXICATION AND INEBRIETY, 571.

See Insanity and Insane Delusions.

Pleading unsoundness of mind. See Contest of Will, *sec.* 5.

**1. Persons Competent to Make Will.**

Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate remaining after payment of his debts.—Estate of Ingram, 1, 222.

**2. Tests of Soundness of Mind.**

The tests of testamentary capacity are: (1) Understanding of what the testatrix is doing; (2) how she is doing it; (3) knowledge of her property; (4) how she wishes to dispose of it; (5) and who are entitled to her bounty.—Estate of Scott, 1, 271.

Upon the issue of sanity raised by a contest to the probate of a will, the court is concerned only with the *fact* of insanity, whatever cause the insanity may have proceeded from being immaterial.—Estate of Spangler, 2, 22.

A person is of sound and disposing mind who is in the possession of all the natural mental faculties of man, free from delusion, and capable of rationally thinking, reasoning, acting and determining for himself. A sound mind is one wholly free from delusion. Weak minds differ from strong minds only in the extent and power of their faculties; unless they betray symptoms of delusion their soundness cannot be questioned.—Estate of Ingram, 1, 222.

If the testator has sufficient memory and intelligence fairly and rationally to comprehend the effect of what he is doing, to appreciate his relations to the natural objects of his bounty, and understand the character and effect of the provisions of his will; if he has a reasonable understanding of the nature of the property he wishes to dispose of, and of the persons to whom and the manner in which he wishes to distribute it, and so express himself, his will is good. It is not necessary that he should act without prompting.—Estate of Ingram, 1, 222.

The constituents of testamentary capacity are that the testator has an idea of the character and extent of his property, and is capable of considering the persons to whom and the manner and proportion in which he wishes his property to go.—Estate of Kershow, 2, 213.

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.—Estate of Kershow, 2, 213.

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, 3, 71.

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, 3, 26.

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, 3, 26.

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, 3, 26.

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, 3, 26.

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, 3, 26.

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, 3, 26.

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.)—Estate of McGinn, 3, 26; Estate of Fallon, 5, 426.

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.)—Estate of McGinn, 3, 26.

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.) Estate of McGinn, 3, 26.

A sound mind is one wholly free from delusion. (Instruction XLI.) Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

It is not the weakness or strength of mind which determines its testamentary capacity, but its soundness—that is, its healthy condition and action.—Estate of Fallon, 5, 426.

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.)—Estate of McGinn 3, 26.

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, 3, 232.

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, 3, 232.

A person may be of sound and disposing mind who is capable of fairly and rationally considering the character and sense of his property, the persons to whom he is bound by ties of blood, affinity or friendship, or who have claims upon him, and the persons to whom and the manner and proportions in which he wishes the property to go.—Estate of Fallon, 5, 426.

### 3. Evidence Respecting Capacity.

See Insanity and Insane Delusions, sec. 5.

On the issues of mental competency of a testator and undue influence in the execution of his will, evidence of the pecuniary circumstances of a legatee and of her husband is inadmissible.—Estate of Brown, 5, 428.

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, 3, 1.

A will may be considered in proof of its own validity and of the sanity of its maker.—Estate of Scott, 1, 271; Estate of Spangler, 2, 22.

The will itself may be considered in determining whether the author was of sound and disposing mind.—Estate of Dolbeer, 3, 232.

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, 3, 232.

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, 3, 232.

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, 3, 249.

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.—Estate of Thompson, 3, 357.

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, 3, 232.

It will not be presumed that a parent was of unsound mind because he discriminated between his children in his testamentary disposition. (Instruction IV.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

The *prima facie* character of a will as just or unjust, equitable or inequitable, is no test of testamentary capacity. (Instruction XV.)—Estate of McGinn, 3, 26.

Where the testator's estate was small, and he left nothing to his wife, who had been his spouse for twenty-five years, and was aged and infirm, remitting her to her community rights, but bequeathed all his estate to strangers, this fact may be considered as evidence in connection with other facts and testimony, upon the issue as to the insanity of testator.—Estate of Sprangler, 2, 22.

The conduct and declarations of a testator, both before and after the execution of his will, are competent to show his capacity or incapacity at the time of making the will. The weight of the declarations depend upon the proximity in point of time to the act, and those made before are more significant than those made after.—Estate of Godsil, 4, 514.

Where a will gives all the estate of the testator to strangers, remitting the widow to her community rights, the probate thereof should be denied if it appears that the testator while young became insane and was confined to a straight-jacket for six months; that he had a brother and cousin who were insane; that he embraced spiritualism a few years before his death and did many strange

things under alleged spiritualistic influences; that he had a great many peculiar beliefs; that less than a month after making his will he was sent to the home of inebriates as dangerously insane, and nine days thereafter was formally adjudged insane and sent to the state asylum.—Estate of Spangler, 2, 22.

The testimony of the attesting witnesses, and, next to them, the testimony of those present at the execution of the will, are most to be relied upon in determining the question of testamentary capacity.—Estate of Scott, 1, 271.

The evidence in this will contest held insufficient to establish a charge of unsoundness of mind on the part of the testator.—Estate of Hill, 1, 380.

#### 4. Effect of Inquisition or Guardianship.

The fact that a guardian has been appointed for a person because of his incompetency to manage his affairs is not conclusive of his incapacity to make a will.—Estate of Hill, 1, 380.

The examination by medical experts of a testatrix prior to her execution of her will, for the purpose of determining her testamentary capacity, is discussed by the court, both as a suggestion of insanity, and as a wise precaution.—Estate of Scott, 1, 271.

#### 5. Opinion Evidence.

The opinion of witnesses as to the soundness of mind of a person sought to be put under guardianship as an incompetent are not entitled to so much weight as facts, especially when conflicting; for 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 or false in its inference.—Estate and Guardianship of Moxey, 2, 369.

A witness called on behalf of the proponent of a will to prove the sanity of the testator, who is not an expert, is not qualified to give his opinion where he did not know that about the time of the execution of the will the testator had been adjudged dangerous to be at large, and was sent to the home of the inebriates, and shortly after to the state insane asylum; all he knew being based upon the fact that he never heard the testator's insanity questioned, and saw nothing particularly wrong about his mind.—Estate of Spangler, 2, 22.

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, 3, 249.

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, 3, 538.

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, 3, 232.

**6. Presumptions and Burden of Proof.**

See *Insanity and Insane Delusions*, sec. 5.

The presumption that every person is of sound mind until the contrary is proved is a legal presumption.—*Estate of Dolbeer*, 3, 232.

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*, 3, 232.

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.—*Estate of Dolbeer*, 3, 249.

The fact that a testatrix committed suicide raises no presumption that she was of unsound mind at that time.—*Estate of Dolbeer*, 3, 232.

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*, 3, 232.

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*, 3, 232.

**7. Time at Which Capacity 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*, 3, 232.

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*, 3, 26.

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*, 3, 26.

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*, 3, 26.

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*, 3, 26.

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*, 3, 26.

### 8. Insane Delusions.

See Insanity and Insane Delusions.

Partial insanity or monomania does not affect testamentary capacity in general, but only as to the persons or subjects in regard to which the unsoundness exists.—Estate of Fallon, 5, 426.

A fear of poisoning on the part of a testatrix, even though a delusion, must, in order to invalidate her testamentary act, be continuous, persistent, and operative upon her volitional capacity.—Estate of Scott, 1, 271.

The mind of a testatrix is not necessarily diseased because she is at times troubled with insomnia while afflicted with intestinal ailment.—Estate of Scott, 1, 271.

Unless a will is the very creature of a morbid delusion put into act and energy, it is a valid will. The mere fact of the possession of a delusion may not be sufficient to render a person incapable of making a valid will; a person of sufficient mental capacity, though under a delusion, may make a will; if the testament is in no way the offspring of such a delusion, it is unaffected by it.—Estate of Kershow, 2, 213.

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.)—Estate of McGinn, 3, 26.

A will which is the direct offspring of partial insanity or monomania is invalid, notwithstanding the general capacity is unimpeached. (Instruction 9.)—Estate of McGinn, 3, 26; Estate of Fallon, 5, 426.

If there are causes sufficient to induce a sane woman to ignore her husband in her will, or reduce what otherwise would have been a just allowance, the fact that she entertains an unjust or an unfounded suspicion in regard to his treatment of her, or an unjust prejudice against him, does not affect the will nor demonstrate that she is necessarily of unsound mind.—Estate of Scott, 1, 271.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

In this case the husband of the testatrix contests her will on the ground that she was of unsound mind by reason of being the victim of insane delusions that her husband was unfaithful, that he was trying to poison her, and that he was conspiring to confine her in an insane asylum, but the court finds against the contestant and sustains the will.—Estate of Scott, 1, 271.

### 9. Old Age, Infirmary, and Sickness.

Unsoundness of mind may be the result of disease, drunkenness, or one of many other causes. (Instruction 10, 33, 36.)—Estate of McGinn, 3, 26.

Evidence of the advanced age of a testator and of his physical infirmities, if they did not impair the operation of his mind in the making of his will, does not establish testamentary incapacity.—Estate of Brown, 5, 428.

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, 3, 232.

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, 3, 26.

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, 3, 26.

Neither old age, distress, nor debility of body incapacitates to make a will, provided there remains possession of the mental faculties and understanding of the testamentary transaction. (Instruction XIII.)—Estate of McGinn, 3, 26.

The law does not require that a person, to be competent to make a will, should be in perfect mental health.—Estate of Dolbeer, 3, 232.

A clinical chart kept by a nurse, showing, by entry made therein by her, that she administered a powerful opiate to her patient a short time before the patient is alleged to have executed a will, is, in conjunction with the testimony of the nurse as what must have been the stupefying effect of the drug, strong evidence of the condition of the mind of the testatrix at the time of the alleged testamentary act.—Estate of Casey, 2, 68.

The testatrix in this case having executed a will on the last day of her life, at the age of nearly eighty years, the court finds, from the combined effect of her sickness, the frequent administration of opiates, the intensity of her pains, and the other influences acting upon her will and understanding, that she must have been incapable of voluntary and intelligent disposition at the time.—Estate of Casey, 2, 68.

#### 10. Intoxication and Inebriety.

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, 3, 26.

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, 3, 26.

Where a person who has indulged in intoxicants to such an extent as to debilitate his mind suspends his drinking for a period, and by such suspension so far regains possession of his faculties as to admit of the presumption that his will was made during the time of his

calm and clear intermission, the testament is held good.—Estate of Kershow, 2, 213.

A man temporarily overcome by a single debauch is, for the time being, of unsound mind, and has not testamentary capacity; so a person to whom intoxication has become such a habit that his intellect is disordered and he has lost the rational control of his mental faculties, is of unsound mind.—Estate of Tiffany, 1, 478.

The evidence in this will contest examined and held not to sustain a charge that the testator was so addicted to the excessive use of intoxicants as to deprive him of testamentary capacity.—Estate of Hill, 1, 380.

The testator in this case had been a prominent and respected citizen, but for some years before his death he became an habitual drunkard, and after becoming such his whole being changed with respect to his affections for his wife and children, as well also in his personal habits and his social nature and disposition. During this period he became acquainted, while taken away from home, with a woman whom he permitted to act as his nurse; and who subsequently obtained a control over him, to the exclusion of his family, and so that he never again returned to his wife or children. Six months before his death he executed a will wherein this woman was made residuary legatee, and for nearly all his estate; his wife and children were expressly excluded by the instrument. They contested the probate of the will, and tendered as issues unsoundness of mind, and undue influence exercised by the residuary legatee. The court found in favor of the contestants upon both issues, and denied the probate of the will.—Estate of Tiffany, 1, 478.

### TIME.

In the legal computation of time there are no fractions of a day, and the day on which an action is done must be entirely excluded or included.—Estate of Caffrey, 5, 431.

The time in which an act provided by law is to be done is computed by excluding the first day and including the last.—Estate of Caffrey, 5, 431.

A citation served on the defendants September 3d, and requiring them to appear at 10 o'clock A. M. on September 8th, is sufficient under section 1711 of the Code of Civil Procedure, which declares that citations must be served at least five days before the return day thereof. The statute does not require the lapse of five full days between the day of service and the day of appearance.—Estate of Caffrey, 5, 431.

### TRAVELING EXPENSES.

Allowance to executor for expenses. See Accounts of Executors and Administrators, sec. 4.

### TRIAL.

See Evidence; Jury.

One having the burden of proof is not relieved therefrom by the anticipation of his case by the opposing party with negative averments.—Estate of Fallon, 5, 426.

**TRUSTS.**

1. IN GENERAL, 573.
2. CREATION OF TRUST, 573.
3. PAROL TO ESTABLISH, 574.
4. BEQUEST TO CORPORATION, 574.
5. VALIDITY AND INTERPRETATION OF TRUST, 574.
6. DETERMINING VALIDITY PRIOR TO PROBATE, 575.
7. TRUSTEE AND BENEFICIARIES, 575.
8. USE AND INVESTMENT OF FUNDS BY TRUSTEE, 576.
9. DURATION OF TRUST, 576.
10. LIMITATION OF ACTIONS, 576.

See Accumulations; Charities; Cy Pres Doctrine; Perpetuities; Precatory Words.

*For other authorities, see Index to Notes, p. 460.*

**1. In General.**

When a trust is created, a legal estate sufficient for the execution of the trust will, if possible, be implied.—Estate of Tessier, 2, 362.

Provisions of the codes in respect to testamentary trusts should be construed liberally.—Estate of Doe, 1, 54.

**2. Creation of Trust.**

It is not necessary to use the word "trust" or "trustee," or any particular form of words, in creating a trust; so long as the intention of the testator is expressed.—Estate of Tessier, 2, 362.

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, 3, 267.

The following language in a letter written by one who has collected and holds moneys for another, establishes a trust: "It leaves a balance in your favor of \$15,000, besides what has accumulated since the estate was fixed up, which I will loan out [at] about nine per cent, being the best I can do at present."—Estate of Armstrong, 1, 157.

A person may declare a trust either directly or indirectly—the former, by creating a trust *eo nomine* in the forms and terms of a trust; the latter, without affecting to create a trust in words, by evincing an intention which the court will effectuate through the medium of an implied trust.—Estate of Tessier, 2, 362.

Devises of land to executors in trust, by implication, are not favored, and are tolerated only where probability of the testator's intention to that effect is so strong that a contrary presumption cannot be entertained.—Estate of Callaghan, 5, 429.

Where a testatrix directs that there be paid monthly to her daughter a specified sum, and to her two granddaughters a like sum, share and share alike, and in case of the death of either of the granddaughters, without issue, the survivor to take the whole of the last named sum; and further provides that on the death of her daughter her estate shall go to her two grandchildren, share and

share alike, or to the survivor of the daughter in case of the death of either of the granddaughters; and an executor is appointed by the will, but he is not named as trustee, a trust is created by the will which appoints an executor, but does not name him trustee.—Estate of Tessier, 2, 362.

### 3. Parol to Establish.

When real estate has been conveyed by a deed reciting a consideration, parol evidence, in the absence of fraud or mistake, is not admissible in behalf of heirs of the grantor to show that a resulting trust arose in his favor.—Estate of Snook, 5, 245.

An express trust in realty can be created only by a writing containing language appropriate for that purpose.—Estate of Ford, 2, 342.

### 4. Bequest to Corporation.

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 of 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, 3, 378.

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, 3, 378.

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, 3, 378.

### 5. Validity and Interpretation of Trust.

If a devise is limited to take effect upon the termination of a trust and the trust proves invalid, the devisees come immediately into their own.—Estate of Doe, 1, 54.

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, 3, 90.

A devise to the widow and daughter of the testator, one-half to the daughter absolutely and the other half to the widow for life with remainder to the daughter, is valid, regardless of the validity of a devise in trust of an intermediate or precedent estate.—Estate of Doe, 1, 54.

A devise and bequest of all the real and personal estate of a testator to designated trustees "in trust" with directions to pay over the net annual income to his widow for life, and upon her death "to divide the estate into three equal parts, when one of the parts shall be forthwith assigned, transferred, set over and delivered" by such trustees to one of the sons of the testator, whereupon "the same shall be and become his absolutely and forever," and another part to another son in the same manner, and the remaining part to be continued to be held in trust by such trustees and the net annual income paid to the daughter of the testator for life and upon her death "to pay over the principal" of such part to her children or

grandchildren, as the case may be, "when the same shall become theirs absolutely and forever," is as to the real estate a void trust.—Estate of Spreckels, 5, 311.

Such devise and bequest is also a void trust as to the personal property, it appearing therefrom and from the whole will that the realty and personalty are united in one inseparable trust scheme.—Estate of Spreckels, 5, 311.

Such a devise and bequest is also invalid as a devise, notwithstanding the trustees and beneficiaries are the same persons and the words therein that "the same shall become his absolutely and forever."—Estate of Spreckels, 5, 311.

Such devise and bequest in so far as attempting to create a trust in the daughter's part avoids the whole trust scheme, being an undue suspension of the power of alienation, owing to the uncertainty of the persons who ultimately are to take such part.—Estate of Spreckels, 5, 311.

A void trust cannot be preserved as a power, as powers are no part of the statutory scheme of trust in this state.—Estate of Spreckels, 5, 311.

If a testator, after making specific gifts, devises the residue of his estate to trustees "for" certain beneficiaries, and elsewhere in the will provides that the executors, who are also named as trustees of the trust, shall pay to the persons designated as those "for" whom the property is held, a specified sum per month, the payment of that sum constitutes a trust purpose of the trust of the residuum, and the latter is not void as a naked trust.—Estate of Doe, 1, 54.

A devise "in trust" for others is not invalid as a bare trust, when it imposes on the trustee the duty of paying the rents and profits of the property to the beneficiaries.—Estate of Doe, 1, 54.

An invalid provision in a trust, which is not an integral or essential part of the trust scheme, will not necessarily vitiate the other provisions.—Estate of Doe, 1, 54.

## 6. Determining Validity Prior to Probate.

Under section 738 of the Code of Civil Procedure, as amended in 1895, the validity of a testamentary trust in real estate may be determined in advance of the probate of the will, in a suit to quiet title or to determine an adverse claim.—Estate of Sutro, 2, 120.

## 7. Trustee and Beneficiaries.

A beneficiary may be a trustee for himself.—Estate of Spreckels, 5, 311.

An executor may be both executor and trustee. If not named expressly a trustee, the court may determine from the whole will whether he is not to act as trustee.—Estate of Tessier, 2, 362.

The probate court will determine whether a valid trust has been created, and may distribute the estate to a trustee, he being entitled to the possession and control of the same.—Estate of Tessier, 2, 362.

One who is the trustee of a person since deceased, under an express trust voluntarily assumed in the lifetime of the decedent, cannot, by virtue of the Code of Civil Procedure, section 1461, be ordered to account before the court wherein the administration of the decedent's estate is pending.—Estate of Chappelle, 2, 34.

### 8. Use and Investment of Funds by Trustee.

An agent or trustee has no right to use the funds intrusted to him as his own, nor to mingle them with his own funds, without clear authorization; it is his duty to keep the funds separate and intact, and free from any liability such as he incurs in the use of his own moneys.—Estate of Armstrong, 1, 157.

An agent or trustee must pursue with exactitude the instructions given as to funds intrusted with him, or show that his particular act was ratified with full knowledge on his principal's part as to the nature of the act.—Estate of Armstrong, 1, 157.

Where an agent or trustee is instructed to "loan out" funds held by him, it means that he is to invest them for his principal's account, and to make an accounting to the principal of such investment. He is not authorized to borrow the funds for his own purposes.—Estate of Armstrong, 1, 157.

Where confidence is reposed in a trustee to judiciously invest the funds in his hands, this confidence is abused when he places himself in the position of a debtor to the principal, without fully advising the latter of the risk he runs, and giving him an opportunity of knowing the hazard that the funds are subjected to.—Estate of Armstrong, 1, 157.

Where a trustee to invest has made himself a debtor to his principal, and thereby subjected the funds to a risk and hazard, he must show that he fully advised his principal in the premises, in order to avoid responsibility for the loss his conduct may cause.—Estate of Armstrong, 1, 157.

### 9. Duration of Trust.

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, 3, 270.

In determining the duration of a trust term, the inherent character of the trust and its essential limitations may form an element in the construction to be given to the language creating it.—Estate of Doe, 1, 54.

A trust created under subdivision 3 of section 857 of the Code of Civil Procedure, to receive the rents and profits of real property, and apply them to the use of designated beneficiaries, may be limited on lives of persons other than the beneficiaries.—Estate of Doe, 1, 54.

A trust in real property to pay the rents and profits thereof to designated beneficiaries cannot endure longer than the lives of the beneficiaries, where, upon the assumption that they will outlive the trusts, the lives of the latter are made the measure of the trust.—Estate of Doe, 1, 54.

When the income of property is given to one for life, and, at his death, the property is given over to another, and no trustee is named in the will, the executor is the trustee to hold the property during the lifetime of the legatee for life.—Estate of Tessier, 2, 362.

### 10. Limitation of Actions.

Where one occupies a fiduciary relation, the statute of limitations cannot avail as a defense. Lapse of time is no bar to a subsisting trust, clearly established.—Estate of Armstrong, 1, 157.

Where one has occupied a fiduciary relation, the statute of limitations cannot be availed of, unless and until a demand on the part of the principal and a refusal by the trustee are shown.—Estate of Armstrong, 1, 157.

### UNDUE INFLUENCE.

1. WHAT CONSTITUTES, 577.
2. UNSOUNDNESS OF MIND AND UNDUE INFLUENCE, 580.
3. EFFECT ON VALIDITY OF WILL, 580.
4. PERSONS EXERCISING INFLUENCE, 580.
5. RELATION OF PARTIES AS LAWFUL OR UNLAWFUL, 581.
6. EVIDENCE IN GENERAL, 582.
7. PRESUMPTIONS AND BURDEN OF PROOF, 583.

Manner of pleading. See Contest of Will, sec. 7.

#### 1. What Constitutes.

Undue influence may be defined as that which compels the testator to do that which is against his will, through fear or a desire of peace, or some feeling which he is unable to resist, and but for which the will would not be made as it is, although the testator may know what he is about when he makes the will, and may have sufficient capacity to make it.—Estate of Ingram, 1, 222.

Undue influence is any kind of influence, either through fear, coercion, or importunity, by which the testator is prevented from expressing his true mind. It must be an influence adequate to control the free agency of the testator. If a weak-minded person is importuned to such an extent that he has not sufficient strength of mind to determine for himself, so that the proposed script expresses the views and wishes of the person importuning, rather than his own, and is not his free and unconstrained act, it is not his wish. Undue influence, or supremacy of one mind over another, is such as prevents that other from acting according to his own wish or judgment.—Estate of Ingram, 1, 222.

Neither advice, argument nor persuasion will vitiate a will made freely and from conviction, though such will might not have been made but for such advice and persuasion. Neither does undue influence arise from the influence of gratitude, affection or esteem.—Estate of Ingram, 1, 222; Estate of McGinn, 3, 26.

Lawful or unlawful influence, in procuring the execution of a will, discussed and distinguished.—Estate of Blanc, 3, 71.

What would be an undue influence on one man might be no influence at all on another. This depends upon the capacity, in other respects, of the testator.—Estate of Ingram, 1, 222.

Undue influence must be an influence exercised in relation to the will itself, and not in relation to other matters or transactions. But it need not be shown to have been actually exercised at the point of time that the will was executed.—Estate of Ingram, 1, 222.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.) Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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 the alleged execution. (Instruction XVIII.)—Estate of McGinn, 3, 26.

Procuring a will to be made, unless by foul means, is nothing against its validity. (Instruction XVIII.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

The court instructed the jury that their verdict upon the issue of undue influence must be "No," if they believed 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.)—Estate of McGinn, 3, 26.

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.—Estate of Blanc, 3, 71.

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.—Estate of Blanc, 3, 71.

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 exercise over the weak and infirm and which could not be resisted, so that the motive was tantamount to force or fear.—Estate of Blanc, 3, 71.

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.—Estate of Harris, 3, 1; Estate of Maynard, 5, 269.

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.—Estate of Blanc, 3, 72.

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, 3, 249.

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, 3, 249.

Undue influence is that kind of influence which prevents the testator from exercising his own judgment and substitutes in the place thereof the judgment of another.—Estate of Fallon, 5, 426.

Undue influence consists 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; in taking an unfair advantage of another's weakness of mind or in taking a grossly oppressive or unfair advantage of his necessities or distress.—Estate of Fallon, 5, 426.

## 2. Unsoundness of Mind, and Undue Influence.

Where the questions of unsoundness of mind and undue influence are presented in the same case, and in their consideration may overlap one the other, it has been said that as legal propositions they are to be kept distinct and apart. But considering the two issues together, it is noted that although mere weakness of intellect does not prove undue influence, yet it may be that in such feeble state, with the mind weakened by sickness, dissipation or age, the testator more readily and easily becomes the victim of the improper influences of those who see fit to practice upon him.—Estate of Tiffany, 1, 478.

The issue of undue influence is entirely distinct from that of unsoundness of mind; and the principles governing each are entirely different. (Instruction 12.)—Estate of McGinn, 3, 26; Estate of Fallon, 5, 426.

A person of sound mind may be the victim of undue influence; so, also, may a person of unsound mind. (Instruction 12.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

## 3. Effect on Validity of Will.

A will produced by undue influence cannot stand.—Estate of Ingram, 1, 222.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

## 4. Persons Exercising Influence.

To exert an undue influence the person charged must be of sound mind. (Instructions XXIX, XXX. And see XXVIII.)—Estate of McGinn, 3, 26.

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, 3, 26.

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, 3, 26.

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.)—Estate of McGinn, 3, 26.

The influence 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.)—Estate of McGinn, 3, 26.

A wife has the right to advise and to exercise her influence to move and satisfy the testator's judgment. (Instruction XXVII.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

If a wife urge upon testator the propriety of leaving her his property, and excluding others, it does not constitute undue influence. (Instruction XXVI.)—Estate of McGinn, 3, 26.

If a wife, by her virtues, has gained such ascendancy 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.)—Estate of McGinn, 3, 26.

Children may exert influence to induce the parent to make a will. (Instruction XXVII.)—Estate of McGinn, 3, 26.

## 5. Relation of Parties as Lawful or Unlawful.

While the natural influence of a lawful relation must be lawful, even where affecting testamentary dispositions, the natural or ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relations and unfavorably to the lawful heirs. So, it would be doing violence to the morality of the law, and thus to the law itself, if courts should apply the rule recognizing the natural influence arising out of legitimate relationship to unlawful as well as to lawful relations, and thereby make them both equal, in this regard at least, which is contrary to their very nature.—Estate of Tiffany, 1, 478.

If the law always suspects and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian and trustee, much more sternly should it deal with unlawful relations, where they are, in their nature, relations of influence over the kind of act under investigation. In their legitimate operation, trust positions of influence are respected; but where apparently used for selfish advantage they are viewed with deep suspicion; and it would be strange

if unlawful relations should be more favorably regarded.—Estate of Tiffany, 1, 478.

There is a distinction between the influence of a lawful relation and that of an unlawful relation. A lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing the execution of a will. However great the influence thus generated, there is no taint of unlawfulness in it; nor can there be any presumption of its unlawful exercise merely because it is known to have existed and to have manifestly operated on the testator's mind as a reason for his testamentary disposition. It is only when such influence is exerted over the very act of devising, preventing the will from being truly the testator's act, that the law condemns it as vicious.—Estate of Tiffany, 1, 478.

General cases and authorities, as to what does and what does not constitute undue influence, are inapplicable in a case where the influence charged originated and was exercised under an unlawful relation.—Estate of Tiffany, 1, 478.

#### 6. Evidence in General.

Undue influence should not be found upon mere suspicion. (Instruction XXXIII.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

While the law will not presume the exertion of undue influence from the mere fact of opportunity or a motive for its exercise, nor permit it to be found upon suspicion, yet proof must generally be gathered from the circumstances of the case, for very seldom is a direct act of influence patent, as a person intending to control another's action, especially as to a will, is not apt to proclaim that intent; and 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 alleged will is such a one as would probably be urged upon him by those surrounding him; whether the persons who surrounded him were benefited by the alleged will to the exclusion of formerly intended beneficiaries.—Estate of Casey, 2, 68.

The court finds from an examination of the evidence in this case that the will dated October 21st was inspired by the proponent, that he was the informing spirit of that testament, and that it was his will rather than of the nominal testatrix.—Estate of Casey, 2, 68.

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.—Estate of Thompson, 3, 357.

The evidence in this case reviewed at length and the conclusion reached, that the testatrix was the victim of an insane delusion, of which the instrument propounded was the offspring, and that the testatrix was unduly influenced to make the will in favor of proponent. Estate of Ingram, 1, 222.

Upon the issue of undue influence in the execution of wills, the evidence must often be indirect and circumstantial. Very seldom does it occur that a direct act of influence is patent; persons intending to control the actions of another, especially as to wills, do not proclaim the intent. The existence of the influence must generally be gathered from circumstances, such as whether the testator formerly intended a different disposition; whether he was surrounded by those having an object to accomplish, to the exclusion of others; whether he was of such weak mind as to be subject to influence; whether the instrument is such as would probably be urged upon him by those around him; whether they are benefited to the exclusion of formerly intended beneficiaries.—Estate of Tiffany, 1, 478.

The evidence in this contest of a will, examined and held insufficient to establish a charge of undue influence.—Estate of Hill, 1, 380.

#### 7. Presumptions and Burden of Proof.

Undue influence cannot be presumed, but must be proved, and the burden of proving it lies on the party alleging it. Such evidence must often be indirect and circumstantial, for undue influence can rarely be proved by direct and positive testimony. The circumstances to be considered, stated.—Estate of Ingram, 1, 222.

Undue influence is not a presumption, but a conclusion from proven facts and circumstances. (Instructions XXXII, XXXIII.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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, 3, 249.

The mere fact that the beneficiary in a will had an opportunity to procure a will in his favor, or that he had a motive for the exercise of undue influence, does not raise a presumption of its exercise.—Estate of Maynard, 5, 269.

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.—Estate of Harris, 3, 1.

**VENUE.**

See Jurisdiction.

Change of venue in guardianship proceedings. See Guardianship, sec. 4.

In this case the court denies a motion, made on behalf of all the defendants except Dore and McNealy, to change the place of trial to San Diego county, where real estate affected by the action is situated, because the true basis of the action is fraud and collusion rather than the recovery or determination of any interest in realty, and because Dore is a resident of San Francisco, and a necessary party, and McNealy opposes the motion.—*Cochrane v. McDonald*, 4, 533.

**VERDICTS.**

In will contest. See Contest of Will, sec. 11.

Special verdicts with blanks to be filled out by the jury, by way of answer to each issue. (Court's Charge D.)—*Estate of McGinn*, 3, 26.

Reaching and returning verdict by a jury; and duty as to required information touching evidence of law during the deliberations. (Court's Charges E, F.)—*Estate of McGinn*, 3, 26.

**VESTING.**

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**WILLS.**

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Soundness or unsoundness of mind. See Testamentary Capacity.

Testamentary power over homestead. See Homestead, sec. 10; Trusts.

Testamentary capacity. See Testamentary Capacity.

Undue influence over testator. See Undue Influence in Procuring Will.

*For other authorities, see Index to Notes, p. 461.*

### 1. Conflict of Laws.

The validity and interpretation of wills, wherever made, are governed by the laws of this state so far as they affect property here situated.—Estate of Renton, 3, 120.

### 2. Right of Testamentary Disposition.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

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.—Estate of Dolbeer, 3, 232.

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, 3, 232.

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, 3, 232.

### 3. Failure of Custodian to Deliver.

The only consequence which the law imposes for the failure by the custodian of a will to deliver it to the superior court within thirty days after the death of the testator is to make the custodian responsible for damages sustained by anyone injured thereby.—Estate of Martin, 4, 451.

### 4. Essentials and Validity of Will.

A devise cannot be created without the use of operative words.—Estate of Hale, 2, 191.

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.—Estate of Fay, 3, 270.

### 5. Unnatural, Unreasonable, and Unjust Wills.

As showing unsoundness of mind. See Testamentary Capacity, sec. 3.

The intention of a testator, if lawful, must be given effect, however unjust it may appear to the court.—Estate of Hale, 2, 191.

A court has neither right nor power to quarrel with the moral quality of a testator's acts; it may not say that he should have made a different disposition; it cannot make a will for him.—Estate of Kershaw, 2, 213.

The will of one having testamentary capacity cannot be avoided because unaccountably contrary to the common sense of the country. If not contrary to the law, it stands for the descent of his property, whether his reasons for it are good or bad, provided they are his own reasons, not influenced by the unlawful influence of others.—Estate of Tiffany, 1, 478.

The paramount right of testamentary disposition is not forfeited, nor subject to deprivation, because a person may be immoral or unjust. (Instruction XIV.)—Estate of McGinn, 3, 26.

A will cannot be contested on the ground that it is foolish, unnatural, capricious or unjust.—Estate of Harris, 3, 1.

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.—Estate of Dolbeer, 3, 232.

▲ 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.—Estate of Dolbeer, 3, 232.

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.—Estate of Dolbeer, 3, 232.

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.—Estate of Dolbeer, 3, 232.

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.—Estate of Dolbeer, 3, 232.

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.—Estate of Dolbeer, 3, 249.

#### 6. Execution—Subscription and Attestation.

*For other authorities, see Index to Notes, p. 462.*

Witnesses and attestation to olographs. See Olographic Wills.

Testimony of subscribing witnesses. See Probate of Will, sec. 3.

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, 3, 26.

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, 3, 26.

The acknowledgment of his signature by a testator is not required to be made in any particular words or in any specified manner, but if, by sign, motion, conduct or attending circumstances the attesting witness is given to understand that the testator has already subscribed the instrument this is a sufficient acknowledgment.—Estate of Williams, 5, 1.

The technicalities of the law relating to the making of wills are deemed to have been satisfied where the circumstances surrounding

the transaction show a substantial compliance, and that compliance need not consist of words or even gestures, but may find its legal expression in silence and acquiescence. This is particularly true as to the acknowledgment of the signature.—Estate of Williams, 5, 1.

An attesting clause is not essential to the validity of a will, beyond the fact that the witnesses signed as such.—Estate of Fallon, 5, 426.

There must be two attesting witnesses to a will, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence. In the presence of the testator means that he must not only be present corporally, but mentally as well, capable of understanding the acts which are taking place before him. Estate of Fleishman, 1, 18.

A will is not attested in the presence of the testatrix when the witnesses subscribe their names in an apartment adjoining the room in which she is lying ill, where it is impossible for her to see them, she having previously signed her name while reclining on her bed, not being able to rise therefrom.—Estate of Fleishman, 1, 18.

A subscribing witness is one who sees the writing executed or hears it acknowledged, and thereupon signs his name as a witness at the maker's request.—Estate of Blythe, 4, 445.

A request to sign a will as witness may be express or implied; anything that conveys to a person the idea that the testator desires him to be a witness is a good request.—Estate of Fallon, 5, 426.

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, 3, 357.

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, 3, 26.

### 7. Interlineations in Will.

An interlineation in a will is the most significant part of the line, and where a clause as originally written is clear, and the testator subsequently makes an interlineation, it must be assumed that he intended to make the sentence convey a meaning which it did not theretofore express.—Estate of Behrmann, 2, 513.

Where two legatees named in a will died after its execution, and the testator thereafter noted the fact of their death in his will, and the sums bequeathed to such legatees equal the amount which will go to other legatees if effect is given to an interlineation in that part of the will containing the bequests to them, the inference is strong that by such interlineation the testator meant to transfer to such legatees the bequests originally made to the legatees who died after the execution of the will.—Estate of Behrmann, 2, 513.

### 8. Revocation of 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, 3, 26.

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, 3, 26.

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, 3, 26.

A will is not revoked by an unsigned olographic document of later date.—Estate of Heatley, 5, 433.

A prior will remains effectual so far as consistent with the provisions of the subsequent will.—Estate of Jones, 2, 178.

Where a testator changes many, though not all, of the provisions of his will by pencil marks and interlineations, but allows his signature and the signature of the witnesses to stand untouched, the revocation of the instrument is not thereby affected.—Estate of Heatley, 5, 433.

When a new will is made in the form of a codicil, it does not require an express revocation to make the intent to revoke the prior will clear; it is sufficient that the intent to make a disposition of the estate in the new instrument, which is inconsistent with the prior gifts, is made as clear as the original.—Estate of Scott, 1, 368.

In this case the codicil of the testatrix, which in effect was a new will, omitted one of the residuary legatees named in the original will. The court found that the codicil was inconsistent and irreconcilable with, and worked the revocation of, the original will in respect to this bequest, and therefore denied the right of the legatee to participate in the distribution of the residuum.—Estate of Scott, 1, 368.

### 9. General 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 Granniss, 3, 429.

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, 3, 442.

Positive provisions in a will are not to be overcome by inference.—Estate of Clancy, 3, 343.

In construing a will the whole instrument must be considered in order to arrive at the intention of the testator.—Estate of Clancy, 3, 343.

The intention of the testator, as gathered from the whole scheme of the will and all its provisions, must prevail.—Estate of Fair, 3, 90.

When the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto or recital thereof in another part of the will.—Estate of Maxwell, 1, 145.

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.—Estate of Fair, 3, 90.

Where several parts of a will are absolutely irreconcilable, the latter part must prevail; but the former of several contradictory clauses is never sacrificed except on the failure of every attempt to give all

such a construction as will render every part effective.—Estate of Maxwell, 1, 145.

All the parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole.—Estate of Maxwell, 1, 145.

The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.—Estate of Maxwell, 1, 145.

Every portion of a will must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible.—Estate of Berton, 2, 319; Estate of Behrmann, 2, 513; Estate of Fair, 3, 90.

Where a testator has heirs, and his language will admit of two constructions, one of which will make all the provisions of the will valid, and the other of which would result in creating a legacy to a charitable society in excess of one-third of his estate, which legacy would be void as to such excess under the statute, it will not be presumed that he intended to make a partially invalid bequest, and the court will adopt that construction which is in harmony with the law of wills.—Estate of Behrmann, 2, 513.

All parts of a will are to be construed in relation to each other so as to form one consistent whole, if possible.—Estate of Fair, 3, 90.

All the parts of a will are to be construed in relation to each other, so as, if possible, to form one consistent whole; but where several parts are wholly irreconcilable, the latter must prevail.—Estate of Jones, 2, 178.

#### 10. Intention of Testator.

If a testator misapprehends the legal effect of his expressed intent, the court is not authorized to enter into his mind to ascertain his intention, but must gather his meaning from his words.—Estate of Spreckels, 5, 311.

The intention of a testator must be ascertained from the words of the will itself; it is not what the testator meant, but what his words mean. The intention to be sought is not what may have existed in his mind, but what is expressed in the language of the instrument itself.—Estate of Hale, 2, 191.

In construing a will the aim of the court is to arrive at the intention of the testator by an examination of the will and the circumstances surrounding its execution, and the age and experience of the testator.—Estate of Pearsons, 2, 250.

It makes no difference what language is used in a will, if the testator's intention can be determined it will be sacredly enforced.—Estate of Hale, 2, 191.

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.—Estate of Fair, 3, 90.

The intendment is that a will as written correctly manifests the intention of the testator, and the whole thereof.—Estate of Fair, 3, 90.

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, 3, 90.

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, 3, 429.

#### 11. Declarations of Testator as Aid to Interpretation.

The declarations of a testator are not admissible to aid in construing his will, unless made in close proximity to the time of making the will, and then only in cases of ambiguity.—Estate of Godsil, 4, 514.

#### 12. Interpretation of Particular Words—Technical Terms.

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.—Estate of Maxwell, 1, 145.

Where a word is used in a particular sense in one part of the will, it may be presumed that it is used in the same sense when employed in a subsequent part of the instrument.—Estate of Dager, 4, 22.

A bequest of "ornaments" is in this case construed to embrace jewelry and "jewels in general."—Estate of Traylor, 1, 252.

A bequest of "her wardrobe" by the testatrix is held in this case not to include her "ornaments."—Estate of Taylor, 1, 252.

The phrase "all my debts," used in a direction by the testator to his executors to pay "all debts which I may owe at my decease, from the proceeds of sale of my unproductive property," is held to include a debt secured by mortgage.—Estate of Heydenfeldt, 4, 510.

The word "leave" in a will, as applied to the subject matter, *prima facie* means a disposition by will.—Estate of Hale, 2, 191.

When a testator is not versed in the meaning of technical terms, it should be presumed that he used his words according to their ordinary meaning and in their popular sense. The words of a will should not be subjected to such a strain as to force them out of the natural channel of construction into the narrow legal groove in which the testator's mind was clearly not accustomed to travel.—Estate of Pearsons, 2, 250.

It is the duty of the court to look for general intent of the testator, to put itself in his place, to regard coexistent circumstances, and, if a technical construction of words and phrases is at variance with the obvious general intention, to apply a rule of interpretation which will give to language its ordinary effect.—Estate of Pearsons, 2, 250.

Since a living person can have no heirs, a legacy to the "heirs" of a person living must be treated as void unless the word can be given some other than its technical meaning.—Estate of Dager, 4, 22.

The word "heirs" in a testamentary instrument will not be construed technically, if the intention of the testator as disclosed by the context will thereby be defeated and a portion of the will rendered inoperative.—Estate of Fitzgerald, 2, 172.

Where it appears from other expressions in a will that the testator used the word "heirs" to mean "children," it may be given that meaning.—Estate of Dager, 4, 22.

If a testator declares, "I will that A and B shall become my sole heirs, and that they shall equally possess" my property, after all just claims against my estate have been paid, and neither A nor B is of

kin to the testator, and A dies before the death of the testator, B will take one-half of the residue of the estate of the testator after the payment of his debts, and the heirs at law of the testator, not the heirs of A, will take the other half.—Estate of Patrick, 5, 435.

The word "heirs" in a testamentary instrument will not be construed technically, if the intention of the testator as disclosed by the context will thereby be defeated and a portion of the will rendered inoperative.—Estate of Fitzgerald, 5, 432.

"Limitation" is particularly defined to be a qualification of an estate given; "words of limitation are words which mark out the estate to be taken by the grantee."—Estate of Hale, 2, 191.

The natural and technical meaning of "descendants" discussed with special reference to section 1334 of the Civil Code.—Estate of De Bernede, 4, 486.

### 13. Time When Will Takes Effect.

While it is true that a will takes effect only from the date of the death, it may be construed according to the circumstances and the facts existing in the mind of the testator at the date of execution. Whenever a testator refers to an actual existing state of things, or to what he considers to be such a state, his language is referential to the date of the will and not to what may exist at the time of his death, which is a prospective event.—Estate of Pearsons, 2, 250.

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.—Estate of Fair, 3, 90.

If an immediate distribution of the estate after due administration had in this case been contemplated, the testatrix would not have made the expense of educating the children a charge upon the estate.—Estate of Berton, 2, 319.

### 14. Avoiding Intestacy.

The law prefers a construction of a will which will prevent a partial intestacy, to one which will permit such a result, unless a construction involving partial intestacy is absolutely forced upon the court, for the fact of making a will raises a very strong presumption against any expectation or desire, on the part of the testator, of leaving any portion of his estate beyond the operation of his will.—Estate of Maxwell, 1, 145; Estate of Jones, 2, 178.

Of the two modes of interpreting a will, that is to be preferred which will prevent a total intestacy; but if the legal effect of the expressed intent of a testator is intestacy, it will be presumed that he designed that result.—Estate of Doc, 1, 54.

The very fact of making a will raises a very strong presumption against any expectation on the part of the testator of leaving any portion of his estate beyond the operation of his will.—Estate of Jones, 2, 178.

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.—Estate of Granniss, 3, 429.

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.—Estate of Pforr, 3, 458.

#### 15. Supplying Defects by Implication.

In order to reach the obvious general intent of a testator, implications may supply verbal omissions.—Estate of Clancy, 3, 343.

When, from the whole will, the court can determine that the testator necessarily intended an interest to be given, which is not bequeathed by express and formal words, the court should supply the defect by implication, and so mold the testator's language as to carry into effect, as far as possible, the intention which he has in the whole will sufficiently declared.—Estate of Maxwell, 1, 145.

#### 16. Rejecting 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.—Estate of Pforr, 3, 458.

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.—State of Pforr, 3, 458.

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.—Estate of Pforr, 3, 458.

#### 17. Transposing Parts of Instrument.

Words or clauses of sentences or even whole paragraphs of a will may be transposed to any extent, with a view to show the intention of the testator.—Estate of Berton, 2, 319; Estate of Behrmann, 2, 513.

Where it appears from the entire language of a will that the testator's intention will be rendered clearer by transposing the order of the bequests, the court will construe the bequests as though the testator had written them in the transposed order.—Estate of Jones, 2, 178.

#### 18. Considering Several Testamentary Writings.

The rule of construction is substantially the same where there are several wills to be harmonized, as where there are several clauses in the same will and codicils.—Estate of Jones, 2, 178.

A will consisting of several parts, separately executed by the testator, must be considered as a single instrument completed in all its parts at one time.—Estate of Maxwell, 1, 145.

Two testamentary instruments are to be taken and construed together as one instrument.—Estate of Jones, 2, 178.

Where two testamentary instruments are admitted to probate as the last will of the testator, each instrument in itself being complete as a will and each containing a residuary clause, the two clauses are inconsistent and the latter clause prevails, unless it fails in whole or in part, in which event the residuary clause of the prior will operates. *Estate of Jones*, 2, 178.

### 19. Residuary Clauses.

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.—*Estate of Granniss*, 3, 429.

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.—*Estate of Granniss*, 3, 429.

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.—*Estate of Granniss*, 3, 429.

Residue or residuum, technically, is the remainder or that which remains after taking away a part; in a will, such portion of the estate as is left after paying the charge, debts, devises and legacies; and the presumption is that the testatrix used it in that sense, unless a contrary intention clearly appears.—*Estate of Scott*, 1, 368.

Where a will is drawn for a testatrix by an attorney, the word "residue," as used in the instrument, will be taken technically, and no resort can be had to artificial aid in its interpretation when natural reason and the circumstances of its insertion make clear its meaning. *Estate of Scott*, 1, 368.

The residuary clause of the will in this case is construed as making a gift to the persons therein named as a class.—*Estate of Langdon*, 4, 357.

Where absolute discretion to dispose of property is left with a residuary legatee, this is equivalent to a personal legacy.—*Estate of Hanson*, 3, 267.

### 20. Property Given and Estate Created.

The provisions of the will in this case show that the testator divided his property into two classes: First, the property held jointly with his aunts; and second, all other property.—*Estate of Pearsons*, 2, 250.

The intent of the testatrix in this case was, that the estate be kept whole until the children attain their majority, and the bequest to the husband is dependent upon his living until that time, and was in a measure intended as compensation for the services expected of him by the testatrix in the promotion of the welfare and the education of the children.—*Estate of Berton*, 2, 319.

Where a testator bequeaths his partnership interest, including "moneys out at interest," when he has during his lifetime drawn

moneys from the firm which it is claimed he merely borrowed from it, paying interest thereon, it is held that "moneys out at interest" do not include moneys drawn by him from the firm.—*Painter v. Painter*, 4, 339.

Where a testator leaves certain property to his children, and in a subsequent clause provides that his wife shall share with them in all property, the second clause relates to and is controlled by the first, and the word "all," underscored in the second clause, refers to the property specified in the first clause.—*Painter v. Painter*, 4, 339.

Inasmuch as the testator had no power of disposition over his wife's share of the community property, it is held in this case that she takes half of all the estate as survivor, and half of the remainder under the will, which latter gives her half and the children half.—*Painter v. Painter*, 4, 339.

When an absolute estate has been conveyed in one clause of a will, it is not cut down or limited by subsequent words except such as indicate as clear an intention therefor as shown by the words creating the estate. Words that merely raise a doubt or suggest an inference will not affect the estate thus conveyed. This rule of construction controls the rule that an interest given in one clause of the will may be qualified or limited by a subsequent clause.—*Estate of Richet*, 4, 334.

Words of command addressed by a testator to devisees are as ineffectual to reduce a fee to an estate for life as precatory or explanatory words; such words are not enough to establish an intention that is not gathered from the operative words upon the face of the will. *Estate of Hale*, 2, 191.

A devise or legacy to two or more persons is presented to vest in them an estate as tenants in common.—*Estate of Dager*, 4, 22.

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.—*Estate of Nelson*, 3, 442.

## 21. Taking Per Capita or Per Stirpes.

Where a testator bequeaths one-half of the residue of his estate to the "heirs" of a deceased sister who left a surviving son and six children of a deceased daughter, these heirs take by right of representation and not per capita; that is, one-fourth of the residue goes to the son and one twenty-fourth to each of the six children.—*Estate of Crane*, 2, 535.

Where the testator made a bequest of \$500 "to the heirs of George and William," brothers of his deceased wife, and William was living at the time of the testator's death, it was held that the word "heirs" was used in the sense of "children," and that the bequest should be divided among the children of George and William per capita.—*Estate of Dager*, 4, 22.

Where a testator made a bequest of \$500 "to the heirs of George and William," brothers of his deceased wife, it was held that the bequest was intended to be given as an entirety to a single class, namely, the heirs of George and William, and to whomsoever, at the time of the death of the testator, should come within that class as tenants in common, and that they should take equally, that is, per capita and not per stirpes.—*Estate of Dager*, 4, 22.

## 22. Conditional or Contingent Devises or Bequests.

A conditional devise necessarily implies that the devisee shall be living at the time of the happening of the condition.—Estate of Clancy, 3, 343.

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.—Estate of Clancy, 3, 343.

A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.—Estate of Clancy, 3, 343.

A legacy is contingent or vested, just as the contingency, if any, is annexed to the gift or to the payment of it.—Estate of Clancy, 3, 343.

Under a will which reads: "I give to my daughter all the property of which I die seised, remainder to the heirs of her body in fee simple, but in the event of her death without surviving heirs of her body, I direct said remainder to be distributed to my heirs then surviving according to the law of descent at the date of my daughter's death," the remainders cannot be attacked as invalid on the ground that the contingencies on which they depend are double or constitute a possibility upon a possibility; they are alternate, and respectively depend on only one contingency.—Estate of Fitzgerald, 2, 172.

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. Estate of Clancy, 3, 343.

## 23. Vesting of Devises or Bequests.

A bequest must be construed as vested unless the testator has in terms declared otherwise.—Estate of Hall, 4, 447.

The law always inclines to treat interests as vested, and in cases of doubt or mere probability it declares legacies vested.—Estate of Hall, 4, 447.

The word "entitled" as used in section 1658 of the Code of Civil Procedure refers to the vesting of the legacy.—Estate of Hall, 4, 447.

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.—Estate of Clancy, 3, 343.

A bequest to a person on attaining the age of twenty-five years is vested on the death of the testator.—Estate of Hall, 4, 447.

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.—Estate of Clancy, 3, 343.

The devise in this case to the widow and daughter of the testator upon the "termination of the trust" is held to be a devise of a vested remainder postponed in possession merely.—Estate of Doe, 1, 54.

Where a testator gives to B a specific fund or property at the death of A, and in a subsequent clause disposes of all his property, the combined effect of the several clauses, as to such fund or property, is to vest it in A for life, and after his decease in B.—Estate of Maxwell, 1, 145.

#### 24. Devise for Life.

A tenant of realty, specifically devised to her for life, is not entitled to possession on testator's death. But as she will be entitled to the rents, issues and profits upon distribution of the estate, her intermediate occupancy might not ordinarily challenge criticism; yet aliter, if objection is made.—Estate of Shillaber, 1, 101.

#### 25. Specific Bequests or Devises.

Where property specifically bequeathed is sold under order of court, the legatee is not entitled to the proceeds before distribution, but the same must be held subject to administration.—Estate of Ricaud, 1, 212.

A legatee of a specific bequest can take only such interest in the property bequeathed as the testator had a right or power to dispose of by will.—Estate of Ricaud, 1, 212.

If in subdivision 18 of his will a testator gives all the rest and residue of his property to his brothers and sisters, share and share alike, and in subdivision 22 he directs that certain real estate be sold and the proceeds "distributed pursuant to the eighteenth subdivision thereof," the devise in subdivision 22 is specific, and therefore cannot abate, the reference to subdivision 18 being only to identify the devisees.—Estate of Lannon, 5, 416.

#### 26. Substitutional Legacies.

Where a decedent leaves two testamentary instruments which are admitted to probate as his last will, in each of which he bequeaths to several persons, respectively, the same amounts, and denominating each instrument as his last will, such language constitutes intrinsic evidence of the testator's intention, and the legacies in the latter instrument are substitutional for those contained in the former.—Estate of Jones, 2, 178.

#### WITNESSES.

1. CREDIBILITY, 598.

2. COMPETENCY OF HUSBAND AND WIFE, 598.

Attestation of will. See Wills, sec. 6.

Expert testimony. See Expert Witnesses.

Jury as judge of credibility. See Jury, sec. 2.

Mileage and fees as costs. See Costs, sec. 3.

Testimony of witnesses to prove execution of will. See Probate of Will, sec. 3.

Weight and credibility of evidence. See Evidence, sec. 2.

### 1. Credibility.

A court is not warranted in imputing want of veracity to a witness, unless it appears that willful falsehood has been told.—Estate of McDougal, 1, 456.

A witness false in one part of his testimony is to be distrusted in other parts.—Estate of Dolbeer, 3, 232.

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.)—Estate of McGinn, 3, 26.

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.)—Estate of McGinn, 3, 26.

A witness false in one part of his testimony is to be distrusted, but the court should be satisfied that the witness has testified falsely, and may discriminate between distrust and utter rejection of testimony.—Estate of McDougal, 1, 456.

Each witness is a man or woman to be treated as an individual, a moral unit, tested for integrity and veracity on his merits or her title to credit by the inherent and extrinsic elements of belief, or the circumstantial criteria of credibility. These are the only considerations for the court in weighing evidence.—Estate of Scott, 1, 271.

Persons employed in domestic service and other categories of honest labor are entitled, as witnesses, to credence equally with those who plume themselves on their higher level, affecting to look down on those who work for wages as inferior. Before the law there is no such distinction, and in courts of justice all must be co-ordinated, irrespective of the accidents of artificial and conventional social relations. Estate of Scott, 1, 271.

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.—Estate of Dolbeer, 3, 232.

### 2. Competency of Husband and Wife.

Subdivision 1 of section 1881 of the Code of Civil Procedure, in disqualifying husband and wife to testify for or against each other, is a declaration of the common law.—Estate of Goff, 5, 432.

In furtherance of justice and for the purpose of exposing fraud, courts are inclined to relax the rule that husband and wife are disqualified to testify for or against each other.—Estate of Goff, 5, 432.

When the executor and proponent of a will is made the defendant in a contest thereof, he and his wife, she being the sole beneficiary under the will, may not refuse to testify because of the relation of husband and wife.—Estate of Goff, 5, 432.

## WORDS AND PHRASES.

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In defining words and phrases, Code of Civil Procedure, section 16, means words are construed according to the text (here of the statute) and the approved usage of the language.—Estate of McGinn, 2, 313.

The term "transfer" has an application in California to the transmission of title to real property and is of equivalent signification and effect to "grant."—Estate of Spreckels, 5, 311.

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