SPREME COURT DECISIONS.

(Continued from Page two.)

thereafter they could hold within the meaning of that word.

A devise of real property is deemed to be a gift of all the testator's estate in the premises subject to his distribution, "unless it clearly appears from the will that he intended to devise a less estate or interest." L. O. L. Sec. 7344. "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true interests (intent) and meaning of the testator in all matters brought before them." Id. Sec. 7347. In the examination of a manuscript, in order to ascertain the intention of a party, courts will take into consideration the ability of the person who drew the instrument correctly to express the terms, objects and purposes desired. Thus in Saunders v. Saunders' Adm'r., 20 Ala. 710, 716, in construing a marriage contract it was held that the intention of the parties was to be gathered from an examination of the entire agreement, though the conclusion reached was contrary to the express provision of a particular clause, the court saying: "This rule we apply in the present case with the less hesitation, for the reason that the settlement bears upon its face the most palpable marks that it was drawn by a person who was not only entirely ignorant of legal forms but incapable of expressing his meaning with clearness and precision."

In the case at bar the testimony shows that the codicil was written by a person evidently unable to express in proper legal form the testator's directions. If the third clause of the supplemental testament transferred an estate in fee to plaintiff his wife has an inchoate right of dower in the premises, which interest, if she survivies him, will become a life estate of an undivided one-half unless she is lawfully barred thereof. L. O. L. Sec. 7286. If the absolute estate to her husband were not cut down by the codicil she could encumber the land by incurring expenses for the support of the family, (Id. Sec. 7039) thereby endangering all the real property, except the homestead, to sale on execution. Id. Sec. 221. The plaintiff could also convey the premises to her in fee. Id. Sec. 7036. The possible consequences suggested could be partially thrwarted by construing the gift to plaintiff "for his sole and separate use, independent of his wife at all times," as manifesting an intention on the part of the testator to bestow a life estate only. As all property of the judgment debtor, except the homestead, is liable to execution, (L. O. L. Sec. 227) it follows that if plaintiff acquired a life estate in the real property, such interest might be subjected to all the incidents indicated, except dower, so that, in all other particulars, the attempt to restrict the rights of plaintiff's wife was almost unavailing. The codicil makes no arrangement for plaintiff's lawful issue in case they survive him, but if he took a fee in the land no provision to that effect was essential. If he were given a life estate, however and his grandchildrn took a fee conditional with a remainder over as an executory devise in case of their death prior to his, and such was the testator's intention, his purpose might in the greater part be effectuated.

The limitation over is not indefinite but takes effect at plaintiff's death without lawful issue him surviving. 17 A. & E. Enc. L. (2d Ed. 564. If he took a fee in the lands such interest would formerly be reduced by the limitation over, upon a definite failure of issue, to an estate in fee tail. Hill v. Hill, 15 Am. Rep. 546. It has been suggested, however, that the statutes of this state, permitting alienation of whatever interest a grantor has in real property, impliedly repealed the statute de donis, which ancient enactment converted estates in fee simple conditional into estates in fee tail. Rowland v. Warren, 10 Or. 129. The absence of the word "heirs" from the codicil does not necessarily imply that a life estate only was given, for words of inheritance are not essential in Oregon to create or transfer an estate in fee simple (L. O. L. Sec. 7103) so that if plaintiff took by the codicil an absolute estate, any attempt to limit a fee upon such a fee will not be sanctioned.

It is argued by plaintiff's counsel that the third clause of the codicil is so different from the first and second which were employed by the testator to cut down the fee simple estate given by the will to Mary C. Stafford and Fred D. Love that a purpose is disclosed to devise to Green C. Love more than a life estate. A comparison of the first and second clauses with the third will shows that the differences observable are in the phrases, "that at her death" and "that at his death" in the former, and "that in case of his death" in the latter, to which contingency is added the condition, "without lawful issue, born alive and living at the time of his death, then the said devise or legacy 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."

The testimony shows that when the codicil was made plaintiff was 52 years old and his wife 46 and for the time of their joint lives, or during his life if he should survive her and remarry, the law will presume the possibility of issue. Hamilton v. Sidwell and note on the rule in Shelly's Case, 29 L. R. A. (N. S.) 961, 1021. In view of such presumption it is unreasonable to suppose that the testator desired to exclude this son's lawful issue from taking the share to which each would be entitled if living at the time of plaintiff's death. As such issue would take a proportion of the share set off to Green C. Love, based on the ratio determined from the number of his children, his grandchildren would take the part of their mother by representation and not a full share in case other lawful issue survived plaintiff's death. These possible conditions and the manifest purpose of the testator to prevent plaintiff's wife from acquiring an estate in fee or a dower right to any part of the land evidently induced the difference noticeable in the codicil respecting the devisees to Mary C. Stafford, Fred D. Love and Green C. Love, each of whom in our opinion took only a life estate.

It will be remembered that the will directed the executors to sell the personal property and settle the estate, after which, as trustees, they were empowered to lease the real property, collect rents, make necessary repairs and pay taxes, but as they were required to protect and keep the real estate intact for the devisees, they were impliedly prohibited from selling any part of the premises. We conclude, therefore, that they never took the legal title to, but held the possession of the land and that their duties were fully discharged when they had divided the premises into six parts of equal value and set off the several shares to the devisees entitled thereto who at the death of the testator and prior to such apportionment took as tenants in common, a vested estate in fee in the real property. The rule of construction prevailing in most states of the Union is that a devise of a fee, coupled with a condition that if the devisee die without issue the estate is to go to others, means dying without issue in the lifetime of the testator, unless a different intention is manifest from the context of the will. "The presumption that the contingency of dying without issue" says the author of the exhaustive note to the case of Lumpkin v. Lumpkin, 25 L. R. A. (N. S.) 1063, 1064, "is to be restricted to testator's lifetime being fundamentally limited to cases where an absolute gift is made to the first taker, in express terms or by implicaton, is not applicable where the gift is clearly of a less interest."

No attempt will be made to reconcile the conflicting decisions or to determine the weight of authority upon the question of death of a devisee in connection with some collateral fact, supposed to happen either before or after the death of a testator, but the decision of this cause will be placed on what is believed to be the purpose of Lewis Love respecting the objects and the extent of his bounty. The intention of a testator is the guide in construing the terms of his last testament, and if his design can reasonably be ascertained, it controls the disposition of his property. Shadden v. Hembree, 17 Or. 14, 20; Jasper v. Jasper, 17 Or. 590, 593; Portland Trust Co. v. Beatie, 32 Or. 305, 309.

If, after giving a fee to plaintiff, the will had also included the third clause of the codicil, it is possible that a presumption might be invoked that the condition of dying without living issue would be construed to mean the death of plaintiff before that of the testator, so that on the happening of the latter event the absolute estate would have become vested in Green C. Love, of which he could not have been deprived on account of any failure of issue him surviving. But however this may be, the legal principle thus adverted to can, in our opinion, have no application to the case at bar, for insofar as the codicil conflicts with the will, it is the last expression of a testamentary disposition of property, revoking the will to the extent of the disagreement in their provisions and preventing a construction of their terms with reference to each other. Examining the will and codicil as each dovetails into and thus necessarily become a part of the other, and regarding plaintiff, who is the first taker, to have been the favorite object of the testator's bounty, and as such entitled to the benefit of every implication in his favor, but considering the conflicting provision of the cocdil as revoking the will pro tanto, we nevertheless believe that the term "use," as employed in the supplmental testament and as modified by its other provisions, clearly evinces an intent on the part of Lewis Love to give to plaintiff a life estate only, since that word, when applied under similar conditions, generally means the transfer of an interest in land of that duration. 8 Words & Phrases, 7228; Brunson v. Martin, 152 Ind. 111; Spooner v. Phillips, 16 L. R. A. 461; In re Metcalfe's Estate, 27 N. Y. Supp. 879. The deduction that plaintiff took only a life estate is strengthened by the provision of the codicil which treats the premises to be partitioned to him as remaining undiminished at his death, thereby impliedly denying to him the right of alienation. The determination thus reached leaves for onsideration the inquiry of who were intended as the devisees in fee of the land, and what is the order of their respective rights.

It is a well recognized legal principle that an heir at law can only be disinherited by express devise or necessary implication. Bender v. Deitrick, 7 Watts & S. 284, 287. That the testator did not intend to exclude plaintiff's grandchildren from sharing his estate in case of the death of Green C. Love, if they or either survive him, appears to be manifest from a clause of the last will, to-wit: "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." Though neither of these great-grandchildren is named in the will or codicil, nor is any provision expressly made for them, we think it is fairly disclosed from the context of the codicil that if either were living when plaintiff died such survivor or survivors would take the real property or a part thereof in fee by implication.

The term isue, as used in the codicil, includes, among others, grandchildren (17 A. & E. Enc. L. (2d Ed) 544) and since plaintiff's lawful issue of that degree were in esse when the supplemental testament was made, and as he took by the codicil only a life estate in the land, they, as remaindermen, became vested with a fee conditional at the death of the testator subject to such life estate and to the possibility of their interest being diminished by the birth of other issue, and to the remainder over by way of executory devise to the other devisees, in case these grandchildren or any other issue of plaintiff do not survive him. 30 A. & E. Enc. L. (2d Ed) 701; Still v. Spear, 3 Grant's Cas. 306; Sturges v. Cargill, 1 Sanf. Ch. 318.

This conclusion, in our opinion, upholds the testator's intention as gathered from the will and codicil when viewed in their entireties where necessary, and considering the supplemental testament as a last will which revokes the prior will insofar as it conflicts therewith. If Lewis Love had designed that the remaining devisees should take as remaindermen, on the termination of plaintiff's life estate, and that the lawful issue of the latter who should be living at his death were to be excluded there would have been no need to refer to such contingency, but the allusion to plaintiff's decease under the condition indicated shows a purpose that such issue, if surviving, should take the remainder, though not so expressly stated, and if plaintiff should die without lawful living issue, the remaining devisees are to take the lands in fee as an executory devise.

It follows from these considerations that the decree is reversed and the suit dismissed.

Notice of Intention to Imporve "D" Street.

"Notice is hereby given that the common council of the city of Salem, Oregon, deems it expedient and proposes to improve "D" street in the City of Salem, Oregon, with El Oso pavement, on a bituminous base, from the west line of Twentieth street westerly to 112½ feet west of the west line of Winter 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 at the office of the city recorder, which said plans and specifications are hereby referred to for a more specific and detailed description of said improvement, 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,
City Recorder.

4-25-11t

Balked at Cold Steel.

"I wouldn't let a doctor cut my foot off," said H. D. Ely, Bantam Ohio, "although a horrible ulcer has been the plague of my life for four years. Instead I used Bucklen's Arnica Salve, and my foot was soon completely cured." Heals burns, boils, sores, bruises, Eczema Pimples, corns, surest pile cure, 25c at J. C. Perry's.

CELEBRATED MAY DAY AT THE WILLAMETTE

GAVE THE CORONATION A DECIDEDLY ENGLISH FLAVOR, "DON'T YER KNOW," AND ALSO SURROUNDED THE GOOD THINGS TO EAT.

Although the rain of yesterday took some of the enjoyment from the exercises, the entire May day at Willamette University was a continual round of pleasure for all the students who participated. About 200 students and others came in the morning and ate the breakfast which the Y. W. C. A. girls had prepared for the occasion. Noon also brought a free feed to all who came, and the dining room of the Eaton Club was crowded.

The coronation of the King and Queen of May was bag feature of the day. The ceremony took place in the chapel. Picked singers from the glee club and ladies' club sang several numbers, and the Duke of Canterbury placed the crown upon the kneeling prince. The Duke of York then crowned Miss Alma Haskins queen. She spoke briefly to her subjects, and the chorus joined in the song "Long Live the Queen."

The track meet, which took place yesterday afternoon, was the most closely contested ever seen upon the Willamette field. At the finish of the third event from the last the score was tied. Lowe and Mills arose to the occasion and pulled down first and second in the 220 hurdles and Willamette was seven points ahead. Pacific captured the relay race, and score stood finally 60 to 62 in favor of Willamette. Blackwell was the star performer for Willamette, making 21 points, receiving first honors in the 100-yad dash, broad jump and shot-put and second in the 220-yard dash and the 50-yard dash. Ferrin, of Pacific, received first in the pole vault, and high jump, while Bryant was their strong man on the sprints. In the broad jump and shot-put W. U. received all three places, and, the strange part of it, was that the same three men took the same places in both events. Blackwell, Westley and Rader. Austin, the crack distance man from Pacific, easily took the mile and the half, although Rowland, of Willamette, ran a plucky race, getting second in both contests.

A return meet will be held a short time later at Cottage Grove.

HOTEL ARRIVALS

Hotel Marion: R. C. McMillan, J. U. McDonald, E. E. Nelson, W. H. Treece, Mr. and Mrs. C. H. Ross, L. A. Crinkshank, W C. Smith, Jr., W. H. Adams, Grace Fancis, Ben Ettelson, R. E. Byron, W. R. Campbell, P. A. Gilmore, W. L. Archambeau, L. Nemire, C. F. Byrne, Mr. and Mrs. Harry Heard, F. B. Tichenor, Portland; Mrs. M. Crapp, Eugene; A. D. Mabry, Eugene ;Ben Luddington, Mrs. F. A. Mathis, Myrtle Creek; J. F. Cullison, Eugene; J. S. Silsby, Cottage Grove; M. J. Monteith, Albany.

Salem Hotel: Leonard Walker, Monoe, Ore.; Beryl Christenson, Dayton, D. H. Parshall, Portland; Jas. P. Feller, Donald; J. W. McKee, Silverton; P. F. Seeck, Lebanon. D. A. Jones, Oregon City; Mr. and Mrs. H. P. Wagner, Turner; L. Maulding, Silverton; Peter McCabe, Eureka, Cal.; Mr. and Mrs. A. M. Robertson and boy, Aumsville.

Cottage Hotel: Mrs. Clara Kauffman, Falls City; Mrs. S. H. Coleman, Cordova, Alaska; Nellie M. Davis, W. Johnson, Portland; A. E. Bradshaw, Stayton; S. H. Williams, Kingston; E. T. Andrews, Eugene; W. F. McDaniel, Bandon; Holman B. Ferrin, Forest Grove.

Capital Hotel: C. T. Edwards, Seattle; W. W. Peebles, St. Louis, Mo.; C. S. Waite, J. E. Abel, W. P. Bakewell, Portland; George W. Stover, Scotts Mills; A. S. Cook, San Francisco; D. H. James, Red Bluff; W. L. Orr, Frank Davis, O. A. Thomas, Portland; Callie Ramsdell, Fenton, Mich.; H. A. Dawson, San Francisco.

Starts Much Trouble.

If all people knew that neglect of constipation would result in severe indigestion, yellow jaundice or virulent liver trouble they would soon take Dr. King's New Life Pills, and end it. It's the only safe way. Best for billiousness, headache, dypepsia, chills and debility. 25 cents at J. C. Perry's.