

**THE CAPITAL JOURNAL**

E. HOFER, Editor and Proprietor. R. M. HOFER, Manager

Independent Newspaper Devoted to American Principles and the Progress and Development of All Oregon

Published Every Evening Except Sunday, Salem, Ore.

**SUBSCRIPTION RATES:**  
(Invariably in Advance)

Daily, by Carrier, per year \$6.00 Per month .50c  
Daily, by Mail, per year 4.90 Per month .45c  
Weekly, by Mail, per year 1.50 Six months .90c

FULL LEASED WIRE TELEGRAPH REPORT



**AN INTERESTING DECISION  
ON INTERPRETATION OF WILLS**

The Will and Codicil of a Rich Portland Man Causes Much Litigation, But Is Finally Settled by the Supreme Court--Some Knotty Points on which Precedents are Wanting and Decisions at Variance Are Decided.

**OREGON SUPREME COURT DECISIONS**

Full Text Published by Courtesy of F. A. Turner, Reporter of the Supreme Court.

**Love v. Walker, et al, Multnomah County.**

Green C. Love, respondent, v. Emma J. Walker, Alistress L., Peach-er, Nancy M. Finkle, Sarah R. Ander-son, Lena G. Richmond, Sidella F. Hohmann, Lewis G. Stafford, Mary C. Stafford, Hazel King, appellants. Belle Robinson, Frank Souers, Inita Souers, Dixon and Jacob Samuels, defendants. Appeal from the circuit court for Multnomah county. Hon. Earl C. Bronaugh, Judge. Argued and submitted March 28 1911. H. J. Big-ger and Wallace McCamant, for re-spondent. Wm. M. Gregory and Dan J. Malarky for appellants. Moore, J. Reversed.

This is a suit to determine an ad-verse interest in real property. The facts are that on January 5, 1899, a last will and testament was made and published as follows: "Know all men by these presents: That I, Lewis Love, of Portland, Multnomah county, Oregon, being over the age of 80 years, and being of sound and disposing mind and memory, do make and declare this as my last will and testament, in manner and form fol-lowing, that is to say: I make, con-stitute and appoint T. T. Struble, Philo Holbrook and H. C. Breeden executors of this my last will and testament, and request and direct that no bonds or undertaking be re-quired of them as such, nor of them as trustees to hold my estate to a certain time hereinafter mentioned. I direct that all of my just debts, in-cluding funeral expenses and the ex-penses of administration be paid by my executors. In order that my pur-pose and ownership of property shall be clearly understood, I hereby pre-face my devise and bequests as fol-lows: I have made no deed to any person or persons to any real or per-sonal property to take effect at or after death. I made five deeds to my children and grandchildren Septem-ber 21, 1894 which were executed and acknowledged before T. T. Struble, notary public. I made eight deeds to my children, grandchildren and grandchild December 28, 1896, which were also acknowledged be-fore T. T. Struble, notary public; other than these mentioned deeds, I have made none since the first men-tioned ones of date September 21, 1894. I am the owner absolute of the following real property in the city of Portland, Oregon: Lots 1 and 2, block 117, city; lot 4, block 116, city; lot 3, block 10, city; north half lot 2, block 10, city; lot 8 block 111, city; south half of lot 2 block 4, city; the east 75 feet and 11 inches of the south half of lot 4, block 3, city; the north half of lot 4, block 3, city; the south half of lot 3, block 3, city. I have never made a deed to any per-son or persons of any part or piece of this property whatever. I also own 757 acres, more or less, of land in sections 10, 11, 14 and 15, town-ship 1 north, range 1 east, Willam-ette meridian; a portion of this land is outside of and a portion inside of the city limits of Portland, Oregon. I have made no deed to any of this acreage to any person or persons at any time, except for Columbia Cem-tery. It is my purpose to will at this time all of my property personal, real and mixed, to my legal heirs in the same proportion as the law would convey the same to them in the ab-sence of any will by me reserving only the burial place where my wife is now buried, and a strip of land two feet in width adjacent thereto on the west north and east of said bur-ial spot, and I hereby set aside said burial place (spot) and said two feet

of land adjacent thereto forever as a resting place or burial spot for wife and myself; said burial place joins Columbia Cemetery on the northwest corner, which said cem-tery is in section 10, township 1 north; range 1 east, Willamette mer-idian.  
"My will is and I direct that my estate shall be divided into six (6) shares or parts of equal value, to be disposed of in the following man-ner, viz: First, I give, devise and be-queath to my son, Fred D. Love, one of said shares or parts. Second, I give, devise and bequeath to my son, Green C. Love, one of said shares or parts. Third, I give, devise and be-queath to my son, Lewis P. Love, one of said parts or shares. Fourth, I give, devise and bequeath to my grandson William King, a son of my deceased daughter, Mallinda J. Shep-herd, one third part of one of said shares or parts. Fifth, I give, devise and bequeath to my grand-daughter, Matilda Shepherd, wife of James Shepherd, and a daughter of my deceased daughter, Mallinda J. Shepherd, one-third part of one of said shares or parts. Sixth, I give, devise and bequeath to my great-granddaughter, Hazel King, who is a minor child, and a daughter of Al-bion King, deceased, who is a son of my deceased daughter, Mallinda J. Shepherd, one-third part of one of said shares or parts. Seventh, I give, devise and bequeath to my daughter, Mary C. Stafford, one of said shares or parts. Eighth, I give, devise and bequeath to the children of my deceased son, William Love, one of said shares or parts of my es-tate to be divided among said child-ren as follows: To L. W. Love, the one-fifth part of said share; to John A. Love, the one-fifth part of said share; to Ulysses G. Love, the one-fifth part of said share; to Charles W. Love, the one-fifth part of said share; to Frank P. Love, the one-fifth part of said share.  
"It is my will and purpose that my estate shall be kept intact and not distributed to my devisees till Jan-uary 1, 1907, (nineteen hundred and seven). I direct that my executors shall proceed to administer upon my estate at once after my demise, and having in due time closed up my estate as executors, that then my es-tate shall pass to them as trustees, to be held in trust for my said devisees till January 1, 1907, and man-aged by them as such trustees till the time of final distribution. I di-rect that my trustees, T. T. Struble, Philo Holbrook and H. C. Breeden, from time to time as the receipts of my estate may exceed the expendi-tures, such portion thereof as in the judgment of my said trustees can safely be distributed, be distributed and paid to the devisees pro rata not oftener than two times in each 12 months. I direct that my trustees make final distribution of my estate on January 1, 1907, or as soon there-after as practicable, and if my de-vicees can agree, said final distribu-tion can be by division of my prop-erty by such agreement, but if they cannot so agree, then my trustees shall make a division of my property according to the shares and parts of shares in my estate and my devisees can cast lots for their several inter-ests either in person or by their law-ful representatives. Be it remem-bered, however, that in the adminis-tration of my estate by my executors, and before they close up my estate, and it passes to them as trustees, all personal property is to be sold, and the proceeds of such sale will belong

to and become a part of my estate. "In their trust my trustees are hereby empowered to rent property and collect rents, make necessary repairs to property, pay taxes, or to be more explicit, they are empowered hereby to collectively do all acts that I would do were I living, necessary to protect and keep my estate intact for my devisees hereinbefore men-tioned. Should a vacancy occur in my trustees, then the remaining ones or one are to act and carry out this trust. This is my only will, but I now refer to a canceled will made by me April 13, 1896, for the purpose of corroborating the idea that it was always my purpose to distribute my property equally between my several children and to the heirs of those of my children who had died, leaving children or grandchildren.  
"Be it remembered that reference to said canceled will should not make it a part of this will, but only to show what my intentions have al-ways been toward my heirs. Refer-ence to the fact in this will that I am the owner of and have made no deed to certain property, is because I have been informed reliably, of one fraudulent deed to certain valuable property purporting to have been made by me and also have heard rum-ors of the existence of another fraudulent deed. I pronounce and declare all such deeds or deed as fraudulent; and any and all claims of any person or persons of having genuine deeds or titles to any of the property hereinbefore described, are false and villainous, and I hereby in-struct my executors and trustees to contest any such claims to the utter-most, that my property may be kept intact and saved to my lawful heirs as herein devised. And lastly, I do hereby revoke all other wills hereto-fore made by me, and declare this and no other to be my last will and testament, and desire that of this pro-perty shall be taken and admitted to probate as a muniment of title.  
In witness whereof I have here-unto set my hand this 5th day of January, 1899. (Signed) Lewis Love. (Seal).  
"The above instrument was at the date thereof signed, sealed, published and declared by the said Lewis Love as and for his last will and testament, in presence of us who at his request, and in the presence of each other, have subscribed our names as wit-nesses thereto. (Signed) O. P. S. Plummer, residing at Portland, Ore-gon. Edward Holman, residing at Portland, Oregon.  
At the time the will was made plaintiff was a widower and two children of a deceased daughter were his only living issue. He subsequent-ly remarried, however, but no issue resulted from the union. A suppl-emental testament was made of which the following is a copy: "I, Lewis Love, of Portland, Oregon, do make this codicil to my will. I hereby ex-pressly confirm my last will, dated January 5, 1899, excepting in so far as the distribution of my property is changed by this codicil. First, I hereby will, decree and declare that the devise or legacy to my daughter, Mary C. Stafford, in my said will, shall be for her sole and separate use, in dependent of her husband at all times and that at her death the said devise or legacy to her shall go to her children, share and share alike. Second, I hereby will, decree and declare that the devise or legacy, in my said will, to my son, Fred D. Love, shall be for his sole and separate use, independent of his wife at all times, and that at his death the said devise or legacy shall go to his children, share and share alike. Third, I hereby will, decree and de-clare that the devise or legacy in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death with-out lawful issue, born alive and liv-ing at the time of his death then the said devise or legacy to him shall belong and go to the remaining de-vicees of my said will in proportion as they hold of the shares or parts of my said will. Lastly, I declare this is a codicil to my will, and that this is the only codicil that I have made and I hereby declare my said will of date January 5, 1899, to be my last will and testament and also hereby re-affirm the same in every particular, except as modified by this codicil, which codicil is to be at-tached to the said will.  
"Witness my hand and seal this 26th day of February, 1902.  
(Signed) "Lewis Love." (Seal)  
The testator died July 3, 1903, and his will and codicil having been pro-bated and the estate settled, the trustees set off to plaintiff the real property described in the complaint. Several of the devisees executed to plaintiff deeds of any possible interest they might have in his allotment but others of them having asserted ad-verse claims thereto, this suit was instituted to determine the issue and the cause having been tried and the relief prayed for in the complaint granted, most of the defendants ap-peal from the resulting decree.  
Moore, J.: It is maintained by plaintiff's counsel that the will gave to their client an estate in fee in the premises; that the codicil does not clearly evince an intention to abridge such absolute interest; that the con-dition stated therein, associated with the contingency of dying "without lawful issue born alive and living at

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Others are imitations.

the time of his death" does not mean the end of plaintiff's life at any time, but his decease prior to that of the testator, or before a partition of the real property. It is insisted by the defendants' counsel, however, that the clause in the codicil, "in case of his death," means plaintiff's dis-solution at any time prior or subse-quent to that of the testator or be-fore or after January 1, 1907 when the land was to be divided, whereby they have possible interests in the real property involved and that in re-jecting their claims an error was committed.  
An irreconcilable conflict of jud-icial utterance exists as to the occur-rence of a possible uncertain inci-dent such as is referred to in the third clause of the codicil. In speak-ing of a similar testamentary direc-tion a text writer says: "The gen-eral rule is that where the contest is silent, the words referring to the death of the prior legatee, in con-nection with some collateral event, ap-ply to the contingency happening as well after as before the death of the testator." 2 Jarman, Wills (6th Ed.) 719. See also Rood, Wills, Sec. 653. Another author, referring to the same subject, observes: "The intention of testator that dying without issue may mean a death after the death of tes-tator may also be inferred from oth-er provisions in the will. Thus, a provision that, in case of the death of the beneficiary without issue, her share shall revert to the estate of testator shows that he contemplates her death without issue after his own. So a provision that certain lands shall pass to testator's sons after the death of testator's widow, provided that if either dies without issue his estate shall pass to an- other, shows that the death without issue meant a death after that of testator." Page, Wills, 798. In the excerpt last quoted it will be ob-served from the allusion to a tes-tator's "estate," which means the property he might leave at his death, and from the reference to a tes-tator's "widow" which necessarily sig-nifies her expected survivorship the intention is deduced that the contin-gency specified is supposed to occur after the testator's death. In the case at bar it will be remembered that the codicil declares that if plaintiff die without lawful issue him sur-ving, "then the said devise or leg-acy to him shall belong and go to the remaining devisees of my said will in proportion as they hold of the shares or parts of my said will." As the remaining devisees could not take any estate or interest in the testator's property until his death, the word "hold" as used in the third clause of the supplemental testament manifests an intention that the de-claration of the contingency of plain-tiffs death without issue meant his decease subsequent to that of the testator. If, however, the condition of death without lawful issue liv-ing related to January 1, 1907, when the real property was to have been par-titioned, it may be supposed from the testator's advanced age when the will was made that he could not reason-ably have expected to live until that time, and that at his departure the devisees would have become vested with an estate in the lands which

**STATE NEWS.**  
Cottage Grove is to have a grand sweet pea carnival.  
The residence of Mrs. Ellen G. Mann, of Independence, burned Monday morning. The building and contents were a total loss.  
The James Means residence and the Hermiston warehouse at Hermis-ton burned Monday; loss \$6000.  
The disciples of Isaac Walton had a fine day's sport at Oregon City Monday, and many fine salmon were taken on the hooks--many 40-pound fish being caught.  
The Forest Grove Commercial Club has petitioned the city council to extend the city limits.  
Citizens of Menlo want a railroad, the Clackamas Southern, extended into the Molalla, and have subscribed a bonus of \$5000 to get it.  
J. A. Nice, rural mail carrier on route No. 1 at Springfield, has set the pace by using a motor cycle, and so makes his rounds in less than half the time occupied when he used a horse.  
Weston has shipped 98 cars, 2829 tons of produce, in the past seven weeks.  
Two of the Astoria jail breakers were captured at Clatskanie Friday.  
Eastern Oregon grain crops begin to feel the need of rain.  
The new Harriman bridge at Port-land will be so constructed that the lower deck can be lifted without in-terfering with the upper.

A Leading California Druggist.  
Pasadena, Cal., March 9, 1911.  
Foley & Co., Gentlemen:—We have sold and recommended Foley's Honey and Tar Compound for years. We believe it to be one of the most effi-cient expectorants on the market. Containing no opiates or narcotics, it can be given freely to children. Enough of the remedy can be taken to relieve a cold, as it has no nau-seating results, and does not inter-fere with digestion. Yours very tru-ly, C. H. Ward Drug Co., C. L. Par-sons, secretary and treasurer. Get the original Foley's Honey and Tar Compound in the yellow package. Red Cross Pharmacy.

And we will stop cutting off those nice tender chops always to be had at this market. Just the things for breakfast, or even dinner, if you do not care to bother with a roast. Our lamb is the real thing. No yearling mutton, but genuine spring lamb, tender, sweet and juicy. Try it and you'll surely enjoy it.

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Phone 1880

**Notice of Intention to Improve Court Street.**  
Notice is hereby given that the common council of the city of Salem, Oregon, deems it expedient and pro-poses to improve Court street, in the city of Salem, Oregon, with concrete pavement, from the east line of Twelfth street to the west line of Eighteenth street, at the expense of the adjacent and abutting property within said limits, and according to the plans and specifications adopted for said improvement and on file in the office of the city recorder, which said plans and specifications are hereby referred to for a more spe-cific and detailed description of said improvements, and are hereby made a part of this notice.  
This notice is published for ten (10) days pursuant to the order of the common council, and the date of the first publication thereof is the 25th day of April, 1911.  
Remonstrances may be filed against said improvement within ten (10) days from the last publication of this notice, and in the manner provided by the city charter.  
CHAS. F. ELGIN,  
4-25-11  
City Recorder.

**NO MORE GRAY HAIR**  
It is easier to preserve the color of the hair than to restore it, although it is possible to do both. Our grandmothers understood the secret. They made and used a "sage tea," and their dark, glossy hair long after middle life was due to this fact. Our mothers have gray hairs be-fore they are fifty, but they are begin-ning to appreciate the wisdom of our grandmothers in using "sage tea" for their hair, and are fast following suit. The present generation has the advan-tage of the past in that it can get a ready to use preparation called Wyeth's Sage and Sulphur. As a scalp tonic and color restorer, this preparation is vastly superior to the ordinary "sage tea" made by our grandmothers, and it can be bought for 50 cents and \$1 a bottle at almost any first-class drug store, or will be sent direct by the Wyeth Chemical Company, 74 Cortlandt St., New York City, upon receipt of price.  
J. C. PERRY, Salem Oregon.

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5 pounds best White Beans, 25c.  
6 pounds Whole Grain Japan Rice, 25c.  
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(Continued on page five.)  
  
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