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New Jersey Court of Errors and Appeals

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Between
David F. Plahn, as Administrator Substituted for Josephine Givernaud and Naomi Josephine Marie Genin,
Complainants,

and

Anita Variel et als.,
Defendants.

20

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,

and

Anita Variel et als.,
Defendants.

On Bill, etc.

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ORDER TO AMEND BILL, ETC.

The defendants, Anita Variel, Joseph Givernaud, Alaska Givernaud Aiken, Lillie Givernaud Short, Charles L. Givernaud, May Regina Givernaud, The Italian Benevolent Institute of New York, The

New Jersey State Library

French Benevolent Society of New York, Thomas A. Kennedy and Oscar Vezin, Jr., executors of the last will and testament of Louis Givernaud, deceased, having filed their answers to the bill of complaint in this cause, and the defendants, Marie Joseph Paul Henri Genin, Marie Josephine Marcianne Martha Genin and Marie Joseph Laurent Maurice Genin, by their Guardian *ad litem*, Samuel K. Robbins, having filed an appearance, and it appearing that due notice has been given of this application, and on good cause shown:

It is, on this fifth day of June, nineteen hundred and eleven, on motion of Besson, Alexander & Stevens, solicitors of the complainants, ordered, that the said complainants have leave to amend their bill as they shall be advised.

And it is further ordered that they pay to the said defendants, Anita Variel, Joseph Givernaud, Alaska Givernaud Aiken, Lillie Givernaud Short, Charles L. Givernaud, May Regina Givernaud, The Italian Benevolent Institute of New York, The French Benevolent Society of New York, and Thomas A. Kennedy and Oscar Vezin, Jr., executors of the last will and testament of Louis Givernaud, deceased, the costs of the answers, heretofore filed, to be taxed.

And it is further ordered that copies of the amended bill be served on the defendant's solicitors, and that the said defendants have thirty days thereafter to plead answer or demur to said amended bill.

MAHLON PITNEY.

Filed June 7, 1911.

SAMUEL K. ROBBINS,
Clerk.

AMENDED BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

To the Honorable Mahlon Pitney, Chancellor of the State of New Jersey:

Humbly complaining, show unto your Honor, your orators, Jeanne Marie Josephine Givernaud, *nee* Haour, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, widow of Camille Genin, all of the City of Lyons, in the French Republic, that they are, the said Jeanne Marie Josephine Givernaud, the widow, and said Joseph Givernaud and Marie Genin, the children and next of kin of Barthelemy Louis Givernaud, also known as Louis Givernaud, deceased; that the said deceased departed this life on the second day of January, nineteen hundred and eight, at Los Angeles, in the State of California, having on or about the fourth day of November, nineteen hundred and seven, executed a last will and testament, in writing, a copy of which is hereto annexed, and marked "Exhibit A," and hereby made a part hereof.

Your orators further show that said last will and testament of the said deceased was admitted to probate by the Surrogate of Hudson County, in the State of New Jersey, on the fourteenth day of January, nineteen hundred and eight.

Your orators further show that notwithstanding the self-serving declaration in said will contained whereby said deceased described himself as being of West Hoboken, Hudson County, New Jersey, the said deceased at the time of his death and for upwards of fifteen years prior thereto, was a resident of and domiciled in the City, County and State of New York.

Your orators further show that the estate of said deceased consisted of personal property to the amount of two hundred and ninety-eight thousand dollars, as shown by the inventory filed by Thomas

A. Kennedy and Oscar Vezin, Jr., executors of the last will and testament of said deceased, in the Surrogate's Office of Hudson County, on the fourth day of February, nineteen hundred and eight, and recorded in Book 31 of Inventories, on page 64, as by reference thereto will more fully appear.

And your orators further show that the trust in said last will and testament is governed by and subject to the following provision of the personal property law of the State of New York, being section 2 of Chapter 417 of the Laws of 1897, of the State of New York, namely:

> "Suspension of ownership.—The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; in other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property."

Your orators further show that, by virtue of the aforesaid statute of the State of New York, of which State the said deceased was a resident and in which he was domiciled at the time of his death and long prior thereto, the trust attempted to be created by the said last will and testament of the said deceased is void and of no effect, and that the personal property in the hands of the said Thomas A. Kennedy and Oscar Vezin, Jr., the persons mentioned and described in said last will and testament as the executors and trustees thereunder, and who received the estate as such, should be accounted for to your orators by said Thomas A Kennedy and Oscar Vezin, Jr., and be distributed to them according to the statute of distributions of the State of New York,

as set forth in Section 2732 of the Code of Civil Procedure of the State of New York, reading as follows:

> "Section 2732. Order of Distribution. If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:
>
> "1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased."

That by virtue of the aforesaid statute of distributions of the State of New York your orators, upon the death of said deceased, became entitled each to one-third part of the personal property of the said deceased.

And your orators further show that the said deceased, Barthelemy Louis Givernaud and the said Josephine Haour Givernaud, were both born at Lyon, France, the said Barthelemy Louis Givernaud on the twenty-first day of April, 1835, and the said Josephine Haour Givernaud on the sixteenth day of April, 1833, where they subsequently intermarried on the fifth day of February, 1860, both being at the time of French nationality and citizenship, and both then residing and domiciled at Lyon, France, which thus became and always remained their matrimonial domicile; that your orators, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, were the issue of said marriage, both born at Lyon, France, and upon their birth became vested under the provisions of the Civil Code of France, with a right to the estate of each of their parents as set forth in Sections 893 and 913 of the said Civil Code of France, of which the following is a correct translation:

"Section 893. No one can dispose of his property gratuitously except by a donation *inter vivos* or by a will under the terms hereinafter established."

"Section 913. Donations either by instrument *inter vivos* or by will cannot exceed the half of the property of the donator if he leaves at his decease an only child; they cannot exceed one-third of his property if he leaves two children, or one-quarter if he leaves three children or more."

That by reason of said provisions of the Civil Code of France, your said orators, Joseph Givernaud and Normi Josephine Marie Genin, *nee* Givernaud, could not be deprived each of one-third or both of two-thirds of the estate of each of their said parents either by donation by instrument *inter vivos* or by will, and that before any property can be distributed under the aforesaid will of said Barthelemy Louis Givernaud, your said orators, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, are entitled to receive out of the estate of the deceased, each of your said orators one-third thereof or both together two-thirds thereof.

Your orators therefore pray that the trust attempted to be created by the said last will and testament of the said deceased be declared void and of no effect, and that the said Thomas A. Kennedy and Oscar Vezin, Jr., the persons named as executors and trustees thereunder and who, as such, received the estate of the said deceased, be directed to account for and distribute the said estate to your orators in accordance with the said provisions of the Statute of Distributions of the State of New York.

And your orators Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, in their separate behalf, pray that their rights under the aforesaid provisions of the Civil Code of France be ascertained and that the said Thomas A. Kennedy and Oscar Vezin, Jr., the persons named as executors

under the said last will and testament of the said deceased be decreed to pay to each of your said orators one-third of the estate of their father.

And your orators further pray that this Honorable Court shall grant to them and each and either of them such other and further relief as this Court may seem just.

May it please your Honor, the premises considered, to grant unto your orators the State's writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to the said Anita Variel, Joseph Givernaud, Alaska Givernaud, Lilly Givernaud, Charles L. Givernaud, May Regina Givernaud, Marie Joseph Paul Henri Genin, Marie Josephine Marcianne Martha Genin, Marie Joseph Laurent Maurice Genin, the Italian Benevolent Institute of New York, the French Benevolent Society of New York, and Thomas A. Kennedy and Oscar Vezin, Jr., executors and trustees of the last will and testament of Louis Givernaud, deceased, commanding them and each of them, by a certain day and under a certain penalty therein to be expresesd, to be and appear before your Honor, in this Honorable Court, then and there to answer all and singular the said premsies, but without oath, and to stand to, abide by and perform such order and decree therein, as to your Honor shall seem meet, and shall be agreeable to equity and good conscience

And your orators will, as in duty bound, ever pray, etc.

BESSON, ALEXANDER & STEVENS,
Solicitors for Complainants.

J. W. RUFUS BESSON,
Of Counsel.

"EXHIBIT A."

In the name of God, amen:

I, Louis Givernaud, of West Hoboken, Hudson County, New Jersey, of sound and disposing mind

and memory, do make, publish and declare this my last will and testament, as follows:

First: It is my will and I do order that all my just debts and funeral expenses be paid as soon as conveniently can be after my decease.

Second: I give and bequeath to my son, Charles L. Givernaud, the sum of ten thousand dollars.

Third: I give and bequeath to May Regine Givernaud, wife of my son Charles L. Givernaud, the sum of ten thousand dollars.

Fourth: I give and bequeath to my two children (by my former wife) now living in Lyons, France, the sum of four thousand dollars each.

Fifth: I give and bequeath to Anita Variel, wife of William J. Variel, of Los Angeles, California, the sum of one thousand dollars.

Sixth: I give and bequeath to each of the persons hereinafter named, as a testimonial of my appreciation of the services rendered by them to me while in my employ, the following amounts: To Thomas A. Kennedy, the sum of two thousand dollars; to Oscar Vezin, Jr., the sum of two thousand dollars; to J. Andrew Ulrich, the sum of five hundred dollars; to Frank Hirt, the sum of five hundred dollars; to Alfred Torhillion, the sum of five hundred dollars, and to Katie Reilly, my cook, the sum of three hundred dollars.

Seventh: I give and bequeath to Laura H. Smith, wife of Abel I. Smith, as a remembrance from an old friend and client of said Abel I. Smith for over twenty-five years, my solitaire diamond ring now worn by me, said to be about four and five-eighths carats in weight.

Eighth: All the rest of the jewelry now worn or used by me, except the diamond ring aforesaid, all my furniture, pictures, household goods and wearing apparel and articles now in my personal use, I give and bequeath to my son Charles L. Givernaud.

Ninth: All the rest, residue and remainder of my estate, real and personal, whatsoever and where-

soever, I give, devise and bequeath unto my executors hereinafter named, and to the survivor of them, in trust, for the following uses and purposes, viz.:

To invest the same as hereinafter provided, and to collect and receive the income accruing therefrom, and after deducting all lawful charges and expenses connected therewith, to pay the net income therein as follows:

1st: To pay to my sister, Marie Givernaud, for and during the term of her natural life, the sum of seven hundred and twenty dollars annually, in equal monthly payments, the first payment to accrue and be made one month after my death, or as soon thereafter as possible.

2d: To pay to Marie Camille Genin (formerly Marie Givernaud) of Lyons, France, for and during the term of her natural life, the sum of fifteen hundred dollars, annually, in equal monthly payments, the first payment to accrue and be made one month after my death, or as soon thereafter as possible.

3d: To pay to Anita Variel, wife of William J. Variel, of Los Angeles, California, for the term of her natural life, the sum of one thousand dollars, annually, in equal monthly payments, the first payment to accrue and be made one month after my death or as soon thereafter as possible.

4th: To pay to my nephew, Joseph Givernaud and to my nieces, Alaska and Lilly, children of my brother Theodore Givernaud, deceased, for and during the term of their natural lives, the sum of five hundred dollars each, annually, in quarter yearly payments, the first payment to accure and be made one month after my death, or as soon thereafter as possible.

5th: To pay to my said son Charles L. Givernaud for and during the term of his natural life, the sum of five thousand two hundred dollars annually, in equal weekly payments, the first payment to accrue and be made two weeks after my death or as soon thereafter as possible, and if my said son shall pre-

decease his wife, May Regine Givernaud, to pay the same to his said wife during the term of her natural life in manner aforesaid.

6th: To pay to said May Regine Givernaud, for and during the term of her natural life, the sum of five thousand two hundred dollars, annually, in equal weekly payments, the first payment to accrue and to be made two weeks after my death, or as soon thereafter as possible, and if she shall predecease her said husband, Charles L. Givernaud, to pay the same to him during the term of his natural life, in manner aforesaid.

7th: At the expiration of one year, after my death, and annually thereafter at the expiration of each succeeding year, to pay over to my said son, Charles L. Givernaud and to his wife, May Regina Givernaud, during the term of their natural lives, in equal portions, share and share alike, the surplus (if any) of the said income from my estate which shall remain in the hands of my said executors and trustees undisposed of and unapplied; and upon the death of either to pay over the same in manner aforesaid, to the survivor during the term of his or her natural life.

8th: If at any time the annual income from my estate shall be insufficient to enable my said executors and trustees to pay the annual sums as hereinbefore mentioned and provided, then and in any such event, and while such insufficiency shall continue, I authorize and direct my said executors and trustees, out of the principal fund of my estate to pay to the said Marie Givernaud, Marie Camille Genin, Anita Variel, Joseph Givernaud, Alaska Givernaud, Lilly Givernaud, Charles L. Givernaud and May Regina Givernaud, so much therof as shall be necessary to make the amounts annually paid to them (while said insufficiency of income shall continue) equal the said sums hereinbefore mentioned and provided.

Tenth: Upon the death of my said son and his said

wife, my son leaving a lawful child or children him surviving, my trustees shall convey, assign, transfer and set over, my estate, real and personal, whatsoever and wheresoever, unto the lawful child of my said son, if only one, to have and to hold the same to him or her and his or her heirs and assigns forever; and to the children of my said son, if more than one, in equal portions, share and share alike, to have and to hold the same to them, their heirs, and assigns forever, in equal portions as aforesaid.

Eleventh: If upon the death of my said son and his said wife, he leave no lawful child or children him surviving, then and in that event the said income heretofore paid to my said son and his said wife, or the survivor of them, as hereinbefore provided, shall thereafter be annually paid by my trustees to my sister, Marie Givernaud, Anita Veriel, the three children of my brother Theodore Givernaud, deceased, viz.: Joseph Givernaud, Alaska Givernaud and Lilly Givernaud, and the three children of Marie Camille Genin (whose Christian names are unknown to me) and the survivors of them in equal portions, share and share alike, during the term of their natural lives, the survivors to receive the whole of said income during his or her natural life, and upon the death of said survivor my trustees shall convey, assign, transfer and set over all my estate, real and personal, whatsoever and wheresoever, unto the "Italian Benevolent Institute" with its principal office now at 165 Houston Street, New York City, and the "French Benevolent Society of New York," with its principal office now at 450 West Thirty-fourth Street, New York City, to have and to hold the same to them, their successors and assigns, forever, in equal portions, share and share alike.

Twelfth: I hereby direct my trustees hereinafter named and the survivor of them and their successors in the trust, to invest and re-invest my said estate in such securities as executors and trustees

may lawfully invest in under the laws of the State of New York; provided, however, that my said trustees are authorized to continue in their discretion such investment or investments as shall have been made by me.

Thirteenth: I hereby authorize and empower my trustees hereinafter named, and the survivor of them and their successors in the trust, if any, to sell and convey any real estate of which I may die seized, at such time and upon such terms as they shall deem proper and to invest and dispose of the proceeds and income thereof as I have heretofore directed.

Lastly: I hereby nominate, constitute and appoint my frinds, the said Thomas A. Kennedy and Oscar Vezin, Jr., and the survivor of them, the executors and executor, trustees and trustee, of this my last will and testament, and direct that they shall not be required to give any bond or other security for the performance of the trusts reposed in them by this my will; and I further order and direct that they shall receive and retain for their services as such executors and trustees, in lieu of all commissions now allowed by law (in addition to the amount bequeathed to them respectively by the sixth clause of this my will) the sum of one per cent. on all sums of principal and five per cent. on all sums of interest which shall come into their hands.

In case of the death, refusal or inability of both of said executors and trustees to serve, I hereby constitute and appoint the Hudson Trust Company, a corporation of the State of New Jersey, the executor of this my last will and testament and trustee thereunder, in the place of the executors and trustees above mentioned.

I hereby revoke any and all former wills by me at any time heretofore made.

In witness whereof, I have hereunto set my hand and seal the fourth day of November, nineteen hundred and seven.

LOUIS GIVERNAUD. [SEAL.]

Signed, sealed, published and declared by the testator, above named, Louis Givernaud, as and for his last will and testament, in the presence of us (both being present at the same time) who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Note—On the 2d, 3d and 4th pages the figures 1st to 9th erased and the figures 1st to 8th written over erasures, and on the 4th page the words "and the same payments shall abate proportionately and" crossed out, all before execution.

ABEL I. SMITH,
Lawyer, Hoboken, N. J.

JNO. S. MABON,
Counsellor-at-Law,
51 *Newark St., Hoboken, N. J.*

Filed July 11, 1911.

SAMUEL K. ROBBINS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD ET ALS,
Complainants,
AND
ANITA VARIEL ET ALS.,
Defendants.
} On Amended Bill.

CONSENT.

The time for the defendants to file their answers

in the above-entitled cause is hereby extended to October twentieth, nineteen hundred and eleven.

BESSON, ALEXANDER & STEVENS,
Solicitors for Complainants.

Filed October 6, 1911.

SAMUEL K. ROBBINS,
Clerk.

In Chancery of New Jersey.

Between
Jennie Marie Josephine Givernaud et als.,
Complainants,

and

Anita Variel et als.,
Dfendants.

APPEARANCE.

Appearance entered for Charles L. Givernaud and May Regina Givernaud, defendants in the above-stated cause, by

COLLINS & CORBIN,
Solicitors.

Filed October 6, 1911.

SAMUEL K. ROBBINS,
Clerk.

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,
and
Anita Variel et als.,
Dfendants.

On Amended Bill, etc.

ANSWER OF THOMAS A. KENNEDY AND OSCAR VEZIN JR., EXECUTORS, &c., OF LOUIS GIVERNAUD, DECEASED.

The answer of Thomas A. Kennedy and Oscar Vezin, Jr., executors and trustees under the last will and testament of Louis Givernaud, deceased, to the amended bill of complaint in the above cause:

These defendants answering say:

1st. They admit so much of said bill of complaint, as sets forth that Joseph Givernaud and Maria Genin, two of the complainants, are the children of Barthelemy Louis Givernaud, also known as Louis Givernaud, deceased. That said deceased departed this life on the second day of January, nineteen hundrd and eight, at Los Angeles, in the State of California, having on or about the fourth day of November, nineteen hundred and seven, executed his last will and testament in writing, a copy of which is annexed to said bill of complaint and marked Exhibit A, and that said last will and testament was duly admitted to probate by the Surrogate of Hudson County, in the State of New Jersey, on the fourteenth day of January, nineteen hundred and eight.

2d. They deny that Jeanne Marie Josephine Givernaud, one of the complainants, is the widow of said deceased, and show that on or about the fifteenth day of September, eighteen hundred and seventy-

one, the said Barthelemy Louis Givernaud, a resident of the State of New Jersey, filed in the Court of Chancery of said State, a petition for divorce against said complainant, on the grounds of desertiin, and that such proceedings were thereafter had in said cause, that afterwards, to wit, on the fifth day of March, eighteen hundred and seventy-two, a decree of divorce was made by said court, wherein it was, by his Honor, the Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of said court and of the acts of the Legislature in such case made and provided, did thereby order, adjudge and decree, that the said Barthelemy Louis Givernaud, the petitioner in said cause, and said Jeanne Marie Josephine Givernaud, the defendant therein, be divorced from the bond of matrimony for the cause if desertion by said Jeanne Marie Josephine Givernaud, and the marriage between them was thereby dissolved accordingly, and the said parties and each of them were thereby freed and discharged from the obligations thereof. Reference being had to said petition, the proceedings and decree in said cause, and the record thereof in the office of the clerk of the said Court of Chancery, will fully appear, and to which for greater certainty these defendants beg leave to refer.

3d. They show that on or about the thirtieth day of May, eighteen hundred and seventy-two, the said Barthelemy Louis Givernaud, also known as Louis Givernaud, and Palmyre Elizabeth Lida Corriveau, also known as Elizabeth Lida Corriveau, were lawfully married in the City, County and State of New York, by the rector of the Protestant Episcopal Church Du Saint Esprit of said city, and after their marriage lived together as husband and wife in the Town of West Hoboken, in the County of Hudson and State of New Jersey, and that while they were so living together a son, Charles L. Givernaud, was lawfully born to them, who is now living.

4th. They deny that said deceased at the time of his death and for upwards of fifteen years prior thereto, or any part of that time was a resident of and domiciled in the City, County and State of New York, and aver that said deceased more than forty years before his death acquired a domicile and took up his residence in what is now the town of West Hoboken, in the County of Hudson and State of New Jersey, where he conducted business, and that such domicile and legal residence there continued up to the time of his death. That although for some time before his death he spent most of his time elsewhere, he never intended thereby to give up or abandon his domicile and legal residence in said town of West Hoboken, but always retained the same, and his absence therefrom, however extended, was not with the intention of effecting a change of domicile to some other place. These defendants aver that at the time of his death his domicile and legal residence was in said town of West Hoboken.

5th. They deny that the trust in said last will and testament is governed by and subject to the provisions of the personal property law of the State of New York, being Section 2 of Chapter 417 of the Laws of 1897 of said State, and set forth in said bill of complaint, and show on the contrary that said trust and the provisions of said will are governed by the laws of said State of New Jersey.

6th. As to whether Barthelemy Louis Givernaud, deceased, and Josephine Haour Givernaud were both born at Lyon, the said Barthelemy Louis Givernaud on the twenty-first day of April, 1835, and the said Josephine Haour Givernaud on the sixteenth day of April, 1833, and were both at the time of French nationality and citizenship and were residing and domiciled at Lyon, France, and that thereafter they lived together at Lyon, France, as alleged in said amended bill, they are strangers and therefore leave the complainants to make such proofs thereof as they may be able.

7th. As to whether said Barthelemy Louis Givernaud and the said Josephine Haour Givernaud intermarried on the fifth day of February, in the year 1860, as alleged in said bill, they are strangers, except as shown by the proceedings and record in the suit for divorce hereinbefore mentioned, and therefore leave the complainants to make such proofs thereof as they may be able.

8th. They admit that said Barthelemy Louis Givernaud was at one time engaged in business in Lyon, France.

9th. They admit that said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, are the children of said Barthelemy Louis Givernaud and said Josephine Haour Givernaud, but have no knowledge as to where they were born, and leave the complainants to make such proofs thereof as they may be able.

10th. As to whether the Civil Code of France contains therein the sections alleged in said bill of complaint as Sections 893 and 913 of the said Civil Code, and that the alleged translations of said sections, as set forth in said bill of complaint, are correct, these defendants are strangers and leave the complainants to make such proofs thereof as they may be able.

11th. They deny that by reason of said provisions of said Civil Code of France that said complainants, Joseph Givernaud and said Noemi Josephine Marie Genin, could not be deprived each of one-third or both of two-thirds of the estate of each of their said parents, either by donation, by instrument *inter vivos*, or by will.

12th. They show that at the time of the death of the said Barthelemy Louis Givernaud, otherwise known as Louis Givernaud, his domicile and legal residence was in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that the distribution of said estate is governed by the law of the said State of New Jersey, and that

the last will and testament of said deceased and the distribution of his estate made thereunder, are valid and binding upon said complainants, and that if any such alleged provisions as Sections 893 and 913 of the Civil Code of France exist and as set forth in said bill of complaint, which these defendants do not admit, such provisions are of no force or effect in the disposition of his property made by said deceased in and by his said last will and testament.

13th. They deny that before any property can be distributed under the last will and testament of said Barthelemy Louis Givernaud, said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, are each entitled to receive out of the estate of the said Barthelemy Louis Givernaud, deceased, one-third thereof, or both together two-thirds thereof, and that the estate of said deceased should be distributed to said complainants according to the statute of distribution of the State of New York, as set forth in Section 2732 of the Civil Procedure of said State, and in said bill of complaint, and that upon the death of said deceased, each of said complainants became entitled to one-third part of the personal estate of said deceased, and that these defendants, the executors and trustees under said will should account for said estate to said complainants, and show that said complainants are not entitled to any part of the estate of said deceased, other than such parts thereof as are bequeathed to them in and by said last will and testament.

14th. They show that if said deceased were a permanent resident of and domiciled in the City, County and State of New York, at the time of his death, which they in no wise admit, but expressly deny, the said trust created by said will and testament is valid under the laws of said State.

15th. They show that the sum of fifteen hundred dollars annually has been paid by these defendants, as executors and trustees under said last will and

testament to said complainant, Noemi Josephine Marie Genin, called therein Marie Cammille Genin, and received by her, according to the terms of the ninth clause thereof.

16th. They admit that the said deceased died possessed of considerable personal property, amounting to $298,000, as shown by the inventory filed in the Surrogate's office of said county, and show that the same was fully and legally disposed of under the terms of said last will and testament of said deceased, prior to the filing of the bill of complaint in this cause, without any objection thereto on the part of said complainants, or notice of the claim set up in said bill of complaint.

17th. They show that no caveat was put in by said complainants against proving said will and no appeal was taken by them from the order of the Surrogate of the County of Hudson, admitting the same to probate; and said will and the provisions thereof are conclusive as to said complainants and all persons whomsover.

And these defendants humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

COLLINS & CORBIN,

Solicitors and of Counsel with defendants Thomas A. Kennedy and Oscar Vedin, Jr., Executors, etc.

Filed October 6, 1911.

SAMUEL K. ROBBINS,

Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD ET ALS.,
Complainants,

AND

ANITA VARIEL ET ALS.,
Defendants.

APPEARANCE.

Appearance entered for Thomas A. Kennedy and Oscar Vezin, Jr., executors, etc., of Louis Givernaud, deceased, defendants in the above-stated cause, by

COLLINS & CORBIN,
Solicitors.

Filed October 6, 1911.

SAMUEL K. ROBBINS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD ET ALS.,
Complainants,

AND

ANITA VARIEL ET ALS.,
Defendants.

On Amended Bill, etc.

ANSWER OF CHARLES L. GIVERNAUD AND MAY REGINA GIVERNAUD.

The answer of Charles L. Givernaud and May Regina to the amended bill of complaint in the above cause:

These defendants answering say:

1st. They admit so much of said bill of complaint as sets forth that Joseph Givernaud and Marie Genin, two of the complainants, are the children of Barthelemy Louis Givernaud, also known as Louis Givernaud, deceased. That said deceased departed this life on the second day of January, nineteen hundred and eight, at Los Angeles, in the State of California, having on or about the fourth day of November, nineteen hundred and seven, executed his last will and testament in writing, a copy of which is annexed to said bill of complaint and marked Exhibit A, and that said last will and testament was duly admitted to probate by the Surrogate of Hudson County, in the State of New Jersey, on the fourteenth day of January, nineteen hundred and eight.

2d. They deny that Jeanne Marie Josephine Givernaud, one of the complainants, is the widow of said deceased, and show that on or about the fifteenth day of September, eighteen hundred and seventy-one, the said Barthelemy Louis Givernaud, a resident of the State of New Jersey, filed in the Court of Chancery of said State a petition for divorce against said complainant, on the grounds of desertion, and that such proceedings were thereafter had in said cause that afterwards, to wit, on the fifth day of March, eighteen hundred and seventy-two, a decree of divorce was made by said Court, wherein it was, by his Honor the Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of said Court and of the Acts of the Legislature in such case made and provided, did thereby order, adjudge and decree, that the said Barthelemy Louis Givernaud, the petitioner in said cause, and said Jeanne Marie Josephine Givernaud, the defendant therein, be divorced from the bond of matrimony for the cause of desertion by said Jeanne Marie Josephine Givernaud, and the marriage be-

tween them was thereby dissolved accordingly, and the said parties and each of them were thereby freed and discharged from the obligations thereof—reference being had to said petition, the proceedings and decree in said cause, and the record thereof in the office of the Clerk of said Court of Chancery, will fully appear, and to which for greater certainty these defendants beg leave to refer.

3d. They show that on or about the thirtieth day of May, eighteen hundred and seventy-two, the said Barthelemy Louis Givernaud, also known as Louis Givernaud, and Palmyre Elizabeth Lida Corriveau, also known as Elizabeth Lida Corriveau, were lawfully married in the City, County and State of New York, by the rector of the Protestant Episcopal Church Du Saint Esprit of said city, and after their marriage lived together as husband and wife in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that while they were so living together, this defendant, Charles L. Givernaud, was lawfully born to them.

4th. They deny that said deceased at the time of his death and for upwards of fifteen years prior thereto, or any part of that time was a resident of and domiciled in the City, County and State of New York, and aver that said deceased more than forty years before his death acquired a domicile and took up his residence in what is now the town of West Hoboken, in the County of Hudson and State of New Jersey, where he conducted business, and that such domicile and legal residence there continued up to the time of his death. That although for some time before his death he spent most of his time elsewhere, he never intended thereby to give up or abandon his domicile and legal residence in said town of West Hoboken, but always retained the same, and his absence therefrom, however extended was not with the intention of effecting a change of domicile to some other place. These defendants aver that at the time of his death his domicile and

legal residence was in said town of West Hoboken.

5th. They deny that the trust in said last will and testament is governed by and subject to the provisions of the personal property law of the State of New York, being Section 2 of Chapter 417 of the Laws of 1897 of said State, and set forth in said bill of complaint, and show on the contrary that said trust and the provisions of said will are governed by the laws of said State of New Jersey.

6th. As to whether Barthelemy Louis Givernaud, deceased, and Josephine Haour Givernaud were both born at Lyon, the said Barthelemy Louis Givernaud on the twenty-first day of April, 1835, and the said Josephine Haour Givernaud on the sixteenth day of April, 1833, and were both at the time of French nationality and citizenship and were residing and domiciled at Lyon, France, and that thereafter they lived together at Lyon, France, as alleged in said amended bill, they are strangers and therefore leave the complainants to make such proofs thereof as they may be able.

7th. As to whether said Barthelemy Louis Givernaud and the said Josephine Haour Givernaud intermarried on the fifth day of February, in the year 1860, as alleged in said bill, they are strangers, except as shown by the proceedings and record in the suit for divorce hereinbefore mentioned, and therefore leave the complainants to make such proofs thereof as they may be able.

8th. They admit that said Barthelemy Louis Givernaud was at one time engaged in business at Lyon, France.

9th. They admit that said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, are the children of said Barthelemy Louis Givernaud and said Josephine Haour Givernaud, but have no knowledge as to where they were born, and leave the complainants to make such proofs thereof as they may be able.

10th. As to whether the Civil Code of France contains therein the sections alleged in said bill of complaint as Sections 893 and 913 of the said Civil Code, and that the alleged translations of said sections, as set forth in said bill of complaint, are correct, these defendants are strangers and leave the complainants to make such proofs thereof as they may be able.

11th. They deny that by reason of said provisions of said Civil Code of France that said complainants, Joseph Givernaud and said Noemi Josephine Marie Genin, could not be deprived each of one-third or both of two-thirds of the estate of each of their said parents, either by donation, by instrument *inter vivos*, or by will.

12th. They show that at the time of the death of the said Barthelemy Louis Givernaud, otherwise known as Louis Givernaud, his domicile and legal residence was in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that the distribution of said estate is governed by the law of the said State of New Jersey, and that the last will and testament of said deceased and the distribution of his estate made thereunder, are valid and binding upon said complainants, and that if any such allegel provisions as Sections 893 and 913 of the Civil Code of France exist and as set forth in said bill of complaint, which these defendants do not admit, such provisions are of no force or effect in the disposition of his property made by said deceased in and by his said last will and testament.

13th. They deny that before any property can be distributed under the last will and testament of said Barthelemy Louis Givernaud, said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, are each entitled to receive out of the estate of the said Barthelemy Louis Givernaud, deceased, one-third thereof, or both together two-thirds thereof, and that the estate of said deceased should be distributed to said complainants according to the statute of distribution of the State of New York,

as set forth in Section 2732 of the Civil Procedure of said State, and in said bill of complaint, and that upon the death of said deceased each of said complainants became entitled to one-third part of the personal estate of said deceased, and that the defendants, Thomas A. Kennedy and Oscar Vezin, Jr., the executors and trustees under said will should account for said estate to said complainants, and show that said complainants are not entitled to any part of the estate of said deceased, other than such parts thereof as are bequeathed to them in and by said last will and testament.

14th. They show that if said deceased were a permanent resident of and domiciled in the City, County and State of New York, at the time of his death, which they in no wise admit, but expressly deny, the said trust created by said will and testament is valid under the laws of said State.

15th. They show that the sum of fifteen hundred dollars annually has been paid by said Thomas A. Kennedy and Oscar Vezin, Jr., as executors and trustees under said last will and testament to said complainant, Noemi Josephine Marie Genin, called therein Marie Camille Genin, and received by her, according to the terms of the ninth clause thereof.

16th. They admit that the said deceased died possessed of considerable personal property, amounting to $298.000, as shown by the inventory filed in the Surrogate's office of said county, and show that the same was fully and legally disposed of under the terms of said last will and testament of said deceased, prior to the filing of the bill of complaint in this cause, without any objection thereto on the part of said complainants, or notice of the claim set up in said bill of complaint.

17th. They show that no caveat was put in by said complainants against proving said will and no appeal was taken by them from the order of the Surrogate of the County of Hudson, admitting the same to probate; and said will and the provisions

thereof are conclusive as to said complainants and all persons whomsoever.

And these defendants humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

COLLINS & CORBIN,
Solicitors and of Counsel with Defendants.

Filed October 6, 1911.
SAMUEL K. ROBBINS, 10
Clerk.

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,
and
Anita Variel et als.,
Defendants.
} On Bill, etc. 20

INFANTS' ANSWER.

The answer of Marie Joseph Paul Henri Genin, Marie Josephine Marcianna Martha Genin, and Marie Joseph Laurent Maurice Genin, infant defendants, by Samuel K. Robbins, Clerk, Guardian, *ad litem.* 30

These defendants, answering by their said guardian, say that they are strangers to all and singular the matters and things in the said amended bill of complaint contained, otherwise than that these defendants are informed that they have some interest therein; and these defendants, being infants of tender years, submit themselves to the judgment of this

Honorable Court, and pray that their interests may be protected and saved to them.

SAMUEL K. ROBBINS,
Guardian ad litem

Filed February 20, 1912.

SAMUEL K. ROBBINS,
Clerk.

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,
and
Anita Variel et als.,
Defendants.

On Amended Bill, etc.

ANSWER OF THE FRENCH BENEVOLENT SOCIETY OF NEW YORK.

The answer of The French Benevolent Society of New York to the amended bill of complaint in the above cause:

This defendants answering says:

1st. It admits so much of said bill of complaint as sets forth that Joseph Givernaud and Marie Genin, two of the complainants, are the children of Barthelemy Louis Givernaud, also known as Louis Givernaud, deceased. That said deceased departed this life on the second day of January, nineteen hundred and eight, at Los Angeles, in the State of California, having on or about the fourth day of November, nineteen hundred and seven, executed his last will and testament in writing, a copy of which is annexed to said bill of complaint and marked

Exhibit A, and that said last will and testament was duly admitted to probate by the Surrogate of Hudson County, in the State of New Jersey, on the fourteenth day of January, nineteen hundred and eight.

2d. It denies that Jeanne Marie Josephine Givernaud, one of the complainants, is the widow of said deceased, and show that on or about the fifteenth day of September, eighteen hundred and seventy-one, the said Barthelemy Louis Givernaud, a resident of the State of New Jersey, filed in the Court of Chancery of said State a petition for divorce against said complainant on the grounds of desertion, and that such proceedings were thereafter had in said cause that afterwards, to wit, on the fifth day of March, eighteen hundred and seventy-two, a decree of divorce was made by said Court, wherein it was, by his Honor the Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of said Court and of the Acts of the Legislature in such case made and provided, did thereby order, adjudge and decree, that the said Barthelemy Louis Givernaud, the petitioner in said cause, and said Jeanne Marie Josephine Givernaud, the defendant therein, be divorced from the bond of matrimony for the cause of desertion by said Jeanne Marie Josephine Givernaud, and the marriage between them was thereby dissolved accordingly, and the said parties and each of them were thereby freed and discharged from the obligations thereof—reference being had to said petition, the proceedings and decree in said cause, and the record thereof in the office of the Clerk of said Court of Chancery, will fully appear, and to which for greater certainty this defendant begs leave to refer.

3d. It shows that on or about the thirtieth day of May, eighteen hundred and seventy-two, the said Barthelemy Louis Givernaud, also known as Louis Givernaud, and Palmyre Elizabeth Lida Corriveau,

also known as Elizabeth Lida Corriveau, were lawfully married in the City, County and State of New York, by the rector of the Protestant Episcopal Church Du Saint Esprit of said city, and after their marriage lived together as husband and wife in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that while they were so living together, a son, Charles L. Givernaud, was lawfully born to them, who is now living.

4th. It denies that said deceased at the time of his death and for upwards of fifteen years prior thereto, or any part of that time was a resident of and domiciled in the City, County and State of New York, and aver that said deceased more than forty years before his death acquired a domicile and took up his residence in what is now the town of West Hoboken, in the County of Hudson and State of New Jersey, where he conducted business, and that such domicile and legal residence there continued up to the time of his death. That although for some time before his death he spent most of his time elsewhere, he never intended thereby to give up or abandon his domicile and legal residence in said town of West Hoboken, but always retained the same, and his absence therefrom, however extended was not with the intention of effecting a change of domicile to some other place. This defendant avers that at the time of his death his domicile and legal residence was in said town of West Hoboken.

5th. It denies that the trust in said last will and testament is governed by and subject to the provisions of the personal property law of the State of New York, being Section 2 of Chapter 417 of the Laws of 1897 of said State, and set forth in said bill of complaint, and show on the contrary that said trust and the provisions of said will are governed by the laws of said State of New Jersey.

6th. As to whether Barthelemy Louis Givernaud, deceased, and Josephine Haour Givernaud were both born at Lyon, the said Barthelemy Louis Givernaud

on the twenty-first day of April, 1835, and the said Josephine Haour Givernaud on the sixteenth day of April, 1833, and were both at the time of French nationality and citizenship and were residing and domiciled at Lyon, France, and that thereafter they lived together at Lyon, France, as alleged in said amended bill, it is a stranger and therefore leaves the complainants to make such proofs thereof as they may be able.

7th. As to whether said Barthelemy Louis Givernaud and the said Josephine Haour Givernaud intermarried on the fifth day of February, in the year 1860, as alleged in said bill, it is a stranger, except as shown by the proceedings and record in the suit for divorce hereinbefore mentioned, and therefore leaves the complainants to make such proofs thereof as they may be able.

8th. It admits that said Barthelemy Louis Givernaud was at one time engaged in business at Lyon, France.

9th. It admits that said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, are the children of said Barthelemy Louis Givernaud and said Josephine Haour Givernaud, but has no knowledge as to where they were born, and leaves the complainants to make such proofs thereof as they may be able.

10th. As to whether the Civil Code of France contains therein the sections alleged in said bill of complaint as Sections 893 and 913 of the said Civil Code, and that the alleged translations of said sections, as set forth in said bill of complaint, are correct this defendant is a stranger and leaves the complainants to make such proofs thereof as they may be able.

11th. It denies that by reason of said provisions of said Civil Code of France that said complainants, Joseph Givernaud and said Noemi Josephine Marie Genin, could not be deprived each of one-third or both of two-thirds of the estate of each of their said

parents, either by donation, by instrument *inter vivos*, or by will.

12th. It shows that said Barthelemy Louis Givernaud, otherwise known as Louis Givernaud, at the time of his death was, and for many years previous thereto had been, a naturalized citizen of the United States, and that at the time of his death his domicile and legal residence was in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that the distribution of said estate is governed by the law of the said State of New Jersey, and that the last will and testament of said deceased and the distribution of his estate made thereunder, are valid and binding upon said complainants, and that if any such allegel provisions as Sections 893 and 913 of the Civil Code of France exist and as set forth in said bill of complaint, which this defendant does not admit, such provisions are of no force or effect in the disposition of his property made by said deceased in and by his said last will and testament.

13th. It denies that before any property can be distributed under the last will and testament of said Barthelemy Louis Givernaud, said complainants, Joseph Governaud and Noemi Josephine Marie Genin, are each entitled to receive out of the estate of the said Barthelemy Louis Givernaud, deceased, one-third thereof, or both together two-thirds thereof, and that the estate of said deceased should be distributed to said complainants according to the statute of distribution of the State of New York, as set forth in Section 2732 of the Civil Procedure of said State, and in said bill of complaint, and that upon the death of said deceased each of said complainants became entitled to one-third part of the personal estate of said deceased, and that the defendants, Thomas A. Kennedy and Oscar Vezin, Jr., the executors and trustees under said will should account for said estate to said complainants, and show that said complainants are not entitled to any part of the estate of said deceased, other than such

parts thereof as are bequeathed to them in and by said last will and testament.

14th. It shows that if said deceased were a permanent resident of and domiciled in the City, County and State of New York, at the time of his death, which they in no wise admit, but expressly denies, the said trust created by said will and testament is valid under the laws of said State.

15th. It shows that the sum of fifteen hundred dollars annually has been paid by said Thomas A. Kennedy and Oscar Vezin, Jr., as executors and trustees under said last will and testament to said complainant, Noemi Josephine Marie Genin, called therein Marie Camille Genin, and received by her, according to the terms of the ninth clause thereof.

16th. It admits that the said deceased died possessed of considerable personal property, amounting to $298,000, as shown by the inventory filed in the Surrogate's office of said county, and show that the same was fully and legally disposed of under the terms of said last will and testament of said deceased, prior to the filing of the bill of complaint in this cause, without any objection thereto on the part of said complainants, or notice of the claim set up in said bill of complaint.

17th. It shows that no caveat was put in by said complainants against proving said will and no appeal was taken by them from the order of the Surrogate of the County of Hudson, admitting the same to probate; and said will and the provisions thereof are conclusive as to said complainants and all persons whomsoever.

And this defendant humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE FRENCH BENEVOLENT SOCIETY OF NEW YORK,

By LUCIEN JOURAND,

[SEAL.] *President.*

Attest:
G. TULCHIRAN, *Secretary.*

JOHN S. MABON,
Solicitor and of Counsel with Defendant, The French Benevolent Society of New York.

Filed May 20, 1912.
SAMUEL K. ROBBINS,
Clerk.

STATE OF NEW YORK,
CITY OF NEW YORK, } *ss.*
COUNTY OF NEW YORK,

The answer of the defendant, The French Benevolent Society of New York, was taken this third day of November, in the year of our Lord, one thousand nine hundred and eleven, before me, under the common seal of said corporation, as by their seal thereto affixed, appears. Lucien Jourand, the president of said society, subscribed the foregoing affidavit and instrument in the City, County and State of New York, in my presence.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year last above written.

ELLA F. BRAMAN,
Commissioner of Deeds for the State of New Jersey, in and for the State of New York, resident in said City of New York

[SEAL]

It is hereby consented that the above answer be filed as of within time, May 20, 1912.
BESSON, ALEXANDER & STEVENS,
Solicitors of Complainants.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD ET ALS.,
Complainants,

AND

ANITA VARIEL ET ALS.,
Defendants.

On Amended Bill, etc.

ANSWER OF ANITA VARIEL, JOSEPH GIVERNAUD, ALASKA GIVERNAUD AIKEN AND LILLY GIVERNAUD SHORT.

The joint and several answer of Anita Variel, Joseph Givernaud, Alaska Givernaud Aiken and Lilly Givernaud Short to the amended bill of complaint in the above cause:

These defendants answering say:

1st. They admit so much of said bill of complaint as sets forth that Joseph Givernaud and Marie Genin, two of the complainants, are the children of Barthelemy Louis Givernaud, also known as Louis Givernaud, deceased. That said deceased departed this life on the second day of January, nineteen hundred and eight, at Los Angeles, in the State of California, having on or about the fourth day of November, nineteen hundred and seven, executed his last will and testament in writing, a copy of which is annexed to said bill of complaint and marked Exhibit A, and that said last will and testament was duly admitted toprobate by the Surrogate of Hudson County, in the State of New Jersey, on the fourteenth day of January, nineteen hundred and eight.

2d. They deny that Jeanne Marie Josephine Givernaud, one of the complainants, is the widow of said deceased, and show that on or about the fifteenth

day of September, eighteen hundred and seventy-one, the said Barthelemy Louis Givernaud, a resident of the State of New Jersey, filed in the Court of Chancery of said State a petition for divorce against said complainant, on the grounds of desertion, and that such proceedings were thereafter had in said cause that afterwards, to wit, on the fifth day of March, eighteen hundred and seventy-two, a decree of divorce was made by said Court, wherein it was, by his Honor the Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of said Court and of the Acts of the Legislature in such case made and provided, did thereby order, adjudge and decree, that the said Barthelemy Louis Givernaud, the petitioner in said cause, and said Jeanne Marie Josephine Givernaud, the defendant therein, be divorced from the bond of matrimony for the cause of desertion by said Jeanne Marie Josephine Givernaud, and the marriage between them was thereby dissolved accordingly, and the said parties and each of them were thereby freed and discharged from the obligations thereof—reference being had to said petition, the proceedings and decree in said cause, and the record thereof in the office of the Clerk of said Court of Chancery, will fully appear, and to which for greater certainty these defendants beg leave to refer.

3d. They show that on or about the thirtieth day of May, eighteen hundred and seventy-two, the said Barthelemy Louis Givernaud, also known as Louis Givernaud, and Palmyre Elizabeth Lida Corriveau, also known as Elizabeth Lida Corriveau, were lawfully married in the City, County and State of New York, by the rector of the Protestant Episcopal Church Du Saint Esprit of said city, and after their marriage lived together as husband and wife in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that while they were

so living together, a son, Charles L. Givernaud, was lawfully born to them, who is now living.

4th. They deny that said deceased at the time of his death and for upwards of fifteen years prior thereto, or any part of that time was a resident of and domiciled in the City, County and State of New York, and aver that said deceased more than forty years before his death acquired a domicile and took up his residence in what is now the town of West Hoboken, in the County of Hudson and State of New Jersey, where he conducted business, and that such domicile and legal residence there continued up to the time of his death. That although for some time before his death he spent most of his time elsewhere, he never intended thereby to give up or abandon his domicile and legal residence in said town of West Hoboken, but always retained the same, and his absence therefrom, however extended was not with the intention of effecting a change of domicile to some other place. These defendants aver that at the time of his death his domicile and legal residence was in said town of West Hoboken.

5th. They deny that the trust in said last will and testament is governed by and subject to the provisions of the personal property law of the State of New York, being Section 2 of Chapter 417 of the Laws of 1897 of said State, and set forth in said bill of complaint, and show on the contrary that said trust and the provisions of said will are governed by the laws of said State of New Jersey.

6th. As to whether Barthelemy Louis Givernaud, deceased, and Josephine Haour Givernaud were both born at Lyon, the said Barthelemy Louis Givernaud on the twenty-first day of April, 1835, and the said Josephine Haour Givernaud on the sixteenth day of April, 1833, and were both at the time of French nationality and citizenship and were residing and domiciled at Lyon, France, and that thereafter they lived together at Lyon, France, as alleged in said amended bill, they are strangers and therefore leave

the complainants to make such proofs thereof as they may be able.

7th. As to whether said Barthelemy Louis Givernaud and the said Josephine Haour Givernaud intermarried on the fifth day of February, in the year 1860, as alleged in said bill, they are strangers, except as shown by the proceedings and record in the suit for divorce hereinbefore mentioned, and therefore leave the complainants to make such proofs thereof as they may be able.

8th. They admit that said Barthelemy Louis Givernaud was at one time engaged in business at Lyon, France.

9th. They admit that said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, are the children of said Barthelemy Louis Givernaud and said Josephine Haour Givernaud, but have no knowledge as to where they were born, and leave the complainants to make such proofs thereof as they may be able.

10th. As to whether the Civil Code of France contains therein the sections alleged in said bill of complaint as Sections 893 and 913 of the said Civil Code, and that the alleged translations of said sections, as set forth in said bill of complaint, are correct, these defendants are strangers and leave the complainants to make such proofs thereof as they may be able.

11th. They deny that by reason of said provisions of said Civil Code of France that said complainants, Joseph Givernaud and said Noemi Josephine Marie Genin, could not be deprived each of one-third or both of two-thirds of the estate of each of their said parents, either by donation, by instrument *inter vivos,* or by will.

12th. They show that said Barthelemy Louis Givernaud, otherwise known as Louis Givernaud, at the time of his death was, and for many years previous thereto had been, a naturalized citizen of the United States, and that at the time of his death his domicile and legal residence was in the town of West Hoboken,

in the County of Hudson and State of New Jersey, and that the distribution of said estate is governed by the law of the said State of New Jersey, and that the last will and testament of said deceased and the distribution of his estate made thereunder, are valid and binding upon said complainants, and that if any such allegel provisions as Sections 893 and 913 of the Civil Code of France exist and as set forth in said bill of complaint, which these defendants do not admit, such provisions are of no force or effect in the disposition of his property made by said deceased in and by his said last will and testament.

13th. They deny that before any property can be distributed under the last will and testament of said Barthelemy Louis Givernaud, said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, are each entitled to receive out of the estate of the said Barthelemy Louis Givernaud, deceased, one-third thereof, or both together two-thirds thereof, and that the estate of said deceased should be distributed to said complainants according to the statute of distribution of the State of New York, as set forth in Section 2732 of the Civil Procedure of said State, and in said bill of complaint, and that upon the death of said deceased each of said complainants became entitled to one-third part of the personal estate of said deceased, and that the defendants, Thomas A. Kennedy and Oscar Vezin, Jr., the executors and trustees under said will should account for said estate to said complainants, and show that said complainants are not entitled to any part of the estate of said deceased, other than such parts thereof as are bequeathed to them in and by said last will and testament.

14th. They show that if said defendant were a permanent resident of and domiciled in the City, County and State of New York, at the time of his death, which they in no wise admit, but expressly deny, the said trust created by said will and testament is valid under the laws of said State.

15th. They show that the sum of fifteen hundred dollars annually has been paid by said Thomas A. Kennedy and Oscar Vezin, Jr., as executors and trustees under said last will and testament to said complainant, Noemi Josephine Marie Genin, called therein Marie Camille Genin, and received by her, according to the terms of the ninth clause thereof.

16th. They admit that the said deceased died possessed of considerable personal property, amounting to $298,000, as shown by the inventory filed in the Surrogate's office of said county, and show that the same was fully and legally disposed of under the terms of said last will and testament of said deceased, prior to the filing of the bill of complaint in this cause, without any objection thereto on the part of said complainants, or notice of the claim set up in said bill of complaint.

17th. They show that no caveat was put in by said complainants against proving said will and no appeal was taken by them from the order of the Surrogate of the County of Hudson, admitting the same to probate; and said will and the provisions thereof are conclusive as to said complainants and all persons whomsoever.

And these defendants humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN S. MABON,
Solicitor and of Counsel with Defendants.

It is hereby consented that the above answer be filed as if within time, May 20, 1912.

BESSON, ALEXANDER & STEVENS,
Solicitors of Complainants.

Filed May 20, 1912.

SAMUEL K. ROBBINS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD ET ALS.,
Complainants,
AND
ANITA VARIEL ET ALS.,
Defendants.

On Amended Bill, etc.

ANSWER OF THE ITALIAN BENEVOLENT INSTITUTE OF NEW YORK.

The answer of The Italian Benevolent Institute of New York to the amended bill of complaint in the above cause:

This defendant answering says:

1st. It admits so much of said bill if complaint as sets forth that Joseph Givernaud and Marie Genin, two of the complainants, are the children of Barthelemy Louis Givernaud, also known as Louis Givernaud, deceased. That said deceased departed this life on the second day of January, nineteen hundred and eight, at Los Angeles, in the State of California, having on or about the fourth day of November, nineteen hundred and seven, executed his last will and testament in writing, a copy of which is annexed to said bill of complaint and marked Exhibit A, and that said last will and testament was duly admitted to probate by the Surrogate of Hudson County, in the State of New Jersey, on the fourteenth day of January, nineteen hundred and eight.

2d. It denies that Jeanne Marie Josephine Givernaud, one of the complainants, is the widow of said deceased, and show that on or about the fifteenth day of September, eighteen hundred and seventy-

one, the said Barthelemy Louis Givernaud, a resident of the State of New Jersey, filed in the Court of Chancery of said State a petition for divorce against said complainant, on the grounds of desertion, and that such proceedings were thereafter had in said cause that afterwards, to wit, on the fifth day of March, eighteen hundred and seventy-two, a decree of divorce was made by said Court, wherein it was, by his Honor the Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of said Court and of the Acts of the Legislature in such case made and provided, did thereby order, adjudge and decree, that the said Barthelemy Louis Givernaud, the petitioner in said cause, and said Jeanne Marie Josephine Givernaud, the defendant therein, be divorced from the bond of matrimony for the cause of desertion by said Jeanne Marie Josephine Givernaud, and the marriage between them was thereby dissolved accordingly, and the said parties and each of them were thereby freed and discharged from the obligations thereof—reference being had to said petition, the proceedings and decree in said cause, and the record thereof in the office of the Clerk of said Court of Chancery, will fully appear, and to which for greater certainty this defendant begs leave to refer.

3d. It shows that on or about the thirtieth day of May, eighteen hundred and seventy-two, the said Barthelemy Louis Givernaud, also known as Louis Givernaud, and Palmyre Elizabeth Lida Corriveau, also known as Elizabeth Lida Corriveau, were lawfully married in the City, County and State of New York, by the rector of the Protestant Episcopal Church Du Saint Esprit of said city, and after their marriage lived together as husband and wife in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that while they were so living together, a son, Charles L. Givernaud, was lawfully born to them, who is now living.

4th. It denies that said deceased at the time of his death and for upwards of fifteen years prior thereto, or any part of that time was a resident of and domiciled in the City, County and State of New York, and aver that said deceased more than forty years before his death acquired a domicile and took up his residence in what is now the town of West Hoboken, in the County of Hudson and State of New Jersey, where he conducted business, and that such domicile and legal residence there continued up to the time of his death. That although for some time before his death he spent most of his time elsewhere, he never intended thereby to give up or abandon his domicile and legal residence in said town of West Hoboken, but always retained the same, and his absence therefrom, however extended was not with the intention of effecting a change of domicile to some other place. This defendant avers that at the time of his death his domicile and legal residence was in said town of West Hoboken.

5th. It denies that the trust in said last will and testament is governed by and subject to the provisions of the personal property law of the State of New York, being Section 2 of Chapter 417 of the Laws of 1897 of said State, and set forth in said bill of complaint, and shows on the contrary that said trust and the provisions of said will are governed by the laws of said State of New Jersey.

6th. As to whether Barthelemy Louis Givernaud, deceased, and Josephine Haour Givernaud were both born at Lyon, the said Barthelemy Louis Givernaud on the twenty-first day of April, 1835, and the said Josephine Haour Givernaud on the sixteenth day of April, 1833, and were both at the time of French nationality and citizenship and were residing and domiciled at Lyon, France, and that thereafter they lived together at Lyon, France, as alleged in said amended bill, it is a stranger and therefore leaves the complainants to make such proofs thereof as they may be able.

7th. As to whether said Barthelemy Louis Givernaud and the said Josephine Haour Givernaud intermarried on the fifth day of February, in the year 1860, as alleged in said bill, it is a stranger, except as shown by the proceedings and record in the suit for divorce hereinbefore mentioned, and therefore leaves the complainants to make such proofs thereof as they may be able.

8th. It admits that said Barthelemy Louis Givernaud was at one time engaged in business at Lyon, France.

9th. It admits that said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, are the children of said Barthelemy Louis Givernaud and said Josephine Haour Givernaud, but has no knowledge as to where they were born, and leaves the complainants to make such proofs thereof as they may be able.

10th. As to whether the Civil Code of France contains therein the sections alleged in said bill of complaint as Sections 893 and 913 of the said Civil Code, and that the alleged translations of said sections, as set forth in said bill of complaint, are correct this defendant is a stranger and leaves the complainants to make such proofs thereof as they may be able.

11th. It denies that by reason of said provisions of said Civil Code of France that said complainants, Joseph Givernaud and said Noemi Josephine Marie Genin, could not be deprived each of one-third or both of two-thirds of the estate of each of their said parents, either by donation, by instrument *inter vivos*, or by will.

12th. It shows that said Barthelemy Louis Givernaud, otherwise known as Louis Givernaud, at the time of his death was, and for many years previous thereto had been, a naturalized citizen of the United States, and that at the time of his death his domicile and legal residence was in the town of West Hoboken, in the County of Hudson and State of New Jersey, and that the distribution of said estate is governed

by the law of the said State of New Jersey, and that the last will and testament of said deceased and the distribution of his estate made thereunder, are valid and binding upon said complainants, and that if any such alleged provisions as Sections 893 and 913 of the Civil Code of France exist and as set forth in said bill of complaint, which this defendant does not admit, such provisions are of no force or effect in the disposition of his property made by said deceased in and by his said last will and testament.

13th. It denies that before any property can be distributed under the last will and testament of said Barthelemy Louis Givernaud, said complainants, Joseph Givernaud and Noemi Josephine Marie Genin, are each entitled to receive out of the estate of the said Barthelemy Louis Givernaud, deceased, one-third thereof, or both together two-thirds thereof, and that the estate of said deceased should be distributed to said complainants according to the statute of distribution of the State of New York, as set forth in Section 2732 of the Civil Procedure of said State, and in said bill of complaint, and that upon the death of said deceased each of said complainants became entitled to one-third part of the personal estate of said deceased, and that the defendants, Thomas A. Kennedy and Oscar Vezin, Jr., the executors and trustees under said will should account for said estate to said complainants, and show that said complainants are not entitled to any part of the estate of said deceased, other than such parts thereof as are bequeathed to them in and by said last will and testament.

14th. It shows that if said deceased were a permanent resident of and domiciled in the City, County and State of New York, at the time of his death, which it in no wise admits, but expressly denies, the said trust created by said will and testament is valid under the laws of said State.

15th. It shows that the sum of fifteen hundred dollars annually has been paid by said Thomas A.

Kennedy and Oscar Vezin, Jr., as executors and trustees under said last will and testament to said complainant. Noemi Josephine Marie Genin, called therein Marie Camille Genin, and received by her, according to the terms of the ninth clause thereof.

16th. It admits that the said deceased died possessed of considerable personal property, amounting to $298,000, as shown by the inventory filed in the Surrogate's office of said county, and show that the same was fully and legally disposed of under the terms of said last will and testament of said deceased, prior to the filing of the bill of complaint in this cause, without any objection thereto on the part of said complainants, or notice of the claim set up in said bill of complaint.

17th. It shows that no caveat was put in by said complainants against proving said will and no appeal was taken by them from the order of the Surrogate of the County of Hudson, admitting the same to probate; and said will and the provisions thereof are conclusive as to said complainants and all persons whomsoever.

And this defendant humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

ITALIAN BENEVOLENT INSTITUTE,
By CELESTIN PIVA,
[SEAL.] *President.*
JOSEPH GERLI, *Secretary.*

JOHN S. MABON,
Solicitor and of Counsel with Defendant, The Italian Benevolent Institute of New York.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } *ss.*

The answer of the defendant, The Italian Benevolent Institute of New York, was taken this twenty-seventh day of May, in the year of our Lord one

thousand nine hundred and twelve, before me, under the common seal of said corporation, as by their seal thereto affixed appears.

Celestin Piva, the president of said Institute, subscribed the foregoing affidavit and instrument in the County of Hudson and State of New Jersey, in my presence.

In witness whereof I have hereunto set my hand the day and year last above written.

DOUGAL HERR,
Master in Chancery of New Jersey.

We hereby consent to the filing of the above answer as of written time, May 31, 1912

BESSON, ALEXANDER & STEVENS,
Solicitors for Complainants.

Filed May 31, 1912.

SAMUEL K. ROBBINS,
Clerk

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD ET ALS.,
Complainants,

AND

ANITA VARIEL ET ALS.,
Defendants.

On Bill, etc.

ORDER OF REFERENCE.

It is, on this nineteenth day of July, nineteen hundred and twelve, on motion of Besson, Alexander & Stevens, ordered, that the above-stated cause be re-

ferred to Lindley M. Garrison, one of the Vice Chancellors, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
Chancellor.

We hereby consent to the entry of the above order.

BESSON, ALEXANDER & STEVENS,
Solicitors for Complainants.

SMITH, MABON & HERR,
Solicitors for Defendants.

COLLINS & CORBIN,
Solicitors of Some of the Defendants.

Filed July 19, 1912.

SAMUEL K. ROBBINS,
Clerk.

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,

and

Anita Variel et als.,
Defendants.

On Bill, etc.

STIPULATION.

Whereas, Jeanne Marie Josephine Givernaud, one of the complainants herein, died at Lyon, France, on the nineteenth day of January, 1914, leaving as her sole heirs-at-law and next-of-kin entitled to administer her estate, her children, Joseph Genin and

Noemi Josephine Marie Genin, complainants herein; and,

WHEREAS, The parties hereto desire the hearing of this cause now pending before Hon. Vivian M. Lewis, Vice Chancellor, to proceed pending the appointment by the Surrogate of Hudson County, New Jersey, of an adimnistrator of the estate of the said deceased in the State of New Jersey,

Now Therefore, It is hereby stipulated and agreed by and between the parties hereto that the trial of this cause proceed before the Vice Chancellor notwithstanding the death of the said Jeanne Marie Josephine Givernaud, the complainants Joseph Genin and Noemi Josephine Marie Genin agreeing to procure with all convenient speed the appointment by the Surrogate of Hudson County of an administrator of the estate of the said deceased, to be thereupon made a party to this cause in the place and stead of the said Jeanne Marie Josephine Givernaud, deceased; and that the testimony and evidence taken and offered in the cause prior to the admission of such administrator as a party shall stand as evidence in the cause.

Dated April 9, 1914.

BESSON, ALEXANDER & STEVENS,
MAURICE LEON,
Solicitors for Complainants.

JOHN S. MABON,
Solicitors for the Defendants, The Italian Benevolent Association and The French Benevolent Society, also for Anita Variel, Josephine Givernaud and Alaska G. Aiken and Lily G. Short.

COLLINS & CORBIN,
Solicitors for Charles L. Givernaud and May R. Givernaud, his wife, Defendants, and Thomas A. Kennedy and Oscar Vezin, Jr., Executors of Louis Givernaud, Defendants.

Filed April 13, 1914.

SAMUEL K. ROBBINS,
Clerk.

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,

and

Anita Variel et als.,
Defendants.

On Bill, etc.

STIPULATION.

It is hereby admitted on the part of the complainants that Barthelemy Louis Givernaud, referred to in the bill of complaint in the above-entitled cause, went through a marriage ceremony with one Palmyre Elizabeth Lida Corriveau on the thirtieth day of May, eighteen hundred and seventy-two, in the City, County and State of New York; that the marriage ceremony was performed by the rector then in charge of the Protestant Episcopal Church Du Saint Esprit of said city; that the annexed extract is taken from the Register of Marriages of said church; and that Charles L. Givernaud, one of the defendants in this cause, is the son of said Barthelemy Louis Givernaud and said Palmyre Elizabeth Lida Corriveau; and that no further proof of said marriage or that said Charles L. Givernaud is their son or the records thereof need be produced by the defendants. All of which is subject to the objection on the part of the complainants that said facts and the evidence thereof are irrelevant and immaterial.

Dated October 17, 1913.

BESSON, ALEXANDER & STEVENS,
Solicitors for Complainants.

EGLISE DU SAINT-ESPRIT
EXTRAIT DU
REGISTRE DES MARIAGES.

Je soussigné, Recteur de l'Eglise protestante épiscopale francaise du Saint-Esprit, située à New York, Etat de New York, Etats-Unis de l'Amérique du Nord, certifie que le 30ę jour du mois de Mai mil huit cent soixante de douze, à a ma residence 22ę rue ouest. ont été mariés par moi, selon la forme de l'Eglise Episcopale, Barthélemi Louis Givernaud, natif de Lyon Dep't du Rône, France, âgé de trente Sept ans et domicilié à West Hoboken, N. J., et Palmyre Elizabeth Lida Corriveau, native de St. Thomas, âgée de vingt ans, et domiciliée a West Hoboken, New Jersey.

THÉODORE GIVERNAUD, *domicilé,*
T. GIVERNAUD *à West Hoboken, N. J.*
E. GIVERNAUD ERENNE GIVERNAUD, *domicilé*
Témoins. *à West Hoboken, N. J.*

Signé: A. VERREN,
LOUIS GIVERNAUD *Recteur.*
LIDA CORRENEAU

Pour copie conforme, le 17 April, 1910.
A. V. WITTMEYER,
Recteur.

Filed April 11 19 .
SAMUEL K. ROBBINS,
Clerk

In Chancery of New Jersey.

Between
David F. Plahn, Administrator of Jeanne Marie Josephine Givernaud, Deceased, et als.,
Complainants,
and
Anita Variel et als.,
Defendants.
} On Bill, etc.

STIPULATION.

It is hereby stipulated and agreed that all the testimony and evidence heretofore taken and offered in this cause prior to the order admitting David F. Plahn, administrator of Jeanne Marie Josephine Givernaud, deceased, as a party complainant herein, in place of said Jeanne Marie Josephine Givernaud, deceased, shall stand as evidence in the cause.

Dated July 7, 1914.

BESSON, ALEXANDER & STEVENS,
Solicitors for Complainants.

JOHN S. MABON,
Solicitors for the Defendants, The Italian Benevolent Association and the French Benevolent Society, also for Anita Variel, Joseph Givernaud and Alaska G. Aiken and Lily G. Short.

COLLINS & CORBIN,
Solicitors for Charles L. Givernaud and May R. Givernaud, his wife, Defendants, and Thomas A. Kennedy, surviving executor of Louis Givernaud, Defendant.

Filed August 17, 1914.
ROBERT H. McADAMS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD ET ALS.,
Complainants,

AND

ANITA VARIEL ET ALS.,
Defendants.

} On Bill, etc.

ORDER SUBSTITUTING DAVID F. PLAHN, ADMINISTRATOR, &c., IN PLACE OF JEANNE MARIE JOSEPHINE GIVERNAUD, COMPLAINANT.

It appearing to the Court that David F. Plahn, the administrator of Jeanne Marie Josephine Givernaud, deceased (one of the complainants herein), duly appointed as such by the Ordinary of the State of New Jersey, is a proper and necessary party complainant to this suit, and application being made for this purpose:

It is, on this seventeenth day of August, nineteen hundred and fourteen, on motion of Besson, Alexander and Stevens, solicitors of the complainants, ordered, that David F. Plahn, administrator of Jeanne Marie Josephine Givernaud, deceased, be and he hereby is substituted as a complainant herein in the place and stead of said Jeanne Marie Josephine Givernaud, deceased, and that the bill of complaint do stand amended accordingly, and that the complainants may proceed further thereunder according to the course and practice of this Court, and that the answers heretofore filed herein shall stand as answers to said bill of complaint as amended as aforesaid.

E. R. WALKER,
Chancellor.

Consented to:

JOHN S. MABON,

Solicitors for the Defendants, The Italian Benevolent Association and the French Benevolent Society, also for Anita Variel, Joseph Givernaud and Alaska G. Aiken and Lily G. Short.

COLLINS & CORBIN,

Solicitors for Charles L. Givernaud and May R. Givernaud, his wife, Defendants, and Thomas A. Kennedy, surviving executor of Louis Givernaud,

Filed August 17, 1914.

ROBERT H. McADAMS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
DAVID F. PLAHN, ETC., JEANNE M. J. GIVERNAUD ET ALS.,
Complainants,

AND

ANITA VARIEL ET ALS.,
Defendants.

ORDER OF RE-REFERENCE.

It appearing to the Court that the above matter was by an order entered on July 19, 1912, referred to Honorable Lindley M. Garrison, then one of the Vice Chancellors of this court:

And it further appearing that the case remains still unheard and undetermined,

It is thereupon, on this twenty-first day of July, nineteen hundred and fifteen, as of the fourth day of March nineteen hundred and thirteen, ordered,

that the order of reference heretofore entered in this cause, be vacated and set aside, and that the matter be referred to Hon Vivian M. Lewis, one of the Vice Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
Chancellor.

Filed July 21, 1915.
ROBERT H. McADAMS,
Clerk.

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,
and
Anita Variel et als.,
Defendants.
} On Bill, etc.

TESTIMONY.

Transcript of testimony taken in the above-entitled cause, before Hon. Vivian M. Lewis, Vice Chancellor, at the Chancery Chambers, Jersey City, New Jersey, on the seventeenth day of October, nineteen hundred and thirteen.

Appearances—Besson, Alexander & Stevens, Esqs., by Mr. Besson, for the Complainants, with whom is associated Maurice Leon, of the New York Bar; John S. Mabon, Esq., for the Defendants, The Italian Benevolent Association and the French Benevolent Society, also for Anita Variel, Joseph Givernaud and Alasko G. Aiken and Lily G. Short; George

Malraison, Esq., for the French Benevolent Society of New York, Defendant; Collins & Corbin, Esqs., by Mr. Collins, for Charles L. Givernaud and May R. Givernaud, his wife, Defendants, and Thomas A. Kennedy and Oscar Vezin, Jr., Executors of Louis Givernaud, Defendants.

Mr. Collins—There are two distinct issues.

Mr. Leon—There is in issue the question of the domicile of the testator at the time of his death.

Mr. Collins—His will was proved in New Jersey, as if he were a resident domiciled in New Jersey, but they claim he was domiciled in New York.

Mr. Leon—The allegation is that he was domiciled in New York, and there is also an allegation to the effect, that under a New York statute—

The Court—Who are the complainants?

Mr. Leon—The complainants in this suit are a wife and two children of a marriage which took place in France in the early sixties. Some few years after that marriage, suit for the recovery of her dowry was brought, and she also sued for a separation and obtained judgment in those two suits.

The Court—She recovered her dowry and secured her separation?

Mr. Leon—Yes. The testator, meanwhile, came to this country, and while here he obtained a divorce by publication.

The Court—I recall Vice Chancellor Stevenson's opinion in the matter now.

Mr. Leon—The complainants are entitled to a distributive share in the estate. Now, with reference to the divorce, I desire to take the position on the record here, that we claim that under Section 1 of the Fourteenth Amendment of the Constitution of the United States, this decree is void, in that it deprives the complainant of her property without due process of law, and also deprives her of the equal protection of the law; and, in order that our point should be perfectly clear on that, I desire to say that our point is this—the Federal question in the case is this—

The Court—Vice Chancellor Stevenson held the divorce to be valid, didn't he?

Mr. Leon—He dismissed our bill.

The Court—He did not touch the question as to the validity of the divorce?

Mr. Leon—He decided that we were not entitled to maintain our bill, on the ground of laches.

Now, we maintain in this court and in this cause, that this decree of divorce is void under that clause of the Constitution of the United States, for this reason, that at the time that it was granted, the marital status of the parties had already been fixed and determined by a valid judgment rendered between them in the place of their matrimonial domicile, namely, in France. I will offer in due course, proof of the celebration of the marriage.

There is also another point in the case which is raised by the bill. It is this: We allege that these parties, namely, the complainant and the testator, were born in France, of French citizenship, residing at Lyons; that they were married, and all children born of that marriage were born in France, and that those children, upon their birth, became entitled to an indefeasable share of the estate of their parents, and we make proof of the French law

Mr. Collins—I will speak for all the defendants.

The Court—Who are all the defendants?

Mr. Collins—The Eexecutors of the decedent, and the son by the second marriage, and certain beneficiaries under this trust—charitable societies of New York, French and Italian benevolent societies. The issues are two: First, where was the domicile of the testator? In his will he said it was West Hoboken, New Jersey. Undoubtedly, that, I think, makes *prima facie* proof that that was his domicile. There is no doubt—the proof will develop that he was domiciled there for many, many years, and the law will be, as we shall maintain, that if a man once acquires his domicile, to make which there must unite—(continues statement).

The Court—What proceedings have been taken in the Orphans' Court?

Mr. Collins—The personal account has been filed in the Orphans' Court, but there has not been any decree of distribution. Now, if the widow is out, then the next-of-kin will take, provided the clause is void absolutely, and the next-of-kin are two children of the first marriage in France, and one child of the second marriage here.

Now, that is the first issue, and that is all that is necessary to say about it.

The second issue presents a fact, that the domicile, by birth and matrimony, way back in the sixties, was France, and that by the French law, a man cannot dispose of more than two-thirds of his property away from his children; so, they say that these children are entitled, irrespective of this trust, to overset the will, but we say as to that, that that could only be true as to property in France—perhaps, only true as to property that was acquired when he ceased to be a citizen of France. He left France a bankrupt; he came here and established the great silk works, and became a naturalized citizen, and we shall contend that that doctrine of the French Code has no application at all to this case. Those are the issues. Charles Louis Givernaud is a child by the second wife. If the widow is out, and if the trust is void, then the estate would be diveded among the two children in France and the one child here, and they do not mention him in their bill; they ignore him; but the stipulation will be made in the case, that there was a ceremonious mariage after the divorce, and a child born of it.

Mr. Leon—I offer in evedince these two documents —first, an exemplified copy of a judgment of the Tribunal of First Instance of Lyons, a court of record of France, rendered on the first of August, 1866, in an action pending in said court, between Jeanne Marie Josephine Haour, wife of Barthelemy Louis Givernaud, as plaintiff, and the said Barthe-

lemy Louis Givernaud, as defendant, which said exemplified copy is certified to by the American Consulate at Paris, as being duly authenticated, so as to be entitled to be received in evidence in the courts of France.

Mr. Collins—We make no objection to the authentication of this paper, provided our friends unite in the stipulation which it has been agreed between us shall be made—simply about the marriage of this decedent to the second wife, and the birth of the child; we will make no objection to the authentication.

This is a judgment in the First Instance between the testator and his first wife, but we do object to this as irrelevant and immaterial. In my judgment, it is irelevant and immaterial, even if there had been no divorce, but there might be enough to argue that it was presumable that there has been no divorce, but in view of the fact which counsel has opened, that there was a divorce in New Jersey, and that this court has dismissed, on final hearing, a bill to set aside that divorce, or to ignore it, it is irrelevant any way.

The bill was dismissed. The bill which was filed by the French wife to annul that New Jersey divorce has been dismissed. In view of that admission in the opening, I take it your honor should do no more than mark this for identification.

Mr. Leon—May it please your Honor, this other case has nothing in common with this. We will offer the same translation as before. In the cause tried by his Honor, Vice Chancelor Stevenson, the record will show that our prayer for the vacating of the decree of divorce was narrowed down to one purpose, namely, in order that the statute of limitations should not stand in the way of the recovery of a judgment rendered in France in favor of the wife and against the husband for the amount of her dowry. I take it that is undisputed. In this case, we offer those judgments in support of our claim of immunity under

the Feneral Constitution; and, I take it, that as presented in this case, your Honor is at liberty, as every judge is at liberty, always to consider a right, privilege or immunity set up under the Federal Constitution.

Now, I offer in evidence—

Mr. Collins—One at a time.

The Court—The Court will receive it for the present.

Mr. Collins—It is not at all pertinent until you decide where was the domicile; you have two questions to decide, first the domicile; then you have to decide whether the trust is void, and then only do you have to inquire who is entitled to the property under the intestate laws.

Mr. Leon—I will certainly not press the offer at this time, unless I am wrong in understanding that your Honor desires to have the whole case in, and then decide every question in the case

The Court—The first question, as I understand, as outlined by yourself, and then as responde dto, is the qusetion of domicile

Mr. Leon—Correct.

The Court—If this Court is satisfied that the domicile was in New Jersey, as proclaimed by the will, then this is entirely irrelevant.

Mr. Leon—That is true.

The Court—Supposing we proceed to dispose of this question of domicile at this time.

Mr. Leon—It is entirely agreeable to to us.

Marked "*Exhibit C*1 for identification, C. E. R."

The Court—It is a judgment.

Mr. Leon—I will also offer this judgment for money for identification.

Mr. Collins—I make the same objection with regard to that.

Marked "*Exhibit C*2 for identification, C. E. R."

Mr. Collins—Note in our case, in addition to the objection stated, that we object to this foreign judgment as not valid in this country.

Mr. Malraison—Under the ruling as stated in Judge Stevenson's opinion.

Mr. Leon—Do I understand that our stipulation is as follows: That Barthelemy Louis Givernaud, deceased—

The Court—Read No. 1, not No. 2.

Mr. Leon—Who executed the will in suit, and the complainant, Jeanne Marie Josephine Haour Givernaud, were both born in Lyons, France. The said Barthelemy Louis Givernaud on the 21st day of April, 1835, and the said Jeanne Marie Josephine Haour Givernaud on the 16th of April, 1833; and that on the 5th day of April, 1860, both being natural-born French citizens, and both residing and having a domicile in Lyons, France, they were joined in marriage at Lyons, aforesaid. That the complainants, Joseph Givernand and Noemi Josephine Marie Genin, *nee* Givernaud, were the issue of said marriage, both born at Lyons, France; the said Joseph on the 5th day of June, 1861, and the said Noemi on the 30th of August, 1862.

Mr. Collins—To that stipulation we accede, subject to the objection to its relevancy, and on condition that the stipulation that we desire is acceded to by our friends.

Marked "*Exhibit D*1 for identification."

Mr. Collins—It is a simple stipulation as to the second marriage and as to the birth of the third child.

New York depositions were read, as follows:

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,
and
Anita Variel et als.,
Defendants.
} On Bill, etc.

DEPOSITIONS.

Depositions *de bene esse* on the part of the complainant taken before me, Theodore Rurode, a Master in Chancery of the State of New Jersey, on this eighth day of October, 1913, at 10 A. M., at No. 60 Wall Street, New York City, in the presence of J. W. R. Besson, Esq., and Maurice Leon, Esq. (of New York), of counsel with the complainants, and Collins & Corbin (Hon. Gilbert Collins), and John S. Mabon, Esq., and Theodore L. Bailey, Esq. (of New York), of counsel with the defendants.

It is stipulated and agreed that the depositions may be taken stenographically, and the necessity for the signatures of the witnesses to the same is waived.

CHARLES NELSON, a witness on behalf of the complainants, being duly sworn, on his oath, says:

DIRECT EXAMINATION, by Mr. Leon.

Q. What is your business, and where do you live?

A. I live at 251 West 87th Street, New York, and I am superintendent of an apartment house.

Q. Between June, 1899, and the year 1902, were you superintendent of the Taccumtha, 219 to 221 West 34th Street, in the Borough of Manhatton, City of New York?

A. Yes, sir. I came there, I think, in 1901. I was only in that place 18 months.

Q. When did you leave that place?

A. In 1902—between 1902 and 1903.

Q. Do you remember what time of the year you left that place?

A. I think the first of December.

Q. 1902?

A. As far as I can recollect. I don't know exactly.

Q. Either 1901 or 1902?

A. Yes, sir.

Q. And you had been in that place for 18 months?

A. Eighteen months, yes, sir.

Q. Do you remember, while in that place, renting an apartment to Louis Givernaud?

A. That is the old gentleman, is it not?

Q. Yes.

A. Yes, I did.

Q. Did you rent it?

A. No, Mr. Schwegler rented it—Mr. George Schwegler. He used to own the apartments at that time.

Q. Were you there at the time when Louis Givernaud leased the premises?

A. No, I was not present, but I know he rented them from George Schwegler.

Judge Collins—I shall move on the trial to strike out the hearsay part of this testimony.

Q. You were the superintendent at that time, were you not?

A. Yes; but the owner was there and done all the business, transacted all the business; he was there all day long.

Q. When you left your place, were the Givernauds still living there?

A. Oh, yes.

Q. Who lived in that household, that Givernaud household?

A. Mr. Givernaud and son, and the son's wife, that is all there were living in there at that time; they had a butler there.

Q. Do you remember the butler's name?

A. No, I do not. If I heard the name I would know it.

Q. To whom was the rent paid?

A. Paid to the owner, George Schwegler.

Q. Do you remember when they moved into the house—when the Givernauds moved into the house?

A. Not the date.

Q. Do you remember seeing them move in?

A. Oh, yes; sure.

Q. Do you happen to know where they came from when they came?

A. No, that I don't know. I can't tell that.

Q. During the eighteen months that you were there, how much of the time were they there?

A. Well, they were traveling a good deal. I think he was in China one time—the old gentleman—and where the young folks were, I don't know; if they were with him or not I don't know.

Q. Do you know of any other residence that they had, except the one at 219 to 221 West Thirty-fuorth Street?

A. That is all.

Q. Did you have any conversation with them while they were living there, from time to time?

A. No, only with the son; he visited me several times, or came down into my place in the evening; but nothing concerning the household.

Q. What kind of an apartment did they have there?

A. They had a seven-room apartment.

Q. Was it furnished, or unfurnished?

A. Their own furniture.

Q. How long were they away when they went to China?

Judge Collins—You say, "they went."

Q. You say the old gentleman was the only one who went to China?

A. They were away quite some time, for how long I don't know; I didn't take any notice; it has slipped my mind, because it is so long ago; it is ten or eleven years ago.

Q. While you were there who was it that acted as head of the household?

Judge Collins—Objected to as calling for a conclusion.

(Question withdrawn.)

Q. To whom was the apartment rented, the father or son?

Judge Collins—Objected to on the ground that he was not present and cannot tell.

A. To the father, because I know he gave the owner the money.

Q. Did you see that?

A. No, I didn't see it.

Judge Collins—I shall move to strike out the answer at the hearing.

Q. How do you happen to know it.

A. Which?

Q. That it was rented by the father and not by the son?

A. The son had little to say, he was kind of indifferent towards the household; the father he done all the—between the father and the butler; the butler was, in fact, the head of the house; he had full charge of it, everything.

Q. Did you see any checks for the payment of that rent?

A. No, I did not.

Q. Who were the checks given to?

Judge Collins—Objected to on the ground that the witness has said that money was paid.

A. Checks or money, I don't know which, but the rent, I mean.

Judge Collins—The question to whom the money or checks were given I object to on the ground that it must be hearsay, that the witness had no personal knowledge, and the checks would be the best evidence.

(Question repeated.)

A. The rent was paid to George Schwegler.

Q. Did Schwegler live on the premises?

A. No, sir.

Q. How was the money collected, if you know?

A. He collected it himself.

Q. Do you mean that he came on the first of the month?

A. Always.

Q. And that he took the money from the tenants?

A. Yes, always.

Q. Were you ever on hand when he collected from the Givernaud Apartments?

A. No, not that I can recollect—I can't recollect that.

Q. Except for that trip to China, do you remember any occasion when Mr. Louis Givernaud, that is the father, was away for any length of time?

A. He was very little home; he was mostly on the go all the time.

Q. Did you ever hear him refer to any other residence that he had, except that one in that apartment house?

A. No.

Q. Did you ever hear him refer to where his business was?

A. No, only I know it, that is, his factory; that is all I know, where his factory was over in Jersey. He is a silk manufacturer, is he not?

Q. Did you ever hear him refer to where his office was?

A. No.

Q. Did he go downtown regularly that you know of—that is, the old gentleman?

A. Down where?

Q. Down to his business, wherever it was?

A. He was sick a good deal of the time. When he moved into the Taccumtha he was sick there one winter, I know for several months, and I don't know how he transacted his business, if he was much out, of course, that is a thing that I didn't pay much attention to.

Q. Do you happen to know what was the matter with him?

A. No. He was lying in bed, because I saw him in bed; it was around Christmas time; I think they moved in in October, and that was the first Christmas he was sick, and after that he took that trip to China.

Q. Do you happen to know whether Mr. George Schwegler, the owner of that apartment house at that time ,is still living?

A. Oh, yes; I know him well; I know where he is, too.

Q. Where is he?

A. His residence I don't know, but his office is up at One Hundred and Forty-fifth Street and Broadway. He has a real estate office up there. Of course, it is easy to be found, as his name is in the telephone book.

CROSS-EXAMINATION, by JUDGE COLLINS:

Q. I would like to get definitely when it was that you left, whether it was in 1901 or 1902?

A. 1902.

Q. December 1, 1902?

A. Yes, sir.

Q. And you had been in the place 18 months.

A. Yes, sir.

RE-DIRECT EXAMINATION, by MR. LEON:

Q. Did I understand you to say that it was two or three months after you came to the place that the Givernauds moved in?

A. Yes, they moved in after I came to the place.

Q. How long after?

A. That I couldn't tell exactly.

Q. Approximately?

A. I think they moved in there in October, 1901.

Q. And they were still there when you left, in December 1902?

A. Yes. I left in November, or the first of December.

Q. Did you ever have occasion to go back to that house subsequently?

A. Oh, yes, I have been there often since.

Q. The next time that you went to that house, after ceasing to be superintendent, were they still living there?

A. Oh, yes, but how long I don't know.

Q. How long after you ceased to be superintendent did you go back to that house?

A. The following March, I think I was there. Of course, I don't know defienitely if they were there, but my friend had charge of the house and said they were still living there, because I asked if the Givernauds were still living there, and that was in March, 1903.

Judge Collins—On the hearing I shall move to strike out the answer as hearsay.

Q. Did you have any occasion to see the Givernauds there after you left the superintendent?

A. No, sir, I never saw them.

RE-CROSS EXAMINATION, by Judge Collins:

Q. Where are you living now?

A. 251 West Eighty-seventh Street.

Q. You have no way of fixing the time when the Givernauds moved into the apartment mentioned, except by general memory, and trying to recall about when?

A. Yes.

Q. Nothing that you could go by to fix the time.

A. No.

Q. Are you sure they were there while you were there, at least one year?

A. Yes; because I can recollect they were there when I left; that I know; and I left the first of December.

Q. And they had moved in in the Fall of the previous year?

A. The Fall of the previous year, that is right.

Taken and sworn to before me the day and year aforesaid.

THEODORE RURODE,
Master in Chancery of New Jersey.

FRANCIS S. HUTCHINS, a witness on behalf of the complainants, being duly sworn on his oath, says:

DIRECT EXAMINATION, by Mr. Leon:

Q. What is your profession?

A. I am a lawyer.

Q. And where is your residence?

A. At 137 East Thirtieth Street, New York City.

Q. And your office is at 27 Pine Street, in this city?

A. Yes, sir.

Q. Are you an officer of the Waldorf-Astoria Hotel Company?

A. Yes, sir, secretary.

Q. And that is a corporation organized under the laws of the State of New York?

A. Yes, sir.

Q. Does it manage and operate the Waldorf-Astoria Hotel Company, at Thirty-fourth Street and Fifth Avenue, in the Borough of Manhattan, City of New York?

A. Yes, sir.

Q. How long have you been secretary of that company?

A. Some three or four years, possibly longer.

Q. Have you in your possession the record called for by the subpœna *duce tecum* served on you in this matter?

A. Yes, sir.

Q. As such secretary have you the custody of the books, papers and records of the corporation?

A. I have access to them.

Q. I show you a book marked on the cover "Reg. 4, Sept. 3, to Dec. 8—07," and ask you whether that book is the hotel register of the Waldorf-Astoria

Hotel for the registration of guests on Monday, October 14, 1907?

A. It is.

Q. I call your attention to the last two lines of the first page of registration of guests on Monday, October 14, 1907, in said register and request you to read into the record the last two registrations on that page.

Judge Collins—Objected to on the ground that there is no proof of who made the entries.

A. "Louis Givernaud, Los Angeles," and under the heading "rooms," "1156," "Mr & Mrs. Charles Givernaud, Los Angeles," and under the heading "rooms," "1157".

Q. Are the names given under the printed heading "names" on that page?

A. Yes, sir.

Q. And are the residences as read by you given under the printed heading "residences" on that same page?

A. Yes, sir.

Q. You don't know who wrote these names on that register?

A. No, I do not.

Q. Are you familiar with the process of registration of guests in the Waldorf-Astoria?

A. Yes, sir.

Q. How are such registrations made generally?

Judge Collins—Objected to as incompetent.

A. In the event that it is an individual he would naturally sign his own name. It is very possible that a person coming with a party might register the entire party.

Q. Is there any other book among the records of the Waldorf-Astoria Hotel containing the registration of guests on Monday, October 14, 1907, than the one that you have here produced?

A. I think, without doubt, there is. As a matter of fact the Waldorf-Astoria maintains and uses during the day perhaps three or four registers.

Q. You have produced this book in obedience to a subpœna calling for the register of the Waldorf-Astoria which contains those registrations which you have read?

A. Yes, sir.

Q. I show you here a book marked on the cover, "Register Waldorf-Astoria," and ask you to state, if you can, what is the character of the entries in that book?

A. This is a book which is kept by the cashier of the Waldorf, and in this book is transcribed from the register the names, residences, room, arrival, and day of departure of guests, alphabetically.

Q. Do you find in this book any entry relating to Louis Givernaud and Charles Givernaud and wife?

A. Yes, sir.

Q. Will you please state what that entry is?

Judge Collins—Objected to as incompetent.

A. Under the heading "name" is "Louis Givernaud," and under that "Charles Givernaud and wife." Under the heading "residences," "Los A.," and under the room number is "1156-7," which is scratched out and aobve that is written "708-09-10-11," and under the heading "arrival" is "10/14" and under the heading "departures" is "11/5."

Q. Do you know what months and year these entries on this page of this register have reference to?

A. They refer to the year 1907, and months of October and November.

Q. What entire period do the entries in this register number sixty-six cover?

A. Apparently from September 23, 1907, to November 25, 1907.

Mr. Leon—I offer in evidence the register of guests, being the first referred to by the witness, and being register number four, September 3 to December 8, 1907, with particular reference to the first page of registration of guests on Monday, October 14, 1907.

Judge Collins—I object to the offer as incompetent.

Mr. Leon—I ask to have said register marked for identification, with particular reference to said page. I do not waive the offer of the book in evidence by having it marked for identification.

Judge Collins—Oh, no.

The page referred to is marked C-1 for identification.

Mr. Leon—I offer in evidence the register number sixty-six of the Waldorf-Astoria, being the second book referred to by the witness, and being from September 23 to November 25, 1907, with particular reference to the page containing the entry, as follows: "Waldorf-Astoria; Name, Givernaud, Lewis; Charles and wife; Residence, Los. A.; Room, 1156-7", stricken out in blue pencil and blue pencil substitution made as follows: "708-09-10-11." "Arrival, 10/14; Departure, 11/5."

Judge Collins—I object to it as incompetent.

Mr. Leon—I ask that it be marked for identification without however waiving the offer of the book in evidence.

The same is marked C-2 for identification.

Q. Please tell us, if you know, who made this Givernaud entry in Exhibit C-2 for identification?

A. I don't know.

Q. By whom were such entries made in the year 1907, according to the practice of the Waldorf-Astoria?

Judge Collins—Do you mean what individual or what officer?

A. I don't know.

Q. Is this the cashier's register?

A. Well, it is kept in the cashier's department, but by whom the entries were made I don't know.

Q. What does the cashier's department consist of in the Waldorf-Astoria Hotel?

A. A number of bookkeepers to make entries of the arrivals and departures of guests and the various charges which guests incur, and also a department which cashes checks and receives payment of bills.

CROSS-EXAMNIATION, by JUDGE COLLINS:

Q. This book, Exhibit C-2, contains entries made in many different handwritings—any bookkeeper would enter in it what came under his notice?

A. Apparently most of these entries about this time are made in the same handwriting.

Q. But there are other writings in it.

A. Yes, sir.

Q. With reference to Exhibit C-1 there was something written in front of the word "Louis", which seems to have been very effectually eliminated with a black lead pencil. To me it seems like "Mr."

A. It might be that. I would have said it was "M".

Q. The name underneath, which you have read as "Mr. and Mrs. Charles Givernaud"—what you read as "Mr." is simply an "M".

A. Yes.

Q. But you take it that meant "Mr."?

A. Yes.

Q. And you take it that what seems to be an "M" under this obliteration seems to be a "Mr."?

A. Yes, sir.

Q. Then, undoubtedly, whoever wrote those two names, if the same person wrote them, or the different persons who wrote them, if written by different persons, prefixed the signatures with the appellation "Mr."?

A. It seems so.

Q. Isn't it a fact when people register their own names on the hotel register they do not usually put any such prefix?

A. I would say that if it were a lady she would certainly put "Mrs.", but I would say that it would be rather unusual that a man would put "Mr." Although there are instances where that is done; for instance, here on that same page we see "Mr. Luke Lee". I happen to know his signature, and know that that is his signature.

Q. But, as a usual thing, it is common knowledge that a man who registers his own name doesn't put "Mr" before it?

A. If he is unaccompanied by his wife, he usually does not.

Q. But it is quite common when some one else registers for him to put "Mr." in front?

A. Well, I don't feel that I am qualified to testify as to that; I don't know.

Q. Is it not a fact that the clerk in charge of the desk frequently registers for the guests, especially if he knows them?

A. Well, I know of such instances, yes.

Q. You don't know who obliterated this "M" or "Mr."?

A. No, I haven't the slightest idea.

Q. It was in that condition when you first saw it?

A. Yes, sir.

Q. In the book, Exhibit C-2, the word "Givernaud" is only written once, and then "Louis" and "Charles and wife" are written opposite it, each occupying half of the space?

A. Yes.

Q. And the "Los A." is opposite "Charles and wife," nothing being after the word "Louis"?

A. No, sir, except the room number.

Q. Except the room number in blue pencil?

A. Yes, sir.

Q. Is it not quite frequent that people register at a hotel, giving the place they have last come from and not their domicile; as, for example, if a man lived anywhere, no matter where, but had been tem-

porarily in Los Angeles, he would register Los Angeles?

A. I am frank to say that I don't feel qualified to testify.

Q. It doesn't follow that every man who signs his name at the foot of a page and gives a place opposite it, looks up to the top of the page to see the word "residence" printed there?

A. I don't know.

Taken and sworn to before me the day and year aforesaid.

THEODORE RURODE,
Master in Chancery of New Jersey.

WILLIAM A. HUSTON, a witness on behalf of the complainants, being duly sworn, on his oath says:

DIRECT EXAMINATION, by Mr. Leon:

Q. What is your business?

A. Bookkeeper.

Q. What is your present address?

A. 423 West Fiftieth Street, New York.

Q. Were you ever the bookkeeper of the Raymore Apartment, No. 1 West Sixty-eighth Street, Borough of Manhattan, City of New York?

A. Yes, I was.

Q. How long were you such?

A. For twelve years.

Q. When did you leave there?

A. It is an estate, and the people wohm I am still with are connected with that same estate. In other words, I have been with those people for 15 years.

Q. But, formerly you were the bookkeeper employed right on the premises of the Raymore, No. 1 West Sixty-eighth Street?

A. Yes, sir.

Q. When did you leave those premsies?

A. I was there up until the fifteenth day of January, this year.

Q. Do you remember Mr. Louis Givernaud?

A. Yes, sir, I recall Mr. Givernaud.

Q. Was he a tenant of the Raymore, at No 1 West Sixty-eighth Street, at any time that you were there?

Judge Collins—Objected to as calling for a conclusion.

A. Yes, he was.

Q. Did he live there at least for any time?

A. Yes, to my knowledge, he did.

Q. Am I correct in the statement that he lived there from the fifteenth of November, 1901, to the thirtieth of September, 1905?

A. I believe it is 1904. I won't be positive about that, but I believe it is 1904.

Judge Collins—Which is 1904?

Witness—The end of the term.

Q. He was there three or four years?

A. Three years, all but about six weeks; from the fifteenth of November, 1901, to October 1, 1904, if I remember right.

Q. What estate did you say owned that apartment house during that period?

A. The estate of Alexander Moore.

Q. As such bookkeeper did you have charge of all books and records relating to that apartment house?

A. Yes, sir.

Q. Do you know to whom the apartment in which Louis Givernaud lived during that period was rented?

Judge Collins—Objected to as calling for a conclusion, and as incompetent.

A. Well, to the best of my knowledge, I believe the lease was made to Mrs. Louis Givernaud for the first term.

Judge Collins—I shall move at the hearing to strike out the answer as incompetent, it appearing that it was a written lease, and that the lease itself would be the best evidence.

Q. Do you know what became of the leases relat-

ing to that apartment covering the period during which Mr. Louis Givernaud lived there?

A. We retained a lot of those leases for a long time, until they accumulated, and then we disposed of them. I guess we haven't got one of any kind. They were no good to us.

Q. When Mr. Louis Givernaud moved in to the Raymore in November, 1901, who moved in there with him?

A. There was, if I remember right, the old gentleman, and there was Mrs. Louis Givernaud, and, I believe, the young man, junior.

Q. You mean the son of Mr. and Mrs. Louis Givernaud?

A. Yes, sir.

Q. How large an apartment did they occupy there?

A. An apartment of nine rooms, six upstairs, and three downstairs.

Q. And was the apartment rented to them furnished, or unfurnished?

A. Unfurnished.

Q. Do you happen to remember where they came from when they moved in?

A. No, I do not.

Q. From the time they moved in until they moved out, were you in regular attendance on the premises?

A. Every day, except Sundays.

Q. And you saw the occupants of that apartment coming in and going out?

A. Yes, at times.

Q. Do you recollect during that period, namely, November, 1901, to September, 1904, that Mr. Louis Givernaud was living in that apartment?

Judge Collins—Objected to as leading and calling for a conclusion.

Q. Describe what you saw of Mr. Louis Givernaud during that time?

A. During that period I used to see him—I won't say every morning—but occasionally, between the hours of eight and nine, going to his business. He

had a regular hackman drive there every morning and take him to his place of business, if I remember it right. I won't say how long I saw him do that, but I saw him a number of times do it.

Q. Was he living there in regular fashion as tenants live in an apartment house?

A. That is my understanding of it, yes.

Q. Did you see him coming in at night?

A. I may have once or twice, but I don't recollect that as much as I do in the morning.

Q. Leaving in the morning?

A. Yes.

Q. When you met him in that way, going in, or coming out, would you have a casual word or two with him occasionally.

A. Well, I might bid him the time of day; that's all.

Q. To whom was the rent paid, that is to say, who received the checks or cash for the rent of that apartment while the Givernauds lived there?

A. I did.

Q. And from whom did you receive it?

A. Generally from the office of Givernaud Brothers.

Q. Do you happen to recall by whom the check was signed?

A. That I can't recall; I don't recollect.

Q. Where was the office of Givernaud Brothers?

A. They were at that time around 33 or 35 Greene Street, in the Borough of Manhattan, City of New York.

Q. That was Mr. Louis Givernaud's place of business?

A. That is my understanding, yes.

Q. What became of Mrs. Louis Givernaud?

A. I don't know anything about them after they left the Raymore.

Q. Do you happen to know where they moved to after they left the Raymore?

A. I believe they moved to Central Park West, within the vicinity, two or three blocks from there in the location of Sixty-fifth or Sixty-sixth Streets.

Judge Collins—I shall move to strike out the answer, as it is apparent that the witness does not know.

Q. How do you happen to know that they moved there?

A. Through Mr. Sibbald, who was our engineer on the premises and lived on the premises.

Q. Were you there when their furniture was removed?

A. I was, yes.

Q. Did you ever hear, while you were there, of Mr. Louis Givernaud having any other residence, except that in the Raymore?

A. No, I did not.

Q. Did you ever hear him refer to any other place as his residence?

A. No, sir.

Q. Do you happen to know why Mr. Givernaud moved out of the Raymore?

A. No, I can't recall just now. It wasn't for any reason of us putting him out, because we considered him a good tenant.

Q. On what floor was he living while he was there?

A. The first floor, or ground floor, occupying also two or three rooms in the basement, in connection with that.

Q. Do you remember his ever having taken up with you the question of his getting a floor higher up?

A. I think I do recollect him making such a request.

Q. And were you able to provide him with an apartment higher up?

A. No, we could not at that time.

Q. Do you know of any other reason for his moving out?

A. I think, since you refresh my mind, that that was the reason that he moved out.

Q. Was his son married at the time they were living there, that is to say, did he have a wife living with him?

A. Well, that I don't know.

Q. While Mr. Louis Givernaud lived there, did he occasionally go away on trips?

A. I believe so.

Q. And did he always return to the Raymore.

A. He generally returned, that is, I have seen him at times.

Q. Was there anything to distinguish him in your mind, so far as his occupation of that apartment was concerned, from the occupation of any other tenant in the house?

Judge Collins—Objected to as calling for a conclusion and not a fact.

A. I don't quite understand the question.

Q. I mean, in his use and occupation of that apartment, did he act, as far as your observation went, in the same way that people using and occupying an apartment act, that is to say, did he live there and receive his friends there and take his meals there, and, in a general way, use that apartment as apartments are generally used in the City of New York, according to your observation?

Judge Collins—Objected to as leading and as calling for a conclusion.

A. That is the impression he gave me.

Q. Did he keep house there?

Judge Collins—Objected to as calling for a conclusion, and also because it does not appear that the witness knows.

A. As far as I know. I wasn't in the rooms enough to know what was going on. My observation has been from the outside, seeing him going in and coming out, that is all.

Q. Did he keep servants that you know of?

A. Yes, he did.

Q. Do you remember how many?

A. I think at one time he had two.

Q. Did you have occasion to look into the apartment there at times?

A. You could look into the apartment from the street, yes, sir.

Q. Was it all furnished?

A. Yes, it was.

Q. Did you have occasion to go into the apartment while he was there?

A. I may have on one or two occasions, with regard to repairs, or something of that description.

Q. On such occasions how would you find that apartment?

A. Furnished, the same as any other apartment.

Q. And the occupants making use of that as a housekeeping apartment?

A. Yes.

Q. Did you have occasion, from the fact that the apartment was on the ground floor, to know where the kitchen was?

A. Yes.

Q. Where was it?

A. The kitchen was located in the basement.

Q. Do you happen to know whether, during the occupancy of the apartment by Mr. Louis Givernaud and his family that that kitchen was used for preparing meals for them?

A. Yes, it was.

Q. Do you happen to know how their laundry was done?

A. No, I can't answer that.

Q. Was it done on the premises?

A. I am not positive; I couldn't answer positively on that question.

Q. Did you have occasion to hear while you were there, in the course of your duties, people inquiring for Mr. Louis Givernaud?

Judge Collins—Objected to as incompetent.

A. No.

Q. According to the practice in that house, how would callers announce themselves?

A. Through the hall boy generally.

Q. Did you know that there were sleeping quarters in that apartment?

A. There were, yes, sir.

Q. And you had occasion to see them when going in there?

A. Oh, yes.

CROSS-EXAMINATION, by JUDGE COLLINS:

Q. Was the Givernaud apartment in view from your station?

A. We were located in the basement, our office was located in the basement, underneath the apartment, except the one end; as I say, the three rooms belonging to the apartment which were in the basement, they were back of the office.

Q. And those three rooms were?

A. Kitchen, dining-room and servants' room.

Q. You don't know whether that dining-room was ever used by the Givernauds or not?

A. That I couldn't say.

Q. When you say that Mr. Givernaud kept servants, you mean servants were kept—you don't know who employed them?

A. That I don't know.

Q. Had the Raymore at this time a restaurant connected with it?

A. No.

Q. So that occupants of apartments there either did their own housekeeping, or else got their meals outside.

A. That is the idea.

Q. You don't know whether the Givernauds sometimes got their meals outside?

A. That I don't know.

Q. And you don't know really what their household arrangements were.

A. No.

Q. Were there two ladies there, or only one?

A. I think there were two ladies there.

Q. The one that you spoke of as Mrs. Louis Givernaud was elderly?

A. No, the Mrs. Louis Givernaud that I refer to was a woman probably thirty-eight years old, not more.

Q. Did you take her to be the wife of Louis, or the wife of the son?

A. I took her to be the wife of the son.

Q. The one that you have here called Mrs. Louis Givernaud you take to be the wife of the son?

A. Yes, sir.

Q. The youngest Givernaud's name was Charles Givernaud, was it not?

A. I believe it was.

Q. The other lady that you spoke of in there, you don't know anything about her?

A. I think she was the sister of this other lady.

Q. Is it a fact that Mr. Louis Givernaud, the old gentleman, went abroad during the time this apartment was occupied?

A. I think he did, yet I am not positive as to that; I don't know just where he went; I know he was away and that is all.

Q. Do you remember how long he was away?

A. No.

Q. He was quite frequently away?

A. Oh, yes, at times.

Q. All you were concerned with that you got your rent regularly?

A. Yes, sir.

Q. And Mr. Louis Givernaud, you recall now, was away a great deal?

A. I won't say a great deal. I will say at times.

Q. Can you remember that on one occasion he was gone for several months?

A. Well, I can't recollect it now.

Q. You can't recall it one way or the other?

A. No.

Q. Don't you recollect his going to California?

A. Yes, I think I recollect that.

Q. And that he was there some months?

A. Well, he may have been; of course, I have forgotten it now more or less.

Q. You never had any real intercourse with him, except to say good morning?

A. Just as I stated.

Q. And no intercourse with his family?

A. No.

Q. Now, if he would leave in the morning for work he would leave from the first floor?

A. The first floor.

Q. But you were in the basement?

A. Yes, but coming to business in the morning, as I came up the street, I would see the hack and I would see him.

Q. He would be leaving in a hack from the street floor as you were coming to business?

A. Yes, sir.

Q. At what hour?

A. Between eight and nine o'clock generally.

RE-DIRECT EXAMINATION, by Mr. Leon:

Q. In your reference to Mr. Louis Givernaud, in answer to my questions about Mr. Louis Givernaud, did you refer to the old gentleman?

A. Yes, I did.

Q. Those trips that have been referred to on cross-examination, did they differ in your observations from the usual vacation trips that people take?

Judge Collins—Objected to as calling for a conclusion.

A. No, I couldn't say they did.

Q. Would you say that he spent the greater part of every night living in that apartment while he was there?

Judge Collins—Objected to as leading and as calling for a conclusion.

A. Well, as I say, that I observed him and saw him going out of the house, but yet I paid no particular attention to his business. I may have at that time, but I don't recall it now. It is nine years ago.

Q. Do you recollect his taking any very long trip; let us say, his being away six months at a time during that period?

A. No, I don't recollect.

Q. Don't you think that if he had been away six months at a time you would remember it?

Judge Collins—Objected to as leading.

A. I may have, yes, sir.

Q. So, from your best recollection of these matters, which, of course, occurred several years, and about which your recollection is not as fresh as concerning other matters which occurred more recently, would you say that he took, occasionally, trips of, let us say, between one and three months at a time?

Judge Collins—Objected to as leading.

A. I should say so, yes.

Q. As to the use made by Mr. Louis Givernaud of that apartment, tell us, if you can, who, in that house, was generally regarded as the head of the household, so far as the Givernaud family was concerned?

Judge Collins—Objected to as incompetent and as calling for a conclusion.

A. Most of our dealings were with Mr. Louis Givernaud.

Q. That is the old gentleman?

A. Yes, sir.

Q. His son was Mr. Charles?

A. Yes.

Q. What did those dealings consist of?

A. It may be with reference to some repairs. I can't say it was with reference to rent, because our rent was prompt. It was mailed to us.

Q. It was occasionally in the matter of repairs?

A. Yes, sir; some little thing he occasionally wanted done, or a gas fixture repaired.

Q. Would he speak to you about it?

A. He most generally spoke to Mr. Sibbald, the engineer.

Q. Was that within your hearing?

A. Not within my hearing, but I heard of it afterwards.

Judge Collins—At the hearing I shall object to the testimony of any intercourse as to repairs, it appearing it was not with the witness.

Q. On occasions would he also speak to you about such matters?

A. Very rarely; once or twice.

Q. Do you remember anybody else in that household taking up with you the question of repairs?

A. As regards to decorations I am under the impression that I spoke once to Mrs. Louis Givernaud, who I took to be the wife of the son—Mrs. Charles Givernaud.

Q. You remember once speaking to her about decorations?

A. Yes.

Q. In the matter of repairs, such as gas fixtures, you don't remember talking to her?

A. No.

Q. Your dealings then for the most part were with Mr. Louis Givernaud, the father?

A. Whatever dealings I had. There were few of them.

Q. Who else had dealings with him?

A. Mr. Sibbald. He is the mechanical man.

Q. And would they be referred to you in the due course of business.

A. Through him, yes, sir; he would mention them.

Q. And who would have the matter attended to?

A. He would go ahead and have the work done,

unless it was for decorations ,or anything of that kind?

Q. And in that case?

A. I would look after that.

Q. In incurring any repair bill, who had authority to decide whether it should be incurred or not?

A. The executor of the estate.

Q. Before a bill was incurred what would be the normal practice?

A. If it was a small matter the engineer would fix it himself, without asking any question at all. They were generally small matters.

Q. Between what hours did you attend on the premises during those years 1901 to 1904?

A. Eight o'clock in the morning until five o'clock at night.

Q. You were never there at night?

A. No, sir.

RE-CROSS EXAMINATION, by JUDGE COLLINS:

Q. How many apartments were there in the house?

A. Twenty-one.

Q. You can't say but that Mr. Louis Givernaud was away for considerable longer than two months at a time.

A. No, I can't recollect his absence at any time in particular.

Q. You can't tell whether he was, or wasn't?

A. No.

Q. The lady whom you knew as Mrs. Louis Givernaud and whom you think was the wife of Charles Louis Givernaud, is the same lady to whom this lease was made that you spoke of?

A. That's the idea, yes, sir.

Taken and sworn to before me the day and year aforesaid.

THEODORE RURODE.
Master in Chancery of New Jersey.

WILLIAM A. HUSTON, re-called.

DIRECT EXAMINATION, by Mr. Leon:

Q. You have just informed me that prior to going into the employ of Alexander Moore you worked in Greene Street?

A. 34 Greene Street.

Q. How many years did you work there and at what time?

A. Well, I was there for at least three years.

Q. Was that immediately before your entering into the employ of the Moore Estate?

A. Within a few months; within probably eight weeks.

Q. Do you recollect the year that you entered the employ of the Moore Estate?

A. Yes, sir, 1899.

Q. Was that approximately for three years prior to about what time in 1899?

A. January, 1899.

Q. That you were employed in Greene Street?

A. 34 Greene Street.

Judge Collins—With what sort of a concern?

Witness—W. B. Lawson & Company, dress *goods*.

Q. Do you know where the office of Givernaud Brothers was on Greene Street?

A. It was practically directly opposite.

Q. In the Borough of Manhattan City of New York?

A. Yes, sir.

Q. During that time tell us fully on the record what you observed with reference to Mr. Louis Givernaud?

A. Well, he was a peculiar character in his make-up, very stout, walked slowly, and I can recollect his cab being in front of the door most generally, and I have seen him walk from the store to Grand Street, or probably, out to some café with the buyers or salesmen. That is all I recollect of him. I knew

when I rented the premises to him as Givernaud that they were good financially and otherwise.

Q. At the time when you rented the apartments, who did you have your negotiations with?

A. With this Mrs. Givernaud.

Q. The daughter-in-law?

A. I don't know what relation she was. I presumed she was the wife of the son.

Q. Was she generally referred to as the wife of the son?

A. Yes, I think so.

Q. You seem to be hesitating a little about the subject.

A. Well, I am not positive.

Q. Did she come to you first?

A. Yes, she did.

Q. Did you have any talk with anybody else?

A. No, the talk was with her. She rented the apartment.

Q. Who came to see it before the lease was signed, if you remember?

A. My impression is that it was this son and this Mrs. Givernaud that I referred to.

Q. When did Mr. Louis Givernaud first come there?

A Why directly after the apartment was furnished; directly after they moved in.

Q. Did they all move in at the same time?

A. I think so, yes, sir.

Q. Throughout the time that this apartment was rented did you get any payment for rent, other than by check of Givernaud Brothers?

Judge Collins—Objected to on the ground that the witness has stated that the checks came from Givernaud Brothers, but he don't know who signed them.

Q. Were they the checks of Givernaud Brothers?

A. That I don't recall.

Q. Did you know the son, Charles Givernaud, to be connected with Givernaud Brothers?

A. No, I did not.

Q. During those three years when you observed Givernaud Brothers from across the street, did you ever see the son?

A. No.

Q. You saw only the father?

A. Only the father, because, as I said, he was a peculiar make-up, dressed peculiar, and, of course, he was more noticeable than the average person.

Q. If you had seen the son going in and out of there with any frequency, would you have remembered him?

A. I don't think I would, no.

Q. While the Givernauds were living in the house did you ever hear of Charles Givernaud having anything to do with the business of Givernaud Brothers?

A. No.

Q. On the other hand, you recall that Louis Givernaud, the father, used to go down there in the morning?

A. Yes, sir.

CROSS-EXAMINATION, by JUDGE COLLINS:

Q. How old are you?

A. Thirty-seven.

Q. Do you recollect, when you were down at Lawson & Company, seeing two other Givernauds, Etienne and Theodore?

A. No, I don't recollect the other gentlemen, but I recollect this one.

Q. Because he was a little peculiar?

A. Yes, he was peculiar in his dress and make-up.

Taken and sworn to before me the day and year aforesaid.

THEODORE RURODE,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } *ss.*

THEODORE RURODE, being duly sworn, on his oath says, that he will, as a Master in Chancery of the State of New Jersey, faithfully fairly and impartially take the depositions in the above case.

THEODORE RURODE.

Sworn and subscribed to before me this eighth day of October, 1913.

WILLIAM D. KELLY,
Attorney-at-Law of the State of New Jersey.

Filed October 17, 1913.

ROBERT H. McADAMS,
Clerk.

JOSEPH BRAUBACH, sworn in behalf of the complainants, testified as follows:

DIRECT EXAMINATION, by MR. LEON:

Q. What is your residence?

A. 107 Fourth Street, Hoboken.

Q. What is your occupation?

A. Valet.

Q. In whose employ are you now?

A. I ain't doing that kind of work now. I work for the North German Lloyd now.

Q. Did you know Barthelemy Louis Givernaud, the man concerning whose will this case has been brought?

A. Yes, sir.

Q. And where did you first see him?

A. At West Hoboken.

Q. Was that many years ago?

A. Quite a number of years, yes, sir.

Q. Was it before or after 1870, if you can remember?

A. It was before.

Q. What was he doing then, if you know?

A. He was at the Homestead Factory, North Bergen.

Q. Was he one of the Givernaud Brothers who were operating a factory at Homestead, or West Hoboken?

A. Yes, sir.

Q. Do you happen to know where he was living at the time?

A. Not at that time, no, sir.

Q. Now, did you enter in the employ of said Barthelemy Louis Givernaud—we will refer to him hereafter as Mr. Givernaud, to save time—did you enter into his employ?

A. Not at that time.

Q. When did you?

A. In 1891.

Q. In what capacity?

A. As coachman.

Q. Where was he living then?

A. West, Hoboken, Hudson County, New Jersey.

Q. Do you happen to remember the address?

A. Corner of Spring and High Streets.

Q. Was that a private house?

A. Yes, sir.

Q. Who was living there?

A. Mr. Louis Givernaud and Madame Louise Givernaud.

Mr. Collins—That was the second wife.

Q. How long were you in his employ all together?

A. Until 1901—the latter part of 1901.

Q. Do you remember until when Mr. Givernaud had this house which you have referred to as the place where he was living when you entered his employ?

A. West Hoboken?

Q. Yes; how long did he have that house after you entered his employ?

A. I could not say how many years.

BY THE COURT:

Q. Do you recall what year that was when you went in his employ?

A. 1891.

FURTHER DIRECT:

Q. Do you remember that he did leave that house?

A. He left there.

Q. Do you remember his leaving that house?

A. I remember the time he left the house, yes, sir.

Q. Now, when was that, before or after his wife's death?

A. Before his wife's death.

Q. Now, were you then employed by him as coachman?

A. Yes, sir.

Q. Do you know whether he sold that house?

A. I could not tell you whether he sold it, or whether his wife sold it.

Q. Was the house closed; did he keep that house after he left it?

A. No, sir, not after he left it.

Q. Now, when he left that house, where did he go to live?

Mr. Collins—I object to the question as calling for a conclusion.

Q. Did you go with him?

A. Not at that time; I was his coachman over at New York.

Mr. Malraison—I move that the answer be stricken out, in behalf of my clients, as not responsive.

The Court—It is not responsive; the objection is sustained.

Q. Do you remember Mr. Givernaud having lived in the City of New York at all?

A. Yes, sir.

Mr. Collins—Objected to on the ground that it calls for a conclusion; we don't know what the word "lived" may mean; it has a double

meaning; if he was simply commorant in New York, that is one thing—if it was a question of legal residence—

The Court—Owing to the issue involved in this case, this evidence will have to be taken somewhat strictly.

By the Court:

Q. Did you ever see Mr. Givernaud in New York?

A. Yes, sir.

FURTHER DIRECT:

Q. Did he have any house or apartment there?

A. Yes, sir, an apartment.

Q. What apartment do you remember his having there?

Mr. Malraison—I object to that; that is incompetent, immaterial and irrelevant, to ask him the knowledge of another man.

The Court—I think we will let that question stand.

Q. Where did you see him there?

A. In the Van Hoffman Flats, West 26th Street, New York.

Q. How many times did you see him there?

A. I was stopping there with him at the time.

Q. You were living there with him at the time?

A. Yes, sir, I was living there with him.

Q. Were you employed by him?

A. Yes, sir.

Q. As what?

A. As valet.

Q. And in such capacity were you in attendance on him every day?

A. Yes, sir.

Q. When did you begin to act as valet—in the Von Hoffman Flats?

A. No, sir, up in West Hoboken first.

Q. And, as such, you were in daily contact with him?

A. Yes, sir.

Q. How long before he left West Hoboken were you doing valet work for him?

A. About six months.

Q. Can you remember about how long you lived with Mr. Givernaud in the Von Hoffman Flats in New York?

A. I could not tell you—about two years.

Q. After that, what did you do?

A. We moved to Thirty-fourth Street—Mr. Givernaud moved to Thirty-fourth Street, New York City.

Q. Did you go to live there with him?

A. Yes, sir.

Q. Were you in daily contact with him as his valet?

A. Yes, sir.

Q. What sort of a place was that?

A. It was a Bachelor Apartment house.

Q. In the Van Hoffman Flats, was it a housekeeping apartment?

A. No, sir.

Q. Where did Mr. Givernaud take his meals?

A. Outside.

Q. Now, in Thirty-fourth Street, was that a housekeeping apartment?

A. The same as the other one.

Q. And do you happen to know where he took his meals, generally?

A. No, sir.

Q. Do you happen to know where he spent his nights while you were waiting on him as his valet in the Von Hoffman Flats?

A. No, sir.

Q. Where he slept at nights?

A. He slept in his apartments.

Q. In the Von Haffman Flats in New York?

A. Yes, sir.

Q. When he moved to Thirty-fourth Street, where did he sleep?

A. In the same place.

Q. Now, after he left the Apartment House in West Thirty-fourth Street, New York, where did he go to live?

A. The third place he went to was the Powhattan in Thirty-fourth Street, New York City.

Q. Was that a Bachelors' Apartment?

A. A housekeeping apartment.

Q. Were you his valet there?

A. Yes, sir.

Q. Did you come in contact with him every day?

A. Yes, sir.

Q. Do you know where he slept?

A. Yes, sir.

Q. Was it at the Powhattan?

A. Yes, sir.

Q. Where did he take his meals?

A. He took his breakfast at the Powhattan, and sometimes his dinner in the evening.

Q. Who was living there with him besides himself?

A. Mrs. Charles Givernaud and Mr. Charles Givernaud.

Q. Now, who was living with him in the other flat in West Thirty-fourth Street, before he moved to the Powhattan; anybody but yourself?

A. All by himself with me.

Q. And in the Von Hoffman Flats?

A. The same way.

Q. Now, don't answer this unless you know; do you happen to know who paid the rent of the Von Hoffman Flats, where he lived?

Mr. Colins—It must be his own personal knowledge and not any hearsay.

Q. If you don't know, say you don't know.

The Witness—Your Honor, if I can express myself—am I allowed to say a few words?

Q. Say whether you knew.

A. Not in that question to the lawyer here—what I am telling—I am telling only the very truth, and

what I know; I am saying nothing else; I am not in favor of one side or the other.

Mr. Collins—I know that. I simply want to caution you.

Q. Do you know?

A. I know once, I did; I paid the rent once myself; Mr. Givernaud gave me the check.

Q. Now, after you left the Powhattan, did you continue to act as valet for him?

A. Yes, sir.

Q. Where did he live?

A. Up to Central Park, West, New York City, around Sixty-eighth Street, I think.

Q. Was that a housekeeping apartment?

A. Yes, sir.

Q. You came in contact with him there every day?

A. Yes, sir.

Q. Do you know where he slept then?

A. Yes, sir.

Q. Where was that?

A. In that apartment. „ „

Q. Where did he take his meals, generally?

A. He took his supper and breakfast at his flat, Sixty-eight Street.

Q. Do you know whether he went to business every day?

A. Yes, sir.

Q. Did you often go with him?

A. Once in awhile, very seldom.

Q. When you went with him, where did he go to business?

A. He went to the West Hoboken factory, to Homestead, and then back to West Hoboken again, and then to the New York office.

Q. He had an office in New York?

A. Yes, sir, 71-73 Greene Street; that was his place of business in New York; I would meet him once in awhile to bring him fresh collars and things like that.

Q. When you left his employ, where was he living?

A. Sixty-eighth Street.

Q. In this same apartment?

A. Yes, sir.

Q. When was that; was that after 1901?

A. That was in 1901.

Q. And after that time, you saw him only occasionally?

A. Yes, sir.

Q. When you did see him, where was it?

A. I saw him once in New York; I saw him on a ferryboat, coming from New York to Homestead.

Q. Now, do you know who lived in the West Hoboken house after Mr. and Mrs. Givernaud ceased to live there?

A. No, sir.

Q. Did they live there after they moved out of that house?

A. No, sir.

Q. Were you there when they moved out?

A. Madame Givernaud was in the house yet when Mr. Louis moved away.

Q. He moved away first?

A. Yes, sir.

Q. Did she join him?

A. No, sir.

Q. Do you know how long after that she remained in the house?

A. No, sir.

Q. Now, at or about the time he left the house with you as his valet—

Mr. Collins—I don't understand that the witness went from the house; as I gather from his testimony, it was some time afterwards that he was re-employed.

Q. When Mr. Givernaud left West Hoboken to go to the Von Hoffman Flats, did you go with him?

A. Yes, sir.

Q. And you had been his valet for about six months before that time?

A. Yes, sir.

Q. And you remained his valet until the year 1901?
A. Yes, sir.
Q. Uninterruptedly?
A. Yes, sir.
Q. Now, at or about the time he left West Hoboken to go to the Von Hoffman Flats in New York, did you have any conversation with him, or did you hear him make any statement concerning what his intentions were as to living in West Hoboken?
A. No, sir.
Q. Well, subsequent to his leavinug West Hoboken, did you hear him say anything at any time?
A. No, sir.
Q. Before he left West Hoboken, what did he say on that subject?

Mr. Collins—Objected to.

A. He did not say anything to me.
Q. Have you never heard him say anything about whether or not he was going to go back to live in West Hoboken—
A. Yes, sir.

Mr. Malraison—Objected to as leading.

The Court—The objection is overruled.

Q. What did he say on that subject?

Mr. Malraison—The reason I object is that the question was asked about four times, so as to get that answer, and then afterwards the witness is led.

The Court—I see the point of your objection; I did not gain the idea, however, that counsel was leading for that purpose.

Mr. Leon—I want the witness to speak the truth and nothing but the truth; I never saw this witness until this morning.

The Court—All right.

Q. When and where?
A. New York.
Q. And when, about?
A. I could not give you the date.
Q. About what time was it; was it shortly before

you left his employ; where was it in New York; was it several times he said he was going back to this place?

A. He said it to two gentlemen in New York, in his apartment, in the Von Hoffman apartment, while he was living there.

Q. He said it to two gentlemen in your hearing?

A. Yes, sir; he said he was glad he was through with West Hoboken.

Q. Do you remember any other statement?

A. No, sir.

Q. Wes he talking generally on the subject?

A. Yes, sir.

BY THE COURT:

Q. Didn't he say anything else about it?

A. I had to attend to my affairs.

FURTHER DIRECT:

Q. Subsequently to that occasion, when he was talking to these two gentlemen that you mentioned, did you hear him say whether or not he intended to go back to live in West Hoboken?

Mr. Malraison—I object now; that is going too far.

BY THE COURT:

Q. Did you hear him discuss the subject subsequent to that discussion with the two gentlemen?

A. No, sir, I was attending to my business.

Q. And at the Powhattan?

A. No, sir.

CROSS-EXAMINATION, by MR. COLLINS:

Q. Now, Mr. Braubach, I want to see that I get it just right; you knew this gentleman as Mr. Louis Givernaud?

A. Yes, sir.

Q. Now, I understand you to say, that about six months before he occupied these apartments at the

Von Hoffman, you had become his valet in the house in West Hoboken?

A. Yes, sir.

Q. And that you went with him to the Von Hoffman Apartments when he went there?

A. Yes, sir.

Q. You cannot give the year?

A. No, sir.

Q. And when you went, he and you went, the house was still open and furnished, and Madame Givernaud, his wife, was still there?

A. Yes, sir.

Q. Do you happen to know that she went abroad?

A. She went abroad occasionally.

Q. I mean then?

A. I don't know.

Q. Do you know what became of her then?

A. No, sir.

Q. Louis went over to this Bachelor Apartment, and did not Mrs. Louis go abroad?

A. I could not tell you.

Q. She was accustomed to going abroad very frequently?

A. Yes, sir.

Q. You don't know whether the house was closed up or not?

A. No, sir.

Q. You don't know whether the furniture remained there or not?

A. No, sir.

Q. You don't know what became of the house afterwards?

A. No, sir.

Q. Can you tell me who the two gentlemen were, or either of them, to whom you heard him make this remark, that he was glad he was through with West Hoboken?

A. No, sir.

Q. It was a fact, wasn't it, that he was not through at West Hoboken?

Mr. Leon—This is argumentative.

The Court—I don't think the question is proper.

Q. He still retained a factory at West Hoboken, didn't he?

A. That ain't his living apartments.

Mr. Collins—I move to strike that out as not responsive.

The Court—It will be stricken out as not responsive.

Q. He retained the factory in West Hoboken, didn't he?

A. Yes, sir.

Q. And continued to retain the factory there until you left him?

A. Yes, sir.

Q. And afterwards?

A. Yes, sir.

Q. Now, while you were valetting him, he made very long trips, didn't he?

Mr. Leon—Objected to. I object to the characterization of "very long."

By the Court:

Q. He made several trips, did he?

A. Yes, sir.

FURTHER CROSS:

Q. And would be gone for months at a time?

A. Yes, sir.

Q. He went to California?

A. Yes, sir.

Q. And to various places in California?

A. Yes, sir.

Q. Before he went to California, he went to New Orleans, didn't he?

A. Yes, sir.

Q. And he went later to Paris, after he had been to California, staying there from June until November?

A. Yes, sir.

Q. What year was that?

A. 1900.

Q. And the California trip was in 1899?

A. Yes, sir.

Q. And so also was the earlier trip, that was 1899?

A. Yes, sir.

Q. He got back from Paris—I think I have made a mistake in the date—he got back from Paris in 1899, and after staying for the holidays in this country, went again to California, in January, 1900; isn't that right?

A. I thought it was 1901.

Q. 1900, I have it; well, it is not very important; after being there several months, he came to New York and went to Atlantic City for the summer?

A. Yes, sir.

Q. You went with him?

A. Yes, sir.

Q In October of 1900, as I understand it, he went to Mr. Clemens, Michigan?

A. Yes, sir.

Q. Do you remember how long he stayed there?

A. Two weeks or a month or so; two weeks, I guess.

Q. He came back for the holidays, and in January, 1901, he went to California, Honolulu and Japan, and returned in July, 1901, to this country?

A. Yes, sir.

Q. Were you with him on that trip?

A. Yes, sir.

Q. Then, when he got back to this country he went to Atlantic City and stayed until the Autumn, and after a short stay in New York, he went to Hot Springs in Virginia, didn't he?

A. No, sir; he went to Havana, Cuba.

Q. Didn't he go to Hot Springs for a little while before he went to Cuba? Perhaps you did not go with him to Hot Springs.

A. I don't remember.

Q. He may have gone to Hot Springs and you have forgotten?

A. Yes, sir.

Q. Then he went to Cuba; that was in December, 1901, wasn't it?

A. Yes, sir.

Q. And he stayed in Cuba for a while, and he went to Spain and the Canary Islands and France, and did not get back here again?

Mr. Leon—The method of cross-examination is about as unfair as it can well be.

Q. He did not get back here to this country until July, 1902?

A. I left him in Havana in 1901—the last part of December.

Q. It perhaps may be within your knowledge that he made that trip?

A. I don't remember it.

Q. You don't remember what he did after you left him?

A. No, sir.

Q. Under what circumstances did you leave him?

A. Well, my wife did not want me to go away on long trips, so I knew there was another one coming and I gave it up.

Q. You knew there was another one coming?

A. Yes, sir.

Q. Where were you told that was to be?

A. In Havana.

Q. Where was it to be—this long trip that you knew was coming?

A. Didn't you just read it?

Q. So you were told he was going to Spain and France, and so forth?

A. Yes, sir.

Q. Then, during the time you were with him, after he went over to the Von Hoffman Apartments, he was away a good deal more than he was in New York?

A. Yes, sir.

Q. He was away most of the time?
A. Yes, sir.

RE-DIRECT EXAMINATION, by Mr. Leon:

Q. After he came back to this country from each of these long trips that you have testified to, where did he live on this side of the water; where would he go?

A. To his flat in New York.

Q. Did you ever know him, on coming back from one of these trips, to stop at West Hoboken?

A. No, sir, he stopped at his sister-in-law's.

Q. Where?

A. At Homestead.

Q. Was that coming back from some long trip?

A. Yes, sir.

Q. How long, at that time, did he stop there with his sister-in-law?

A. I don't know.

Q. One week or one month?

A. A day or so; he would eat and sleep there; just one night.

Q. Except for one night at a time, did you ever know him to stop in West Hoboken after he moved to the Von Hoffman Flats?

A. He used to stay in Homestead.

Q. And that would be for one night at a time?

A. Yes, sir.

Q. How often would that be?

A. Sometimes once a week; every time they had an entertainment down there he would spend the night there.

Q. And then where would he go?

A. Go back to his flat in New York.

Q. Now, for about six months prior to the time he left the West Hoboken house, until 1901, were you away from him any length of time?

A. I was away once.

Q. How long was that?

A. A short while.

Q. A few weeks?
A. A few weeks or a month or so.
Q. A month probably?
A. Yes, sir.
Q. Except for that, you were with him every day?
A. All the time.

RE-CROSS EXAMINATION, by Mr. Collins:

Q. When you say he went to his sister's, you mean, I suppose, his sister-in-law, the wife of his brother Etienne?
A. Yes, sir.
Q. Who was then living?
A. Yes, sir.
Q. And that was at Homestead, New Jersey?
A. Yes, sir.
Q. In Hudson County?
A. Yes, sir.
Q. It adjoins West Hoboken?
A. Yes, sir.
Q. Now, do you happen to know whether or not the leases for the premises were taken in the name of the son or the son's wife?
A. I don't know in whose name the leases were taken.

RE-DIRECT EXAMINATION, by Mr. Leon:

Q. Can you tell us how many years you lived in New York all together?

Mr. Collins—Objected to as calling for a conclusion; you see, we have got two dates.

Q. (Question withdrawn.) From 1891 to 1901, is that the time during which you lived with Mr. Givernaud?
A. Yes, sir; that is the time I was employed there.
Q. Will you please tell us how long at a time you were away with Mr. Givernaud on those trips? What was your longest trip?
A. The one we took to Japan?
Q. How long were you away?

A. Seven or eight months, I guess; or six months.

Q. And except for that trip, there was no trip as long as that?

A. No, sir.

Q. How long would he be usually away on these trips?

A. Three or four months.

Q. In any one year did he take more than one trip of three or four months?

A. No, sir.

Q. And the rest of the time, where did he spend it?

A. Well, he would be all over.

Q. He would be taking those short trips and those long ones?

A. Yes, sir.

Q. On an average, how much time did he spend in a year in New York?

A. Well, about one-quarter in New York and three-quarters traveling.

Q. You would say as much as that?

A. Yes, sir.

Q. You would not think that one-half was more accurate?

Mr. Collins—Objected to.

The Court—Objection sustained.

GEORGE SIBBALD, being sworn in behalf of the complainants, testified as follows:

DIRECT EXAMINATION, by Mr. Leon:

Q. Where do you reside?

A. In Westwood, Paterson, New Jersey.

Q. Were you ever employed at No. 1 West Sixty-eighth Street, in the Borough of Manhattan, New York City?

A. Yes, sir.

Q. In what capacity?

A. Engineer and superintendent.

Q. And for how long a time?

A. For 11 years.

Q. When did you leave there?

A. I left there last April.

Q. Now, do you remember Mr. Louis Givernaud living there?

A. Very well.

Q. Do you remember how long he lived there?

A. He lived there over three years; I cannot give you any dates.

Q. You cannot give me the date?

A. Not at present.

Q. Will you say that he lived there as much as eight years ago?

A. No, sir, I would not be certain; I think about seven years ago.

Q. Now, did you see him frequently while he lived there?

A. Very frequently.

Q. And what was he occupying?

A. He occupied the first floor south.

Q. What did that apartment consist of?

A. The rooms, do you mean?

Q. Yes.

A. Six rooms upstairs and three rooms downstairs.

Q. You mean that on the ground floor he had six rooms?

A. Yes, sir.

Q. And in the basement he had three rooms?

A. Yes, sir.

Q. Did that include a kitchen and dining-room?

A. Yes, sir, and the maid's room in the basement; two bedroms, a sitting-room, a library, and two other rooms close to the hall door.

Q. Now, after he left the Raymore—that is the name of the house—do you know where he lived?

A. No, sir.

Q. Now, you say that he lived there three years?

A. Over three years.

Q. Now, did he sleep there?

A. He did.

Q. Did he have his meals there?

A. No, sir, not very often; he took most of his meals out; he did dine there sometimes.

Q. Usually he took his breakfast there?

A. Yes, sir.

Q. Did you go into the apartment while he was occupying it there?

A. Yes, sir.

Q. Did you see him occupying it?

A. Yes, sir.

Q. Was it all furnished apartments?

A. Yes, sir.

Q. That is to say, was the furniture supplied by the tenant?

A. Yes, sir.

Q. Now, you found the apartment furnished there?

A. The apartment was furnished, as I understand, by Mr. Louis Givernaud.

The Court—Strike that out.

Q. In what capacity were you on the premises?

A. Engineer and supervisor; but we had a book-keeper who attended to the making out of all the leases, but usually I was in the office when the work was going on.

Q. In the discharge of your duties, did you have occasion to deal with the person in charge of each apartment in the house?

A. Yes, sir.

Mr. Malraison—Objected to; I move the last part of the question be stricken out, on the ground that it is incompetent, immaterial, irrelevant and leading.

The Court—I think, probably, the question might be put in a different form.

By the Court:

Q. Who was the person in charge of the rooms?

Mr. Malraison—I object; there is the same question.

FURTHER DIRECT:

Q. Now, in the discharge of your duties as engineer and supervisor of the apartment house called The Raymore, did you have occasion to have any business with the persons occupying the different apartments in the house?

A. Yes, sir.

Q. And with respect to the particular apartment that you have testified to, namely, on the ground floor, with three rooms in the basement, when you had such business, whom did you take it up with?

A. Mr. Louis Givernaud.

CROSS-EXAMINATION, by Mr. Collins:

Q. Mr. Charles Louis Givernaud, who is here present, and his wife, also occupied those apartments, didn't they?

A. They lived there, yes, sir.

Q. And you frequently talked with one or other of them about matters in connection with the apartment, didn't you?

A. Not about alterations and other things to be done.

Q. (Question read.)

A. No, sir.

The Court—Strike out the first part of the answer preceding the last.

Q. Did you never talk with Charles Louis Givernaud's wife about matters in that apartment?

A. Not officially.

Mr. Collins—I move to strike out that answer.

Q. Did you, or didn't you, talk with them about it?

A. No, sir.

Q. You didn't talk at all?

A. No, sir.

Q. You never talked with them about things in the apartment?

A. I spoke to all my tenants about all sorts of things.

Q. Did you consider Charles Louis and his wife your tenants there?

A. No, sir, they lived with Mr. Louis Givernaud.

Q. To whom was the lease made out; you say there were written leases?

A. Yes, sir.

By Mr. Leon:

Q. You had nothing to do with those leases?

A. No, sir.

FURTHER CROSS:

Q. Did you ever see them?

A. Yes, sir.

Q. Was not the lease of this apartment to either Mr. or Mrs. Charles Louis Givernaud?

A. I never saw the lease of that particular apartment, and could not swear to it; I have seen some of the leases, but I could not swear to that particular lease.

Q. You never saw the lease, then?

A. There was a written lease.

Q. You cannot tell to whom it was made?

A. No, sir.

Q. What were the matters that you did talk to Charles L. Givernaud or his wife with respect to the apartment?

A. None.

Q. What were the matters that you spoke to Louis Givernaud about?

A. When he came down to the office he told me about several alterations, papering and kalsomining, etc.

Q. Mr. Louis Givernaud, the old gentleman, was away a great deal during that three years?

A. I don't know, sir; he was away, but how long, I don't know.

Q. He used to make trips?

A. Yes, sir.

Q. And trips to distant places?

A. I could not say.

Q. He was away for months at a time?

A. I could not say how long he was away.

Q. He was away a good deal of the time, wasn't he?

A. I could not say that.

Mr. Leon—Objected to.

The Court—There is evidence before the court that he was away.

Mr. Collins—That was not at this period.

Q. You simply say that he was away, and you cannot tell how long he would be away?

A. That is it.

Q. But the absence would be for months at a time?

A. I could not say.

Q. They were frequent?

A. I might say they were not very frequent.

Q. Every year he was away more or less?

A. Possibly he was home for a year at a time, as far as I can vouch to; I could swear that he was not away a year at a time.

A. We are fencing with each other; I ask you if there was any year that he was there all the time?

A. I could not swear to that.

Q. I would like it if you could fix the time that the Givernauds came to this apartment, and the time that they went away?

A. They were there when I went there in February, 1902, and they were there, to my positive remembrance, for three Christmases.

Q. That would be 1902, '03 and '04?

A. Yes, sir.

Q. That is as near as you can come to it?

A. Yes, sir.

Q. You have not said that you had anything to do with the rent; the collection of the rent?

A. No, sir.

Q. The rent was not paid to you?

A. Not always; sometimes the tenants paid the rent to me, and I delivered it to the office.

Q. You are speaking of the house generally, now?

A. Yes, sir.

Q. You don't mean to say that the Givernauds did?

A. No, sir, but I saw Mr. Louis Givernaud come down to the office and pay, the rent himself.

Q. How do you know that he was paying rent?

A. Because the receipt was there, and the clerk received it as $135.00 for a month's rent for that apartment.

Q. What was it paid in?

A. Paper currency, or a check, possibly; I could not swear; the rent was paid to the bookkeeper.

Q. And who was that bookkeeper?

A. Mr. William Huston.

Q. All you know is that Louis Givernaud handed in either some paper currency and possibly a check, and got some receipt?

A. Well, in my memory, it was paper currency that morning.

Q. And he handed it in and got some receipt?

A. Yes, sir.

Q. What do you call paper currency?

A. Bills.

Q. And you did not overhear the conversation?

A. I did, but I don't remember it.

RE-DIRECT EXAMINATION, by Mr. Leon:

Q. When did you see Mr. Huston last?

A. About three weeks ago.

Mr. Leon—I expect a witness on the law of New York here, but I believe your Honor wanted to take up the question of domicile?

The Court—That is the question we are discussing now.

Mr. Leon—Now, we have some depositions here. Do you wish to have them read, or consider them as read?

Mr. Collins—Better read them in now.

(Mr. Collins and Mr. Leon then read the depositions.)

Mr. Collins—There are various objections made, and I suppose it is not necessary to pause to rule on them, but that your Honor will deal with them when you come to consider the testimony.

The Court—Yes.

Mr. Leon (Referring to Hutchins' testimony, page 11)—I did not offer this testimony in support of any allegations that Louis Givernaud wrote those entries on the register. The only purpose for which I offer them is that there were registered there at that time, in 1907, people under those names.

Mr. Collins—With reference to the testimony of the witness Huston, the objection to his stating to whom the lease was made, is withdrawn.

Mr. Leon—We desire to introduce proof concerning that part of the property belonging to the estate, and which the decedent stored in New York, and which was got out of storage warehouse at Fourteenth Street and Fifth Avenue after his death—that part of the property belonged to the decedent at the time of his death, which was stored in a safe deposit vault at the Safe Deposit Company at Fourteenth Street and Fifth Avenue, Borough of Manhattan, City of New York, and which was, subsequent to his death withdrawn from said vault. This is a matter concerning which we have agreed to let the records speak for themselves, as there is a record of the matter; I mean the record of the withdrawal of that property.

Mr. Collins—We are perfectly willing to let that record be received if the testimony is relevant, but we object to this as entirely irrelevant and immaterial, for the reason that the situs of personal estate is the situs of the domicile; and if he lived in New Jersey, it makes

no difference where he happened to keep his securities, and if he lived in New York, it makes no difference either; he might have had them all in New Jersey, and in this case the executors themselves live in New Jersey, so that in any case the situs of this personalty is immaterial.

Mr. Leon—Now, as to its materiality in this issue, I will satisfy your Honor that the question where the testator kept his property has been considered by the highest courts of some of the States in this Union in the determination of the question of where his domicile was. It is some evidence. Now, I think that there can be no dispute as to that; this is my information, and, perhaps, it will save time if I state it now, that the New York City—

The Court—I will allow it to stand until the final disposition of the case. I question its materiality now.

Mr. Leon—We will offer in evidence the inventory of the estate, and also a statement of what part of that property included in the inventory was stored in the safe deposit vault in New York, and then your Honor will be able to ascertain how much of this estate he kept in New York.

The Court—Are you able to stipulate in regard to this?

Mr. Collins—Mr. Mabon will check that up.

Mr. Leon—We can readily stipulate in regard to that.

On this question of domicile, I think that we can rest.

Complainants rest on the question of domicile.

Mr. Collins—We are not prepared to proceed now, as we thought they would take up the entire day.

The Court—The case is closed on the question of domicile.

Mr. Leon—Your Honor has stated in unmistakable terms, that we are going to dispose of the question of domicile first.

The Court—Yes.

Mr. Collins—We cannot have two decisions.

The Court—My understanding at the opening of the case was that the desire was on both sides to separate and try first the question of domicile. Now, as far as the complainants' case is concerned, the testimony is all in on the question of domicile, as I understand it. Now, the other question involved in the case—

Mr. Collins—There is nothing in the rest of the case except to prove the French code, that is all there is; and then you will have to pass on the materiality of these two judgments that have been offered.

Mr. Leon—These judgments bear only on the question of marital rights.

The Court—It is a judgment for dowry rights.

Mr. Collins—What she put into the matrimonial partnership now dower, as we call it, but dowry.

Mr. Malraison—It is to recover back what she and her family brought at the marriage.

Mr. Collins—There is nothing left in their case, as I understand it, except to prove the code of France.

Mr. Leon—No, we have the law of New York to prove.

The Court—It seems to me that it would be better to put in your whole case now. If you could close your case, then they could go on some other day and close their case. It won't take long to do it.

Mr. Leon—When I asked leave to examine Dr. Torrhilon, I now assume that he is going to be called by the defense.

The Court—He is here.

Mr. Leon—Now, by arrangement with Judge Collins, I think that two sections of articles of the French Civic Code are to be read into the record.

Mr. Malraison—What sections are those?

Mr. Leon—Article 893: "No one may dispose of

his property gratuitously, except by donation *inter vivos* or by will, in the forms hereinafter prescribed."

"Art. 893: On ne pourra disposer de ses biens, á titre gratuit que par donation entre vifs ou par testament, dans les formes ciaprés établies."

Now, Section 913, first paragraph: "Gifts either by instrument *inter vivos* or by will, may not exceed one-half of the property of the giver, if he leaves, at his death, only one legitimate child; one-third if he leaves two children; one-quarter if he leaves three or a greater number."

"Art. 913: Les liberalites, soit par actes entre vifs soit par testament, ne pourront exceder la moitie des biens du disposant, s'il ne laisse á son décés qu'un enfant légitime; le tiers, s'ly laisee deux enfants; le quart, s'il en laisse trois ou un plus grand nombre."

Now, these proceedings of the Civil Code were in force at the time of the marriage of those parties at Lyons, France, as stated before, and are still in force.

Mr. Collins—I will cross-examine Mr. Leon on that without the necessity of his being sworn.

MR. MAURICE LEON is examined by Mr. Collins:

Q. When you say they were in force at the time of the marriage, is that, from a study of the subject, or simply from tradition; do you know when they were adopted; you are a member of the French Bar?

A. No, sir.

Q. But you are French born?

A. Yes, sir.

Q. And have studied the French law?

A. I have devoted much time to the study of it.

Q. Where did you get the information that these sections were in force when the marriage took place, of Mr. Givernaud to Miss Haour?

A. I have been familiar with these provisions of the French Civil Code for, probably, a matter of 15 years, and I have had occasion to examine them in connection with other cases; and in the examination of these provisions, I have used various editions of the Civil Code, including the only official edition, which dates back to 1816, August 30, 1816. The last publication, I think, is the one in my hands, 1913, and in that edition there are references to the sources of the law whenever these sources are other than the original "Code Napoleon," and these two provisions which I have appear in this edition to have been in the original code.

Mr. Malraison—There is no doubt about that; the law has been the same.

Mr. Collins—Then they are in.

The Court—Anything further?

Mr. Collins—Not from Mr. Leon.

The Court—When do you expect your witness from New York?

Mr. Leon—I can have him here at two o'clock.

The Court—All right; then, as I understand, the situation is, that the complainants' case will close, and the other side can go on with what witnesses they have here.

Recess to 2 P. M.

AFTER RECESS.

HENRY W. HARDON, sworn in behalf of the complainants, testified as follows:

DIRECT EXAMINATION, by Mr. Leon:

Q. What is your residence and profession?

A. I reside in New York City, and am a lawyer.

Q. When were you admitted to the Bar of New York?

A. In 1886.

Q. Since that time have you been lecturer or Professor of Law in any university of the State of New York?

A. I was Professor of Law at Cornell for one year, and then for three years, at the Columbia Law School in New York City.

Q. Except for these periods have you been practicing your profession in New York continuously?

A. I have, except for these periods, and for about a year and a half, when I was in Europe at the University in Berlin.

Q. As Professor of Law, at Columbia, did you lecture on wills?

A. That was my subject at Columbia for three years, one of my subjects.

Mr. Leon—Do you concede that these statutes are not repealed?

Mr. Collins—We concede that; produce the book that has got the statute in. The Court can look at it, and he can see that it is all right; our statute is very liberal.

Q. Have you had occasion to examine the will in this suit?

A. At your request.

Q. Please refer to it, or rather, to the copy which you have used.

Mr. Collins—He may use the copy; anything you say goes with me, except on the law.

Q. Please refer to the eleventh clause of the will. In your opinion, is that clause there valid or invalid, according to the laws of the State of New York?

A. Invalid.

Q. Will you refer to the ninth clause in the said will. In your opinion, is that clause vaild or invalid?

A. In my opinion that clause also is invalid.

Mr. Leon—When referring to the ninth and eleventh clauses, I refer to the clauses and not to the subdivisions.

CROSS-EXAMINATION, by Mr. Collins:

Q. Professor Hardon, have you been over the entire will?

A. Yes, sir.

Q. From beginning to end?

A. Yes, sir.

Q. In your opinion, the first, second, third, fourth, fifth, sixth, seventh and eighth clauses are valid?

A. I think the first eight clauses are valid.

Q. And in your opinion, if the first eight clauses are valid and the rest of the will is invalid, the New York courts, construing the New York law, would give effect to the first eight clauses, but would expunge and disregard the invalid provisions?

A. That is so.

Q. Now, with regard to the ninth clause, which is the residuary clause, I call your attention to subdivisions first, second, third and fourth. and in connection with those subdivisions, I ask you to look at a very recent case, entitled "Bailey *vs.* Loan, Trust and Safe Deposit Company," 151 New York Appellate Division, page 166, and I would like to show the case to Professor Hardon so as to refresh his recollection; he is undoubtedly familiar with it.

(Witness examines the case in the book.)

Mr. Collins—There are one or two other paragraphs to which I wish to call your attention before you answer that question.

(Witness continues reading the case.)

Q. I have another case along the same lines in the Court of Appeals, if you would like to look at it.

(Witness continues reading.)

Q. Do you care to see the Court of Appeals case—Buchanan *vs.* Little, 154 New York, holding that similar provisions are annuities?

A. I have seen that case, but I should like to see your note of it again.

Q. It begins at the very foot of that page.

A. I remember the last case.

Q. Would you care to see any other New York cases to refresh your recollection; I have some others here along the same line?

A. If you have any that you wish to call to my attention, I should be glad to look at them.

Q. People's Trust Company *vs.* Flynn, 188 New York?

A. Yes, I know that case.

Q. After calling your attention to the subdivisions first, second, third and fourth of paragraph 9, and also subdivision eight, paragraph nine, I ask you if the New York courts, in construing this will, would not give effect to the first, second, third and fourth subdivisions of paragraph nine, either by the payment to the legatees named, of the annual sums named, or by decreeing a payment to the legatees named of a lump sum arrived at by means of the annuity tables?

A. I think they would not.

Q. State why.

A. Because it seems to me too clear for argument that the eleventh clause of this will is absolutely invalid; it seems to me that the eleventh clause of the will is an essential part of its provision for trusts, and an essential part being void, the entire provision will have to fall.

Q. In the cases that I have shown you, I think the Court held, that although the remainders fell—being invalid—provisions similar to the subdivisions one, two, three and four, of paragraph nine, were sustained, on the theory that they were annuities, and were charges upon the estate, regardless of the invalidity of the balance of the trusts?

A. Would you like my views on that case?

Q. Isn't it your opinion, that the Court might still hold the same way in the present case?

A. It is undoubtedly true that there are cases where part of a trust provision is invalid, as creating a postponement of alienation, which is not permiteed by the law of the State of New York, where the Court has, nevertheless, sustained some other part of a general provision; and the case of Bailey *vs.* Buffalo Loan, Trust and Safe Deposit Company is one of those cases; and they sustained the general provision, because the Court thinks that the in-

valid part is not so involved with the others—that the invalid part is not so involved with the others that are invalid, that it must fall with them. That doctrine, according to my examination of the cases, is a very narrow doctrine, and is applied substantially, only in those cases where the invalid provisions can be lopped off without interfering with the general scheme of the will; and that doctrine is applied primarily for the benefit of a widow and in some cases, as in this case, for the benefit of the only issue of the testator. In the Bailey case, the provision for the only son was upheld, although the limitations of the estate, after his life estate, were invalid. In my opinion, in this case it is impossible to sever the invalid part of the will from the part of the will which otherwise would be valid.

Q. You mean the trust, don't you?

A. Yes, sir; and that cannot be done because it will alter so radically the disposition of the estate. It will be noticed, for example, in the Bailey case, that the persons who will take will be the son, who takes an absolute estate, instead of taking merely a life estate; and after him, the testator's heirs, who would be the son's children; in other words, the same persons take ultimately in the Bailey case as would take if the entire provision could be held valid, and that, according to my examination of the cases, is usually a fact, that those persons only take where the invalid part is lopped off, who would have taken if the invalid part had not existed.

Q. Assuming that the first, second, third and fourth subdivisions of paragraph nine contain provisions for annuities chargeable against the estate; and assuming that the balance of paragraph nine were invalid, isn't it your opinion that those annuities would be sustained?

A. Let me make sure that I understand your question.

Q. Assuming that the first, second, third and fourth subdivisions constitute annuities, and assum-

ing that the rest of clause nine of the will is invalid, isn't it your opinion that the Court would sustain the annuities in discarding the balance?

A. No, sir; my answer is the same as before, because I think that the first four subdivisions of clause ninth are part of the general trust scheme in this will, and that they cannot be severed from the general trust scheme because that will so violate the manifest intention of the testator.

Q. Professor, I call your attention to subdivisions one, two, three, four, five and six of paragraph nine of the will, and I ask you if you don't think that that provision would be valid in the event that Charles L. Givernaud and his wife, May R. Givernaud, died leaving issue?

A. No, sir, I do not.

Q. Why, may I ask?

A. Because, in order to determine whether a trust provision which violates the statute relating to restraints an alienation, is valid, it is only necessary to determine that in some possible contingency it will be invalid. Now, as long as clause eleven remains in this will, there are many contingencies in which the entire trust provision will be invalid, and it is not enough, therefore, to determine that if clause eleven were not in the will, and that Charles L. Givernaud died leaving issue, the will might then be valid.

Q. I call your attention to section 52 of the real property law of New York, which provides: "A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect"; and also to section 51 of the New York real property law, which provides: "Two or more future estates may be created to take effect in the alternative, so that, if the first in order fails to vest, the next in succession shall be substituted for it and take effect accordingly."

Mr. Leon—We object to that as immaterial.

Q. (Continued.) I also call your attention to the case of Dennison *vs.* Dennison, 185 N. Y., 438, at page 442; and also to the case of Underwood *vs.* Curtis, 127 N. Y., page 523, at page 541; and I ask you if, in your opinion, the trust contained in the ninth paragraph would not be valid in the event that Charles Givernaud and his wife died leaving issue?

Mr. Leon—We desire to object on the ground of immateriality, in that it is quite clear that the question relates to provisions of the real property law.

The Court—I will allow the question to stand, and will deal with it on final hearing. Now, examine the cases.

A. In my opinion it would not.

Q. Why not?

A. I might say, that in my judgment the first of these cases, Dennison *vs.* Dennison, 185 N. Y. 438, is not in point at all, because the Court held there that the second trust was a dry trust; in other words, that the beneficiary had both the legal and the equitable estate; therefore, it was a case of the creation of an estate for A. for life, remainder to B. in fee simple. The case of Underwood *vs.* Curtis, 127 N. Y. 523, 541, is a case which illustrates the principle to which I adverted a while ago in my testimony, namely, that there are cases where the Court finds that the provisions in the trust are separable and sustains the valid part, if separable; and the common case, as I said, is the case where the Court endeavors to sustain a trust provision for a wife or a widow, and these two cases which are cited in Underwood *vs.* Curtis, Kennedy's case, and Van Shiver's case are: the first, a case of a trust for a widow, and the second case, of a trust for children; in other words, in both those cases, and I think also in Underwood *vs.* Curtis, the same person would take eventually, whether the invalid part of the trust was lopped off or not. In other words, there is, in these three cases where the separable valid part of

the trust is sustained, no general alteration in the testator's scheme

Q. Reverting again to the Bailey case—in that case, as I understand it, and as you stated, there was an only child, for whose benefit the trust was created, and in the case at bar, the trust is for the lives of Charles L. Givernaud and his wife, remainder to their issue; do you have in mind a distinction between the two cases?

A. I should think that there would be a distinction, inasmuch as it does not appear in the case at bar that Charles L. Givernaud is the only child of the testator; in fact, as I recall the will, it appears that there were some other children.

Q. However, if the trust is declared invalid, the children of one other living child will fail to take the share left to them in the trust, as well as Charles L. Givernaud and his wife, by whose lives the trust seems to be measured?

A. Assuming that it is so, to my mind that is not the controlling consideration at all; the important thing in this case is, to determine whether the obviously invalid part of the trust can be lopped off. Now, in my judgment, it can be lopped off only when the estate, if it were lopped off, would fall substantially to those persons who would take it if the invalid part were valid and could be enforced, unless it appears that there is a primary and obvious purpose in the first clause in the valid part. If that appears, why, then, the courts in New York have, in a number of cases, sustained the valid part of the clause and lopped off the rest; but those cases are primarily cases of provision for a widow or for children; in the Butler case, for an only child.

Q. Are you familiar with the Berry case, decided in the Appellate Division, First Department, January, 1913?

A. No, sir, I don't think I have seen that case.

Q. The trust was for the Employee's Benefit Association of the department store of Simpson, Craw-

ford and Company, for five years, at the expiration of which time, the principal was to be paid to the Lutheran Hospital, and which case was recently, in 209 N. Y., confirmed by the Court of Appeals, without opinion?

A. No, sir, I have not seen that case.

Q. Had you seen and read over carefully the Bailey case before you came into court to-day?

A. I have read over the Bailey case to know what the general point was which was decided in that case.

Q. Had you read it over after this will was submitted to you for your consideration?

A. I did, yes, sir.

Q. Will you kindly give me, or state what authority, either statutory or case authority, you have for the conclusion which you have arrived at in regard to this trust provision-

A. I don't rely on any particular authority; I have read a great many of these cases, and I think I know what the rule is, and I think that the rule is as I have stated it. Of course, I have looked at the statute, section 11 of the personal property law, as it is now numbered and called, although it is the same section as the one which is printed in the bill of complaint.

Q. Is there any other statute that you have in mind in arriving at your conclusion?

A. Affecting the validity of this trust provision?

Q. Yes.

A. No.

Q. And can you cite any case in point at all analogous with the case at bar, sustaining the conclusion at which you have arrived?

A. I should refer to the language of Judge Parker, in Underwood *vs.* Curtis, page 541, Volume 127, of the N. Y. Court of Appeals Report; I think he states the law there, as I understand it: "If the provision for the benefit of the widow and the two unmarried daughters, during the life of the widow, is inseparably connected with the other dispositions of the

will, and a necessary part of the general scheme for the disposal of the testator's property, then it must fall with them, and the testator die intestate—even though it be for the wife and daughters, if it is inseparably connected (where he cites Benedict *vs.* Well), but where several trusts are created, and those which render the entire disposition illegal, can be separated and legally upheld, without doing injustice or defeating that which the testator might be presumed to wish, that which is illegal, or which, added to the others, renders the whole illegal, may be cut off, and the intention of the testator given effect, so far as the statute will permit''; and for the exception, he cites three cases there, one of which was, where a trust had to be sustained for a widow, and the other for the testator's children, and the third one, I don't recall; there are not many cases of that character; there are very few where the provisions can be separated.

Q. Calling your attention again specifically to the will in the case at bar, if Charles Givernaud and his wife died leaving issue, as I understand the terms of the will, the principal is to be paid over to the issue, and do you agree with me, that in that event, the trust would be measured by only two lives in being? Have you a copy of the will there?

A. Yes, I have a copy of the will.

Q. To and including the tenth clause?

A. I think that is correct.

Q. And you agree with me, that if the trust could be divided, so that the eleventh paragraph could be discarded, that the will would be valid down to and including the tenth paragraph?

A. There is something in the seventh subdivision of the ninth paragraph which raises a doubt in my mind; the words four lines from the end of that subdivision: ''Undisposed of and unapplied.'' It seems to me that that indicates that after the death of the persons named in the preceding clauses their interest in the trust passes to Charles and his wife,

in equal shares, and then, on the death of Charles or his wife, that same interest passes to the survivor for life. If I am correct about that, there is there an unlawful suspension for three lives, but, apart from that, I am inclined to think, that if the eleventh paragraph were not in the will, or could be separated from it, the will would be valid.

Q. Do you not agree with me, Professor, that where there is an alternative provision in the trust, and where, in a case like this, it may very possibly happen that the two life tenants shall die, leaving issue, and where it may very possibly happen that the eleventh paragraph, and what follows, shall never be of any material importance, that the Court will, at least, await the event before holding a will invalid?

A. No; I disagree with you entirely about that, and, in my view, the Court will never wait for that purpose. It is sufficient that the Court can see that in some possible contingency the trust provision is invalid. It must appear on the face of the trust that it is invalid in every possible contingency.

Q. And what citation can you give me on that point?

A. That is, in many of these cases; I find it in Underwood *vs.* Curtis. Yes, here it is, on page 540: Judge Parker says: "In the words of Judge Grover: '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 estates will be held to be void.' "

Q. Nevertheless, in that very case, if they had not lopped off the invalid provisions of the trust, the trust would have been invalid?

A. That is one of those rare cases where they have lopped off an invalid provision.

Q. Can you give me any cases in point, where the Court has refused to lop off the invalid portion, cases similar to the case at bar?

A. No, sir, I can mention no case by name.

Q. Now, don't the New York courts attempt to sustain a will, rather than declare it invalid?

A. Undoubtedly, I suppose courts of all States do.

Q. And where there is any doubt on the construction of the will that is resolved in favor of the validity of the will, isn't it?

A. That is a rule which is applied, if you have no better rule, undoubtedly.

Q. Then, it is your opinion that the provision of this trust down to the eleventh paragraph is what we might consider an alternative provision to the eleventh paragraph, and what follows?

A. I have not said that; it is an alternative provision in the same sense in which many wills first provide for the disposition of property, if there are issue, and then for the disposition of property if there are no issue.

Q. And you are familiar with section 51 of the real property law, which provides that two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it and take effect accordingly?

A. Yes.

Mr. Leon—I make the same objection as before.

The Court—Objection overruled.

Q. Still, you don't think that the New York courts would sustain the will down to the eleventh paragraph?

A. I think the New York courts would sustain the specific legacies only.

Q. And would decline to separate the eleventh clause from the balance of the will?

A. That is my opinion.

Q. Don't you think that the remainder here, even in the eleventh clause, might be accelerated by the New York courts, and being a vested remainder, it might be sustained as being valid by expunging the intermediate, invalid estates?

A. By expunging what estates?

Q. The various life estates contained in the eleventh paragraph, so that the remainder would at once vest after the termination of the two life estates, without issue, in the Italian Benevolent Association and the French Benevolent Society of New York?

A. I know of no authority which would justify any such action.

Q. But you are familiar with the matter of Berry?

A. No, sir, that is a case I have not seen.

Q. Just affirmed?

A. (No answer.)

Complainants rest.

THEODORE L. BAILEY, sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION, by Mr. Collins:

Q. You are an attorney and counsellor-at-law of the State of New York?

A. Yes, sir.

Q. When were you admitted?

A. 1901.

Q. Have you given special study to the subject of wills?

A. I have.

Q. You are in practice in the City of New York?

A. Yes, sir.

Q. Have you examined the will of Louis Givernaud?

A. Yes, sir.

Q. Have you heard the testimony of Professor Hardon?

A. I have.

Q. Do you agree with him, and if not, wherein do you disagree; in other words, tell us what you understand the law of New York to be, referring to statutes and decisions, with respect to the will of Louis Givernaud, having special reference to the ninth and eleventh paragraphs thereof?

A. I agree with Professor Hardon that the legacies

would be sustained, but, in coming to the ninth paragraph, I disagree with Professor Hardon so far as the trust is concerned, for this reason: that taking the first, second, third and fourth subdivisions of paragraph ninth, and reading them in connection with subdivision eight of the same paragraph, wherein the testator mentions the annual sums and the amounts annually paid, I am of opinion that the New York courts would hold the first, second, third and fourth subdivisions of paragraph ninth to be annuities, chargeable upon the estate, and that the New York courts would hold, that upon the death of Charles L. Givernaud and his wife, May Givernaud, the annuities would be determined as to value; with the asistance of the annuity tables, and the amount due the annuitants mentioned in the first, second, third and fourth subdivisions of paragraph ninth, would be paid outright and absolutely to them out of principal, if there was insufficient income, and that the balance of the principal would be paid to the issue of Charles Givernaud and his wife, absolutely, if there were issue.

Q. And if there were no issue?

A. I am of opinion that the trust is separable, and that the provisions down to and including the tenth paragraph can be separated and would be separated by the New York courts from the eleventh paragraph and the following paragraphs.

Q. Will you cite your authorities for your opinion?

A. My authorities for my opinion that the first, second, third and fourth subdivisions of paragraph ninth would be considered annuities payable absolutely, upon the death of Charles and his wife, the two persons whom I consider to be those for whose lives the trust is mentioned, are, Buchanan *vs.* Little, 154 N. Y., 147, 148 and 151; also, Poeple's Trust Company *vs.* Flynn, 188 N Y., 385, being decided by the Court of Appeals in 1907, at page 389; also page 390; also page 392. Also the case of Matter of Trumble, 199 N. Y., page 454, decided by the Court

of Appeals in 1910, at pages 456 and 463; and also the case of Bailey *vs.* Buffalo Loan, Trust and Safe Deposit Company, 151, Appellate Division, page 166, and decided in May, 1912.

My authorities for my conclusion that the trust is in the alternative, conditioned in the first place upon whether Charles Givernaud and his wife die leaving issue; and secondly, if they die leaving no issue, are: Dennison *vs.* Dennison, 185 N. Y., page 438, at pages 442, 447, 448; Schettler *vs.* Smith, 41 N. Y., 328, at pages 331 and 335.

My authorities for my conclusion that the trust is separable, and that the eleventh paragraph and the following paragraphs can be disregarded and expunged, if deemed invalid, and the foregoing paragraphs retained and given full effect, are: Matter of Buckner, 68 N. Y., Miscellaneous, 287, at pages 289, 290 and 292; the Matter of Corlies, 11 N. Y. Miscellaneous, 670, at page 674; case of Burns *vs.* Allen, 89 Hun. 552, page 558; Underwood *vs.* Curtis, 167 N. Y. 523, at page 541 and 542; Kennedy *vs.* Hoy, 105 N. Y. 134, 136 and 137; Tiers *vs.* Tiers, 98 N. Y., 568, at page 573; Manice *vs.* Manice, 43 N. Y., 503, at page 583; Harrison *vs.* Harrison, 36 N. Y., 543, pages 544 and 547; Oxley *vs.* Lane, 35 N. Y., 340; Post *vs.* Hover, 33 N. Y., 593, at page 598; Leonard *vs.* Burr, 18 N. Y., 96, page 105; Savage *vs.* Burnham, 17 N. Y., 561, at page 576, and other cases cited in those authorities. In the matter of Berry, decided by the Appellate Division in January, 1913, reported in the New York Law Journal January 13, 1913, and recently affirmed by the Court of Appeals in 209 N. Y., without opinion. The Bailey case also comes in under "Separability."

Q. Now, do you find any such distinction as Professor Hardon thinks exists, that a Court will not separate an invalid part of a trust from the valid part—except the same persons—for example, the widow or only children, would take, if the trust were not invalid?

A. No, I don't agree with the Professor on that point; I think that they will separate the invalid part from the valid part wherever they can do so without doing violence to the testator's intention, and without disturbing his general scheme.

CROSS-EXAMINATION, by Mr. Leon:

Q. If I understand rightly, you are under retainer in this case as counsel for the defendants?

A. Yes, sir.

RE-DIRECT.

A. If I may add one other point, I would like to say, in the recent Berry case, which evidently had not come to the attention of Professor Hardon, the facts were, that the testator gave his property to the trustee, in trust, to invest, and for a period of five years to pay the income to the Employee's Benefit Association of the Department store of Simpson, Crawford and Company, of New York City, and at the expiration of said five years to pay over the principal to the Lutheran Hospital. The Surrogate declared the remainder to the hospital, as well as the provision for the income to the Benevolent Association, to be invalid, and held that the testator died intestate as to all the trust property; but the Appellate Division, admitting that the provision for the income to the Benefit Association for a definite period of five years, was invalid, argued that the remainder was a vested remainder, and vested in the hospital, and should be accelerated and saved from falling with the intermediate estate, which was held invalid by reason of its violation of the statute against the suspension of alienation of personal property for more than two lives in being. In that case, the widow and children were not protected by the decision of the Court.

Q. In your opinion, does the tenth paragraph provide for a lawful remainder to the children of Charles and his wife, upon their death, if they leave children?

A. It does.

Q. And upon what provision of the New York statute do you rely for that opinion?

A. There is no statute prohibiting the suspension of alienation of the ownership of personal property, provided such suspension be not more than two lives in being; and my construction of the tenth paragraph and all that goes before it is, that the first, second, third and fourth subdivisions of paragraph nine would be held, under a long line of New York cases, to be mere annuities, although the testator did not and need not use the word "annuity."

Q. You have already told us that.

A. And that the remaining portion is simply for the lives of Charles Givernaud and his wife, who constitute two lives in being, so that, discarding the eleventh paragraph and what goes after, the ownership of this personal property would only be suspended for a period of two lives then in being, and would accord with the New York statutes and decisions, in my opinion.

Q. And would Charles and his wife get their life estate?

A. They would.

Q. Does Section 52 of the Real Property Law of New York figure in this case, and if so, how and why?

A. The statute, which I believe is pleaded in the bill, provides at the end thereof: "In other respects, limitation of future or contingent interests in personal property are subject to the rules prescribed in relation to real estate, in real property."

Q. What does that provide, page 16?

A. Section 52 of the New York Real Propetry Law provides: "* * * shall not be void on the ground of the improbability of the contingency on which it is limited to take effect."

Q. Having that in view, does the fact that Charles and his wife have no child at the present time, affect the validity of the trust?

A. No, sir.

RE-CROSS.

Q. In the Berry case, Mr. Bailey, is it a fact that the Court of Appeals of New York affirmed without opinion, or that it affirmed on opinion below?

A. That I cannot tell you at present; I know they rendered no opinion. It is a very recent affirmance.

Mr. Leon—I should like to have it stipulated that in the briefs counsel may refer to any case in New York.

Mr. Collins—We have a right to refer to any case of any State for a matter of general law.

The Court—I think the proper way would be to recall Mr. Hardon, if you desire to put in the authorities.

Mr. Leon—Or else give you a list of those authorities.

The Court—If you make a stipulation to that effect it will be all right.

Adjourned to a day to be fixed.

SECOND DAY.

Transcript of testimony taken in the above-entitled cause, before Hon. Vivian M. Lewis, Vice Chancellor, at the Chancery Chambers, Jersey City, New Jersey, on the twenty-ninth day of January, 1914.

Appearances as before noted.

HENRY C. SIMMONS, sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION, by Mr. Collins:

Q. You are connected with some department of the city government of New York?

A. Yes, sir.

Q. Borough of Manhattan?

A. Yes, sir.

Q. What?

A. I am Clerk and Custodian of the Records, in the Secretary's office, Department of Taxes and Assessments, City of New York.

Q. How long have you been there?

A. I have been there fourteen years in the same position.

Q. You were asked to produce an affidavit purporting to be signed by Louis Giveranud in the year 1898?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Q. From the public files of the department?

A. Yes, sir.

Marked "*Exhibit A. B.* 1. for identification."

Q. That was in the files of the year 1898?

A. Yes, sir, for the assessment of 1898.

Q. You did not see Mr. Louis Givernaud sign it?

A. No, sir.

No cross-examination.

Mr. Leon—We will admit the genuineness of the signature of Louis Givernaud.

Mr. Collins—I now offer it in evidence.

Mr. Leon—I consent also, that if it be admitted in evidence, a copy may be used instead of the original.

Mr. Colins—Now, we offer it in evidence.

Marked "*Exhibit A. B.* 1."

(Reading "*Exhibit A. B.* 1."

THEODORE L. BAILEY, being recalled in behalf of the defendants testified as follows:

RE-DIRECT EXAMINATION, by Mr. Collins:

Q. You have already testified that you are an attorney and counsellor of the State of New York, of many years' standing, and you have been a witness in this case on the law of New York on certain points I have recalled you to ask you with regard to what law is applied in New York as to the personal prop-

erty of a person domiciled in New York acquired after the abandonment of a domicile in France, and acquisition of a domicile in this country—I mean, with respect to the law of France as applied to French citizens, reserving to the wife and children certain portions of the French citizens' property.

Mr. Leon—That is restrictive to after-acquired property?

The Court—Yes.

A. The law of New York recognizes and enforces the law of the domicile of the decedent, as such domicile was at the time of death, and gives no force or effect to the la wof the matrimonial domicile. My authority for that opinion is, "Matter of Majot, 199 New York, page 29.

Q. Just state what is declared in that case

A. In that case the facts were, that the decedent and his wife were married in France, thereby acquiring a matrimonial domicile in France; subsequently, they removed to New York, where the decedent acquired the personal property which he left at his death, and where he also acquired a domicile, which he retained up to the time of his death. The Court of Appeals, deciding this case in 1910, refused to recognize or enforce the law of the matrimonial domicile, which was, in this case, France. The Court cited Story's Conflict of Laws, Eighth Edition, 267; and the Court of Appeals, which is our highest court, put in italics, or at least it is reported—the following is reported in italics: "But where there is a change of domicile, the law of actual domicile and not of the matrimonial domicile, will govern as to all future acquisitions of movable property; and as to all immovable property the law *rei sitae* will apply." I might also cite cases of Matter of White, 116 Appellate Division, 183; and Matter of Newcomb, 192 New York, 238; Schultz *vs.* Dambmann, 3 Bradford, 379; Trimble *vs.* Dzieduzyiki, 57 Howard Practice, 208; and Matter of Ruppauer, 15 Miscellaneous, 654.

RE-CROSS EXAMINATION, by Mr. Leon:

Q. The Majot case was a tax case, wasn't it?

A. Yes, sir; transfer tax.

Q. And in that case, as you stated on direct examination, both husband and wife removed from France to this country, didn't they?

A. Yes, sir.

Q. In your opinion, did that not create a new matrimonial domicile for them in this country?

A. I would rather not answer that, as I do not think that in New York matrimonial domicile is of material moment in such a case, except as enforcing the law of France.

The Court—You must answer it in some way or other.

A. I don't think so.

Q. So you wish this Court to understand that where husband and wife are married in one country, being their country of origin, and they together move to another country and establish themsleves in that country, without any intent of returning to the country of origin, so as to make their new home their permanent home, that is not to be looked upon as their matrimonial domicile?

A. Their new home I do not think would be looked upon as a new matrimonial domicile.

Q. Your understanding of the law then is, that the matrimonial domicile is only the domicile where people are married?

A. That is my understanding.

Q. Where, for example, in cases which have come up in the courts of New York, parties married in a State, and then became established permanently in New York in the way in which they were in the Majot case, don't you know that the courts of New York take jurisdiction in the absence of one of the parties from the State of New York, to grant a divorce, on the theory that New York was the matrimonial domicile?

A. In divorce actions they would take jurisdiction in such a case, in my opinion.

Q. On that ground, that it was the matrimonial domicile of the parties?

A. On the ground that it was the domicile.

Q. Haven't they actually done it on the ground that it was the matrimonial domicile of the parties?

A. They may have used that term in some of the cases.

Q. Now, do you know of any case in the State of New York, or in any other State of the United States, in which has been held upon the following state of facts, viz.: A man departing from his country of origin and matrimonial domicile, leaving his children behind with his wife, absconding with a dowry belonging to his wife, which he had been ordered to restore, did you ever hear of a case where, upon that state of facts, it has been held that the law of the matrimonial domicile would not apply to the distribution of property left by the decedent in such new domicile?

Mr. Collins—I object to it as irrelevant, immaterial and incompetent. Some of the recitals also that he puts in his question are not established by any proof.

The Court—I think you should re-frame that question; I think the question may be admitted and allowed if it is re-framed; leave out some of those recitals.

Q. Have you ever heard of a case where it has been held that the law of matrimonial domicile would not apply to the distribution of his personal estate?

A. My answer would be no.

RE-DIRECT EXAMINATION, by Mr. Collins:

Q. I take it, Mr. Bailey, that you have used the term "matrimonial domicile," as meaning the domicile of the place where the marriage took place?

A. Yes; and also as distinct from the domicile—

Q. As I understand you, it is not quite accurate

to call a domicile that the husband acquires after marriage, though shared there by his wife, a matrimonial domicile; it is the husband's domicile; and it may happen or it may not happen, that the wife deserts it, but what you have termed a matrimonial domicile in your testimony, is the domicile at the time of the marriage; am I right about that?

A. Yes, sir.

Q. It is possible, and perhaps some judicial writers or judges may have spoken of a domicile of the husband acquired after marriage, in which his wife shared, as the matrimonial domicile; that may be so in some books, but in your view that is not quite accurate?

A. I have tried to use the terms as they are used apparently in the bill of complaint herein, which I have read.

The Court—The witness stated the word might have been used, "matrimonial domicile," in matters of divorce; as I understood the witness, his interpretation was that the matrimonial domicile was the place where the contract of marriage took place.

Mr. Collins—As referred to in these cases.

The Witness—And for the purpose of this present proceeding.

RE-CROSS EXAMINATION, by Mr. Leon:

Q. Now, I should like you to testify to these terms, without reference to any case.

The Court—You mean as to domicile and matrimonial domicile?

Mr. Leon—Yes.

Q. I wish to know, then, whether as an attorney and counsellor of the State of New York, in which capacity you are testifying, your understanding of the term "matrimonial domicile"; and I would like you to testify to this without reference to any case, any particular case—I mean, to the state of facts in any particular case.

The Court—How is it material, then, unless it affects the distribution of personal estate?

Mr. Leon—I would like to get his understanding.

A. I have used the term, "matrimonial domicile," to denote the domicile at the time of the marriage and during the period that the husband and wife lived together in that same place, same country in which they were married, and I have used the term "domicile" to denote the place to which the husband subsequently removed without his wife and family, where he subsequently establsihed himself.

Q. What about the place where they both removed subsequently?

A. In some cases it would be termed "matrimonial domicile," but in such a case as the present proceeding, it would not.

Mr. Leon—I object to that.

Q. You desire your testimony to stand in this way, that your understanding is that "matrimonial domicile" has been used in New York as applying to a place where husband and wife removed, after they are married, only in divorce cases?

A. Possibly some others; I would not care to limit it absolutely to divorce cases.

Q. You think it entirely possible that it was used in connection with cases in which the question of the disposition of the estate of a deceased was at issue, don't you?

A. No, sir.

Q. Well, then, what other kinds of cases in addition to divorce cases?

A. I have none in mind.

Q. You don't think it possible that it was done in cases of decedents' estates?

A. No, sir.

Q. You have no particular case in mind, either of decedents' estates or of any other case other than a divorce case?

A. Yes, sir, I have a case of decedents' estates, in

which the Court of Appeals has distinguished between the matrimonial domicile and the domicile, and has used the word "matrimonial domicile" to refer to the place where the husband and wife were married, and has used the "domicile" to refer to the place to which the husband and wife subsequently removed and lived together, as distinct from the matrimonial domicile where they were married.

Q. As a matter of fact, don't you know, upon my refreshing your recollection, that matrimonial domicile does not at all mean, and is not understood by any authority on the subject to mean, the place where the parties were married, but the place where they intend to live together after marriage?

A. No, sir.

Q. That is not your understanding?

A. No, sir.

Q. You would be greatly surprised if authority was brought before you to satisfy you that such was not the understanding of the leading authorities on questions of conflict of law?

A. No, sir.

Q. So take, for example, the case of a man marrying a woman in California, they intending to remove to New York to live and setle; you would say that New York was not their matrimonial domicile.

A. Under the authority of the Majot case.

JOEPH BRAUBACH, recalled by the complainant to make corrections of his testimony formerly given, testified as follows:

DIRECT EXAMINATION, by Mr. Leon:

Q. You are the same gentleman who testified here in this case at the last hearing in October last?

A. Yes, sir.

Q. Where you refer in your testimony to the Von Hoffman Flats, you refer to a house in West Twenty-sixth Street, in the County and State of New York?

A. Yes, sir.

Q. Where you have referred to Mr. Givernaud

moving to Thirty-fourth Street, you refer to a place in the County and State of New York?

A. Yes, sir.

Q. Where you referred to the Powhattan Apartment House, you refer to a place in the County and State of New York?

A. Yes, sir.

Q. Where you referred to Mr. Louis Givernaud moving to Central Park, West, around Sixty-eighth Street, you referred to a place in the County and State of New York?

A. Yes, sir.

Q. Where you referred to 71 and 73 Greene Street as Mr. Louis Givernaud's place of business, that was in the County and State of New York?

A. Yes, sir.

Q. Now, on cross-examination by Mr. Collins, page 24, oyu testified, referring to Mr. Givernaud's leaving the house at West Hoboken about six months after you entered in his employ?

Mr. Collins—Six months after he became his valet.

Q. Yes, that is correct. You were asked: "Q. You don't know whether the furniture remained there or not?" and the answer is: "No, sir." Now, do you wish to add anything to your answer with reference to the question of whether you know of any piece of furniture not having remained there?

A. I have nothing to add.

Q. Do you remember what became of his bed and of a certain wardrobe?

A. That was taken to New York.

Q. What knowledge have you of that?

A. I helped to take it over there?

Q. And where did it go in New York?

A. It went to the Von Hoffman Flats.

Q. When he moved from the Von Hoffman Flats, where did it go?

A. It went to Thirty-fourth Street.

Q. When he moved from Thirty-fourth Street, where did it go?

A. As I recall, he got a new bed.

Q. Now, as for that wardrobe, can you describe it for us?

A. Yes, sir.

Q. Tell us what you know about it.

A. It was made in sections—a big long thing, in sections.

Q. What wood?

A. It was dark wood.

Q. Was it made to order?

A. Yes, sir, it was made to order.

Q. And that is where he kept his clothes?

A. Yes, sir.

Q. Was it a very large piece of furniture?

A. Yes, sir; you could hang about 30 suits in it, or more.

Q. Now, at another place under cross-examination, you were asked, on the same page, page 24, referring to the lady who lived with Mr. Louis Givernaud as his wife at that time, viz., at the time when he went from West Hoboken to the Von Hoffman Flats, you were asked by Judge Collins: "Do you know what became of her then?" And you answered, "No, sir." Have you any recollection about her having lived in Forty-second Street, in the County and State of New York a few months after Mr. Givernaud left to go to the Von Hoffman Flats?

A. Did you ask me those questions then?

Q. No.

A. I don't remember you asking me those questions.

Mr. Collins—Then I don't think it is corrections; I don't understand there is any correction in this.

Q. Page 23: "And when you went he and you went, the house was still opened and furnished, and Madame Givernaud, his wife, was still there? A. Yes, sir. Q. Do you happen to know that she went

abroad? A. She went abroad occasionally. Q. I mean then. A. I don't know. Q. So you don't know what became of her then? A. No, sir. Q. Louis went over to this bachelor apartment, and did not Mrs. Louis go abroad. A. I could not tell you. Q. She was accustomed to going abroad very frequently? A. Yes, sir." You say you don't know whether Mrs. Louis went abroad; do you want to correct that?

A. She went abroad quite often.

By the Court:

Q. At this time, did she go abroad?

A. I don't know.

FURTHER DIRECT:

Q. Have you any knowledge about her going to West Forty-second Street?

A. Yes, sir.

Q. That was in the Borough of Manhattan, City of New York?

A. Yes, sir.

Q. What is now the Borough of Manhattan; what was then merely the City of New York?

A. Yes, sir.

Q. And that was a few months after Mr. Louis Givernaud—

Mr. Collins—I object to the question.

Q. When was it; how long after he left there?

A. Three or four months.

Q. Did you see her there?

A. Yes, sir.

Q. What was she doing there?

A. She was living there.

Q. In what kind of a place was she living?

A. She had her own house, as I understand.

Q. Was it a dwelling house or an apartment?

A. A dwelling house.

Q. And you saw her there?

A. Yes, sir.

Q. Do you happen to know how many years she lived there?

A. No, sir.

Q. Do you know the number of the place?

A. No, sir.

Q. That was in West Forty-second Street?

A. Yes, sir, on the downtown side between Broadway and Eighth Avenue.

Q. Did Mr. Louis Givernaud live there with her?

A. No, sir.

Q. Do you know where she went to live after she left that Forty-second Street house?

A. I think she had a country place out on Long Island somewhere; I am not sure.

Q. Do you know anything about her going back to West Hoboken?

A. No, sir.

Q. Did she go back to West Hoboken?

A. Not to my knowledge.

CROSS-EXAMINATION, by Mr. Collins:

Q. I will take advantage of your being here to fill a gap that I notice; the date does not seem to be given when Mr. Louis Givernaud went to the Von Hoffman Flats; can you give us that year?

A. I could not give you that year, no, sir.

RE-DIRECT EXAMINATION, by Mr. Leon:

Q. What year did you go into his employ?

A. 1891.

Q. In what capacity?

A. As coachman.

Q. How long did you work with him as coachman at that time?

A. Two or three years, I think.

Q. And then you became his valet?

A. Yes, sir.

Q. How long were you his valet before he removed to the Von Hoffman Flats?

A. Two years, I think; I am not sure.
Q. Would it be as much as about six months?
A. Oh, more than that.
Q. Would it be around a year?
A. Yes, oh, yes.
Q. Are you sure the year was 1891 or 1890?
A. 1891.
Q. You cannot tell how many years after 1891 it was, that he went to the Von Hoffman Flats?
A. No, sir.

By the Court:
Q. Were you his valet at West Hoboken for some time?
A. Yes, sir.

FURTHER RE-DIRECT:
Q. According to your best recollection, was it more or less than four years from the time you went in his employ, that he went over to New York?
A. He went before the four years.
Q. Now, you were in his employ as coachman how long?
A. Three or four years.
Q. Do you remember whether it was in the spring or fall of the year that you first went in with him in West Hoboken?
A. In the spring of the year.
Q. Of 1891?
A. Yes, sir.
Q. Now, you went in as coachman?
A. Yes, sir.
Q. You remained in his employ as coachman for about how long?
A. Three or four years.
Q. Would you say that three years was probably about the time?
Mr. Collins—Objected to.
A. I could not say.

Mr. Leon—I think we shall be able to supply that year without any doubt; I have got records of that.

The Court—All right.

Mr. Leon—Now, on page 4, where the word "indivisible" appears, in the lower part of the page, the word used is "indefeasible."

JEANNE M. NAVELLE sworn as interpreter.

EMILE HANNON, being sworn through the interpreter, in behalf of the defendants, testified as follows:

DIRECT EXAMINATION, by Mr. Collins:

Mr. Leon—The complainants reserve objection to the competency of the interpreter.

Mr. Collins—I object to that.

Q. State your name, age and residence.

A. Emile Hannon, 42 years of age, 102 Seventy-ninth Street, Brooklyn.

Q. Where were you born?

A. France.

Q. When did you come to this country?

A. The first of March, last year.

Q. Do you understand English?

A. Very, very little.

Q. Not enough to testify?

A. Oh, no, not sufficiently to follow conversation.

Q. Are you connected with a law firm in the City of New York?

A. I am French counsel for the firm of Caudert Brothers.

Q. That firm has a large business in this country for French clients, has it not?

A. Evidently—a large practice, and also a firm in Paris.

Q. What is your profession?

Mr. Leon—This interpreter is suggesting the answer; this interpreter suggested to the witness that he say "lawyer"; now, I object to that.

Q. What is your profession?

A. My profession is French counsel of Coudert Brothers.

Q. What has been your education or studies in French law?

A. I have been engaged in the law business and everything connected with it since I was 17 years of age; I am graduated in law of the French Faculty; I have been egree, that is a kind of a lawyer accepted by the Court of Commerce; I have been for eight years a principal clerk of a solicitor (avoué).

Q. Where?

A. Dunkerque.

By the Court:

Q. What other experience have you had?

A. I have been several years a court officer, appointed by the government.

Q. Government of what?

A. Of France.

Q. Where?

A. Laon and Calais.

FURTHER DIRECT:

Q. What were your duties as such court officer?

A. The court officers are called upon to fill in the duties of huissier.

Mr. Leon—He said, "Huissiur" are ministerial officers, as are also solicitors and others practicing in the courts. If that is his entire answer, I move to strike it out on the ground that it is not responsive. He was asked what were the duties of huissier.

Q. What are the duties of huissier?

A. I had charge of preparing instruments such as writs in this case, whereby parties are summoned into court.

Q. Have you made a study of French law?

A. Evidently, since I am graduated at law.

Q. Have you given testimony in court as to what is French law?

Mr. Leon—I object; that does not qualify him.

The Court—It is something in his career that would tend to qualify him; I shall allow him to answer that.

A. Yes, sir, in this country.

Q. Are you familiar with French law?

A. Very much so.

CROSS-EXAMINATION, by Mr. Leon:

Q. You have not passed the examinations required for admission to the Bar in France?

A. No.

Mr. Leon—He says, "I have told you that I was a graduate at law"; that means that he has passed the lower examination, admitting him to lower functions in law.

Q. What is the examination required for admission to practice at the bar of a Court of Appeals in France?

Mr. Collins—Objected to; that is unimportant; it is perfectly proper to ask what his examination was, and it is perfectly proper to find out what different kinds and degrees of the professors of the law there may be; I understand that there is an avoué and there is an avocat. Now, it appears there is a huissier, who is a brief clerk; and it does not follow that a man cannot testify to French law because he has not been admitted to some of the particular branches of the profession.

The Court—I want to know something about this evidence.

Mr. Leon—I asked the question whether he has passed the examination entitling people to practice in the Court of Appeals.

The Court—The question will be allowed.

Q. (Question read.)

A. The French bar does not open its doors to any lawyers who do not have received a diploma of licentiate in law; that every other law profession, such as solicitors, may be appointed by the government upon diploma, which I have in my possession, and my study of law and my practice would even allow me to be a judge in France, where judges are not elected.

Mr. Collins—There is a word left out, I want to put in.

Mr. Leon—I move to strike out the entire answer.

The Court—It is not responsive to your question.

Mr. Leon—I asked a question that requires yes or no.

The Court—I will strike it out if Mr. Leon desires it struck out as not responsive.

BY THE COURT:

Q. Have you passed such an examination which would qualify you to practice at the bar of the Court of Appeals in France?

A. No.

Mr. Leon (addressing the interpreter)—Will you kindly tell the witness that he will save time if he will answer by yes or no any question which is susceptible of such an answer?

Mr. Collins (addressing the interpreter)—Do not say that to the witness, madame.

FURTHER CROSS:

Q. Will you kindly state yes or no, whether you have ever been admitted to practice at the bar in any Civil Tribunal or Court of Appeals in France?

A. I could not answer that question by yes or no, because it would not cover the truth.

Q. (Question read.)

A. I possess a diploma required to be admitted and appear in civil courts.

Q. In what capacity?

Q. What is the French word?

A. Avoué.

Q. You know that my question was not directed at that, but that I was asking you whether you were qualified to practice at the bar of a Civil Tribunal or Court of Appeals?

The Court—That is argumentative, and it will be stricken out. Frame it differently, so that it is not argumentative. This witness seems to be dealing fairly with you and with us all.

Q. As a matter of fact, solicitors in France have charge of the preparation of pleadings in court, papers, haven't they?

A. Yes, they are, as counsellors, and they attend to all the proceedings of suits; they do what these gentlemen here are doing now.

A. In France there is a very precise difference between the role of a solicitor and that of a barrister, because, from what I see, the way of discussing a suit is entirely different in America than in France; because the role of a barrister is to explain the whole matter to the judge, and to set forth in court the arguments of his clients.

BY THE COURT:

Q. Let me ask you this: are you a barrister or a solicitor in France?

A. Solicitor.

FURTHER CROSS:

Q. As a matter of fact, Mr. Witness, you are not a solicitor, are you; you are not an avoué?

A. I cannot be an avoué in America.

Q. You are an avoué in France?

A. Yes, sir.

Q. When did you become an avoué?

A. After remaining seven years as principal clerk of a solicitor, and then upon passing my law examination.

Q. Avoues are appointed as such by the government, are they not?

A. Yes, sir.

Q. When were you appointed by the French Government an avoué?

A. (No answer.)

Q. When were you appointed an avoué by the French Government?

A. Mr. Leon appears to wish to make a contradistinction between the regular appointment of avoués and the obtaining the qualification to be an avoué.

The Court—That will be stricken out as not responsive.

Q. When were you appointed avoué; when were you appointed by the French government?

A. I have explained before, that I have all the qualifications to be an avoué, but I have not exercised the function.

By the Court:

Q. Have you any certificate that shows this, or paper?

A. Yes, sir, in my room; at my office at Coudert Brothers.

Q. You have never been appointed an avoué?

A. No, sir; I have told you that three times; it does not matter.

Q. Well, it does matter in this court. Now, have you heard of cases where foreign courts, foreign as regards French courts, have desired to secure the testimony in France of persons qualified to give their testimony concerning the state of French law?

A. I don't understand your question.

Mr. Leon—He says that he has passed an examination which is not that examination required of barristers or counsellors.

The Court—But it is an examination which is required of a solicitor.

Mr. Collins—That is right, but he never got the appointment.

Mr. Leon—This witness is not qualified.

The Interpreter—Mr. Hannon would like to ask Mr. Leon something.

Mr. Leon—He cannot ask any questions of me.

Mr. Collins—There are in France, as there are here, two branches of the profession, avoué is solicitor and avocat is barrister. I don't understand it is necessary to have a barrister to give an opinion on law. If he is a solicitor, he is able to do so. Now, this gentleman has passed all the examination that entitles him to be an avoué, but he was actually never appointed one. He has got the degree, the diploma, however.

FURTHER CROSS:

Q. Do you wish to be understood as stating that an avoué can be appointed in any part of France, including Paris, upon the diploma which you hold?

A. Certainly, and you know it.

Q. Do you know of any avoué at the Civil Tribunal of Paris who holds merely the diploma that you hold?

A. I don't know of any solicitor in Paris, because I lived there very shortly, and they usually do not talk about their diplomas.

Q. Referring to the office of huissier, do I correctly understand that huissier is an officer of the court who is required in all proper cases to prepare and cause to be served writs of summons or subpœna, and to see to the execution of judgments?

The Court—I do not understand it qualifies him at all; it is a clerical office.

Q. Is the diploma which you hold recognized in France as being as important as the diploma of Master in Law or Licentiate in Law, required, as

you have admitted, of an applicant for admission to the bar?

Mr. Collins—Objected to; that is a matter of degree.

The Court—Objection overruled.

A. The diploma of Licentiate in Law is obtained by two degrees, first, Bachelor at Law, and then Licentiate. The main difference between this diploma and that of Graduate at Law, is that the first one included studies of old law, particularly Roman law; whereas, the diploma of a Graduate at Law, which I possess, has been established by the law of France as a diploma for practical knowledge of law, and particularly instituted in view to insure to solicitors juridical knowledge in conformity with the role that they are required to fill before the courts.

Q. Do you ever practice as a lawyer in France?

A. I have practiced as agréé and as secretary of a solicitor.

DIRECT EXAMINATION (continued), by Mr. Collins:

Q. Now, when did you receive your diploma?

A. I was 19 years old.

Q. Have you, ever since you received that diploma, been connected with the law?

Mr. Leon—We concede that he has been connected with the law.

Q. And have you kept up your legal studies constantly?

A. Oh, always; I never left what is called in France the law business.

Q. Does your diploma render you eligible to be appointed an avoué?

A. Certainly.

Q. Does your diploma render you eligible to be appointed a judge?

Mr. Leon—A justice of the peace.

A. In France judges are not elected. With my capacity, I could be a judge of the peace, and after a number of years, which I believe to be five, I could be appointed a judge at the court.

Q. What court?

A. Civil court, which would be equivalent to the Court of Appeals here.

Q. For how long were you the principal clerk of a solicitor, or solicitors?

A. Seven years.

Q. Did you, during that time, perform the duties of a solicitor?

A. I did exactly the same work as a solicitor.

Q. What are your duties with Messrs. Coudert Brothers?

A. French counsel.

By the Court:

Q. Do you advise the firm of Coudert Brothers on French law as applied to cases in this country?

A. Evidently; I am only there for that.

The Court—Then he is more than a managing clerk. I shall allow this witness to testify. If you want to test him further, you may do so.

CROSS-EXAMINATION, by Mr. Leon:

Q. Now, as a matter of fact, you are employed on a salary by Coudert Brothers?

A. I am receiving a salary.

Q. And your duties consist of, in part, preparing powers of attorney and other documents?

A. Powers of attorney are taken care of by the stenographers.

Q. You do not prepare powers of attorney; you take no part in it?

A. I do not prepare them, but I overlook them; I make out all the juridical researches necessary for them.

Q. Is that your main occupation in that office?

A. My occupation is to examine, to inform, to advise, to counsel, in all matters which are directly connected with French law.

Q. You have known of cases where Coudert Brothers have taken the testimony of French experts in France on some question of French law?

A. No, sir, I am there for that myself; they do not have to call for it in France.

Q. Do you know a case now in the Court of Appeals in the State of New York, involving, among others, questions of French law, in which Coudert Brothers took the testimony of Mr. Chenu, barrister in Paris?

A. It might be before my arrival.

Q. You know of no such case?

A. No, sir.

Q. Don't you know of a case in which Coudert Brothers were required to make proof of French law; a case involving construction of a will, in which they sent specially for Mr. Chenu to testify here in New York?

Mr. Collins—Objected to.

A. When they are asking advice, they ask me in a general way, not always mentioning the name of cases or names, but ask me to make all the researches in law concerning such case, without mentioning names, and maybe I gave advice about such a case without knowing the name.

The Court—Did you testify in any cases since you have been in this country on French law, in the courts of New York?

The Witness—Yes, sir, in Boston.

By the Court:

Q. Have you in Massachusetts courts?

A. Yes, sir.

Q. In what court in Massachusetts?

A. It was about Customs House questions.

FURTHER CROSS:

Q. Do you remember the Hart will case?

A. I think I said a little while ago, that I was only here ten months and could not, therefore, know about cases that were settled before.

Q. So you don't remember the case of the United States Trust Company *vs.* Hart, 150 New York Appellate Division, 413?

A. No, sir.

Q. You don't know that within the last ten months that case has been before the Court of Appeals in New York?

A. No, sir, I don't remember that case. But only yesterday I was questioned about a matter exactly like the one at bar at present.

Q. The members of the firm of Coudert Brothers are all members of the bar of the State of New York, as far as you know; born in America and practicing at the bar of New York?

A. Yes, sir.

Q. None of them is an expert on French law?

A. They are not absolutely foreign to it, since they have many cases of that kind arising to take care of.

Q. They have an office in Paris which deals with their French business, haven't they?

A. They have a firm in Paris to take care of American business in France; and the firm here takes care of French business in America.

Q. Where the business involves any question before a court in France, the matter is in charge of the Paris office, isn't it?

A. Yes, sir; I mean to say, that the American firm here takes care of all French interests which are under discussion in America; and the French firm takes care of all American interests in France.

Q. You don't mean to say that there is any partner of the French firm or of the American firm which is qualified to practice at the bar in France?

A. Evidently, no, since it would be impossible.

Q. Where a case is put in the hands of Coudert Brothers and is brought in a Civil Tribunal of Paris, for example, parties who put their interests in the

hands of Coudert Brothers, are represented by a solicitor and barrister in that court, and not by Coudert Brothers?

Mr. Collins—Objected to as incompetent and irrelevant.

Q. Now, let me ask you this: if you were in France and not in America, and a commission was issued to a French court to take the deposition of a qualified witness, in any case, with reference to the French law, do you consider that you or anybody of your qualifications, would be called upon to testify?

A. If Mr. Leon knows French law, he would know that in civil courts there is no evidence, no proof by witneses, admitted for any value above 150 francs.

Q. I did not ask you any such question at all.

The Court—Strike out the answer. Now, you put the question to him in French, and see what his answer will be.

Q. (Question put in the French language by Mr. Leon).

A. He might, as you know probably secure the services of a man such as Clunet; I am not vain enough to believe myself a man like that.

Q. The question is not as to the eminence of the lawyer.

The Court—He says he might, probably, secure the services of a man such as Clunet.

Mr. Leon—If he says that, I am satisfied.

Q. The question is not as to the eminence of the lawyer who would be called upon to testify, but as to the qualifications of the lawyer. Would they call upon one of your qualifications, or would they call upon one of the qualifications possessed—

A. (Interrupted by the Court).

By the Court:

Q. Are you qualified to perform such a service, were you asked to do it?

Mr. Leon—That is not my question.

The Court—That is one of the questions involved in it.

Mr. Leon—That is, of course, taking the witness away from me.

Q. Are you qualified to perform such a service?

Mr. Collins—The Court, however, selects the experts at its own risk.

The Court—What Mr. Leon is trying to prove is that you have not got the very best kind of a witness that you could have got; it is quite apparent to the Court that you may not have done so.

Q. If such a commission were directed to you, would you be qualified to perform the service?

A. Evidently.

Mr. Leon—Your Honor has asked for his own opinion of his own qualifications.

Recess to 2 P. M.

After recess.

EMILE HANNON resumes the witness stand.

The Court—Are you going to argue that he is not properly qualified to testify?

Mr. Leon—Just one more question.

FURTHER CROSS:

Q. You have heretofore testified that upon a commission being received by the French Court, such as the Civil Tribunal of the Seine, sitting at Paris, calling for expert testimony as to the French law for the instruction of a foreign court, the Civil Tribunal would probably call upon a man like Mr. Clunet—I think that is the name you mentioned; can you tell me whether Mr. Clunet holds the same diploma as you do, or whether he holds the diploma of Master of Law, or Licentiate of Law?

Mr. Collins—Objected to as incompetent and irrelevant. In the first place, the witness has not said the court would probably call on Mr. Clunet; he mentioned Mr. Clunet as a high grade of man—the point of my objection is,

that we are not concerned with what the Court of France would do, if a commission was sent to the Court of France.

Mr. Leon—I want to know if that man holds his degree, or some other.

Mr. Collins—And, therefore, it is irrelevant.

Q. Kindly mention what degree Mr. Clunet, if you know, holds—the Mr. Clunet that you referred to?

A. Mr. Clunet is a barrister, and has, therefore, passed the examination of Licentiate, or Master of Law.

The Court—I have concluded to hear this witness; to let him testify. The Court is going to hear him; and then, if there is anything comes up that you think you have a right to object to, I will hear your objection.

Mr. Leon—I should like to state this to your Honor—a consideration that has not been called to your Honor's mind—it is this: that by this ruling your Honor may make it necessary for us to issue a commission to France to take the testimony of some other French lawyer, better qualified, in our opinion, to testify.

Mr. Collins—I wish to ask this witness a few more questions as to his qualifications before I ask him the main question. I have procured the witness' consent, and also that of the interpreter, they having lost their day now, anyhow, that this witness shall step aside for the present, to enable me to call Judge Smith, who is not well, and I want to get through with him.

(Witness steps aside.)

ABEL I. SMITH, sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION, by Mr. Collins:

Q. You are an attorney and counsellor-at-law of the State of New Jersey?

A. Yes, sir.

Q. And when were you admitted?

A. I think it was in 1866.

Q. And you have practiced your profession in Hudson County, New Jersey, ever since?

A. Ever since, yes, sir.

Q. Did you know the late Barthelemy Louis Givernaud, commonly called "Louis Givernaud," deceased

A. I did.

Q. Did you draw the will that is now before the court?

A. I did.

Q. Under instructions from Mr. Givernaud?

A. Yes, sir.

Q. Did you, on the occasion of the preparation of that will, or its execution—I am not sure which and you can tell us—have a conversation with Mr. Givernaud with respect to his residence, and if so, what was the occasion of it and what was the conversation?

A. I did. Mr. Givernaud came into my office at Hoboken and said he was about leaving for California and wanted a codicil prepared to his will. As I remember, I went to my safe and got his will out, where I always kept a number of wills, and had kept Mr. Givernaud's different wills for a number of years. I had drawn, probably five or six wills for him; and I got the will out of the safe and then read it over to Mr. Givernaud as he was sitting there, as I remember it now; and I asked him what changes, if any, he wanted to make in the will. He had already said that he wanted to make some changes, and I asked him what changes he wanted to make; and he said, "I have prepared, written out, the changes I want made"; and he took a paper out of his pocket and handed it to me, as I remember, and I, of course, looked at it, and then I said to him—I looked at the changes he wanted to make, and I saw that, amongst others, he wanted to give his property eventually, after a certain trust, to two charitable

institutions. The bulk of his property—I think all of it, as I now remember—

Mr. Leon—I think the question did not call for so full a statement as Mr. Smith is laying before the court.

A. (Continued)—I noticed there were certain charitable institutions provided for. I then said to him: "Mr. Givernaud, as I know, you have always lived in West Hoboken, and it is proper for me to ask you whether you have changed your residence." It was because of these bequests to the charitable institutions, because I had in my mind that in some of the States—

Mr. Leon—Your Honor, here is a witness on the witness stand who is an interested witness, interested in the outcome of the case here, and taking the witness stand he testified as to what he had in his mind; he is testifying to a conversation with the deceased.

Mr. Collins—You will find in a minute, that he would state that he said to Mr. Givernaud what he had in his mind.

Mr. Leon—The witness has now been instructed how to testify.

A. (Continued)—I had a conversation with Mr. Givernuad in which most of this that I am saying occurred; I don't remember the order of it exactly; it was some time ago, and exactly what he said and what I said, I can only give the purport of the conversation, as I remember. I called his attention, as I remember, to the fact, as already stated, of the bequests to these two charitable institutions, and that it was proper for me to know whether he had changed his residence.

Q. Because of what?

Mr. Leon—Objected to, on the ground that it does not matter what the reason was; we are now getting the testimony as to the conversation.

The Court—Let the witness testify, and

then you may move to strike it out if you think certain parts are improper.

A. I asked him whether he had changed his residence, and said it was proper for me to know that, as the laws in different States varied in regard to bequests to charitable institutions. Mr. Givernaud said to be, "No, I have not changed my residence; my domicile is here, and I have not changed it." I am positive about the word "domicile," because, when he used the word "domicile," he said it in French, and used the word "domicile" and said to me, "Is 'domicile' right?" and I said, "Yes; it is the same in English as in French, 'domicile'." Then he went on to say, that when he first came to this country and reached Hoboken with his brother, he was so poor, they were so poor, that he had to sleep in a coal bin—as I remember it—in the upper part of Hoboken; and from there he had gone to West Hoboken and had gone into the silk business with his brother; and that they had been successful, and that he was very much interested in West Hoboken for that reason; that all his success had grown out of his going to that place. That he said he owned a lot in Weehawken Cemetery, and when he died, he expected to be buried there.

Q. Weehawken Ceemtery is in Hudson County?

A. Yes, sir; there might have been something else said, probably, that I would prepare his will; but that is generally the outline of what I remember at this time.

Q. Have you in your possession some of these former wills?

A. I have; I examined in my safe a few weeks ago, and I happened to find two or three of his old wills that he probably left with me for some reason, and had not been destroyed or had not been removed from my safe.

Q. Have you some deeds also, to which he was a party?

A. Yes.

Q. Will you produce those papers?

A. (Some papers are handed to the witness by a clerk, and the witness examines them.) I produce the last will and testament of Louis Givernaud, dated January 24, 1898.

Q. Who are the witnesses?

A. The witnesses are myself and Mr. John S. Mabon.

Q. Did you see Louis Givernaud sign that paper?

A. Yes, sir.

Q. Is that his signature?

A. Yes.

Mr. Collins—I offer that in evidnece.

Marked "*Exhibit Collins* 1."

The Witness—I also produce another will with the signature of Mr. Givernaud torn off, witnessed by Mr. Mabon and myself; and the date of the 27th day of—the date is torn off, and the only thing on it is the 27th and "105"; I don't remember exactly when that was executed, but on the outside of the paper I find, "1905."

By Mr. Leon:

Q. In whose handwriting?

A. That is in mine.

Q. And was the signature, which is torn off, the signature of Louis Givernaud, made in your presence?

A. Yes, sir.

Q. Do you recognize the signature?

A. It is not here; I remember Mr. Givernaud executing several wills that I drew.

I offer that.

Marked "*Exhibit Collins* 2."

The Court—The probabilities are, if you ask him, that he tore that off.

The Witness—Probably I did. There are a number of notes on the margin that you will find in pencil, where I probably re-drafted

another will from it and used the old will for that purpose as a memorandum.

Mr. Leon—No objection.

The Witness—I also produce a third will, which I found in my safe, dated the ninth of November, 1905, in the City ,of Hoboken County of Hudson and State of New Jersey; also witnessed by Mr. Mabon and myself, and signed by Mr. Louis Givernaud—not only at the end of the will, but in two other places—

By the Court:

Q. What date?

A. This is dated the ninth of November, 1905.

Mr. Collins—I offer that.

Marked "*Exhibit Collins* 3."

The Witness—And these are the envelopes that they were enclosed in, which I also found in my safe.

Mr. Collins—I offer the envelopes. One has on the outside "1898".

Marked "*Exhibit Collins* 4."

Mr. Collins—And "195" on the other.

Marked "*Exhibit Collins* 5."

FURTHER DIRECT:

Q. And as to the second one, you said there was nothing in it but the 27th; it is a little more than that—"27," and on the next line "dred and five"?

A. Yes, sir.

Q. "*Exhibit Collins* 3," you saw Louis Givernaud sign that?

A. Yes, sir; I saw him sign them all.

Mr. Collins—This one the signature is there —the identical signature.

The Witness—I also produce a deed, dated December 19, 1905, between Louis Givernaud, widower, of the Town of West Hoboken, County of Hudson and State of New Jersey, of the first part, and Kenneth Cranstoun, of

the County of Union, State of New Jersey, conveying a parcel of land in West Hoboken.

Q. Who witnessed that, the deed to Cranstoun?

A. Signed "Louis Givernaud."

Q. Who witnessed it?

A. I witnessed it.

Q. Now, you saw him sign that deed?

A. Yes, sir.

Q. And took the acknowledgment?

A. Yes, sir.

Mr. Collins—I offer that deed.

Marked "*Exhibit Collins* 6".

CROSS-EXAMINATION:

Q. Was it a *bona fide* conveyance?

A. I drew the deed, as I remember it, at Mr. Givernaud's direction, and I am sure it was a *bona fide* conveyance for some purpose at that time; I don't know exactly now the reason, but that was a conveyance. There were two deeds made at the same time —one by Mr. Givernaud to Mr. Cranstoun, and one by Mr. Cranstoun back to Mr. Givernaud; both in my possession, and both dated at the same time; but I don't remember now exactly what—

Mr. Leon—You don't offer the other one, do you?

Mr. Collins—Yes, we offer both of them.

Q. What was the object of the transaction?

A. I don't remember that; it conveys the same property.

Q. You do not remember the object of the transaction?

A. No, sir.

Q. Is your mind an utter blank on it?

A. To some extent; I think, though, it was in connection, in some way, with property that Mrs. Givernaud owned in West Hoboken, and was to convey the right of curtesy or something of that sort.

Q. Do you recollect any conversation with the deceased on the subject of these deeds?

A. Not of that deed, I don't.
Q. Either of these deeds?
A. No, sir.
Q. You have no recollection of it whatever?
A. Not in connection with these deeds.

Mr. Leon—Then I object to this.

The Court—They are deeds which the witness testified—they were signed by Mr. Givernaud, and he witnessed the signature of Mr. Givernaud to one of them; did he witness the signature of this other one?

Mr. Collins—I offer the deed from Louis Givernaud to Kenneth Cranstoun.

Marked *"Exhibit Collins 6A."*

DIRECT EXAMINATION resumed:

Q. You knew that Mr. Louis Givernaud and his brother, Etienne, being the firm of Givernaud Brothers, and having two factories in Hudson County—

A. They had three originally—one in Hackensack, one in West Hoboken, and one down at Homestead, New Jersey.

Q. And afterwards, only the two in Hudson County?

A. Yes, sir; I think they sold the one in Hackensack at one time, after the brother died; there were three brothers originally, and one had the factory in Hackensack, and the other two, one in West Hoboken, I think, and one in Hackensack; then, when the brother died in Hackensack, I think that went into a corporation, Givernaud Brothers.

Q. This brother that had the Hackensack factory was Theodore, I think?

A. Yes, sir.

Q. Then there was a corporation formed, called Givernaud Brothers?

Q. Do you happen to know that Louis Givernaud afterwards sold the stock in that corporation to E. Gerli and Co.?

A. Yes, sir; he spoke about it in my office more than once, about the transaction.

Q. So that the notes that were in his estate, promissory notes, were the notes of E. Gerli and Co.?

A. Yes, sir.

Q. They were given for this stock?

A. Yes, sir.

Q. And he held those notes at the time he died?

A. Yes, sir.

CROSS-EXAMINATION, by Mr. Leon:

Q. Did you incorporate that corporation?

A. I did not; it was done by some firm in Paterson, I think.

Q. Now, you testified that you wanted to know particularly about the testator's domicile, because of the difference in the law of charitable bequests in different States?

A. Yes, sir.

Q. Did you have in mind the States of New York and New Jersey?

A. I had in mind the fact that he had been living in California and in New York and other places, and in Europe, and in drawing the will I made the inquiry for the purpose of information, as I thought was proper, at that time.

Q. Now, you mentioned that he owned a lot in Weehawken Cemetery; he has not been buried there, has he?

A. I know nothing about that.

Q. I believe this conversation took place at or about the time of the execution of the will in 1907?

A. It took place, probably, four or five days, or five or six days before he left for California; the date of the will is there.

Q. November, 1907?

A. Well, it was within two or three days of the execution of the will, or the drawing of it; I won't be certain about that.

Q. Did you generally see him at your office?

A. Yes, sir.

Q. Nowhere else?

A. No, sir; he generally came to my office.

Q. You did not call at his office?

A. No, sir.

Q. You were not counsel for Givernaud Brothers?

A. You mean the corporation? I did some business originally for Givernaud Brothers; I think they had one or two suits that I represented them in.

Q. You never went to the office of Givernaud Brothers in Green treet in New York?

A. Well, I won't say that I never went there; oh, yes, I did go there once or twice.

Q. When did you go there last?

A. Oh, I did not go there after the corporation was formed; that is, after they had sold out to Gerli Brothers I did not go there; it was previous to that time; it must have been fifteen or twenty years before Mr. Givernaud died.

Q. Did you have any dealings with him while he was living in the Von Hoffman Flats?

A. I did not.

Q. You did not know of him being there at all, did you?

A. Not at that time; I don't remember

Q. Did you know anything about his living in West Thirty-fourth Street?

A. No, sir.

Q. Did you know anything about his living at Central Park, West?

A. As I remember, once I went to visit him at Central Park, West, in relation to some matter; I don't recall what it was about exactly, and I saw him there, but it did not make any strong impression on my mind.

Q. Evidently not. Now, you remember all the details, substantially, of the conversation at the time this will in suit was executed?

A. No, sir, I said I did not remember every detail.

Q. But you remember everything on the subject of domicile?

A. I remember generally.

Q. You remember particularly on the subject of domicile?

A. I remember that; the word "domicile" was used particularly, because, as I say, when Mr. Givernaud used it, he asked me whether that was right.

Q. On the other hand, you remember nothing concerning these two deeds, the one to Cranstoun and back again from Cranstoun?

A. As I say, I don't remember anything except that I think it was in connection with the property at West Hoboken that his wife owned, and it was to convey his right of curtesy in that property, or something of that kind, or some right that he had.

Q. You don't remember any conversation, however; you could not tell us in what conversation that took place about that transaction?

A. About what transaction?

Q. The Cranstoun transaction.

A. No, sir, I do not recall that.

Q. Did you ever see Cranstoun?

A. Oh, yes.

Q. Who was Cranstoun?

A. He was a clerk in our office at that time, as I remember; a son of Mr. William Cranstoun was studying law in our office.

Q. Do you wish, Judge Smith, to stand on your testimony that this was a *bona fide* transaction?

A. I don't know anything about it; in fact, I drew the deeds, and it was for some purpose connected, as I remember, with this property at West Hoboken.

Q. To convey away the curtesy?

A. That is as I remember—ten or fifteen years ago that transaction was.

Q. Now, then, you are one of the counsel for the defendants in this case, are you not?

A. I think not.

Q. You are not interested in any way in this case, are you?

A. I am only a member of the firm of Smith, Mabon and Herr; and Mr. Mabon represents some of the defendants, and Judge Collins represents some of them.

Q. Haven't you got charge of this case?

A. No, sir, I have not.

Q. Is not this case—

A. I have been consulted about the case.

Q. Haven't you been active in this litigation?

A. In what way?

Q. In every way.

A. I have been active in trying to have a talk with you at one time; we had a conference together about a settlement of the case, and I was disposed to do everything I could to bring about that settlement, if possible.

Q. Do you regard yourself as a disinterested witness?

A. I do; I have not a particle of interest in it.

Q. You have no interest in this suit one way or the other?

A. No, sir, except as a member of the firm of Smith and Mabon, that is all; Mr. Mabon and Mr. Herr are my partners; my interest is indirect and small, whatever it is.

Q. You regard it as an indirect, small interest, that you are a member of the firm that represents these defendants?

A. Yes, sir.

Q. Now, you are the head of that firm, are you not?

A. Yes, sir, in name.

Q. Was Levi C. Albertson in your office at that time?

A. No, sir, I don't know him.

Q. Did your office have anything to do with the conveyance of the property at the corner of High and Spring Streets, West Hoboken, New Jersey?

A. I don't remember.

Q. Could you refresh your recollection from your records, and let us know later?

A. In what way?

Q. I mean, did your office have anything to do with it; could you tell by your records?

A. I suppose I might tell; if it involved the drawing of a conveyance, I probably would not remember much about it, because I did not draw the deeds myself; they were written in the office, and they were brought to me, probably, sometimes to acknowledge, and sometimes not.

Q. And is that also true of wills in your office?

A. No, sir, I generally drew the wills myself, particularly Mr. Givernaud's wills; I drew several of them.

Q. What about Mr. Givernaud's deeds?

A. Well, I don't remember particularly about the deeds; I don't remember drawing any particular deed. If my attention was called to it, I might remember; I might have drawn some.

Q. When Mr. Givernaud came to the office, was he referred more particularly to you?

A. Generally when he came there in regard to his wills, he always wanted to talk with me, and I generally had a talk with him.

Q. You testified on your direct examination that Mr. Givernaud, in stating that he was a resident of, and domiciled in, West Hoboken, laid stress upon his deep interest in West Hoboken, or words to that effect?

A. During the conversation which we had, he said then, as I have already stated to you, that when they reached Hoboken, they were so poor that they had to sleep in a coal bin, if I remember correctly; and I think he spoke about being interested in West Hoboken in connection with the fact—when he spoke about the plot in the cemetery—

Q. So that was his interest in West Hoboken?

A. No, sir; it was all part of the same conversation.

Q. But, in the course of that conversation, he expressed an abiding interest in West Hoboken?

A. Yes, sir, he spoke about West Hoboken.

Q. Now, was there any occasion for him to do that, if, as a matter of fact, he was drawing a will in which no institution in West Hoboken or in the State of New Jersey is mentioned?

A. I don't know anything about that; I was drawing the will; I was drawnig the will for him.

Q. As a matter of fact, he did not tell you that he wanted to leave any money to any institution in West Hoboken, did he?

A. No, sir.

Q. You say that he mentioned these charitable institutions in New York?

A. Yes, sir.

Q. So, what occasion was there for him to tell you his interest in West Hoboken?

A. I asked him the question, as I have already told you, and it was during the conversation; I, in fact of these bequests for charitable purposes, asked him the question whether he had changed his residence, because, if he had—and I think I explained to him at that time, we had some talk together about it—I don't remember all the details of it—I thought it was proper for him to know it, because the laws were different in California and New York and other States about charitable bequests.

Q. Did you know of any difference between the law of New York and the law of New Jersey upon the matter of charitable bequests?

A. I remember at that time that it was in my mind that there was some provision in the law of New York and California that limited the amount that could be given to charitable purposes.

Q. That is what you had in mind?

A. Yes, sir, that is what I had in mind at the time; I thought I ought to get all the information I could to prepare his will; it might have been unnecessary.

Q. Mr. Smith, what compensation have you received in this case—or rather, you have received compensation in this case, haven't you?

A. Not a cent; I don't think I have received a cent in this case; we were retained in the other case. I have received nothing—

Q. Has your firm received anything?

A. (No answer.)

Q. Can you explain why you should have been compensated in one case and not in the other?

A. Because I was in the firm then, in active practice in the firm, and I have not been so for two or three years now; I am still a member of the firm, however, receiving a very small amount of the profits of the concern; my name is kept there because I was the head of the firm; the main profits go to Mr. Mabon and Mr. Herr; I am virtually out of the firm.

Q. In this particular case, however, you have been as active, haven't you, as any other member of the firm, and adjournments have been obtained on the strength of your not being able to attend the trial?

A. I don't know of any.

Q. You have attended every hearing in this case, haven't you?

A. Most of them.

Q. You have been in frequent consultation with your associates in this case?

A. From time to time, Mr. Mabon naturally would speak to me about the case.

Q. As a matter of fact, don't you know that every time we have gone to Mr. Mabon to ask him anything in connection with this case, that he has said, "I must refer it to Mr. Smith?"

A. I don't know.

Q. Would it surprise you to hear that that was the case?

A. It would surprise me.

RE-DIRECT EXAMINATION, by Mr. Collins:

Q. The other case that you allude to, was the one brought by the first wife of Mr. Givernaud, in Chancery, referred to Vice Chancellor Stevenson?

A. Yes, sir.

Q. And that case was settled and went to final decree?

A. Yes, sir, and I took an active part in that case and prepared the interrogatories; but since I have been ill for the last two or three years, I have had very little to do with the firm, excepting that my name was used as the head of the firm, but my share of the profits is very small, almost nominal. I go there once or twice a week, and sometimes not in two or three weeks, or even longer; I did not go there but twice between May and November and October.

Q. The firm of Smith, Mabon and Herr would be paid whether this suit is lost or won?

A. I suppose so; I suppose the firm will be paid for their services.

Q. You never heard of any compensation being contingent on success?

A. No, sir.

Q. I forgot to ask you: these wills and this deed correctly show the dates that they were executed?

A. Yes, sir.

Q. Weehawken Cemetery is right near West Hoboken?

A. Yes, sir.

EMILIE HANNON resumes the witness stand.

DIRECT EXAMINATION (Continued), by Mr. Collins:

Q. Are the number of avoué in France in a given locality limited?

A. Yes, sir.

Q. How can a man become an avoué

A. To have the right to be a solicitor appointed by commission of the government, you must have been a student in a notarial office; the word "clerk"

in French means a student, one who learns the practice of law—

Q. I mean, after you had graduated and are eligible to be an avoué, how can you become one?

A. First, I would have to furnish the diploma granted to me by the Faculty; next, a certificate issued by the solicitor where I studied, showing exactly the number of years I have been there; third, I would have to buy the right to be appointed by the government from the solicitor I want to succeed.

Q. Or his heirs, if he be dead?

A. Because French law limits the number of officers of the court.

Q. You have to buy out an attorney or soilcitor retiring from practice, or buy out his estate; is that right?

A. Yes, sir.

Q. If he be dead?

A. Yes, sir.

Q. Now, that is not so with avocats, that is not limited?

A. No, sir, that is unlimited; lawyers are free; the number is unlimited.

Q. You mean barristers?

A. Yes, sir.

Q. It was not your desire to appear in court, therefore you did not become an avocat?

A. (No answer).

Q. Now, how many attorneys or solicitors are there in Dunkerque?

A. Five.

Q. And how much of a population has it?

A. 150,000.

Q. And only five solicitors?

A. Yes, sir.

Q. Now, how much does it cost generally to buy a solicitorship?

A. 100,000 francs.

Q. And only five solicitors?

A. Yes, sir.

Q. Now, listen carefully and repeat: Suppose the case of a native born Frenchman marrying a French woman in France, and having children born in France, leaving his family and coming to America and establishing his home and business here, becoming a naturalized citizen of the Unted States, acquiring his property here; in the event of the death of that man, domiciled in an American State, what law would France apply to the distribution of the property acquired by him in this country, personal property?

Mr. Leon—I object, upon the ground that the witness has not been shown to be qualified to testify on a question of law.

The Court—The Court overrules the objection and will receive the testimony.

A. Article 110 of the French Civil Code states the place where the estate shall be opened will be determined by the domicile. The code that I have in my hand, which is Dalloz, has a note, "The domicile *de facto* of a foreigner in France, is sufficient to determine the place of opening of his estate"—that means the place where the estate will be liquidated or settled. It further states civil decisions of the French courts giving proof of the above.

Q. Give one decision.

A. Nineteenth of June, 1894, in Dalloz—that is the name of the book.

Q. What court was it?

A. Paris Court.

Q. What page in Dalloz?

A. Page 518; and also the Court of Cassation in the year 1895, first part, page 344; the domicile, in fact, in the French language, is the domicile as Judge Collins put the question.

Q. It is the domicile of fact that the French courts apply?

A. Yes, sir.

Q. Have you other decisions?

A. Yes, sir, I have another decision; I have here a full decision of Pau, quite a big city in the south of France.

Q. Court of Appeals of Pau?

A. Yes, sir; June 22, 1885.

Q. Where do you find that reported?

A. In Clunet, in the year 1887.

Q. Page?

A. 479.

Q. The name of the case?

A. In the matter of Bayerque against Society of St. John the Baptist.

Q. This is Clunet Journal de Droit Internationale?

A. Yes, sir.

Q. What did that court hold?

A. The court has shown, in its judgment, that the establishment of a Frenchman in a foreign country, even made with the intention of returning, may, according to circumstances, constitute therein his domicile; the domicile of a Frenchman may be in a foreign country, without that Frenchman losing his nationality. The property, personal and chattel, no real, of a Frenchman, domiciled in a foreign country, is governed by the law of said domicile. It is in pursuance of said law, that his testamentary disposition must be interpreted. Concerning his estate, personal property, that happened to be in his domicile, if said law does not admit of a reserve portion in favor of ascendants—meaning father and mother, the ascendant of the deceased will have no right to any reservation whatever out of the property in question.

Q. What do you mean by that; what is meant by the reserve portion?

A. The reserve means a portion of his estate that he can dispose of by will, that under the law of France it gives to either his ascendants or descendants, a certain portion.

Q. Do you refer to Section 893 and Section 913 of the Civil Code?

A. Yes, sir.

Q. What were the facts of the case decided by the Court of Appeals of Pau?

A. The facts are not all enumerated in Clunet's work, which only contains the ground of decision of the court. I have already stated the ground of decision found in there.

CROSS-EXAMINATION, by Mr. Leon:

Q. Is not the Court of Cassation the court of last resort in France?

A. Yes, sir.

Q. That is, in all cases between private parties?

A. Yes, sir.

Q. While, on the other hand, the Council of State is the court of last resort in any proceeding to which the government is a party?

A. Yes, sir.

Q. Now, have you examined the reports of the Court of Cassation between the year 1887 and the year 1913, to find if the principle laid down in that case has been modified or reversed?

A. I have looked, and I have found that in principle that the French jurisprudence generally adopted the principles set forth in the decision of the Court of Pau; this is so true, that an author who makes a specialty of international law, A. Weiss, states in his work that the French jurisprudence has adopted in a general way the law of the place where the estate is to be settled, and where, therefore, the person in question died, in order to settle his personal estate.

By Mr. Collins:

Q. Give the page.

A. 555.

FURTHER CROSS:

Q. I will repeat my question: "Now, have you examined the reports of the Court of Cassation between

the year 1887 and the year 1913, to find if the principle laid down in that case has been modified or reversed''; that calls for an answer yes or no, and I move to have the answer struck out.

The Court—The latter part of his answer is simply explanatory. The question is as to whether the witness clearly comprehended your question or not, or whether his answer, as it is now made, is not responsive.

By the Court:

Q. Have you examined the opinion of the Court of Cassation, and has this principle been upheld?

A. I have looked all over the works which we have on jurisprudence, and Clunet's work, which we have up to date.

FURTHER CROSS:

Q. Do you know of such a publical as the Journal de Palais?

A. Yes, sir.

Q. Does the Journal de Palais contain reports of decisions of the Court of Cassation?

A. Yes, but the Journal de Palais is not one of the best authorities.

Q. What is, according to your notion, the best publication of reports of the decisions of the Court of Cassation?

A. In international law, Clunet is the best work.

Q. Isn't it true that Clunet is a mere selection of decisions on particular points?

A. Clunet makes special research and selection of international cases, just as the one at bar.

Q. Is there no report containing the decisions *in extenso* of the Court of Cassation, no matter what question they bear on; is there not such a publication?

A. Yes, there is a Sirey Pandectes Francaise and Dalloz and Journal le droit.

Q. I have asked you whether you can tell us which

is the best publication—recognized as the best publication in the French courts, containing *in extenso* all the opinions or decisions rendered by the Court of Cassation.

The Court—In your judgment?

A. Dalloz and the Pendectes would be the best.

Q. Have you ever heard that the Court of Cassation, on the question of the law governing the distribution of the personal estate of a Frenchman, had adopted the principle known as that of the personal status, namely, the principle to the effect that a Frenchman, a Frenchman's personal estate and its disposition upon his death, were to be governed by his personal, viz., his national status?

A. (No answer.)

Q. (Question read.)

A. You ask me if I have found a decision of the Court of Cassation; according to your question, I shall reply "No; all I have found, more or less near to it, establishes that the French jurisprudence adopts the principle to settle estates, the personal estate, in accordance with the law of the place where the deceased died, and not upon the principle of his personal status.

Q. And this applies to Frenchmen?

A. Evidently.

Q. And it applies also to foreigners?

A. Yes, it is precisely stated in the note I have read to you in the Civil Code of Dalloz.

Q. When did you make that examination?

A. Since August of last year.

Q. Can you tell us the names of some of the decisions of the Court of Cassation that you have read on this subject?

A. I hoped that the Bayerque case had been taken to the Court of Cassation.

Mr. Leon—His answer is: "No, I had hoped that the decision of the Court of Appeals of Pau in the Bayerque case had been taken up to the Court of Cassation, but upon referring

to the Court of Cassation I found that evidently there did not seem to be any expectation that it would be reversed."

The Court—Strike out everything after the word "No."

Q. Can you tell the Court what is the doctrine known in French law as the doctrine du renvoi. If so, will you kindly state for the benefit of the Court what that doctrine is?

A. It is to cause a court to apply in a case a law other than the *lex fori.*

Q. Don't you know that there have been cases, in fact, causes in which the Coudert office in Paris was interested in which the French courts, in passing on the distribution of the estate of an American, who was, in fact, domiciled in France, but who had retained his citizenship, caused to be applied the law of his nationality?

A. This must be a case which is prior to my connection with the Coudert office.

Q. You have not been connected with the Coudert office, have you?

A. Only a few weeks.

Q. Now, are you sure from your examination of the authorities that there are not cases in the French courts in which they have applied the law of the nationality of an American to the distribution of his estate, where he had died domiciled in France?

A. I cannot affirm the negative fact.

Q. If I tell you that there are such cases, would that tend to refresh your recollection?

Mr. Collins—I object to that; that depends on how much faith you put in Mr. Leon.

The Court—The objection is overruled.

A. It is doubtful.

Mr. Leon—I offer now to take Mr. Charles L. Givernaud's examination here in Jersey City, or in New York, or in any other place within 100 miles of this court room, at any time that Mr. Collins wishes; and that I earn-

estly hope that no advantage will be taken of us, by having that testimony taken in California. He is in court here now, and I will go on to-morrow, the next day, or any day.

Mr. Collins—If I could be sure of the testimony being limited to the fair cross-examination of what we bring out, I would not object; but your Honor will not be here to control it; that is the only objection to going before a master.

Mr. Leon—My cross-examination would not take more than two hours.

In view of Judge Collins' statement that there is a disposition to consider the taking of Mr. Givernaud's testimony in California—

The Court—It is simply a suggestion to the Court that it might be done that way, but the Court is not impressed with that idea. He is mightily interested in this case, and he will certainly come back here; Mr. Givernaud will come back and be here on April 9th.

Mr. Leon—Your Honor's understanding is, that they are not to take the testimony in California?

The Court—That is my understanding, that Mr. Givernaud will come back from California to give his testimony.

Mr. Collins—He wants to know who will pay his expenses.

The Court—I have no doubt that Mr. Givernaud will come here to testify.

Mr. Leon—I have very good grounds to doubt that he will come back.

Mr. Charles L. Givernaud—I will be here on the ninth of April.

The Court—Otherwise, we will close the case without you.

Mr. Collins—Of course, you cannot tell whether he will get back or not. If, when we come back here on the second, you give us

an earlier day, and he has not gone then, we will have him on then.

Adjourned to April 9, 1914.

THIRD DAY.

Transcript of testimony taken in the above-entitled cause, at the Chancery Chambers, Jersey City, New Jersey, on the ninth day of April, 1914, before Hon. Vivian M. Lewis, Vice Chancellor.

Appearances — Besson, Alexander & Stevens, Esqs., by Mr. Besson, for the Complainants, with whom is associated Maurice Leon, of the New York Bar; John S. Mabon, Esq., for the Defendants, The Italian Benevolent Association and The French Benevolent Society, also for Anita Variel, Joseph Givernaud and Alaska G. Aiken and Lily G. Short; George Malraison, Esq., for the French Benevolent Society of New York, Defendant; Collins & Corbin, Esqs., by Mr. Collins, for Charles L. Givernaud and May R. Givernaud, his wife, Defendants, and Thomas A. Kennedy and Oscar Vezin, Jr., Executors of Louis Givernaud, Defendants.

STIPULATION.

Mr. Collins—If the Court please, we have reached a *modus vivendi*, owing to the death of Mrs. Givernaud; we have agreed to a stipulation, which we will now sign and file, that the testimony shall proceed, and an administrator be appointed in this State, later, by the Surrogate of Hudson County, and be made a party to the cause, for the deceased complainant; and that then the testimony taken, and to be taken, before the admission of the administrator of the party, shall stand as evidence in the court.

DR. ALFRED JOHN TORRILHON, being sworn in behalf of the defendants, testified as follows:

DIRECT EXAMINATION, by Mr. Collins:

Q. Where do you live?

A. I live in West Hoboken.

Q. What is your age?

A. 45.

Q. And what is your profession?

A. I am a dentist.

Q. Did you know the late Louis Givernaud, the decedent in the present case, in his lifetime?

A. I knew him for about 27 years, something like that.

Q. When and where did you become acquainted with him?

A. Well, about 27 years ago I was introduced to him by my brother-in-law.

Q. About 27 years ago you were introduced to him by your brother-in-law?

A. Yes, sir.

Q. Where were you then living?

A. In West Hoboken.

Q. Where was he living?

A. In West Hoboken, corner of High Street and Spring Street; they had the whole square block.

Q. On what occasion were you introduced to him?

A. I cannot remember exactly, but I met him; he was an old friend of my brother-in-law's, a personal friend; I suppose it was either at his house or at our house.

Q. Did you say where you lived then?

A. In West Hoboken.

Q. Where did Louis Givernaud live?

A. In West Hoboken.

Q. What street?

A. High and Spring, I think it is.

Q. What was he engaged in?

A. In the manufacture of silk goods.

Q. Where was his factory?

A. They had some in West Hoboken, some in Homestead, some in Hackensack.

Q. Where was the one in West Hoboken?

A. That was on Spring Street.

By the Court:

Q. Near his residence?

A. Within about three blocks.

FURTHER DIRECT:

Q. How intimate did you become with Mr. Givernaud?

A. Very intimate; in fact, for years we saw each other every day, or at least four or five times a week; we went to the theatre together mostly every night.

Q. I call your attention to one occasion, in the winter of 1895-1896, when you and he were at the theatre in New York and a snow storm came on—

A. I remember it very well.

Q. Did it take you a long time to get home?

A. From the corner of Palisade Avenue to his house, which was about two blocks away, it took us nearly two hours; it was a snow storm like we have had lately; we stayed for over an hour in a druggist's doorway, and I had to really help him, almost drag him along.

Q. Do you remember anything he said?

A. When he got home he said: "I cannot stand these rough nights any more; I like my theatre, so I think that next winter I will take a room in a hotel, or somewhere in New York, so that I can enjoy my theatre."

Q. What happened the next summer, the summer of 1896; did you go anywhere with him?

A. The summer of 1896 he was very sick at Atlantic City, and he asked me to come and stay with him down there, and I stayed pretty nearly two months with him; we went down the latter part of June and stayed until September, until the first of September.

Q. In Atlantic City?

A. Yes, sir.

Q. Do you know what happened and what he said about it when he came back from Atlantic City?

A. About what?

Q. In the autumn of 1896?

A. When he came back in the fall he decided that he would go to New York, and he asked Dr. Bertini and me to look up an apartment for him, which we did, and rented in Dr. Bertini's name, at the Von Hoffman, in Twenty-sixth Street; there were two rooms there.

Q. Did he say anything about that, in reference to his own home?

A. He said he just wanted that in case he stayed late in New York; I asked him if he was going to leave his house to become a citizen of New York City, and he said, "Never; my home is in West Hoboken, and I stay there."

Q. You say this room was taken at the Von Hoffman in the name of Dr. Bertini?

A. Yes, sir; we paid the rent for it.

Q. Was there a friend of Mr. Givernaud that had an apartment in the same building?

A. Mr. Piva had an apartment on the next floor, and when we had company we used to receive them up there; there was not enough room in the two rooms down below, and later on Mr. Piva took the two rooms upstairs, on that next floor, and Mr. Givernaud used these, and then Dr. Bertini kept those rooms for himself down below.

Q. You say the rooms were taken in Dr. Bertini's name?

A. Yes, sir.

Q. How much per year?

A. $300.00, I think.

Q. I call your attention to the year 1897, in the spring; what happened then?

A. In the spring of 1897 we went down to Hot Springs, Arkansas, me and Mr. Givernaud.

Q. Do you remember anything that you did on the way, that enables you to fix the time?

A. Yes, sir, I remember the date, because we went from there to Nashville, to the exposition, and I remember it was in the late spring, because I left Nashville on that special train they had running, and it was warm, and I had a crash suit on, and when we arrived in Chicago it was snowing.

Q. Up to that time Mr. Louis Givernaud's wife had not sold the West Hoboken house?

A. No, sir.

Q. Now, I call your attention to 1898; what happened in January?

A. On January 27, 1898, we started off to California by way of Hot prings, and we remained in California until April.

Q. You say you started for California by way of Hot Springs; had you remained in Hot Springs all that time?

A. No, sir; we remained in Hot Springs two or three years.

Q. In January, 1898, you first started for California by way of Hot Springs?

A. Yes, sir.

Q. And thence?

A. Then we went from there to California, through Texas, by the Sunset Limited route, which was running from Chicago at that time, instead of from New Orleans, on account of the yellow fever.

Q. How do you fix this as being in 1898, January, 1898?

A. Well, because on our way homeward, it was the twenty-first of April, Mr. Louis Givernaud's birthday, and the declaration of the Spanish-American war; so on the way home the declaration of war was made—

Q. Now, you came back to New York?

A. Yes, sir.

Q. You stayed there how long?

A. Two weeks.

Q. Where?

A. At the same apartments.

Q. Then you went where?

A. To Europe.

Q. Did you go anywhere temporarily before you went to Europe?

A. Before we started for Europe—

Q. Before you started for Europe, did you leave New York and go somewhere else for a little while?

A. Yes, sir, we went over to Homestead to his brother's, and a few other places.

Q. Did you run down to Atlantic City?

A. Yes, sir.

Q. Then you went to Europe?

A. Yes, sir.

Q. When did you go to Europe?

A. That was in late May, because we were over there for the races in the early part of June, and we stayed in Europe until July—the latter part of July or August—because we came back on account of his brother being very sick, his brother Etienne.

Q. You came back because his brother Etienne was sick?

A. Yes, sir; they cabled to us to come home. Our intention had been to stay in Europe for almost a year.

Q. Where was Charles Givernaud, the son of Louis Givernaud, then?

A. He was living in Stonington, Connecticut, at that time.

Q. Did you have a talk with Louis at that time about his wife having sold the house?

A. Yes, sir; at that time his wife was selling, or swapped, her house, or something of that sort; and I said to him, "What are you going to do now; shall you make New York your residence?" and he said, "No, I never intend to live in New York"; he said he had an aversion to becoming a resident of New York City, positively; he told me that positively,

twenty times; he said he was going to remain a resident of West Hoboken.

Q. Did he say anything about having a place for himself to go, at his brother's house?

A. Yes, sir, that was his headquarters; his business headquarters.

Mr. Leon—I object to this as leading. I ask that the witness be instructed not to give his own conclusions, but to testify to facts—I move that that answer be stricken out.

The Court—That question and answer will be stricken out.

Q. Did he say anything about his brother's house?

A. He said his brother's house was his headquarters in the future.

Q. Did he say anything else about his personal business there?

A. Yes, sir, at that time he said he had his room over there.

Q. State what he said about his residence in his brother's house?

A. He said that was to be his business headquarters; he had his room there; he had underwear there, and when he used to play billiards, many a time I went up there and helped him to make a change up there.

Q. What did you see up there in that room?

A. I saw a bed; I saw Mr. Louis Givernaud's picture, and Mrs. Louis Givernaud's picture on the wall; and in the bureau I saw some of his underwear that he changed after perspiring at a game of billiards.

Q. Did he occupy the bed there?

A. Yes, sir; I am pretty sure he occupied the bed, but I never saw him in the bed.

Q. Do you happen to know anything about his being assessed for personal taxes that year in New York City?

Mr. Leon—Objected to.

Q. Did you have it from him?

Mr. Leon—Objected to.

A. I was present when he swore off those taxes at Atlantic City, swore off the New York taxes; he was assessed for personal taxes in New York City, and he was sick with a cold at Atlantic City.

Q. Tell us what happened at Atlantic City?

A. He was there, laid up with a cold, and I was keeping company with him, visiting him.

Q. When was this?

A. This was in 1898, late in the fall.

Q. After your return from Europe?

A. Yes, sir.

Q. And he was at Atlantic City?

A. Yes, sir, and he received notice of those taxes, and he asked me to go to a lawyer's office, or to a notary, with him, that he wanted to swear off those New York taxes; and I went there and was present when he swore he was a resident of West Hoboken.

Q. Did you see the affidavit?

A. I saw him answer those questions, and sign something.

Q. Now, we come to the next year, January, 1899; what happened then?

A. Again, on the 27th of January, we left for New Orleans and stayed there during the carnival, about three weeks, and then went to California.

Q. You went with him?

A. Yes, sir.

Q. When did you come back from California?

A. About May, I think, about May or the first of June.

Q. What year was that?

A. 1899.

Q. How did you find the weather there?

A. Very cold; it was in May, and we went back to Hot Springs for three weeks; we only stayed about four days, and from there we went to Glenwood Springs, Colorado, and from there back to New York.

Q. And where did you spend the summer?

A. That summer of 1899 he went to Atlantic City, and he stayed there; I went down there at week-ends; I was down there, maybe, half a dozen times at Atlantic City; he stayed there most of the summer at the Rudolph Hotel.

Q. How often did you go down?

A. Mostly every week.

Q. What were you doing this for—these trips you took with him?

A. I acted as a sort of private secretary for him.

Q. Now, we come to the year 1900. What did he do that year?

Q. In 1900—that was the exhibition in Paris; I did not go with him to Paris; he went with Charlie and his wife to Paris; he went in the late May, I think.

Q. Do you know whether Charles had taken an apartment in New York?

A. Yes, sir.

Q. Where?

A. In Thirty-fourth Street; that was between Seventh and Sixth Avenues.

Mr. Leon—I think I shall have to move to strike out the question and answer; I think we shall have to be a little technical now; if he has personal knowledge of the transaction between the landlord and Charles, and was personally present, he may testify.

Q. How do you know?

A. Because I was inforemd by Charles and his wife at their apartment.

Mr. Leon—I move to strike both answers out.

The Court—The motion is refused.

Q. Did you see the lease of Charles's apartment?

A. No, sir, but it was known, and when I went there I asked for Charles Givernaud of the elevator man, and he took me upstairs.

Q. Did you see Louis Givernaud there before he went to Europe?

A. Yes, sir.

Q. Do you recall when that apartment was taken?

A. I cannot recall exactly the time.

Q. Do you know whether or not, after it was taken, Louis Givernaud left off, staying at Piva's?

A. Yes, sir, I believe he did; he told me he was then living with his son.

Q. What do you say that Louis Givernaud told you?

A. That he was living with his son and daughter-in-law.

Q. How often did you go to see him there?

A. We went to the theatre mostly every night.

Q. How often did you go to see him?

A. Very often.

Q. You have spoken about his going to Europe to the Paris Exposition in that year 1900; you did not go with him. Before he went to Europe, had he gone anywhere else; did he go anywhere in the January of that year?

A. Yes, sir; that was the year that we came back from California the second trip.

Q. You had not mentioned the second trip.

A. 1899 was the second trip. In 1898 we took a trip to California by way of Hot Springs; and in 1899, we took another trip to California by way of New Orleans; then we went again in 1900.

Q. By what route?

A. I think we went by way of Hot Springs again.

Q. Was it after that he went to Europe?

A. Yes, sir, after that.

By the Court:

Q. You came back from California when?

A. Always about June.

Q. When did you in 1900?

A. At about May.

Q. When did he go to the Paris Exposition?

A. A few weeks after he arrived in New York from California.

FURTHER DIRECT:

Q. When did he come back?

A. They came back in the fall of 1900.

Q. Where did he go?

A. (No answer).

By Mr. Leon:

Q. Where did he come back to?

A. To his daughter-in-law's, or his son's apartment.

FURTHER DIRECT:

Q. Where did they go after they got back in 1900?

A. After the exhibition; they went to Atlantic City and stayed awhile, because Mrs. Givernaud was very sick that year, and I had to send down Dr. Hammond to see her.

Q. Which Mrs. Givernaud was sick?

A. Mrs. Charles Givernaud was taken sick while they were down at Atlantic City.

Q. After they came back from Atlantic City, where did they go?

A. They stayed in New York and took little trips here and there; they went to Hot Springs, Virginia, that year, I think.

Q. Where did he return to in New York?

A. Always to his son's apartment.

Mr. Leon—I object to his evidence.

Q. Always to the apartment where?

A. In Thirty-fourth Street.

Q. They were taking little trips?

A. Yes, sir.

Q. What happened in January, 1901; did you go anywhere with him?

A. Yes, sir, we went to California.

Q. What place in California?

A. Los Angeles, and from there to Honolulu, where we spent the winter; and from there to Japan.

Q. And from there where did you go?

A. From there we returned home by way of San Francisco.

Q. You went with him on all this journey?

A. Yes, sir.

Q. What time did you get back?

A. That year we got back in July.

Q. 1901?

A. Yes, sir, and he went to the apartment in New York.

Q. What street?

A. I think the apartment then was up in Sixty-eighth Street.

Q. When he went to Los Angeles and Japan and back again, you went with him; did Charles and his wife go?

A. Yes, sir.

Q. And when you came back he and Charles and his wife went to an apartment?

A. Yes, sir.

Q. That summer, where did he go?

A. That summer, I think he went down to Atlantic City, because every summer we went down there a great deal—a good many times.

Q. Did you go with him to Atlantic City, or did you go back and forth?

A. I went back and forth.

Q. What time did he come back from Atlantic City?

A. In the late fall.

Q. Now, in December of that year, did you and he go anywhere, and if so, where, and who went with you?

A. Yes, sir, on the fourteenth of December we left for Havana, Cuba.

Q. Who went?

A. That was 1901.

Q. December, 1901, you started for Havana; who went?

A. Mr. Louis Givernaud, his valet and Mr. Moretti.

Q. Did he have a valet?

A. Yes, sir.
Q. Mr. Louis Givernaud did?
A. Yes, sir.
Q. Did Mr. Moretti have a valet?
A. No, sir.
Q. What happened when you got to Havana?
A. (No answer).

By Mr. Leon:
Q. Who was the valet?
A. Mr. Braubach.

FURTHER DIRECT:
Q. Mr. Moretti was a friend?
A. Yes, sir.
Q. What happened when you got to Havana?
A. Charlie and his wife and his wife's sister met us there, and Mr. Louis Givernaud was taken sick, and the valet left us.
Q. You stayed there a while?
A. Yes, sir, for about a month, and then we went to Spain, by water—traveled all through Spain, and from there we sailed for the Canary Islands, to the Valley of Orativa.
Q. From the Canary Islands, where did you go?
A. To Marseilles, and then to Monto Carlo, Aix le' Bains, and then to Italy, and back to Paris.
Q. What time did you get to Paris?
A. About the first of May, 1902.
Q. How long did you stay there?
A. We stayed there until about the fifth of July, something like that, and we got back to Hoboken about the 10th or 12th of July.
Q. By steamer?
A. Yes, sir.

By Mr. Leon:
Q. You mean that the steamer came into Hoboken, and you got off at Hoboken?
A. Yes, sir.

By the Court:

Q. Where did you go from there, when you landed in Hoboken?

A. I went home directly, and he either went to his brother's, or to the apartment, I don't remember which.

Q. Now, that late summer and fall, what did you do?

A. We took several automobile trips. Charlie had an automobile, and we took trips every week or so.

Q. In the winter where did you go?

A. In the winter—we left again for Los Angeles.

Q. Before you left, did you go to any other place?

A. I think we went to the Hot Springs of Virginia again.

Q. And then you went to Los Angeles?

A. Yes, sir, and Santa Barbara, where we remained the winter, until June.

Q. 1903?

A. Yes, sir.

Q. Then you came back to New York?

A. Yes, sir.

Q. Do you remember what apartment he went to there?

A. I am sure it was at Sixty-eighth Street.

Q. Did he stay there long?

A. No, sir, because he made several trips; I received postal cards; I did not go away traveling with him any more after that.

Q. When was that?

A. In July, 1903.

Q. Do you know whether he went down to Atlantic City that season?

A. I went to visit him there several times.

Q. Now, you say you did not go any more with him after that. Did you later?

A. About two years after that, I took a little trip of six weeks, or three weeks, to Los Angeles; I was back in business again, and I could not afford to stay away longer.

Q. You took a little trip with him?

A. Yes, sir, twice during the summer.

Q. You had started as a dentist then?

A. I went back to dentistry.

Q. Now, did you remember the day that he last went to California, election day, 1907?

A. I do.

Q. I want to ask you who this Bertini was?

A. He was Mr. Louis Givernaud's physician at that time; Dr. Bertini de Noise; he lived on Twenty-fifth Street, New York City.

Q. Do you remember when Charles was married, Charles L. Givernaud?

A. I was the best man.

Q. Did you hear Louis Givernaud say anything to you—

A. (Interrupted.)

By the Court:

Q. When was that?

A. That was in December, 1899.

Q. Did you hear Louis Givernaud say anything about the subject of Charlie's marriage, and how he was to live after he was married?

A. Yes, sir.

Q. What was it?

A. He said, "Now Charlie is married, I suppose I shall have to support him."

Q. Go on.

A. And I said, "I suppose, as he is your son, you will have to"; and he said then that he would support him, and I always understood afterwards that he always supported him.

The Court—That may be struck out—what he understood.

Q. Did you know anything about any apartments being taken for Charlie?

A. I know Charlie and his wife went and chose these different apartments.

Q. Do you know anything about their rent and expenses—from Louis?

A. Yes, sir.

Q. What do you know?

A. I know that Mr. Louis told me if they would rent an apartment, he would pay the rent for it.

By Mr. Leon:

Q. That conversation occurred in your presence?

A. Certainly.

Q. Where and when?

A. They spoke of it on the trip when we were away in California, right after they were married, at the table; I was like a member of the family, and I heard all this conversation.

FURTHER DIRECT:

Q. Now, doctor, did you know of their living in an apartment in Central Park, West, up to May, 1907?

A. Yes, sir.

Q. Do you know whether or not that was givne up?

A. Yes, sir, it was.

Q. What became of the furniture?

A. The furniture for a while was put in storage, then it was shipped to California.

Q. Now, I come to the occasion of his going to California; did you have a conversation with Louis on election day, 1907, just before he went last to California?

A. I did.

Q. Where was it?

A. On the corner of Broadway and Thirty-fourth Street.

Q. And where did you go?

A. We went around to have a little drink together at Keen's Chop House.

Q. What did he say to you?

A. He said to me, as I left him and said "Good-bye," he called me back and he said, "Bill, you may think a little better of me if you find I have left you

a few hundred dollars in my will"; and I said, "Have you made another will?" and he said, "Yes"; and I said, "Where, in New York?" and he said, "No, in New Jersey; you know I am always a resident of New Jersey."

Q. When was this?

A. On election day of 1907, the day that he left for California. Those are the last words he uttered to me.

Q. Did he say anything about his son Charles, with reference to that apartment in Central Park, West?

A. He always called it "My son's apartment."

BY THE COURT:

Q. What did he say to his son that particular day?

A. His son was not with him.

Q. Is that the last time you saw him?

A. Yes, sir; I wrote to him afterwards, but I never saw him.

FURTHER DIRECT:

Q. You know of his death; when did that occur?

A. That was, I think, in January, 1908; I received a telegram stating that Mr. Louis died, and letter from Charles and from Charles' wife, in which they said they expected to bring the body back at his request, to sleep on the hill.

Q. Was it brought back?

A. Yes, sir.

Q. Did you attend the funeral?

A. No, sir.

Q. Where was he buried?

A. In Fairview Cemetery; his brother is buried next to him.

Q. Where?

A. In New Jersey.

Q. What place?

A. Fairview Cemetery, Hudson County.

Q. Have you a sister?

A. Yes, sir.

Q. What is her name?

A. Mrs. J. Salembier.

Q. Do you remember a conversation between that sister and Louis Givernaud, in West Hoboken?

A. I remember many of them; he visited the house often.

Q. I refer to a conversation in West Hoboken, when your sister and he talked about his going back to California?

A. Oh, yes, I remember that.

By Mr. Leon:

Q. When was that?

A. That was about 1907, the year before he died; when he was here. He had bought a house, I believe, in California; he had bought it in his son's name, like he always did, and she said to him, "Now, you are a resident of California"; and he said, "Not a bit; I am a resident of West Hoboken."

FURTHER DIRECT:

Q. You spoke of Mrs. Givernaud, Mrs. Louis Givernaud, having sold the property in West Hoboken; where did she go to live?

A. She went to live at Forty-second Street, New York City.

Q. Did Louis Givernaud ever live with her after she went over to New York?

A. No, sir; he told me one day that he never stopped there.

Q. There was some friction between them?

A. A little misunderstanding, nothing serious, but it was not congenial.

Q. She lived by herself in New York and he did not live with her?

A. He only went there for meals once in a while; he told me that himself positively.

CROSS-EXAMINATION, by Mr. Leon:

Q. When was the house in West Hoboken sold?

A. It was sold in 1898, some time.

Q. Was it in Mrs. Givernaud's name?

A. Yes, sir.

Q. Do you know to whom it was sold?

A. It was sold to a man named Scott.

Q. How long before that did Louis Givernaud move over to the Von Hoffman Flats?

A. Well, he moved over there in the fall of 1896.

Q. 1896?

A. Yes, sir.

Q. In the fall?

A. Yes, sir.

Q., Did the friction to which you have referred exist at that time?

A. He had not spoken of it then.

Q. Do you recall the occasion of his leaving the house for the purpose of going over to the Von Hoffman Flats--I mean, were you about on that occasion?

A. Yes, sir.

Q. Do you know who bought the furniture that was used in the Von Hoffman Flat?

A. There were a few pieces of furniture brought from New Jersey, which were given away a short time afterwards, and I know that they were bought the following year; after Charlie was married, they were bought by Mrs. Charles Givernaud, and all the old furniture discarded.

Mr. Leon--I move to have the answer struck out. I am referring to the time when he moved from West Hoboken to the Von Hoffman Flat, not to any subsequent period.

(Motion withdrawn.)

Q. When did he move out of the Von Hoffman Flats?

A. Shortly after Charlie was married, after our return. In 1899 Charles got married, and then on our return from California, the apartment was not

big enough then; it was known as Mr. Piva's apartment, and Mr. Piva's name was always on the door, I remember the card distinctly.

Mr. Leon—I move to have that part struck out.

The Court—Strike it out.

Q .(Question read).

A. On our return from the first trip after Charlie's marriage.

Q. After he left the West Hoboken house in the fall of 1896, and until he moved out of the Von Hoffman Flats, you did not know him to live again in the West Hoboken house, did you?

A. I know him to visit there; I did not know whether he lived there or not—no.

Q. You did not know him to live there again?

A. No, sir.

By the Court:

Q. Did you ever know him to spend the night there?

A. No, sir.

FURTHER CROSS:

Q. Now, after he left the Von Hoffman Flats, he moved into that apartment in West Thirty-fourth Street, didn't he?

A. Yes, sir.

Q. And he remained there how long?

A. They remained there a year or so, and then they took another apartment further West in Thirty-fourth Street.

Q. In that apartment, how long did they remain?

A. To my memory, a year or so, something like that.

Q. And after that, when they moved out of that apartment, where did they move to?

A. To Sixty-eighth Street, in Central Park, West.

Q. And you visited him frequently when he was in these different apartments in New York?

A. I told you, I said before, that I went to the theatre with him five times a week, and always saw him home.

By Mr. Collins:

Q. Is this Sixty-eighth Street and Central Park, West, the same place?

A. No, sir, they were two different apartments.

FURTHER CROSS:

Q. From the apartment furthest on West Thirty-fourth Street, he moved over to Sixty-eighth Street?

A. Yes, sir.

Q. And he remained there how long?

A. A year or two.

Q. Then where did Louis Givernaud go from that apartment in Sixty-eighth Street?

A. He went up to his son's new apartment.

Q. Where was that?

A. At Central Park, West.

Q. Central Park, West, near Sixty-fourth Street?

A. Round that neighborhood.

Q. Was it 64 Central Park, West?

A. I could not remember the number; I know the house. I have been there hundreds of times.

Q. You have insisted on describing these apartments as his son's apartments, but it is true, isn't it, as you have already testified, that Mr. Louis Givernaud was paying all the expenses?

A. He was supporting his son.

Q. He was paying all the expenses, wasn't he?

A. I suppose he had to pay his rent if he was supporting him, didn't he?

The Court—Strike that answer out.

Q. (Question read).

A. Certainly, yes.

Q. And whether living in the Von Hoffman Flats or living in the first apartment on Thirty-fourth Street, or the second apartment on Thirty-fourth Street, or the apartment on Sixty-eighth Street, or

the apartment at Central Park ,West, the expenses were all paid by Louis Givernaud, were they not?

A. I cannot say that all were; I don't know.

Q. As far as you know?

A. As far as I know, yes, sir.

Q. You were intimate in that household, were you not?

A. Yes, sir.

Q. If Charles Givernaud had any independent source of income, you would probably know about it?

A. I should have heard of it, yes, sir.

Q. If his wife had independent sources of income, you would have known of it?

A. Yes, sir.

Q. You knew, didn't you, from your intimate acquaintance of that household, that all the money used by these three people was supplied by Louis Givernaud?

A. Well, I cannot say that, no, because Charlie's mother died and left him some money; I don't know how much she left him, and I believe he spent some of that on himself.

Q. You don't know how much?

A. No, sir.

Q. Now, you have testified to an occasion when you returned to this country from Europe and landed at Hoboken, and that after that you went home. Where did you see Louis Givernaud after that occasion, next?

A. At his brother's house.

Q. Where was that?

A. Homestead, New Jersey.

Q. You are quite sure of that?

A. I am pretty sure.

Q. What makes you recollect?

A. Because we were there every Sunday.

Q. You used to call there on Sundays?

A. Every Sunday I used to meet him there; I don't know what time he got there, or whether he

went there the night before, but every Sunday without fail, I met him there.

Q. Did you happen to know whether he was living there?

A. No, sir, that was his business headquarters.

Q. You say that that home of his brother's was his business headquarters?

A. That is what he told me.

Mr. Leon—I move to have that stricken out.

A. They held the meetings of the company there, the Givernaud Brothers' Company's meetings were held there.

Q. I would like you to tell us whether he was living at his brother's?

A. My honest opinion is that that was as much his home as his son's house was.

The Court—Strike that out as not responsive.

By the Court:

Q. Do you know whether he was living at his brother's?

A. I cannot answer that question.

Mr. Collins—I have a right to object to your Honor's striking that out; I do not mean that I shall try to get you to reconsider your ruling, but I want the answer to be put down and your Honor's direction to strike it out, also, but not to have it actually struck out with the pen.

The Court—All right.

FURTHER CROSS:

Q. Do you know whether he was living at his brother's house?

A. It is a pretty hard thing to answer; I cannot definitely state; I am under oath here, and sometimes he would say that was his headquarters; he always said he lived in West Hoboken; he always said his home was in West Hoboken.

Mr. Leon—I move to have all that stricken out.

The Court—I cannot strike that out; it was, in a measure, responsive.

Q. Did you ever observe him living in West Hoboken, spending any night there, subsequent to 1896?

A. I cannot recollect any.

Q. Yet you were seeing him all the time?

A. Sure.

Q. You were spending your evenings with him going to the theatre?

A. About four or five times a week.

Q. You saw him home after going to the theatre?

A. Yes, sir.

Q. Where did you see him home?

A. Well, sometimes he went to his son's apartment.

Q. And at other times, where did he go?

A. I don't know where he went.

Q. Where did you see him home?

A. To his son's apartment.

Q. And by "his son's apartment," you mean these apartments that we have already heard about?

A. Yes, sir.

Q. In Twenty-sixth Street, Thirty-fourth Street, Sixty-eighth Street, and Central Park, West?

A. Yes, sir.

Q. Did you ever see him home to West Hoboken?

A. Yes, sir.

Q. After the theatre?

A. Yes, sir.

Q. On how many occasions?

A. On a good many occasions.

Q. After 1896?

A. No, sir.

Q. After 1896, did you see him home at West Hoboken on a single occasion?

A. I said, "No."

Q. Now, you have spoken of that last conversation that you had with him at Keen's Chop House?

A. The conversation occurred on the corner of Thirty-fourth Street and Broadway; we went to Keen's Chop House to have a drink.

Q. You have testified, haven't you, that when he said that he had left you a few hundred dollars in his will, you specially inquired whether he had made the will in New York?

A. Yes, sir.

Q. What was the occasion for that?

A. I wanted to know where I was going to get the money; I was naturally interested.

Q. Did it make any difference to you whether he had made his will in New York or elsewhere?

A. No, sir; but I was anxious to know.

Q. What was the occasion for your being anxious to know?

A. Well, it simply crossed my mind, and I asked him.

Q. It just happened?

A. Yes, sir; naturally, when a man thinks a man is going to leave him some money, he wants to appear interested in it.

Q. You have testified that you were his constant companion over a period of years; nobody was closer to him than you were, except, possibly, his valet; is that right?

A. His partners in his business were very close to him, too, and his son and daughter-in-law.

Q. But among strangers, you were the closest, except his valet?

A. I believe so.

Q. Do you recall, that from the fall of 1896 until that trip to Cuba, that Joseph Braubach was his valet?

A. Joseph Braubach was not his valet when he moved to New York?

Q. What was he?

A. He had been discharged, I think. And Mr. Louis stayed in New York for several months before Mr. Braubach came back.

Q. You mean at the Von Hoffman Flats?

A. Yes, sir.

Q. He was discharged, you think?

A. Yes, sir.

Q. How long do you think he was out of his employ?

A. During the whole time that we were at Atlantic City, that Mr. Louis was sick, and when he came back, he did not take Mr. Braubach back.

Q. When did he take him back again?

A. Several months after we had—well, it was in 1897.

Q. It was in 1897 that he took him back?

A. Yes, sir; I stayed up there a great deal with him, and I told him he needed a valet, and then he took Braubach back, but that was several months afterwards.

Q. When did you first meet Mrs. Charles Givernaud?

A. I met her first at Mrs. Etienne Givernaud's house.

Q. Who was she?

Mr. Collins—Objected to.

Mr. Leon—On direct examination they brought out and laid great stress on the fact that this man was living with his son and daughter-in-law, and I am going into that.

Q. Who was she?

A. Miss Kelly.

Q. Don't you know where she was living prior to her marriage?

Mr. Collins—Objected to as irrelevant.

The Court—Objection overruled.

A. She was living with her father and mother in Brooklyn.

Q. Continuously for several months prior thereto?

A. As far as I know.

Q. You have no other knowledge than that?

A. I have answered your question.

By Mr. Collins:

Q. That is all the knowledge that you have?

A. Yes, sir.

FURTHER CROSS:

Q. Did you see her at the Von Hoffman Flats prior to her marriage?

Mr. Collins—Objected to as irrelevant.

The Court—I will let it stand for the present.

A. Yes, sir.

Q. In what capacity was she there?

Mr. Collins—Same objection.

The Court—I will note an objection to all this testimony, and will deal with it on the final disposition of the matter.

A. She came to visit Mr. Givernaud with some friends, and met young Givernaud there, and I believe he escorted her home, and—

Q. Have you any knowledge of her relationship to Louis Givernaud prior to her marriage to Charlse Givernaud?

Mr. Collins—Objected to as irrelevant; your Honor must see some sinister suggestion in counsel's mind.

Mr. Leon—I am willing to amend the question by putting it in this way:

Q. What was the relationship between Mrs. Charle Givernaud for several months prior to the marriage, at the time of the marriage, and after the marriage?

Mr. Collins—I certainly object to it as irrelevant, immaterial and incompetent, and not cross-examination.

The Court—There is some reason for believing that the testimony might be material, but it is questionable in my mind. I will allow it to stand, and note an objection to it at present: by present impression is that it will all have to be ruled out as immaterial.

Q. What was the relationship between Mrs. Charles Givernaud and Louis Givernaud, if any, to your knowledge?

A. A friend.

Q. You knew nothing more than that?

A. No, sir.

The Court—You are now dealing with the son's wife?

Mr. Leon—Yes.

Q. You did not know of her living in the Von Hoffman Flats?

A. No, sir.

Q. You had no conversation with Joseph Braubach on the subject of the relationship between Mrs. Charles Givernaud and Louis Givernaud?

A. I don't remember: he was the valet and I was Mr. Louis' friend, and I never talked about family matters to him, as far as I remember.

Q. If you had had any conversation at or about that time, as to that subject, you would remember it, wouldn't you?

Mr. Collins—Objected to as incompetent; I move that all be stricken out.

The Court—That last question will be stricken out.

Q. Did you have any conversation with Louis Givernaud as to his relationship with Mrs. Charles Givernaud?

Mr. Collins—Objected to as irrelevant and immaterial.

The Court—Objection overruled.

A. Not that I particularly remember.

Q. Do you know a sister of Mrs. Charles Givernaud?

A. Yes, sir.

Mr. Collins—Objected to as irrelevant.

The Court—Objection overruled.

Q. Did you see her in the Von Hoffman Flats?

A. Yes, sir.

Q. Do you know anything about her relationship, if any, with Louis Givernaud?

Mr. Collins—I object.

By the Court:

Q. Do you know anything about the sister living there at the Von Hoffman Flats; did she stay there for any length of time?

A. No, sir.

FURTHER CROSS:

Q. Did you see her there merely as a casual visitor?

A. That is all.

Q. And prior to her marriage to Charles Givernaud, you saw Mrs. Charles Givernaud there merely as a casual visitor?

A. Yes, sir, she and her sister came as casual visitors.

Q. They were living with their parents?

A. Yes, sir.

Mr. Leon—This is a case which is *sui generis*.

Q. Did you have any conversation with Louis Givernaud shortly prior to the marriage of Charles Givernaud, on the question of Charles Givernaud's marriage, generally?

Mr. Collins—Objected to as irrelevant.

The Court—Objection overruled.

A. Yes, sir.

Q. Did he tell you in the course of any of these conversations, in effect, that he was concerned about Charles Givernaud marrying somebody other than Mrs. Charles Givernaud?

Mr. Collins—Objected to as irrelevant and not proper cross-examination.

The Court—Objection overruled.

A. He did; he spoke about some girl in Stonington, Connecticut, and sent me there to see what Charlie was doing.

Q. Did he say he wanted him to marry his present wife?

A. Her name was never brought in that conversation at all.

Q. How long was this prior to the marriage, about?

A. About three months or so—no ,it was more than that; this was in the summer time; I went down in the summer time to see what Charlie was doing in Stonington; and he got married in December.

Q. You had conversation with Mr. Givernaud regarding the prospective marriage of his son, didn't you?

A. Yes, sir.

Q. What did he say?

A. He did not want him to get married to this girl in Stonington, Connecticut, because she did not have a very good character.

Q. This girl who lived in Stonington, Connecticut?

A. Yes, sir.

Q. What did he say?

A. Charlie met her several times, and Charlie came over one day and asked me if I would be the best man for him, and prior to that, Mr. Givernaud and I had no conversations about Charlie's marriage to Miss Kelly; the first I knew of it, Charlie asked me to be his best man at his wedding.

Q. Now, when you saw this Mrs. Charles Givernaud, prior to her marriage to Charles Givernaud, when you saw her there in the Von Hoffman Flats, as a casual visitor, as you have testified, how did you hear Louis Givernaud address her; did he speak to you of her as "Miss Kelly"?

A. Certainly.

Q. And spoke of her sister how?

A. As "Miss Anita and Miss May Kelly."

Q. On the day of the marriage of Charles Givernaud, where you assisted as best man—

A. I did not assist; I was "best man".

Mr. Leon—I think the witness should not argue with counsel; the question is a perfectly proper one.

Q . Where did you see Charles Givernaud first on that day?

A. He came to my house in West Hoboken in the morning.

Q. Then, what did he say?

A. He asked me if I would go with him, and I told him I would.

Q. That was the first you had heard of your being called upon to act as best man?

A. Yes, sir.

Q. Then, what did you do?

A. Then, I went and acted as best man.

Q. Where did you go?

A. To Brooklyn; we went to her house.

Q. Directly?

A. We went to her father's and mother's house, where we met them and went to church.

Q. You went there directly from West Hoboken to Brooklyn?

A. Directly from West Hoboken to Brooklyn.

Q. And from Brooklyn, you went directly to the church?

A. Yes, sir; that is, from the parents' house; the church was in Brooklyn.

Q. What church was it?

A. The Catholic Church; I don't remember the name of it.

Q. Prior to her marriage, was Mrs. Charles Givernaud engaged in any business?

A. Yes, sir.

Q. What was it?

A. Dressmaker.

Q. Where was she engaged?

A. At her home.

Q. And her sister was engaged in similar business?

A. I don't know about that.

Q. You know nothing about that?

A. No, sir, I don't know anything about what her sister was engaged in; I have answered that before.

Q. What time did the marriage take place?

A. In the afternoon.

Q. And he came for you in the morning?

A. Yes, sir.

Q. Then you went directly to Brooklyn and waited until the afternoon?

A. Maybe we stayed and had lunch, or something, but we did not see anybody or talk to anybody except the two of us; we went directly to her mother's house.

Q. You did not stop in New York?

A. No, sir.

Q. Now, after 1896, after the fall of 1896, did you spend any particular election day with Louis Givernaud, that you recall?

A. I cannot recall particularly, no, sir.

Q. Did you ever accompany him on any occasion when he cast his vote as a citizen?

A. No, sir.

Q. On these different trips that he took with you in this country and abroad, were you ever his sole companion, or were there others in the party?

A. There was always quite a party.

Q. Did his wife ever go along?

A. No, sir; she met him in Europe, though.

Q. I mean the wife you knew in West Hoboken?

A. Yes, sir; he met her in Paris.

Q. Was she ever a member of any party that you were a party of?

A. At dinners in Paris and at Milan.

Q. Was she ever a member of any party on any trip that you took with him?

A. Not to my recollection; I don't remember, no.

Q. On all these trips he paid all the expenses, didn't he?

A. Surely he did.

Q. Including your expenses?

A. You bet.

Q. Your services were those of a private secretary?

A. Yes, sir.

Q. What did they consist of?

A. He received every day some cables in code; he received the inventory of the factory every week, and I had to decipher those and answer them for him; I had to pay the hotels; make arrangements at the hotels for him, and so forth.

Q. Then you were a sort of a courier?

A. No, sir, a courier goes on before the man; I was more of a personal friend.

Q. Companion?

A. Yes, sir.

Q. Were you married during that period?

A. I am still a single man, sir.

Q. These parties and dinners given by Louis Givernaud, were they made up of men and women?

A. I don't know which parties and dinners you refer to.

Q. Well, who were his usual guests at the parties that you attended?

Mr. Collins—Objected to as irrelevant, immaterial and not cross-examination.

The Court—Objection overruled.

A. Well, I should have to say—I have been to so many of the parties, dinners, that I should have to mention about 400 people.

Q. Now, prior to the marriage of Charles Givernaud, did you go to such dinners and parties with Louis Givernaud?

A. What do you mean by "such"?

By the Court:

Q. Parties and dinners?

A. Yes, sir.

FURTHER CROSS:

Q. Do you recall whether, prior to the marriage,

Mrs. Charles Givernaud or her sister were members of those parties?

A. Several times.

Q. Where did those parties take place?

A. Shanley's Restaurant.

Q. And where else?

A. Do you mean the dinners?

Q. Yes.

A. That is about all I can remember; we used to go to Shanley's and Delmonico's; we used to go to some of those restaurants.

Q. Well, after those parties, where did Louis Givernaud go?

A. Well, he was living at the Von Hoffman Flats.

Mr. Collins—Objected to as not cross-examination.

The Court—Objection overruled.

A. I suppose he usually went home—

Q. When he was living at the Von Hoffman Flats, he went back to the Von Hoffman Flats?

A. I presume so.

Q. You don't know?

A. I don't know if he did every time.

Q. Most of the time?

A. Well, most of the time, yes.

Q. And you went back with him?

A. Yes, sir.

Q. Well, when these young ladies, the Misses Kelly, concerning whom you have testified, were members of those parties, where did they go?

Mr. Collins—Objected to as irrelevant and not cross-examination.

The Court—Objection overruled; I will deal with it later on.

Q. (Question read).

A. They generally went home, as far as I know.

Q. Well, were there any other occasions when they did not go home?

Mr. Collins—Same objection.

The Court—Objection overruled.

A. What do you mean—that they stayed in the apartment?

Q. Answer my question; you tell us whether there were any other occasions when they did not go home?

A. Maybe there were occasions when they went to friends' houses.

Q. Did they ever go to the apartment in New York?

A. Yes, sir, I think they did a couple of times, but both of them were there; I am not positive.

Q. You have a vague recollection that there were such occasions?

Mr. Collins—Same objection.

The Court—The objection is overruled.

A. Yes, sir.

Q. Don't you know that there were numerous occasions when they did go back with him?

Mr. Collins—Same objection.

The Court—Objection overruled.

A. Well, what do you call numerous?

Q. Well, at least ten times?

The Court—Do not presume that they went there. It is a question as to the materiality of the testimony.

By Mr. Collins:

Q. Did you see them in the apartment with him when you were there yourself?

A. Oh, yes, I have seen them.

FURTHER CROSS:

Q. After these parties?

A. During the parties.

Q. During parties that had taken place at the Von Hoffman Flats?

A. Yes, sir.

Q. And they stayed there after the parties?

A. Yes, sir.

Q. And you left them there?

A. Well, I suppose I did; I had to go home, but they were both there; they were company.

Q. Did you stay all night at the apartment yourself?

A. Many times.

Q. On these occasions when these two young ladies were there, were their parents there, too, at those parties?

Mr. Collins—Same objection.

The Court—Objection overruled.

A. No, sir.

By the Court:

Q. Were there any lady relatives there?

A. Friends, yes.

Q. Who, for example?

A. There was a Mrs. Brouer that was there, a sort of a chaperon.

Q. Chaperon for whom?

A. To the party; now, there were many nights that I was not there, you know; I was not there every night.

Q. But you were there on a great many occasions?

A. You said ten would be a great many.

Q. I ask you for ten?

A. I said at least ten.

Q. Were there not twenty?

A. I don't remember.

Q. Were there not thirty?

A. I cannot remember.

Q. Were there not fifty?

A. I don't remember.

Q. And that is your best testimony—that you don't remember?

A. What do you want me to do, to lie about things?

Q. No, I want the truth; were there not at least fifty times when you were there at the Von Hoffman Flats?

A. I cannot say fifty times, and I won't say fifty times.

Q. On those occasions when you stayed there all night, do you happen to know who else stayed there all night?

Mr. Collins—Objected to as irrelevant, incompetent and not cross-examination.

A. There were two apartments there, you understand.

Q. You say there were two apartments?

A. Yes, sir.

Q. And the rents of both were paid by Louis Givernaud?

A. I don't know; it was known as Mr. Piva's apartment; I know that Mr. Givernaud paid for that first one downstairs.

Q. Was that where his bedroom was?

A. Yes, sir; that was rented in Dr. Bertini's name, and not Mr. Givernaud's; Dr. Bertini kept it.

Q. Were there any other bedrooms in that apartment?

A. There was Mr. Piva's apartment upstairs.

Q. How many bedrooms were there there?

A. Two, I think.

Q. How many down below?

A. One.

Q. That one was Louis Givernaud's, wasn't it?

A. Yes, sir; there were two beds there, and I slept on a cot there in the same room with him.

Q. So, on those occasions when you spent the night there, you slept in the same room with him?

A. Yes, sir.

Q. Every time?

A. As far as I can remember.

Q. And when you retired, he retired with you, did he?

Q. Well, not always; he was a great reader; he would read and I would feel sleepy and I would go to bed.

Q. Now, who used the bedrooms in the other apartments?

A. Mr. Piva, Mr. Piva's friends, and some of Mr. Louis Givernaud's friends.

Q. No women, so far as you know?

A. Sure; Mr. Piva received ladies up there.

Q. Mr. Louis Givernaud did not?

A. He had a party, as you said before—there were several ladies up there.

Q. Who were those ladies?

Mr. Collins—Objected to as irrelevant and immaterial.

A. I cannot remember all their names.

Q. Give us some of the names.

A. Well, that Mrs. Brouer was there, and Mrs. Ellsworth was there.

Q. Nobody else, that you can remember?

A. Not that comes right to my mind.

Q. You cannot remember that either of the Misses Kelly ever spent the night there?

Mr. Collins—Same objection.

The Court—Objection overruled.

A. I think they did; I don't remember; if they did, they had their room by themselves.

Q. Now, one apartment was known as Dr. Bertini's, that was down below?

A. Yes, sir.

Q. And the other one upstairs was known as Mr. Piva's apartment?

A. Yes, sir, at first.

Q. Both of these apartments were Louis Givernaud's apartments, were they not, to your knowledge?

A. No, sir; I know that Mr. Piva hired that apartment, and he told me he was going to take that apartment, and I was entertained by Mr. Piva in that apartment.

Q. How long did he keep it?

A. I don't know; it was always known as Mr. Piva's apartment.

Q. Did Mr. Louis Givernaud make very free use of it?

A. Sure; they were partners in business; they were there together sometimes, and Mr. Piva used to sleep up there once in a while.

Q. Not very often?

A. No, sir, not very often.

Q. Where did Mr. Piva live at that time?

A. In West Hoboken, I think, at that time; he had a little room like Mr. Givernaud's was, in case he wanted to change his clothes or stay in the city he could go up there.

Q. You spent nights with Louis Givernaud in the two Thirty-fourth Street apartments, didn't you?

A. Yes, sir.

Q. In the Sixty-eighth Street apartment?

A. Yes, sir.

Q. And in the Central Park, West, apartment?

A. Yes, sir.

Q. Did you spend any night with him after the fall of 1896 anywhere in West Hoboken?

A. No, sir.

Q. Now, you have referred to that room in Mr. Etienne Givernaud's house, where Mr. Louis Givernaud used to go and change his underwear after playing billiards?

A. Yes, sir.

Q. When did Etienne Givernaud die?

A. I don't know if it was 1905 or 1906; it was one of the two; I don't remember exactly the year.

Q. On the occasions when you were in that room with Mr. Louis Givernaud, he did nothing more than change his underwear, did he?

A. He lay down and took a rest once in a while.

Q. Do you know of any occasion when he came back from those trips that he took with you, where, on returning to this part of the country from a trip, whether to Europe or elsewhere, he went with his baggage to that room—

A. Every time that we arrived home, without an exception, I went directly home from the steamer or train, and I don't know where he went.

Q. If he had gone to any New Jersey home, he would have gone with you, wouldn't he?

A. Not necessarily; he had his carriage waiting.

Q. Did't you understand that he was going to New York, to his New York home?

A. You ask me things I understand.

Q. Now, when he returned from those trips—for example, if he arrived at the Grand Central Station—there were occasions when he did arrive at the Grand Central Station?

A. Yes, sir.

Q. You came into that station occasionally?

A. Once.

Q. Do you happen to know where he went on that occasion?

A. He went into his cab that was waiting for him.

Q. And you went over to West Hoboken?

A. Yes, sir.

Q. Did he mention where he was going?

A. When we arrived, generally Mr. Piva, or Mr. Gerli, or Mr. Vezin, they would meet him there to talk business.

Q. Were there not many occasions when you returned to this part of the country from such trips, when he mentioned casually that he was going over to New York?

A. When we came from Atlantic City, of course; I cannot remember all these things; I am trying to answer the best I can.

Q. That is all we can ask of you, doctor, and I want to say I have nothing antagonistic against you, and I am not trying to trap you. Now, except on Sundays, following these returns to this part of the country from any of these trips, you would usually see him in one of those apartments in New York?

A. Thursdays, I would see him at his brother's

house, every Thursday, too; I would meet there at supper time, and other days I have met him up there at his brother's house; I would go down and meet him in the morning many a time.

Q. Many times also, you met him at his apartment, didn't you?

A. Yes, sir.

Q. Now, the last apartment in New York where you saw him, was the one at Central Park, West?

A. Yes, sir.

Q. And that was what is called a housekeeping apartment, wasn't it?

A. Yes, people lived there.

Q. Did you have meals there with him?

A. Yes, several times I had supper there.

Q. And when you spent the night there, he spent the night there, too?

A. Naturally.

Q. Now, the same in the Sixty-eighth Street apartment house; that was a housekeeping apartment?

A. Yes, sir.

Q. You had meals there?

A. Yes, sir.

Q. And spent the night there with him in the same apartment?

A. Yes, sir.

Q. Now, the two apartments on West Thirty-fourth Street, concerning which you have testified, were likewise housekeeping apartments, were they not?

A. One of them was not; one of them had no kitchen to it—the first one there was no kitchen to it; the second one, there was an excuse for a kitchen.

Q. You had meals there?

A. Yes, sir.

Q. And in both those apartments, you spent the night with him?

A. Yes, sir.

Q. Now, when did you stop traveling with him?

A. 1903 was the last trip that I made with him; that is, a regular long trip; and in 1905 I took a short trip to California.

Q. After that, you continued to see him frequently?

A. Yes, sir; mostly every day he would stop at my house in Jersey, when he went to visit his factories over there; he was over there visiting his factories every day of his life in West Hoboken.

Q. And in the evening you used to see him over in New York?

A. Yes, sir.

Q. And did you go right on attending theatres with him in 1903?

A. Yes, sir.

Q. With the same frequency, practically?

A. Yes, sir.

Q. Right up to the time of his death?

A. No, sir, right up to the time he moved to California; he moved to California, or his children did.

Q. Now, Mr. and Mrs. Charles Givernaud moved to California when?

A. In the spring they moved there; they bought that house, I think, in 1905, because we went to visit that house the last time that I was there in California.

Q. And when was that?

A. About 1905—the winter, there.

Q. You went there in the winter of 1905?

A. Yes, sir; I said so in my testimony a long time ago.

Q. Where was that house?

A. On Washington Street, Los Angeles.

Q. And you and he visited Mr. and Mrs. Charles Givernaud?

A. No, sir; they were still living in New York; the house was bought and they spent the winter there, and the summer in New York, but they moved out there; they moved there in about May, 1907; they sent all the furniture out there; I know that, because I wrote to Mr. Givernaud while he was sick

in his last illness, to send me some copies of photographs that he had taken in Japan, and he answered he could not let me have them, because they had been spoiled by a railroad wreck that spoiled most of their furniture.

Q. You have destroyed all those letters?

A. Yes, sir.

Q. When did you destroy the last one?

A. Oh, a couple of days after I got it, or the day I got it; I destroyed them, from time to time, as I received them.

Q. Now, on the occasion of that meeting at Keen's Chop House, or rather, in that conversation following the visit at Keen's Chop House, at that time was Louis Givernaud stopping at the Waldorf-Astoria in New York?

A. During his temporary stay here.

Q. And you saw him there several times?

A. Once or twice.

Q. Not more than that?

A. No, sir.

Q. Who was stopping there with him?

A. His son and daughter-in-law.

Q. And that was in December, 1907, or November?

A. It was around election day; he left on election day; that is the way I remember that date.

Q. He left on election day?

A. Yes, sir.

Q. And you saw him on a couple of occasions prior to that at the Waldorf-Astoria?

A. Yes, sir.

Q. Who was that Mrs. Ellsworth?

A. A friend af Mrs. Charles Givernaud.

Q. Have you seen her since?

A. Since when?

Q. Well, since his death?

A. Mr. Givernaud's death?

Q. Yes.

A. No, sir.

Q. Do you know where she is now?

A. No, sir.

Q. Where was she when you last heard of her?

A. When I last met her, she was at Mrs. Charles Givernaud's apartment, to visit her and her husband.

Q. Was she a married woman?

A. She was a widow, I believe.

Q. And did she have any particular occupation?

Mr. Collins—Objected to as irrelevant, immaterial, and not proper cross-examination.

10 The Court—Objection overruled.

A. She was a hair specialist, or something of that kind.

Q. A kind of a masseuse?

A. No, sir, not a masseuse.

Q. A person who treats the scalp?

A. Something like that, because she gave me a prescription to keep my hair from falling out, but it didn't do any good.

Q. Now, when you were visiting him at Central 20 Park, West, the last apartment in which he lived in New York, whom did you meet there—tell us who were the persons that you met there most frequently, those that you recall best?

A. Well, the ones I recall best are Mr. and Mrs. John Denner; he had a drug store on Columbus Avenue somewhere; those are the people that were most frequently there.

Q. Anybody else?

A. There were a number of them.

30 Q. More or less frequently?

A. I cannot remember; I am trying the best I can to remember them for you.

Q. When did you last see that Mrs. Brouer?

A. I have not seen her in years and years; she was very friendly with Mrs. Etienne Givernaud, and they used to go to Homestead a great deal to visit Mrs. Etienne Givernaud; in fact, they were there every Sunday also; and they had a little quarrel among the ladies, as they will, and then she did not come any more, and then I did not see her any more.

Q. How old a woman was she at that time?

A. In the forties.

Q. What was her occupation?

A. Looking after her husband, I guess, and household duties.

Q. Did you know him?

A. Yes, sir; he used to come with her.

Q. Did he used to come to the Von Hoffman Flats also?

A. Yes, sir, very often.

Q. Do you recall his full name, and where he is living?

A. No, sir; those people had disappeared from my life for some years; his name was Albert Brouer.

Q. Do you know what business he was in?

A. I think an insurance against failures, something like that, some peculiar insurance.

Q. Now, outside of his partners, who were Mr. Louis Givernaud's best friends? There was yourself. now, who else?

A. Well, he did not have many intimate friends; that is why I happened to be so often with him.

Q. From 1897 to 1907, tell us who were the men and women with whom he spent most of his time, outside of Mr. and Mrs. Charles Givernaud, as far as you know?

A. Well, it would take me all day to remember them; there were people like Riccadonna, the restaurant man.

Q. Did they come down to his house?

A. Yes, sir, they all came down to his apartment; there were a number of people; there was Mr. Monquin; there was a Judge Morat, from Canada—

Q. Did he come there frequently?

A. Quite often; every time he was down from Canada; there was a number of people.

Q. I mean those that were there most frequently during that period of ten years, from 1896 to 1906?

A. In ten years a man that travels around knows and makes a great many acquaintances; there was

the Riccadonnas for a while, and then there was the Brouers, and then Mr. and Mrs. Bobricks.

Q. Where do they belong?

A. In Los Angeles.

Q. Let us take, for example, the period when he was living at the Von Hoffman Flats; during that time please tell us whom you saw there—not as casual acquaintances, but as people who came there frequently, outside of his partners and Mr. Charlie?

A. There was Mr. and Mrs. Brouer there very often, and Mrs. Ellsworth; I have told you that before.

Q. Who else, at that time?

A. I cannot specifically mention any more.

Q. You cannot recollect anybody else?

A. No, sir, I do not recollect all those things, my dear man.

Q. You don't recollect, although you were there frequently?

A. I am doing the best I can to answer you.

The Court—Keep cool; do not answer counsel that way.

The Witness—I am doing the best I can, Judge.

Q. What is your idea—that there were so many there that you cannot remember them?

A. You would be surprised at the number of people I met there; one week he would have one party—he had Weidman, the silk dyer; he had many men in the silk business; his customers would call on him.

Q. Were those most frequently stag parties?

A. Yes, sir, those that I remember.

Q. There were others that you don't remember, that were not stag parties?

A. I told you they had ladies there sometimes.

Q. Now, on the occasions when these parties were not stag parties in the Von Hoffman Flats, can you recollect anybody else except these Brouers and the Misses Kelly and Mrs. Ellsworth?

A. There were several other friends of the Misses Kelly that used to come there; when they came, it was a festive occasion.

Q. And there were men there, too?

A. Yes, sir.

Q. About equally divided between the sexes?

A. Not necessarily, no more than any other house.

Q. These parties took place in the evening?

A. Yes, sir.

Q. Do you remember Mrs. Louis Givernaud being at any of these parties?

A. No, sir.

Q. In fact, you are quite sure she was at none of those parties?

A. That is the time when I told you there was not a good friendly feeling between them.

Q. At any time after the fall of 1896, was Mrs. Louis Givernaud at any party in any of these apartments?

A. No, sir.

Q. Now, in the first apartment, in Thirty-fourth Street, you attended many parties there, didn't you?

A. Yes, sir.

Q. Well, who were the persons that were most frequently there?

A. I want to say that you could not call them parties; there was no kitchen there, much; we just went there and went to the theatre and returned; something like that.

Q. Who were the people that you went to the theatre with?

A. I can recall these Brouer people, and there was a Miss Healy and her cousin, from Brooklyn, and many Brooklyn friends of Mrs. Givernaud used to come there; they used to all go to the masquerade balls at Mr. Etienne Givernaud's.

Q. Now, on the occasions when you spent the night in that first Thirty-fourth Street apartment house, or apartment, rather, who else spent the night there, that you can recollect, except Mr. Louis Givernaud,

yourself, Mr. and Mrs. Charles Givernaud, and the valet, Joseph Braubach; can you recollect anyone else spending the night there?

A. I think this Mr. and Mrs. Brouer slept there once or twice; and Mrs. Ellsworth stayed there quite often with Charlie and his wife.

Q. Was she a friend of theirs or Mr. Louis Givernaud, or both?

A. A friend of both.

Q. Now, where did she spend the night, as far as you know?

A. I suppose Mrs. Ellsworth slept with the other three ladies by themselves.

Q. There were three ladies?

A. Yes, sir, Mrs. Charles Givernaud, Mrs. Ellsworth, and Mrs. Charles Givernaud's sister.

Q. Did her sister go on remaining there in the second Thirty-fourth Street apartment?

A. Well, she was there very often; two or three times a week, I might say; that is, she went back and forth from their home in Brooklyn to go and visit her sister, Mrs. Charles.

Q. Where is she now?

A. She is in Los Angeles; her name is Anita Variel.

Q. When was she married?

A. In 1904, I think, something like that.

Q. Prior to that, did she frequently live in those apartments occupied by Louis Givernaud, and Mr. and Mrs. Charles Givernaud?

A. Yes, sir.

Q. She was there a great deal of the time?

A. Yes, sir.

Q. Did she have any particular occupation during these times?

A. I don't know.

Q. She was there simply, as far as you know, as a visitor?

A. The same as myself.

Q. Did she have her own room there?

A. There was a visitor's room; there were two visitors' rooms.

Q. You occupied one of them?

A. Well, very often in Thirty-fourth Street Charlie and I would sleep together, and she and her sister would go and sleep together, because there was not enough room.

Q. That was not the case, however, at Sixty-eighth Street, or Central Park, West?

A. No, sir, they had more room up there.

Q. You would occupy the visitor's room?

A. Yes, sir.

Q. You did not sleep with Louis Givernaud at any time after they moved out of the first Thirty-fourth Street property?

A. There was a little cot in the room, and I slept there.

Q. And in the second apartment?

A. Then there was an extra room that I could sleep in.

Q. Now, the household in Thirty-fourth Street, in the second apartment in Thirty-fourth Street, was composed of Mr. and Mrs. Charles Givernaud, Mr. Louis Givernaud, and who else?

A. And the valet.

Q. Nobody else?

A. No, sir, not to my knowledge.

Q. Now, at West Sixty-eighth Street, who constituted the household?

A. The same company.

Q. Mr. and Mrs. Charles Givernaud and Louis Givernaud and the valet?

A. Yes, sir, until he left—until the valet left—and then they got a servant girl.

Q. Any other valet?

A. No, sir.

Q. Now, in the Central Park, West, who constituted the household?

A. The same family.

Q. Was there any valet there?

A. No, sir.

Q. Who took care of Mr. Louis Givernaud?

A. Well, he took care of himself; he had enough trouble with his valet and he thought he could dispense with the comfort he got out of his valet.

The Court—Strike that out.

RE-DIRECT EXAMINATION, by Mr. Collins:

Q. Mr. Variel, the husband of Anita Kelly, lives where?

A. In Los Angeles.

Q. What is his profession?

A. Lawyer.

Q. He is practicing his profession?

A. Yes, sir.

Q. You said something, and it was struck out as not responsive; you said Mr. Piva's room had a card on the door; what was it?

A. "C. Piva."

Q. How was the room at Etienne's, where Mr. Louis' things were kept, where the bed was; how was that known?

A. It was known as Mr. Louis' room.

Q. When did Mrs. Louis Givernaud—the one you knew—die?

A. It was about—I cannot tell you exactly—it was in 1905, or something, 1904 or 1905; she died in Paris.

Q. You are not sure of the exact date?

A. No, sir.

Mr. Collins—We offer in evidence the application for probate, a certified copy of the will of Louis Givernaud, deceased.

(Marked *Exhibit D. L.* 1.")

Then a certified copy of decree barring creditors in the estate of Louis Givernaud, deceased; dated June 14, 1908.

(Marked *Exhibit D. L.* 2.")

I offer in evidence full certified transcript of the pleadings and decree of divorce in a

suit between Barthelemy Louis Givernaud and Jeanne Marie J. Givernaud; the decree is dated March 5, 1872; filed the same day.

(Marked *Exhibit D. L.* 3.")

I give notice that I will produce the records; our rules permit that, and I will read in evidence the proceedings and decree in the suit of Jeanne Marie Josephine Givernaud, complainant, and Charles L. Givernaud and others, defendants, in the Court of Chancery, and particularly the decree dated the eighth day of January, 1913, and filed January 9, 1913; that is the suit that Vice Chancellor Stevenson decided.

(Marked *Exhibit D. L.* 4.")

I now offer in evidence certified copy of the declaration of intention of Louis Givernaud to become a citizen of the United States; the declaration was dated October 31, 1870, before the Court of Common Pleas of the County of Hudson, New Jersey.

(Marked *Exhibit D. L.* 5.")

I now offer the original certificates of naturalization of Louis Givernaud, issued by the Court of Common Pleas of the County of Hudson, dated October 31, 1872.

(Marked *Exhibit D. L.* 6.")

I also offer a stipulation, dated October 17, 1913, in this cause, signed by the solicitors of the complainant; it is simply the marriage ceremony with the second Mrs. Louis Givernaud; I think it is already in; it has been already marked "D-1 for identification."

(Marked *Exhibit D. L.* 7.")

We also offer in evidence all papers that have heretofore been marked for identification, if there are any that have not been offered. Some of them were a little out of time, and it may be that they were not in; and they will retain the same number.

Mr. Leon—I offer in evidence a stipulation dated January 27, 1914, signed by the solicitors for the defendants, which reads as follows (reading):

(Marked *Exhibit C. L.* 1.")

I should like to offer in evidence next, the certificate of death of Josephine Haour Givernaud, and I would like to read into the record a translation of it, which I am willing to swear to:

"Mayor's Office of Lyons; Second Municipal District; Certificate of Death; extract from the Registers of the Civil Status of the Second District of the City of Lyons, year 1914, this 19th day of January, 1914, at 1 P. M., Josephine Haour, 81 years old, born at Lyons; no occupation, 47 Rue Victor Hugo; widow of Louis Givernaud, daughter of Joseph and Marie Basson, deceased. Died in her domicile. Written this 19th of January, 1914, at 2 o'clock P. M., upon the declaration of Adolph Guillaud, 39 years old, tradesman of 38 Rue Franklin; and of George Guerry, 32 years old, a partner in a stock brokerage house, living at 5 Place Ampere, who, the foregoing having been read, signed these presents with me, Francois Millet, Assistant to the Mayor of Lyons, Officer of the Civil Status, by delegation of the Second Municipal District." The signatures follow.

"A true copy, Lyons, March 9, 1914, before the Mayor, the Assistant Delegate to the Second District (signed) La Marche.

"Certifications of the Civil Tribunal of Lyons, of the Ministry of Justice of Paris, and the Ministry of Foreign Affairs, Vallos."

(Marked *Exhibit C. L.* 2.")

I offer translations of judgments entered in the Civil Tribunal of Lyons, France, the first on February 7, 1866.

(Marked *Exhibit C. L.* 3.")

The second, entered August 1, 1866, the originals having already been offered in evidence in behalf of the complainant.

(Marked *Exhibit C. L.* 4.")

Recess to 2 P. M.

After recess.

EMILE HANNON resumes the witness stand.

CROSS-EXAMINATION (continued), by MR. LEON:

Q. Have you your copy of the Civil Code of France?

A. Yes, sir.

Q. Will you kindly refer to the article which relates to divorce?

A. Yes, sir.

Q. Article 229 of the Civil Code provides as follows: "The husband may apply for a divorce for cause of adultery of his wife"; that is right, is it?

A. Yes, sir.

Q. Article 230 provides: "The wife may obtain divorce for the cause of adultery of her husband"; is that right?

A. Yes, sir.

Q. Article 231 provides: "The husband and wife may reciprocally demand the divorce upon the ground of exceses, cruelty, and grave injuries by one against the other"; is that correct?

A. Yes, sir.

Q. Now, in the year 1865, did the French Civil Code provide for absolute divorce?

A. No, sir.

Q. Well, subsequent to the year 1865, when did divorce first become legal in France?

A. In 1884.

Q. Now, after 1865, and priod to 1884, the French law did not permit divorce?

A. No, sir, no divorce.

Q. Between 1865 and 1884, the French law did not provide for a divorce—between 1865 and 1884, divorce could not be granted under the French law?

A. It did not exist.

Q. Now, are you familiar with cases in the French courts, where parties, that is to say, a husband or a wife, desiring to obtain a divorce, finding it impossible to obtain it in France, left France, and obtained a divorce in another country, and the question of the validity of that divorce came up for consideration in the French courts, subsequent—

Mr. Collins—Objected to as irrelevant, immaterial and not cross-examination.

The Court—I will allow it to stand and note the objection.

A. Yes, I have seen in the reports, in the course of my examniation in connection with this case ,cases coming very close to that mentioned in your question.

Q. Will you refer me to those cases; what was decided in those cases?

A. The decision was that the French law could not have any effect outside of the borders of French territory, but that, insofar as the effect of such divorce in France, why its effect would be limited.

Q. Don't you know of cases where the French courts declared that such a divorce would be regarded as of no validity at all in France?

A. The cases, as I understand them, say that while the French jurisdiction may not apply to anything done outside of France, still, so far as anything done in France is concerned—

Q. Do you know a French law work, by Carpentier Frere, Jouan du Saint and Fusier Hermann, a repertory of French law?

A. I know this work; it is one of the best French works, with Dalloz and the Pandects.

Q. Now, I refer you to Volume 28 of that work, page 1123, and I ask you if you do not find therein a statement as follows: "The French courts not only recognize themselves as having jurisdiction to deter-

mine whether the conditions to which the French law subjects the loss of nationality have been fulfilled. According to a steady line of cases they assert the right to declare null in France, a naturalization regular and valid in itself, but which may have been acquired in fraud of the French law.'' Is that the statement at page 1123?

A. I know the passage in question.

Q. Now, at 1124, do you find the following: ''Foreign naturalization would be acquired in fraud of the French law, when a Frenchman intended not so much to obtain a new nationality, as to procure the means of exercising a right or capacity which was refused to him by the law of his country, to avoid an obligation which it imposed on him, and finally, in one way or another, to evade its obligation''?

Mr. Collins—Objected to as irrelevant, immaterial and not cross-examination.

The Court—Objection overruled.

A. I know that passage.

Q. At page 1125, do you find the following passage: ''Naturalization thus obtained may not effect a general interest or a private interest.''

Mr. Collins—Same objection.

The Court—The same ruling.

A. Yes, sir.

Q. At page 1126, ''Naturalization may also prejudice a private interest; thus, at the time when the French law did not allow divorce, it happened more than once that one of the French spouses would have himself naturalized in a foreign country(most often in Switzerland, where naturalization was very easy) and obtained the divorce in accordance with the laws of his new country ,and contracted a new marriage, and would later return and inhabit France as theretofore. The cases have steadily determined that naturalization was, in such case, acquired in fraud of the French law, and could not be set up against the first spouse: that the first marriage continued to exist, and that, therefore, the second was null;

the Court of Cassation, decree of December 16, 1845, in the case of Plass and Chopin; Siorey, 1846, Volume 1, page 100; Dalloz, 1846, Part 1, page 7; Decree of March 18, 1878, Bauffremont case; Siorey, 1878, part 1, page 193; Dalloz, 1878, Part 1, page 201; Court of Cassation, Decree of March 25, 1889; Argentre case, Siorey, 1890, Part 1, page 145; Dalloz, 1889, Part 2, page 17; Decree of July 17, 1876, of the Court of Appeals, reported 1876, Part 2—249; Dalloz, 1878, Part 2, page 1; Decree of March 14, 1889, in the Law Journal of 1889, Part 1, page 539. These cases have been followed by all the others. See Aubry and Rau, Treatise on Civil Law, 5th Edition, Vol. 1, pages 436-437. Bandry Lucantinire and Houques Fourcade, Treatise on Civil Law, Volume 1, page 527; Surville and Arthuys, Treatise on Private International Law, No. 64. Lesneuer and Dreyfus on Nationality, page 190; and Clunet Journal of Private International Law for the year 1875, page 420." Did you find that passage at page 1126 of the work?

A. Yes, sir. I found that passage in the work, but I did not examine all the decisions cited in the work.

Q. You have found the other passages from the same work, reference to which is contained in the memorandum which I have furnished to you, namely, passages at Section 1127, Section 1128, Section 1129; also 1156, 1157 and 1158, and you have found them in the book?

A. Yes: I have not examined all the cases.

Q. You have examined my memorandum containing an abstract of decisions in the various courts of France?

A. Yes, sir.

Q. In addition to the memorandum to which reference has already been made, and you have found that that memorandum conformed to the reports in those decisions?

A. Yes, with regard to all of the works which I had in my possession and was able to examine.

Q. Have you examined the trials mentioned in the memorandum which I have given you, Treaties between France and different countries, Austria, Russia, Servia, Mexico, the San Domingo Republic and Ecuador, and have you found therein, in all these treaties, the provision which is quoted in the memorandum which I have given you?

Mr. Collins—Objected to as irrelevant and immaterial, and not cross-examination.

The Court—Objection overruled.

A. No, sir; I do not doubt that your memorandum is accurate.

Mr. Leon—I will put that in as an exhibit, and I will dictate a translation to the stenographer any time that will suit him.

(See translation at end of testimony.)

Q. Now, Article 913 of the French Civil Code provides: "Donations, whether by gifts *inter vivos*, or by will, may not exceed one-half of the property of the donor, if he leaves at his decease one legitimate child; one-third if he leaves two children; one-fourth if he leaves three or a greater number; that has been the law in France since 1850, at all events, hasn't it?

A. Yes, sir.

Q. Now, in this case, it is in evidence that Louis Givernaud and Josephine Haour, both born in France, were married at Lyons, France, where they established themeslves and had two children born of said marriage; that thereafter, and in the year 1865 or 1866, there was litigation between them in the Civil Tribunal of Lyons, and that in that court the wife obtained judgments of separation both as to her person and as to her property, directing him to restore her dowry to her. In view of those facts, can you tell us, from your knowledge of the French law whether, thereby, according to the French law, their marital status became established, so that, so far as the French law was concerned, no divorce could be granted which the French law would recognize as valid as against the wife.

Mr. Collins—Objected to as irrelevant immaterial and not cross-examination.

A. I don't understand the idea.

Q. I ask you whether any divorce obtained by the husband would be recognized as valid in France, against the wife who remained there?

A. The answer is this: Divorce is a matter of public policy, hence, at the time when the French law did not permit divorce, in France persons could not be considered to have been divorced by any decree granted in another country.

Q. This, of course, would be applicable to people of French nationality, wouldn't it?

A. Yes, sir.

Q. At the time when divorce did not exist in France, as you have heretofore testified, a Frenchman was deemed by the French courts incapable of depriving his wife of the benefit of the marriage by anything that he could do going out of France?

A. That is my opinion.

Q. Would, according to the French law, as you understand it, would the French courts regard as valid, testamentary or other disposition, whereby the Frenchman, having left France under the circumstances already explained to you, depriving his children of the rights granted to them at Article 913 of the French Civil Code, to which reference has already been made?

Mr. Collins—Objected to as irrelevant, immaterial and not cross-examination, and also, it does not fully state the facts. I do not know how far the French decree of a separation of personal property may enter into the question; he does not have that enter into it at all; but if it does, the element of no notice to the husband does not appear. If, however, he means to leave it to the children irrespective of that decree, then I think they are important elements; namely, the fact of his get-

ting a domicile in this country and being domiciled here.

The Court—The objection is overruled. I will let it stand for what it is worth.

A. It is not possible to answer categorically this question.

Q. You know the circumstances under which Louis Givernaud left France?

A. Not very well.

Q. I will give them to you; he was born in France, of French nationality; he was married in France to a French woman; two children were born in France of said marriage, who are still living there, and who are French citizens; he departed, he left France at the time when these suits for separation were pending against him, and came to this country, and died here. In a case of that character, would the French courts say that by a domicile obtained under such circumstances, these children could be deprived of their reserved rights under Article 913 of the French Civil Code?

Mr. Collins—Objected to as excluding very important elements.

The Court—Objection overruled.

A. Under the facts of a long stay in this country, the French courts would say that this was a domicile established without fraud.

Q. Would your opinion in that respect be affected by the consideration that one of the purposes of his departure was to avoid the payment of his wife's dowry, which the court had ordered him to restore to her?

Mr. Collins—Objected to as not warranted by the evidence in this case.

The Court—Objection overruled.

A. That is a moral consideration and not a question of law.

Q. Would a French court in seeking to ascertain whether the new domicile was fraudulent or not, take into consideration the fact that he had thus evaded

to restore the dowry, and had also later obtained here a divorce in this country on the ground of desertion?

A. I think not; I do not consider that that would be enough for any French court to base a judgment of fraud upon.

Q. But would they take such facts into consideration in determining whether there was or was not fraud in the establishment of the new domicile?

A. In general, questions presented to the French courts in cases analogous to this, are governed mainly by facts.

Q. Is it your opinion, as an expert on French law, that a French court would not hold to be void as against the wife and children of a Frenchman, the establishment of a domicile in a foreign country, which domicile was acquired as a part of a plan to deprive the wife of the restoration of her dowry, and to obtain a divorce abroad, at a time when no divorce was permissible in France?

Mr. Collins—Objected to as immaterial, irrelevant and not cross-examination, and not warranted by the evidence.

The Court—Objection overruled.

A. The question is somewhat delicate; I should be rather inclined to answer "No."

RE-DIRECT EXAMINATION by Mr. Collins:

Q. Was divorce permitted in France at a period before 1865?

A. Yes, under the original Code Napoleon it allowed a divorce.

Q. Now, Mr. Hannon, you were asked at the previous session of the court whether you had examined the decisions of the Court of Cassation to see whether or not the cases that you cited from the Court of Appeals of Pau, had been followed or disapproved; have you since examined the reports of the Court of Cassation on that subject?

A. I have made as complete a search as possible of

all cases of the Court of Cassation on analogous questions.

Q. With what result?

A. I have found cases in the Court of Cassation which say that where a domicile is acquired in a foreign country, even though there may be an intention to return to France, that even under those circumstances, in the case of the death of the party, the laws of the domicile will govern as regards his personal property.

Q. Can you give the citations?

A. Jeanin *vs.* Jeanin, Cassation Ch. Civ., 27th of April, 1868, Dalloz, Perrodique, 1865, 1-302. Annexe B. Aff. Gauthier *vs.* Murphy, Cassatione Chamber of Requetes, 21st June, 1865, Dalloz, 1865, 1-418.

Q. Did you find anything to the contrary of the decision of the Court of Pau?

A. Yes, sir, I found a decision in the Court of Toulouse.

Q. What was that decision?

A. As has been noted and commented on as an exception.

Q. I asked you did you find anything to the contrary of the Court of Pau in the Court of Cassation?

A. No, sir.

Q. What did you mean by saying that the French court would recognize a foreign divorce of a Frenchman domiciled abroad, although they would not enforce it?

Mr. Leon—Objected to on the ground that there was no such testimony.

The Court—I do not recall any such testimony; however, I will allow you to answer it.

A. I meant from that, that the French courts cannot have any authority or jurisdiction outside of France, and if a decision is made by courts of a foreign jurisdiction, in accordance with the law of the foreign jurisdiction, all that the French courts can do is not to pay any attention to it in France.

Mr. Leon—I have another witness who will take about ten minutes.

The Court—Then, I will hear him on the day of the argument.

(Afterwards it was arranged to take the testimony of the witness on May 25, 1914, at 2 P. M., and the argument is to take place on June 8, 1914, at 12 o'clock noon.)

GENERAL ALPHABETICAL DIGEST OF FRENCH LAW.

By Carpentier.

Frere Jouan du Saint et Fuzier Herman.

Book 28.

Nationality—Naturalization, page 278; Sec. 1123 *et seq.*

1123.—The French Tribunals recognize themselves as having jurisdiction not only to determine whether the conditions to which the French law subordinates the loss of nationality have been fulfilled. According to a uniform jurisprudence they assert the right to declare ineffective in France a naturalization, which, regular and valid in itself, has, however, been acquired in fraud of the French law.

1124.—Foreign naturalization would be acquired in fraud of the French law by any Frenchman who intended not so much to obtain a new nationality as to procure a means to exercise a right or capacity of which the law of his country deprived him, to escape an obligation which that law imposed upon him or finally in one way or another to avoid its application.

1125.—Naturalization so obtained might conflict with a general interest or a private interest * * *

1126.—Naturalization might also prejudice a private interest. Thus at a time when the French law did not allow divorce, it happened more than once

that one of the French married parties would have himself naturalized in a foreign country, most often in Switzerland where naturalization was very easy, obtained the divorce in conformity with the laws of his new country and contracted a new marriage, later returning to live in France as formerly.

The Courts have uniformly decided that naturalization was thus acquired in fraud of the French law and could not be set up as against the first spouse; that the first marriage continued to exist and that therefore the second was void.

Court of Cassation, Decree of December 16th, 1845, in the matter of Plass and Chopin.

Sirey 1846—1—100
Dalloz 1846—1— 7

Decree of March 18th, 1878, in the matter of Baufremont.

Sirey 1878—1—193
Dalloz 1878—1—201

Court of Cassation, Decree of March 25th, 1889, in the matter of the d'Argentre.

Sirey 1890—1—145
Dalloz 1889—2— 17

Court of Appeal of Paris, Decree of July 17th, 1876.

Sirey 1876—2—249
Dalloz 1878—2— 1

Decree of March 14th, 1889, in the Law Journal for 1889—1—539.

This jurisprudence has been confirmed by all the authors:

See Aubry and Rau, "Treatise of Civil Law," Fifth Edition, Book 1, pages 436, 437.

Baudry, Lacantinerie and Houques Fourcade "Treatise of Civil Law," Book 1, No. 327.

Surville and Arthuys "Treaties of Private International Law," No. 64.

Lesuerur and Dreyfus "On Nationality," p. 190, and Journal of Private International Law of Clunet for the year 1875, page 420.

1127.—There is better than that. The Court of Appeal of Paris has recognized the fraudulent character of naturalization in a case where the married parties had made an agreement to have themselves naturalized in Switzerland without, however, leaving Paris and obtain a divorce afterwards.

The court, on the application of the husband and of the Government Consul, declared the new marriage contracted by the wife void. It was difficult to maintain that naturalization and divorce had been acquired in fraud of the rights of the husband, since both spouses had reached a prior agreement on the matter. Nevertheless, naturalization had been acquired by one and the other for the purpose to act in fraud of the French law which held a conjugal bond to be indissoluble; hence, such naturalization could not be set up as against interests of a public order and of a private order which the same law had for itself purposed to protect.

Court of Appeal of Paris, June 30th, 1877, In the matter of Vidal.

Sirey 1879—2—205
Dalloz 1878—2— 6

1128.—The restoration of divorce in France must have rendered less frequent the resort to these subterfuges without, however, such resort having become entirely useless. Several foreign legislations recognize other cases of divorce than those recognized by the French law. One of the spouses, or both of them, might wish, by having themselves naturalized abroad, to obtain the benefit of one of these broader laws and obtain a divorce which the French law did not permit. Here again, without any doubt, the courts would deem naturalization fraudulent.

1129.—Such jurisprudence has not been applied, however, only with regard to divorce.

A husband foreseeing that his wife is going to apply for a personal separation from him went to Switzerland ,had himself naturalized in that country

and expressed the intention to obtain a divorce there. Then, on the application of separation made by the wife he contested the jurisdiction of the French court by setting up the Franco-Swiss Treaty of June 15th, 1869, according to which, in matters relating to personal property, a Swiss must be sued by a Frenchman before the court of his domicile. The Court of Appeal of Toulouse refused to recognize such contention and the Court of Cassation dismissed the writ of error obtained to review such decree.

Naturalization obtained by the husband in fraud not only of the rights of the wife but also of the French law could not be set up against the wife.

Court of Cassation, July 19th, 1875.

Sirey 1876—1—289

Dalloz 1876—1— 5

Court of Appeal of Toulouse, July 27th, 1874—Sirey, 1876—2—149. Dalloz, annotation of the above cited decree in Cassation, 1876, Book 1—5.

NATURALIZATION HAS NO RETROACTIVE EFFECT.

FUZIER HERMANN—Book 28, page 280.

Section 1156.—The loss of French nationality have no retroactive effect, nor has its acquisition. The Frenchman naturalized abroad does not lose his French nationality except for the future.

1157.—Hence, this change of nationality does not in any way affect the rights which have been acquired either by the expatriate himself or by third parties, but, contrary to jurisprudence in the case where it is fraudulent, if the nationality be in good faith, it produces all its consequences relative to the future only.

1158m.—It is according to this principle that it was decided at the time when divorce was not granted in France that the spouse who had become naturalized in a foreign country could not obtain

the divorce there, or at least that the divorce thus obtained could not be set up against the spouse who had remained French, and that the marriage which followed it was without validity in France and could be contested either by the spouse or by persons having interest in existence and persent or by the Government's Counsul.

See the cases cited above at Sections 1111 and 1126. See also—

Baudry Lacantinerie and Housque Fourcade, Treaties of Civil Law, Book 1, No. 529.

Pasquale Friore, Private International Law (Translation by Pradier-Fodere) No. 132.

Weiss, Book 1, page 456.

Audinet No. 565.

Vincent No. 191.

Renault, doctrinal examination, critical review for 1883, page 722.

Pin, on Marriage in International Law, p. 240.

CIVIL TRIBUNAL OF NICE.

June 5th, 1893 (Reported in Clunet for 1893, p. 885).

Where a foreigner dies in France leaving a personal estate, it is proper, in order to determine who are the heirs, to follow the provisions of the national law of the deceased, that is to say, provisions of foreign laws.

COURT OF APPEAL OF DOUAL.

February 2d, 1899 (Reported in Clunet for 1899, page 825.)

The laws which govern the inheritance and limit the freedom of disposing of property with a view to preserving the property for the heirs of the blood are part of the real property law, but this principle does not apply only to real property; the personal

estate of a foreigner is governed by his personal status, that is to say, by the laws of his country.

CIVIL TRIBUNAL OF THE SEINE.
March 11th, 1904 (Reported in Clunet for 1907, page 434).

The disposition of the personal estate of a foreigner who has not obtained a domicile is governed by his personal status by the application of the legal fiction *mobilia sequantum personam.*

TRIBUNAL OF THE SEINE.
April 26th, 1907 (Reported in Clunet, 1907, p. 1132).

In order to determine the law which governs the disposition of an estate it is necessary to distinguish between the real estate governed by the *lex rei sitae* and the personal estate governed by the personal status.

TRIBUNAL OF MARSEILLE.
January 26th, 1889 (Reported in Clunet for 1889, p. 676).

Foreigners established in fact in France, but not authorized by the government to establish therein their legal domicile are not subject to the jurisdiction of the French courts, but by reason of their *defacto* domicile they may nevertheless be subjected to their jurisdiction and the *defacto* domicile of the deceased may particularly in the matter of his estate and the distribution of the same serve to determine the jurisdiction of the judge and the place where the estate is to be administered. In such case the French courts have, by virtue of the maximum *mobilia sequuntur personam,* the duty to apply to the personal estate of foreigners the law of their country, their personal status.

COURT OF APPEALS OF AIX.
May 27, 1890 (Reported in Dalloz for 1891, Book 2, p. 13.)

The personal estate of a foreigner, even when he dies in France, is governed not by the French law but by the national law of the deceased.

Grounds of a judication—

Whereas, Sakikini died in France June 9th, 1880, and a foreigner is governed only by the law of his country, of his personal status for the disposition of his personal estate, and undoubtedly the fact of his residence in France is not to be disregarded and may produce certain effects, particularly in what concerns the determination of the court having jurisdiction, but it leaves in tact the principle of the national law of the deceased.

COURT OF ALGER.
January 14th, 1891 (Reported in Clunet for 1895, p. 1082).

While it is the French law which in the case of an estate left by a foreigner who has not been authorized to acquire a domicile which must be consulted in order to determine who are the heirs who may receive the real estate situated in France, it is on the contrary the national law of the deceased which must be consulted when it is a matter of distributing the personal property which the deceased has left.

COURT OF CASSATION.
January 12th, 1869 (Reported in Dalloz for 1869, Book 1, p. 294).

The estate of a foreigner may not be considered as governed by the law of the domicile, even though

he may have had a *defacto* domicile in France, but must be governed by his national law.

Menizet *vs.* Transfer Tax Office.

COURT OF APPEALS OF LYONS.

June 21st, 1872 (Reported in Sirey for 1872, Book 2, page 201.)

In an estate administered in France the personal property is governed by the national law of the heirs of the deceased. Consequently personal property left by an Italian, who died in France, must be distributed *in toto* to his natural children in the absence of ascendants, ligitimate descendants and surviving spouse.

COURT OF APPEAL OF PARIS.

July 14th, 1871 (Reported in Dalloz for 1872, Book 2, page 65).

The personal estate of a foreigner who is not authorized to establish his domicile in France, and who died there, is governed by his national law.

CIVIL TRIBUNAL OF EVREUX.

August 17th, 1881.

In the matter of Cuirana *vs.* Calvet y Torres.

The share of a natural foreign child in the estate of his father, a foreigner, who died in France must be determined in conformity with the national law.

(Reported in Clunet for 1882, page 194.)

INTERNATIONAL CONVENTIONS.

All the international conventions which France has made with foreign countries relative to the estate of her citizens formally sanction the principle that

"The inheritance of real property shall be governed by the laws of the country in which the real property is situated.

"That of personal property *by the national law* of the deceased."

See conventions of France—

With Austria, December 11, 1866, Article 2;
With Russia, April 11, 1874, Article 10;
With Servia, January 18, 1883, Article 8;
With Mexico, November 27, 1886, Article 6;
With the Dominican Republic, September 9, 1887, Article 6;
With Ecuador, May 12, 1888, Article 6.

Exhibit C-1 and C. L. 4.

CIVIL TRIBUNAL OF LYON (FRANCE).

(Translation.)

JUDGMENT AS TO SEPARATION OF PERSON.

Entered August 1st, 1866.

Extract from the Minutes of the Office of the Clerk of the Civil Tribunal, sitting at Lyon, Department of the Rhone.

NAPOLEON, by the Grace of God and National Will, Emperor of the French, to all present and to come, Greeting:

The Civil Tribunal of First Instance of Lyon has rendered the following judgment:

Between the Lady Jeanne Marie Josephine Haour, wife separated as to property from Mr. Barthelemy Louis Givernaud, she having no occupation, residing at Lyon with Mr. Haour, her father, rue de Bourbon, the plaintiff appearing by Master Mathian, solicitor, on one side, and Mr. Barthelemy Louis Givernaud, merchant, residing at Lyon, No. 2 Place Gerson, hav-

ing now disappeared, having no occupation, domicile nor residence in France, the defendant in default for failure to appoint a solicitor, on the other side.

After hearing Master Mathian, solicitor, who set forth that it should please the Court:

To note the default for failure to appoint a solicitor against Mr. Givernaud and give such consideration as is proper to the inquest taken July 12th last.

To state and decree that the Lady Jeanne Marie Josephine Givernaud is and remain separated as to her person from the said Mr. Louis Givernaud, her husband.

That she shall retake the free management of her property and that she is authorized to reside whereever may seem proper to her and that the said Givernaud is forbidden to seek or frequent her.

To state that the children born of the marriage shall remain entrusted to the keeping and care of the Lady Givernaud, their mother.

To state in what concerns the deceased child, that it shall remain in the place where the body was deposited at the cemetery of Loyasse, and that Mr. Givernaud is forbidden to have it exhumed and trasnported elsewhere.

To give judgment against Mr. Givernaud of all costs of the action.

Facts.

Following a judgment by default rendered by the First Chamber of the Civil Tribunal of Lyon, June 13th last, witnesses were heard and following the minutes of the inquest taken July 12 last, the Lady Givernaud summoned her husband before the Tribunal by process served by Borgot, bailiff, dated July 19th, served at the City Hall, and at the attorney general's office of the Imperial Judicial officers representing the State in civil and criminal matters.

In support of the cause of action set forth as above by Master Mathian, the case was placed on the calendar; Mr. Givernaud did not appoint a solicitor.

Having been reached on the calendar at the hearing this day, a tribunal after having heard the public judicial officer representing the State as to his points, has held:

Law.

Shall default be noted against Givernaud for failure to appoint a solicitor? Shall the separation as to person of the Lady Givernaud from her husband be pronounced? What shall be held as to the children? What as to the costs?

Having heard as to his points, Mr. Gilardin, assistant to the Imperial Attorney General;

Considering that upon the complaint for separation as to person made by the Lady Givernaud against her husband, the Court under date of June 13th, 1866, rendered a judgment which ordered that proof be taken as to the facts set forth by the Lady Givernaud.

Considering that the inquest which was proceeded with July 12th, 1866, establishes that facts complained of by the Lady Givernaud against her husband are true, that from said inquest and from the writs served, that Mr. Givernaud has to-day no known domicile or residence, that the abuse and injuries are established as well as abandonment.

In what concerns the children:

Considering that it is proper to leave them entrusted to the care and keeping of the Lady Givernaud, their mother;

Considering that by not appearing, Mr. Givernaud leaves it to be presumed that he has nothing to oppose to the complaint, which having been proven is valid;

Considering that by judgment which is now *res adjudicata,* rendered by this Tribunal on February

7th, 1866, the said Lady was separated as to her property from Mr. Givernaud her husband, that it is therefore not necessary to consider the property to be returned to the Lady Givernaud, upon these grounds:

The Tribunal giving judgment on the merits and as a Court of First Instance, notes the default against Mr. Barthelemy Louis Givernaud for failure to appoint a solicitor.

States and decrees that the Lady Jeanne Marie Josephine Givernaud is and remains separated as to person from the said Mr. Givernaud, her husband, that she shall retake the free administration of her property and that she is authorized to reside where it shall seem good to her and that Mr. Givernaud is forbidden to seek or frequent her.

States that the children born of the marriage shall remain entrusted to the keeping and to the care of the Lady Givernaud, their mother.

States that in what concerns the deceased child, it shall remain in the place where the body is deposited in the cemetery at Loyasse and that Mr. Givernaud is forbidden to have it exhumed and moved elsewhere.

Gives judgment against Mr. Givernaud for all the costs of the action.

Apoints Bailiff Gagnaux of Lyon to serve the present judgment on the defaulting party.

Thus done and adjudged and judicially decreed at the public hearing of the First Chamber of the Civil Tribunal of Lyon in the Palace of Justice, Roanne Place, August 1st, one thousand eight hundred and sixty-six.

By Messrs. Aucher, presiding judge of the Civil Tribunal of Lyon, Knight of the Legion of Honor.

Dueurtyl, vice-presiding judge, Bon and Bruneau, judges of the First Chamber of the said Tribunal.

In the presence of Mr. Gilardin, assistant to the Imperial Attorney General.

The Court being attended by Mr. Ferreol, sworn deputy clerk.

In faith whereof the record of the present judgment has been signed by the President and the Deputy Clerk. Thus signed upon the record:

A. AUCHER, *Presiding Judge.*
P. FERREOL, *Sworn Deputy Clerk.*

We direct and order all bailiffs, upon request, to execute the present judgment.

To our attorneys general near the Imperial Court of Appeals.

To our Imperial District Attorneys near the Civil Courts.

We direct and order that they shall sustain the same.

To all commanders and officers of the public force.

We direct and order that they shall lend aid by force when legally requested to do so.

Registered at Lyon, August 11th, one thousand eight hundred and sixty-six. Folio 109, Box 5, Received 23 francs. (Signed) Reynier.

A true copy (Signed) Mathian.

I, Bouisson, Judge of the Civil Tribunal at Lyon, the President being prevented, hereby certify the signature of Mr. Mathian and the authority which he sets forth.

(Seal.) (Signed) A. BOUISSON.

The signature of Mr. Bouisson is hereby certified. Paris, December 24th, 1908, by delegation of the Keeper of the Seals, Minister of Justice.

(Signed) DELAGUETTE, *Chief Clerk.* (Seal.)

The Minister of Foreign Affairs certifies as genuine the signature of Mr. Delaguette, Paris, December 26th, 1908. For the Minister and the Delegated Chief Clerk.

(Signed) SCHNEIDER. (Seal.)

The following in English:

UNITED STATES CONSULATE GENERAL,
PARIS, FRANCE.

December 28th, 1908. The Seal of Ministry of Foreign Affairs and the signature of Mr. Schneider are certified to be genuine.

DEAN M. MASON,
Vice-Consul General of the United States of America at Paris (France).

Exhibit C-2 and C. L. 3.

CIVIL TRIBUNAL OF LYON (FRANCE).

(Translation.)

JUDGMENT.

Entered February 7th, 1866.

Extract from the minutes of the Office of the Clerk of the Civil Tribunal of First Instance of Lyon, Departemnt of the Rhone, February 7th, 1866.

NAPOLEON, by the Grace of God and National Will, Emperor of the French. to all present and to come, Greeting:

The Civil Tribunal of First Instance, sitting at Lyon, Rhone, has rendered the following judgment:

Between the Lady Jeanne Marie Josephine Haour, wife of Mr. Barthelemy Louis Givernoud, having no occupation, residing with her father at No. 56 rue de Bourbon, plaintiff, appearing by Master Joannes Mathian, Solicitor, on the one hand;

And Mr. Barthelemy Louis Givernaud, merchant, residing at Lyon, at No. 2 Place Gerson, defendant, appearing by Master Didier. Solicitor, on the other hand;

After hearing Mr. Dallas, Barrister, who argued with the assistance of Mr. Mathian, Solicitor, and who

concluded that it should please the court to state and declare that the Lady Jeanne Josephine Marie Haour, wife of Mr. Barthelemy Louis Givernaud, shall be purely and simply separated as to property from the said Mr. Givernaud, her husband, that she is authorized to engage in such lawful commerce as she pleases without the asistance of the joining of her husband, and to recover the free administration of her property; to say and declare that the property to be returned to the Lady Jeanne Josphine Marie Haour is purely liquidated at the sum of forty-four thousand (44,000) francs, the amount of the dowry constituted under the terms of her marriage settlement, delivered to Master Baud and his colleague, notaries public, at Lyon, January 23d, one thousand eight hundred and sixty, except to charge against the sum of four thousand (4,000) francs representing the trousseau, the objects which the said lady will re-take in kind; in consequence to condemn Mr. Givernaud to be thereafter constrained by all legal means to pay to the Lady Jeanne Josephine Marie Haour the said sum of forty-four thousand (44,000) francs; secondly, the lawful interest; thirdly. the costs of the action. And the said Barrister concluded that it should please the court to grant to the Lady Givernaud an adjudication that she reserves her objections to renouncing the community stipulated in her marriage settlement and to pronounce the allowance of the costs for the benefit of Master Mathian.

In a subsidiary way, and in case the Tribunal should not deem itself sufficiently enlightened to appoint an expert who will have mission to verify the books of the Givernaud firm, of which the defendant is a member, and to give his opinion on the state of the books of said firm.

After hearing Mr. Chastaing, Barrister, who argued with the assistance of Master Didier, Solicitor, and who concluded that it should please the Tribunal to say and declare that the complaint of the Lady

Givernaud is purely and simply dismissed and to condemn the said lady to all the costs:

Facts.

By virtue of an order rendered on application by the First Chamber of the Civil Tribunal of Lyon on December 8th, one thousand eight hundred and sixty-five, registered and according to notice duly registered, of bailiff Delaye, dated November 9th, of the same year, the Lady Givernaud has sued Mr. Barthelemy Louis Givernaud before the Civil Tribunal of Lyon to the ends of the conclusions hereinabove taken by Master Mathian. Upon that complaint, Mr. Didier appeared as the solicitor of Mr. Givernaud.

This complaint was published in accordance with law in the Journal of Public Safety on December 11th, one thousand eight hundred and sixty-five, and was filed in the Civil and Commercial Clerk's office and in the Chambers of Solicitors and Notaries on December 11th,

The cause was placed on the calender. the briefs were filed in the First Chamber.

The cause having been assigned and having been duly reached at this day's session, Messrs. Dallas and Chastaing argued, and Messrs. Mathian and Didier filed their briefs and the Tribunal has adjudicated after having heard the conclusions of the Government's Counsel.

Law.

Shall the separation of property of the Lady Givernaud be pronounced? If that be done, at what sum will the propetry to be returned to the Lady Givernaud be liquidated? On the contrary shall the complaint of the Lady Givernaud be rejected as unsound? Or shall the subsidiary conclusions presented by the Lady Givernaud be sustained?

Quid as to Costs?

After hearing in his conclusions, Mr. Gilardin, Assistant of the Imperial Government Counsel;

WHEREAS, According to Article 1443 of the Code Napoleon, the separation of property may be sought by the wife whose dowry is imperiled.

WHEREAS. It is not necessary in order that the complaint shall prevail that it should be instituted only when the husband's ruin is consummated; that in such case the protection which the law intends to grant to the wife for the safety of her matrimonial claims would be too often illusory; that it follows from the very terms as from the spirit of the law that the wife is entitled to ask her separation of property when the embarrassing situation of her husband may inspire legitimate fears as to the conservation of the dowry.

WHEREAS, In this matter the Lady Jeanne Josephine Marie Haour and Mr. Givernaud were married pursuant to the status of community reduced to the property acquired during the marriage;

WHEREAS, According to their marriage settlement delivered to Master Baud, Notary at Lyon on January 23d, 1860, the wife constituted for herself as a dowry her trousseau and divers objects estimated at four thousand (4,000) francs, and finally a sum of forty thousand (40.000) francs in species which was received by the husband;

WHEREAS, The latter possesses no other resources than his share in a business firm which he established in Lyon for the manufacture of silk-tissues, but this firm being far from prospering suffered reverses and such pecuniary embarrassments that it has been compelled to suspend its payments and to call a meeting of its creditors and it has escaped an adjudication in bankruptcy only by means of an amicable composition by which the creditors have granted long terms of settlement.

WHEREAS, The sole existence of such an agreement suffices to demonstrate that the partners and particularly Mr. Givernaud have not fulfilled their obligations and attests clearly if not their complete ruin at least their state of difficulty and a most embarrassed situation;

WHEREAS, The complaint of Lady Givernaud is therefore sound.

WHEREAS, It is the more proper to grant it that on the one hand her contributions to the household are important, and that on the other hand the husband possesses no real estate which might give mortgage security to the already endangered dowry of his wife.

On these Grounds.

The Tribunal giving judgment in the First Instance and in ordinary matters

Pronounces the separation of property of the husband and wife, Givernaud and Haour;

Authorizes the Lady Givernaud to retake the free administration and enjoyment of her property and condemns the husband Mr. Givernaud to pay her for the amounts of the contributions ascertained by the marriage settlement the total sum of forty-four thousand (44,000) francs with the interest from the date of filing of the complaint, the value of the trousseau and furniture which the Lady Givernaud is authoried to retake in kind to be allowed on that sum according to an appraisal which shall be made by the proper public officer, and condemns the husband to all costs.

Thus made and pronounced at Lyon at the Palace of Justice, Quai de l'Archeveche, in public audience of the First Chamber of the Civil Tribunal of First Instance of that city in the seventh of February, one thousand eight hundred and sixty-six.

By Messrs. Pascal Armand Aucher, President of said Tribunal, Knight of the Imperial Order of the Legion of Honor, Dimityl, Vice- President and Bru-

neau, Judges of the same bench, in the presence of Mr. Gilardi, Assistant of the Imperial Government Counsel. and assisted by Mr. Ferreol, Deputy Clerk.

We direct and order all bailiffs, reguested to do so, to execute the present judgment, as also the general Government Counsel near the Imperial Courts and the Imperial Government Counsel near the Tribunals of First Instance to lend aid.

We direct and order all Commanders and Officers of the Public Force to lend aid by force when legally requested to do so.

In Witness Whereof the said judgment has been signed upon the minutes by the said President and by the Clerk.

Signed on the minutes Aucher, Ferreol.

Registered at Lyon, February 12, 1866. Folio 32, Box 4, Received 221 francs, 80 centimes, plus 33 francs 27 centimes. (Signed) Reynier.

A true copy. (Signed) Mathian.

I, Bouisson, Judge of the Civil Tribunal at Lyon, the President being prevented, hereby certify the signature of Mr. Mathian and the authority which he sets forth.

(Seal.) (Signed) A. Bouisson.

The signature of Mr. Bouisson is hereby certified. Paris, December 24th, 1908, by delegation of the Keeper of the Seals, Minister of Justice.

(Signed) Delaguette, *Chief Clerk.* (Seal.)

The Minister of Foreign Affairs certifies as genuine the signature of Mr. Delaguette, Paris, December 26th, 1908. For the Minister and the Delegated Chief Clerk.

(Signed) Schneider. (Seal.)

The following in English:

UNITED STATES CONSULATE GENERAL,
PARIS, FRANCE.

December 28th, 1908. The Seal of Ministry of Foreign Affairs and the signature of Mr. Schneider are certified to be genuine.

DEAN M. MASON,
Vice-Consul General of the United States of America at Paris (France).

Exhibit C. L. 1.

IN CHANCERY OF NEW JERSEY.

BETWEEN
JEANNE MARIE JOSEPHINE GIVERNAUD, ET ALS.
Complainants,
AND
ANITA VARIEL ET ALS.,
Defendants.
} On Bill, etc.

The following facts are admitted on behalf of the defendants represented by the undersigned attorneys, namely:

That the property of whatsoever nature owned by the deceased at the time of his death, consisted of the items hereinafter set forth in two schedules, marked respectively Schedule A and Schedule B.:

Schedule A.

	Value.
Cash on deposit with Italian Trust Co.	$1,498.86
Insurance policy on life of Louis Givernaud, payable to his estate, Commercial Reliance Insurance Company of New York, for $5,000. Policy No. 8501, value unknown	Worthless.

Insurance policy in same company, No. 8502, on life of Etienne Givernaud, payable to Louis Givernaud, value unknown	Worthless.
Policy in the Mutual Reserve Fund Life Association, No. 65504, on life of Etienne Givernaud, for $10,000, and assigned to and payable to Louis B. Givernaud, value unknown	Worthless.
Certificate No. 149, for 17½ shares of the capital stock of The Norwood Insurance Company of New York, value unknown	Worthless.
New York City Corporate Stock, 4% registered in name of Louis Givernaud, dated November 19, 1906, and numbered, respectively, 101, 103, 104, 105, 106, 108, 109, 110, 159, for $1,000 each, due November 1, 1956	$9,800.00
New York City Corporate Stock 4% registered in name of Louis Givernaud, dated November 16, 1906, and numbered, respectively, 152, 100, 99, 98, 87, 96, 95, 94, 93, 92, 91, 90, 89, 88, 87, 86, 85, 83, for $5,000 each, due November 1, 1956	$88,200.00
Four promissory notes, three of which are dated March 14, 1906, and one dated April 19, 1906, all made by E. Gerli Co., and payable to the order of Louis Givernaud, and numbered 6, 7, 8 and 10, respectively, and for $50,000 each, No. 10 and 6 being payable three months after demand, No. 7 being payable four months after demand, No. 8 being payable six months after demand, and all bearing interest at the rate of six per cent. per annum, payable weekly	$200,000.00
	$299,498.86

Schedule B.

	Value.
1 Promissory note, Dated October 24, 1907, made by E. Gerli & Company, and payable to the order of Louis Givernaud, 10 days after demand, for $10,000	$10,000.00
1 Promissory note. dated May 8, 1907, made by E. Gerli & Company, payable to the order of Louis Givernaud, 10 days after demand, for $7,000	$7,000.00
I Promissory note, dated May 8, 1907, made by E. Gerli & Company, payable to the order of Louis Givernaud, 10 days after demand, for $6,000.....	$6,000.00

That the property set forth in Schedule A was at the time of the decedent's death deposited in a safe deposit box leased by the deceased since the 17th day of January, 1894, from the Metropolitan Safe Deposit Company, 3 East 14th Street, in the City, County and State of New York, in its vault located at said address.

That the only property owned by the deceased at the time of his death other than that set forth in Schedule A is the property set forth in Schedule B., and that the three promissory notes set forth in said Schedule B were at the time of the death of said Louis Givernaud actually physically present in his possession in Los Angeles, California.

Dated January 27th, 1914.

JOHN S. MABON,

Attorney for the Defendants, The Italian Benevolent Association and The French Benevolent Society, also for Anita Variel, Josephine Givernaud and Alaska G. Aiken and Lily G. Short.

JOHN S. MABON,

Attorney for the French Benevolent Society of New York, Defendant.

COLLINS & CORBIN,
Attorneys for Charles L. Givernaud and May R. Givernaud, his wife, Defendants, and Thomas A Kennedy and Oscar Vezin, Jr., Executors of Louis Givernaud, Defendants.

DEFENDANT'S EXHIBITS.

D-1.

Certified copy of will of Louis Givernaud. (See copy annexed to the bill of complaint.)

D-2.

Certified copy of decree of Hudson County Orphans' Court, barring creditors of Estate of Louis Givernaud, deceased, dated October 15, 1909.

D-3.

Certified copy of the transcript of pleadings and decree of divorce in favor of complainant, in suit of Barthelemy Louis Givernaud, complainant, and Jeanne Marie Josephine Givernaud, defendant. Decree dated March 5, 1872.

D-4.

Decree and proceedings in suit of Jeanne Marie Josephine Givernaud, complainant, and Charles L. Givernaud and others, defendants. Decree dated January 8, 1913, filed January 9, 1913. (See 81 N. J. Equity Reports, page 66; 88 N. J. Equity Reports, page 201.)

D-5.

Declaration of Louis Givernaud of his intention to become a citizen of the United States, dated October 3, 1870—Hudson County, New Jersey.

D-6.

Certificate of naturalization of Louis Givernaud, dated October 31, 1872—Hudson County, New Jersey.

D-7

Stipulation of facts. (Set out in full in the evidence, page .)

Collins 6.

Deed by Louis Givernaud, widower, of West Hoboken, County of Hudson and State of New Jersey, to Kenneth Cranstoun, dated December 19, 1905.

Collins 6-*A*.

Deed by Kenneth Cranstoun to Louis Givernaud, of West Hoboken, County of Hudson, New Jersey, dated December 19, 1905.

In Chancery of New Jersey.

Between
Jeanne Marie Josephine Givernaud et als.,
Complainants,
and
Anita Variel et als.,
Defendants.
} On Bill, etc.

OPINION.

The testator's domicile of origin was France. He became a naturalized citizen of the United States in 1873, his domicile of choice being West Hoboken, New Jersey. He left a wife and two children in France, who are the complainants in this cause. In 1871 he obtained a divorce in this State and remarried, one son being the offspring of this second marriage. In 1896, having amassed a fortune of three hundred thousand dollars, he decided to take apartments in New York, as he was constantly attending different places of amusement in that city, almost every night in the week, and he did not feel strong enough to come back to West Hoboken at night. He made New York his headquarters, but was away traveling in different parts of the world a very great part of his time. He, on many occasions, emphasized the fact that he was still domiciled in New Jersey. He died in Los Angeles, California, in 1908, where he had bought a house in his son's name.

Held, that he never abandoned his domicile of choice, namely, West Hoboken.

Messrs. Besson, Alexander & Stevens, and Mr. Maurice Leon (of the New York Bar), for the complainants.

Mr. John S. Mabon and Messrs. Collins & Corbin, for the defendants.

LEWIS, *V. C.*:

The only question which the Court considers it necessary to decide in this case is, whether Barthelemy Louis Givernaud had his domicile in the State of New Jersey at the time of his death, which occurred on January second, 1908, at Los Angeles, California.

For a clear understanding, I will set forth, at this time, the facts bearing on the case: The testator, Barthelemy Louis Givernaud, was born in Lyon, France, on April twenty-first, 1835; on April fifth, 1860, he married, in France, Josephine Haour, both of them being French citizens. Two children were born of that marriage, viz.: the complainants, Joseph Givernaud and Noemi Josephine Marie Genin, *nee* Givernaud, both born at Lyon, Joseph being born June fifth, 1861, and Noemi on August thirtieth, 1862. By judgments rendered February seventh, 1866, and August first, 1866, in the Civil Tribunal of Lyon, Madame Josephine Givernaud obtained a separation from her husband, dissolving the community existing between them as to their property, and giving her leave to live separate and apart from him, and the custody of their children, on the ground of "abuse and injuries," and "abandonment." He came to the United States of America in 1866, established himself in West Hoboken, obtained in 1871 a divorce in this Court upon service by publication on the ground of "desertion," and thereafter contracted another marriage with Palmyre Elizabeth Lida Corriveau, on the thirtieth day of May, 1872, and as the fruit of this second marriage a son, Charles L. Givernaud, was born to them, all three children being alive at the present time. In the course of time the testator became a very prosperous man, having factories at West Hoboken, Hackensack and Homestead, New Jersey, with an office in Green Street, New York

City. The bill was filed by the first wife of the testator and her two children born of their marriage, but she, the first wife, died during the taking of testimony, but by stipulation the testimony stands.

In the year 1873 the testator became a citizen of the United States, and from the time of his second marriage, until 1896, he lived with his wife at Spring and High Streets, in West Hoboken. The second wife is also deceased.

The tetsator died on January second, 1908, at Los Angeles, California, having, on or about the fourth day of November, 1907, executed a last will and testament in writing, which was admitted to probate by the Surrogate of the County of Hudson on the fourteenth day of January, 1908.

The trust scheme contained in Articles 9, 10 and 11 of the will is claimed, by the complainants, to be void, under the New York law, against perpetuities, found in Laws of 1897, Chapter 417, Section 2.

It is admitted, that if the testator was domiciled in New Jersey at the time of his death, that the said trust is a legal one, and the only doubt of its legality would arise in case the Court found that he was not domiciled in New Jersey at the time of his death. My own opinion is, that if the testator were domiciled in New York at the time of his death, the New York courts would have to pass on the legality of this trust scheme, and not the courts of New Jersey. However, as I have concluded that the testator was domiciled in New Jersey when he died, I find it unnecessary to decide as to whether this court would have jurisdiction to decide on the legality of the trust if he had been domiciled in New York or elsewhere than in New Jersey at the time of his death.

The testimony shows, that for many years the testator devoted himself to building up his business, and after he had become successful he devoted himself more and more to theatres, concerts and other amusements; he loved to travel and visit distant countries. He became acquainted with a dentist

named Torillhon, and Dr. Torillhon became his companion, the testator being willing to pay the expenses of the companionship, and they used to go together to theatres and other entertainments in New York about five times a week, coming back to West Hoboken each night. That continued until the year 1896, when the testator decided to take apartments in New York. In the winter of 1895-1896, when caught in a snow storm while returning from New York to West Hoboken, the testator said to Dr. Torillhon, "I cannot stand these rough nights any more; I like my theatre, so I think that next winter I will take a room in a hotel or somewhere in New York, so that I can enjoy my theatre"; and the next fall he asked Dr. Bertini and Dr. Torillhon to rent an apartment for him in New York, which they did. His wife continued to live in West Hoboken until 1898, when they sold the house, and she removed to New York, but not to live with her husband, the testator. They were uncongenial, and the testator never lived with Madame Givernaud after she left Hoboken in 1898, although he used to take meals with her occasionally. His brother lived in Homestead, New Jersey, and a room was set apart for him there, which was called "Mr. Louis' room." He had changes of clothoing there and the use of a bedroom, but the defendants do not claim that he was domiciled anywhere else than in West Hoboken; their claim is that he never changed his domicile from West Hoboken.

At all times when the question was broached the testator insisted strenuously that his domicile was New Jersey, and he went there to have his will drawn up in accordance with the laws of the State of New Jersey. The witness, Joseph Braubach, however, testified that he overheard him saying to two gentlemen in New York, in his apartment, that he was glad he was through with West Hoboken. That might mean "I am glad I don't have to go back there nights," and, in view of all his other statements,

I must conclude that that is what he did mean; he certainly was not through with West Hoboken, as his factories remained there. He lived in many different apartments in New York, and he was away from New York much more than he was in New York. At the time of his death, shortly after he made the will in suit, he had no property in New Jersey, but kept his fortune, consisting of personal property amounting to about three hundred thousand dollars, in a safe deposit vault in New York. In 1898 he made an extended trip to the West, with Dr. Torillhon, and then returned to New York, staying there two weeks, and then took several short trips before going to Europe. In 1899, they went to California, to Hot Springs, to Glenwood Spa, and then came back to New York. The summer was spent at Atlantic City. Early in 1900 Mr. Givernaud again went to California. A few weeks after his return from California, he went to Europe, accompanied by his son Charles ond the wife of Charles, returning in the fall to New York. They then went to Atlantic City and came back to stay in New York, making short trips. These returns were all to his son's apartments, with the exception of the return from California, when he went to the Von Hoffman Flats. In 1901 the testator, his son Charles and wife, and Dr. Torillhon, returned from Los Angeles and Honolulu to the New York apartment in Sixty-eighth Street. He spent the summer of 1901 at Atlantic City and returned in the fall, making short trips from New York as a base in the fall of 1902. The winter of 1902-1903 was spent by Mr. Givernaud in California, returning to New York in the spring. And so it went on; he was constantly on the go. Sometimes he would spend a night in Homestead. Between 1896 and 1907 he moved to five different apartments in New York.

There is no doubt whatever, that the testator firmly believed that he was domiciled in New Jersey. He certainly supposed there could be no possible

question about that. In the fall of 1896 he asked Dr. Bertini and Dr. Torillhon to look up an apartment for him in New York, and they rented one under Dr. Bertini's name, though the testator paid the rent. Dr. Torillhon testifies that at that time he asked him if he was going to leave his house to become a citizen of New York, and that he replied, "Never; my home is in West Hoboken, and I stay there." In 1898, when he was still living in New York, Mme. Givernaud sold the house in West Hoboken, and Dr. Torillhon testifies, "I said to him, 'What are you going to do now; shall you make New York your residence?' and he said, 'No, I never intend to live in New York'; he said he had an aversion to becoming a resident of New York City, positively; he told me that positively twenty times."

Again, in the fall of 1898, Louis Givernaud made an affidavit in which he swore that he was a resident of West Hoboken, to avoid the payment of taxes in New York. There was no evidence offered to show that he paid taxes in New Jersey or elsewhere, after 1898.

At the time of drawing the will in question, the testator, when asked by his attorney, Abel I. Smith, if he were still a resident of West Hoboken, stated that his domicile was there and he would be buried there. Mr. Smith testified: "I asked him whether he had changed his residence, and said it was proper for me to know that, as the laws in different States varied in regard to bequests to charitable institutions. Mr. Givernaud said to me, 'No, I have not changed my residence; my domicile is here, and I have not changed it.' I am positive about the word 'domicile,' because when he used the word 'domicile' he said it in French, and used the word 'domicile,' and said to me, 'Is "domicile" right?' and I said 'Yes, it is the same in English as in French, "domicile".' " As a matter of fact, the meaning in French of the word "domicile" is not necessarily always the same as in English, but the word in that language

may denote a domicile in name which is used for legal purposes only, while the actual domicile is maintained in an entirely different place. Again, before he left for California in 1907, he had a conversation with Dr. Torillhon's sister, which Dr. Torillhon reports as follows: "He had bought a house, I believe, in California; he had bought it in his son's name, like he always did, and she said to him, 'Now you are a resident of California'; and he said, 'Not a bit; I am a resident of West Hoboken'."

Now, as to the law on the subject of domicile. Every man, woman and child has a domicile of origin. He may, however, choose another domicile for himself, but if he abandons his domicile of choice without adopting another domicile in the manner prescribed by law, then his domicile of origin becomes his domicile. So that in this case, if the testator, when he left West Hoboken in 1896, had no intention of returning (*animo revertendi*) and did not take up such a residence in New York or elsewhere (*animo manendi*), then his domicile would revert to his place of birth, namely, Lyon, France.

"Domicile can only be changed *animo et facto*, and residence alone, although decisive as to the *factum* is an equivocal act as to the *animus*."

"Domicile imports an abiding and a permanent home and not a mere temporary one."

"The acquisition of a new domicile involves the abandonment of the previous domicile, and to effect the change, the *animus* of abandonment must be shown."

Jopp v. *Wood*, 4 *De G. J. & S.* 616; 4 *N. R.* 422; 34 *L. J. Ch.* 212.

"A change of domicile must be a residence *sine animo revertendi*. A temporary residence or business does not change the domicile. Also (1) every presumption is to be made in favor of the original domicile; (2) no change can occur without an actual residence in a new place; and (3) no new domicile

can be obtained without a clear intention of abandoning the old."

"A mere change of residence, however long continued, does not effect a change of domicile in a testamentary sense, unless there is also an intention to change the domicile or throw off his native country, as, for example, if an Englishman goes to France, he must not only reside in France but intend to become a Frenchman instead of an Englishman, before his domicile will be held changed." (See *Mews English Case Law Digest, Vol.* 8, *p.* 234, *etc., title "Domicile."*)

"The onus of proving a change of domicile is on the party alleging it." (*Monroe* v. *Douglas,* 5 *Madd.* 379.)

"No length of residence without the intention of remaining will constitute domicile."

See *Stout* v. *Leonard,* 37 *N. J. L.* (8 *Vr.*) 492; *Cadwalader* v. *Howell,* 18 *N. J. L.* (3 *Harr.*) 138; *Valentine* v. *Valentine,* 61 *N. J. Eq.* (16 *Dick.*); 400 *Crawford* v. *Wilson,* 4 *Barb.* 504, *at* 518; *Matter of Thompson* v. *Wend.* 46; *Frost* v. *Brisbin,* 19 *Wend.* 13; *Haggart* v. *Morgan,* 5 *N. Y.* 422, *at* 427; *Matter of White,* 116 *App. Div.*, 183; *Matter of Newcomb,* 192, *N. Y.*, 238; *Flatauer* v. *Loser, N. Y. App. Div. First Department, May* 16, 1913; *also, the recent English case of Huntley* v. *Gaskell,* 1906 *App. Cas.*, 56; *Watkinson* v. *Watkinson,* 68 *N. J. Eq.*, 632.

A careful study of the evidence entirely satisfies me that the testator was domiciled in New Jersey at the time of his death Actions do speak louder than words, and the courts place greater reliance on them, but I see nothing in Mr. Givernaud's actions to contradict his statements regarding his domicile. For convenienc sake he made New York his headquarters, after the year 1896, when he was in this section of the country, but I cannot see that he ever made it his home in any sense of the word. True,

he spent very little time in New Jersey after 1896, except to attend to his business here, but I am entirely satisfied that he never had any intention of abandoning his domicile in New Jersey, and never, for an instant, formed any intention of remaining indifinitely in any other State or country. Having reached this conclusion, the case is disposed of, and there is nothing further necessary to be said in the matter, and no reason exists for the Court to pass upon the other questions which have been raised.

Filed February 5, 1916.

ROBERT H. McADAMS,
Clerk.

In Chancery of New Jersey.

Between

David F. Plahn, as Administrator, Substituted for Jeanne Marie Josephine Givernaud and Naomi Josephine Marie Genin,
Complainants,

and

Anita Variel et als.,
Defendants.

} On Bill, etc.

FINAL DECREE.

This cause coming on to be heard in the presence of Besson Alexander & Stevens, solicitors, and Maurice Leon, Esq. (of the New York Bar), of counsel with complainants, and Collins & Corbin, solicitors and of counsel with the defendants Charles L. Givernaud, May Regine Givernaud and Thomas A. Kennedy, surviving executor and trustee of the last

will and testament of Louis Givernaud, deceased; John S. Mabon, solicitor and of counsel with the defendants, French Benevolent Society, Italian Benevolent Institute of New York, Anita Variel, Joseph Givernaud, Alaska Givernaud Aiken and Lily Givernaud Short, and David F. Plahn, solicitor and of counsel with Naomi Josephine Marie Givernaud Genin, guardian *ad litem* of the infant defendants Marie Joseph Paul Henri Genin, Marie Josephine Mareianne Martha Genin and Marie Joseph Laurent Maurice Genin; and the pleadings and proofs having been heard and the argument of the respective counsel having been had, and the Court having duly considered said pleadings, proofs and argumnets, and it appearing to the Court that the complainants are not entitled to the relief sought and prayed for by the bill of complaint;

It is, on this eleventh day of February, 1916, by Edwin Robert Walker, Esq., Chancellor of the State of New Jersey, ordered, adjudged and decreed that the complainants' bill be and the same is hereby dismissed, with costs to be taxed.

E. R. WALKER,
Chancellor.

Respectfully advised,
VIVIAN M. LEWIS,
Vice Chancellor.

Filed February 15, 1916.
ROBERT H. McADAMS,
Clerk.

In Chancery of New Jersey.

Between

David F. Plahn, as Administrator Substituted for Jeanne Marie Josephine Givernaud; Joseph Givernaud and Naomi Josephine Marie Genin,

Complainants,

and

Anita Variel et als.,

Defendants.

On Bill, etc.

NOTICE OF APPEAL.

The complainants, David F. Plahn, as administrator substituted for Jeanne Marie Josephine Givernaud; Joseph Givernaud and Naomi Josephine Marie Genin, hereby appeal from the whole and every part of the final decree made herein on the eleventh day of February, nineteen hundred and sixteen, to the Court of Errors and Appeals of the last resort in all causes.

BESSON, ALEXANDER & STEVENS,
Solicitors of Complainants.

I conceive there is good cause for appeal in the above-stated cause.

J. W. RUFUS BESSON,
Of Counsel with Complainants.

Service of a copy of the within notice of appeal is hereby acknowledged this twelfth day of May, A. D. 1916,

Charles L. Givernaud, May Regina Givernaud and Thoams Kennedy, surviving executors of the last will and testament of Louis Givernaud, deceased,

By COLLINS & CORBIN,
Solicitors for said Defendants.

French Benevolent Society, Italian Benevolent Institute of New York, Anita Variel, Joseph Givernaud, Alaska Givernaud Aiken, Lily Givernaud Short,

By JOHN S. MABON,
Solicitor.

Naomi Josephine Givernaud Genin, guardian *ad litem* of the following infants: Marie Joseph Paul Henri Genin, Marie Josephine Marcianna Martha Genin and Marie Joseph Laurent Maurice Genin,

By DAVID F. PLAHN,
Solicitor.

Field May 15, 1916.
ROBERT H. McADAMS,
Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN
DAVID F. PLAHN, AS ADMINISTRATOR SUBSTITUTED FOR JEANNE MARIE JOSEPHINE GIVERNAUD; JOSEPH GIVERNAUD AND NAOMI JOSEPHINE MARIE GENIN,
Complainants, Appellants,

AND

ANITA VARIEL ET ALS.,
Defendants, Respondents.

} On Bill, etc.

PETITION OF APPEAL.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of David F. Plahn, as administrator substituted for Jeanne Marie Josephine Givernaud, Joseph Givernaud and Naomi Josephine Marie Genin, the appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrived by a certain order made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the eleventh day of February, nineteen hundred and sixteen, in a cause therein pending wherein your petitioners were complainants, and Anita Variel and others, were defendants;

That in and by the said order, it is ordered, adjudged and decreed that the complainants' bill be, and the same is thereby dismissed, with costs to be taxed.

And your petitioners humbly appeal from the said decree, upon the ground that the same is erroneous, for that the said bill should not have been dismissed, nor should the same have been dismissed with costs, but, on the contrary, the said bill should have been

retained, and all the relief thereby and therein prayed should have been granted to your petitioners.

Your petitioners therefore pray that the said decree of the said Chancellor may be reversed, set aside and for nothing holden.

And your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

BESSON, ALEXANDER & STEVENS,
Solicitors for Appellants.

J. W. RUFUS BESSON,
Of Counsel.

Service of a copy of the within Petition of Appeal is hereby acknowledged this 12th day of May, A. D. 1916.

Charles L. Givernaud, May Regina Givernaud and Thomas Kennedy, surviving executors and trustees of the last will and testament of Louis Givernaud, deceased,
By COLLINS & CORBIN,
Solicitors of said Defendants.

French Benevolent Society, Italian Benevolent Institute of New York, Anita Variel, Joseph Givernaud, Alaska Givernaud Aiken, Lily Givernaud Short,
By JOHN S. MABON,
Solicitor.

Naomi Josephine Marie Givernaud Genin, Guardian *ad litem* of infants Marie Joseph Paul Henri Genin, Marie Josephine Marcianne Martha Genin and Marie Joseph Laurent Maurice Genin,
By DAVID F. PLAHN,
Solicitor.

Filed May 16, 1916,
THOMAS F. MARTIN,
Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

DAVID F. PLAHN, AS ADMINISTRATOR SUBSTITUTED FOR JEANNE MARIE JOSEPHINE GIVERNAUD; JOSEPH GIVERNAUD AND NAOMI JOSEPHINE MARIE GENIN,

Appellants,

AND

ANITE VARIEL, JOSEPH GIVERNAUD, ALASKA GIVERNAUD AIKEN, LILY GIVERNAUD SHORT, FRENCH BENEVOLENT SOCIETY, ITALIAN BENEVOLENT INSTITUTE OF NEW YORK, CHARLES L. GIVERNAUD, MAY REGINA GIVERNAUD AND THOMAS A. KENNEDY, SURVIVING EXECUTOR AND TRUSTEE OF THE LAST WILL AND TESTAMENT OF LOUIS GIVERNAUD, DECEASED,

Respondents.

On Appeal from Chancery.

ANSWER TO PETITION OF APPEAL.

The answer of the above-named respondents to the petition of appeal of the above-named appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree, called in the ptition of appeal an order, was, on the eleventh day of February last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and

believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

JOHN S. MABON,

Solicitor for and of Counsel with Respondents, Anita Variel, Joseph Givernaud, Alaska Givernaud Aiken, Lily Givernaud Short, French Benevolent Society, and Italian Benevolent Institute of New York.

COLLINS & CORBIN,

Solicitors for and of Counsel with Respondents, Charles L. Givernaud, May Regina Givernaud, and Thomas A. Kennedy, Surviving Executor and Trustee of the Last Will and Testament of Louis Givernaud, Deceased.

Filed June 26, 1916.

THOMAS F. MARTIN,

Clerk.

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New Jersey Court of Errors and Appeals.

Between DAVID F. PLAHN, as administrator of JEANNE MARIE JOSEPHINE GIVERNAUD, deceased, JOSEPH GIVERNAUD, and NOEMI JOSEPHINE MARIE GENIN, Complainants-Appellants, AND ANITA VARIEI, et als., Defendants-Respondents.	On Appeal from Final Decree of Chancellor.

BRIEF FOR THE RESPONDENTS.

Effect of Other Litigation Between the Parties.

This is an appeal by the complainants below, whose bill of complaint was dismissed by the decree of the Chancellor, upon the advice of Lewis, V. C., whose opinion is reported in 97 *Atlantic Reporter*, 49. Before the hearing of this suit in Chancery, Vice Chancellor Stevenson had advised a decree dismissing a bill filed by Jeanne Marie Josephine Givernaud, one of the complainants in this cause, whose object was to set aside a decree of divorce entered against her at the suit of Louis Givernaud, in Chancery of New Jersey, in the year 1872. Vice Chancellor

New Jersey State Library

Stevenson's opinion is reported in 81 *N. J. Eq.* 66. Since the appeal was taken in the case at bar, this Court has dismissed an appeal taken from the decree advised by Vice Chancellor Stevenson (85 *N. J. Eq.* 201).

The effect of the dismissal of Mme. Givernaud's bill to set aside the decree of divorce was to settle forever the fact that she was not the widow of Louis Givernaud after his death in 1908, and not entitled to any part of his estate, as his widow, if he died intestate; and to settle the legitimacy of Charles L. Givernaud, the son of Louis Givernaud by his second wife.

The appellants' case now before this Court is so far modified by the final settlement of the validity of the divorce, that David F. Plahn, as administrator of Jeanne Marie Josephine Givernaud, one of these appellants (Mme. Givernaud having died pending the suit in Chancery), has no longer any standing in Court, or any interest in the subject matter of this suit. The theory of the bill is that if, as is alleged, Louis Givernaud died intestate, because his last will and testament was void under the law of his domicile, Jeanne Marie Josephine Givernaud was (and her administrator is) entitled to one-third of his estate, under the statute of distributions of that domicile, *as his widow*. Hence the bill was properly dismissed as to her in any event, and the decree of the Chancellor so far as the appellant Plahn is concerned should be sustained by this Court without any examination of the merits of the appeal.

The determination of the legitimacy of Charles L. Givernaud likewise affects the claims of the

other appellants in this cause. They claim by the bill to be the only two legitimate children of Louis. Whatever may be thought of the merits of their appeal, their claims must be reduced by one-third in favor of Charles.

The Questions Before This Court, on This Appeal.

Coming to the merits of the case, it should be observed that the bill is brought to have it declared that certain trust provisions in the last will and testament of Louis Givernaud are void, and that the executors and trustees named therein be directed to account and pay over, &c. It is not strictly speaking, therefore, a suit "for the construction of the will," as appellants style it. (App. Brief, p. 1, l. 24).

The theory of the bill is that Louis Givernaud was domiciled in New York City at the time of his death, hence that the law of New York applies in determining the validity of his will, that under the New York statutes limiting the suspension of alienation the trust scheme of Louis Givernaud's will is void, hence that he died intestate, and that under the New York law of intestacy the widow is entitled to one-third, and the children to two-thirds, of the personal property.

It will be noted that appellants' case turns first on the question of domicile They have undertaken to prove that New York was testator's domicile at the time of his death. Otherwise, it is conceded that his will is valid and legal. The decision below was that the testator's domicile was New Jersey, and the legal questions raised and argued below were therefore not considered by the Court.

The questions before this Court, then, are two:

1. Was Louis Givernaud domiciled in New York at the time of his death?

The Vice Chancellor found, as a determination of fact, that he was not domiciled in New York. If this Court sustains that finding, the other question is irrelevant.

2. Is the testamentary trust contained in the last will and testament of Louis Givernaud void under the New York law forbidding the suspension of alienation for a longer period than two lives in being at the time of the testator's death?

POINT I.

Louis Givernaud was not domiciled in New York at the time of his death, January 2, 1908.

The Burden on the Appellants.

Appellants ask this Court to reverse the Chancellor upon a finding of fact. Domicile being a question of intention, the testator's intent was not merely evidential, but was itself the fact in issue, the separate and controlling element of the legal situation.

III *Wigmore*: *Evidence,* Section 1727.

Hence, we are concerned with an inference of fact. The various facts testified to in the case, by the witnesses on both sides, form a mass of evidence not wholly to be reconciled in all its parts. Appellants say that there are no facts in dispute (App. Br., p. 2, l. 11), which is true only in a narrow sense, for while no concrete fact has been categorically denied, the evidence as a whole shows certain inconsistencies and conflicts. This mass of evidence forms the basis of an inference of fact adopted by the Vice Chancellor. The appellants insist that another, and the very opposite, inference should have been adopted from the same mass of evidence. The situation is therefore the same as though the facts themselves were in dispute.

2 R. C. L., *"Appeal and Error,"* §173.

Where different inferences are reasonably deducible from a state of facts, the judgment of

the trial court depends upon the credibility of the witnesses before him to as great a degree as when the testimony itself is conflicting.

Magie, C. J., in a case in this Court where the evidence below had been conflicting, said: "As the decision thereon must have depended upon the credit given to the witnesses, I feel unable to say that the Vice Chancellor, who saw and heard the witnesses, was wrong in his conclusion."

Riddle v. *Clabby,* 59 N. J. Eq., 573, 583.

The Vice Chancellor says in his opinion (p. 277, l. 31): "A careful study of the evidence *entirely satisfies* me that the testator was domiciled in the State of New Jersey at the time of his death." (Italics ours.) There was no doubt in the mind of the Vice Chancellor, after seeing and hearing the witnesses Should any doubt arise upon the evidence as printed in the record, it should be resolved against the appellants, and the greater the positiveness of the Vice Chancellor's conviction, the greater should be the deference paid to it by this Court, and the stronger should be the force of his conclusion.

A Statement of the Facts.

The testator was a naturalized citizen of the United States. He was born at Lyon, France, on April 21, 1835. In 1866 he came to America and established himself in West Hoboken, Hudson County, New Jersey. On October 3, 1870, at Hudson County, New Jersey, he declared his intention of becoming a citizen of the United States (Ex. D5, page 269) and on October 31, 1872, at Hudson County, New Jersey, a certificate of

naturalization was duly issued to him (Ex. D6, p. 269). Prior to his immigration he had been a citizen of France Upon his declaration of intention and subsequent naturalization West Hoboken became his domicile and it is conceded that West Hoboken continued to be his domicile down to the year 1896. (App. Brief, p. 41, l. 12).

During those 30 years (1866-1896) he had divorced his French wife, who was one of the complainants in this suit, and for whom, upon her death *pendente lite,* David F. Plahn, as her administrator was substituted and is now one of the appellants. This divorce was attacked by her in the courts of this State, without success, as we have already stated. Givernaud established silk mills or factories at West Hoboken, Hackensack and Homestead, and became prosperous. He married again and had a child by the second marriage, Charles, who is himself married. He lived with his wife at the corner of Spring and High Streets, West Hoboken, and for many years devoted himself to building up his business.

As he became successful and prosperous, he gave himself up more and more to the theatre and similar amusements, and to travel. By the year 1896 he had acquired the habit of attending the theatre in New York almost every night, returning late to his home in West Hoboken. His companion on these evenings was Dr. Torrilhon. In the winter of 1895-1896 while returning from the theatre one night to his home in West Hoboken, Givernaud and his companion were caught in a heavy snow storm. Dr. Torrilhon testified (p. 187):

> "From the corner of Palisade Avenue to his house, which was about 2 blocks away, it took us nearly 2 hours—and I had to really

help him, almost drag him along. When he got home he said, 'I cannot stand these rough nights any more; I like my theatre, so I think that next winter I will take a room in a hotel, or somewhere in New York, so that I can enjoy my theatre.' "

The summer of 1896 was spent by Givernaud in Atlantic City, where he went in June and stayed until September (p. 187, l. 40), and in the autumn of 1896 he decided to go to New York, and asked Dr. Bertini and Dr Torrilhon to look up an apartment for him, which they did, and rented in Dr. Bertini's name, at the Von Hoffman, in 26th Street. This apartment consisted of two rooms. Givernaud told Torrilhon that "he just wanted it in case he stayed late in New York," and in answer to a question whether he was going to become a citizen of New York, "Never; my home is in West Hoboken, and I stay there."

The West Hoboken house belonged to Givernaud's wife, and she continued to live there until 1898, when she sold it and moved to New York, but not to live with her husband. They were uncongenial and the testator never lived with her after she left West Hoboken in 1898, although he used to take meals with her occasionally.

Givernaud's business interests continued, however, to be in West Hoboken and Homestead. Every day of his life, except when he was traveling, he visited his mills in West Hoboken (p. 226, l. 8). His brother lived in Homestead, near by, and a room was set apart for the testator there which was called "Mr. Louis' room." He had changes of clothing and the exclusive use of a bedroom there. He referred to his brother's house as his "business headquarters."

For about a year Givernaud kept his two room apartment at the Von Hoffman. After giving up the apartment he secured another small apartment in West 34th Street, which he kept a few months. Neither of these apartments had housekeeping facilities. During this period he was away more than half the time In 1899 his son Charles was married and Givernaud went to stay with him and his wife at the Powhattan, in West 34th Street. Givernaud was seldom there. Appellants' witness Nelson says: "He was very little home; he was mostly on the go all the time" (p. 66, l. 15). This apartment was rented by Charles L. Givernaud (p. 193, l. 30) during Givernaud's absence in Paris. Thereafter, he continued to visit his son Charles, at the various apartments in New York and California which Charles rented, during the intervals between his travels, which travels occupied three-fouths of his time (Appellants' witness Braubach, p. 107, l. 18).

None of these were permanent residences, so far as Givernaud was concerned. The first two were bachelor apartments, without housekeeping arrangements. The testator always supported his son Charles, and of course furnished the money with which Charles paid the rent of his several apartments. There is no evidence that Givernaud paid the rent direcly. The Powhattan apartment was leased by Charles in the testator's absence. The next apartment which Charles rented, the Raymore, was leased to Charles' wife. Givernaud spent very little time at any of these apartments. All of these apartments were chosen by Charles (p. 199, l. 40).

It is in evidence that Givernaud was absent from New York almost all of his time. In the Spring of 1897 he went to Hot Springs, Arkansas,

and to Nashville. On January 27, 1898, he left for California, via Hot Springs, returning April 21, 1898, and after a stay of two weeks in New York during which he was in West Hoboken every day, he visited his brother at Homestead, and then went to Atlantic City for the summer. The following winter he spent in California and New Orleans, and immediately upon his return left for Paris, returning in the autumn of 1899. The winter of 1900 was again spent in California where he remained until May or June, and whence he visited Hot Springs, and Glenwood Springs, Colorado. He spent the summer of 1900 in Atlantic City. In October he went to Hot Springs, Virginia, and in January, 1901 to California, Honolulu and Japan. returning in July to Atlantic City for the summer. The winter of 1901-1902 was spent at Hot Springs and in Cuba, followed by a long trip to Spain, the Canary Islands and France. Returning in July, 1902, the summer and autumn were spent automobiling and at Atlantic City, and he then went to Los Angeles where he stayed until June, 1903. The winters of 1905, 1907 and 1908 were likewise spent in California, until his death

Between these trips, he frequently stayed at his brother's house in Homestead, for a night or two at a time, and was in West Hoboken every day.

The Argument as to Domicile: *Facts.*

Appellants contend that when Givernaud left West Hoboken in 1896 he not only intended to abandon it as his domicile, but intended also to adopt New York as his domicile. The burden is upon them to prove both of these elements, to establish the *animus*, and to prove the residence in New York as the *factum*.

Watkinson v. *Watkinson,* 68 N. J. Eq. 632.

Appellants have not proved the *factum.* Givernaud spent only a small portion of his time in New York, and only at temporary places of residence. He spent more time in California than in New York His chief place of residence after 1896 was in California rather than in New York.

Appellants have failed to prove that Givernaud ever had *animum manendi* as to New York.

The facts show quite the opposite:

1. *Residence.* Givernaud, as we have shown, resided the greater part of his time, when he did not travel, in California. His residence in New York was of a temporary character, always.

2. *Specific parol declarations of residence.* Mr. Abel I. Smith, Givernaud's counsel, testified to a conversation which took place between them in November, 1907, on the occasion of the drawing of Givernaud's last will and testament. Mr. Smith said to Givernaud:

"Mr. Givernaud, as I know, you have always lived in West Hoboken, and it is proper for me to ask you whether you have changed your residence." He replied, "No, I have not changed my residence; my domicile is here, and I have not changed it," and went on to say that he was very much interested in West Hoboken because all his business success had grown out of his going to that place, and that he owned a lot in Weehawken Cemetery, and when he died expected to be buried there (pp. 162-164).

Several such declarations were also testified

to by Dr. Torrilhon, one on the occasion of Givernaud's first determination in 1896 to take a room in New York: "He said he just wanted that in case he stayed late in New York; I asked him if he was going to leave his house to become a citizen of New York City, and he said 'Never; my home is in West Hoboken, and I stay there.'" In 1898, when Givernaud's wife sold the West Hoboken house, Torrilhon asked him: "What are you going to do now; shall you make New York your residence?" and he replied "No, I never intend to live in New York." He said that he had an aversion to becoming a resident of New York, positively; "he told me that positively, twenty times; he said he was going to remain a resident of West Hoboken," and that his brother's house at Homestead was his business headquarters for the future (pp. 190-191). In 1907, when he was about to leave for California, he said to Torrilhon: "Good bye, Bill, you may think a little better of me if you find I have left you a few hundred dollars in my will;" to which Torrilhon replied, "Have you made another will?" Givernaud said "Yes." Torrilhon asked: "Where, in New York?" And Givernaud replied, "No. In New Jersey; you know I am always a resident of New Jersey" (pp. 200-201). Torrilhon says that Givernaud always spoke of each of the various New York apartments as "My son's apartment" (p. 201).

Again, in 1907, Givernaud had bought a house in California, in his son's name, and when asked if he was not now a resident of California, he replied, "Not a bit; I am a resident of West Hoboken" (p. 202).

Torrilhon testified in general (p. 207) that Givernaud "always said he lived in West Hobo-

ken; he always said his home was in West Hoboken."

There is no declaration made by Givernaud as to his domicile which does not show his positive and unchanging intent to have been to retain West Hoboken as his domicile, save the one referred to by the Vice Chancellor in his opinion (p. 273, l. 35). This was testified to by Joseph Braubach alone. Braubach was appellants' witness, and had been a servant of Givernaud. He said that he overheard Givernaud, in 1896, say to two gentlemen in New York (whose names he does not remember) that he was glad he was through with West Hoboken.

As to this declaration, the inference adopted by the Vice Chancellor that it might mean "I am glad I don't have to go back there nights" was reasonably deducible in view of all the facts (p. 273, l. 35—p. 274, l. 3).

3. *Written declarations of residence.* There are several written declarations of residence proved in the case, and without exception they point to New Jersey as the domicile. The will itself (p. 7, l. 38) executed November 4, 1907, recites "I, Louis Givernaud, of West Hoboken, Hudson County, New Jersey." The same recital was contained in Givernaud's wills previously made, one in 1898, and two in 1905 (pp. 165-166), and in a deed of Givernaud's executed in 1905 (exhibit, Collins 6), and in a deed to George Scott executed in 1898 (Exhibit D8).

On April 20, 1898, Givernaud made the "tax affidavit" (Exhibit A.B.1) in which he swore that he was a resident of New Jersey, giving as his place of residence the house at Spring and High Streets, West Hoboken, where his wife

still resided. It was natural and proper that he should have regarded it as his domicile.

Brewer v. *Linnaeus,* 36 Me. 428.
Topsham v. *Lewiston,* 74 Me. 236.

Shortly after making the "tax affidavit" on January 14, 1899, Charles was married. Up to this time Louis' two "apartments" in New York were merely places to sleep, without cooking arrangements. Upon Charles' marriage, Louis gave up his apartment and visited Charles, here and there, wherever Charles and his wife went.

Without any declarations by Louis, it would be difficult from the evidence above detailed, and from the evidence of his habits, methods of life and social and business activities (which are carefully described in the Vice Chancellor's opinion) to say that his intention ever was to keep New York as his home. In view of his many and very specific declarations of intent, such a conclusion, we submit, is impossible; for these declarations, oral and written, are controlling, unless it affirmatively appear by other evidence in the case that they are untrue.

Dabaghian v. *Kaffafian,* 71 N. J. L. 115.

Chancellor Walworth said:

> "The declarations of the party himself, where he can have no object or inducement to falsify the truth or to deceive those to whom such declarations are made, are the best evidence of his intention—."
>
> *Cath. Roberts' Will,* 8 Paige Ch. 519.

Written declarations are of course especially valuable evidence. The description of his residence given by a person in deeds or other legal

documents has often been received as evidence that he is there domiciled.

Jennison v. *Hapgood,* 10 Pick. 77.
Lord v. *Colvin,* 4 Drew. 366, 409; 28 L. J. Ch. 361; 5 Jur. (N. S.) 351; 7 W. R. 250.
Prothier: *Intr. aux. Cont.* d'Orlèans, No. 20.

And similar declarations in wills are of great weight, especially where the controversy arises over the estate.

Att'y Gen'l v. *Pottinger,* 6 Hurl. & Nor. 733; 30 L. J. Ex. 284; 7 Jur (N. S.) 470; 9 W. R. 578; 4 L. T. 368.
Lyall v. *Paton,* 25 L. J. Ch. 746.
Drevon v. *Drevon,* 34 L. J. Ch. 129.
Ennis v. *Smith,* 14 How. 400 (20 U. S. 251).
Ward v. *Oxford,* 8 Pick. 476.
Carey's Appeal, 75 Pa. St. 201.

The form of the will is important. Where its provisions are valid under the laws of one state, and invalid according to the law of another, and where this fact is within the knowledge of the testator, the form of the will is the very highest and most cogent evidence that the testator was domiciled in the State under whose laws it is valid.

Guier v. *O'Daniel,* 1 Binn. 349, note.
Cole v. *Cheshire,* 1 Gray 441.

The Argument as to Domicile: *Law.*

All the authorities and the tenor of all the decisions on the subject is to the effect that resi-

dence and domicile are entirely distinct from each other; that domicile is not synonymous with residence, the former including residence with an intention to remain in a particular place; that a man may have a number of residences but can have only one domicile; that mere sojourn in a place does not give one a domicile there; that while a man can have but one domicile for one and the same purpose at any one time, he may nevertheless have numerous places of residence; that while his place of residence may also be his place of domicile it is by no means necessarily so, for no length of residence without the intention of remaining will constitute domicile; that a temporary residence or place of business does not change the domicile; that a man can change his residence as often as he pleases without affecting his domicile unless there is a clear intention of abandoning the old domicile and acquiring a new one at the place of his new residence; and that the burden of proving a change of domicile is on the party alleging it.

In *Cadwalader* v. *Howell*, 18 N. J. Law (3 Harr.) 138, it was held that the residence required in the laws of this State, to entitle a person to vote at an election, means his *fixed domicile*, or *permanent home;* and is not *changed* or *altered* by his occasional absence, with or without his family, if it be *animo revertendi.* A residence in law *once* obtained, *continues* without intermission until a *new* one is gained.

Justice Dayton in the opinion rendered in this case says, amongst other things (page 145):

> "The place where a man is commorant, may perhaps be properly considered as prima facie, the place of his legal residence; this

presumption, however, may be easily overcome by proof of facts to the contrary. If a person leave his original residence, *animo non revertendi,* and adopt another (for a space of time, however brief, if it be done) *animo manendi,* his first residence is lost. But if in leaving his original residence, he does so, *animo revertendi,* such original residence continues in law notwithstanding the temporary absence of himself and family. Such is the uniform language of the books, as well as the clear conclusion of common sense."

Stout v. *Leonard,* 37 N. J. Law (8 Vr.) 492, arose under the Attachment Act in this State. The Chancellor in delivering the decision of the Court, after reviewing the facts, uses these words:

"Residence is not domicil, though domicil is the legal conception of residence. Domicil is residence combined with intention. It has been well defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. A man can have but one domicil for one and the same purpose at any one time, though he may have numerous places of residence. His place of residence may be, and most generally is, his place of domicil, but it obviously is not by any means necessarily so, for no length of residence without the intention of remaining will constitute domicil."

See *Mews' English Case Law Digest,* Vol. 8, page 234, &c., title "Domicile," wherein the following language is used:

"A mere change of residence however long continued does not affect a change of domicil in a testamentary sense, unless there is also an intention to change the domicil or throw off his native country, as, for example,

if an Englishman goes to France, he must not only reside in France, but intend to become a Frenchman instead of an Englishman, before his domicil will be held changed."

"A change of domicil must be a residence *sine animo revertendi.* A temporary residence or business does not change the domicil. Also (1) every presumption is to be made in favor of the original domicil; (2) no change can occur without an actual residence in a new place; and (3) no new domicil can be obtained without a clear intention of abandoning the old."

The Lauderdale Peerage, 10 App. Cas. 692 (House of Lords).

"Prima facie, the place of residence is the place of domicil, but that may be rebutted or supported by circumstances."

Bempde v. *Johnstone,* 3 Ves. Jr. 198.

"The strongest intention to change a domicil, and actual abandonment of residence, will not deprive a man of that domicil unless he has acquired another."

Forbes v. *Forbes,* Kay 341. 2 Eq. R. 178. 23 L. J. Ch. 724. 18 Jur. 642. 2 W. R. 253.

"For the purpose of succession, where there is an undoubted domicil of origin continued through many years, such domicil will be held to have been retained unless there is evidence of an intention to abandon it, accompanied by acts sufficient to found the acquisition of a new domicil."

Crookenden v. *Fuller,* 1 Sw. & Tr. 441. 29 L. J. P. 1. 5 Jur. (N. S.) 1222. 1 L. J. 70. 8 W. R. 49.

"A domiciled Scotchman not in the service or employ of the Indian Government went

to India and resided there for the purpose of his private business, always, however, retaining the wish and intention of returning finally to Scotland. Held, that he never lost or intended to lose his original Scotch domicil."

Jopp v. *Wood,* 4 De G. J. & S. 616; 34 Beav. 88; 5 N. R. 422; 34 L. J. Ch. 212; 11 Jur. (N. S.) 212; 12 L. T. 41; 13 W. R. 481.

"Domicil can only be changed animo et facto and residence alone although decisive as to the factum, is an equivocal act as to the animus." Ib.

"Domicil imports an abiding and a permanent home and not a mere temporary one." Ib.

"The acquisition of a new domicil involves the abandonment of the previous domicil, and to effect the change the animus of abandonment must be shown." Ib.

"For many purposes a domicil of origin requires more to change it than a domicil of acquisition and in order to prove that the domicil of an adult of sound mind has been changed, an intention on his part must be shown."

Douglas v. *Douglas,* 41 L. J. Ch. 74. L. R. 12 Eq. 617. 25 L. T. 530.

"To constitute a new domicil there must be not only the factum of residence in a place. but the animus manendi." Ib.

"A British subject, domiciled and having real and personal estate in England, went abroad and purchased in 1821, the title, castle and estate of R in the papal states. He hired Italian domestics, male and female, whom he kept at R until his death. He expended large sums in repairing and improving the castle and grounds of R, his constant residence from 1828 to 1831, sometimes oc-

cupied it, sometimes lived in furnished lodgings in the town adjacent and at other times visited Rome, Florence and other parts of Italy, residing in furnished lodgings. In 1831 he came to England, and resided in different parts of it till September, 1832. In March, 1832, he made his will in London. In the same month he left England and went to Florence, where he remained two months, and thence to R. He then lived sometimes in the castle at R, somtimes in furnished lodgings in the adjacent town, till October, 1833, when he went to Rome and there lived in furnished lodgings till his death in February, 1834. Held, that upon these facts there was no evidence of the testator's having actually acquired a domicil at R or elsewhere abroad, although they indicated an intention to make R his domicil, that his English domicil therefore remained."

Att. Gen'l. v. *Dunn,* 6 M. & W. 511.

"An acquired domicil is not lost by mere abandonment, but continues until a subsequent domicil is acquired, which can only be animo et facto, unless the party dies in itinere towards an intended domicil."

Munroe v. *Douglas,* 5 Madd. 379.

"The onus of proving a change of domicil is on the party who alleges it."

Bell v. *Kennedy,* L. R. 1 H. L. 307.

"Where a domicil has been acquired the onus of proof to be deduced from all the facts and circumstances of the case lies on the person who desires to show that that domicil has been changed."

Maxwell v. *McClure,* 3 Macq. H. L. 852
6 Jur. (N. S.) 407. 2 L. T. 65.

"A testator made his will in England in 1843 and afterwards went to reside in

France where he died in 1850. On the question that an inquiry ought to take place, as it had been suggested that his domicil was French, held, that there was no ground for an inquiry, there being nothing to show that the testator's domicil was not English."

Harrison v. *Southampton Corporation,* 18 Jur. 669. 2 W. R. 659.

"Domicile" is not synonymous with "residence;" the former includes residence *with an intention* to remain in a particular place. Thus a man may have a number of residences, but can have only *one domicile.* Mere sojourn in a place does not give one a domicile there.

This has been the rule from the beginning.

Crawford v. *Wilson,* 4 Barb. 504, at 518.
Matter of Thompson, 1 Wend. 45.
Frost v. *Brisbin,* 19 Wend. 13.
Haggart v. *Morgan,* 5 N. Y. 422, at 427.

Three very recent New York cases are important, both as to facts and law.

The first is

Matter of White, 116 App. Div. 183.

The question here was whether the testator's estate was subject to the Decedent Estate Tax. The next of kin contended that testator was a non-resident, and that therefore the personalty was not taxable.

The facts shown were as follows: Testator was born in Newton, N. J. He lived there for about 25 years, and then removed to Newark, N. J., where he lived for 20 years, owning the house in which he lived. About 15 years before his death he broke up his home at Newark, spent the summer at Newton, and about Novem-

ber 1 came to New York, lived in a boarding house during the winter, and left New York again for New Jersey. Subsequently he generally spent his winters in New York. In the fall of 1903 he came to New York, boarding at a hotel, stayed there a few months, and left about March 1, 1904, taking up his residence in Newton, N. J. He died at Asbury Park, N. J., in August 1904, leaving no property in New York. He had voted in New York in 1900 and 1901, and had paid a personal tax for several years prior to his death *as a resident of New York*, and had described himself in some instruments executed by him as a resident of New York.

The court held that there was not sufficient proof that testator was a resident of New York at the time of his death, and that thereafter his estate was not subject to tax.

The second case is

Matter of Newcomb, 192 N. Y. 238.

This was a case involving the validity of a will which consisted largely of a trust of personal property. The question was as to whether the law of New Orleans or of New York should apply.

The testatrix went to live with her sister in 1837, where she finished her education and was married. She then went to Kentucky to live with her husband until 1862, when, owing to the confusion of the war, they moved to New York City, and resided at the Hoffman House until her husband died in 1866. Thereafter she continued to live in New York, at hotels and boarding houses until 1870, when her daughter died. She then devoted the bulk of her fortune to the foundation of a college at New Orleans, but continued to reside in New York. She made a few visits to New Orleans for a few weeks at a time. In

several instruments executed at this time she declared herself a resident of New Jersey. She wished for legal reasons to have Louisiana as her domicile, and under advice of counsel she filed there a declaration setting forth that she had made her permanent home at New Orleans. In 1899, while in New York, she purchased a house in New Orleans for her own use. She lived there a few months, but came North in the summer of 1900, and never returned. She died in New York City in 1901.

All three courts held that her *legal domicile* at the time of her death was *New Orleans.*

At page 250, the Court of Appeals says:

> "As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, *but only one domicile.* Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also *an intention to make it one's domicile.* The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. * * *
>
> "In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence, although continued for a long time, does not effect a change of domicile, while a change of residence, even for a short time, with the intention in good

faith to change the domicile, has that effect * * * Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile (citing cases from several different jurisdictions). There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. * * * Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention. No pretense or deception can be practiced for the intention must be honest, the action genuine, and the evidence to establish both, clear and convincing. The animus manendi must be actual, with no animo revertendi. A temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged, but even if the residence was begun for a temporary purpose, intention may convert it into a domicile. When a new domicile has been actually acquired, it does not necessarily revert, even if not followed by continuous residence. There may be many absences from the new place and protracted sojournings in the old, unless intention and residence unite again, when still another change of domicile is effected."

The third case is

Matter of Martin, 94 Misc. 81.

This was an appeal by the State Comptroller

from a final order of the Surrogate's Court of New York County (Judge Fowler), adjudging that Frederick Townsend Martin, deceased, was a non-resident of New York at the time of his death, and his estate therefore not subject to transfer tax. The question was one of domicile since under the New York Tax Law (section 220) residence is synonymous with domicile. The facts are closely analogous to those in the case at bar, and we therefore quote at some length the opinion of Smith, J., in which the facts are recited:

> "Frederick Townsend Martin was born in Albany in 1849 and remained there until 1885, when he removed to New York City and rented a house there. Some time previous to 1890 he gave up this house and thereafter when in New York he visited his sister or lived at the Murray Hill Hotel, and from 1907 on he occupied a suite of rooms at the Plaza. He always had the same rooms, and kept a few belongings there, but only paid for the suite during actual occupancy. Up to February, 1913, Mr. Martin always spent the winter, with the exception of an occasional trip to Palm Beach, in New York City. During the summer he went abroad, stopping in London hotels, and while in Paris living at an apartment which appears to have been furnished and maintained by Mr. Martin and his intimate friend, Mr. Sands.
>
> In February, 1913, while Mr. Martin was in New York City, his brother, Bradley Martin, died in London and Mr. Martin went over, returned to New York in April, but went back to England again in July and remained there until his death in London in March, 1914. In December, 1913, his friend, Mr. Sands, died leaving Mr. Martin his personal effects and $25,000 cash. Mr. Martin immediately gave up the Paris suite and purchased a house in England, to which

he removed Mr. Sands' and his own furniture and which he proceeded to fit up as a residence.

It is clear that Mr. Martin's domicile up to the purchase of this London house was New York, and the burden of proof rests on the party desiring to show a different one (matter of Newcomb, 192 N. Y., 238). The only fact tending to show another is the purchase of the London house, and there are a number of circumstances to explain or offset the significance of this fact.

In the first place, Mr. Martin seemed to consider himself under a duty to provide a home for Mr. Sands' collection, and in his letter of December 19, 1913, he refers to the London house as purchased solely for that purpose. The unfinished letter written just before his death to Mrs. Dewey is very significant as to his attitude toward his London house. It reads in part as follows:

'You will understand so well that it was a frightful disappointment to me to be forced by illness to give up my winter in my beloved land.

'I have bought the lease of a house in London for eight years, as Mr. Sands, who was my dear, devoted friend from boyhood, died in Paris last November quite suddenly and left me a legacy to buy the lease of a house where I could keep all the furniture and pretty things that we had bought during the long years of our friendship. I look upon it only as a storehouse to keep these things in, as nothing would induce me to live in Paris after his death. My home is in New York, where I am happier than in any other city in the world.

'Just think of it that I, an American, should have brought out a book that was the book of the year in England.'

"Then, on another occasion, he wrote, 'I think it is better for you to enter 6 Great Cumberland Place as my permanent address

as trustee to Lord Craven,' thus indicating that he considered it his permanent house only for a limited purpose.

Mr. Martin did nothing to transfer any of his business interests, etc., to London, and he allowed to stand his will previously made, which gave his residence as New York. On the whole the evidence seems definitely to show that Mr. Martin still considered New York City as his domicile, and, taking into consideration Mr. Martin's wealth and habits of life, the purchase of a private residence in a city where he was accustomed to spend a considerable portion of his time does not have the significance that would attach to a like action by a person of a less cosmopolitan character."

The law as above laid down is clearly the general common law. See the recent case of *Huntley* v. *Gaskell,* 1906 App. Cas. 56 (House of Lords). See also

Flatauer v. *Loser,* 156 App. Div. 591 (1913).

In this case one of the questions involved was as to the residence and domicile of the deceased and the Court held that while it should be assumed in said case that the decree of the Surrogate's Court conclusively established the fact of Flatauer's residence at the time of his death, it did not determine the question as to his domicile. Justice Scott in the decision rendered by the Court uses these words:

"As was recently said by the Court of Appeals: 'As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means liv-

ing in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile. The existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. * * * Mere change of residence, although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect.' (*Matter of Newcomb*, 192 N. Y., 238, 250). Following this well established rule this court has recently decided that a testator had retained his domicile in the City of New York under the facts proven as to his intention, notwithstanding he had for many years resided in Paris, France (*United States Trust Company* v. *Hart*, 150 App. Div., 413), quoting from *de Meli* v. *de Meli* (120 N. Y., 485), the statement that domicile may exist without actual residence, but never without intention."

It is submitted that there is no evidence in the case which would sustain a decree that Givernaud was domiciled in New York; that if there is such evidence there is also evidence that Givernaud was domiciled in New Jersey, and that the latter evidence is more cogent than the former; that if there be conflicting inferences reasonably deducible from the evidence, the Vice Chancellor's conclusion has the force of a conclusion based upon conflicting facts, and that the decree should be affirmed.

POINT II.

Under the laws of the State of New York the scheme of testator's will as contained in the ninth and tenth sections thereof is valid and legal; and the provisions of section eleven of said will, while invalid under the laws of the State of New York, are such that the Courts of New York would disregard them and lop them off, sustaining all other parts of the will.

Should the Court be of opinion that the Vice Chancellor erred in his conclusion, and that Louis Givernaud was domiciled in New York at the time of his death, it only remains to answer the appellants' contention that under the laws of New York the trust created in his will is illegal.

The will in question is as follows:

In the name of God, amen:

I, Louis Givernaud, of West Hoboken, Hudson County, New Jersey of sound and disposing mind and memory, do make, publish and declare this my last will and testament as follows:

First: It is my will and I do order that all my just debts and funeral expenses be paid as soon as convenienty can be after my decease.

Second: I give and bequeath to my son, Charles L. Givernaud, the sum of ten thousand dollars.

Third: I give and bequeath to May Regina Givernaud, wife of my son Charles L. Givernaud, the sum of ten thousand dollars.

Fourth: I give and bequeath to my two children (by my former wife) now living in Lyons, France, the sum of four thousand dollars each.

Fifth: I give and bequeath to Anita Variel, wife of William J. Variel, of Los Angeles, California, the sum of one thousand dollars.

Sixth: I give and bequeath to each of the persons hereinafter named, as a testimonial of my appreciation of the services rendered by them to me while in my employ, the following amounts: To Thomas A. Kennedy, the sum of two thousand dollars; to Oscar Vezin, Jr., the sum of two thousand dollars; to J. Andrew Ulrich, the sum of five hundred dollars; to Frank Hirt, the sum of five hundred dollars; to Alfred Torhillion, the sum of five hundred dollars, and to Katie Reilly, my cook, the sum of three hundred dollars.

Seventh. I give and bequeath to Laura H. Smith, wife of Abel I. Smith, as a remembrance from an old friend and client of said Abel I. Smith for over twenty-five years, my solitaire diamond ring now worn by me, said to be about four and five-eighths carats in weight.

Eighth: All the rest of the jewelry now worn or used by me, except the diamond ring aforesaid, all my furniture, pictures, household goods and wearing apparel and articles now in my personal use, I give and bequeath to my son Charles L. Givernaud.

Ninth: All the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, I give, devise and bequeath unto my executors hereinafter named, and to the survivor of them, in trust, for the following uses and purposes, viz.:

To invest the same as hereinafter provided, and to collect and receive the income accruing therefrom, and after deducting all lawful charges and expenses connected therewith, to pay the net income therein as follows:

1st: To pay to my sister, Marie Givernaud, for and during the term of her natural life, the sum of seven hundred and twenty dollars annually, in equal monthly payments, the first payment to accrue and be made one month after my death, or as soon thereafter as possible.

2d: To pay to Marie Camille Genin (formerly Marie Givernaud) of Lyons, France, for and during the term of her natural life, the sum of fifteen hundred dollars, annually, in equal monthly payments, the first payment to accrue and be made one month after my death, or as soon thereafter as possible.

3d: To pay to Anita Variel, wife of William J. Variel, of Los Angeles, California, for the term of her natural life, the sum of one thousand dollars, annually, in equal monthly payments, the first payment to accrue and be made one month after my death or as soon thereafter as possible.

4th: To pay to my nephew, Joseph Givernaud and to my nieces, Alaska and Lilly, children of my brother Theodore Givernaud, deceased, for and during the term of their natural lives, the sum of five hundred dollars each, annually, in quarter yearly payments, the first payment to accrue and be made one month after my death, or as soon thereafter as possible.

5th. To pay to my said son Charles L. Givernaud for and during the term of his natural life the sum of five thousand two hundred dollars annually, in equal weekly payments, the first pay-

ment to accrue and be made two weeks after my death or as soon thereafter as possible, and if my said son shall predecease his wife, May Regina Givernaud, to pay the same to his said wife during the term of her natural life in manner aforesaid.

6th: To pay to said May Regina Givernaud, for and during the term of her natural life, the sum of five thousand two hundred dollars, annually, in equal weekly payments, the first payment to accrue and to be made two weeks after my death, or as soon thereafter as possible, and if she shall predecease her said husband, Charles L. Givernaud, to pay the same to him during the term of his natural life, in manner aforesaid.

7th: At the expiration of one year, after my death, and annually thereafter at the expiration of each succeeding year, to pay over to my said son, Charles L. Givernaud and to his wife, May Regina Givernaud, during the term of their natural lives, in equal portions, share and share alike, the surplus (if any) of the said income from my estate which shall remain in the hands of my said executors and trustees undisposed of and unapplied; and upon the death of either to pay over the same in manner aforesaid, to the survivor during the term of his or her natural life.

8th: If at any time the annual income from my estate shall be insufficient to enable my said executors and trustees to pay the annual sums as hereinbefore mentioned and provided, then and in any such event, and while such insufficiency shall continue, I authorize and direct my said executors and trustees, out of the principal fund of my estate to pay to the said Marie Givernaud, Marie Camille Genin, Anita Variel, Joseph Giv-

ernaud, Alaska Givernaud, Lilly Givernaud, Charles L. Givernaud and May Regina Givernaud, so much thereof as shall be necessary to make the amounts annually paid to them (while said insufficiency of income shall continue) equal the said sums hereinbefore mentioned and provided.

Tenth: Upon the death of my said son and his said wife, my son leaving a lawful child or children him surviving, my trustees shall convey, assign, transfer and set over, my estate, real and personal, whatsoever and wheresoever, unto the lawful child of my said son, if only one, to have and to hold the same to him or her and his or her heirs and assigns forever; and to the children of my said son, if more than one, in equal portions, share and share alike, to have and to hold the same to them, their heirs, and assigns forever, in equal portions as aforesaid.

Eleventh: If upon the death of my said son and his said wife, he leave no lawful child or children him surviving, then and in that event the said income heretofore paid to my said son and his said wife, or the survivor of them, as hereinbefore provided, shall thereafter be annually paid by my trustees to my sister, Marie Givernaud. Anita Variel, the three children of my brother Theodore Givernaud, deceased, viz.: Joseph Givernaud, Alaska Givernaud and Lilly Givernaud, and the three children of Marie Camille Genin (whose Christian names are unknown to me) and the survivors of them in equal portions, share and share alike, during the term of their natural lives, the survivors to receive the whole of said income during his or her natural life, and upon the death of said survivor my trustees shall convey, assign, transfer and set over all my estate, real and personal, whatsoever and wheresoever, unto the "Ital-

ian Benevolent Institute" with its principal office now at 165 Houston Street, New York City, and the "French Benevolent Society of New York," with its principal office now at 450 West Thirty-fourth Street, New York City, to have and to hold the same to them, their successors and assigns, forever, in equal portions, share and share alike.

Twelfth: I hereby direct my trustees hereinafter named and the survivor of them and their successors in the trust, to invest and re-invest my said estate in such securities as executors and trustees may lawfully invest in under the laws of the State of New York; provided, however, that my said trustees are authorized to continue in their discretion such investment or investments as shall have been made by me.

Thirteenth: I hereby authorize and empower my trustees hereinafter named, and the survivor of them, and their successors in the trust, if any, to sell and convey any real estate of which I may die seized at such time and upon such terms as they shall deem proper and to invest and dispose of the proceeds and income thereof as I have heretofore directed.

Lastly: I hereby nominate, constitute and appoint my friends, the said Thomas A. Kennedy and Oscar Vezin, Jr., and the survivor of them, the executors and executor, trustees and trustee, of this my last will and testament, and direct that they shall not be required to give any bond or other security for the performance of the trusts reposed in them by this my will; and I further order and direct that they shall receive and retain for their services as such executors and trustees, in lieu of all commissions now allowed by law (in addition to the amount bequeathed to them respectively by the sixth clause of this my

will) the sum of one per cent. on all sums of principal and five per cent. on all sums of interest which shall come into their hands.

In case of the death, refusal or inability of both of said executors and trustees to serve, I hereby constitute and appoint the Hudson Trust Company, a corporation of the State of New Jersey, the executor of this my last will and testament and trustee thereunder, in the place of the executors and trustees above mentioned.

I hereby revoke any and all former wills by me at any time heretofore made.

In Witness Whereof, I have hereunto set my hand and seal the fourth day of November, nineteen hundred and seven.

LOUIS GIVERNAUD. (Seal)

In appellants' bill, their contention is pleaded as follows (page 4, line 8):

> "And your orators further show that the trust in said last will and testament is governed by and subject to the following provision of the personal property law of the State of New York, being section 2 of chapter 417 of the laws of 1897 of the State of New York, namely, 'Suspension of ownership.—The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; in other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property.'

"Your orators further show that, by virtue of the aforesaid statute of the State of New York, of which State the said deceased was a resident and in which he was domiciled at the time of his death and long prior thereto, the trust attempted to be created by the said last will and testament of the said deceased is void and of no effect—"

The burden is on the appellants to sustain the contention of their bill. They undertake to do so in point three of their brief, at page 54 & seq, and their argument may be summarized as follows:

1. If any one or more of the annuitants mentioned in the first four subdivisions of article ninth of the will should die before Charles Louis Givernaud and May Regina Givernaud, the income which otherwise would have been paid to such annuitant had he lived would become in the hands of the trustees "surplus income not disposed of and unapplied," and as such would go, under the seventh subdivision of paragraph ninth, to Charles L. Givernaud and his wife, and thus (they say) the power of alienation is suspended as to such annuity for the life of the beneficiary entitled to a life income, and for the lives of the two beneficiaries, Charles L. Givernaud and his wife; thus making a suspension of alienation for three lives instead of the permissible two lives.

2. Article tenth of the will is bad under the law of New York, because there was no one in being at the death of the testator capable of taking the remainder, so that there could be and was no estate in remainder vested; in other words, that there is an illegal suspension of alienation by virtue of the fact that the remainder cannot be vested immediately upon the death of the testator.

3. There can be no lopping off or separation of the eleventh clause, which is admittedly bad, under the laws of New York, because to do so would be to destroy the chief intention of the testator.

In order to present this matter clearly, the several elements which comprise the testamentary trust scheme should be separately considered as follows:

1. The annuities provided for in the ninth article.

2. The tenth article.

3. The admittedly illegal eleventh article so far as the question of separability is concerned.

A. The testamentary trust scheme so far as it provides for the payment of annuities by the provisions of the ninth article thereof is not bad under the New York statute as suspending the ownership for an undue period of time.

The law of the State of New York applicable to the situation is that mere annuities need not be extended beyond the two lives in being, but that upon the death of Charles and his wife the then present value of the annuities will be ascertained and paid in lump sums to the annuitants, and the fund freed from the claim of the annuitants and the remainder distributed according to law.

The New York Courts follow the rule that in case of doubt that construction should be adopted which will sustain the will. *Greene* v. *Greene*, 125 N. Y. 506.

Appellants' expert, Prof. Hardon, admits this rule (p. 129, l. 1):

> "Q. Now, don't the New York courts attempt to sustain a will, rather than declare it invalid?
>
> "A. Undoubtedly, I suppose courts of all States do."

In a very recent case in New York, *Matter of Fidelity Trust Company*, 94 Misc. 533 (March, 1916) the Court states the rule and the leading authorities for it as follows (p. 538):

> "It is a fundamental rule of construction that the testator's intention must govern, if it be a legal intention, that is to say, if it be not inconsistent with rules of law, statutory or otherwise. Therefore, it is the duty of the court to find out what the testator has meant to do with his property after his death, and then, if it be possible to ef-

fectuate his plan by a construction which will validate it, to do so. *Central Trust Co.* v. *Egleston,* 185 N. Y., 23; *Matter of Jones,* 75 Misc. Rep., 47.

"When the meaning of a testator is involved in doubt, and the provisions of his will are susceptible of two interpretations, one of which will sustain and the other defeat it, that construction is to be preferred which will uphold and sustain the will, because it is presumed to accord with the actual intention of the testator. *Roe* v. *Vingut,* 117 N. Y., 204; *Greene* v. *Greene,* 125 id. 512; *Jacoby* v. *Jacoby,* 188 id. 124; *Hopkins* v. *Kent,* 145 id. 363; *Trask* v. *Sturges,* 170 id. 482; *Seitz* v. *Faversham,* 205 id. 197; *Matter of Hinchman,* 141 App. Div., 95.

"The law favors a construction which will prevent partial intestacy. Redfield in his work on Wills, says: 'The courts have for a long time inclined very decidedly against adopting any construction of wills which would result in partial intestacy unless absolutely forced upon them. This has been done partly as a rule of policy, perhaps, but mostly as one calculated to carry into effect the presumed intention of the testator, for the fact of making a will raises a very strong presumption against any expectation or desire on the part of the testator of leaving any portion of his estate beyond the operation of his will.' *Schult* v. *Moll,* 132 N. Y., 127, and cases there cited. See, also, to the same effect, *Johnson* v. *Brasington,* 156 N. Y., 181; *Mills* v. *Tompkins,* 110 App. Div., 212."

It must also be remembered that if the principal disposition of the will can be upheld, ulterior, contingent limitations which though they violate all statutory rules respecting the ownership of property, if separable from the principal disposi-

tions, may and should be disregarded.

Henderson v. *Henderson,* 113 N. Y. 1.
Tiers v. *Tiers,* 98 N. Y. 568.
Harrison v. *Harrison,* 36 N. Y. 543.
DeKay v. *Irving,* 5 Den. 646.
Everitt v. *Everitt,* 29 N. Y. 39.
Downing v. *Marshall,* 23 N. Y. 366.
Chaplin on *Susp. of Power of Alienation,* 84.
Becker v. *Becker,* 13 App. Div. 342.
Cochrane v. *Schell,* 140 N. Y. 99.

In the case of *Buchanan* v. *Little,* 154 N. Y., 147 (Court of Appeals, October, 1897), the will provided (page 148):

"SECOND. I give, devise and bequeath all of the remainder of my estate, both real and personal, to my executors hereinafter named, and the survivor of them, in trust, however, for the uses and purposes hereinafter set forth, etc.

"1st. I direct my said executors to pay to my beloved wife, Jane Cooper, the sum of five hundred dollars per year, each and every year during her natural life, to be paid half yearly or quarterly if practicable, which said sum is hereby given her in lieu of dower.

"2nd. I direct my said executors to pay to my sister, Rebecca Cooper, the yearly sum of four hundred dollars, each and every year during her natural life, payable quarterly.

"3rd. I direct my said executors to pay all the remainder of the income of my estate, after paying the above-mentioned legacies to my wife and sister as follows: One-half of the remainder of the income of my said estate to my daughter Sarah Jane Little (formerly Cooper) for and during her natural life, and the other half of the remainder of my said income to my daughter, Mary E. Cooper, for and during her natural life, said income to be paid half yearly or quar-

terly, if practicable.

"4th. Should either of my said daughters die without lawful issue, during the life of the other, I give the share of the deceased sister in my estate to the survivor.

"5th. Should either die during the life of the other, leaving lawful issue, I direct the share of such deceased sister to be paid to her children, share and share alike.

"6th. At the death of my two daughters, Sarah Jane Little and Mary E. Cooper, I give, devise and bequeath all my property, both real and personal, to their children, one-half to the children of each daughter, share and share alike, per stirpes and not per capita. Should either of my said daughters die without leaving lawful issue, then I give all my estate to the children of the other, share and share alike. Should both of my said daughters die without lawful issue my estate shall then go to my heirs at law."

Judge Bartlett (all concurring) said (page 151):

"The duration of the trust is clearly dependent upon the lives of the two daughters, and there is no other suggestion on the face of the will. We, therefore, agree with the court below, that the testator created a valid trust.

"The principal argument urged against this construction of the will by the appellant was, that the lives of the daughters might fall, in, thus terminating the trust long before the death of either the wife or sister, who are entitled to annuities during their natural lives, and that it was quite impossible that the testator should have contemplated that there might be a very considerable time when his wife and sister would be cut off from any income under the will.

"The opinion below intimates that the testator selected the lives of his children, who,

in the ordinary course of events, would be presumed to live longer than the annuitants, and if this expectation was not realized, it was one of the risks that the testator assumed when he created such a trust.

"We are of the opinion that the termination of the trust while the annuitants, or either of them, survived would not result in cutting off the annuities. It is clearly the intention of the testator, on the face of the will, that the annuities during the lives of his wife and sister, respectively, should be a charge upon his residuary estate, whether held by the executors in trust or freed from the limitation by the falling in of the selected lives.

"This lien upon the estate, consisting of real and personal property, could not be effectually enforced by the annuitants if the estate were distributed to the remaindermen under the provisions of the will, especially if there should be a failure of grandchildren and the residue passed to the heirs at law and next of kin.

"It would, therefore, be necessary to ascertain the present value of the annuities at the termination of the trust and pay the amount over to each annuitant respectively, and distribute the residue of the estate to the remaindermen, discharged of any lien. In this manner the entire will of the testator is carried out, and those who stood quite as near to him as the life tenants and remaindermen are protected from a result that never could have been contemplated when the will was framed."

In *People's Trust Co.* v. *Flynn,* 188 N. Y., 385 (Court of Appeals, April, 1907) the testator made his will in 1897, 8 months before he died. The residuary clause provided (page 389):

"I hereby give, devise and bequeath all the rest, residue and remainder of my es-

tate, real and personal, of which I may die seized, entitled to, or possessed of, unto my said executors hereinafter named as trustees, to them, and their successors, to have and to hold the same for the following uses, intents and purposes, viz.:

"To enter into and take possession of same, to keep the real estate in repair; to pay all insurance, taxes, assessments and water rates which may accrue against said property and also other necessary expenses; to collect and receive all the rents, issues, profits and income therefrom, and out of the net annual income of my said residuary estate pay over to my wife Annie the sum of one thousand eight hundred dollars ($1,800) per annum, payable half yearly for and during the term of her natural life, which payment shall be in lieu of all dower right or interest which she might or may have in my estate; and also after the payment of the above annuity or dower interest to my wife, to divide the net residue of the income derived under said trust into five equal parts and pay over one share thereof to each of my five children, namely, Mary C., Regina, William J., John, Jr., and James, or the issue of each child or any of them who shall die leaving issue, until the death of my two daughters, Mary and Regina. If, however, any of said five children shall have predeceased me, without issue surviving them, then said net residuary income shall be equally subdivided among those living or represented. Upon the death of my two daughters, Mary and Regina, I give, devise and bequeath the entire estate of which I may die seized, entitled to or possessed of to the issue of said Mary, the said Regina, William J. Flynn, John Flynn, Jr., and James Flynn, or to the issue of either of said sons, if they shall have previously died leaving issue, such issue taking the share which would have belonged to its parent in equal shares."

Judge Vann (all concurring) said (page 390):

"It is insisted on the one hand, and the courts below so decided, the Appellate Division unanimously and the Special Term under the constraint of the Appellate Division, that the provision for the wife is part of the trust; that the provision for the children until the death of the two daughters is also part of the trust; that the testator did not intend that the title of the trustee should be divested until the death of the wife and the two daughters and, hence, as the duration of the trust was measured by the three lives, namely, those of the widow and the two daughters, it was void. On the other hand, it is insisted that the testator intended to give his wife an annuity chargeable upon the residuary estate and that the case is governed by our recent decision in *Buchanan* v. *Little* (6 App. Div., 527; 154 N. Y., 147)."

And referring to the *Buchanan* case, at page 392:

"When this Will came before us for construction, all the judges united in holding that there was created a valid trust—that the annuities to the wife and sister were a charge upon the residuary estate—and that at the termination of the trust the present value of the annuities should be ascertained, and the amount paid over to the annuitants, and the remainder of the estate distributed to the remaindermen, discharged of any lien.

"Analogy is seldom so exact as that which exists between these two wills, and we are unable to distinguish the case before us from the case cited. The facts are almost identical and the same principle must govern both. We regard further discussion of the subject as unnecessary, for the principle of *stare decisis,* as well as the rule requiring a construction which will preserve a Will rather than destroy it, when possible, com-

pel us to hold the trust to be valid and binding in every respect."

Matter of Trumble, 199 N. Y., 454 (Court of Appeals, November, 1910) was an appeal from an order of the Appellate Division of the Supreme Court, adjudging invalid the residuary clause of the will, which was as follows (page 456):

"FOURTH. I give and bequeath all the rest, residue and remainder of my estate, if any, to be paid out as set forth in this paragraph of this my last will and testament, equally to such of my sisters, Amanda F. Parkhurst, Waty A. Hodgney, Rebecca J. Dalrymple, Fanny M. Tyler and Mary B. Draper as are living at the time of my death.

"I hereby direct my executor hereinafter named to convert my estate, which has not been disposed of by this will, into money and deposit the same in banks or trust companies paying interest on deposits, and to pay therefrom monthly to such of said sisters named in this paragraph of this will as are living at the time of my death the sum of forty dollars to each until such moneys and interest are fully paid out to them.

"In case one or more of my sisters named in this paragraph of my will shall survive me, but shall die before said fund is fully paid out, then in that case from that time on, I direct my executor hereinafter named to pay to the heir or heirs of such sister except the heir or heirs of my sister, Amanda F. Parkhurst, the monthly sum of Forty Dollars until said fund is fully paid out, it being my intention and direction that the said heir or heirs except the heir or heirs of Amanda F. Parkhurst, shall be substituted in the place of said sister and receive the said sister's payment of forty dollars per month, and said forty dollars per month shall be

divided among the heir or heirs of such sister in the proportion prescribed by law for the division of personal property among heirs of a deceased person. And in that event to that end, I hereby give and bequeath to such heir or heirs the sum or sums which he or they shall be entitled to receive under this fourth paragraph of my last will and testament except the heir or heirs of Amanda F. Parkhurst as above stated."

Judge Chase (all concurring) said (page 463):

"It has been adjudged and decreed that the provisions contained in the will for the heir or heirs of any sister therein named are illegal and void, and no appeal has been taken from such part of the decree. All of the parties to the proceeding and their respective counsel have apparently overlooked the fact that the gifts to the sisters create in them severally a legal estate transferable by them at will.

"The gifts to them severally are of specific amounts, payable monthly and continuing in each case until the death of the sisters respectively. Such gifts are unqualified and constitute simple, general legacies, with the time of payment postponed, and such gifts to the sisters are vested interests, tranferable by them, as is any gift in the nature of a general legacy. (*Durfee* v. *Pomeroy*, 154 N. Y., 583; *Snedeker* v. *Congdon*, 41 App. Div., 433; *Wells* v. *Squires*, 117 App. Div., 502; 191 N. Y., 529).

"The fact that the executors as such, or as trustees, may have to hold such residue and deal with the income thereof in order to carry out the provisions of the will, does not create an illegal suspension of the power of alienation so far as the sisters are concerned. (*Gillman* v. *Reddington*, 24 N. Y., 9, 18; *Durfee* v. *Pomeroy*, supra.)

"It is quite immaterial so far as it affects the interests of the sisters whether a

trust is created in the executor or not. It is provided by section 15 of the Personal Property Law (Cons. Laws, Ch. 41) as follows: "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property may be transferred." The sisters are not beneficiaries of a trust to receive the income of personal property and apply it to their benefit.

"It is immaterial, therefore, whether the executor holds the residue of the testator's estate under an executory power, power in trust, or as a trustee.

"The gifts to them severally are absolute and payable out of principal and any added income received while the principal is held by the executor or trustee and they do not violate any statute. The case of *Wells* v. *Squires* (supra) is controlling authority to sustain the gifts to the sisters under the fourth paragraph of the will as legal vested estates in them severally.

"In that case the residue of a testator's estate was given to a person named in trust to pay over to his wife during her life $2,100 annually in monthly payments of $175 each; to a cousin during her life $360 annually in monthly payments of $30 each; and to another cousin during her life $240 annually in monthly payments of $20 each. The Court says:

"The plaintiff asserts that the article and codicil are invalid and void because they unlawfully suspend the absolute ownership of personal property, of which alone the estate consists. It is observable that the direction for the payment of the annuities is not limited to their payment out of the income. Indeed, the words 'income' or 'rents and profits' are not to be found in either

article except where the wife's annuity is made a first charge upon the principal and income. A gross sum is given to the trustee, and out of that sum, not alone out of its income, are the annuities to be paid. In other words, if necessary, the principal is to be used, and it appears that it will be necessary to use it" (p. 503).

"The court further say: '"The prohibition against the assignment by a beneficiary of the right to enforce the performance of a trust of personal property is limited to cases where the trust is one to receive the income and apply it to the use of any person. The statute expressly provides that 'the right and interest of the beneficiary of any other trust in personal property may be transferred.'—— The trust in the present case is distinctly not a trust to receive the income and apply it to the use of any person, and cannot be construed as such by any known rule of construction. Consequently the interests of the beneficiaries are alienable and do not suspend the absolute ownership of the fund.—— The annuitants, acting in conjunction with the trustee, could convey the estate to the remaindermen, or they, with the remaindermen, could convey to a third person. And if the annuitants and the remaindermen united in an assignment, the trustee would be obliged to convey to the assignee"' (p. 504).

"An appeal was taken from the judgment of the Appellate Division in that case to this court, where the judgment was affirmed on the opinion below. (*Wells* v. *Squires,* 191 N. Y., 529)."

The most recent case is *Bailey* v. *Buffalo Loan, Trust & Safe Deposit Co.,* 151 App. Div., 166 (Fourth Department, May, 1912). In that case the testator directed that personal property of the vaue of $60,000 be deposited with the trustee as a trust fund (page 168):

"The income of which, after paying the expenses of such trust, I direct to be paid as follows: Fifty dollars per month to my brother, Alanson C. Bailey, of Toledo, Ohio, during his natural life; Thirty dollars per month to Mrs. Mary A. Swain, of Buffalo, N. Y., during her natural life, and the remainder of said income to my son, Harlow W. Bailey, during his natural life, or until the trust shall terminate, as hereinafter stated. And in case of the death of either my said brother, Alanson C. Bailey, or Mrs. Mary A. Swain, then her proportions of said income shall be paid to my said son, Harlow W. Bailey, and in case of the death of my said son, Harlow W. Bailey, then I direct that his share of said income shall be added to the principal sum of said trust. The principal of said trust fund of Sixty Thousand Dollars, I direct to be held in trust by the said Buffalo Loan, Trust and Safe Deposit Company for the children of my said son, Harlow W. Bailey, and I direct that each child of my said son, Harlow W. Bailey, shall have and receive his or her proportion of said trust fund upon his or her arriving at the age of twenty-one years, and then to take such proportion of said principal sum as the number of children then living and minors, shall bear towards the principal sum then undivided, so that if there be three children living when the oldest becomes twenty-one years of age, such oldest child shall receive one-third of said principal sum of said trust fund, and if another child be born after the oldest child has become twenty-one years of age, and shall have received his or her proportion of said trust fund, then the second child shall, upon becoming twenty one years of age, have and receive one-third of the remaining principal of said trust fund.

"And in case there be no children of my said son, Harlow W. Bailey, living at the

time of my decease, or in case the children then living shall die before arriving at the age of twenty-one years, then I direct that the trust hereby created shall continue for twenty-five years from the date of this will, and if at that time there be no children of my said son, Harlow W. Bailey, living, I direct that the trust hereby created shall cease and be determined, and I hereby direct that the principal of said trust fund shall then be paid to my said son, Harlow W. Bailey, and the same shall be his property absolutely, and forever, and if at that time my said son, Harlow W. Bailey, shall not be living, then I direct that the principal of said trust fund shall be divided and paid over, share and share alike, to the heirs of my said sister, Caroline E. Blair, of Madison, Ohio. But if there be a child of my said son, Harlow W. Bailey, living twenty-five years from the date of this will, though born after my decease, then said trust hereby created shall continue for the benefit of such child"

The judgment appealed from declared that the clause in question attempts to suspend the absolute ownership and power of absolute alienation of the personal property therein referred to as a trust fund for a period beyond the termination of two lives in being at the death of the testator, and is illegal and void.

Judge Kruse (all concurring) says (page 171):

"All of the parties to the controversy seem to concede that the 2d paragraph of the clause in question, which provides for a continuance of the trust for twenty-five years, with a limitation over as therein stated, is invalid.

"I think the provision for the children also contravenes the statute against perpetuities and is likewise invalid (*Matter of Wil-*

cox, 194 N. Y., 288), but that provision for the life beneficiaries may be upheld. That provision is not, as it seems to me, so involved with the others which are invalid that it must fall with them.

"It is contended, however, that eliminating all provisions for the children, and the final disposition of the fund under this clause, still the trust is void, because, as it is claimed, the duration of the trust extends beyond a period of two lives, namely, that of the plaintiff and two other life beneficiaries.

"But the provisions for Alanson C. Bailey and Mrs. Swain are mere annuities, chargeable against the income, and the trust need not on that account be extended beyond the life of the plaintiff, as the present value of the annuities can be ascertained upon his death and paid and the fund freed from the claim of the annuities, and the remainder distributed under the residuary clause of the will. (*Buchanan* v. *Little,* 154 N. Y., 147; *People's Trust Co.* v. *Flynn,* 188 id. 385; *Matter of Trumble,* 199 id. 454, 464.)"

In the case at bar, the annuities being eliminated, the trust is measured by two lives in being, to wit, Charles L. Givernaud and his wife, and upon their death it is expressly provided that the trust shall terminate and the principal be paid to their children, if they have any.

Appellants in their brief (page 63, line 25) assert that the case of *Bailey* v. *Buffalo Loan, &c., Co.,* above mentioned, was reversed by the Court of Appeals. Appellants do not claim the reversal to be of any importance except on the question of separability, which question we are not now discussing. The case was cited by us only incidentally on the question of separability, but on the point now under discussion we cited it as being only the most recent of a long line

of cases holding that the provision for the payment of a definite sum of money annually is to be considered by the Court as a provision for an annuity, and upon the death of the two life tenants, Charles and his wife, the annuities are to be valued according to the annuity tables and the value of the annuities thereupon paid to the annuitants in a lump sum; the residue being paid upon the death of Charles and his wife to their children if they shall die leaving children, and that in this way the property is held in suspension during two lives only and is perfectly valid.

That the first four paragraphs of the ninth article of the Givernaud will constitute annuities is shown beyond question by the eighth article, which refers to the annuities as "annual sums" and authorizes and directs the executors and trustees to pay such annuities out of the *principal*, if necessary. This direction to pay out of principal was missing from the Bailey will.

Appellants are mistaken in asserting that the case of *Bailey* v. *Buffalo L. T. & S. D. Co.* as reported in 151 New York App. Div., 166, was reversed. The case there decided was not appealed, but was sent back for a retrial by the Appellate Division. A retrial was had subsequent to the taking of testimony in this cause in the Court of Chancery, and after the retrial the new case was taken up upon new findings to the Court of Appeals. The Court of Appeals on the appeal from the second trial did not consider the question as to whether or not the annual payments under the Bailey will constituted annuities. (All parties having admitted the invalidity of the trust provisions and simply con-

tending for the expunging of the invalid portions and giving effect to the balance of the trust). In other words, the reversal in the Bailey case does not affect the question now under discussion, but the opinion in the Appellate Division as above quoted remains the most recent expression of the law of New York relating to annuities in connection with suspension of alienation or ownership. The silence of the Court of Appeals in the Bailey case upon the question of annuities is perhaps regrettable, but that silence, in view of the issues before the Court, is of no weight as against the long line of decided cases in New York on this subject, as above set forth. It will be noted also that Judge Chase, who concurred in the opinion in the Bailey case, wrote the opinion in the case of *Matter of Trumbull,* 191 N. Y., 454, above quoted. On the question of separability, we shall have more to say about the Bailey case at a later point in this brief.

That the annuities provided in the sub-divisions of the ninth clause of the Givernaud will are valid under the New York law is conceded by appellants' witness, Professor Henry W. Hardon, who testifies (page 127, lines 18-26):

> "Q. —If Charles Givernaud and his wife died leaving issue, as I understand the terms of the will, the principal is to be paid over to the issue, and do you agree with me that in that event the trust would be measured by only two lives in being—? To and including the tenth clause? A. I think that is correct."

Professor Hardon then continues to express a doubt as to his answer, based upon the existence of the words "undisposed of and unapplied."

Except for this doubt which the witness ex-

presses, it is conceded by him that if the eleventh paragraph were not in the will or could be separated from it, the will would be valid.

As to this doubt, which the appellants in their brief emphasize (page 55, line 35, to page 56, line 15), but do not seriously argue, a moment's reflection will serve to show that it is without foundation. In addition to the annuities provided in the fifth and sixth sub-divisions of article nine, it was the testator's intention to add thereto the amount of such annuities as might accrue during the lifetime of the annuitants mentioned in the fifth and sixth sub-divisions, by reason of the death of any of the annuitants mentioned previously in the will. These added annuities as to Charles Givernaud and his wife are, therefore, contingent annuities, the contingency being such as would be bound to occur, if at all, during the lifetime of the persons mentioned in the fifth and sixth sub-divisions of paragraph nine.

It is therefore submitted that the annuities provided for in the ninth article of the will are not objectionable under the law of the State of New York.

B. The tenth article of the will is legal and valid under the law of New York.

It has already been noted that Professor Hardon, the appellants' expert witness, admits the validity of section ten of the will, if standing by itself, his only objection being that clause eleven, which is admittedly bad, cannot be separated and therefore taints the whole trust scheme of the will. In view of this admission, it would seem to be unnecessary to argue this question except that the appellants in their brief, in spite of the testimony of their witnesses, argue that section ten is bad under the New York law because there is no person in being at the time of the testator's death in whom the remainder could be vested.

This argument is untenable, for three reasons:

1. No such theory was advanced by appellants' expert below, and no such authority cited. The New York law being a fact question, there is no evidence upon which to make the argument.

2. There is no evidence that Charles and his wife have not children. If they have, the argument falls. The burden was on appellants to show that there are no children.

3. The argument is bad, for the New York law is well settled on the subject, and it is uniformly held that there need be no person in being at testator's death capable of taking the remainder, and that a future estate otherwise valid shall not be void on the ground of the improbability of the contingency on which it is limited to take effect.

The statute pleaded by appellants in their bill

of complaint provides:

> "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; *in other respects limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property.*"

Section 52 of the Real Property Law provides:

> *"A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect"* (p. 123, l. 30).

In *Denison* v. *Denison,* 185 N. Y., 438 (Court of Appeals, June, 1906), Chief Judge Cullen said (at page 442):

> "The testator after creating a trust to provide an annuity for his wife gave all the residue of his estate to his executors in trust for the benefit of the children of a named brother and of a sister who might be living at his decease to be divided into shares, the shares to be held for the "use and benefit" of the several beneficiaries during their respective lives and on the death of any beneficiary 'in trust for his, her or their child or children and the issue, if any, of any of his, her or their deceased child or children who shall be living at the time of his, her or their decease respectively, his, her or their executors, administrators and assigns.' In

> case of the death of any beneficiary without leaving issue at his death there is a gift over of which it is sufficient to say that its terms are such as to render it concededly illegal and void, and so the courts below have held. The invalidity of the gift over in default of issue surviving the life tenant cannot affect the primary gift to that issue if there should be such. (*Harrison* v. *Harrison,* 36 N. Y., 543; *Woodgate* v. *Fleet,* 64 N. Y., 566; *Underwood* v. *Curtis,* 127 N. Y., 523.)"

And Judge O'Brien, concurring with him, at page 447:

> "While these cross remainders are doubtless invalid, they are of no present consequence, inasmuch as the conditions which would give rise to them have never occurred. It is generally quite sufficient to deal with these questions when the case arises. They certainly can have no effect upon an interest bequeathed to a life beneficiary, who has children or other descendants. Hence, these cross-remainders may be eliminated from the case since it cannot be said that their presence in the will is necessary for any general scheme of the testator in the disposition of his property."

And at page 448:

> "We think that the will taken as a whole is capable of a construction that will render it valid, and that the objectionable clauses above referred to can be cut off and eliminated without destroying the general scheme of the testator."

So, in *Schettler* v. *Smith,* 41 N. Y., 328 (hereafter noted at greater length) where the will contained a similar provision, it was said (p. 336):

> "The trust to convey to the issue of John Jacot, the son, living at his decease, in case he left no widow, must be held valid."

In the recent case of *Church* v. *Wilson,* 152 App. Div., 844 (1912), affirmed 209 N. Y. 553 (1913), the trust was for the life of the widow, three children, and in the event that any child should die without issue, then during certain other lives. By holding the testamentary intention to have been to create three separate trusts to take effect upon the death of the widow, the Court found that up to this point the power of alienation was suspended for only two lives. Upon the question arising in the event that either of the three children should die without issue, the Court said:

> "Hence, if the three children of the testator each dies leaving children, there can be no unlawful suspension. The provision for a further life estate, causing a further suspension, in case one of testator's children dies leaving no child, undoubtedly violates the statute against perpetuities and cannot be sustained, but that is a contingency which may never happen.———

At page 851:

> "The fact that testator's son, William E. Pettit, now has no child and may leave none him surviving does not affect the validity of his life estate in his share. In further treating of alternative future dispositions, Chaplin (in section 432) says: 'And in such cases also, if the disposition of the precedent estate is so far separable as to be valid in any event, irrespective of which contingency may occur in future, then it may be sustained, and the determination of the validity of the future dispositions may be deferred, within the limits of the statutory period, until the events occur upon which the decision as to them must be based."

By the tenth paragraph of the will, therefore, Givernaud provided for a lawful remainder to the

trust created in the ninth paragraph,—a remainder to the children of Charles and his wife, upon their death; and the fact that Charles and his wife have no children at the present time (if it be a fact) does not affect the validity of the trust.

There is no evidence in the case, however, to show that Charles and his wife have no children. The burden was on appellants to prove this fact, if it exists.

C. Paragraph eleven of the will should be disregarded and lopped off, and the provisions of paragraphs nine and ten sustained as valid.

By paragraph Eleventh the testator has added an alternative provision, to wit, in the event that Charles and his wife die leaving no children, then the trust shall continue for the lives of several relatives and the survivor, with remainder over to charitable corporations.

Paragraph Eleventh clearly violates the New York Statute against Perpetuities, which limits the trust term to two lives. The trust has already run for the period of two lives (Charles and his wife) by the terms of prior paragraphs, and paragraph Eleventh attempts to continue the trust for seven additional lives. This cannot be accomplished in New York.

However, the trust, down to and including the Tenth paragraph, is perfectly valid, and cannot be affected by the invalidity of the Eleventh paragraph. It is a well established rule that where the invalid portion of a trust can be separated from the valid portion, without disturbing the general scheme of the testator, the invalid portion of the trust will be expunged.

It is furthermore a well established rule that where alternative provisions have been made by the testator, and one alternative is valid and the other invalid, the valid alternative will stand and the invalid alternative fall.

Section 51 of the Real Property Law provides:

> "Section 51. FUTURE ESTATES IN THE ALTERNATIVE. Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly."

In *Schettler* v. *Smith,* 41 N. Y. 328 (Court of Appeals, 1869) the third clause of the will provided (page 311):

> "3d. I give, devise and bequeath one other equal fourth part or share of all my said rest, residue and remainder of my estate, real and personal, to my executors, in trust, to receive the rents, issues and profits and income thereof, and pay the same to my son, John Jacob Smith, during his natural life; and on his decease, to pay the said rents, issues, profits and income to his wife, during her natural life, and on her decease, if he leave a widow; or, if he leave no widow, then, on his decease, to convey and transfer said one-fourth part or share, in fee, to the issue, then living, of my said son, John Jacob, *per stirpes;* but in case the said John Jacob shall die, without issue, then, on the expiration of said life estates, to convey and transfer said one-fourth part or share, in fee, to the issue then living, of my son Lawrence, and the issue, then living, of my son Lafayette, by another than his present wife, and the issue, then living, of my daughter Cornelia, by a husband other than Frederick R. Schettler: the issue entitled to take, taking *per stirpes.*"

The son J. J. Smith was not married at the date of testator's death, and therefore it was a possibility that he should subsequently marry a wife who was not in being at the time of testator's death. Judge Grover, writing for the unanimous court, said (page 335):

> "The provision in favor of the son, and the further trusts to convey upon her decease might suspend the power of alienation of the real for a longer period than two lives in being at the creation of the estate, and also the absolute ownership of the personal property for a period longer than two lives

in being at the death of the testator, and were therefore void. But it will be seen, that the clause of the will under consideration makes a disposition of this portion of the property in the alternative upon the happening of another series of events. That provision is: if he (the son) leave no widow, then upon his (the son's decease) to convey as above provided. It will thus be seen, that in the contingency of the son's having no widow, the property is to be conveyed to his issue upon his decease; that is, upon the termination of a single life in being at the death of the testator. Had this been the only direction as to the conveyance, it is clear that it would have been valid, as by no possibility could the power of alienation of the real and absolute ownership of the personal property be suspended beyond the period allowed by statute. The son having died leaving no widow, the inquiry is, whether this lawful disposition is rendered invalid by the unlawful disposition attempted to be made in the contingency of his leaving a widow. It is difficult upon principle to see why it should. But for the prohibition of the statute, both dispositions would have been lawful and valid, and either would have taken effect according to the happening of the events giving it vitality. The statute comes in and avoids one of the dispositions, leaving the other unaffected by its provisions. Why should not the latter take effect upon the occurrence of the events, upon which it was made to depend. The authorities sustain its validity. Lewis on *Perpetuities* (501, 2) says, that where a limitation is made to take effect on two alternative events, one of which is too remote and the other valid as within the prescribed limits, although the gift is void so far as it depends on the remote event, it will be allowed to take effect on the happening of the alternative one. That is, in principle, precisely this

case in this aspect, vide, *Crompe* v. *Barrow* (4 Vesey, 681); *Savage* v. *Burnham* (17 N. Y., 561). The trust to convey to the issue of John Jacob, the son, living at his decease, in case he left no widow, must be held valid."

EVEN THOUGH THERE BE NO ALTERNATIVE AND BUT A SINGLE TRUST PROVISION, PART OF WHICH IS VALID, AND PART INVALID, THE COURT WILL SUSTAIN THE VALID AND DISCARD THE INVALID, WHENEVER IT CAN DO SO WITHOUT DISTURBING THE TESTATOR'S GENERAL SCHEME.

In *Matter of Buchner,* 60 Misc. 287 (Surrogate's Court, Kings County, July, 1908) the Will directed the executor (page 288):

"To divide the remaining one-sixth part into three equal parts and to hold each of said parts in trust; to invest and reinvest the same, and to pay over the net income derived from one of said equal parts for the support, maintenance and education of my grandchild, Marian A. Buchner, and the net income derived from another of said equal parts for the support, maintenance and education of my grandchild, William A. Buchner, and the net income derived from the other of said equal parts for the support, maintenance and education of my grandchild, Carrie M. Buchner, and to pay over to each of them the principal of such equal part with all accumulations thereon, as they shall respectively arrive at the age of twenty-one years. In case either of my grandchildren, Marian A. Buchner, William A. Buchner and Carrie M. Buchner shall die before arriving at the age of twenty-one years, then I direct that the share so held in trust for him or her, shall be divided equally between the survivors or survivor if he, she or they, as the case may be, have arrived at

the age of twenty-one years, and, if not, then the same is to be added to and form part of the fund held in trust for him, her or them, as the case may be."

Surrogate Ketcham said at page 289:

"There is but one direction in the language under consideration which, if effectuated, will transgress the statute of perpetuities. This possibility of offense will arise if, after the death of one grandchildr, during minority, a second shall die during the minority of himself and the survivor. In these three successive events, one-half of the share originally allotted to the child first dying will have been held in suspension (1) during his life; (2) during the life of the second to die, and (3) during the minority of the last survivor."

And at page 290:

"It is quite clear that the disposition of each one-third of one-sixth covered by paragraph (f) is to be sustained at least in so far as it pertains to the life of each grandchild, if this be so, the validity of any disposition which is intended to come into play beyond the first life is not now material and its consideration may be postponed until the event shall provoke it. If the provision for the benefit of one of these grandchildren is inseparably connected with the other dispositions of the will, which are designed to take effect after the death of such grandchild, and is a necessary part of the general scheme for the disposal of testator's property, then it must fall with them and the testator died intestate. But 'where several trusts are created, and those which render the entire disposition illegal can be separated and the legal upheld without doing injustice or defeating that which the testator might be presumed to wish, that which is illegal, or which added to others renders the whole

illegal, may be cut off and the intention of the testator given effect so far as the statute will permit.' *Underwood* v. *Curtis,* 127 N. Y., 523, 542."

And at page 292:

"In any event, the rule with respect to separation of the diverse parts of a trust is plainly extended in the Underwood case to a will in which the several features of the trust were stated in close rhetorical relation. There is no consideration which was applicable in that case to the first term of the trust, for the benefit of the widow and the two daughters during the life of the widow, which is not equally applicable to the trust now under construction, the first term of which was for the grandchild during his life and for the payment to him during that period of the entire income."

In the *Matter of Corlies,* 11 Misc., 670 (Surrogate's Court, Kings County, March, 1895) one of the provisions of the will was (page 670):

"SIXTH. I give, devise and bequeath all the rest, residue and remainder of my estate to my executors, or to such of them as may qualify and take upon themselves the execution of this will, *in trust,* to divide my said residuary estate into as many equal parts or shares as I may leave children surviving me, one share to represent each child, and to securely invest the principal of every such share in trust for the benefit of the child whom it represents, and to collect and receive the income arising therefrom, and to apply the said income as fast as received to the use of the child whom it represents.———

"SEVENTH. In case of the death of any child of mine leaving lawful issue, such issue shall stand in the place of and represent their deceased parent and take the share representing such parent remaining in the hands

of my executors and trustees, with all accumulations and income thereon in equal proportionate parts, and in default of issue the share remaining in the hands of my executors and trustees of any child so dying shall fall into and become a part of my residuary estate."

Surrogate Abbott said at page 674:

"To the extent of at least two successive lives in being at the date of the death of the testator, the provisions of his will which provided for a suspension of absolute ownership of personal property and the power of alienation of real property are valid, whether or not the testator has attempted to accomplish a further suspension or to make any other unlawful disposition of the remainder. *Purdy* v. *Hayt,* supra; *Tiers* v. *Tiers,* supra; *Henderson* v. *Henderson,* supra.

"Applying the test of lives in being at the testator's death to the effect of the subdivision of Thomas' share, we find that the suspension as to the entire share of Thomas has already extended through Thomas' life. That share is now to be subdivided into four parts, and the suspension as to such subshare may continue during the life of the person for whose benefit it shall be set apart without doing violence to the statute against perpetuities.

"In the event of the death of a second child of the testator, without leaving issue, it will become necessary to determine the ultimate and final ownership of the accretion to his share from the share of Thomas. As to such subshare, the limit of two lives will then have been reached, and a final distribution thereof in absolute ownership must be made. But until such contingency happens, it is unnecessary to decide this question."

In *Burns* v. *Allen,* 89 Hun, 552 (Appellate Division, Fifth Department, October, 1895), the

will provided:

> "SEVENTH. I give to my executor or executors hereafter named—the rest, residue and remainder of my estate of every kind whatsoever to be held in trust for my adopted daughter, Melita Black.—— The income arising from said trust estate, or so much thereof as may be necessary, to be used in the education and support of Melita. Directing and authorizing my said executor or executors, however, from said trust estate, to provide a sufficient sum to afford Isabella S. Burns like educational advantages as are afforded to Melita. Should the income of said trust estate be insufficient to carry out this provision of this clause, then so much of the principal may be used as may be necessary for that purpose.—
>
> "EIGHTH. Should Melita die without leaving issue, I direct that the aforesaid trust estate be divided equally between my nephews, Augustus F. Allen and Alfred D. Allen, and Isabella S. Burns, or the survivors of them.
>
> "NINTH. Should Melita leave children surviving her, I direct that the said estate be held in trust for said child or children until the youngest of said children reaches the age of twenty-one years. The estate then to be divided equally between such children, and, in case none of said children reaches the age of twenty-one years, the remainder of said estate to be divided as provided in the preceding clause."

Writing for the unanimous Court, Judge Bradley said at page 558:

> "By the seventh clause the executors take the property there referred to in trust for Melita Black, and in execution of such trust are to apply the income of that estate, or so much of it as may be necessary, to her education and support. They are also directed to

use sufficient of the income to give Isabella S. Burns like educational advantages, and if the income is not sufficient, they are to appropriate so much of the corpus of the fund to these objects as may be necessary for such purposes. To this, standing alone, there can be no objection going to its validity The eighth clause follows, giving directions for the ultimate disposition of this trust estate in the event that Melita Black dies without issue. Thus far there is no illegal suspension of alienation or ownership of the estate.

"But it is urged that the seventh and eighth clauses are rendered invalid by the provisions of the ninth clause, which is to the effect that if Melita leaves children surviving her the estate is to be held in trust until the youngest of them arrives at the age of twenty-one years, when it is to be divided between them. There might be some force in this contention if the provisions of the seventh clause were dependent upon those of the ninth clause. (*Rice* v. *Barrett,* 102 N. Y., 161.)

"But they are not. The provisions of the seventh clause created the trust, and for the purpose of its execution as there provided they are complete and independent of those which follow. While the devolution of the estate in the events mentioned was within the scheme which the testatrix had in view, when she made the several provisions of her will, those of the seventh and ninth clauses are not so united as to render the execution of the former in any sense dependent upon the validity of the latter. (*Savage* v. *Burnham,* 17 N. Y., 561; *Kennedy* v. *Hoy,* 105 id. 134)."

In *Underwood* v. *Curtis,* 127 N. Y., 523 (Court of Appeals, October, 1891), Judge Parker, writing for the unanimous Court, said at page 535:

"An examination of the will discloses that the testator, at the time of its execution, intended first to have the income of all his property devoted to the use of his wife and two unmarried daughters during the lifetime of his wife. Second, that thereafter his two unmarried daughters should each receive one-fourth of his entire estate, the remaining one-half to be retained by the executrices in trust for the benefit of his two married daughters, the income of one-fourth to be paid to each during life, and after death the principal to go to her heirs."

And at page 541:

"Having reached the conclusion that the trust terms sought to be created are in hostility to the statute, we must now consider whether there may be such a separation of the trusts as will preserve the trust authorized for the life of testator's widow.

If the provision for the benefit of the widow and the two unmarried daughters, during the life of the widow, is inseparably connected with the other dispositions of the will, and a necessary part of the general scheme for the disposal of testator's property, then it must fall with them and the testator died intestate. (*Benedict* v *Webb,* 98 N. Y., 460). But where several trusts are created, and those which render the entire disposition illegal, can be separated and the legal upheld without doing injustice or defeating that which the testator might be presumed to wish, that which is illegal, or which added to others renders the whole illegal, may be cut off and the intention of the testator given effect so far as the statute will permit. (*Kennedy* v. *Hoy,* 105 N. Y., 134; *Van Schuyver* v. *Mulford,* 59 id. 426; *Manice* v. *Manice,* 43 id. 303)."

And at page 542:

"And within the rule established by those

and kindred cases, we think the trust created for the life of the testator's widow, should be permitted to stand, and the testator held to have died intestate, except as to the estate created for her life.

"This can be done without in any manner interfering with the general scheme adopted by the testator for the disposition of his property. On the contrary, it is in furtherance of his wish to as great an extent as the courts may be permitted to go.

"It is apparent that his primary purpose was to provide that his widow and unmarried daughters should have the use of his entire estate during the widow's life. Subsequently, he concluded to give the unmarried daughters the benefit of such use for an indefinite period, but while effect cannot be given to such subsequent intention, it may and should be given to the first."

In *Kennedy* v. *Hoy,* 105 N. Y., 134 (Court of of Appeals, March, 1887), Judge Earl, writing for the unanimous Court, said (page 136):

"In her will the testatrix placed a share of her estate in the hands of her executors and directs them to apply the income thereof to the support and maintenance of William E. Hoy and his family during his life, and after his death to pay the income to his surviving children, "until they reach the age of twenty-one years, when the principal is to be divided among them share and share alike;" and in case William should die without lawful issue surviving him, or in case all his children should die subsequently to his decease before reaching the age of twenty-one years, and without leaving issue, then she directs the share to be divided equally among all her three surviving children, and the children of any deceased child. William survived and had a wife and two children.

"The claim on the part of the planitiff is, that the trusts created for the benefit of

William and his children are void, because they suspend the absolute ownership of personal property for a longer period than is authorized by the statute."

And at page 137:

"We do not deem it important now to determine whether all the trusts for William E. Hoy and his children are valid or not, because it is sufficient for the determination of this action that the trust for the life of William is legal and valid. That is a separate trust, created by a separate paragraph in the will, is complete in itself, and is not connected with the trust intended to take effect after his death, and can be permitted to stand alone. It has been decided in many cases that where in a will some trusts are legal and others illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were held legal and other portions illegal, or if manifest injustice would result to the beneficiaries under the will, or some of them, by holding one trust legal and the others illegal, then all the trusts must be construed together, and all must be held to be illegal, and must fall together. But when several trusts are created, and they are independent of each other, each trust complete in itself, and the legal can be separated from the illegal and upheld without doing injustice, or defeating what the testator might in the emergency be presumed to wish, the illegal trust may be cut off and the legal permitted to stand, and thus the intention of the testator be effectuated so far as the law will permit. In this case, by upholding the trust for the benefit of William E. Hoy during his life, no injustice is done to any of the other beneficiaries under the will, and effect is given to the primary intention of the testatrix, so far as pertains

to William and his family. A precise authority for this conclusion is the case of *Van Schuyver* v. *Mulford* (59 N. Y., 426)."

In *Tiers* v. *Tiers,* 98 N. Y. 568 (Court of Appeals, April, 1885), Judge Rapallo, writing for the unanimous Court, said at page 573:

"It is very evident that the ulterior contingent limitation is quite separable from the primary trust, and merely incidental, its only purpose being to provide for a contingency which may never arise, and the failure of that provision would not affect the general scheme of the testatrix. In such cases the rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate. (*Harrison* v. *Harrison,* 36 N. Y., 543; *Savage* v. *Burnham,* 17 id. 561; *Manice* v. *Manice,* 43 id. 303, 383, 384; *DeKay* v. *Irving,* 5 Denio, 646; *Knox* v. *Jones,* 47 N. Y., 389.)"

In *Manice* v. *Manice,* 43 N. Y., 303 (Court of Appeals, January, 1871), Judge Rapallo said at page 383:

"The result of declaring void these directions for accumulation and the limitations of contingent remainders in the personalty after the death of the testator's widow, will be to give to the infant children of any daughter who may survive their mother the absolute title to so much of their sub-shares as may consist of personal property, and the right to the immediate enjoyment of the income from the time of their mother's death. (*Leonard* v. *Burr,* 18 N. Y., 103; 2 *Washburn on Real Prop.,* 2d ed., 357; 1 R. S., 726, section 40.)

"It does not seem to us, however, that the

failure of these trusts or directions for accumulation during the minority of the daughters' children, and of the contingent limitations over in case of their death in infancy, will so far affect the general scheme of the testator as to render it necessary to declare the whole of the sixteenth clause void. A contingent ulterior limitation of a legal estate may be held void in such a case without impairing the validity of the other dispositions of the will. The general rule is that where the effect of such a limitation over is to abridge or defeat the prior estate, the result of such contingent limitation being held void for remoteness is that the person whose estate would be defeasible, if such contingent limitation were valid, takes the estate discharged of the condition or limitation over. (2 *Washburn on Real Property,* 2d ed., 357; *Leonard* v. *Burr,* 18 N. Y., 103; *Church* v. *Grant,* 3 Gray, 156)."

In *Harrison* v. *Harrison,* 36 N. Y., 543 (Court of Appeals, March, 1867) Chief Justice, writing for the unanimous Court, said (page 544):

"It is conceded, that the ulterior limitations over, on failure of issue of testator's children, or upon said issue dying under twenty-one, are void. So the supreme court held, and the same question arises and is presented in this case, as was decided in *Savage* v. *Burnham* (17 N. Y., 561), viz., can those ulterior limitations over be dropped, and the primary disposition of the estate be allowed to stand?"

And at page 547:

"The principle is now well settled, that the courts lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid, without defeating the general intent of the testator. (*Post* v. *Hover,* 30 Barb., 313; 33 N. Y., 593; 17 id. 561, 576; *Darling* v. *Rogers,* 22

Wend., 483; *Gott* v. *Cook,* 7 Paige, 521; s. c., 24 Wend., 641, 664; *DePeyster* v. *Glendenning,* 8 Paige 295; *Haxtun* v. *Corse,* 2 Barb. Ch., 506; *Van Vechten* v. *Van Vechten,* 8 Paige 120; *Gilman* v. *Reddington,* 24 N. Y., 9; *Everitt* v. *Everitt,* 29 id. 99.)

"It is no objection to the application of this rule to the case at bar, that the limitations, as well those which are good, as the one alleged to be bad, are embraced in a single trust. A single trust, created for two purposes, one lawful and the other unlawful, is good for the lawful purpose, although void for the unlawful one."

In *Oxley* v. *Lane,* 35 N. Y., 340 (Court of Appeals, March 1866), Judge Smith, writing for the unanimous Court, said at page 349:

"The gift to the first taker, and the limitation over on his death, would still be valid, and the ulterior limitation, being void, might be separated from them, and be dropped. It is a settled rule of construction, that, if effect cannot, consistently with the rules of law, be given to the entire will, or an entire provision in a will, any part of it may be sustained, which is conformable to the rules of law, and which can be separated from the residue, without doing violence to the testator's general intention."

In *Post* v. *Hover,* 33 N. Y., 593 (Court of Appeals, September, 1865), Chief Justice Denio, writing for the unanimous Court, said at page 598:

"The principle of these cases, and of some others which might be mentioned, is, that if the purposes of a trust are separable, and some of them must arise, within two lives, and there are others which must or may become operative only after the expiration of the two lives, the former may be sustained, but the latter cannot. (See *De*

Peyster v. *Glendening,* 8 Paige, 295; *Haxtun* v. *Cerse,* 2 Barb. Ch., 506.) And where a limitation fails for remoteness, under this rule, the gift does not go to the parties who were the beneficiaries of the trust which has been declared valid, but to the heirs or representatives of the testator."

In *Leonard* v. *Burr,* 18 N. Y., 96 (Court of Appeals, September, 1858), Judge Strong, writing for the unanimous Court, said at page 105:

"The rule, as we consider it to exist, is laid down with great distinctness in Lewis' *Treatise on the Law of Perpetuities* (p. 657), thus: 'The invalidity of a limitation on account of remoteness places all prior gifts in the same situation as if it had been entirely omitted in the dispositive system.'"

And at page 106:

"A limitation of a life estate or other partial interest, with a remainder expectant on it, which is void for remoteness, of course remains in statu quo prius, neither receiving enlargement nor suffering diminution. And the like holds with respect to executory limitations, not operating to divest previous partial estates, but expressed to take effect at some period subsequent to their determination; the limited interest remains as originally created, both as to character and extent, without reference to the manner of devolution of the property after its expiration. (See, to the same effect, 2 Fearne, *on Rem.,* 12 to 15, 134 ed., 1844.)"

In *Savage* v. *Burnham,* 17 N. Y., 561 (Court of Appeals, June, 1858), the devise was to the widow for life, then to the daughter of the testator for life, and then, if any of them should die without issue, to the survivors, not abso-

lutely, but subject to the same limitations which were applied to their original shares: that is, the parts of shares which should accrue to the surviving daughter upon the decease of one of them was still to remain inalienable, until the death of such survivors, in order to determine whether it should go to her issue or be subject to a further devolution of ownership in favor of the last survivor. Judge Comstock said at page 572:

> "The first bequests, then, to the sons and the daughters' children, including the dispositions of income until those bequests should vest or fail, were good. The limitations over, in case of the failure of all or any one of them, were void.
>
> "Can those ulterior limitations over be dropped and the primary disposition of the estate be allowed to stand? This should be done if the intentions of the testator will be thereby effectuated rather than defeated."

And at page 576:

> "It is truly said, however, that all the limitations, as well those which are bad as those which are good, are enveloped in a single trust; and on this ground it is claimed that the whole trust, and all the dispositions dependent on it, must fall to the ground. It needs no argument to show that a trust created for a single purpose, unauthorized by law, is void; but it does not follow that an entire trust is void where it is made to subserve also another purpose which is lawful. It has sometimes been thought that the maxim, "Void in part void in toto," expresses a general principle of law; but in reality it does not, as every one must see on a moment's reflection. In the nature of things, in reason, and, above all, in justice, it may and must be true that a deed, a will or other instrument can in part be good, although another part is void because in contravention of positive law."

To the same effect are *Gott* v. *Cook,* 7 Paige, 521 (affirmed on appeal in 24 Wend., 641) and *DeKay* v. *Irving,* 5 Denio, 646.

Appellants (Brief, p. 63, l. 25) say:

> "The doctrine of separability was adopted by the respondents largely upon the authority of *Bailey* v. *Buffalo L. T. & S. D. Co.,* 151 N. Y., App. Div., 166. That decision was referred to particularly during the cross examination of appellants' expert (pp. 120, 121, 122, 125, 126).——— Thereupon the cross examiner took the stand and testified for the respondents and emphasized further the importance which he attributed to the Bailey case in connection with his theory by referring to it twice (see p. 132)."

Appellants are mistaken in saying that the cross-examiner (Judge Collins) took the stand. The witness at page 132 was Mr. Bailey. As to the case of *Bailey* v. *Buffalo Co.,* a glance at the testimony will show that the case was cited principally as authority for sustaining the annuities (as to which the opinion of the Appellate Division is still authority), and only incidentally on the doctrine of separabiltiy, as the most recent and extreme case in which the doctrine was applied, and in which the long line of cases establishing the doctrine were cited.

Mr. Bailey cited the case of *Bailey* v. *Buffalo Co.* as authority for the specific proposition that the provisions of the Givernaud will as contained in the first four paragraphs of the ninth clause

should be considered as annuities, and that upon the death of the two life tenants, Charles and his wife, the annuities would be valued according to the tables and their value paid to the annuitants in a lump sum, the residue being payable to the children of Charles and his wife, if any. The trust property will thus be held in suspension during two lives only, and these provisions of the will are valid. It must be assumed that Charles and his wife had children, living at the time of Givernaud's death, for there is no proof to the contrary, and the burden was on appellants. But even though Charles and his wife should die without having had children, the questions which would arise are now purely academic, for it is not yet time to say that such a contingency will arise.

Upon the question of separability, the Court of Appeals in the *Bailey* case (209 N. Y., 525, 536) said:

> "The clause of the will of Mr. Bailey as the same appears in the record is embodied in a *single paragraph* and must be considered as a whole. The rule is well established that when some of the trusts in a will are legal and some illegal, if they are connected together so as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or some of them, then all of the trust provisions must be construed together and all must be held illegal. (*Manice* v. *Manice,* 43 N. Y., 303; *Knox* v. *Jones,* 47 N. Y., 389; *Van Schuyver* v. *Mulford,* 59 N. Y., 426; *Kennedy* v. *Hoy,* 105 N. Y., 135; *Tilden* v. *Green,* 130 N. Y., 29.)
>
> Respondents ask us to apply the rule *which permits unlawful trusts to be elim-*

inated from a will, and those which are lawful to be enforced. The court will at all times give full effect to the intention of the testator, provided always that such intent does not violate provisions of the statutes or well-established principles of law. It is not permissible for the court to violate the intention of the testator or interfere with the general plan created by the testator for the disposition of his property." (Italics ours.)

In the case at bar, the invalid portion of the will (Clause 11) is contained in an entirely distinct and separate part of the will from the valid provisions. Clauses 9 and 10 are complete and valid beyond question, and if Charles and his wife die leaving children (which we must now assume will be the case), the provisions of clauses 9 and 10 will be fully carried out, to the letter. In the *Bailey* case the entire trust provisions were contained in one clause of the will. The decision was that *a part of an entire and single clause* will not be cut out, because to do so would be to destroy or subvert testator's general scheme. In the case at bar the eleventh clause is quite disconnected and separated from the ninth and tenth clauses, and consists of an alternative trust provision, intended to operate only in the event that the tenth clause should prove to be ineffective to vest the remainder upon the death of the two life tenants. Hence, it is no part of the testator's general schem,e and to lop it off will not alter his testamentary intention, as it would have done to discard a part of the clause in the *Bailey* case.

In the *Bailey* case, the Court of Appeals considered simply the clause of the will "as the same appears in the record," which was "embodied in a single paragraph and must be considered as a

whole;" and said (at page 538):

> "The trust for a payment of the income of the trust fund was subordinate to the disposition made of the principal, consequently the creation of the trust fund and disposition of the same, both income and principal, are so closely allied that they are inseparable. The testator in his earnestness to provide for his grandchildren surrounded the disposition of the trust by provisions in violation of the statutes relating to perpetuities and ownership and alienation of personal property. As the predominating purpose for which the trust attempted to be created was dependent upon the validity of the whole trust, which cannot be carried out, the trust as to the income must also fall. It is not permissible to eliminate language of a will so closely intermingled with the general plan the same was intended to cover, to make and thereby creates a valid trust, where the clause of the will seeks to establish a trust which by its provisions is wholly invalid. (*Central Trust Co. of N. Y.* v. *Egleston,* 185 N. Y., 23.)"

The opinion of the Court of Appeals is in perfect accord with the long line of decisions, and the Court of Appeals has simply held that under the Bailey Will, or that portion thereof presented by the record on the second appeal, the trust provision is such a close entity, being contained in a single clause and being so interwoven, that the rule of separability cannot be applied without disturbing the testator's general scheme. It has not altered or affected in the slightest the general principle involved.

In this connection, the case of *Church* v. *Wilson,* 152 App. Div. 844 (1912), affirmed without opinion in 209 N. Y., 553 (1916), which we have already cited, is in point.

This case involved the construction of a will under which the power to alienate property was suspended during the life of the widow, three children, and in the event that any child should die without issue then during other lives. The court construed the will so as to find the intention of the testator to have been that upon the death of the widow three separate trusts should be created, one for each of the three chidren. In this way the property of the testator was found to have been tied up for only two lives, up to this point. If the three children left issue, then the trust would fall and the property would vest absolutely in the issue of the children. The court says (152 App. Div., 849):

> "Hence, if the three children of the testator each dies leaving children, there can be no unlawful suspension. The provision for a future life estate, causing a further suspension, in case one of testator's children dies leaving no child, undoubtedly violates the statute against perpetuities and cannot be sustained, but that is a contingency which may never happen. Should it happen, its effect would be not to destroy the 7th clause of the will as a whole, but only the limitation beyond the second life, as to which no valid remainder having been created by the will there would be intestacy. We reach this conclusion upon the authority of *Fowler* v. *Depau* (26 Barb., 224); *Schettler* v. *Smith* (41 N. Y., 328); *Matter of Wilcox* (194 id. 288). The rule established by these cases, which we think controls the construction of this will, is thus succinctly stated in Chaplin on *Suspension of the Power of Alienation* (2d ed., section 430): 'Where the instrument provides for a future disposition of property, by making alternative limitations, one or the other of which is to take effect according to the happening of specified

alternative contingencies, the mere fact that the limitation over upon one contingency is invalid because it might involve undue suspension, or postponement of vesting, does not invalidate the other limitation which, if the contingency upon which it would become operative should occur, could not possibly occasion such undue suspension or postponement.' "

The general testamentary scheme of Louis Givernaud is contained in the ninth and tenth articles of his will. His chief desire was to benefit the several annuitants, and Charles' children, should he leave any. The eleventh article of the will was included, as an afterthought, to prevent intestacy in the event that testator's real desire should prove impossible of fulfillment. It is fair to say that Louis Givernaud had no serious thought or plan beyond his friends and his son and daughter-in-law. The structure of the will itself shows this, for the annuities were, as he intended them to be, much larger than the income, so that the corpus of the estate would in the ordinary course of events be absorbed in their payment. It was testator's plan that there should be nothing left of his estate after the death of Charles and his wife.

The corpus of the estate was $298,000. After deducting $40,000 for payment of specific legacies and expenses of administration, the corpus is reduced to $248,000. Interest on this sum at 4 per cent., without deducting anything for expenses, waste, losses or commissions, is less than $10,000 per year, yet the annuities provided for exceed $15,000 per year. The testator expressly provided that the deficits should be met out of the corpus. A calculation will show that the cor-

pus at this rate would be entirely exhausted in less than 30 years. Charles was 24 years old when the will was executed, and the testator died within two months thereafter. Charles' expectancy of life was then 39.49 years, by the American Experience Table of Mortality. The expectancy of life of the survivor of Charles and his wife was of course higher still.

This purpose of the testator, that his estate should be in the ordinary course of events exhausted in the payment of the annuities, is in effect conceded by the appellants, who say in their brief (p. 66, l. 17):

> "The life incomes provided for in the first four sub-divisions of article ninth represent an aggregate of $4,720 per annum. If the average expectancy of life of the beneficiaries was only 13 years, which is a low average in this case, the total amount of lump sums would be $61,360, nearly one-quarter of the whole estate, which would thus be disposed of to the detriment of the intermediate life estates and of the remainder."

Every will must be separately studied and considered. Where an invalid trust can be separated and expunged without doing violence to the general scheme of the testator or disturbing his general plans, and without doing injustice to the beneficiaries, such separation will be made.

In the case at bar, no separation is necessary because the provisions of the will can be carried out without disturbing the scheme of the testator, without working injustice to the beneficiaries, and without violating the statute against perpetuities. This may be done by maintaining the trust for the life of Charles and his wife, and upon their death ascertaining by the tables the value of the several annuities and paying the

same, and then paying the residue to the children of Charles and his wife.

The authorities cited above fully sustain respondents' witness, Mr. Bailey. Appellants' witness, Prof. Hardon, has no authority to offer in aid of the contrary view expressed by him. He says (Case, p. 128, l. 36):

> "Q. Can you give me any cases in point, where the Court has refused to lop off the invalid portion, cases similar to the case at bar?
>
> "A. No, sir, I can mention no case by name."

It is respectfully submitted, therefore, that if Louis Givernaud died domiciled in New York State, his will is not invalid under the statutes of that state, except for the eleventh clause thereof; and as to that clause, it should be lopped off and expunged, leaving the will otherwise in all respects effective.

POINT III.

The decree below, dismissing the bill of complaint, should be affirmed.

Respectfully submitted,

GILBERT COLLINS,
JOHN S. MABON,
DOUGAL HERR,
Of Counsel with Respondents.

New Jersey Court of Errors and Appeals

DAVID F. PLAHN, as Administrator of Jeanne Marie Josephine Givernaud, deceased, JOSEPH GIVERNAUD and NOEMI JOSEPHINE MARIE GENIN,
Complainants-Appellants,

against

ANITA VARIEL *et als.*,
Defendants-Respondents.

APPELLANTS' BRIEF IN REPLY

POINT I.

The Court of Chancery lacked jurisdiction to nullify an existing decree of separation rendered in favor of the wife in the matrimonial domicil on the ground of desertion by rendering a decree of divorce on the same ground in favor of the husband upon service by publication; such decree of divorce is coram non judice and void.

At the outset of Respondents' brief certain contentions are made concerning the effect of the litigation in which the question of the right of Jeanne Marie Josephine Haour Givernaud, now deceased, to recover from the testator's estate the amount of her dower which testator had been ordered to restore to her by a judgment of the Civil Tribunal of Lyon, the court of their matrimonial domicil. It is claimed by respondents

that the effect of this litigation is "to settle forever the fact that she (Marie Josephine Haour Givernaud) was not the widow of Louis Givernaud after his death in 1908 and not entitled to any part of his estate as his widow, if he died intestate (Respdts' brief, p. 2).

In this connection attention is called to the facts summarized in the opinion below, as follows:

"By judgments rendered February seventh, 1866 and August first, 1866, in the Civil Tribunal of Lyon," (Appeal book pp. 254-265) "Madame Josephine Givernaud obtained a separation from her husband, dissolving the community existing between them as to their property, and giving her leave to live separate and apart from him, and the custody of their children, on the ground of 'abuse and injuries' and 'abandonment'. He came to the United States of America in 1866, established himself in West Hoboken, obtained in 1871 a divorce in this Court upon service by publication on the ground of desertion," &c. (Opinion of Lewis, V. C., Appeal book, p. 271.)

The testator and Josephine Haour were born in Lyon, where they were married, and their children born (*ibid*). They were separated by a decree of the Tribunal of Lyon obtained by the wife upon several grounds, including desertion (abandonment). Six years afterwards the testator obtained a divorce on the same ground in the Court of Chancery upon service by publication. If the latter decree is valid its effect is to vacate and set aside so far as this state is concerned a decree of separation rendered in France in a cause pending between French citizens born, married and established in the city whose tribunal of first instance rendered the decree, hence valid everywhere. To uphold such a result is contrary to rules of jurisprudence uniformly recognized in American courts and subversive of the comity which it has been held entitles French judgments to recogni-

tion in our courts (*Hilton* v. *Guyot,* 159 U. S. 113) besides being manifestly unjust to the wife thus deprived of the benefit of a valid decree, granted in her favor in the matrimonial domicil long before suit was brought in this state by the husband.

We conceive the principle of law to be settled that where the husband abandons his wife in the matrimonial domicil and goes into another jurisdiction, the latter does not become a new matrimonial domicil and is not, therefore, to be treated as the domicil of the wife.

In *Haddock* v. *Haddock,* 201 U. S. 522, 570-1, the husband left New York, the matrimonial domicil, and procured a divorce in Connecticut upon service by publication. The wife later brought an action for divorce in New York and the husband set up the Connecticut decree as a bar. The New York courts refused to recognize as binding under the full faith and credit clause of the Federal Constitution a decree thus obtained, and in this they were upheld by the Supreme Court of the United States. Here the case is stronger, for the wife had obtained the decree in her favor in the matrimonial domicil five years prior to the filing of the husband's suit in this State.

See also *Hibbert* v. *Hibbert,* 2 Buch., 778, 779.

Where there is a valid decree of separation, the presumption that a wife's domicil follows that of her husband does not obtain.

Percival v. *Percival,* 106 App. Div. (N. Y.) 111.

No case has been found where the decree of separation of the court of matrimonial domicil has been in effect annulled by a subsequent decree rendered in another forum based upon substituted service. The *res* upon which the court of chancery in this state was assuming to adjudicate by granting a divorce to the husband on the ground of

desertion had already been adjudicated upon in France by a decree on the same ground in favor of the wife. Having obtained such relief in the court of the matrimonial domicil possessing jurisdiction of both parties, living apart from her husband under a valid decree of that court, was she bound at her peril to litigate with her husband in such foreign forum as he might seek for another adjudication regarding the same subject-matter, or see herself deprived of the benefit of the decree in her favor? It is submitted that to lay down such a rule would be to introduce an element of grave confusion in the already complex subject of conflict of laws in matters of divorce. After the decree of the French court no court elsewhere, save on the basis of personal service within the State, or voluntary appearance, could have acquired jurisdiction of the *res* sufficiently to render a decree against the wife on the very ground upon which she had previously obtained a decree in her favor. Hence it was contended below and is urged here that the decree of 1872, insofar as it is claimed to override the French decree and to deprive the wife of property rights flowing from the marital relation is not due process of law against the wife, but is void and of no effect as repugnant to Section 1 of the fourteenth amendment of the Federal Constitution (Appeal book, pp. 56-57).

N. Y. Life Ins. Co. v. *Dunlevy,* 241 U. S. 518 (June 5, 1916).

"The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person. *Pennoyer* v. *Neff,* 95 U. S. 714. *Freeman,* Judgm. 4th ed. § 120 a; *Black* Judgm. 2nd ed. § 904 and 905" at pp. 522-3.

Thompson v. *Thompson,* 226 U. S. 551, and cases cited at pp. 561-2.

At the outset of the respondents' brief, the decree of 1872 is described as having acquired binding value by reason of the dismissal in another action of an appeal to this court dismissed solely upon the ground that it had been filed too late. In that case the decree of 1872 was attacked directly while here it is attacked collaterally.

But, as stated by Pitney, V. C., in *Watkinson* v. *Watkinson,* 1 Rob. 142, 154,

"*An inherent lack of jurisdiction renders the decree void for all times and in all places and for all purposes,* and a decree so declaring it does not vacate a valid decree, does not change the relation of the parties, but simply declares that the decree never was valid and that the relations of the parties have not been changed."

This rule, as stated above, is so well established as not to require elaboration. In that connection two additional authorities may be cited:

Elsasser v. *Haynes,* 23 Vr. 10, 15;
Pennoyer v. *Neff,* 95 U. S. 714.

POINT II.

While testator travelled to California and to many other places he kept his entire fortune in New York and presumably intended to return there regularly as he had always done after leaving West Hoboken in 1896.

The recent *Martin* case, on which respondents lay stress in their brief (pp. 24-27), involved the question whether Frederick Townsend Martin had changed his domicil from one country to another,

from the United States to England. Such change of domicil involves rules somewhat different from the change from one State of the United States to another as pointed out in our main brief (p. 23). In deciding that no such change took place the Appellate Division opinion points to a written declaration by the testator as follows:

"You will understand so well that it was a frightful disappointment to me to be forced by illness to give up my winter in my beloved land."

Quoted at p. 26 of respondents' brief from *In re Martin's Estate,* 158 N. Y. Supp. 915, 917.

Where is there in the present record any declaration, written or oral, showing a longing to live in West Hoboken?

In the *Martin* case the Appellate Division found that "Mr. Martin did nothing to transfer any of his business interests, etc., to London," (respdts' brief, p. 27). While in the case at bar the testator had concentrated his entire estate in New York, leaving no property whatever in West Hoboken.

The claim of respondents, made for the first time on this appeal, that testator spent more time in California than in New York is completely negatived by the record, which shows that from 1896 to 1907 he spent more time in New York than in any other one place. Dr. Torrilhon went constantly to the theatre with him in New York. He moved out of West Hoboken because he loved the life of pleasure which he could lead in New York. The respondents' claim regarding California is untenable and resorted to in desperation because of the overwhelming proof against the West Hoboken domicil, which had no existence except in a legal confusion which arose in testator's mind that domicil could be made to rest on a mere claim of right to preserve for legal purposes a domicil abandoned for every other purpose.

In view of the prominence given in respondents' brief (pp. 7, 8) to the Givernaud factories as an element in favor of the theory that testator retained his domicil in West Hoboken it is necessary to point out that, according to testimony adduced by respondents taken in connection with facts stipulated by them Mr. Givernaud sold his interest in those factories nearly two years before his death, which occurred two months after the will in suit was executed.

Direct examination by Judge Collins of Abel I. Smith, at pp. 168-169:

"Q. You knew that Mr. Louis Givernaud and his brother, Etienne, being the firm of Givernaud Brothers, and having two factories in Hudson County—

A. They had three originally—one in Hackensack, one in West Hoboken and one down at Homestead, New Jersey.

Q. And afterwards only the two in Hudson County?

A. Yes, sir; I think they sold the one in Hackensack at one time, after the brother died; there were three brothers originally, and one had the factory in Hackensack, and the other two, one in West Hoboken, I think, and one in Hackensack; then, when the brother died in Hackensack, I think that went into a corporation, Givernaud Brothers.

Q. This brother that had the Hackensack factory was Theodore, I think? A. Yes, sir.

Q. Then there was a corporation formed, called Givernaud Brothers?

Q. Do you happen to know that Louis Givernaud afterwards sold the stock in that corporation to E. Gerli and Co.? A. Yes, sir; he spoke about it in my office more than once, about the transaction.

Q. So that the notes that were in his estate, promissory notes, were the notes of E. Gerli and Co.? A. Yes, sir.

Q. They were given for this stock? A. Yes, sir.

Q. And he held those notes at the time he died? A. Yes, sir."

These notes are described (Appeal book p. 266) in the stipulation setting forth the inventory of all the property left by decedent which shows that at the time of his death he kept nearly $300,000. of his estate in New York, and none at all in West Hoboken or any other part of New Jersey. The two institutions in which he was most interested as shown by the provision of his will giving them the corpus of his estate in case his son Charles should leave no lawful issue are "the 'Italian Benevolent Institute' with its principal office now at 165 Houston Street, New York City, and the 'French Benevolent Society of New York' with its principal office now at 450 West 34th Street, New York City" (Appeal book p. 11). No institution in West Hoboken or in any other part of New Jersey is mentioned in the will and it does not appear that the testator belonged to any organization, social, philanthropic or other, in West Hoboken. No decision has been found which, as is the case of that appealed from, spells a domicil out of absolutely nothing but declarations of residence unsupported by any act whatever, and which do not even go to the extent of expressing an intention by the testator ever to live again in Hoboken after his removal to New York in 1896.

POINT III.

The provisions disposing of the corpus of the fund are essential parts of the general plan of the Will.

Appellants' counsel have read with astonishment the assertion in respondents' brief regarding

the lack of proof that Charles Givernaud and his wife had no child. The fact was conceded throughout the case and the chief counsel for the respondents made a record of it as follows:

> Redirect Examination by Judge Collins of Theodore L. Bailey:
>
> "Q. Having that in view, *does the fact that Charles and his wife, have no child at the present time,* affect the validity of the trust? A. No, sir." Appeal book pp. 134-135.

The point (d) made in that respect at pp. 56-7 of the main brief and which respondents describe as made for the first time in this court is reproduced verbatim from pp. 45-6 of appellants' brief in the Court below. It has been compared with the text of the copy of that brief which was delivered to respondents' counsel in exchange for a copy of their brief when the cause was submitted for determination in the Court below; the only difference in the text is that the word "respondents" has been substituted in the brief on appeal wherever the word "defendants" occurs in the brief below. Said copy of the brief below was borrowed from the respondents for the purpose of verifying the accurracy of the facts as given here.

Coming to the argument of respondents in regard to the validity of the trust scheme under the New York law, it is found that they concede that clause eleventh of the will is invalid and must be expunged; by that clause testator disposes of the corpus of his estate in favor of the two benevolent institutions in the event of the failure of issue of his son Charles; thus one provision for the disposition of the remainder concededly disappears and the only other provision disposing of the remainder is that in favor of issue of Charles, no such issue being in existence as already shown.

Thus the will rests so to speak on two pillars,

being the only provisions dealing with the remainder hence presumably those to which the testator attached the greatest importance. As to the corpus of his estate it was his will that it should go to the issue of one of his children and, lacking such issue, to two institutions. It is conceded that when the will took effect there was no issue of Charles in being; it is further conceded that the provision in favor of the benevolent institutions is void under the New York law, yet with these two pillars on which the trust scheme rests removed respondents argue that it ought to stand nevertheless. They are driven to the position in the last analysis that "it was testator's plan that there should be nothing left of his estate after the death of Charles and his wife" (Respdts.' brief p. 82). In other words, according to the respondents the clauses disposing of the corpus were put in by the testator with the intention that they should not be carried out. This contention carries its own refutation.

The decisions in the Bailey case speak for themselves. In this connection Judge Collins will distinctly recollect, notwithstanding the remark at p. 77 of the respondents' brief, that his expert conducted the cross-examination of appellants' expert. While it is true that there was a second appeal to the Appellate Division in the Bailey case the action was finally disposed of in the Court of Appeals, the same will was involved throughout, and the decision in the highest court must be resorted to if we are to ascertain what has been decided in the case. That decision is found at 213 (instead of 209) N. Y. 525 and the second sentence of the last quotation therefrom at p. 65 of the appellants' brief should be corrected to read as follows:

> "The Court is powerless to make valid a provision in a will which in its inception con-

travenes the statute and which it had found as a matter of law did violate the provisions of the statute.''

Respectfullly submitted

Dated March, 1917.

ROBERT H. MCCARTER,
MAURICE LEON
(of the Bar of New York),
J. W. RUFUS BESSON.

Exhibit A B 1.

In the

Matter of the application of

LOUIS GIVERNAUD for the vacatur of a certain assessment upon personal estate.

STATE OF NEW JERSEY, County of Atlantic } ss.:

LOUIS GIVERNAUD, being duly sworn, deposes and says:

I have received from C. Rockland Tyng, Secretary of the Commissioners of Taxes and Assessments of New York, the annexed notice dated January 10th, 1898, informing me that my personal estate has been assessed at the sum of $75,000. I respectfully ask that this assessment be vacated upon the ground that I am not a resident of New York and neither as principal nor partner have any capital or property invested in business in New York, and that no part of my personal estate is subject to taxation in New York.

I was born in France and am now sixty-three years old. For over thirty years last past I have been a resident of the State of New Jersey. I became a citizen of the United States and of the State of New Jersey by order of naturalization entered in the Court of Common Pleas of the State of New Jersey, held in and for Hudson County, at Jersey City, in said State, October 31st, 1872.

For the last eighteen years I have resided at the corner of High and Spring Streets, West Hoboken, New Jersey. I have for many years exercised the rights of citizenship by voting in New Jersey and I have never voted in New York or elsewhere than in New Jersey. Prior to this year (1898) my personal estate has never been assessed for taxation in New York. I am not doing business in the State of New York either as "principal or partner, and I have no capital or property invested in any such business. I accordingly ask that the said assessment upon my personal estate referred to in the annexed notice be vacated. I make this application by affidavit in this manner for the reason that for some months I have been traveling for my health and am now at Atlantic City, N. J., and can not appear in person before said Commissioners within the time stated in said notice.

LOUIS GIVERNAUD.

Sworn to before me this 20th day of April, 1898.

LEVI C. ALBERTSON,
Notary Public.
(Seal.)

STATE OF NEW JERSEY }
County of Atlantic } ss.:

I, LEWIS P. SCOTT, Clerk of the Inferior Court of Common Pleas of the County of Atlantic, do hereby certify that Levi C. Albertson, whose signature to the foregoing certificate I believe to be genuine, was at the time of making thereof, a Notary Public of the County of Atlantic, duly commissioned and sworn, to all of whose acts as such full faith and credit are and ought to be given as well as in Courts of Justice as elsewhere.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County of Atlantic, this twentieth day of April, in the year of our Lord, one thousand, eight hundred and ninety-eight.

LOUIS P. SCOTT,
Clerk.

(SEAL).

Exhibit D 8.

Block 2022

Louis Givernaud *et Ux.* by Attorney to George Scott.	Deed dated June 1st. 1898.

This indenture, made the 1st day of June in the year of our Lord One thousand eight hundred and ninety-eight, between Louis Givernaud and Elizabeth Leda Givernaud, his wife, by Emanuel Gerli, their duly authorized attorney, all of the township of West Hoboken, in the county of Hudson and state of New Jersey, of the first part, and George Scott, of the Borough of Manhattan, in the county of New York and state of New York, of the second part.

Witnesseth that the said parties of the first part for and in consideration of $1.00 and other good and valuable considerations lawful money of the United States of America to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt thereof is hereby acknowledged and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part and to his heirs and assigns forever.

All that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the township of West Hoboken in the county of Hudson and state of New

Jersey, known and described on a certain map entitled "Map of Property at West Hoboken, Hudson county, New Jersey, known as the Kerrigan Homestead," made by Frank H. Earl, City Surveyor, allotments and divisions in color by R. C. Barcot, dated February, 1875, and filed in the Registers, late Clerk's, office of Hudson County aforesaid on the 22nd day of March, 1875, as lots numbered, one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), in Book numbered 7, taken together and bounded and described as follows:

Beginning at the northwesterly corner of High and Spring Streets, thence northerly and along the westerly side of Spring Street, two hundred and fifteen one hundredths (200 15/100) feet, thence westerly along the southerly side of Charles Street, three hundred fifty and seventeen one hundredths (350 17/100) feet, thence southerly along the easterside of West Street, two hundred and thirteen one hundredths (200 13/100) feet, thence easterly along the northerly side of High Street, three hundred fifty and forty-two one hundredths (350 42/100) feet to the place of beginning.

Being the same premises described in a certain indenture bearing date the 22nd day of March, 1884, made by John E. Develin and Lucy S. Develin, his wife, to the said Elizabeth Leda Givernaud, wife of Louis Givernaud, one of the parties hereto of the first part.

Together with all and singular the house, building, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in any wise appertaining.

Also all the estate right, title, interest, property claim and demand whatsoever of the said party of the first part of, in, and to the same, and of, in, and to every part and parcel thereof.

To Have and To Hold all and singular the above described land and premises with the appurtenances, unto the said party of the second part, his heirs and assigns to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

And the said Elizabeth Leda Givernaud, one of the parties of the first part, does for herself, her heirs, executors and administrators, covenant and grant to, and with the said party of the second part, his heirs and assigns, that she the said Elizabeth Leda Givernaud is the true, lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof with the appurtenances thereunto belonging and that the said land and premises or any part thereof at the time of the sealing and delivering of these premises are not encumbered by any mortgage, judgment or limitation or by any encumbrance whatsoever by which the title of the said party of the second part hereby made, or intended to be made, for the above described land and premises can or may be changed, charged, altered or defeated in any way whatsoever.

And also that the said parties of the first part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in the manner aforesaid.

And also that Elizabeth Leda Givernaud, one of the parties of the first part, will warrant, secure and forever defend the said land and premises unto the said George Scott, party of the second part his heirs and assigns forever against the lawful claims and demands of all and every person or persons, freely and clearly discharged of and from all manner of encumbrances whatsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of Edward Sand for

(Seal.)

ELIZABETH LEDA GIVERNAUD,
By EMANUEL GERLI, *Attorney in Fact.*

STATE OF NEW JERSEY }
County of Atlantic } ss.:

LOUIS GIVERNAUD, (Seal.)
By EMANUEL GERLI, *Attorney in Fact.*

BE IT REMEMBERED, That on this 27th day of June in the year of our Lord One thousand eight hundred and ninety-eight, before me personally appeared Emanuel Gerli, who I am satisfied is the attorney in fact of Elizabeth Leda Givernaud and Louis Givernaud, both of the township of West Hoboken, County of Hudson, New Jersey, the grantors mentioned in the within indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as the voluntary act and deed of the said Elizabeth Leda Givernaud and Louis Givernaud for the uses and purposes therein expressed.

STATE OF NEW JERSEY }
County of Atlantic } ss.:

EDWARD SANFORD,
Notary Public,
New York County, No. 183.

(Notary Seal.)

I, WILLIAM SOHMER, Clerk of the County of New York and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that Edward Sandford, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof and acknowledgement, a Notary Public in and for the said County, duly commissioned and sworn and authorized by the laws of said State to take the acknowledgements and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York.

And, furthermore, that I am well acquainted with the hand writing of such Notary Public and verily believe that the signature to said certificate of proof or acknowledgement is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court and County the 28th day of June, 1898.

WILLIAM SOHMER,

(County Seal.) *Clerk.*

(Received in the office and recorded June 29th, 1898, at 11 A. M.). No. 2926.

COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY.

Between
DAVID F. PLAHN, as Administrator substituted for Jeanne Marie Josephine Givernaud, deceased, Joseph Givernaud and Noemi Josephine Marie Genin,
Complainants, Appellants,

and

ANITA VARIEL *et als.*,
Defendants, Respondents.

STATEMENT AND POINTS OF COMPLAINANTS - APPELLANTS UPON APPEAL FROM DECREE DISMISSING BILL.

This is an action for the construction of the will of Barthelemy Louis Givernaud who died at Los Angeles in the State of California on January 2nd, 1908 (Record p. 3). It is alleged by the complainants that while the testator in his will, executed eight weeks before his death, described himself as a resident of West Hoboken, Hudson County, N. J., he was at the time of his death and for a number of years prior thereto a resident of and domiciled in the City, County and State of New York (*ibid*). It is alleged further that the trust scheme in the testator's will is invalid according to the law of New York (Record p. 4), and that the Statute of Distributions of the State of New York should govern the distribution

of the remainder of the estate of the deceased (p. 5) and a decree accordingly is prayed for (pp. 6-7). The learned Vice Chancellor, after reaching the conclusion that the testator had not lost his domicile in West Hoboken, found it unnecessary to consider any other question, and from the decree advised by him dismissing the bill this appeal is taken.

Statement of Facts.

There are no facts in dispute upon this appeal. All the facts on which Appellants rely are established by uncontroverted testimony, by records and by stipulations between counsel.

Barthelemy Louis Givernaud was born in Lyon, France, April 21st, 1835, a French citizen. On April 5th, 1860, he married, at Lyon, France, Josephine Haour, also a French citizen, born at Lyon. Of that marriage were born the respondents Joseph Givernaud and Noemi Josephine Marie Genin, nee Givernaud, both born at Lyon, the said Joseph on June 5th, 1861, and the said Noemi on August 30th, 1862 (stipulation, p. 61).

By judgments rendered February 7th, 1866, and August 1st, 1866, in the Civil Tribunal of Lyon (Ex. C., and L. 4, record p. 254, Ex. C. 2 and C. L. 3, record p. 259 being translations of said judgments) Mme. Josephine Givernaud obtained a separation from her husband, dissolving the community existing between them as to their property and giving her leave to live separate and apart from him and the custody of their children on the ground of "abuse and injuries," and "abandonment."

He came to the United States in 1866, established himself in West Hoboken, obtained in 1872 a divorce in this Court upon service by publication on the ground of "desertion" (one of the

very grounds on which his wife had obtained a judicial separation) and thereafter contracted another marriage of which the defendant Charles L. Givernaud is the issue. He established a prosperous business in this country with factories at West Hoboken, Hackensack and Homestead, New Jersey, and an office in Greene Street, New York.

According to the undisputed facts appearing from the testimony adduced at the trial from witnesses on both sides, it was established:

1st: That Louis Givernaud left his West Hoboken home in 1896, *taking with him his bed, wardrobe and personal effects, and never returned there afterwards.*

The testator lived for many years with his American wife in a house at Spring and High Streets, West Hoboken (Record p. 92).

In the winter of 1895-6, when caught in a snow storm, while returning from New York, he said to Dr: Torillhon, a witness called by the respondents:

> "I cannot stand these rough nights any more; I like my theatre so I think that next winter I will take a room in a hotel or somewhere in New York, so that I can enjoy my theatre" (p. 187 Testimony of Dr. Torillhon, Givernaud's most constant companion from 1880 to the time of his death in 1908. He was a dentist by profession, but acted as Givernaud's secretary part of the time, accompanying him on all his travels up to the summer of 1903).

The next Fall he asked Dr. Bertini and Dr. Torillhon to rent an apartment for him in New York, which they did, taking an apartment for him in the Von Hoffman Flats, West 26th Street (p. 188, Testimony of Dr. Torillhon).

He took his wardrobe and bed with him from

West Hoboken to New York (p. 93, Testimony of Joseph Braubach, coachman and valet to Mr. Givernaud—coachman 1891-5 and valet 1895-1901. Also Test. of Dr. Torillhon pp. 203-204).

The house in West Hoboken was sold in June, 1898 (p. 203, Test. Dr. Torillhon, deed in evidence in which Mr. Givernaud joined).

Mr. Givernaud never lived with Mme. Givernaud after she left West Hoboken in 1898. They were not congenial (p. 202, Test. Dr. Torillhon). She died in 1904 or 1905 (ibid 234).

When Mr. Givernaud was living in the Von-Hoffman Flats he said to two gentlemen, that he was glad he was through with West Hoboken (p. 100, Test. Jos. Braubach).

2nd: That after 1896 *he had no place of residence of any kind in West Hoboken.*

Dr. Torillhon did not know him to live in the West Hoboken house again after this date, nor to spend the night there (p. 204, Test. Dr. Torillhon).

Dr. Torillhon cannot recollect that Mr. Givernaud spent any night in West Hoboken after 1896. He saw Mr. Givernaud home four or five times a week after the theatre, always to an apartment in New York; never, after 1896, to West Hoboken (p. 208, Test. Dr. Torillhon).

Dr. Torillhon never accompanied Mr. Givernaud on any occasion when he cast a vote anywhere after 1896 (p. 216, Test. Dr. Torillhon).

Dr. Torillhon spent many nights with Mr. Givernaud in New York, but never one in West Hoboken after 1896 (p. 223, Test. Dr. Torillhon).

3rd: That from 1896 *on the only permanent homes he ever kept were in New York City in apartments the rent of which he paid and where he was regarded as the head of the household, of which he paid all the expenses; and that he kept*

up such homes continuously in New York from 1896 until shortly before he died, namely: for a period upwards of ten years.

He maintained an apartment from this time on continuously in New York.

That home was moved from time to time during the years 1896-1907; as soon as one apartment was given up, another was taken each time in New York, and the furniture moved to it; the record in this regard may be summarized as follows:

(1) Von Hoffman Flats, West 26th Street, 1896 (p. 188) to 1899 (p. 203). A bachelor's apartment (p. 95).

(2) The Tacumtha, 219 West 34th Street, 1899 (p. 203) to 1900 (p. 204). A bachelor's apartment (p. 95).

(3) The Powhattan, West 34th Street, 1900 (p. 96) to 1901 (p. 204). A housekeeping apartment (p. 96).

(4) The Raymore, 1 West 68th Street, 1901 (p. 76) to 1904 (p. 76). A housekeeping apartment (pp. 97, 225).

(5) 64 Central Park West, 1904, (pp. 79, 205) to 1907 (p. 200). A housekeeping apartment (p. 225).

Dr. Torillhon testified on direct examination:

> "Q. How intimate did you become with Mr. Givernaud? A. Very intimate; in fact for years we saw each other every other day; or at least four or five times a week; we went to the Theatre together mostly every night" (p. 187).

On cross-examination he testified thus:

> "Q. After he left the West Hoboken house in the Fall of 1896 and until he moved out of the VonHoffman flats; you did not know him to live again in the West Hoboken house, did

you? A. I knew him to visit there; I did not know whether he lived there or not—no.

Q. You did not know him to live there again? A. No, sir'' (p. 204).

''Q. Now after he left the VonHoffman flats he moved into that apartment in West 34th Street, didn't he? A. Yes, sir.

Q. And he remained there how long? A. They remained there a year or so, and then they took another apartment further West in 34th Street.

Q. In that apartment how long did they remain? A. To my memory, a year or so, something like that.

Q. And after that, when they moved out of that apartment where did they move to? A. To 68th Street, in Central Park West.

Q. And you visited him frequently when he was in these different apartments in New York? A. I told you, I said before, that I went to the theatre with him five times a week and always saw him home'' (p. 204-205).

''Q. From that apartment furthest on West 34th Street he moved over to 68th Street? A. Yes, sir.

Q. And he remained there how long? A. A year or two.

Q. Then where did Louis Givernaud go from that apartment in 68th Street? A. He went up to his son's new apartment.

Q. Where was that? A. At Central Park West * * * I could not remember the number. I know the house. I have been there hundreds of times (p. 205).

''Q. You have insisted on describing then these apartments as his son's apartments; but it is true, isn't it, as you have already testified, that Mr. Louis was paying all the expenses. A. He was supporting his son.

Q. He was paying all the expenses, wasn't he? A. I suppose he had to pay his rent if he was supporting him, didn't he?

"The Court: Strike that answer out."

"Q. (Question read). A. Certainly, yes."

(A) *Payment of Rent.*

Braubach once paid the rent at the VonHoffman Flats with a check given him by Mr. Louis Givernaud (p. 97, Test. Jos. Braubach).

Mr. Louis Givernaud paid the rent at the Tacumtha, West 34th Street, N. Y.

"I know he (Louis Givernaud) gave the owner the money" (p. 65, deposition of Charles Nelson).

When Charles Givernaud was married in 1899, Louis Givernaud said that if they (Charles and his wife) would rent an apartment in New York he would pay the rent (p. 200 Test. of Dr. Torillhon).

Louis Givernaud said that he supposed he would have to support Charles after his marriage, which he did (p. 199, Test. Dr. Torillhon).

Louis Givernaud paid all the expenses in the last New York apartment and as far as Dr. Torillhon knew in all of the others (pp. 205-206, Test. Dr. Torillhon).

Mr. Louis Givernaud paid the rent at No. 1 West 68th Street, New York.

"I saw Mr. Louis Givernaud come down to the office and pay the rent himself" (p. 113 Test. George Sibbald, Engineer and Superintendent at No. 1 West 68th Street, New York, during the time that Mr. Louis Givernaud lived there).

Checks in payment of rent came from the office of Givernaud Brothers in Greene Street, New York (p. 78, Deposition of William Huston, bookkeeper at the Raymore, 1 West 68th Street, New York, during the entire time that Louis Givernaud was a tenant there).

Huston was employed across the street from

the office of Givernaud Brothers in Greene Street for three years but never knew Charles Givernaud to be connected with this office (pp. 89-90 Deposition of William Huston).

(B) *Regarded as Head of the household in New York.*

Mr. Louis Givernaud was regarded as the head of the household in the 34th Street apartment.

> "I was not present but I know he (Louis Givernaud) rented them from George Schwegler" (p. 63, Deposition of Charles Nelson).

The son never spoke to Nelson of matters concerning the apartment though he often came down to talk to him. "The son had little to say; he was kind of indifferent." (p. 65, Deposition of Charles Nelson).

Mr. Louis Givernaud was also regarded as the head of the household in the apartment at No. 1 West 68th Street. William Huston, the superintendent, said:

> "Most of our dealings were with Mr. Louis Givernaud" (p. 85).

These dealings concerned repairs, alterations and so forth. With the exception of speaking to Mrs. Charles Givernaud, once about decorations, Huston had all his dealings, in the matter of repairs, gas fixtures and so forth with Louis Givernaud (pp. 85-86, Deposition of William Huston); also the question of changing the apartment (p. 79, Test. William Huston).

> "Further Direct:
>
> Q. Now, in the discharge of your duties as engineer and supervisor of the Apartment House called the Raymore, did you have occasion to have any business with the persons occupying the different apartments in the house A. Yes, sir.

Q. And with respect to the particular apartment that you have testified to, namely: on the ground floor, with three rooms in the basement, when you had such business, whom did you take it up with? A. Mr. Louis Givernaud'' (p. 110).

Cross-Examination by Mr. Collins:

Q. Mr. Charles Louis Givernaud, who is here present, and his wife, also occupied those apartments, didn't they? A. They lived there, yes, sir.

Q. And you frequently talked with one or other of them about matters in connection with the apartment, didn't you? A. Not about alterations and other things to be done.

Q. (Question read). A. No, sir.

The Court: Strike out the first part of the answer preceding the last.

Q. Did you never talk with Charles Louis Givernaud's wife about matters in that apartment? A. Not officially.

Mr. Collins: I move to strike out that answer.

Q. Did you or didn't you, talk with them about it? A. No, sir.

Q. You didn't talk at all? A. No, sir'' (p. 110, Test. George Sibbald).

''Q. Did you consider Charles Louis and his wife your tenants there? A. No, sir, they lived with Mr. Louis Givernaud'' (p. 111, Test. George Sibbald).

''Q. What were the matters that you spoke to Louis Givernaud about? A. When he came down to the office he told me about several alterations, papering and kalsomining, etc'' (p. 111, Testimony George Sibbald).

Sibbald never spoke to Charles Givernaud or his wife about matters in connection with the apartment (p. 110, Test. George Sibbald).

''He said then that he would support him

(Charles, after his marriage) and I always understood afterwards that he always supported him'' (p. 199, Test. Dr. Torillhon).

''Q. And whether living in the VonHoffman Flats or living in the first apartment on 34th Street, or the second apartment on 34th Street, or the apartment on 68th Street, or the apartment at Central Park West, the expenses were all paid by Louis Givernaud, were they not? A .I cannot say that all were; I don't know.

Q. As far as you know? A. As far as I know, yes, sir'' (pp. 205-206, Test. Dr. Torillhon).

(C) *These apartments were the only permanent homes Louis Givernaud had after* 1896.

Mr. Louis Givernaud lived as any other permanent tenant in the New York apartments (p. 105, Test. George Sibbald).

Nelson never heard Mr. Louis Givernaud refer to any other residence while at the Tacumtha, West 34th Street (p. 64, Deposition of Charles Nelson).

Mr. Louis Givernaud lived in the manner usual to tenants of apartments, in the 68th Street apartment, which the Givernauds furnished (pp. 77-78, Deposition of William Huston).

Huston never heard of Louis Givernaud having any other residence or heard him refer to one (p. 79, Deposition of William Huston).

The apartment at the Raymore was a housekeeping apartment and meals were prepared there for the Givernauds (p. 81, Test. William Huston).

Dr. Torillhon slept and had meals with Mr. Givernaud in all the New York apartments, except the Von Hoffman Flats and the first 34th Street apartment, where there were no kitchens (p. 225, Test. Dr. Torillhon).

Louis Givernaud slept in the VonHoffman

Flats, and in the Taccumtha, but had his meals outside. The Powhattan was a housekeeping apartment, and he slept and had breakfast and dinner there (pp. 95, 96, Test. Jos. Braubach).

Mr. Louis Givernaud gave parties at the Von-Hoffman Flats (pp. 217-218, Test. Dr. Torillhon).

Mr. Louis Givernaud also gave parties in the first 34th Street apartment (p. 231, Test. Dr. Torillhon).

Louis Givernaud slept and ate breakfast, sometimes dinner, at the Raymore, 1 West 68th Street (pp. 108-109, Test. George Sibbald).

The Givernauds furnished this apartment (p. 34, Test. George Sibbald).

> "Possibly he was home for a year at a time; I could swear he was not away for a year at a time" (p. 112, Test. George Sibbald).

The Givernauds were there for Christmas 1902, 1903, 1904 (p. 112, Test. George Sibbald).

Mr. Louis Givernaud slept and ate breakfast and supper at the first West 68th Street apartment (p. 97, Test. of Jos. Braubach).

4th: That while it appears to have been his custom to rent apartments in New York under names of other persons, namely: his friends Dr. Bertini and Mr. Piva and his son, it is nevertheless conceded that in all these cases he paid the rent of the apartments, all the testimony on the subject of payment of rent showing payments by Louis Givernaud and that testimony was not contradicted by either Charles Givernaud or his wife who were present at the trial.

The first two apartments which he occupied in the VonHoffman Flats were known respectively as Dr. Bertini's (p. 97, Test. Joseph Braubach) and Mr. C. Piva's (pp. 188, 221, Test. Dr.

Torillhon, pp. 141, 160, 221-222, Test. Dr. Torillhon).

In Dr. Bertini's apartment it has been conclusively shown that he paid the rent (p. 97, Test. Jos. Braubach; p. 221, Test. Dr. Torillhon).

That he paid the rent in all the other apartments has been shown above under heading third.

5th: That he decided to move over to New York because he enjoyed life in New York and because life in West Hoboken was not suited to his daily habits.

Upon this matter as upon substantially all others, the chief witness for the appellees and the chief witness for the appellants were in accord.

Louis Givernaud enjoyed his life in New York and had no desire to live again in West Hoboken.

"A. He said it to two gentlemen in New York in his apartment, in the VonHoffman apartment, while he was living there.

Q. He said it to two gentlemen in your hearing? A. Yes, sir; he said he was glad he was through with West Hoboken" (p. 100 Test. Jos. Braubach).

"I call your attention to one occasion in the winter of 1895-'96, when you and he were at the theatre in New York and a snow storm came on— A. I remember it very well.

Q. Did it take you a long time to get home? A. From the corner of Palisade Avenue to his house, which was about two blocks away, it took us nearly two hours; it was a snow storm like we have had lately; we stayed for over an hour in a druggist's doorway, and I had to really help him, almost drag him along.

Q. Do you remember anything he said? A. When he got home he said: 'I cannot stand these rough nights any more; I like my theatre, so I think that next winter I will take a

room in a hotel, or somewhere in New York, so that I can enjoy my theatre' '' (p. 187). Dr. Torrillhon's Testimony).

"A. When he came back in the fall he decided that he would go to New York, and he asked Dr. Bertini and me to look up an apartment for him, which we did, and rented in Dr. Bertini's name, at the VonHoffman, in 26th Street; there were two rooms there'' (p. 188, Test. Dr. Torillhon).

He went to the theatre almost every night after he had moved to New York'' (p. 194, Test. Dr. Torillhon).

Mr. Louis Givernaud gave parties at Shanley's, Delmonico's and other places (p. 218, Test. Dr. Torillhon).

Dr. Torillhon claimed that the original idea was to have a room in the VonHoffman Flats merely to use when he stayed late in New York (p. 188). But Dr. Torillhon never knew him to spend a night in West Hoboken after 1896 (p. 204, Test. Dr. Torillhon).

There were parties after which the guests returned to the VonHoffman Flats (pp. 217-218, Test. Dr. Torillhon).

There were also parties at the VonHoffman Flats in which the Misses Kelly (later one Miss Kelly became Mrs. Charles Givernaud) participated. There were many of these parties (pp. 218, 219, Test. Dr. Torillhon).

The guests often remained over night after these parties, sleeping in Mr. Piva's apartment, above Mr. Givernaud's, and in Mr. Givernaud's. There were many parties in the first 34th Street apartment, Mrs. Charles Givernaud's sister often stayed there (pp. 232, 233, Test. Dr. Torillhon).

The VonHoffman Flats and the First 34th Street apartment were not housekeeping apart-

ments. The three others rented subsequently were such (p. 225, Test. Dr. Torillhon).

6th: That while he travelled extensively, the place to which he always returned from his trips was New York.

After an extended trip in the West in 1898, Dr. Torillhon and Louis Givernaud returned to New York, staying two weeks, and making several short trips before going to Europe (p. 189, 190, Test. Dr. Torillhon).

In 1899 Louis Givernaud and Dr. Torillhon returned from California, to New York, went to Hot Springs, to Glenwood Spa, and then came back to New York. The summer was spent at Atlantic City, returning in the fall to New York (pp. 192-193, Test. Dr. Torillhon).

In 1900 Louis Givernaud again returned to New York from a trip to California, arriving in May. A few weeks later, he went to Europe, this time not accompanied by Dr. Torillhon but by Charles and his wife, returning in the Fall to New York. They then went to Atlantic City and came back to stay in New York making short trips. These returns were all to "his son's apartment" in 34th Street with the exception of the return from California, when he went to the VonHoffman Fats (pp. 193-195, Test. Dr. Torillhon).

In 1901 Louis Givernaud, Charles and his wife, and Dr. Torillhon, returned from Los Angeles and Honolulu to the New York apartment in 68th Street (pp. 195-196, Test. Dr. Torillhon).

Mr. Louis Givernaud spent the summer of 1901 at Atlantic City and returned in the Fall. They made short trips from New York as a base in the Fall of 1902. The winter of 1902-1903 was spent by Mr. Givernaud in California returning to New York in the spring (pp. 196-198, Test. Dr. Torillhon).

Louis Givernaud was stopping at the Waldorf Astoria in 1907 at about the time when the will in suit was executed (Dr. Torillhon, p. 227).

Dr. Torillhon went to the theatre regularly with Mr. Louis Givernaud up to 1903 in New York (p. 226, Test. Dr. Torillhon.

In 1905 and 1906, Charles Givernaud and his wife were still living in New York, wintering in California (p. 226, Test. Dr. Torillhon).

"Q. After he came back to this country from each of these long trips that you have testified to, where did he live on this side of the water, where would he go? A. To his flat in New York (p. 105, Test. Jos. Braubach).

He would spend a night in Homestead when they had an entertainment there, and then would go back to his flat in New York (p. 105, Test. Jos. Braubach).

While at the Raymore, West 68th Street, Louis Givernaud's absences were not very frequent. They were at home for Christmas in 1902, 1903, 1904 (p. 112, Test. George Sibbald).

Louis Givernaud generally returned to the Raymore after trips (p. 80, Test. William Huston).

Louis Givernaud was usually away for not more than one to three months at a time (pp. 83, 85, Test. William Huston).

When Dr. Torillhon and Louis Givernaud came in at the Grand Central there would usually be some business associates to meet Mr. Givernaud, or he would get into a cab, while Dr. Torrillhon went alone to West Hoboken. When they came from Atlantic City, Louis Givernaud would sometimes mention the fact that he was going over to New York (pp. 224, Test. Dr. Torillhon).

7th: That he re-affirmed his determination to continue his domicile in New York on five important occasions when, having decided to move, he chose to move to some place in New York rather than in West Hoboken.

(Pp. 187, 188, 189, Test. Dr. Torillhon).
(Pp. 93, 94, 95, 96, 97, Test. Jos. Braubach).
See at p. 5 of this brief list of apartments under heading 3rd.

8th: That at the time of his death, shortly after he made the will in suit, he had no property in New Jersey, but kept his entire fortune in New York.

He sold the stock of the Corporation which had been called Givernaud Brothers, to E. Gerli & Company (pp. 168-69, Test. Abel I. Smith).

He kept his fortune in securities in a safe deposit in New York, namely, $98,000 par value New York City Corporate stock, dated November 19, 1906, $200,000 in two notes of E. Gerli & Co., dated, respectively, March 14th and April 19th, 1906, $23,000 in three notes of E. Gerli & Co., two dated May 8th and one October 24, 1907. (Stipulation of counsel, dated January 27, 1914, Ex. C. L. 11 Record, pp. 265-8). Thus at the time the will in suit was executed, November 4th, 1907, he did not have any property, real or personal, in New Jersey and acquired none thereafter during the two last months of his life (p. 267).

9th: That while he declared on several occasions that he had not ceased to be a resident of West Hoboken and in one instance pointed to his brother's house in Homestead as "his business headquarters in the future," neither Dr. Torillhon nor Mr. Abel I. Smith, witnesses called by re-

spondents, nor any other witness heard was able to testify to his ever having said that he intended to come back to live in West Hoboken nor indeed anywhere else in New Jersey, and all the evidence adduced negatives any such intention on his part.

Louis Givernaud's declarations that his residence was still in West Hoboken were never coupled with any expression of any desire ever to return to live in West Hoboken; he probably believed that he could claim a West Hoboken residence for legal purposes without any actual intent of ever living in West Hoboken again—an idea which led him to claim that he had not officially deserted the place where he had first found success, and at the same time enabled him to live in the place of his choice. The following abstract of every such declaration when considered in the light of the attendant circumstances amply supports the existence of such a theory in his mind.

First, in 1896, he began to think of leaving West Hoboken.

> "I cannot stand these rough nights any more; I like my theatre, so I think that next winter I will take a room in a hotel or somewhere in New York, so that I can enjoy my theatre" (p. 187, Test. Dr. Torillhon).

In the fall of 1896 he asked Dr. Bertini and Dr. Torillhon to look up an apartment for him in New York. They rented one under Dr. Bertini's name though Givernaud paid the rent (p. 188, Test. Dr. Torillhon).

> "I asked him if he was going to leave his house to become a citizen of New York, and he said, 'Never; my home is in West Hoboken, and I stay there'" (p. 188, Test. Dr. Torillhon).

At this time Givernaud was planning to aban-

don West Hoboken, and adopt New York as his domicil of choice (p. 188, Test. Dr. Torillhon). This he did, occupying the apartment known as Dr. Bertini's and later the one above, known as Piva's. Neither of which was openly under his name (pp. 188, 221, 222, Test. Dr. Torillhon; p. 93, Test. Joseph Braubach).

In 1898, when he was still living in New York (pp. 203, Test. Dr. Torillhon), Mme. Givernaud sold the house in West Hoboken.

> "I said to him, 'What are you going to do now; shall you make New York your residence?' and he said, 'No, I never intend to live in New York'; he said he had an aversion to becoming a resident of New York City, positively; he told me that positively twenty times" (pp. 190-1).

But the evidence shows that at the time Louis Givernaud was declaring his aversion to being considered a resident of New York, he did not declare or even hint that he intended or desired ever to live in West Hoboken again. On the contrary, it was at about this time that he returned from Europe not to West Hoboken, but to his home in New York, as had been and was thereafter his invariable custom (p. 197, Test. Dr. Torillhon).

Again in the fall of 1898 Louis Givernaud made an affidavit, in which he swore that he was a resident of West Hoboken, to avoid the payment of taxes in New York. At that time he had not spent a night in the West Hoboken house since the time, eighteen months before, when he took up his bed and wardrobe and left it (pp. 191, 192, 204, 223, Test. Dr. Torillhon; pp. 99-100, Test. Jos. Braubach). No doubt his aversion was limited largely to being taxed as a resident of New York, a rather common human trait.

He did not, either before or after that date, so far as is known, pay taxes or exercise the right to vote in New Jersey (p. 216, Test. Dr. Torillhon).

Before he left for California in 1907 he had a conversation with Dr. Torillhon's sister, which Dr. Torillhon reports as follows:

> "He had bought a house I believe in California; he had bought it in his son's name like he always did, and she said to him, 'Now you are a resident of California,'' and he said, 'Not a bit; I am a resident of West Hoboken' " (p. 202, Test. Dr. Torillhon).

Mr. Givernaud, previous to his departure for California in 1907, stayed at the Waldorf-Astoria Hotel in New York City (p. 227, Test. Dr. Torillhon). He had spent the previous winter in California (*ibid.*), but had come back to New York, and no doubt would have returned regularly thereafter if death had not overtaken him.

Dr. Torillhon gives their last conversation thus:

> "He said to me as I left him and said goodbye, he called me back and he said, 'Bill, you may think a little better of me if you find I have left you a few hundred dollars in my will,' and I said, 'Have you made another will?' and he said, 'Yes,' and I said, 'Where, in New York?' and he said, 'No, in New Jersey; you know I am always a resident of New Jersey' " (pp. 200-201, Test. Dr. Torillhon).

Dr. Torillhon's question as repeated by him: "Where, in New York?" is significant of his own unprejudiced impression at the time concerning the testator's domicil, founded upon intimate knowledge of his daily habits for many years.

That Mr. Givernaud's residence in New York was one of choice is shown by the fact that as long

as he retained his factories in West Hoboken, he went over to visit them every day (p. 97, Jos. Braubach; p. 226, Dr. Torillhon). He preferred to live in New York when he had his business largely in New Jersey, just as many persons having their business in New York prefer to live in New Jersey.

At the time of drawing the will now before the court, Louis Givernaud, when asked by his attorney, Abel I. Smith, if he were still a resident of West Hoboken, said, that as success had come to him there, his "domicile" was there, and he would be buried there.

> "A. I asked him whether he had changed his residence, and said it was proper for me to know that, as the laws in different States varied in regard to bequests to charitable institutions. Mr. Givernaud said to me, 'No, I have not changed my residence; my domicile is here, and I have not changed it.' I am positive about the word 'domicile,' because when he used the word 'domicile' he said it in French, and used the word 'domicile,' and said to me, 'Is 'domicile' right?' and I said, 'Yes, it is the same in English as in French 'domicile' " (p. 164, Test. Abel I. Smith).

This conversation would explain the inconsistencies, which are so manifest, between the acts and the declarations of Louis Givernaud. The meaning in French of the word "domicile" is not necessarily always the same as in English as Mr. Smith informed Louis Givernaud in perfect good faith, but the word in that language may denote a domicile in name which is used for legal purposes only, while the actual domicile is maintained in an entirely different place. (See *infra* Article 111 of the French Civil Code.) It is the actual domicile and not the legal domicile which is identical with the English interpretation of the word, while

Mr. Givernaud thought and was erroneously confirmed in his belief by Mr. Smith that it could mean either, and that here, as in France, he could maintain a nominal domicile in one place for legal purposes, and an actual domicile in another; it is submitted that such a misapprehension alone might explain the contradictory acts and declarations which characterized his conduct.

In taking the stand, Mr. Abel I. Smith, whose memory failed him on cross-examination, also forgot the 19th cannon of the Code of Professional Ethics adopted by the American Bar Association, entitled:

> "Appearance of lawyer as witness for his Client."

This code has been adopted in nearly every State in the Union. In many jurisdictions the rule is that an attorney cannot appear in the same case in the double capacity of witness and advocate. (See *Wilkinson* v. *People,* 80 N. Y. Rep. 309.)

The attempt of Mr. Smith to minimize his activities as counsel in this case, in which his activities have come under the observation of appellants' counsel, proved as surprising as it was painful, in view of the age and eminence of the lawyer who had thus, in an excess of zeal, assumed the position of witness-advocate. That impression was in no way removed by the production of some of the documentary evidence offered and the total failure of memory displayed by the witness as to the circumstances under which the testator had on a given day deeded his interest in certain land in West Hoboken to a clerk of Mr. Smith and received on the same day a deed back from said clerk, thus indicating what is generally known as a fictitious sale, the purpose of which however, Mr. Smith protested inability to recall;

there is no desire to enlarge upon this painful episode which may be dismissed with the statement that the conversation testified to by Mr. Smith related to a fictitious domicil.

Two questions are involved in this case which will be considered in their order. The first is: Was Louis Givernaud's domicile at the time of his death West Hoboken or New York? The second is: If Louis Givernaud died a resident of New York, is the trust in his will valid under the law of New York?

POINT I.

The undisputed facts create the presumption that New York was the testator's true domicil from 1896 to the time of his death in 1908, and that presumption, which rests upon the testator's acts, has not been overcome by mere declarations inconsistent with those acts.

The rule uniformly applied in determining *prima facie* the place of a person's domicil is stated in the following language in the article on "Domicil" found in the American and English Encyc. of Law (2nd Ed.), vol. 10, p. 22:

> *"The presumption is that the place where a person lives is his domicil when he has no family elsewhere, but the presumption may be rebutted."* Citing numerous cases (*none contra*), including *England*: *Bempde* v. *Johnstone,* 3 Ves. Jr. 198; *Bruce* v. *Bruce,* 2 B. & P. 229. *United States*: *Desmare* v. *U. S.,* 93 U. S. 609; *Anderson* v. *Watt,* 138 U. S.. 694; *Mitchell* v. *U. S.,* 21 Wall (U. S.) 350; *Shelton*

v. *Tiffin,* 6 How. (U. S.) 400; *Kenna* v. *Brockhaus,* 10 Biss. (U. S.) 128. *New York*: *Ames* v. *Duryea,* 6 Lans. (N. Y.) 155, *affirmed* 61 N. Y. 609; *Ryall* v. *Kennedy,* 40 N. Y. Super Ct. 347; *Vischer* v. *Vischer,* 12 Barb. (N. Y.) 640; *Campbell* v. *Campbell,* 90 Hun N. Y. 233.

This presumption is a necessary consequence of the nature of domicil. The definition of domicil most frequently used in the Courts and which was adopted in *Cadwalader* v. *Howell,* III. Harr. (18 Law) 138, at p. 144, is that set forth in Story on Conflict of Laws (8th Ed.) §473, in these words:

> *"In a strict and legal sense that is properly the domicil of a person where he has his true, fixed, permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning (animus revertendi).*"

The following rule is generally recognized in American courts:

> "Less evidence is required to establish a change of domicil from one State to another than from one nation to another."
>
> *Matter of Newcomb,* 192 N. Y. 238, at p. 250.

Most of the cases relied upon by respondents involve changes of domicil from one nation to another, a category of cases in which it has been held both here and in England that a change of domicil will not result except with the relinquishment of nationality (see *U. S. Trust Co.* v. *Hart,* 150 N. Y. App. Div. 413, 416).

Upon the record it is not open to dispute that from and after 1896 and for upwards of ten years thereafter—until May, 1907—the testator had his only home in New York, the home to which he always returned after each trip, a home similar

to that maintained by the majority of the inhabitants of New York, who, for the most part, live in apartment houses.

It is further undisputed that shortly after he left West Hoboken under the circumstances already described, his wife removed to New York and that he joined with her in conveying their home in West Hoboken, the last place in which they lived together, and that thereafter she continued to live in New York until her death. It is also undisputed that from 1899 on his household consisted of his son Charles and the latter's wife, both of whom lived with him in the apartments in New York rented in the son's name, but maintained by the testator; hence that neither the testator nor his wife nor Charles his son, lived in West Hoboken after 1896, but that they all lived in New York, the father and son and daughter-in-law sharing the same home for a matter of eight years, traveling often together and always returning to that home in New York.

Thus the presumption arising from the rule cited is particularly strong, if not conclusive, in the case at bar and to rebut it there is nothing in the record save only declarations made by the testator who, after leaving West Hoboken in 1896, continued to describe himself in various documents as a resident of West Hoboken, and to assert orally that he was such.

No doubt, it was more a matter of habit for him to do so than anything else, and in addition the claim of West Hoboken as a residence had its advantage in the one instance when the testator availed of it to avoid payment of a tax on personal property as a resident of New York. But what is clear beyond the possibility of being obscured is that from the time he left West Hoboken in 1896, he did not, so far as the record shows, express either orally or in writing to any of the wit-

nesses who were heard or in any document of any description an intent to live in West Hoboken again, nor did he perform the duties of citizenship there either as a juror or elector, nor pay taxes there—these being the main indicia of intention in matter of domicil.

It is probably true that the testator believed that nothwithstanding his complete relinquisnment of West Hoboken for living purposes, he was entitled nevertheless to continue to claim residence there. Such a belief, however, falls short of a declaration of intent to return to West Hoboken and live there. Such a declaration, as already stated, he never made in any form so far as the record shows. His son Charles and the latter's wife attended the trial of this action. They had lived with him almost continuously from 1896 until his death. If they had been in a position to produce any proof of the existence of an actual intention on the part of the testator, expressed orally or in writing at any time after he left West Hoboken to return and live there, or any proof of his having performed the duties of citizenship or paid taxes there, they would undoubtedly have produced it. The fact that they kept silent is itself evidence that they were possessed of no evidence on this point, the production of which would help their cause.

Thus these declarations upon which the learned Vice-Chancellor relied as supporting the conclusion which he reached in the making of his decision, these words which to him spoke louder than all the testator's acts, these declarations accepted at their full face value, are merely naked assertions of claim of residence in West Hoboken —not of intention to live there again.

The record contains proof of but one declaration made by the testator with regard to his in-

New Jersey State Library

tention whether or not to live again in West Hoboken after he left there in 1896. That is the declaration related by the witness Braubach, who testified that the testator, speaking to two gentlemen within the hearing of the witness, stated to them that "he was glad that he was through with West Hoboken" (p. 100) and to that declaration he lived up until his death in 1908. Braubach's testimony on this point is uncontradicted, and is corroborated by the testator having actually lived up to the statement made in Braubach's presence.

But even if the testator had done what he did not do so far as this record shows—what he could hardly have done truthfully in view of his entire course of conduct—even if the testator had stated orally or in writing an intention to return to and live in West Hoboken or to establish a home in some other part of New Jersey, such declarations would be insufficient to overcome the presumption arising from his having maintained no semblance of a home there after 1896. For his acts show that such intention, if he had been possessed of it, was a mere "floating intention" not sufficiently strong to induce the testator to perform any act in furtherance of it, hence not sufficient to establish his domicil elsewhere than where he actually maintained his only household.

The affidavit which he gave in April, 1898, for the purpose of avoiding taxation as a resident of New York, in which he described himself as having resided at Spring and High Streets, West Hoboken, New Jersey, "for the last eighteen years" (p. 286) is not a declaration of intention to return to West Hoboken, but a representation of fact, and as such it should be considered in connection with the fact proved by the record and undisputed that at that time and for some eighteen months prior thereto he had not lived in the house in question.

By joining in the conveyance of this house (p. 288) on June 1st, 1898, within six weeks of the time of the verification of his affidavit, he showed practically that he never intended to live there again.

The proof here concerning the use of New York as a domicil *i. e.*, the place where testator kept his abode to which he returned after each absence is quite clear and virtually undisputed.

In *Firth* v. *Firth*, 5 Dick. Ch. (50 Eq.) 137, the question of domicil arose upon an application for divorce. Vice-Chancellor Van Fleet, in his opinion in that case, lays down a rule which can with safety be adopted here:

> "The acts or conduct of the person whose domicil is the subject of dispute will, in many cases, seem to indicate with certainty that his residence must have been in one place, while his declarations go to show that it was in another. That is the case here. If we look at the petitioner's acts alone * * * the conclusion would seem well-nigh unavoidable that he had abandoned his domicile of origin and established a new home" (pp. 141-2).

The Vice-Chancellor decided that in determining a person's intentions as to the situs of his domicil "*the best and most trustworthy evidence of it is found, as a general rule, in his acts rather than in his declarations*" (p. 142), and indeed the rule has been adopted generally that declarations are "*the lowest species of evidence*" of domicil (*Kreitz* v. *Berenmeyer*, 125 Ill. 197). No case has been found where declarations have superceded acts, but many where acts have been deemed controlling, regardless of declarations. In the Firth case the facts unsuccessfully relied on to establish a domicil in New Jersey were identical with those relied on here, with this difference that petitioner was born in the domicil which he claimed

having retained in Phillipsburg and had a mother living there in Phillipsburg where a room was kept as his room.

> "He says, however, that he always considered and spoke of Phillipsburg as his home, wrote it as his place of residence on hotel registers; when he married in June, 1886, he gave that as his residence, and that he never paid poll tax in the West, nor voted anywhere except at Phillipsburg. *But he does not tell when he voted at Phillipsburg. He certainly did not after the spring of 1885.* He also says that there was a room in his mother's house which was called his, where he kept pictures, books, shells and other like things up to the time of his mother's death in January, 1892, when these things were removed to his brother's house in Phillipsburg, where they have since remained" (pp. 140-1).

> "The petitioner says he and his wife never kept house and stops there. *He does not tell where they made their abiding place or home —where they ate, slept and surrounded themselves with such things as their relation, comfort and position required them to have*" (p. 141).

In *Holmes* v. *Greene*, 7 Gray (Mass.) 299, the question was whether the plaintiff was a resident of Fall River, in Massachusetts, or of Tiverton, in Rhode Island. Among other features of similarity to the case at bar is the fact that Fall River and Tiverton are near the boundary line between these states, one on the Massachusetts side and the other on the Rhode Island side; just as in this case with New York City and West Hoboken.

> At p. 300: "The only question which now arises upon this proof is, whether it sustains the claim of the plaintiff, that his legal domicil was in Fall River in the autumn of 1853, and that he had a right to vote there in the

annual election of that year. We think it very clear that it does not. This case differs from any other which has heretofore come before this court, involving a question of domicil. *Six months before the time when the plaintiff claimed a right to vote in Fall River, he had removed thence with his family and all his household goods to the town of Tiverton, and there hired a house, in which he lived.* All the outward *indicia* of inhabitancy pointed to Tiverton as his place of residence. The whole case of the plaintiff therefore rested on the fact, that at the time of his removal he declared his intention to be to remain in Tiverton only temporarily, and to return to and retain his habitancy in Fall River. *If this evidence be sufficient to sustain a claim of domicil, then it must follow that a mere naked declaration of intent to reside in a city or town from which a party has removed, without any proof of other facts with which such intent can be connected, is adequate proof of inhabitancy, under the Constitution and laws of this commonwealth. This cannot be so.* It is true, that, in cases where the domicil of a party is in issue, evidence of his intent may have an important and decisive bearing on the question, *but it must be in connection with other facts, to which the intent of the party gives efficacy and significance.* Such is the case where a person has two dwelling houses in different towns, in each of which he lives with his family an equal portion of the year. *Harvard College* v. *Gore,* 5 Pick. 370. So, too, where a citizen leaves the country to be absent abroad for purposes of business or pleasure, for an indefinite period, still retaining his house and furniture in the place of his previous residence. *Sears* v. *Boston,* 1 Met. 250. But no case can be found where the domicil

of a party has been made to depend on a bald intent, unaided by other proof. The *factum* and the *animus* must concur in order to establish a domicil. *Harvard College* v. *Gore,* 5 Pick. 370. The latter may be inferred from proof of the former. But evidence of a mere intent cannot establish the fact of domicil."

What is there, upon the facts, to distinguish the *Holmes* case from the case at bar? The latter is, if anything, the stronger as an example of change of domicil, for there is a veritable absurdity in the claim that the testator could keep his domicil in West Hoboken while living in New York, just across the river from the place of his pretended choice, which made it particularly easy to demonstrate any serious intention on his part to make his home there.

In *Hegeman* v. *Fox,* 31 Barb. Sup. Ct. Rep. (N. Y.) 475, the testator had removed from Williamsburgh, N. Y., to Florida, and his declarations to the effect that he intended to return to live in New York were not borne out by his acts. Although he sought by his will to dispose of his property according to the laws of New York it was held that his widow was entitled, under the laws of Florida, to one-third of his personal property, notwithstanding his will.

The similarity between the *Hegeman* case and the case at bar in respect to intent as borne out by acts rather than declarations is made plain in the following passage from the opinion, at p. 478:

"The facts proved or admitted, as well as the statements and declarations of Mr. Moore, are sufficient to show that he left Williamsburgh with the intention of abandoning his residence there for a new abode in some other place. He sold his house and his furniture, he removed his family, he closed

his bank account, and made such arrangements of his affairs as were natural for a person permanently leaving the place. The evidence as to his declarations and conversations, at the time of his departure and afterwards, is to some extent conflicting upon the question of his intention, although I think the weight of it is that he neither expected nor intended to return to the northern states. In any view of the testimony it is material to observe that he expressed no desire or intention to return to Williamsburgh. He spoke of returning from the south to reside in New York, or on the banks of the Hudson River, *but I do not perceive any proof that he looked forward, under any circumstances, to resuming his residence in Williamsburgh.*

"The question then is whether he acquired a residence in Florida, or whether he continued a mere traveler, with no intention of becoming domiciled any where, after he left this state, and therefore continued to hold a legal domicil here. The proofs are, we think, sufficient and satisfactory upon this point. *I refer to the proof of his acts, rather than to his written or spoken declarations.*"

Two explanations have been given on behalf of respondents as the testator's reason for leaving West Hoboken:

The first, that he was very fond of the theatre and accustomed to go there every night and did not like to have his pleasure interfered with by having to return home during snowstorms; the other, that he and his wife were "not congenial" at about that time. Either of these reasons would be sufficient to explain a change of domicil. As stated in *Matter of Newcomb,* 199 N. Y. 238, at p. 251:

"A change of domicil may be made through caprice, whim or fancy, for business, health

> or pleasure, to secure a change of climate or a change of laws, or for any reason whatever,"

and, although snowstorms are not common in the vicinity of New York and West Hoboken outside of three winter months, the fact that the testator was induced thereby to give up maintaining any home of any description in West Hoboken during any part of the year because of conditions prevailing in winter is not open to criticism. As for the state of uncongeniality which developed between himself and his wife, this certainly was not a bar to his maintaining a home in West oboken after she moved to New York a few months following his own removal there in 1896, especially after her death, which took place some three years before he died (p. 234).

It will be recalled that while living in the Von Hoffman Flats he said to two gentlemen within the hearing of Joseph Braubach, his valet, that he was glad he was through with West Hoboken (p. 100).

No attempt was made to impeach the veracity and disinterestedness of the witness Braubach, whose good faith and reluctance to volunteer testimony were only too obvious.

The argument resorted to by counsel for the respondents and which commended itself to the learned Vice-Chancellor is that in any event the statement thus overheard by the witness Braubach was erroneous because Louis Givernaud was not through with West Hoboken since he had his factories there and went there every day. It is submitted, however, that the obvious meaning of this statement, that which fits into Mr. Givernaud's whole course of conduct, is that he was glad he was through with West Hoboken as his actual home, as the place in which he lived and the

surroundings of which affected his enjoyment of life. The fact that he had business interests there was, of course, immaterial to his pleasure in life.

This statement of the witness Braubach was in no way contradicted by any other testimony adduced. The insistence of the testator to Dr. Torillhon and his sister that he was "always a resident of West Hoboken," his conversation with Mr. Smith on the subject of the relative meanings of the word "domicile" in English and in French, and his assertion that his domicil was in West Hoboken, were at the most indicative of his belief that he could keep his permanent establishment in New York, no establishment whatever in West Hoboken and never intend to live again in West Hoboken, yet claim residence there. It was simply a confused legal notion. (See *in re Geiser, infra,* p. 630).

It has already been seen that that notion served his convenience when he came to swear off taxes in New York, although it did not induce him to pay taxes in West Hoboken nor indeed to perform any duty of citizenship there, so far as the record shows.

In view of the undisputed facts the tax affidavit might have been produced by the appellants to explain the motive which led Louis Givernaud to claim a residence in West Hoboken after leaving there in 1896. That affidavit was produced, however, by the respondents and is thus peculiarly binding upon them.

Although Louis Givernaud had not lived in New Jersey for a year and a half and had throughout that time maintained his permanent establishment, indeed his only establishment in New York, he used his long previous residence in West Hoboken for the purpose of dodging taxes. This is not an unfamiliar situation.

Guggenheim v. *Long Branch,* 51 Vroom (80 Law) 249.

In that case the prosecutor tried to swear off taxes in New Jersey on the ground of his residence in New York and taxes in New York on the ground of his residence in New Jersey. He was unsuccessful in New Jersey.

In the case at bar if West Hoboken had attempted to collect taxes from Louis Givernaud the same situation might have arisen. At all events, while the occasion was not afforded him to resist the levy of a tax in New Jersey, the testator was prompted to contest the New York tax as soon as the opportunity arose, and he did so, giving as his residence a house not occupied then by him or his wife, from whom he had become separated by what appears to have been mutual consent, a house in which he had not lived for a year and a half, from which a year and a half prior to the verification of the affidavit he had removed his bed and wardrobe and personal effects, bringing them over to New York, and in the sale of which he joined six weeks after he swore to that affidavit.

Of that declaration of residence in the tax affidavit the same might be said which was said by the Court of Appeals of New York in *Matter of Newcomb,* 192 N. Y. 238, in which Judge Vann, discussing formal declarations made for the purpose of creating evidence to prove what a person's choice of residence is, says of them:

> "If they are false and made for a sinister purpose, they will meet the fate that falsehoods always meet in courts of justice when discovered at the trials of fact" (p. 252).

A learned New York judge in the case of *Plant* v. *Harrison,* 36 Misc. (N. Y.) 649, at p. 669, collates the following authorities on the subject of

the value to be given to declarations, both oral and written, made by a person concerning his domicil, such as those relied upon by the respondents at bar:

"Declarations are always, for obvious reasons, inferior to acts.

"*Doncet* v. *Geoghegan,* 9 Ch. Div. 441.

"*The Venus,* 8 Cr. 253, 281.

"Rather than being evidence of facts relating to domicile, they are merely explanatory of them when otherwise shown.

"Jacobs Domicil, §454.

"Little stress is to be placed on them as against a man's actions and course of conduct.

"*Sherwood* v. *Judd,* 3 Bradf. 267;

"*Petersen* v. *Chemical Bank,* 32 N. Y. 21.

"Declarations are primarily valuable as expressive of intention, but they are not controlling and are subject to being overcome by 'other and more reliable indications of 'the true intention.'

"*Isham* v. *Gibbons,* 1 Bradf. 69;

"*Matter of Zerega,* 20 N. Y. Supp. 417.

"They often serve to turn the scale when they are not inconsistent with acts, 'but it is 'otherwise if they are contradicted by the 'acts and general conduct of the person 'making them.'

"Jacobs Domicil, §455.

"In the paragraph just cited the learned author aptly says: 'The time, occasion and 'manner of making them the reasonable-'ness and consistency with themselves and 'with the other proven facts in the case, *the 'presence or absence of the suspicion of sin-'ister purpose in making them* * * * 'enter materially into the estimation of 'their value.'

"Written declarations, like oral ones, must be considered in the light of all the circum-

"stances of the case. While they are *prima* "*facie* entitled to more weight as being pre- "sumably made with greater deliberation, "yet even they are within the class that have "been designated as the 'lowest species of " 'evidence.'

"*Kreitz* v. *Behrensmeyer*, 125 Ill. 197."

Great stress has been laid by counsel for respondents upon the point that no change of domicil can be established from mere temporary change of residence, that in order that a change of residence may carry with it a change of domicil it must be shown that the party intended to relinquish the old locality and settle in the new. Counsel for respondents then points to testator's declarations in the tax affidavit, in successive deeds and wills and in the conversations already alluded to, showing that he never intended to change his domicil. In doing so, counsel for the respondents appears to indulge in a strange misconception concerning the matters as to which the intent must bear on in order to effect a change of domicil.

As is frequently stated in the cases, in order to effectuate a change of domicil, the *animus manendi* must be effectual with no *animo revertendi.*

In the case at bar the *animus manendi* necessary to constitute a domicil in New York and the lack of *animo revertendi* so far as living again in West Hoboken is concerned, are shown by the removal from West Hoboken of those pieces of furniture which the testator regarded as necessary to his permanent comfort, by the successive hiring under different names, but always at his expense of five abodes in the Borough of Manhattan within a period of eleven years, in the remark overheard by Joseph Braubach that testator was glad that he was through with West Hoboken, in the joining in the sale of the house in West Hoboken and the

failure to maintain any home or even to keep a room in West Hoboken, in the fact that respondents having at their disposal such witnesses as his business associates and executors, his son and daughter-in-law and his constant companion, Dr. Torillhon, were unable to produce any testimony to the effect that the testator had ever said that he intended to go back to West Hoboken to live, or had ever performed any duty of citizenship there after 1896.

The question of what constitutes a *change of domicil* has recently come up in two cases decided in the Supreme Court of the United States:

Gilbert v. *David,* 235 U. S. 651 (decided Jan. 5, 1915);

Williamson v. *Osenton,* 232 U. S. 619 (decided Mar. 9, 1914).

In *Williamson* v. *Osenton,* Mr. Justice Holmes, who delivered the opinion of the court, says at p. 624:

> "*The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere* (Story, Conflict of Laws, §43); or, as M.r Dicey puts it in his admirable book, 'The absence of any present intention of not residing permanently or indefinitely in' the new abode. Confl. L., 2d ed., 111."

In *Gilbert* v. *David,* it appeared that for some years prior to 1890 the plaintiff lived in Menominee, Michigan, where he had a home and exercised the ordinary duties and privileges of citizenship. In February, 1890, his uncle died in Connecticut and the plaintiff immediately went to Danbury in that State, where he remained practically all the time until his death in 1911 (p. 569).

The opinion of the Court, written by Mr. Justice Day, says:

"The question is, had he lost his domicile in Michigan and acquired one in Connecticut, so that he was at the beginning of the suit in 1904 in reality a citizen of the last-mentioned State?

"This matter of domicile has been often before this court, and was last under consideration in the case of *Williamson* v. *Osenton,* 232 U. S. 619, *supra.* In that case the definition of domicile as defined by Mr. Dicey, in his book on 'Conflict of Laws,' 2d ed., 111, is cited with approval. *There change of domicile is said to arise where there is a change of abode and 'the absence of any present intention to not reside permanently or definitely in the new abode.'* Or, as Judge Story puts it in his work on 'Conflict of Laws,' 7th ed., §46, page 41, 'If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of domicile, notwithstanding he may entertain a floating intention to return at some future period.' *'The requisite animus is the present intention of permanent or indefinite residence in a given place or country,* or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely.' *Price* v. *Price,* 156 Pa. St. 617, 626."

"Applying these definitions to the conduct of plaintiff, we have no doubt that the court was right in holding that he had acquired a new domicile in the State of Connecticut. He removed there with his family, and occupied a house to which he held the title. He owned other real estate in Connecticut, inherited from his uncle.

"He took a letter from his church in Michigan to a church in Danbury, Connecticut. For about ten years he was not back in Michigan, except for a short time, and then for a tem-

porary purpose. The Michigan homestead and much of the furniture used there were sold upon the removal to Connecticut. For more than ten years he resided continuously with his family in the same house in Danbury, Connecticut. While the plaintiff did not vote in Connecticut, as far as the record shows, it is in evidence that he declared to another his intention of becoming a voter there. To some witnesses he declared his purpose to reside in Connecticut. As against this testimony, *it appears that he left his desk with his brother-in-law in Michigan, which he declared was for the purpose of 'holding his residence there.'* To some witnesses he declared his intention to live in Michigan and expressed his preference for that State as a dwelling place. He continued to pay membership dues to orders to which he belonged in Michigan.

"It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut should he succeed in disposing of it for what he considered it worth. *But as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances, shown, from becoming his domicile. It was his place of abode which he had no present intention of changing, that is the essence of domicile"* (pp. 569-570).

In the case at bar there were also assertions of residence in West Hoboken with the pretext now given for such assertions being found to be in the use of a room in the house of a brother not at West Hoboken, but at Homestead, and there was not even a "floating intention" in Mr. Givernaud's mind ever to live in the place to which he alluded as his residence.

Upon the argument of this case below, it was pointed out that in all likelihood Louis Givernaud, who, according to Mr. Abel I. Smith, used the French word "domicile" pronouncing it in the French way and wanting to know whether that was the right word to use, probably had in mind the practice in France to "elect domicile" for legal purposes in the office of a lawyer, although, of course, there was a still further confusion that Judge Smith's office, where the conversation took place at the time the will was executed and left with Judge Smith, is in Hoboken and not West Hoboken.

It may be pointed out here that Article 111 of the French Civil Code provides as follows:

> "When an instrument shall contain on the part of the parties or one of them an *election of domicile* for the performance of the terms of such instrument in another place than that of the *true domicile,* the notices, demands and prosecutions relative to such instrument may be made at the agreed domicile and before the judge of such domicile."

All the testimony in the case is consistent with the existence of some such notion in the mind of Louis Givernaud, although he did not put sufficient reliance on that theory to test it out by attempting to vote in West Hoboken or to perform other duties of citizenship. While it is shown that in April, 1898, he resisted the payment of a tax in New York, where he had his only home, claiming in his affidavit that he lived at Spring and High Streets, although it is now undisputed that he did not live there at that time and had not lived there for eighteen months prior thereto, it was not shown at the trial that his desire to be considered a citizen and resident of West Hoboken had ever led him to pay any personal tax as

such, nor in fact to do any act or thing whatsoever except assure Dr. Torillhon, his sister and Mr. Abel I. Smith when the question came up, that he was still a resident in West Hoboken, which declarations were, of course, in the nature of legal opinions rather than representations of fact and were negatived by the facts.

In brief, all his acts point to an effectual and complete abandonment of the West Hoboken domicil and the establishment and maintenance of a domicil in New York.

West Hoboken was undoubtedly the testator's domicil when he used to go back to it every night, although at some inconvenience as compared with going to an apartment in New York. Up to 1896 it can be said that by every journey back from the theatre, where he went practically every night, he reaffirmed the choice of West Hoboken as his domicil, as the place to which he returned from every journey, long or short. But when from 1896 on he decided that he would never again spend a night in West Hoboken, and, carrying his bed and wardrobe with him, settled in New York and ever after kept that resolve—never once spending a night there from that time until his death, never once expressing an intention ever to live there again—it can be said that from that moment on and until his death West Hoboken ceased to be his domicil.

The attempt to establish a domicil for the testator in Homestead on the strength of a series of declarations that he considered himself a resident of West Hoboken, is a desperate expedient which should defeat itself. Dr. Torillhon, as has been seen, makes him refer to the brother's house in Homestead, where there was a room known as "Mr. Louis' room," as his "business headquarters," and this in connection with the fact that the meetings of the Givernaud Brothers corpora-

tion were held there. Thus the case of the respondents is made to rest on a hopeless confusion between the domicil of a corporation in which the testator was interested and the testator's own domicil.

During the conversation which took place in Mr. Abel I. Smith's office in Hoboken at the time the will in suit was made, no reference was made by the testator to the house at Homestead. He said that he considered he had in West Hoboken what he called in French a "domicile" and wanted to know if there was no difference between the French and English conception of that word. Mr. Smith hastened to assure him that it was all the same, whereupon the will having been executed, the testator departed with the French Civil Code conception of the kind of domicil he had in West Hoboken leaving Mr. Smith blissfully unaware of that provision and of the misunderstanding to which different conceptions of the same word in two different languages might give rise.

But whatever may have been Mr. Givernaud's legal notions on the subject and whether or not the explanation here given is the right one, it is certain that neither at that time or at any other time did he tell Mr. Smith, his lawyer, nor Dr. Torillhon, his companion, nor any other witness, nor his own son and daughter-in-law that he intended to come back to West Hoboken to live, for if he had they would have so testified, and this coupled with his actual record of complete relinquishment of West Hoboken as an abode is deemed fatal to the contentions on which the respondents rely under this point.

Attention should be called to a feature in the case at bar which has not been found in any case except the Holmes case (p. 28 supra) namely, that the very nearness of West Hoboken to New

York is a decisive factor in establishing that West Hoboken was not testator's true domicil after 1896. It often happens that for reasons of business, or pleasure, or health, or duty persons absent themselves from their domicil for years at a time, intending as soon as the cause of their absence disappears to return to their domicil and resume their place in the community, and there discharge the ordinary duties of citizenship. Mere distance in those cases often defeats such intention. What an easy matter this would have been for the testator, as between New York and West Hoboken! A short ferry ride, followed by a short street car ride, would have brought him to the place which the respondents contend was the place in which by choice he would have had his permanent abode, the place to which, had not something prevented, he would have delighted in returning after every long voyage. And what, indeed, was there to prevent his going back there if he chose? What was there to prevent his exercising his choice? The obvious answer is that nothing whatever stood in the way except that, on the whole, he had come to prefer to live in New York and therefore chose to live there rather than in West Hoboken.

The respondents had at their disposal the testimony of the witnesses closest to the testator. If at any time after 1896 the testator had claimed the right to vote from any place in West Hoboken or had responded to a request to serve on a jury in the County of Hudson, or had paid a tax as a resident of West Hoboken, or had manifested his interest in West Hoboken by endowing or contributing to any of its institutions, educational or philanthropic, it may safely be inferred that the son and daughter-in-law with whom he lived, the companion with whom he enjoyed himself both at home and on travels and the lawyer who drew

wills and deeds for him and in general looked after his interests, would have known it, or heard of it. Their silence on all these points furnishes in itself convincing proof that nothing that they could say would have helped their cause.

It is no wonder on the whole that when he came to draw the will in suit Mr. Smith was under the impression that it should be drawn in accordance with the law of New York, and asked the testator where his residence was. And it may be added that Mr. Smith had gone further into the matter than to merely discuss the relative meanings of "domicile" in French and English, if he had asked the testator where he had maintained his abode of choice, the one to which he had always returned for eleven years, and asked him further whether he had the remotest intention of living in West Hoboken in the future, he would have reached the conclusion now only too obvious, namely, that the testator's true domicil under the law was not West Hoboken, but New York.

14 Cyc., page 834, "Domicile."

> "B. *Synonymous With Home.* No word is more nearly synonymous with domicile than home."

Citing *Krone* v. *Cooper,* 43 Ark. 547, 549; *Salem* v. *Lyme,* 29 Conn. 74; *Smith* v. *Croom,* 7 Fla. 81, 153; *Hart* v. *Horn,* 4 Kan. 232, 238; *Venable* v. *Paulding,* 19 Minn. 488; *Wood* v. *Roeder,* 45 Nebr. 311; *Foss* v. *Foss,* 58 N. H. 283; *Matter of Dimock,* 11 Misc. (N. Y.) 610; *Chaine* v. *Wilson,* 1 Bosw. 673 (N. Y.); *In re Fry,* 71 Pa. St. 302; *Dean* v. *Cannon,* 37 W. Va. 123; *White* v. *Brown,* 29 Fed. Cas. No. 17,538.

State, ex rel. Beckett v. *Collector of Bordentown,* 32 Law. 192:

"A domicil is a residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time" (cited in *Stout* v. *Leonard,* 37 Law, 492).

Hegeman v. *Fox,* 31 Barb. 475, at p. 476:

"* * * intention may be established by declarations of the party, or his conduct which is at least as satisfactory evidence as his declarations."

At pp. 479-480:

"* * * Where a man deliberately breaks up his residence, purchases a new mansion, engages in new occupations and acts in every respect as a man would who was settling himself altogether from choice and free will, he must be acting under the control of motives and not of necessity, and he looks forward to no return."

Jacobs' Domicil, §455:

"The time, occasion and manner of making them (oral declarations), their reasonableness and consistency with themselves and with the other proven facts in the case, the presence or absence of sinister purpose in making them * * * enter materially into the estimation of their value."

Dupuy v. *Wurtz,* 53 N. Y. 556:

"The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations" (p. 562).

In *Chaine* v. *Wilson,* 1 Bosw. 673, it was held that one's domicil is in the country rather than in the city, even though he originally went to the country because of his or his child's ill health, where it does not appear that the child continued ill or that he himself might not have returned to the city, if in truth it was his home.

Butler v. *Farnsworth,* 4 Fed. Cases 2240, at p. 903. (U. S. Circuit Court, E. D. Pennsylvania, 1821; Washington, Circuit Justice):

"* * * But when a removal takes place from one State to another, the question necessarily arises, whether the person so removing is a citizen of the State in which he was born or naturalized, or of that to which he had removed. * * * The question of law, arising upon the particular facts of each case must always be * * * has he changed his domicile and become a permanent resident in the State to which he has removed. Mere residence is *prima facie* evidence of such change; although when it is explained and shown to have been for mere temporary purposes, the presumption is repelled. It is true that the intention of the party in changing the place of his residence is a material ingredient in the question of citizenship as it concerns Federal jurisdiction. *But this intention is to be collected from the acts, and not from the declarations of the party.* If the removal be for the purpose of committing a fraud upon the law, the court must pronounce that his removal was without a bona fide intention of changing his domicile. * * * If, on the other hand, the sincerity of the removal, for the purpose of permanently residing in the State which the person has selected, be not questioned and his acts correspond with such purpose, *the change of domicil is completed and the law forces upon him the character of a citizen of the State where he has chosen his domicile; although he may have uniformly declared, as it is contended the lessor of the plaintiff has done, that he nevertheless considered himself as continuing a citizen of South Carolina.*"

In *Valentine* v. *Valentine*, 61 Eq. 400, the testator had a domicile at Camden, N. J., with his wife. In 1893 they separated and he went to New Orleans. Reed, V. C., at p.

"* * * The question is not, whether he intended to abandon Camden, for he might have entertained such an intention and yet not have acquired a domicile in the city of New Orleans. Such an intention would shift his domicile from Camden, but it would be to the domicile of origin. Dicey on Domicil 92" (at p. 406).

"There is nothing to show that New Orleans was his domicile of origin" (at p. 406).

"If, however, he, while having a residence in fact, in the city of New Orleans, had also an *animus manendi* his domicile was there until he changed it. *Cadwalader* v. *Howell,* 3 Harr. 145" (at pp. 406-407).

"Nor need the intention to remain in New Orleans have been an intention to remain there until he died. He may have had a floating intention to return to Camden or some other place in the North, at some time, and yet his intention to remain in New Orleans for an indefinite period might have been sufficient to fix his domicile in that place. 10 Am. & Eng. Encyc. Law (2d Ed.) 19."

"Nor would a subsequent intention to return to Camden unless followed by an actual change of residence affect his New Orleans domicile, for there must be the fact of residence as well as the intent to remain combined."

"The general rule in respect to the acquisition of a new domicile is, that after a person has abandoned his domicile of origin, or his acquired domicile, his domicile will be considered to be in that place in which he has voluntarily fixed his habitation, not for a special or temporary purpose, but with a present intention of making it his home, unless, or until, something which is uncertain or unexpected should happen to induce him to adopt some other permanent home. *Harral* v. *Harral,* 12

Stew. Eq. 279, 285; *Firth* v. *Firth*, 5 Dick. Ch. Rep. 137" (at p. 407).

Story's definition was adopted by Judge Leventritt in the *Plant Will Case*, 37 Misc. (N. Y.) 646, 654, 655, in a noteworthy opinion the soundness of which was such as to induce the unsuccessful litigants not to carry the case further. In that case the testator made a pretense of moving his domicil to New Haven, on about as slender a foundation as the testator here made a claim of continuing his residence in West Hoboken.

In *Guggenheim* v. *Long Branch*, 51 Vroom (80 Law) 246, the court said:

> "That residence is a question of *bona fide* intention and where doubt exists as to its proper *situs*, the *animo revertendi* of the claimant is decisive in establishing it, was determined by this court as early as 1840 in the case of *Cadwalader* v. *Howell*, 3 Harr. 138."

This test of *animo revertendi*, adhered to in New Jersey for so many years, is decisive in the case at bar.

The abandonment of the West Hoboken domicil, quite apart from the establishment of a new domicil in New York City has been shown by proof that the testator performed every act within his power needed to effect such relinquishment. Not only did he leave his home never to return to West Hoboken, but he took with him those household objects most conducive to his permanent comfort as well as his personal effects. It is said that several years later he kept a change of underwear at his brother's house in Homestead, but it is difficult to see how that circumstance can be relied upon to show the preservation of a domicil in West Hoboken. (See in *Hegeman* v. *Fox, supra* a discussion of the same point as regards Williamsburgh and New York.)

The general rule in this country is that a domicil once acquired continues not only until it is abandoned, but until another is acquired.

Jacobs' Domicil §114;
Plant v. *Harrison,* 36 N. Y. Misc. 649, at p. 656.

The English rule, on the other hand, is that the domicil of origin reverts at once upon the abandonment of the origin of choice.

Udny v. *Udny,* L. R. (L. S. C. App.) 441.

According to the general rule in the United States the domicil which the testator acquired in New York by reason of his acts remained his domicil on his death.

In this State the American rule has been followed in *Watkinson* v. *Watkinson,* 68 N. J. Eq. 632 where it was held that a domicil once acquired continues until a new one is acquired *animo et facto.*

POINT II.

The probate is not an adjudication of domicil binding on appellants in this cause.

The probate of the will shows on its face that it was a proceeding purely *in rem.* The appellants and the infant children of Mme. Genin were non-residents and they did not appear. The decree of probate was thus granted *ex parte* but even if the parties had been before the court it would not have constituted an adjudication of domicil binding on the parties and evidence against them in a collateral proceeding.

In *Tilt* v. *Kelsey,* 207 U. S. 43, a case in which the State of New York sought to collect a transfer tax, it appeared that the will of Albert Tilt had been admitted to probate and that his estate had been settled in the Orphans' Court of Morris County, New Jersey, as the will and estate of a resident of New Jersey. The State of New York in a transfer tax proceeding instituted in this county claimed that Tilt was at the time of his death a resident of New York County. The Executors claimed that the determination of the Orphans' Court of New Jersey admitting the will and settling the estate as that of a resident of New Jersey made the question of the decedent's residence *res adjudicata* in the New York transfer tax proceeding. The United States Supreme Court, in reversing the New York Court of Appeals, said (Moody J.) at page 51:

> "In consideration of this question, the first inquiry which presents itself is whether the adjudication of the New Jersey court, that Tilt was at the time of his death a resident of New Jersey, was conclusive upon the State of New York, a stranger to the proceedings. If it was that is the end of the case, because then New York could take the first step necessary to bring the estate within the provision of the tax law of that State. *But upon principle and authority that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicile, nor even evidence of it in a collateral proceeding.*
>
> *Thormann* v. *Frame,* 176 U. S. 350;
>
> *Overby* v. *Gordon,* 177 U. S. 214;
>
> *Dallinger* v. *Richardson,* 176 Mass. 77

and see

> *Mutual Benefit Life Ins. Co.* v. *Tisdale,* 91 U. S. 238;

DeMora v. *Concha,* 29 Ch. Div. 268, aff'd 11 App. Cases, 541;
Brigham v. *Fayerweather,* 140 Mass. 411."

After considering this question further the learned Justice states (page 53) that:

"*It is open to the Courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicile of the deceased.*"

In re Chadwick, 80 Eq. 471 cited by defendants does not hold that a decree of probate is an adjudication of domicile, not open to collateral attack does not sustain their point. The case is reviewed by Walker, Ordinary, *in re Geiser's Will,* 87 Atl. 628, as follows:

"In the case of *In re Chadwick's Will,* 80 N. J. Eq. (10 Buch.) 168, 82 Atl. 918, although dubious, I felt bound to follow the decision of Vice Ordinary Reed in *Bracher's Case,* 60 N. J. Eq. (15 Dick.) 350, 51 Atl. 63, and held that 'Mrs. Chadwick had property in Hudson County, in this state, and therefore her will could be probated here, without having been proved at the place of her domicile, according to the practice of this court as established by its decisions.' The Court of Appeals in affirming the decree in that case (80 N. J. Eq. 471, 85 Atl. 266) dissented from so much of the opinion as held that the prerogative court had orginal jurisdiction of the estate of those of foreign domicile, having property in this state, and expressed the view, concisely stated in the syllabus, that 'neither the prerogative court nor any of the surrogates of this state have general jurisdiction to admit to probate the last will and testament of a non-resident having a domicile at the date of his death in another state, although decedent leave prop-

erty in this state, except as ancillary to a probate by the courts of the locality of such domicile.' Therefore the power of this court to admit to probate the will in question must rest exclusively upon the deceased having been domiciled in this state at the time of her death; and, if she were not, probate must be denied'' (at p. 629).

Probate was denied, the Chancellor dealing with the declarations made by the testatrix on the subject of her domicile in these apt words:

''The recital in the trust deed is powerless to create a domicile where none existed. Her statement to the scrivener that she regarded Atlantic City as her home and her domicile was merely a deliverance of a belief of the acquisition of a political status which was without warrant in law, and unsustained by the facts and circumstances as they then existed. Combined these facts and circumstances did not create a new domicile. *Gillman* v. *Gillman,* 52 Me. 165, 83 Am. Dec. 502; *Hindman's Appeal,* 85 Pa. 466'' (p. 630).

There is no authority in New Jersey to sustain the proposition that a decree of probate is conclusive on the subject of the testator's domicile and may not be attacked collaterally; nor is it conceivable that such a decree, rendered *ex parte,* should bind absent heirs in that respect.

Attention is invited to a recent New York case on this point: *Matter of Mesa y Hernandez,* in which the decision of the Surrogate whose opinion is reported at 87 N. Y. Misc. 242, was affirmed by the Appellate Division in an opinion reported at 172 App. Div. 467, and was affirmed without opinion by the Court of Appeals on October 24th, 1916.

See also

Flatauer v. *Loser,* 156 N. Y. App. Div. 591;

Matter of Grant, 83 N. Y. Misc. 257.

The learned Vice Chancellor states: "My own opinion is that if the testator were domiciled in New York at the time of his death, the New York courts would have to pass on the legality of this trust scheme and not the courts of New Jersey." (Record, p. 272).

This is a novel view of the limitations of the jurisdiction of the Court of Chancery, a view for which no authority by way of precedent is cited and which is contrary to the universal practice. It will suffice to refer to the case of *Harral* v. *Harral,* 12 Stew. (39 Equity) 279, where the court construed the will of a non-resident in accordance with the law of his matrimonial domicil. Construction of the will of a decedent in accordance with the law of his domicil outside the forum is a matter of current experience in the realm of conflict of laws and so far as counsel for appellants are aware has not been challenged except in the passage quoted from the learned Vice-Chancellor's opinion in this case. The Vice Chancellor however, found it unnecessary to decide that the Court of Chancery of New Jersey lacked such jurisdiction having concluded that the testator was domiciled in New Jersey when he died (Record, p. 272).

POINT III.

The Trust Scheme contained in articles ninth, tenth and eleventh of the will is void under the New York Law.

This question did not receive consideration in the Opinion below.

Appellants contend in their bill that the trust scheme as set forth in articles ninth, tenth and eleventh of the will is void under the law of New York which provides that the suspension of ownership for more than two lives in being at the time of the testator's death renders the trust void.

The respondents made a determined effort to establish that under the law of New York the will would be upheld in all respects except as to those provisions contained in article eleventh, the invalidity of which respondents conceded. Their claim was that under the New York law article eleventh should be expunged or lopped off from the will leaving the other provisions to be carried out. An understanding of the question treated under this point will be facilitated by examining the following synopsis of the trust provisions:

Ninth: Remainer to executors in trust, to invest, collect the income and pay:

(1) To Marie Givernaud (sister) $720. per year for life;

(2) To Marie Camille Genin (daughter) $1500. per year for life;

(3) To Anita Variel, (niece) $1,000. per year for life;

(4) To Joseph, Alaska and Lilly Givernaud (nephew and nieces) each $500. per year for life;

(5) To Charles L. Givernaud (son) $5,200. per year for life (and if he dies leaving his wife surviving him, to her for life);

(6) To May Regina Givernaud, wife of Charles L. Givernaud $5,200. per year for life (and if she dies leaving husband surviving to him for life);

(7) "Surplus income" (if any) "undisposed of and unapplied" goes to Charles L. Givernaud and his wife, share and share alike and on the death of either, all surplus goes to the survivor.

(8) In case of deficiency in income, principal to be used to make up annual payments as directed. (Record pp. 8-10).

Tenth: Upon the death of Charles L. Givernaud and May Regina Givernaud, leaving lawful issue, trustees shall transfer entire estate to such issue absolutely. (Record pp. 10-11).

Eleventh: Upon death of Charles L. Givernaud and May Regina Givernaud leaving no lawful issue the income theretofore paid to them to be paid in equal shares to Marie Givernaud, Anita Variel, Joseph, Alaska and Lilly Givernaud and the three children of Camille Genin, and the survivors of them and upon the death of the last survivor the entire estate to be transferred to the Italian Benevolent Institute and the French Benevolent Society in equal portions (p. 11).

The following propositions are deduced from the testimony of the witness called by appellants on the question of the validity of the will:

(a) Should the beneficiary mentioned in each of the first four subdivisions of Article Ninth of the will die before Charles L. Givernaud and May Regina Givernaud the income paid to him would become, in the hands of the trustees, "surplus in-

come, undisposed of and unapplied'' and as such would go to Charles L. and May Regina Givernaud and the survivor of them under subdivision 7th of the same article. Thus the power of alienation is suspended for the life of the beneficiary entitled to a life income under each of the first four subdivisions and for the lives of the two beneficiaries entitled under subdivision 7th to receive that same income as surplus income remaining thus undisposed of and unapplied by reason of their survivorship after the death of the life beneficiary mentioned in the first four subdivisions of the article. Thus the power of alienation is suspended for *three lives.*

(b) Under clause Eleventh, the income given to Charles L. Givernaud and May Regina Givernaud in clause Ninth would go upon their death leaving no lawful issue, to *eight* life beneficiaries and the survivors of them, suspending the power of alienation for *eight lives.*

(c) The remainder of the charitable institutions is not *vested* but contingent upon Charles L. and May Regina Givernaud leaving no lawful issue.

(d) The disposition of the remainder upon the death of Charles L. Givernaud and May Regina Givernaud to their issue is *contingent* upon their leaving lawful issue. No such issue is in existence.

Thus there is no person *in being* in which the remainder is *vested.* The fallacy of the theory of respondents' expert witness is due to his assumption that there is a vested remainder. Such a vested remainder was found and given effect in *Matter of Berry,* 154 App. Div. 509, (affirmed without opinion 209 N. Y. 540), on which so much stress is placed by respondents' expert. There the trust was for a definite period, not measured

by two lives in being, with remainder "and the person to whom it was given was in being, definitely ascertained and competent to take at the time of the death of the testator. There is nothing uncertain about it. It was vested remainder. A future estate is vested when there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. (Real Property Law, sec. 40)." (Page 511).

The Court found authority to expunge an intermediate trust and hold the remainder valid, in *Kalish* v. *Kalish,* 166 N. Y. 368, *Brinkerhoff* v. *Green,* 201 N. Y. 539 and *Smith* v. *Chesebrough,* 176 N. Y. 317. Here, if the intermediate trust in Clause Ninth were to be expunged, where would the remainder go? Not to the lawful issue of Charles L. and May Regina Givernaud; there is none. Nor to the two charitable institutions, whose remainder is contingent upon Charles L. Givernaud and May Regina Givernaud dying without lawful issue, after which the trust is to continue during eight lives, for the benefit of a second or rather a third set of life income beneficiaries.

The respondents' expert proposes lopping off the Eleventh clause of the will which is admittedly void under the New York law. But how can that be done without defeating the scheme of the trust and the intent of the testator? What is to become of the remainder with the charitable institutions out of the will and no lawful issue in being of Charles L. Givernaud and May Regina Givernaud? Obviously Louis Givernaud meant to die testate; the "lopping off" scheme proposed by the respondents' witness would leave him intestate.

Appellants' expert witness testified that the entire trust scheme as set forth in articles ninth, tenth and eleventh of the will was void and in support of that view testified as follows:

"It is undoubtly true that there are cases where part of a trust provision is invalid, as creating a postponement of alienation, which is not permitted by the law of the State of New York,—where the court has, nevertheless, sustained some other part of a general provision; and the case of *Bailey* vs. *Buffalo Loan, Trust and Safe Deposit Company* is one of those cases; and they sustained the general provision, because the Court thinks that the invalid part is not so involved with the others—that are invalid, that it must fall with them. That doctrine, according to my examination of the cases, is a very narrow doctrine, and is applied substantially, only in those cases where the invalid provisions can be lopped off without interfering with the general scheme of the will; and that doctrine is applied primarily for the benefit of a widow, and in some cases, as in this case, for the benefit of the only issue of the testator. In the Bailey case, the provision for the only son was upheld, although the limitations of the estate, after his life estate, were invalid. In my opinion, in this case it is impossible to sever the invalid part of the will from the part of the will which otherwise would be valid.

Q. You mean the trust, don't you? A. Yes, sir, and that cannot be done because it will alter so radically the disposition of the estate. It will be noticed, for example, in the Bailey case, that the persons who will take will be the son, who takes an absolute estate, instead of taking merely a life estate; and after him, the testator's heirs, who would be the son's children; in other words, the same

persons take ultimately in the Bailey case as would take if the entire provision could be held valid, and that, according to my examination of the cases, is usually a fact, that those persons only take where the invalid part is lopped off, who would have taken if the invalid part had not existed". (Pages 121-122).

" * * * in order to determine whether a trust provision which violates the statute relating to restraints on alienation, is valid it is only necessary to determine that in some possible contingency, it will be invalid. Now, as long as Clause II remains in this will, there are many contingencies in which the entire trust provision will be invalid, and it is not enough, therefore, to determine, that if Clause II were not in the will, and that Charles L. Givernaud died leaving issue, the will might then be valid (p. 123).

"I might say, that in my judgment, the first of these cases, *Dennison* vs. *Dennison* (185 N. Y. 438) is not in point at all, because the Court held there, that the second trust was a dry trust; in other words, that the beneficiary had both the legal and the equitable estate; therefore, it was a case of the creation of an estate for A. for life, remainder to B. in fee simple. The case of *Underwood* vs. *Curtis* (127 N. Y. 523, 541) is a case which illustrates the principle to which I adverted a while ago in my testimony, namely, that there are cases where the Court finds that the provisions in the trust are separable and sustains the valid part, if separable; and the common case, as I said, is the case where the Court endeavors to sustain a trust provision for a wife or a widow, and these two cases which are cited in *Underwood* vs. *Curtis*, Kennedy's case, and Van Shiver's case are; the first, a case of a trust for a widow, and

the second case, of a trust for children; in other words, in both these cases, and I think also in *Underwood* vs. *Curtis,* the same person would take eventually, whether the invalid part of the trust was lopped off or not. In other words, there is, in these three cases where the separable valid part of the trust is sustained, no general alteration in the testator's scheme.

Q. Reverting again to the Bailey case—in that case, as I understand it, and as you stated, there was an only child, for whose benefit the trust was created, and in the case at bar, the trust is for the lives of Charles L. Givernaud and his wife, remainder to their issue; do you have in mind a distinction between the two cases? A. I should think that there would be a distinction, inasmuch as it does not appear in the case at bar, that Charles L. Givernaud is the only child of the testator; in fact, as I recall the will, it appears that there were some other children (pp. 124-125).

Q. And can you cite any case in point at all analogous with the case at bar, sustaining the conclusion at which you have arrived? A. I should refer to the language of Judge Parker in *Underwood* vs. *Curtis,* page 541, Volume 127 of the N. Y. Court of Appeals Report; I think he states the law there, as I understand it: "If the provision for the benefit of the widow and the two unmarried daughters, during the life of the widow is inseparably connected with the other dispositions of the will, and a necessary part of the general scheme for the disposal of the testator's property, then it must fall with them, and the testator die intestate—even though it be for wife and daughters, if it is inseparably connected (where he cites *Bene-*

dict vs. *Well*) but where several trusts are created, and those which render the entire disposition illegal, can be separated and legally upheld, without doing injustice or defeating that which the testator might be presumed to wish, that which is illegal, or which, added to the others, renders the whole illegal, may be cut off, and the intention of the testator given effect, so far as the statute will permit,'' and for the exception, he cites three cases there, one of which was, where a trust had to be sustained for a widow, and the other for the testator's children, and the third one, I don't recall; there are not many cases of that character; there are very few where the provisions can be separated'' (pp. 126-127).

Q. And you agree with me, that if the trust could be divided, so that the 11th paragraph could be discarded, that the will would be valid down to and including the tenth paragraph? A. There is something in the seventh sub-division of the ninth paragraph, which raises a doubt in my mind; the words four lines from the end of that sub-division: ''Undisposed of and unapplied.'' It seems to me that that indicates that after the death of the persons named in the proceding clauses, their interest in the trust passes to Charles and his wife, in equal shares, and then, on the death of Charles or his wife, that same interest passes to the survivor for life. If I am correct about that, there is there an unlawful suspension for three lives, but, apart from that, I am inclined to think, that if the 11th paragraph were not in the will, or could be separated from it the will would be valid.

Q. Do you not agree with me, Professor, that where there is an alternative provision in the trust, and where, in a case like this, it

may very possibly happen that the two life tenants shall die, leaving issue, and where it may very possibly happen that the 11th paragraph, and what follows, shall never be of any material importance, that the Court will, at least, await the event before holding a will invalid? A. No; I disagree with you entirely about that, and, in my view, the Court will never wait for that purpose. It is sufficient that the Court can see that in some possible contingency the trust provision is invalid. It must appear on the face of the trust that it is invalid in every possible contingency.

Q. And what citation can you give me on that point? A. That is, in many of these cases; I may find it in *Underwood* vs. *Curtis*. Yes, here it is, on page 540; Judge Parker says: "In the words of Judge Grover, '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 estates will be held to be void' " (p. 127-128).

"Q. Then, it is your opinion that the provision of this trust down to the 11th paragraph, is what we might consider an alternative provision to the 11th paragraph, and what follows? A. I have not said that; it is an alternative provision in the same sense in which many wills first provide for the disposition of property if there are issue, and then for the disposition of property if there are no issue.

Q. And you are familiar with Section 51 of the real property law, which provides that two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it and take effect accordingly? A. Yes.

Q. Still you don't think that the New York courts would sustain the will down to the 11th paragraph? A. I think the New York courts would sustain the specific legacies only.

Q. And would decline to separate the 11th clause from the balance of the will? A. That is my opinion.

Q. Don't you think that the remainder here, even in the 11th clause, might be accelerated by the New York courts, and being a vested remainder, it might be sustained as being valid by expunging the intermediate, invalid estates? A. By expunging what estates?

Q. The various life estates contained in the 11th paragraph, so that the remainder would at once vest after the termination of the two life estates, without issue, in the Italian Benevolent Association and the French Benevolent Society of New York? A. I know of no authority which would justify any such action'' (pp. 129-130).

The doctrine of separability was adopted by the respondents largely upon the authority of *Bailey* vs. *Buffalo L. T. and S. D. Co.*, 151 N. Y. App. Div. 166. That decision was referred to repeatedly during the cross-examination of appellants' expert (pp. 120, 121, 122, 125, 126). The witness was asked whether he had ''read over carefully the *Bailey case*'' before he came into court (p. 126), also whether he had read it over after the will was submitted to him for his consideration. To both of which questions he replied in the affirmative (p. 126). Thereupon the cross examiner took the stand and testified for the respondents and emphasized further the importance which he attributed to the *Bailey case* in connection with his theory by referring to it twice. (See p. 132).

He said, "The *Bailey case* also comes in under "separability" (p. 132).

> Q. Now, do you find any such distinction as Professor Hardon thinks exists, that a court will not separate an invalid part of a trust from the valid part—except the same persons—for example, the widow or only children, would take, if the trust were not invalid? A. No, I don't agree with the Professor on that point; I think that they will separate the invalid part from the valid part wherever they can do so without doing violence to the testator's intention, and without disturbing his general scheme (pp. 132-133).

It so happens that the *Bailey case* which formed the cornerstone on which defendants had built their theory of separability has since the trial been decided in the Court of Appeals in New York and decided adversely to their contentions at the trial. (See *Bailey vs. Buffalo L. T. and S. D. Co.*, 209 N. Y. 525). The unanimous opinion of the court reversing the decision of the Appellate Division deals thus with the doctrine of separability relied on by the defendants on the strength of the App. Div. decision:

> "The rule is well established that when some of the trusts in a will are legal and some illegal, *if they are connected together so as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected,* or if manifest injustice would result from such construction to the beneficiaries or some of them, *then all of the trust provisions must be construed together and all must be held illegal.* (*Manice* v. *Manice,* 43 N. Y. 303; *Knox* v. *Jones,* 47 N. Y. 389; *Van Scuyver* v. *Mulford,* 59 N. Y. 426; *Kennedy* v. *Hay,* 105 N. Y. 135; *Tilden* v. *Green,* 130 N. Y. 29).

> Respondents ask us to apply the rule which permits unlawful trusts to be eliminated from a will, and those which are lawful to be enforced. The court will at all times give full effect to the intention of the testator, provided always that such intent does not violate provisions of the statutes or well-established principles of law. It is not permissible for the court to violate the intention of the testator or interfere with the general plan created by the testator for the disposition of his property (pp. 536-537).
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> It is not permissible to eliminate language of a will so closely intermingled with the general plan the same was intended to cover, to make and thereby cerate a valid trust, where the clause of the will seeks to establish a trust which by its provisions is wholly invalid. (*Central Trust Co. of N. Y.* v. *Egleston,* 185 N. Y. 23) (p. 539).
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> The validity of the trust must be determined as of the time of the probate of the will, rather than after the death of one of the beneficiaries named therein. (*Matter of Wilcox,* 194 N. Y. 288). The court is powerless to make valid a provision in a will which in its inception found as a matter of law did violate the provisions of the statute'' (ibid).

This very late decision of the New York Court of Appeals may be said to remove the very foundation on which respondents' case rests on this point.

The theory that the life incomes provided for in the first four sub-divisions of article ninth of the will might be capitalized and a lump sum representing their value according to the tables of mortality, paid to the several beneficiaries is inconsistent with the theory of the will itself; as

has already been seen, the will provides that on the death of each of the several beneficiaries mentioned in the first four clauses of article ninth, the income derived by such beneficiaries is to go as "surplus income undisposed of and unapplied" to Charles L. and May Regina Givernaud in equal shares and on the death of either of them the whole of such surplus income is to go to the survivor. There are thus three successive life estates and capitalizing the first life estate according to the tables of mortality would amount to giving to the beneficiary of that life estate what partly belongs to two other beneficiaries whose interest stands between the first life estate and the remainder interest in the fund.

The life incomes provided for in the first four sub-divisions of article ninth represent an aggregates of $4,720. per annum. If the average expectancy of life of the beneficiaries was only thirteen years, which is a low average in this case, the total amount of lump sums would be $61,360, namely one quarter of the whole estate which would thus be disposed of to the detriment of the intermediate life estates and of the remainder.

Briefly stated the scheme of the will is to tie up the principal of the estate *for three lives* under Article Ninth; and on the termination of those three lives the remainder is to go to the lawful issue of the testator's youngest son Charles if there be such issue; none however has come into being so far—and in default of such issue the principal of the estate is to be further tied up *for eight lives* after which the remainder is to go to two charitable institutions.

Such being the situation, what is the effect of the lopping off process proposed by the respondents? Admittedly, Article Eleventh must be expunged from the will, thereby suppressing the

second set of life beneficiaries and the only set of remaindermen in being when the testator died. We would then have a trust without any one before the court entitled to the remainder. The result would be intestacy as to the entire residuary estate. The trustees would hold that estate to pay life incomes on the chance that Charles Givernaud might leave lawful issue yet to be born. Nothing can be found in any New York authority to uphold such a disposition which moreover is not that contemplated by the testator.

POINT IV.

It follows that the prayer of the bill should have been granted, and that the decree denying relief to the appellants should be reversed.

Dated, November, 1916.

Respectfully submitted,

Robert H. McCarter,
Maurice Leon, of the Bar of New York,
J. W. Rufus Besson.