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72657-9

NO. 72657-9

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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NANCY SHURTLEFF,

Respondent,

v.

THOMAS E. MORGAN,

Appellant.

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**BRIEF OF RESPONDENT NANCY SHURTLEFF**

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## **I. INTRODUCTION**

Respondent Nancy Shurtleff (“Nancy”) requests that the Court deny Appellant’s appeal of the trial court’s award of attorneys’ fees and costs to her from Appellant’s personal assets. The trial court’s decision must be upheld absent a finding that the trial court abused its discretion by acting in an untenable or unreasonable manner. The record before this Court, and the trial court’s assurance that it reviewed the entirety of the pleadings filed when determining that a fee award was equitable pursuant to RCW 11.96A.150, belie any assertion that the trial court awarded fees and costs without sufficient analysis or opportunity for Respondent to meaningfully object.

## **II. RESTATEMENTS OF ASSIGNMENTS OF ERRORS AND ISSUES**

### **A. ALLEGED ASSIGNMENTS OF ERROR**

**First Assignment of Error:** The trial court did not error in awarding attorneys’ fees and costs from Appellant’s personal funds when Appellant’s actions dictated both the original jurisdiction of the filing and precipitated the filing of a substantially similar petition in California. When Nancy filed her petition, King County was the designated principal place of administration for the Trust at the election of the Trustee and the state of residence for all the beneficiaries and Appellant-Trustee. Nancy’s

Petition was filed within the statute of limitations and served all of the beneficiaries, who then *all* appeared. Appellant unilaterally, and *admittedly without evaluation of what was in the beneficiaries' best interests*, changed the principal place of administration after the expiration of the statute of limitations, did not advise Nancy of that change until one day before the hearing on the Petition, and did not offer to waive the statute of limitations defenses that would be applicable in California until after the matter was certified for trial in Washington. Nancy voluntarily filed a similar, but not identical petition in California after the California court specifically held that she *may* file such a petition and that Appellant was not to assert any defenses based upon a statute of limitations. Nancy then voluntarily moved to dismiss her King County action to consolidate the actions in California.

**Second Assignment of Error:** The trial court did not err in awarding attorneys' fees and costs when a redacted copy of the attorneys' fees and descriptions of the fees in the form of sworn declarations from the billing attorney were provided to Appellant and the Court; when Appellant challenged both the reasonableness and necessity of the requested attorneys' fees in the trial court; when the costs were not redacted and are available in full to both Appellant and the Court; and when the trial court's Order specifically provided, *via* interlineation, that the Court considered

“all pleadings” filed in the action, that Nancy’s fees and costs were reasonable in light of the facts underlying the Petition and the manner in which the litigation progressed, and that the Order was specifically based upon the “Court’s review of the hours incurred and reasonable rate of Petitioner’s attorney”.

**Third Assignment of Error:** The trial court did not err in conducting an *in camera* review of unredacted billing information when billing information redacted for attorney-client and work product privilege and declarations of the billing attorney were both provided to the trial court and Appellant and preserved on appeal. Based upon that information, Appellant challenged the fees and costs in the trial court. The trial court considered the award in light of all the pleadings filed in the matter and upon completion of the required equitable analysis exercised its discretion and rejected Appellant’s challenges.

**Fourth Assignment of Error:** The trial court did not make a finding that it was mandatory that Nancy’s petition be filed in King County and, consequently, Appellant’s assignment of error is itself in error and a misstatement of the trial court’s findings. Rather, the trial court found that Nancy “properly filed the Petition in Washington as a direct result of Respondent’s designation of King County Washington as the principal place of administration...”

**Fifth Assignment of Error:** The trial court did not make a finding that only the notification of the principal place of administration determines jurisdiction where the trust petition can be filed and, consequently, Appellant's assignment of error is itself in error and a misstatement of the Court's findings. The trial court merely made the finding stated in the prior paragraph, which confirmed that Nancy's Petition was properly filed in Washington as a result of Respondent's designation of the Trust's principal place of administration, not that such designation alone determines exclusive jurisdiction for where a trust petition may be filed. Nor is any such finding necessary to support the trial court's Order under the equitable provisions for RCW 11.96A.150.

**Sixth Assignment of Error:** The trial court did not find that the Trustee voluntarily and intentionally transferred the trust situs from Orange County, California to King County, Washington and, consequently, Appellant's assignment of error is itself in error and a misstatement of the court's findings. The trial court found that Appellant's "unilateral decision to change the principal place of administration after the Petition was filed appears to be an action which benefited himself to the detriment of the other beneficiaries", but that finding referred to Appellant's decision to change the designated principal place of administration *from* King County *to* Orange County on July 16, 2014. The court did not find

that the original situs of the Trust was in Orange County nor did the court make any finding as to any transfer *from* Orange County *to* King County. Moreover, no such finding was necessary to support the trial court's Order under the equitable provisions for RCW 11.96A.150. To the extent that the trial court's Order implicitly found that Appellant was bound by his attorney's actions in initially designating the Trust's principal place of administration in Seattle, Washington, such a finding is appropriate under Washington law, which binds clients to the representations of counsel.

**Seventh Assignment of Error:** The trial court did not find that a "notification of trust situs entitled Nancy to continue prosecuting her petition in King County, Washington after Trustee offered to return the trust situs to Orange County, California" and, consequently, Appellant's assignment of error is itself in error and a misstatement of the Court's findings. Nor is any such finding necessary to support the trial court's Order under the equitable provisions of RCW 11.96A.150.

**Eight Assignment of Error:** The trial court did not err in awarding Nancy attorneys' fees and costs against Appellant personally under the equitable provisions of RCW 11.96A.150 when 1) the fees were incurred for the filing of a Petition in King County Superior Court, the jurisdiction identified by Appellant as the principal place of administration of the Trust and the county of residence of the Trustee; 2) the fees sought ran

only through July 22, 2014, the date of the hearing on Nancy's Petition which resulted in certification of the matter for trial in King County Superior Court and one week *prior* to Appellant's offer to waive the statute of limitations otherwise barring Nancy from filing her claims in California; and 3) the *sole* reasons Appellant cited as a basis for changing the principal place of trust administration considered only his own self-interests in the litigation, and not the best interests of the Trust beneficiaries.

**B. ALLEGED ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**Issue One:** The trial court properly awarded attorneys' fees and costs to Nancy from Appellant, when 1) Nancy properly filed a petition in the jurisdiction Appellant had designated as the principal place of administration of the Trust and where all of the beneficiaries and the trustee reside, when all of the beneficiaries appeared in the matter, 2) the Commissioner conducted the initial hearing pursuant to RCW 11.96A.100(8) but pursuant to KCLR 98.14(b) certified the matter for trial in the King County Superior Court, and 3) two weeks after that certification the Orange County Court ruled pursuant to a separate action brought by Appellant that Nancy could *in her discretion* file substantially similar claims in Orange County without regard for the already expired

statute of limitations, and Nancy thereafter voluntarily filed a petition in Orange County upon the Court's invitation and voluntarily dismissed her action in Washington, consolidating the parties' disputes to save Trust assets and in the interest of judicial efficiency.

**Issue Two:** The trial court may make an equitable award of attorneys' fees and costs under RCW 11.96A.150 when none of the costs were redacted, redacted fees statements supplemented by declarations from the billing attorney were provided to all parties and the trial court, Appellant challenged the fees as unreasonable and unnecessary and the trial court evaluated those challenges in light of all the pleadings as well as an *in camera* review of the fee statements.

**Issue Three:** The trial court made no finding as to the exclusivity of King County as the *only* venue and jurisdiction in which Nancy's Petition could properly be filed and did *not* base the award of attorneys' fees on such alleged exclusivity. Rather, the trial court confirmed that Nancy's Petition was properly filed in Washington as a result of Appellant's designation of King County as the principal place of administration. The trial court could have equally easily found jurisdiction was proper under the language of RCW 11.96A.040(1)(c) & (2) and that venue was proper in King County pursuant to RCW 11.96A.050(b) because a qualified beneficiary and trustee resided in King County. Moreover, Appellant's belated offer to

change the principal place of administration of the Trust was insufficient standing alone to allow Nancy to file a Petition in California since the applicable statute of limitations had already passed, and Appellant did not make an offer to waive that statute until after the Washington action was certified for trial and after the period of time for which Nancy sought an award of fees. Any alleged exclusivity of King County Superior Court as the sole appropriate jurisdiction and venue for the litigation was not and is not necessary to support the trial court's Order under the equitable provisions of RCW 11.96A.150. That Order rests in equity upon the affirmative actions, or omissions, of Appellant as trustee.

### **III. RESTATEMENT OF THE CASE**

Appellant's statement of the case appears to confabulate the Washington and California actions, as well as the timing of events relevant to the fees and costs awarded. A revised statement of facts follows.

#### **A. BACKGROUND**

Appellant, Nancy Shurtleff ("Nancy") and John Morgan ("John") are the children of Decedent Beverly C. Morgan. Kathleen Shurtleff and Jessica Shurtleff are Nancy's daughters. Decedent named each of her children and Nancy's children, Jessica and Kathleen, as beneficiaries of

the Beverly C. Morgan Family Trust (“Trust”).<sup>1</sup> CP 140-242.

Upon Decedent’s death, on January 25, 2014, Appellant asserted that he was the successor trustee of the Trust and that an amendment and restated trust agreement dated November 6, 2013, approximately two and a half months prior to Decedent’s death, was the controlling document. CP 521. That amended and restated trust agreement substantially changed Decedent’s prior trust agreement, executed October 30, 2012, to benefit Appellant to the detriment of Nancy and her daughters. CP 140-242.

At the time of Decedent’s death, Appellant maintains that the Trust held a condo with an estimated value of \$2 million, a home with an estimated value of \$600,000, and interests in several laddered limited partnerships and limited liability companies with an estimated value of \$34.855 million. CP 511 & CP 331. Thus, by Appellant’s own admission the total value of the real property located in California and owned by the Trust at the time of Decedent’s death was \$2.6 million. CP 511. The laddered limited liability companies and limited partnerships were registered in California, Washington and Oregon and ultimately, obtained

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<sup>1</sup> Appellant has asserted that the amended and restated trust dated November 6, 2013 is the final controlling document for Decedent’s plan. Nancy has contested that document in part, and alternatively in whole. If the November 6, 2013 amended and restate trust were found to be invalid, the prior trust amendment, dated October 30, 2012 would be the controlling document. Appellant, Nancy, John, Jessica and Kathleen are the beneficiaries of the Trust under either version of the trust agreement.

value from interests in real properties located in California, Washington and Oregon. CP 244, 246 & 248.

**B. RESTATEMENT OF LITIGATION TIMELINE**

On or about January 30, 2014, Appellant, as trustee of the Trust, assisted by counsel Russell G. Allen, issued a “Notification by Trustee under Probate Code Section 16061.7” identifying the principal place of administration of the Trust as Seattle, Washington. CP 521. The notice provided that any action to contest the Trust must be brought within 120 days of the notification, the statute of limitations under both Washington and California law for contesting a revocable trust after the death of the grantor. CP 521, RCW 11.103.050 & California Probate Code §16061.8.

Nancy flagged concerns with the Trust terms, specifically Section 4.1(b), to Appellant via a letter on March 12, 2014. CP 516-517. On March 24, 2014, Appellant sent Nancy a letter purporting to comply with the same trust provision that Nancy identified as a concern and unenforceable in her letter. CP 264-271.

Nancy did not agree with the terms of the March 24, 2014 letter and believed the terms set forth in the November 6, 2013 version of the Trust did not reflect her mother’s true testamentary intent. In deference to Appellant’s designation of Seattle, Washington as the Trust’s principal place of business, and given that Appellant, as trustee and a qualified

beneficiary, also resided in Seattle, on May 28, 2014, two days prior to expiration of 120 day period, Nancy filed a Verified Petition to Construe Trust Terms; to Determine the Validity of Trust Provision; to Ascertain Beneficiaries; and, In the Alternative to Invalidate Trust on Basis of Undue Influence, Lack of Capacity and Fraudulent Representations (“Nancy’s Petition”) in King County Superior Court. CP 1-17. Nancy’s Petition was signed May 27, 2014. CP 1-17.<sup>2</sup> Nancy’s Petition was served on all the beneficiaries of the Trust, namely Appellant, John, Jessica and Kathleen. CP 2 & 18-19. At the time Nancy filed her Petition, and for months, if not years preceding and since that time, Appellant and *all* of the Trust beneficiaries have been Washington residents. CP 335, CP 397-409 & CP 131-134.

On June 5, 2014, *after* having been served with Nancy’s Washington Petition, Appellant filed a Petition to Interpret the Trust in Orange County, California (“Appellant’s Petition”). CP 300-304. Appellant served only Nancy, and none of the other trust beneficiaries, with his Petition. CP 300. Appellant’s Petition requested the Orange County Court find that the Trust was neither ambiguous nor

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<sup>2</sup> Also on May 27, 2014, Nancy’s counsel in California sent a letter to Appellant’s California counsel identifying failings in Appellant’s offer to purchase Nancy’s interests in various entities as required by the amended and restated trust agreement. CP 257-262.

unenforceable, that Appellant complied with the purpose and intent of his obligations under Section 4.1(b) of the Trust and that he be awarded attorneys' fees and costs. CP 303. On July 8, 2014, Nancy filed a motion to dismiss Appellant's Petition for lack of jurisdiction. CP 436-489.

On June 13, 2014, Appellant filed a Response to Nancy's Petition in Washington and attempted to incorporate into that response a Motion to Decline Jurisdiction for Forum Non Conveniens ("Motion to Decline Jurisdiction"). CP 273-289. With his Response, Appellant submitted a declaration in which he offered to reimburse Nancy for her airline flights and hotels to travel to Orange County Court to "defend against the proper petition brought there once this Court has declined jurisdiction." CP 336. Appellant's initial offer was thus *not* to allow Nancy to file her Petition contesting the Trust in California. The offer was to pay for her costs to "*defend* against the proper petition brought there", *i.e.*, to defend against *Appellant's* Petition, filed in Orange County--it would be nonsensical to suggest that Nancy "defend" against her *own* petition. The offer was also clearly contingent upon the Washington court declining jurisdiction over Nancy's Petition. That never occurred. Moreover, Appellant was fully aware that on June 13, 2014, the statute of limitations to file an action in California had already passed and, consequently, absent a waiver, Nancy could not file her Petition in California. Thus, it is a fallacy that upon

receipt of Appellant's declaration on June 13, 2014, Nancy could have unilaterally filed a petition contesting the Trust in California. Such an action was not possible given California's statute of limitations and would not have been encompassed in the terms of Appellant's "offer" to merely change the Trust's principal place of administration.

On July 8, 2014, a notice of appearance was filed on behalf of Kathleen Shurtleff and Jessica Shurtleff in the Washington case. CP 574.

On July 18, 2014, Nancy filed her reply to Appellant's response to her Petition, which incorporated her objections to Appellant's improperly filed Motion to Decline Jurisdiction. CP 410-423.

With Nancy's Petition pending in King County Superior Court, on July 16, 2014 Appellant unilaterally issued an Amended Notification by Trustee under Probate Code §16061.7 changing the Trust's principal place of administration from Seattle to Newport Beach, California. CP 524-25. However, that Amended Notice was attached to Appellant's declaration, filed with an improper and untimely sur-reply, and ***served on July 21, 2014***. CP 507 & 524. Thus, almost two months after Nancy's Petition was filed and over a month after filing his Response to the Petition, Appellant decided to change the principal place of administration of the Trust, although he admitted in his initial declaration that "[f]or the last 25 years, I primarily receive mail and write partnership and Trust checks

from my home office in Washington.” CP 335.

The hearing on Nancy’s Petition occurred on July 22, 2014. Counsel appeared on behalf of Nancy, Appellant, Kathleen and Jessica.<sup>3</sup> At that initial hearing, which pursuant to RCW 11.96A.100(8) “must be a hearing on the merits to resolve all issues of fact and all issues of law”, the Commissioner imposed KCLR 98.14(b) and certified the matter for trial in King County Superior Court. CP 564-565. The Commissioner did not rule on the merits of Nancy’s Petition or Appellant’s Motion to Decline Jurisdiction. Thus, Nancy’s Petition remained alive and well in the King County Superior Court and was set for trial. CP 564-565. All of the fees that Nancy sought in her Motion for Award of Fees and Costs on appeal here were incurred prior to and up through the July 22, 2014 hearing – no fees were sought for time incurred subsequent to that hearing. CP 57-62.

Seven days *after* the hearing on Nancy’s Petition, on July 29, 2014, Appellant filed a declaration in Orange County wherein he offered for the first time to allow Nancy to file the claims from her Washington petition

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<sup>3</sup> Appellant claims that “only Nancy and Trustee in his individual capacity were named as beneficiaries and appeared at the proceeding”. Appellant’s Brief, p. 14. However, Nancy’s Petition clearly identified Appellant as both beneficiary and trustee. CP 2. In addition, not only were Appellant, John, Kathleen and Jessica served with Nancy’s Washington petition, all of them filed notices of appearance in the action. CP 574-575. Moreover, Karen Bertram, as counsel for Kathleen and Jessica, attended the ex parte hearing at which the matter was certified for trial.

in California without raising any defense based upon statute of limitations or other time-barred defenses. CP 111-112.

On August 8, 2014, the Orange County Court heard Nancy's Motion to Dismiss or Stay Proceedings. CP 41. The Orange County Court denied Nancy's request to dismiss Appellant's Petition or stay the California action pending the outcome of the Washington case, denied some evidentiary objections, granted other evidentiary objections and provided that Nancy could *voluntarily* file claims or a separate petition in California raising similar issues to those raised in her Washington Petition without any defense based upon statute of limitations or other time bar. The final order was issued on August 27, 2014. CP 41-42.

Nancy believed that the California court's decision to retain jurisdiction over Appellant's Petition was improper. However, overturning the California court's order would require a writ – and actions on a writ in California are time-consuming and usually unsuccessful. CP 29. Although Nancy had the option of pursuing *both* the then-pending Washington action and the California action, in the interest of preserving the Trust and parties' assets and judicial efficiency, and with judicial waiver of the otherwise applicable statute of limitations on her claims, Nancy voluntarily filed a petition in Orange County on September 26, 2014 (less than one month after the Orange County court's permissive

Order) which reflected the same bases for her causes of action as her Washington Petition but raised them under California law. CP 29.

With the claims proceeding in the California action, Nancy voluntarily dismissed the Washington action. CP 22-23.

Nancy initially requested that Appellant pay the fees and costs associated with the Washington Petition voluntarily. CP 44-55. In that request, Nancy's counsel clearly stated that "we did not include in the request for reimbursement time spent interviewing witnesses who will be useful in both the WA and CA actions or additional research that has been done which is also beneficial or useful in the California action. Thus, the requested reimbursement represents solely time and energy which would not have been incurred were it not for Washington being identified...as the situs of the Trust." CP 44. Nancy's counsel went on to offer Appellant's counsel the opportunity to request additional information about the redacted fee schedules, but no request came. CP 29 & CP 53-54.

On October 9, 2014, Nancy moved the trial court for an award of fees and costs for time incurred between May 14, 2014 and July 22, 2014 – the date of the first hearing on Nancy's Petition. CP 576-587. Counsel's declarations and exhibits made clear that the fees sought related only to the Nancy's Petition in Washington, Appellant's Motion to

Decline Jurisdiction that was incorporated into his Response to Nancy's Petition, and Nancy's Reply to the Petition. CP 28-62.

Counsel's supplemental declaration set forth the hourly rates of the attorneys, their respective education and years of experience. CP 127-128. His declaration detailed the process used to determine which fee entries were appropriate for reimbursement and which were eliminated, including reductions to particular entries to remove time spent on items that were useful in both the California and Washington action. CP 128-129.

None of the requested costs were redacted. CP 61-62.

On October 15, 2014, Appellant filed an Opposition to the Motion for Attorneys' Fees and Cost. CP 67-78. In that Opposition, Appellant made many of the same arguments put before this Court, none of which were persuasive to the trial court under the equitable provisions of RCW 11.96A.150. CP 67-78. Moreover, Appellant specifically argued that the trial court must consider the attorneys hourly rates (which were set forth in Mr. McDermott's declaration and in the bills for *in camera* review), the attorneys' education, skill and experience (also set forth in Mr. McDermott's declaration), and the novelty and difficulty of the issues (readily apparent from the Court record which the trial court specifically noted via interlineation it reviewed in full). CP 73-74, CP 127-128, CP 572-573. In Reply to Appellant's challenges, Nancy noted that if the

trial court felt that it lacked sufficient detail to determine the amount of the fee award, the proper outcome was to grant the award of fees and reserve for further briefing the final amount of such fees. CP 126.

On October 20, 2014 the trial court granted Nancy's motion for an award of fees and costs against Appellant personally, not against the Trust. CP 572-573. The trial court interlineated that it considered "all the pleadings filed in the action" and held that based upon its findings and "the Court's review of the hours incurred and the reasonable rate of Petitioner's attorneys" the award was proper. *Id.* On October 31, 2014, Appellant filed a notice of appeal. CP 135-136.

#### **IV. STANDARD OF REVIEW**

Nancy filed her petition for attorneys' fees pursuant to RCW 11.96A.150 which provides:

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

Whether there is a statute, contract or equitable basis for an award of attorneys' fees is a question of law to be reviewed *de novo* on appeal. *Gander v. Yeager*, 167 Wn. App. 638, 646, 282 P.3d 1100, 1104 (2012). *De novo* review, then, applies when there is a conflict as to which statute applies or was the basis of the underlying fee award. *Cook v. Brateng*, 180 Wn. App. 368, 321 P.3d 1255 (2014)(*de novo* review was appropriate to determine whether RCW 11.96A.310 or RCW 11.96A.150 or some combination of the two statutes was the basis for an award of fees).

Here there is no such conflict--appellant does not deny that RCW 11.96A.150, as a statute, authorizes the court to make an equitable award of fees and costs from any party to any party or that the statute is applicable to this matter. It follows that the operative standard of review on the contested issue remaining is not *de novo*.

Since it is clear that RCW 11.96A.150 applies in this matter, the award of fees and costs by the trial court was discretionary and may not be overturned on appeal absent a clear showing of *abuse of discretion*. See *Rettkowski v. Department of Ecology*, 128 Wash.2d 508, 910 P.2d 462 (1996) and *In re Estate of Krappes*, 121 Wn. App. 653, 91 P.3d 96 (2004). Abuse of discretion requires a showing that the trial court exercised its discretion in a manifestly unreasonable manner. *Rettkowski v. Department of Ecology*, 128 Wash.2d 508, 910 P.2d 462 (1996). Appellant cannot

make that showing here, and this Court should therefore deny his appeal.

## V. ARGUMENT

Nancy begs the indulgence of the Court in reviewing her responsive brief. Appellant's brief essentially restates the same alleged errors and issues in multiple assignments and arguments. RAP 10.3 requires that "[t]he brief of respondent should conform to section (a) and answer the brief of appellant", so Nancy is somewhat constrained by the structure of Appellant's presentation. Where possible, Nancy has referred back to arguments made in prior sections rather than restate them each time they are implicated by Appellant's assertions, but when it is clear that particular evidence is directly contrary to those assertions, that evidence and corresponding argument on rebuttal is restated in each pertinent section.

**ISSUE ONE: The trial court properly award fees and costs against Appellant personally where Respondent 1) properly filed a petition in the jurisdiction the Trustee had identified as the principal place of administration and the residence of the Trustee, and served all the interested parties--all residents of Washington--who then appeared in the matter, 2) engaged in an initial hearing which resulted in certification for trial, and 3) after receiving permission from a court of another jurisdiction (chosen thereafter by Appellant) to ignore the**

**already expired statute of limitations and file a similar Petition in that court, filed that Petition and moved to dismiss her claims in this jurisdiction to facilitate judicial efficiency and preserve the assets of the Trust and the parties.**

The history of this case is set forth in above. *Supra* III, B. In direct contravention to the picture that Appellant paints, the documentary evidence shows the following:

Appellant's legal notice identified King County as the principal place of administration of the Trust and May 30, 2014 as the last day upon which a petition contesting the terms of the Trust could be filed. CP 521. In accordance therewith, Nancy's Petition was timely filed and served on *all* the beneficiaries of the Trust. CP 2 & 18-19. When Nancy filed her Petition, jurisdiction and venue were properly asserted in King County, Washington pursuant to RCW 11.96A.040, RCW 11.98.039, RCW 11.96A.030(2), RCW 11.96A.080 and RCW 11.96A.050(1)(b). All of the beneficiaries appeared in the Washington action and each also filed a declaration affirming their status as Washington residents and beneficiaries of the Trust. CP 397-408, CP 131-134 & CP 574-575.

Moreover, at the time the Petition was filed, Washington was the correct jurisdiction under California law as well. California law provides that the proper place for commencement of a proceeding involving a trust

is “where the principal place of administration of the trust is located.” California Probate Code Section 17005(a)(1) & (2). The principal place of administration is defined as “the usual place where the day-to-day activity of the trust is carried on by the trustee.” California Probate Code Section 17002(a). Appellant had filed a notice identifying Washington as that principal place of administration. CP 521.

Appellant filed his Response to Nancy’s Petition and his Motion to Dismiss *after* the California statute of limitations for Nancy to contest the Trust had expired. California Probate Code §16061.8.

On July 18<sup>th</sup>, Nancy replied to her Petition, objected to any attempt to change the venue and detailed the basis for her belief that the matter should continue in Washington. CP 410-423. On July 21, 2014, heedless of the beneficiaries’ stated preferences, Appellant served Nancy with the amended notice of the principal place of administration which allegedly moved the administration to Newport Beach, California. CP 524. The bases set forth in Appellant’s declaration as to why he unilaterally elected to change the Trust’s principal place of the administration do not make *any* mention of the best interests of the beneficiaries, and in fact made clear that he had not even *considered* what might be in their best interests, notwithstanding the requirements of RCW 11.98.078. Instead, the reasons given all regarded his alleged convenience and perceived litigation

advantages for him. CP 509.<sup>4</sup>

The next day, the King County Commissioner heard Nancy's Petition. The Commissioner certified Nancy's Petition for trial. CP 564-565. *This is the last date—July 22, 2014--through which Nancy requested an award of attorneys' fees in this matter.*

Appellant's offer to waive the statute of limitations was filed in Appellant's Orange County action on July 29, 2014, *a week after the hearing on Nancy's Petition in Washington and a week after the last date for which Nancy requested an award of fees.* CP 112.

On August 8th the California court denied Nancy's motion to dismiss Appellant's Petition for lack of jurisdiction. At the same hearing, the California court held that Nancy could voluntarily file a petition similar to her Washington Petition in California and prohibited Appellant from bringing any defenses based upon a time bar; that oral order was documented on August 27, 2014. CP 119. Although Nancy believed that the California court's failure to dismiss Appellant's Petition was in error, both the timetable and prospects for success for interlocutory writs of appeal in California made appeal unattractive. Nancy therefore filed a

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<sup>4</sup> On July 31st, John filed a declaration in the California matter in which he stated that he believed that Appellant's recent unilateral decision to change the principal place of administration of the Trust was the "direct result of the pending litigation and an attempt to make it more difficult for me, and the other beneficiaries, to participate in the litigation." CP 133.

petition in California, raising the same issues as were raised in her Washington petition, and again properly served all the parties. Her decision to dismiss the Washington petition and pursue the action in California were both direct results of Appellant's actions, actions which he admits were motivated solely by his own self-interest and attempts to gain litigation advantage. CP 29.

Appellant cites to cases which stand for the general proposition that when attorneys' fees are awarded from a trust or estate, the Court should consider whether substantial benefit was conferred on the trust or estate. However, the trial court did not award attorneys' fees and costs from the Trust. The trial court awarded attorneys' fees and costs from *Appellant's personal funds*. Thus, it is irrelevant whether substantial benefit is conferred upon the Trust – the Trust is not the liable party. The trial court's decision to award fees and costs against Appellant derives from the same statute--RCW 11.96A.150--but a separate line of case law.

Courts in equity have repeatedly acknowledged that when a fiduciary breaches his or her duties, the personal funds of that fiduciary should be available to make the depleted trust or beneficiaries whole. *See, e.g., In re Estate of Jones*, 152 Wash.2d 1, 21, 93 P.3d 147, 157 (2004) (“Russell should personally pay these fees because the litigation was necessitated by his multiple breaches of fiduciary duty to Peter and

Jeffery.”) and *Matter of Estate of Cooper*, 81 Wn. App. 79, 92-93, 913 P.2d 393, 400 (1996) (“The court, however, should have awarded a portion of Joyce’s fees against Mr. Cooper personally, because it found he breached his fiduciary duties”). “Here, in order to make the trust beneficiaries whole, the trial court concluded that an award of attorney fees for the breach of the fiduciary’s duty under an express trust was appropriate. This is a tenable basis for the award. But for the breach of fiduciary duty, there would have been no need for the beneficiaries to incur the fees.” *Gillespie v. Seattle-First Nat. Bank*, 70 Wn. App. 150, 178, 855 P.2d 680, 695 (1993). “If there is a breach of fiduciary duties, the plaintiff has a right to recover fees against the trustee personally.” *Matter of Estate of Cooper*, 81 Wn. App. 79, 92, 913 P.2d 393, 400 (1996) citing *Allard v. Pacific Nat’l Bank*, 99 Wash.2d 394, 407, 663 P.2d 104 (1983). Appellant’s brief fails to address the pertinent line of cases.

The trial court found that “Respondent’s unilateral decision to change the principal place of administration after the Petition was filed appears to be an action which benefited himself to the detriment of the other beneficiaries” and held that “[n]one of these costs (which are reasonable as to hours and rates charged) would have been incurred but for Respondent’s designation of Washington as the situs of trust administration.” CP 572-573. Thus, the trial court’s decision to award

fees against Appellant personally was not based upon whether Nancy's Petition benefited the Trust--the Trust is not the charged entity.<sup>5</sup> Instead, the award was based upon the Court's conclusion that Appellant, as Trustee, placed his individual interests above those of the beneficiaries.

Appellant's own declarations confirm that the sole considerations affecting his unilateral decision to change the Trust's principal place of administration, and his belated offer to waive defenses related to statute of limitations if Nancy would file petition in California, related only to the differences in the rules of evidence and tests for undue influence, testamentary capacity and fraud between Washington and California. CP 509. Absolutely no mention is made of the best interests of the beneficiaries, all of whom reside in Washington. This is and was contrary to Appellant's obligations to administer the Trust solely in the interests of the beneficiaries and his unwaivable duties to act in good faith and with honest judgment in favor of those beneficiaries. RCW 11.98.078 & RCW 11.97.010; *Esmieu v. Schrag*, 88 Wash.2d 490, 563 P.2d 203 (1977) ("The trustees, as fiduciaries, owe to the beneficiaries the highest degree of good faith, care, loyalty and integrity"). The trial court's award is thus entirely consistent with Washington's interpretation and application of the

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<sup>5</sup> In fact, Nancy believes that her suit will ultimately benefit the Trust and all the beneficiaries by effectuating her mother's testamentary intent.

equitable provisions of RCW 11.96A.150 and its predecessors.

**ISSUE TWO: The trial court correctly determined, after consideration of the entirety of the Court file, the declarations of counsel, the unredacted cost statements, redacted and unredacted fee detail, and actual challenge to the requested fees by Appellant, that Appellant had been given sufficient opportunity to object to the fees and costs requested.**

Appellant cannot cite to a single case which holds that a contesting party must have *carte blanche* to review the details of a requesting parties' billing statements. Appellant even acknowledges that the documentation "need not provide exhaustive details but must inform *the court* in addition to the number of hours worked, the type of work performed and the category of attorney who performed the work." Appellant's Brief, p. 18 citing *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581 (1983)(emphasis added).<sup>6</sup> Notably, *Bowers* and the associated cases cited by Appellant arise out of the Consumer Protection Act and its progeny.<sup>7</sup>

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<sup>6</sup> Interestingly, the statute that Appellant cites for the premise that attorneys' fees must be reasonable--RCW 11.68.100--is not applicable in this matter at all. That statute applies to a personal representative with nonintervention powers who is seeking to close an estate. Nancy is a beneficiary of a Trust seeking an equitable award of fees under RCW 11.96A.150.

<sup>7</sup> *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581 (1983) and *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735 (1987). *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141 (1993) was a tortious interference case that adopted the Consumer Protection Act standards. *Berryman v. Metcalf*, 177 Wn. App. 644 (2013) was a

Such cases are not controlling in an action brought pursuant to RCW 11.96A *et. seq.*; rather, RCW 11.96A.150 is controlling.

Even giving a nod to the Consumer Protection Act cases, *Bowers* acknowledges the *court*, not the opposing party, is the reviewing party. Here the trial court had complete and unfettered access to every detail of the billing statements. There is no argument that the trial court lacked for any of the information noted in *Bowers* and its progeny.

While no case law supports Appellant's claim that the opposing party must have unfettered access to billing information, Nancy's counsel, in fact, provided Appellant with the same information noted by *Bowers*. Appellant was given the hourly rate for each attorney, CP 127-128, the category of attorney who performed the work, CP 127-128, the amount billed by that attorney (simple division then shows the hours billed) CP 57-62, and a description of the work performed.<sup>8</sup> CP 44-62 & CP 128-

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personal injury case. None of these cases examine the reasonableness of fees in trust administration cases or under RCW 11.96A.150.

<sup>8</sup> "To determine what fees for which to request reimbursement in this matter, our accounting department downloaded every account entry from the date of our employment by Nancy Shurtleff through the date of the initial Washington hearing. We first eliminated time entries related to interviews with potential witnesses in both the Washington and California actions. We next eliminated entries related to the motions to strike and the opposition to the motion for admission *pro hac vice*. We did not eliminate entries that evaluated law particular to the state of Washington and how that law would or could apply in our case. We then examined the individual entries and reduced the hours billed on particular entries to edit out time spent on items that were used in both the California and the Washington action. Time incurred to reply to Mr. Morgan's

129. Nancy's counsel then went further and offered to supplement the fee information based upon Appellant's suggestions, provided that privilege issues could be addressed – Appellant's counsel never responded. CP 53.

This Court had previously held that “[t]he determination of the fee award should not become an unduly burdensome proceeding for the court or the parties. An ‘explicit hour-by-hour analysis of each lawyer’s time sheets’ is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded.” *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086, 1090 (1995). The trial court specifically noted that it reviewed “all the pleadings filed in the action” when making its award. Moreover, the trial court interlineated that its holding was based upon its findings and “on the Court’s review of the hours incurred and the reasonable rate of Petitioner’s attorneys.” CP 573. Nancy’s counsel’s hourly rate was disclosed in counsel’s declaration.

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Response was included in the reimbursement request because his filing was filed as a Response to our initial Petition, and under the rules we were entitled to file a reply to those pleadings. Filings reply briefs and documents in support is particularly important in cases brought under RCW 11.96A. *et. seq.* as the initial hearing may be a hearing on the merits. We also billed time for work with co-counsel, in particular counsel for the other trust beneficiaries who were never served by Respondent in the California action, and thus, at that time, were parties only in the Washington action. When we filed our petition in California, we properly named all of those individuals as parties and we currently have a pending motion in California to join them to Mr. Morgan’s original California petition as indispensable parties.” CP 128-129.

That declaration included a description of the tasks, and the statement which showed date and amount billed for each time entry, from which the trial court and Appellant could calculate the hours spent for the activities described in counsel's declarations. The information provided contained all the relevant factors to make the fee award.

Appellant's claims that the trial court relied upon "Nancy's chart of attorneys' fees *alone*" are demonstrably false. Appellant's Brief, p. 19 (emphasis added). The trial court was clear that it carefully considered not only the fee statement, but also all the pleadings, which necessarily included the supporting declarations describing the attorneys, the rates charged and the work completed. CP 572-573.

The same interlineations in the Order belie Appellant's argument that "the appellant record lacks any evidence that the trial court actively and independently confronted the question of what is a reasonable fee." Appellant's Brief, p. 19-20. The trial court was quite careful to interlineate that it considered all the pleadings, reviewed the hours incurred and the rate of Petitioner's attorneys, and held that the fees and costs were reasonable as to hours and rates charged. CP 572-573.

Appellant claims that the attorney-client privilege should not cover "fee information". However, both cases Appellant cites merely support that the names of clients and the "nature of fee arrangements" are

generally not privileged. Appellant's case law, the same law cited to the trial court in support of Nancy's request for fees, confirms that "[t]he consultations for which the fees were charged are protected by the privilege, and they will remain privileged despite a requirement that the amount, source and manner of payment of the fee be disclosed." *Seventh Elect Church in Israel v. Rogers*, 102 Wash.2d 527, 532, 688 P.2d 506, 509 (1984).<sup>9</sup> Nancy disclosed the amount of her fees and there is no question that to date she has paid them.

Appellant actually cites to a case that confirms that *in camera* review of fee statements is permissible. *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 741, 281 P.3d 693, 715 (2012). In that case, the trial court completed a lodestar analysis and then imposed a multiplier to result in an award three times the requested amount. This Court noted when reviewing the award that the multiplier was extremely unusual and unwarranted unless the representation were found to be truly exceptional. As part of that review, the Court also looked to the trial courts' underlying lodestar analysis. No redacted fee detail had been

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<sup>9</sup> *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496, 499 (1995) addressed breach of contract and tortious interference claims and stands only for the proposition that information about whether a law firm was acting as a conduit for funds to sustain a lawsuit of others in a case that did not directly involve the firm's clients was not information covered by the attorney-client privilege.

provided to the opposition; instead, for the entirety of the case through trial, the party requesting fees provided a one-page summary which listed the total hours worked on case, undifferentiated by pleadings or issues, by each attorney. The Court found that the summary was insufficient to show the tasks accomplished during the hours claimed. *Id.* The trial court's analysis was then perceived by the Court of Appeals to be resting virtually entirely on its *in camera* review of the underlying fee statements. On appeal, those fees statements were unavailable to the Court of Appeals and only two of the three fee declarations reviewed by the trial court were available to the Court. The Court remanded to the trial court for more complete findings, and noted that if *in camera* review was necessary, those records should be preserved on appeal. *Id.*

Thus, this Court has previously held that *in camera* review of fee statements to preserve the attorney-client and work-product privileges can be appropriate. The appellate court must first consider whether the available information is sufficient to find that the trial court did not abuse its discretion in making the fee award. In making that award, the trial court and Appellant had available supporting declarations from counsel identifying the attorneys, those attorneys' education and experience, the hourly rate, the tasks accomplished during the time requested as an award, details of tasks that were removed or adjusted in the billing statements, the

dates the tasks were completed and a redacted fee statement which set forth generally the tasks completed (*e.g.* research, draft, attend hearing, review opposing pleadings). The trial court *and* Appellant thus had more than sufficient information to support the trial court's analysis, independent of the trial court's fully appropriate *in camera* review of the fee statements. And, *even if* this Court were to find that additional information is somehow necessary, the appropriate result is not to overturn the fee award as Appellant requests. The appropriate outcome in that event, as Nancy noted in her initial motion for fees, would be for this Court to remand to the trial court for a more detailed summary and preservation of any records reviewed *in camera* in the event of further appeal. *Westlake, LLC v. Engstrom Properties*, 169 Wn. App. 700, 281 P.3d 693 (2012).

In addition to arguing in favor of complete disclosure of privileged information, Appellant's also argues that the "Trustee had better knowledge than the trial court of what billed activities were necessary, useless or duplicative." Appellant's brief, p. 21. This statement not only pretentiously exalts the trustee over the trial court, it is directly contrary to the observation of the Washington Supreme Court:

In all cases...it is the trial judge ...[who] is in the best position to determine which hours should be included...

*Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash.2d 527, 540, 151 P.3d 976, 982 (2007). Appellant is *not* defending in his capacity *as Trustee*--the fees were awarded ***against him personally***. It is difficult to conceive of a party less able to be impartial in determining what activities were unnecessary than the person who will personally have to pay for activities found to be properly billed.

**ISSUE THREE: The Court correctly awarded attorneys' fees and costs when details of the work performed were provided to Appellant in the form of detailed declarations inclusive of the hourly rate, category of attorney who performed the work, descriptions of the activities performed and redacted fee statements identifying the working attorney, the date, and the amount charged.**

Appellant's Issue Three is merely a recap of the same arguments raised in Issue Two and addressed above, an attack on the trial court<sup>10</sup>, and a confabulation of the Washington and California actions. Nancy lost nothing in the Washington action – to the contrary, her Petition was certified for trial. Nor was she required by any court to dismiss her Petition in Washington and refile in California. The California order

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<sup>10</sup> “[n]o reasonable judicial officer could award any attorneys’ fees (let alone \$41,573.64) based on the criteria for awarding attorneys’ fees.” Appellant’s Brief, p. 22.

orally decided two weeks **after** the period for which she seeks attorneys' fees, and signed more than a month **after** the end of the period for which she seeks attorneys' fees, was permissive. CP 119 ("Nancy Shurtleff's claims, as alleged in her May 28, 2014 Washington petition, **may** be tried in this pending action without any defense of statute of limitations or any other time barred defense, or in the alternative, Nancy Shurtleff **may** file a petition in this action, seeking all relief that she sought in the Washington action without any defense of statute of limitations or time barred defense")(emphasis added). Counsel's declaration is clear that Nancy elected to file in California, secure with the California court's order specifically allowing her to file otherwise time-barred claims, and that she dismissed the Washington petition *in the interests of efficiency and economy*. CP 29. The entirety of Appellant's brief reviewing Nancy's alleged legal failures is defied by the record, a record readily available to and affirmatively considered by the trial court.

Appellant cites to *Berryman v. Metcalf*, 177 Wn. App. 644 (2013) as instructive for what is considered an abuse of discretion in awarding attorneys' fees. That case arose from a motor vehicle accident resulting in minor soft-tissue damage where the trial court awarded \$292,000 in fees based upon a "short trial" and a multiplier of 2.0 to effectively reward the attorneys for taking the matter on contingency. The Court of Appeals

noted that the ultimate award was almost four times as much as the jury's evaluation of the case and appeared "grossly inflated." *Id.* Moreover, the trial court in *Berryman* signed the proposed order without making any changes except to add the multiplier and did not address the opposition's arguments raised for reducing the hours. *Id.* The Court of Appeals noted that "[a] trial court does not need to deduct hours here and there just to prove to the appellate court that it has taken an active role in assessing the reasonableness of a fee request" but remanded the award to the trial court to address the specific challenges to the fee request. *Id.*, at 658.

*Berryman* is easily distinguishable from the record before this Court.<sup>11</sup> First and foremost, fees in *Berryman* were not sought pursuant to RCW 11.96A.150 and its progeny but under RCW 7.06.060(1), which is not applicable here. Second, the trial court did not apply a multiplier in this matter or award fees four times the amount granted by a jury. Third, this trial court did not accept without change the proposed order, but specifically interlineated additional findings and clarifications which

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<sup>11</sup> Notably, the facts in *Berryman* were unique. It has since been distinguished on those facts in subsequent decisions. *See Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 321 P.3d 1215 (2014)(holding that when awarding fees under RCW 4.84.250 the trial court should not consider the size of the amount in dispute when considering the reasonableness of a fee award under RCW 4.84.250); *Johnston-Forbes v. Matsunaga*, 181 Wash.2d 346, 333 P.3d 388 (2014)(Washington Supreme Court upheld allowance of expert testimony which had been excluded in *Berryman*).

evidence that it considered the fees sought and the arguments raised in opposition.

Appellant's claims that the trial court's review of the unredacted fee statement *in camera* was improper or unethical are not based in Washington law. This Court has already held in *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 741, 281 P.3d 693, 715 (2012) that while not generally encouraged, *in camera* review of fee statements is permissible in the right instances.<sup>12</sup>

In sum, Appellant cannot cite to a single case in which *in camera* review of fee statements resulted in reversal of a fee award. The sole question before this Court is whether the trial court abused its discretion and based its fee award on untenable grounds when it considered all the pleadings filed in the case, the supporting declarations of counsel (inclusive of the attorneys' hourly rate, education and experience, descriptions of the tasks undertaken and adjustments to the statements),

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<sup>12</sup> Appellant's citation to the dissent in *Erckman v. United States*, 416 U.S. 909, 94 S. Ct. 1618 (1974) is also unpersuasive, as it is both citation to a defeated viewpoint and on a wholly unrelated issue. The United States Supreme Court denied review of *Erckman* and upheld the District Court's determination, after *in camera* review of an IRS Agent's report, that the report did not need to be produced in the underlying litigation. The report had nothing to do with fee statements. Moreover, the dissent's argument was based upon the Jencks Act, which applies only to criminal prosecutions brought by the United States and statements made by government witnesses or prospective witnesses. 18 U.S.C. §3500. Appellant's citation to a dissenting opinion in a wholly unrelated case on wholly unrelated issues cannot be persuasive in this matter.

redacted fee statements showing the attorneys involved, the dates of the tasks, summaries of the activities and the amount charged, and *in camera* review of unredacted fee statements. If this Court finds despite these facts that the record is insufficient, the proper result is not reversal, but instead remand to the trial court for further review.

**ISSUE FOUR: The trial court properly noted that the fees and costs sought were largely incurred prior to notice by the Appellant of a change in the principal place of Trust administration to California and all were incurred prior to any waiver of the applicable statute of limitations in that jurisdiction.**

In applying RCW 11.96A.150, the Court “may order the costs to be paid in such amount and in such manner as the court determines to be equitable.” The conduct of the parties and to whom the benefit of the suit runs are primary concerns to the Court, but the Court does not impose a prevailing party standard. *See Estate of Black*, 116 Wn. App. 476, 66 P.3d 119 (2003); *Foster v. Gilliam*, 165 Wn. App. 33, 268 P.3d 945 (2011); *In re Estate of Evans*, 181 Wn. App. 436, 326 P.3d 755 (2014). When upholding a fee award on appeal, the courts of appeal consider the actions of the parties and whether those actions resulted in substantial professional fees and costs. *Foster v. Gilliam*, 165 Wn. App. 33 (2011).

The undisputed facts show that at the time that Nancy filed her

Petition, a mere two days before expiration of the statute of limitations, and through July 21, 2014, one day before the hearing on Nancy's Petition and the second to last day for which fees were sought, the information available to her was that the Trust's principal place of administration, as chosen by Appellant, was King County; all the beneficiaries and Appellant were residents of Washington state; and that if she dismissed her Petition in Washington she would be unable to file the same petition in California without risking a defense based upon statute of limitations. Appellant's affirmative actions precipitated the filing in Washington. His belated offer, which came in the form of a declaration filed in the California action a week *after* the initial hearing in the Washington action, did not render filing of the Washington action unnecessary. None of the fees sought post-date Appellant's offer to waive the otherwise applicable statute of limitations. Moreover, the only fees sought after Appellant claimed to have unilaterally changed the place of administration were those relating to attending the hearing the day after receiving the amended notice.

The trial court did not find that Washington was the only jurisdiction in which Nancy could have filed her initial petition – although Nancy believes that to be true and so argued to the trial court. The trial court instead found that “Petitioner properly filed the Petition in Washington as a direct result of Respondent's designation of King County

Washington as the principal place of administration.” CP 572. This finding makes eminent sense, since the place of administration and the residency of the trustee (Appellant) were expressly noted in Nancy’s Petition. CP 2 & 4. It also makes sense under California law which provides that trust actions should be commenced at the principal place of administration of the trust. *Supra* p. 22-23. It was therefore perfectly sensible for Nancy to file her petition in Washington, the location identified by Appellant as the principal place of administration of the Trust at all times prior to the expiration of the statute of limitations and continuing until July 21, 2014 – one day before the initial hearing on the merits.

Appellant cites to a treatise for the idea that a California court may exercise jurisdiction to determine matters concerning trust property, particularly land, located in California. Appellant’s brief, p. 27. However, the treatise acknowledges that the California Court’s exercise of such jurisdiction is permissive, not mandatory. Moreover, the basis for such permissive jurisdiction is not specific but merely the general plenary authority of the court to “exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States.” California Code of Civil Procedure §410.10. This is hardly persuasive authority upon which the California court should assert jurisdiction, and

the analysis is incomplete.

Absent jurisdiction over the trust or the persons, neither of which existed in California when Nancy's Petition was filed, California must have jurisdiction over the trust property in order to exercise jurisdiction. However, the California court's power over assets held in trust is limited only to property located within California:

Subject to constitutional limitations and CCP 410.30, the court may exercise in rem jurisdiction over matters involving trust property located in California, even if the trust's principal place of administration is outside California. Prob. C §17004. **However, the court's in rem jurisdiction does not extend to intangible personal property.** See Hanson v. Denckla (1958) 357 US 235, 246, 78 S.Ct. 1228; see also Estate of Radovich (1957) 48 Ca 2d 116, 120 (court has in rem jurisdiction over probate estate)

CEB California Trust Administration, §15.5 1 Reach of Court's Power (emphasis added).

Appellant continues to assert that there are "tens of millions of dollars of real property factor that Nancy chose not to rely on" as a basis for filing in California. Appellant's Brief, p. 28. However, by Appellant's own acknowledgement there are only two parcels of real property owned by the Trust in California, Decedent's condo and a home, with a total value of \$2.6 million – neither of which were at issue in Nancy's Petition. The remaining Trust assets, and the assets at issue in Nancy's Petition, are

interests in closely-held laddered entities. CP 331. The parent companies for those laddered entities in which the Trust held an interest include a Washington limited partnership (CP 244); a California limited partnership (CP 246); and a Washington limited liability company (CP 248). Business interests owned via limited liability companies and limited partnerships are not interests in the underlying real estate and under California law are considered interests in personal property situated in the location of the trustee. *In re Estate of Barriero*, 125 Cal. App. 153, 13 P.2d 1017 (1932); *Miller v. McClogan*, 17 Cal.2d 432, 110 P.2d 419 (1941) & *Lowry v. Los Angeles County*, 38 Cal. App. 158, 175 P. 702 (1918). As the primary residence of Appellant-Trustee was and remains Washington, the tens and millions of dollars of interests in those closely-held entities are, in fact, situated in Washington – not California. Thus, Nancy did *not* overlook “tens of millions” of dollars situated in California when her petition was filed, but instead looked directly at business interests worth that much, and noted that under California law those assets were situated at the location of the Trustee, which the Trustee had repeatedly identified as Washington. Understandably then, the only way to assert *in rem* jurisdiction over those assets was to file in Washington.

Appellant’s argument regarding the primacy of California jurisdiction in reliance on a permissive statement in a treatise is

particularly weak when considered in light of the statutes directly on point: California Probate Code Section 17005(a)(1) & (2) provide that under California law the principal place of administration dictates the appropriate jurisdiction in which to commence an action. A permissive grant of additional undefined authority does not overcome this specific provision. In both Washington and in California, the rules of statutory construction provide that a specific statute will supersede a general statute when both apply. *See Association of Washington Spirits and Wine Distributors v. Washington State Liquor Control Board*, 340 P.3d 849 (2015); *Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n*, 123 Wash.2d 621, 869 P.2d 1034 (1994); *People v. Radar*, 288 Cal. App. 4<sup>th</sup> 184, 175 Cal. Rptr.3d 65 (2014) (“if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute... ‘the rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict’”). Both California and Washington’s specific applicable jurisdictional statutes show Washington was the proper jurisdiction in which to commence the initial petition. California Probate Code §17005(a)(1) & (2), RCW 11.96A.040, RCW 11.98.039, RCW 11.96A.030(2), RCW 11.96A.080 & RCW 11.96A.050(1)(b).

Regardless, a finding of *exclusivity* of jurisdiction was not necessary for an equitable award of fees under RCW 11.96A.150. Even Appellant cannot and has not argued that Washington lacked jurisdiction over the Trust. Instead, Appellant argued that while Washington had jurisdiction over the Trust, California was a more convenient forum. CP 281-288. Thus, by all accounts, the courts of this state *may* properly assert jurisdiction over the Trust and make an equitable award of fees under RCW 11.96A.150.

Appellant's final argument seems to be that Appellant's unilateral decision to amend his notice of the Trust's principal place of business after Nancy's Petition was filed, all the parties had been served, Kathleen and Jessica appeared in the Washington action and the briefing on Nancy's Petition completed and submitted to the Court should not have weighed in favor of an award of fees against him. Appellant argues two bases for this objection: i) that his original designation of the principal place of administration was uninformed; and ii) that the beneficiaries would not suffer any negative effects of his unilateral decision. Both arguments fail.

First, Appellant argues that his original designation was uninformed. Whether the designation was uninformed is truly irrelevant to the trial court's decision, because Appellant's decision is presumed to be informed and he is so bound. It has long been the law that an attorney

is the agent of his or her client and that “in the absence of fraud, the client is bound, according to the ordinary rules of agency, by the acts, omissions, or neglect of the attorney within the latter’s authority, whether express or implied, apparent or ostensible. In other words, whatever is done in the progress of the cause by such attorney is considered as done by the party, and is binding on him.” 7A C.J.S. §180 (1980). *See also Rivers v. Washington State Conference of Mason Contractors*, 145 Wash.2d 674, 679, 41 P.3d 1175, 1178 (2002)(“Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The ‘sins of the lawyer’ are visited upon the client”). Appellant is bound by the actions of his former counsel in placing the principal place of administration in Washington, the home of Appellant and all the beneficiaries, and Nancy was perfectly justified attributing that decision to Appellant and in relying upon that written directive in filing her Petition.

Not only is Nancy legally entitled to the presumption that Appellant is bound by his attorney’s actions, the facts belie any attempt by Appellant to argue he was acting in his beneficiaries’ best interests. To the contrary, when Appellant initially tried to have the Washington court decline jurisdiction, the beneficiaries of the Trust were clear that their preference was that the Trust remain in Washington and that the litigation continue in Washington. CP 397-409; CP 131-134; & CP 410-423.

Appellant's statements for why he elected to change the principal place of administration do not even pay lip service to the best interests of his beneficiaries or his unwaivable duty to act in their best interests.

RCW 11.98.078 & RCW 11.97.010 . In fact, *none* of the reasons stated in Appellant's declaration as the bases for moving the Trust to California mention the interest of the beneficiaries. CP 509. Appellant here, in fact, does not even try to argue that moving the Trust to California was in the best interests of the beneficiaries--it would be a farce, given their statements regarding their preference for Washington, and the evidence of actual harm to the beneficiaries from such a move, discussed below.<sup>13</sup>

Appellant tries to argue on appeal that the relocation of the Trust to California had no adverse tax consequences and implies that designating Washington as the principal place of Trust administration could subject the Trust to Washington estate tax. Both arguments are baseless.

California has an income tax, Washington does not. California Revenue and Taxation Code §§17001-17039.2; §§17041-17061;

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<sup>13</sup> Appellant's brief makes a reference to "how beneficiaries who were not a party to the petition somehow suffered detriment." However, all of the named beneficiaries of the Trust were served with Nancy's Washington petition and all appeared in the action. CP 574-575. In addition, each filed a declaration confirming Washington as their residence. CP 335, CP 397-409 & CP 131-134. Thus, it should be abundantly clear that all the interested parties were, in fact, parties to the petition and expressed a preference that the litigation continue in Washington.

<http://dor.wa.gov/content/FindTaxesAndRates/IncomeTax/> (“Washington State does not have a personal or corporate income tax”). For this reason, Appellant’s former trust administration counsel, Mr. Allen, testified that situsing the Trust in Washington was preferable from a state income tax position and *likely would produce a lower income tax bill for the trust and beneficiaries*.<sup>14</sup> CP 35-36. His conclusion was based in part upon his determination, confirmed in Appellant’s declaration, that not all of the Trust income is California-source income--at least two of the underlying properties are located outside of the State of California. CP 331. When

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<sup>14</sup> Russell G. Allen, who authored the Trust and advised Appellant as successor trustee, when asked in his recent deposition about how the principal place of administration was initially identified as Washington, testified that: “Tom was then a resident of the state of Oregon as I understood it -- of Washington as I understood it. My correspondence with him over the years had always been in Washington. I was not aware of anyone planning to be in residence at the Lido condominium. To the extent there was income or gain recognized at the trust level from other than California source income, the absence of an income tax in the state of Washington would produce a lower income tax bill than if the fiduciary had been located in the state of California. Here all of the beneficiaries were outside or almost all beneficiaries were outside California, so it seemed to me relatively easy from an income tax standpoint to the extent there was any difference, to the extent there was any income other than California source income, there would be preferential treatment if we did not have a fiduciary who was a resident of the state of California.” CP 35-36. When further questioned, Mr. Allen confirmed that he did not believe that situsing the BCMF Trust in California would be in the best interests of the trust beneficiaries, all of whom are Washington residents and whose interests Appellant has a fiduciary obligation to protect over his own. CP 36 (“Q. So what is the net tax effect, positive or negative, tax only, of siting the trust in California versus Washington? A. If the fiduciary were located in California, then California’s income tax would apply to all income and gain recognized by the trustee regardless of source. Q. So how would it be in the best interest of the trust and its beneficiaries to cite the trust in California? A. I don't know that it would be.”)

further questioned, Mr. Allen confirmed that *he did not believe that situsing the Trust in California would be in the best interests of the beneficiaries*, all of whom are Washington residents and whose interests Appellant has a fiduciary obligation to protect over his own. Appellant fails to address how his decision to subject all the Trust income, rather than just the California sourced income, to the California income tax system is not harmful to the beneficiaries.

Appellant's secondary inference that changing the principal place of administration of the Trust to Washington after the death of the Decedent would subject the Trust to Washington's estate tax is nonsensical. The Washington estate tax is based upon the residency of the decedent and the location of the property at the time of her death – actions taken by a fiduciary after the decedent's death to change the situs of the trust are irrelevant for determining a decedent's Washington state estate tax liability. RCW 83.100.040(1) & RCW 83.100.020(12). Decedent was not a resident of Washington at the time of her death; therefore, *none* of her intangible property, including the interests in the closely-held companies, are subject to the Washington state estate tax. RCW 83.100.040(1) & RCW 83.100.020(12). Moreover, Dr. Morgan did not own any real property in Washington in her own name at the time of her death; it follows that there is no real property to attract the Washington state estate

tax. RCW 83.100.040(b). Appellant's brief spends two pages excerpting portions of the Department of Revenue webpage, *see* [http://dor.wa.gov/content/FindTaxesAndRates/OtherTaxes/tax\\_estateOnAfter010114.aspx](http://dor.wa.gov/content/FindTaxesAndRates/OtherTaxes/tax_estateOnAfter010114.aspx), without noting the statement on the same page that the tax only applies if decedent owned property in Washington State.

Decedent did not directly own real property in Washington state at the time of her death, and as a resident of California, at the time of her death, her interests in the laddered business entities were considered California property for the purposes of the Washington estate tax. No matter where Appellant claimed the principal place of administration for her Trust *after* her death, her estate and Trust would not be liable for Washington estate taxes. The entirety of this argument is a red herring.

#### **VI. ATTORNEYS FEES ON APPEAL**

Nancy asks that pursuant to RCW 11.96A.150, this Court award her fees and costs associated with this appeal. This appeal is further evidence of Appellant's intention to violate his fiduciary duties and take actions which benefit him personally to the detriment of the beneficiaries.

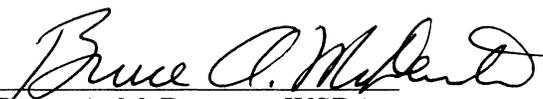
#### **VII. CONCLUSION**

The trial court's award of attorneys' fees against Appellant personally arose after a review of all the pleadings filed in this matter. Those pleadings revealed that Appellant's unilateral and self-interested

actions directly caused Nancy to file her initial Petition in Washington. Subsequent unilateral and self-interested acts, taken over the objections of the beneficiaries, opened the door for a permissive change of venue and jurisdiction. The trial court noted this from the complete records before it and completed an equitable analysis under RCW 11.96A.150 that granted Nancy's fees against Appellant personally, but only from the time she filed the action to July 22, 2014 – the date of the first hearing. As acknowledged by the Washington State Supreme Court, the trial court is uniquely situated to conduct that analysis and its decision may be reviewed only for abuse of discretion. The evidence clearly shows that no such abuse occurred here. The trial court's award of attorneys' fees and costs against Appellant personally should be upheld.

DATED this 25th day of March, 2015.

GARVEY SCHUBERT BARER

By   
Bruce A. McDermott, WSBA  
#18988  
Teresa Byers, WSBA #34388  
Attorneys for Respondent  
Nancy Shurtleff

APPENDIX

	NAME	DATE	PAGE
1.	California Probate Code Section 16061.8		App-1
2.	California Probate Code Section 16061.7		App-2
3.	California Probate Code Section 17005		App-5
4.	California Probate Code Section 17002		App-6
5.	California Probate Code Section 17003		App-7
6.	California Probate Code Section 17004		App-8
7.	<i>In Re Matter of Estate of Barreiro</i> , 125 Cal. App. 153, 13 P.2d 1017 (1932)		App-9
8.	California Code of Civil Procedure Section 410.10		App-32
9.	<i>Miller v. McColgan</i> , 17 Cal.2d 432, 110 P.2d 419 (1941)		App-33
10.	<i>Lowry v. County of Los Angeles</i> , 38 Cal. App. 158, 175 P. 702 (1918)		App-41
11.	<i>People v. Rader</i> , 228 Cal. App.4 <sup>th</sup> 184, 175 Cal. Rptr.3d 65 (2014)		App-45
12.	California Revenue and Taxation Code Section 17001		App-59
13.	California Revenue and Taxation Code Section 17004		App-60
14.	California Revenue and Taxation Code Section 17006		App-61
15.	California Revenue and Taxation Code Section 17041		App-62
16.	California Revenue and Taxation Code Section 17008		App-66

**C****Effective: January 1, 2011**

West's Annotated California Codes Currentness

Probate Code (Refs &amp; Annos)

Division 9. Trust Law (Refs &amp; Annos)

Part 4. Trust Administration (Refs &amp; Annos)

Chapter 1. Duties of Trustees (Refs &amp; Annos)

Article 3. Trustee's Duty to Report Information and Account to Beneficiaries (Refs &amp; Annos)

**→ → § 16061.8. Limitations of actions to contest trust**

No person upon whom the notification by the trustee is served pursuant to this chapter, whether the notice is served on him or her within or after the time period set forth in subdivision (f) of Section 16061.7, may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later.

## CREDIT(S)

(Added by Stats.1997, c. 724 (A.B.1172), § 24. Amended by Stats.2000, c. 34 (A.B.460), § 5; Stats.2000, c. 592 (A.B.1628), § 2; Stats.2010, c. 621 (S.B.202), § 6.)

## HISTORICAL AND STATUTORY NOTES

## 2011 Main Volume

Stats.2000, c. 592 (A.B.1628), substituted "upon whom" for "who receives", inserted "is served" following "the trustee", and deleted "in response to his or her request" preceding "during that 120-day".

Section affected by two or more acts at the same session of the Legislature, see Government Code § 9605.

Stats.2010, c. 621 (S.B.202), following "to this chapter", inserted ", whether the notice is served on him or her within or after the time period set forth in subdivision (f) of Section 16061.7,".

## LAW REVIEW AND JOURNAL COMMENTARIES

"Its my money til I die": When trustees must notify heirs and beneficiaries concerning a trust that has become irrevocable. Erik R. Beauchamp, 32 McGeorge L. Rev. 670 (2001).

C

**Effective: January 1, 2011**

West's Annotated California Codes Currentness

Probate Code (Refs &amp; Annos)

Division 9. Trust Law (Refs &amp; Annos)

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Chapter 1. Duties of Trustees (Refs &amp; Annos)

Article 3. Trustee's Duty to Report Information and Account to Beneficiaries (Refs &amp; Annos)

**→ → § 16061.7. Status of trust changing to irrevocable, change of trustee of irrevocable trust, or power of appointment of irrevocable trust becoming effective or lapsing; notification; final judicial determination of heirship**

(a) A trustee shall serve a notification by the trustee as described in this section in the following events:

(1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.

(2) Whenever there is a change of trustee of an irrevocable trust.

(3) Whenever a power of appointment retained by a settlor is effective or lapses upon death of the settlor with respect to an inter vivos trust which was, or was purported to be, irrevocable upon its creation. This paragraph shall not apply to a charitable remainder trust. For purposes of this paragraph, "charitable remainder trust" means a charitable remainder annuity trust or charitable remainder unitrust as defined in Section 664(d) of the Internal Revenue Code.[FN1]

(4) The duty to serve the notification by the trustee pursuant to this subdivision is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification.

(b) The notification by the trustee required by subdivision (a) shall be served on each of the following:

(1) Each beneficiary of the irrevocable trust or irrevocable portion of the trust, subject to the limitations of Section 15804.

(2) Each heir of the deceased settlor, if the event that requires notification is the death of a settlor or irrevocabil-

ity within one year of the death of the settlor of the trust by the express terms of the trust because of a contingency related to the death of a settlor.

(3) If the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General.

(c) A trustee shall, for purposes of this section, rely upon any final judicial determination of heirship, known to the trustee, but the trustee shall have discretion to make a good faith determination by any reasonable means of the heirs of a deceased settlor in the absence of a final judicial determination of heirship known to the trustee.

(d) The trustee need not provide a copy of the notification by trustee to any beneficiary or heir (1) known to the trustee but who cannot be located by the trustee after reasonable diligence or (2) unknown to the trustee.

(e) The notification by trustee shall be served by mail to the last known address, pursuant to Section 1215, or by personal delivery.

(f) The notification by trustee shall be served not later than 60 days following the occurrence of the event requiring service of the notification by trustee, or 60 days after the trustee became aware of the existence of a person entitled to receive notification by trustee, if that person was not known to the trustee on the occurrence of the event requiring service of the notification. If there is a vacancy in the office of the trustee on the date of the occurrence of the event requiring service of the notification by trustee, or if that event causes a vacancy, then the 60-day period for service of the notification by trustee commences on the date the new trustee commences to serve as trustee.

(g) The notification by trustee shall contain the following information:

(1) The identity of the settlor or settlors of the trust and the date of execution of the trust instrument.

(2) The name, mailing address and telephone number of each trustee of the trust.

(3) The address of the physical location where the principal place of administration of the trust is located, pursuant to Section 17002.

(4) Any additional information that may be expressly required by the terms of the trust instrument.

(5) A notification that the recipient is entitled, upon reasonable request to the trustee, to receive from the trustee a true and complete copy of the terms of the trust.

(h) If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the

trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, the notification by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, that states as follows:

“You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to you during that 120-day period, whichever is later.”

(i) Any waiver by a settlor of the requirement of serving the notification by trustee required by this section is against public policy and shall be void.

(j) A trustee may serve a notification by trustee in the form required by this section on any person in addition to those on whom the notification by trustee is required to be served. A trustee is not liable to any person for serving or for not serving the notice on any person in addition to those on whom the notice is required to be served. A trustee is not required to serve a notification by trustee if the event that otherwise requires service of the notification by trustee occurs before January 1, 1998.

#### CREDIT(S)

(Added by Stats.1997, c. 724 (A.B.1172), § 23. Amended by Stats.1998, c. 682 (A.B.2069), § 10; Stats.2000, c. 34 (A.B.460), § 4; Stats.2000, c. 592 (A.B.1628), § 1; Stats.2010, c. 621 (S.B.202), § 5.)

[FN1] Internal Revenue Code sections are in Title 26 of the U.S.C.A.

#### HISTORICAL AND STATUTORY NOTES

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Stats.1998, c. 682 (A.B.2069), made nonsubstantive changes throughout the section; redesignated subd. (e)(6) as subd. (g) and inserted “Unless the notification by trustee is served only because of a change of the trustee, the notification by trustee shall also include” preceding “a warning”; redesignated subd. (f) as subd. (h) and substituted “unless the” for “; provided, however that this subdivision shall not apply in any case where a”; and redesignated subd. (h) as subd. (j), substituted “notification by trustee” for “notice”, and at the end of the subdivision, inserted “A trustee is not required to serve a notification by trustee if the event that otherwise requires service of the notification by trustee occurs before January 1, 1998.”

Stats.2000, c. 592 (A.B.1628), rewrote this section, which read:

“(a) A trustee shall serve a notification by the trustee described in this section in either of the following cases:

**C****Effective:[See Text Amendments]**

West's Annotated California Codes Currentness

Probate Code (Refs & Annos)

Division 9. Trust Law (Refs & Annos)

▣ Part 5. Judicial Proceedings Concerning Trusts (Refs & Annos)

▣ Chapter 1. Jurisdiction and Venue (Refs & Annos)

→ → **§ 17005. Venue**

(a) The proper county for commencement of a proceeding pursuant to this division is either of the following:

(1) In the case of a living trust, the county where the principal place of administration of the trust is located.

(2) In the case of a testamentary trust, either the county where the decedent's estate is administered or where the principal place of administration of the trust is located.

(b) If a living trust has no trustee, the proper county for commencement of a proceeding for appointing a trustee is the county where the trust property, or some portion of the trust property, is located.

(c) Except as otherwise provided in subdivisions (a) and (b), the proper county for commencement of a proceeding pursuant to this division is determined by the rules applicable to civil actions generally.

**CREDIT(S)**

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

**LAW REVISION COMMISSION COMMENTS****1990 Enactment**

Section 17005 continues Section 17005 of the repealed Probate Code without change. See also Section 17002 (principal place of administration of trust).

Subdivision (b) applies only to appointment of a trustee for a living trust that has no trustee. Proceedings to appoint a trustee for a testamentary trust that has no trustee are commenced in the county where the decedent's estate is administered. See subdivision (a)(2).

**C****Effective:[See Text Amendments]**

West's Annotated California Codes Currentness

Probate Code (Refs &amp; Annos)

Division 9. Trust Law (Refs &amp; Annos)

▣ Part 5. Judicial Proceedings Concerning Trusts (Refs &amp; Annos)

▣ Chapter 1. Jurisdiction and Venue (Refs &amp; Annos)

→ → **§ 17002. Principal place of administration of trust**

(a) The principal place of administration of the trust is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust.

(b) If the principal place of administration of the trust cannot be determined under subdivision (a), it shall be determined as follows:

(1) If the trust has a single trustee, the principal place of administration of the trust is the trustee's residence or usual place of business.

(2) If the trust has more than one trustee, the principal place of administration of the trust is the residence or usual place of business of any of the cotrustees as agreed upon by them or, if not, the residence or usual place of business of any of the cotrustees.

**CREDIT(S)**

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

**LAW REVISION COMMISSION COMMENTS****1990 Enactment**

Section 17002 continues Section 17002 of the repealed Probate Code without change.

**Background on Section 17002 of Repealed Code**

Section 17002 was added by 1986 Cal.Stat. ch. 820 § 40. The section superseded the second and third sentences of subdivision (a) of former Probate Code Section 1138.3 (repealed by 1986 Cal.Stat. ch. 820 § 31). Subdivision (a) of Section 17002 substituted a criterion of day-to-day activity for the former reference to the location of the

**C****Effective:[See Text Amendments]**

West's Annotated California Codes Currentness

Probate Code (Refs & Annos)

Division 9. Trust Law (Refs & Annos)

▣ Part 5. Judicial Proceedings Concerning Trusts (Refs & Annos)

▣ Chapter 1. Jurisdiction and Venue (Refs & Annos)

→ → **§ 17003. Jurisdiction over trustees and beneficiaries**

Subject to Section 17004:

(a) By accepting the trusteeship of a trust having its principal place of administration in this state the trustee submits personally to the jurisdiction of the court under this division.

(b) To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court under this division.

**CREDIT(S)**

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

**LAW REVISION COMMISSION COMMENTS****1990 Enactment**

Section 17003 continues Section 17003 of the repealed Probate Code without change. This section is drawn from Section 7-103 of the Uniform Probate Code (1987) and is intended to facilitate the exercise of the court's power under this chapter. As to the construction of provisions drawn from uniform acts, see Section 2. As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under Section 17003. Consequently, appropriate notice must be given to a trustee or beneficiary as a condition of jurisdiction under this section. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Section 17003 is not a limitation on the jurisdiction of the court over the trust, trust property, or parties to the trust. See Section 17004 (general basis of jurisdiction). See also Section 15800 (limits on rights of beneficiary of revocable trust).

**Background on Section 17003 of Repealed Code**

**C****Effective:[See Text Amendments]**

West's Annotated California Codes Currentness

Probate Code (Refs & Annos)

Division 9. Trust Law (Refs & Annos)

↗ Part 5. Judicial Proceedings Concerning Trusts (Refs & Annos)

↗ Chapter 1. Jurisdiction and Venue (Refs & Annos)

→→ **§ 17004. Basis of jurisdiction**

The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

**CREDIT(S)**

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

**LAW REVISION COMMISSION COMMENTS****1990 Enactment**

Section 17004 continues Section 17004 of the repealed Probate Code without change.

Section 17004 recognizes that the court, in proceedings relating to internal trust affairs or other purposes described in Section 17000, may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ.Proc. § 410.10. In addition, Section 17003 codifies a basis of personal jurisdiction derived from concepts of presence in the state and consent to jurisdiction. However, personal jurisdiction over a trustee may be exercised where the trustee is found, regardless of the location of the trust property. See *Estate of Knox*, 52 Cal.App.2d 338, 348, 126 P.2d 108 (1942). Similarly, jurisdiction may be exercised to determine matters concerning trust property, particularly land, located in California even if the principal place of administration of the trust is not in California. See Restatement (Second) of Conflict of Laws § 276 & comments (1969); 5 A. Scott, *The Law of Trusts* §§ 644-47, at 4074-83 (3d ed.1967).

A determination that a California court may exercise jurisdiction is not decisive if the exercise would be an undue interference with the jurisdiction of a court of another state which has primary supervision over the administration of the trust. See *Estate of Knox*, 52 Cal.App.2d 338, 344-48, 126 P.2d 108 (1942); *Schuster v. Superior Court*, 98 Cal.App. 619, 623-28, 277 P. 509 (1929); Restatement (Second) of Conflict of Laws § 267 & comments (1969). This concept of primary supervision in the context of trust administration is a special application of the doctrine of *forum non conveniens*, which is recognized generally in Code of Civil Procedure Section 410.30.



In the Matter of the Estate of BENIGNO BARREIRO, Deceased. MARIA TERESA BARREIRO et al., Minors, etc., Appellants,

v.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION (a Corporation), as Executor, etc., Respondent.

Civ. No. 885.

District Court of Appeal, Fourth District, California.

July 29, 1932.

HEADNOTES

(1) EXECUTORS AND ADMINISTRATORS--BANKS AND BANKING--CONSOLIDATION--SALE OF BANK.

When a state bank, which is the duly appointed and acting executor of an estate, is purchased by another state bank, or is consolidated therewith, in accordance with the provisions of sections 31 and 31a of the Bank Act, and the purchaser bank is subsequently converted into a national banking association, such transitions carry with them the office of executor by operation of law and without the necessity of court order.

See 4 Cal. Jur. 121.

(2) BANKS AND BANKING--NATIONAL BANKS--CONSOLIDATION--IDENTITY.

Under the federal banking laws, the changing of a state bank into a national banking association does not destroy the identity of the original bank, but all the assets and rights of the state bank pass to the national bank without any formal assignment and are subject to all existing liabilities and obligations of the state bank as if the change had not taken place; and the state bank merely passes from one jurisdiction to another but its identity is not thereby necessarily destroyed and it remains substantially the same institution under another name and subject to new control.

(3) EXECUTORS AND ADMINISTRATORS--ESTATES OF DECEASED PERSONS-- JURISDICTION.

Although jurisdiction over estates of decedents is vested in the probate court which has discretion in the appointment of executors, who must take the oath of office after appointment, the fact that such a successor bank does not receive its appointment as executor through an order of the probate court, but succeeds to the office through purchase or consolidation with another bank which had been the duly appointed and acting executor, and the fact that such successor bank has not, through one of its officers, taken the oath of office, do not render it an interloper or affect its occupation of the office of executor.

(4) ID.--BANKS AND BANKING--CONSOLIDATION--PURCHASE--JURISDICTION-- CONSTITUTIONAL LAW.

The purchase of an executor bank by, or its consolidation with, another bank does not create an entire new entity but merely directs the blood of the old corporation into the veins of the new, and the holding that the office of executor descends by operation of law to the successor corporation does not violate the provisions of section 5 of article VI of the Constitution which vests original jurisdiction of all probate matters in the superior court, and does not divest the probate court of the power to select a new administrator with the will annexed in the case of such a purchase or consolidation.

(5) ID.--NOMINATION--JURISDICTION--PROCEDURE.

A testator has the right to nominate the executor of his will and the probate court will appoint the nominee in the absence of legal disqualification, but the power to appoint a particular person or corporation as an executor or administrator concerns procedure in a probate court rather than its jurisdiction, and in the case of such a purchase or consolidation.

ation of banks, and the transfer of the office of executor to the successor bank by operation of law, the power remains in the probate court to remove the successor bank from the office if occasion should arise and the necessity for such action present itself.

(6) ID.--CORPORATIONS--ALTER EGO--ISSUES.

On this appeal from an order settling the fourth account of an executor, where the purpose of the proceeding was to settle and distribute the estate of deceased under the terms of his will, whether or not deceased during his lifetime operated in a foreign country through a corporation as his *alter ego* was not the concern of the probate court and could have no bearing on the conduct of the administrator in the administration of the estate.

(7) ID.--PROBATE LAW--ANCILLARY ADMINISTRATION--CORPORATE STOCK.

In such proceeding, the probate court did not err in finding that the estate had not been damaged, prejudiced nor confronted with loss because of a failure to have ancillary letters of administration taken out in a foreign country, where the principal estate of deceased consisted of shares of stock of a foreign corporation which were in his possession in this state at the time of his death, and there was no showing that administration thereof in this state would not be recognized in said foreign country, and it appeared that the value of the property to be recovered to the estate by such ancillary proceedings did not exceed, and might be much less than, the cost of proceedings to the estate.

(8) ID.--ORDERS--JUDGMENTS--RES JUDICATA.

Where certain heirs sought to remove the executor in such proceeding because of alleged waste, embezzlement and mismanagement of the estate, and urged matters directly involved in the first, second and third annual accounts, which were heard and settled by the court in the regular course of probate proceedings, and the orders settling those accounts had become final, no appeals having been

taken therefrom, said orders were not subject to review on appeal from the order settling the fourth account.

(9) ID.--FAMILY ALLOWANCE--MISTAKE.

Where the family allowance during the period covered by the first three accounts, in view of the facts subsequently disclosed, appeared to have been extravagant, but the amount of such allowance was undoubtedly due to a mistaken estimate of the actual value of the estate and the permanency of the income therefrom, and it was subsequently reduced, and such mistakes were honestly made and indulged in by all the parties interested in such proceedings and their then attorneys, the size of such allowance furnished no ground for the removal of the executor under the facts disclosed by the record.

(10) ID.--GUARDIAN AND WARD--ADVERSE INTERESTS--REMOVAL OF EXECUTOR.

The mere fact that the persons, who are the guardians of the estates of minor heirs or distributees, are at the same time trust officers of the corporate executor and are acting as its representatives in the active management of the affairs of the estate of the decedent, does not in itself demonstrate that they are occupying hostile and adverse positions, and that fact cannot be made the sole ground for the removal of the executor from office.

(11) ID.--LITIGATION--MISTAKE--EVIDENCE.

In this proceeding to settle the fourth account of an executor, wherein certain heirs sought to have the executor removed from office, the record supported the finding that the expenses of certain litigation did not furnish ground for the removal of the executor, where the litigation arose out of a mutual mistake indulged in by all the attorneys then connected with the estate and the proceedings, and was started by decedent's divorced wife by her petition for partial distribution of that portion of the property which she claimed belonged to her as community property, but which she owned as tenant in common with decedent after the divorce.

(12)

13 P.2d 1017  
125 Cal.App. 153, 13 P.2d 1017  
(Cite as: 125 Cal.App. 153)

ID.--ADVANCEMENTS--MISTAKE--HUSBAND  
AND WIFE--DIVORCE--TENANTS IN COM-  
MON.

Where said divorced wife was only entitled to \$1 under the will, and she was neither his widow nor his heir at the time of his death, the "advancement" of several hundred dollars could not be credited as a lawful expenditure by the executor out of the funds of the estate, and was to be charged against her portion of the property held in tenancy in common upon an accounting thereof by the executor; but the payment of such money, being the result of an honest mistake, did not furnish ground for the revocation of the letters testamentary.

(13) ID.--ESTATES OF DECEASED PERSONS--  
APPRAISEMENT--VALUE.

The finding that the inventory and appraisal filed in such proceeding was greatly in excess of the actual value of the property could not be disturbed on appeal where it appeared that the appraisal included certain stock belonging to said divorced wife as tenant in common and that the valuation placed thereon was seemingly measured by the income derived from rentals and based upon cadastral values.

(14) ID.--CORPORATIONS--DIVIDENDS.

In such proceeding, where the executor took certain "liquidating dividends" from a foreign corporation which was alleged to be the *alter ego* of decedent, and used the same in paying the expenses of administration, the family allowance, repairs to property damaged by an earthquake and other such purposes, and the amount taken was less than the excess of the value of the property of the corporation over the par value of its capital stock, the fact of such withdrawal, in itself disassociated from the actual expenditures made, did not furnish grounds for the removal of the executor.

(15) ID.--REMOVAL OF EXECUTOR--  
EVIDENCE--FINDINGS--APPEAL.

Where the conclusions of the trial judge, refusing to revoke the letters testamentary and remove the executor in such proceeding, were based on a

great mass of conflicting evidence, some of which supported his conclusions that the executor was not guilty of the acts charged, the order refusing to remove the executor could not be disturbed on appeal.

(16)  
ID.--ACCOUNTING--EVIDENCE--RESERVATI  
ON OF RULING.

When objections to the account of an executor are raised, the probate judge may properly reserve his rulings upon the allowance or disallowance of any portion of the account wherein the evidence is unsatisfactory or incomplete.

(17)  
ID.--APPEAL--ERROR--PRESUMPTIONS--REC  
ORD.

Error cannot be presumed and an appellant must show error before an appellate court can hold that it has been committed by a trial court; and in such proceeding, where certain minor distributees claimed that a certain payment should have been surcharged against the executor, but merely referred to the clerk's transcript by volume and page without making any explanation or comment upon the payment, the appellate court presumed that there was some valid explanation in the record and refused to search the entire record to determine whether such payment, which was relatively small in amount, was legally made.

(18) ID.--REAL PROPERTY--  
-VALUE--INCOME--EVIDENCE.

While the value of the use of property, or its income, may be considered as an element in fixing its value, the value of the use alone cannot be taken as a standard upon which to estimate and fix its market value; and in such proceeding, the finding that no loss resulted from the sale of certain realty could not be disturbed on appeal where the witnesses who testified as to value knew of no sales of or offers for, similar property but based their estimates largely on its rental value or on cadastral values, and it was uncertain whether they were giving values in terms of American or foreign dollars, and no

purchaser could be found who would pay more than the amount received by the executor.

**(19) ID.--LEASES--OPTIONS--EVIDENCE.**

In such proceeding, there was no showing that a loss occurred when the executor refused a higher rental for certain property and executed a new lease for the same term and at a similar rental as specified in the option given to the lessee in the prior lease, where it appeared that the decedent had commenced an action to cancel the lease but the investigation by the executor and its attorneys correctly showed that the same could not be brought to a successful conclusion.

**(20) ID.--SERVICES--COMPENSATION--EVIDENCE--FINDINGS.**

The appellate court could not disturb the finding that the amount paid a certain person to take care of business connected with the foreign property of the estate was a reasonable amount to be paid for such services, even though the total compensation, including the free use of a room, was somewhat in excess of that paid in this state for like services, where there was no evidence that the amount paid was an unreasonable amount for such services in the place where the same were rendered.

**(21) ID.--CLAIMS--TAXES--ORDER OF PAYMENT--INTEREST.**

In such proceeding, there was no showing that the executor should have been charged with a loss of interest because it paid an allowed claim bearing seven per cent interest before paying the state succession tax, which carried a higher rate of interest, but which was on the shares of stock transferred and was to be paid out of such shares and not out of the estate, or because it paid said claim before paying the federal estate tax, which also carried a higher rate of interest, where the evidence did not show that the amount of said tax was finally arrived at, fixed and placed in shape to be paid.

**(22) ID.--TRUSTS--CONTRACTS.**

In such proceeding, neither the estate nor the

minor distributees were prejudiced by the conduct of the executor in making a contract with decedent's divorced wife and in attempting to get her to execute a trust agreement placing her portion of the property, which was owned by her as tenant in common with decedent, in trust with the executor for the benefit of said minors after her death, where the contract was prepared before the appointment of the executor, and the declaration of trust was not executed, but if executed might have resulted in a benefit to said minors by giving them a fixed and present interest in her property.

**(23) ID.--REMOVAL OF EXECUTOR--LOSS OF MONEY--MISTAKE--REFUND.**

In such proceeding, the trial court did not err in refusing to remove the executor, even though, through its negligence, it lost money taken by a foreign attorney who disappeared before making payment, where a return of the money by the executor would prevent its loss to the estate, and it appeared that the executor and its then attorney were honestly mistaken in the position taken in the earlier years of the administration and that a refund of the money lost was all that the equities of the situation required.

See 11 *Cal. Jur.* 426; 11 *R. C. L.* 97.

**(24) ID.--ESTATES OF DECEASED PERSONS--HUSBAND AND WIFE--TENANTS IN COMMON--DISTRIBUTION--ACCOUNTING.**

In such proceeding, the property owned by the divorced wife as tenant in common with decedent should be removed from the possession of the executor, as the income therefrom does not belong to the estate and the expenses of caring for and maintaining the same should not be charged to the estate; and the trial court should have reserved to itself the right to credit to, or charge against, the executor any sums that an accounting between it and said wife might show necessary and proper under the circumstances of such an accounting.

**SUMMARY**

APPEAL from orders of the Superior Court of San Diego County refusing to remove an executor

and settling portions of an executor's account. Charles C. Haines, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

#### COUNSEL

Jesse George and C. A. Brinkley for Appellants.

Wright & McKee and C. M. Monroe for Respondent.

#### MARKS, J.

Benigno Barreiro, citizen of the United States, resident of San Diego, died testate on June 4, 1925, leaving as heirs his three minor children, Maria Teresa Barreiro, Benigno Barreiro, Jr., and Oscar Barreiro. He had been divorced from his wife, Gertrudis Marquez Barreiro, on December 29, 1923. The decree of divorce was silent as to any division of the community property, leaving them tenants in common with an equal interest therein. \*159

Benigno Barreiro owned property in California and in Mexico, and conducted a considerable mercantile business in the latter country originally under the name "Barreiro & Co." In 1920 he organized a Mexican corporation, the Compania Mercantil Internacional, S. A., hereafter referred to as the "Compania Internacional", through which he transacted his mercantile business in Mexico and which held the legal title to his property in that country. At some date, probably early in 1922, he discontinued the operations of the Compania Internacional except for the purpose of its liquidation. Victoriano Sanchez was appointed its liquidator with the apparent object of collecting in and distributing its assets and otherwise winding up its affairs. Accounts receivable and promissory notes of the total face value of about \$30,000 (whether in Mexican money or that of the United States is uncertain) came into his possession. As far as the record discloses, no accounting was obtained from him by the deceased and none has been made to the executor. Miguel Gonzales purchased the other and remaining personal property of this corporation for

\$250,000, payable part in cash, the balance being evidenced by promissory notes. The certificates of stock of the Compania Internacional have not been found, but it is probable that Mr. Barreiro owned all of them with a community interest in his wife.

Mr. Barreiro organized another Mexican corporation, the Compania de Inversiones de la Baja California, hereafter referred to as the "Compania", to which was deeded all of the Mexican real estate of the Compania Internacional, except one lot in the city of Mexicali, title to which remained in the original corporation. After 1922 the business of Mr. Barreiro in Mexico consisted mainly of leasing the real estate there.

The capital stock of the Compania was divided into 1,000 shares of the par value of \$100 each, Mexican money, which would be equivalent to \$50 in money of the United States at the rate of exchange prevailing at that time. All of the stock was issued to bearer and was found in the possession of Mr. Barreiro at the time of his death. He evidently assumed that he owned all of the corporate stock as he disregarded the rights of his divorced wife in the interest which she took at the time of the divorce as tenant in common with him. \*160

Deceased left two testamentary instruments which have been construed as his last will and a codicil thereto and have been admitted to probate as such. They were offered for probate by the Southern Trust & Commerce Bank, a California banking corporation, with its principal place of business in San Diego, together with a petition for its appointment as executor, which petition was granted. The bank immediately qualified and entered upon the discharge of its duties with Norman R. Morison, its trust officer, assuming active charge of the affairs of the estate.

On the same day that the will was admitted to probate, Norman R. Morison was appointed sole guardian of the estates of the minor children. He qualified and acted as such guardian until May 12, 1927, when his resignation was accepted and Dean

M. Plaister, an official of the Bank of Italy National Trust and Savings Association, was appointed and qualified and continued to serve until January 17, 1929, when he resigned and Robert L. Cardenas and Charles A. Brinkley were appointed in his stead. They qualified and are now acting in such capacity. Mrs. Barreiro is the appointed, qualified and acting guardian of the persons of the minors.

The Southern Trust & Commerce Bank was sold to the Bank of America. The Bank of America consolidated with the Liberty Bank and was known as the Liberty Bank of America. The Liberty Bank of America was sold to the Bank of Italy, which was converted into a national banking association known as the Bank of Italy National Trust and Savings Association.

A first executor's account was filed by the Southern Trust & Commerce Bank; a second by the Liberty Bank of America; and a third by the Bank of Italy National Trust and Savings Association, all of which were settled and the orders settling them were allowed to become final. The Bank of Italy National Trust and Savings Association filed a fourth annual account to which objections were filed by the minors and removal of the executor from office was asked. After a lengthy contest the trial court ordered a full and detailed account of matters not directly covered in any of the other accountings. Amended and supplemental accounts were filed to which the minors objected and another extended hearing was had. The trial court settled certain \*161 portions of the account, overruling objections to some of its items and reserving its rulings on others. It virtually surcharged the executor's account with certain expenditures which it held were illegally made, but not with the full amount which the minors sought to have charged against it. The removal of the executor was refused, the court holding that it had succeeded to the office originally occupied by the Southern Trust & Commerce Bank.

On November 13, 1929, the trial court filed findings of fact and conclusions of law in which the

various changes from the Southern Trust & Commerce Bank to the Bank of Italy National Trust and Savings Association were found in detail, and it was concluded therefrom that the Bank of Italy National Trust and Savings Association had succeeded to the office of executor and was then the duly qualified and acting executor of the estate. On November 21, 1929, a judgment was filed in which the following appears: "Now, Therefore, it is ordered and decreed that the Bank of Italy National Trust and Savings Association by reason of successive transfers and mergers and by operation of law has become and now is vested with the office of executor of the last will and testament of said Benigno Barreiro, deceased. That the petition for the removal of the Bank of Italy National Trust and Savings Association from the office of executor of the last will and testament of said Benigno Barreiro, deceased, be and the same is hereby denied."

After the filing of the amended and supplemental accounts, and objections thereto, a hearing was had and this question of the succession of the Bank of Italy National Trust and Savings Association as executor was again considered by the trial court, for it again made and filed findings of fact and conclusions of law on June 27, 1930, in accordance with those of November 13, 1929, and incorporated in this judgment a paragraph similar in effect to the one we have quoted from the judgment filed on November 21, 1929. The judgment of June 27, 1930, is the one attacked on this appeal as well as the minute order of November, 1929.

Appellants' specifications of error upon which they rely for a reversal of the judgment contain the following: "Appellants maintain that the Honorable Superior Court erred in the following particulars, viz.: \*162

"One: In finding and holding that the Bank of Italy National Trust and Savings Association lawfully succeeded to the office of Executor by means of the series of purchases and sales set forth in Finding IV of the Findings of November 13, 1929, without appointment or letters, and without having

taken the oath of office, and in recognizing it as anything other than an intermeddler required to account as such.

“Two: In finding and holding that the so-called Mexican corporation, Compania de Inversiones de la Baja California, S. A., ever had a separate existence apart from the decedent, Benigno Barreiro, during his lifetime and apart from the Executor after his death.

“Three: In holding under the facts found that the said Corporation, Compania de Inversiones de la Baja California, was legally organized on July 9, 1926, by the Executor, or at all, and holding that all or any of the irregularities, defects or illegalities in the said reorganization and conduct of the said Compania have been waived by the appellants, and that no damage has or will result to the appellants from said reorganization.

“Four: In finding and holding that the Estate of the decedent has not been damaged or prejudiced, nor put in jeopardy of damage and prejudice by the failure of the Executor to have ancillary administration of the estate in Mexico. ...

“Six: In refusing to discharge the Executor Bank as required by section 1626 of the Code of Civil Procedure, even if it ever had a status as executor, for acts of waste, mismanagement, neglect, and embezzlement actually found by the court, and other like acts established by the evidence and which should have been found by the Court. ...

“Eight: In refusing to surcharge the Fourth Account as supplemented and amended, for losses suffered through waste, neglect, and embezzlement in the following sums in addition to the amount of the actual surcharge ordered, viz.:

(a) In the sum of \$8799.63 over-payments to and embezzlements by Manuel Lujan, instead of the sum for which it was actually surcharged on that account amounting to \$4732.95 net.

(b) In the sum of \$16,986.00 principal of the

so-called Cardinale notes and interest thereon at seven per cent per annum from the date of said notes, September 18, 1924, for \*163 negligently failing to collect said notes.

(c) In the sum of \$6500.00 principal of the Alfred H. (Ed.) Johnson note and interest at seven per cent from the date of the death of the decedent, outstanding and uncollected and now uncollectable.

(d) In the sum of \$14,000.00 for failure to collect from Victoriano Sanchez, liquidator of the Compania Mercantile Internacional.

(e) In the sum of \$35,000.00 loss on the sale of the Tia Juana real property, fractional portions of lots 9 and 10, block 40, Tia Juana, Mexico, according to old plat thereof sold to Mariano Escobeda and the Compania Commercial S. A. for \$35,000.00 less than the fair market value.

(f) In the sum of \$13,895.00 spent in speculation on the mining claims.

(g) In the sum of \$500.00 per month from the date of the death of the decedent, loss suffered from the renewal of the leases with the Compania Commercial owned by Miguel Gonzales after he had offered to surrender and cancel them.

(h) In the sum of \$50.00 per month from January 1, 1929, rental of store room occupied by Eustachio Valle.

(i) In the total sum of \$3605.75 payments to Ernestine Belindez on her fifth class claim before delinquent income and Federal Estate taxes drawing 12 per cent interest were paid. ...

“Ten: In suspending, postponing and reserving decision upon and deferring for further hearing the following issues and matters presented for determination, viz.: (Consisting of a restatement of subdivisions *a*, *b*, *c*, *d*, and *f*, of specification eight just quoted.) ...

“Twelve: In failing to make findings and con-

clusions upon and to determine and adjudicate the following matters on issues squarely presented for determination and adjudication, viz.:

(a) The misconduct and negligence of the Executor Banks in entering into the contract Exhibit A with Gertrude Marquez Barreiro, agreeing that one-half of the property of the estate should be set aside and distributed to her, and that her share should be placed in trust with the said Banks during her lifetime, and in demanding that she execute a trust agreement in accordance with said contract and offering to allow a distribution of a full one-half of the property to her if she would execute such trust agreement, engaging the estate in a prolonged, void proceedings in partial distribution because of her refusal, claiming and collecting \*164 fees for extraordinary services in said void proceedings and afterward having said proceedings set aside as void."

Many other specifications of error are made but have been omitted here as they are a restatement of those already quoted, couched in different language or necessarily involved therein.

We will have occasion to refer to code sections relating to probate and guardianship proceedings. All such references will be made to the sections of the Code of Civil Procedure in effect at the time the questions discussed here arose and not to the Probate Code now in effect.

Appellants' first contention, that the Bank of Italy National Trust and Savings Association did not lawfully succeed to the office of executor by means of the series of purchases and consolidations, presents a question which has not been definitely decided in this state. As a first answer to this contention, respondent urges that this matter is *res judicata* and cannot properly be considered on this appeal and relies upon the following facts: Appellants' original objections to the fourth annual account presented the issue as to whether or not the Bank of Italy National Trust and Savings Association had succeeded to the office of executor and

requested its removal from office as an interloper. Thereupon the executor filed a petition seeking an order that it had succeeded the Southern Trust & Commerce Bank as executor. By a minute order made on September 13, 1929, the petition to remove the executor was denied and the petition of the bank was dismissed on the ground that the order sought was unnecessary. The minute order was followed by the formal judgment of November 21, 1929, which we have already quoted. While respondent has presented forceful arguments in support of its contention, we prefer to place our conclusion that the respondent is now the due and lawful executor of the will of deceased upon other grounds. Whether this order, under the circumstances, could be interlocutory, is a question that seems not to have been determined in California and authorities in other jurisdictions are not in harmony.

The various mutations by which the Southern Trust & Commerce Bank finally was purchased by and consolidated into the Bank of Italy National Trust and Savings Association have been fully set forth in the opinion of the Honorable \*165 Charles C. Haines, trial judge, as follows: "On December 31, 1926, under the provisions of section 31 of the California Bank Act, the Southern Trust and Commerce Bank sold its business, including its Trust Department, to the Bank of America, which had trust powers and was authorized to do business as a trust company in this state. Before the sale was completed the Bank of America and Liberty Bank consolidated under the provisions of section 31a of the California Bank Act and continued its corporate existence under the name of 'Liberty Bank of America', which likewise had trust powers and was authorized by law to transact business as a trust company in this state. In January, 1927, the State Superintendent of Banks approved the sale of the Southern Trust and Commerce Bank to the Liberty Bank of America and thereupon the trust business of the Southern Trust and Commerce Bank was transferred to the Liberty Bank of America. On the 15th day of February, 1927, the Liberty Bank of

America, under the provisions of section 31 of the California Bank Act, sold all of its assets to the Bank of Italy and said sale was approved by the Superintendent of Banks of the State of California, and thereupon the trust business of the Liberty Bank of America was thereafter transferred to the Bank of Italy, which was a state institution and had trust powers and was authorized by law to do business as a trust company in this state. On the 1st of March, 1927, the Bank of Italy under the provisions of section 5154 of the Revised Statutes of the United States was converted into and became a national banking association under the name of Bank of Italy National Trust and Savings Association with its principal place of business at San Francisco, California. Immediately upon its conversion into a national banking association, Bank of Italy National Trust and Savings Association made the deposits required by law and received from the Federal Reserve Board and from the Superintendent of Banks of the State of California permits and certificates authorizing it to do business as a trust company in this state." These transitions involve purchases under section 31 of the California Bank Act (Stats. 1909, p. 87, as amended), and consolidations under section 31a of the same act, together with the reorganization of a state bank into a national banking association under sections 35 and 36 of chapter 2 and \*166section 248 of chapter 3 of title 12 of the United States Code Annotated. A decision of the interesting question presented requires careful consideration of portions of these sections.

Section 31 of the California Bank Act, dealing with the sale and purchase of banks, in effect at the time of the above purchases, contains the following provisions: "Upon the approval by the superintendent of banks of an agreement of sale and purchase and the transfer of the business of a trust department or of a bank having a trust department the purchasing bank shall, *ipso facto* and by operation of law and without further transfer, substitution, act or deed, and in all courts and places, be deemed and held to have succeeded and shall become subrogated and shall succeed to all rights, obligations,

properties, assets, investments, deposits, demands, contracts, agreements, court and private trusts and other relations to any person, creditor, depositor, trustor, principal or beneficiary or any court or private trust, obligations and liabilities of every nature, and shall execute and perform all such court and private trusts in the same manner as though it had itself originally assumed the relation or trust or incurred the obligation or liability."

Section 31a of the same act, governing the consolidation of banks, provides in part as follows: "When the superintendent of banks issues the certificate of authorization provided for by section one hundred twenty-eight of this act the new or consolidated corporation shall be a body politic and incorporate by the name stated in the certificate, and for the term of fifty years, unless it is, in the articles of incorporation and consolidation, otherwise stated and thereupon each constituent corporation named in the articles of incorporation and consolidation must be deemed and held to have become extinct in all courts and places, and said new corporation must be deemed and held in all courts and places to have succeeded to all their several capital stocks, properties, trusts, claims, demands, contracts, agreements, assets, choses, and rights in action of every kind and description, both at law and in equity, and to be entitled to possess, enjoy and enforce the same and every thereof, as fully and completely as either and every of its constituents might have done had no consolidation taken place. Said consolidated or new corporation must also, in all courts and places, be deemed and held to have become subrogated to its several \*167 constituents and each thereof, in respect to all their contracts and agreements with other parties, and all their debts, obligations and liabilities, of every kind and nature, to any persons, corporations, or bodies politic, whomsoever, or whatsoever, and said new corporation must sue and be sued in its own name in any and every case in which any or either of its constituents might have sued or might have been sued at law or in equity had no such consolidation been made."

Sections 35 and 36 of chapter 2, title 12, United States Code Annotated, provide for the reorganization of state banks into national banking associations. Section 248 of chapter 3 of the same code provides that a national bank when not prohibited by state or local laws may have "the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located".

[1] We cannot see how the legislature could have been more explicit and clear in the language it used in the subdivision of section 31 of the California Bank Act which we have quoted in specifying the right of the purchasing bank to *ipso facto* succeed to all of the rights, privileges and benefits of the purchased bank without any further court or other proceedings. It would do violence to the plain language of this section to hold that a purchasing bank would not automatically succeed to the office of executor held by the purchased bank, unless the language of the Bank Act be modified by some other statutory enactment or be repugnant to some provision of our Constitution. This perhaps explains the scarcity of decisions in California upon this question. However, two recent decisions are of assistance to us in construing this section.

In the matter of the *Estate of Barnett*, 97 Cal. App. 138 [ 275 Pac. 453, 454], the Bank of Italy National Trust and Savings Association, the same corporation that is before us here as executor, filed its annual account as trustee under the will of Melancton Barnett, deceased. It asserted its right of succession from the original corporate trustee appointed in the decree of distribution of the probate court \*168 to the office of trustee of this trust estate following various purchases, consolidations and mergers with its predecessors. The beneficiaries under the trust objected to the account filed by the

Bank of Italy National Trust and Savings Association upon the ground that it could not succeed to the office of the original trustee merely by operation of law resulting from these sales, consolidations and mergers. The court held adversely to this contention and in so doing said: "Sections 31, 31a, and 31b of this act provide for the transfer of the business of banking corporations by sale, by consolidation and by merger. Each section makes special provision for the transfer of trusteeships by such corporations, the provisions of section 31 relating to a sale reading, in part, as follows: 'Upon the approval of the superintendent of banks ... the purchasing bank shall *ipso facto* and by operation of law and without further transfer, substitution, act or deed, and in all courts and places, be deemed and held to have succeeded ... to all rights, obligations, ... court, and private trusts and other relations to any ... principal or beneficiary of any court or private trust'. With this statute before it, it became the duty of the court sitting in probate to recognize the respondent as the new trustee and that court was without jurisdiction to hear or determine any protest on the part of the beneficiaries to the statutory substitution of the trustee, unless the statute is void as offending some constitutional provision."

The case of *Bank of America of California v. Granger*, 115 Cal. App. 210 [1 Pac. (2d) 479], also furnishes us with authority for the conclusion that the office of executor passed to the Bank of Italy National Trust and Savings Association by operation of law. This case involved purchases and consolidations of state banks under sections 31 and 31a of the California Bank Act. While the question of the right of a purchasing bank to automatically succeed to the trusts held by the purchased bank, or the right of a consolidated bank to succeed to those of its component parts was not particularly discussed in the opinion, it was of necessity before the court and the conclusions there reached could not have been arrived at had not the court been of the opinion that all of the rights of the predecessor banks merged in the successor banks by operation of law under the \*169 provisions of the two sections of the

California Bank Act from which we have quoted.

Section 31a of the California Bank Act is also clear and specific in its terms. Its provisions have been thoroughly discussed in the case of *Mercantile Trust Co. v. San Joaquin Agr. Corp.*, 89 Cal. App. 558 [ 265 Pac. 583, 585]. This case involved the right of a bank, after consolidation, to receive and exercise a trust in which the bank with which it had consolidated was named as trustee. In reaching the conclusion that the consolidated bank succeeded to this office by operation of law under the provisions of section 31a of the California Bank Act the court said: "It is not claimed here, nor could it be, upon any sound or reasonable basis or hypothesis, that the legislation involved in the foregoing section of the Bank Act in any manner or degree impinges upon or transcends any of the constitutional restrictions by which the legislative department of the state is hedged. Nor can it be doubted that where, as here, there is, in pursuance of the provisions of section 31a of our Bank Act, a consolidation of two banking corporations the result of which is to bring into existence a single corporation as the successor of the two, the former *ipso facto* succeeds to and is vested with ownership of the combined capital stocks, properties, trusts, contracts, etc., of the two several constituents of the corporation thus created. ... The rule as thus stated is declared and expressed in section 4712, volume 7, of Fletcher's Cyc. Corp., as follows: 'When corporations are consolidated, the rights, franchises and privileges of the consolidated corporation depend upon the intention of the legislature as manifested by the statute authorizing the consolidation. The legislature may confer upon it, with the consent of the consolidating corporations, which consent is given impliedly by entering into the consolidation, all the rights, franchises, privileges and property of the consolidating corporations, or it may withhold some of them, or it may add to them new rights, franchises or privileges.' ... (See, also, 5 Thompson on Corporations, secs. 6083, 6107 and 6111.)

"The banking laws of the State of Illinois, as

well as those of the State of New York, in all vital respects, are substantially the same as those of California. The provisions in the statutes of those states relating to the merging and consolidation of banking corporations are practically \*170 similar to those contained in section 31a of our own Bank Act. Especially illuminating and peculiarly pertinent to the present investigation, therefore, is the discussion in the decisions of the courts of those states in construing and expounding the several provisions of their statutes relative to banking corporations and the scope and the effect thereof with respect to the rights acquired and the obligations assumed by the offspring of the consolidation of two or more banking corporations. The case of *Chicago Title & Trust Co. v. Zinser et al.*, 264 Ill. 31, 35 et seq. [Ann. Cas. 1915D, 931, 105 N. E. 718], is, in the facts, strikingly similar to the case at bar, and discusses and disposes of several points advanced here. In that case a corporation named Real Estate Title & Trust Company of Chicago was made by one Etta Nelson the executor of her last will and testament. By her will she authorized said corporation, as her executor, to sell and convey the real estate of which she died seized. At the time the will was made the Real Estate Title & Trust Company and the Chicago Title & Trust Company were two distinct and unrelated corporations, each organized under and according to the laws of the state of Illinois and each vested with the power and right to accept and execute trusts and to be appointed assignee or trustee by deed, and also to be appointed executor, guardian, and trustee by will. Subsequently to the making of the will, and prior to the death of Etta Nelson, the two corporations were consolidated into one, under the name of Chicago Title and Trust Company, in pursuance of the statute of said state authorizing such consolidation. After due legal proceedings, letters testamentary were issued to the plaintiff (the consolidated corporation), and thereafter said plaintiff instituted a suit to compel the specific performance by the Zinsers of an agreement, entered into by and between the latter and the plaintiff after letters testamentary had been issued to the corporation, whereby the

Zinsers agreed to purchase certain real estate belonging to the estate of the deceased. The suit was resisted upon grounds involving objections similar to some of those urged against the position of the plaintiff in the case now before us. The cause reached the Supreme Court of Illinois, and the action was by that court sustained in an opinion so clearly and satisfactorily disposing of the objections \*171 referred to that we feel that pardonably we may *in extenso* quote therefrom as follows:

“By the consolidation of the Real Estate Title & Trust Company and the Chicago Title & Trust Company the original corporations ceased to exist, and the appellee, as the consolidated corporation, acquired and succeeded to all the faculties, property, rights and franchises of its component parts and became subject to all the duties, obligations, and conditions imposed upon them. (*Robertson v. City of Rockford*, 21 Ill. 451; *Chicago, Rock Island & Pac. R. Co. v. Moffitt*, 75 Ill. 524.)

“The material question here is whether the general rule that a trustee cannot delegate his authority to another is an obstacle to the exercise of a power by the appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality, and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title & Trust Company as executor and trustee, knew that its direct-

ors, officers, and stockholders might change from time to time, and that the statute authorized a change of name or place of business, enlargement, or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur, and that the Real Estate Title & Trust Company might be consolidated with some other corporation such as the Chicago Title & Trust Company, \*172 and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer.' To the same effect are the *Matter of the Will etc. of Bergdorf*, 206 N. Y. 309 [99 N. E. 714]; *McElwain Co. v. Primavera*, 181 App. Div. 929 [168 N. Y. Supp. 1134]; see latter case also reported in 180 App. Div. 288 [167 N. Y. Supp. 815].”

[2] Under the banking laws of the United States the changing of a state bank into a national banking association does not destroy the identity of the original bank. All the assets and rights of the state bank pass to the national bank without any formal assignment and are subject to all the existing liabilities and obligations of the state bank as if the change had not taken place. (*Michigan Ins. Bank v. Eldred*, 143 U. S. 293 [36 L. Ed. 162, 12 Sup. Ct. Rep. 450]; *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520 [35 L. Ed. 841, 12 Sup. Ct. Rep. 60].) Where a state bank reorganizes into a national bank it passes from one jurisdiction to another but its identity is not thereby necessarily destroyed. It remains substantially the same institution under another name and subject to new control. (*Coffey v. National Bank*, 46 Mo. 140 [2 Am. Rep. 488]; *City National Bank v. Phelps*, 86 N. Y. 484.) With these

rules before us the conclusion is inevitable that the transition of the Bank of Italy, a state institution, into Bank of Italy National Trust and Savings Association, a national bank, carried with it the office of executor of the last will and testament of Benigno Barreiro, deceased, by operation of law and without the necessity of court order.

[3] Appellants seriously contend that jurisdiction over the estates of decedents is vested in the probate courts in California; that these courts have discretion in the appointment of executors given them by law; that an executor is required by law to take the oath of office after its appointment and that the provisions of the state and national banking acts must be construed with and modified by the provisions of the probate law of this state; that the Bank of Italy National Trust and Savings Association did not receive \*173 its appointment as executor through an order of the probate court and did not qualify by having one of its officers take the required oath of office and that it cannot now be held to be the duly appointed, qualified and acting executor of the estate of Benigno Barreiro, deceased, but must be regarded and treated as an interloper in the office which it asserts it occupies; that the right to name the executor of his estate is a right belonging to a testator, and to hold that the office of executor would descend to a corporation not named as such executor would destroy the right of nomination by the testator.

Several of the foregoing objections are answered in the portion of the opinion in *Mercantile Trust Co. v. San Joaquin Agr. Corp.*, *supra*, from which we have already quoted. Some are also considered in *Estate of Barnett*, *supra*, where the court said: "But, to our minds, there is one principle which controls a situation of this kind and that is the principle of consent of the parties. The legislature, as we have stated, having the power to enact the legislation, and the trust having been created in contemplation of it, the consent of all parties to the legislative method of substitution of trustees must be deemed to have been given. Mr. Justice Hart, in

the *Mercantile Trust* case, expressed the same thought in this language: 'The statute authorizing the consolidation or merger of banking corporations, in so far as it prescribes a scheme for the transfer of their properties, ... enters into and becomes a part of every agreement or obligation ... and of this the defendant (the trustor) its directors and bondholders, are presumed to have known before and at the time of the execution of the trust deed ... and to have impliedly assented to the exercise of the legal right of said bank to merge ... with all the consequences following such merger or consolidation as are prescribed by law.' The right of the trustor to provide a method of filling vacancies and for appointment of successors in the trust is not disputed. (26 R. C. L., p. 1278.) But when a trustor, in full contemplation of the provisions of the Bank Act relating to the sale, consolidation, or merger of banking corporations, voluntarily designates such a corporation as trustee he must be deemed to have adopted and included within his declaration of trust the full scheme for substitution of trustees prescribed in that act. No more \*174 forceful application of this principle could be made than in a case such as we have here of a testamentary trust, because the right to make a testamentary disposition of property is not an inherent right, but one which depends entirely upon the consent of the legislature. Thus, when the legislature has prescribed the rules and conditions under which the disposition and administration of estates may be had, the testator is deemed to intend the result which such rules produce and 'they affect the testamentary disposition and provisions as though embodied in the will'."

The same questions were considered in *In re Bergdorf's Will*, *supra*, from which it appears that the will of a decedent named the Morton Trust Company as his executor. Before his death the Morton Trust Company merged into another corporation known as the Guaranty Trust Company under the banking laws of the state of New York which contain provisions similar to those we have quoted from the California Bank Act. After the death of the testator the Guaranty Trust Company

applied for letters testamentary which application was contested. In denying the contest and granting the letters to the Guaranty Trust Company the New York court said: "It was within the power of the legislature to enact that a trust company, into which another trust company lawfully designated as an executor had been merged subsequent to the making and prior to the probate of the will, should be the transferee of the privilege or right of being the executor. ... By virtue of the statute, effective as a part of the will, the Guaranty Company was designated as an executor and as such is entitled to receive the letters testamentary." *Chicago Title & Trust Co. v. Zinser*, *supra*, strongly supports this conclusion.

The case of *O'Rourke v. Standard Wood Turning Co.*, 204 App. Div. 658 [198 N. Y. Supp. 632], decides a question very similar to the one before us. An award under the Workmen's Compensation Law of the state of New York had been made to Bridget O'Rourke for the death of her husband. She had been declared incompetent and the Trust Company of America, a New York corporation, appointed committee of her property. The Trust Company of America merged with the Equitable Trust Company of New York which petitioned for the payment of the award to it as the successor of the Trust Company of America. In directing \*175 the award to be paid to the Equitable Trust Company of New York, the court said: "The merger was an equitable and ratable combination of the assets of each of said companies, becoming one instead of two bodies, and the taking of the one name for both companies. The question is asked: Is the relation of committee and incompetent a trust relation? In *Person v. Warren*, 14 Barb. 488, it is held that the committee is a trustee of an express trust although at the same time he is a servant or bailiff of the court. In *People ex rel. Smith v. Commissioner of Taxes*, 100 N. Y. 215 [3 N. E. 85], the court says: 'The office of committee is as well defined and specifically referred to in law and in the statutes, as that of guardian, executor or administrator.' The question here is the effect of the merger, and the force of the statute is pointed out in *Bank of Long Island v. Young*, 101 App. Div.

88 [91 N. Y. Supp. 849]. It is disclosed in *Matter of Bergdorf's Will*, 206 N. Y. 309 [99 N. E. 714], that the testator made his will in 1904, and he named, with others, the Morton Trust Company an executor thereof. In January, 1910, the Morton Trust Company merged into the Guaranty Trust Company. The testator died in January, 1911. It was held that the merger did not prevent the issuing of letters testamentary to Guaranty Trust Company. It is found by the Industrial Board that the compensation 'is due and payable to Bridget O'Rourke,' and directs its payment to her committee, the Equitable Trust Company of New York. I am of the opinion that said committee has authority to take it under section 494 of the Banking Law." It must be borne in mind that in this case there was no new appointment of a committee by the court after the merger and no showing of the new committee taking an oath of office.

In *Turner's Estate*, 277 Pa. St. 110 [120 Atl. 701], the orphan's court of Pennsylvania appointed a state trust company as guardian of the estates of minors. The trust company was afterward consolidated with a national bank which petitioned the orphan's court to order the guardianship funds turned over to it as guardian of the minors. The petition was denied by the orphan's court but upon appeal was reversed by the superior court, which order was affirmed by the Supreme Court of the state. In the opinion of the latter court no question of the necessity of an application for \*176 letters of guardianship by the national bank after the consolidation was discussed, but a consideration of this question would seem to be necessarily involved in the decision and it must, therefore, be construed as indicating that the conclusion of the Supreme Court of Pennsylvania was that the office of guardian occupied by the state trust company under order of the orphan's court automatically descended upon the national bank at the time of the consolidation and that no application for appointment or oath of office by the national bank was necessary.

[4] The next question involved in this appeal is

whether or not the provisions of the California Bank Act, under which we have held that the office of executor descended by operation of law to a successor corporation, violates the provisions of section 5 of article VI of the Constitution of California (as amended November 4, 1924), which vested original jurisdiction of all probate matters in the superior court. Appellants insist that the power to select and appoint a new administrator with the will annexed is taken from the probate court upon the happening of the purchase or consolidation of an executor bank. A sufficient answer to this is found in the cases which we have already cited through which runs the principle that purchase or consolidation does not create an entire new entity but, to paraphrase the expression of a court of a sister state, merely directs the blood of the old corporation into the veins of the new, the old living in the new. [5] Further, the power to appoint a particular person or corporation as an executor or administrator concerns procedure in a probate court rather than its jurisdiction. A testator has the right to nominate the executor of his will and the probate court will appoint the nominee in the absence of legal disqualification. Section 1365 of the Code of Civil Procedure has long provided the rules governing probate courts in the order of priority which must be followed in appointing administrators. These provisions have been recognized as lawful under the Constitution and have never been held to interfere with the jurisdiction of the probate court in the administration of estates. By analogy we conclude that the holding that the office of executor descends to a purchasing or consolidated bank is not a violation of these constitutional provisions any more than it is a limitation on the probate court\*177 in the appointment of an executor or administrator in the instances above specified. The power remains in the probate court to remove the successor bank from the office if occasion should arise and the necessity for such action present itself.

We have reached the conclusion that the Bank of Italy National Trust and Savings Association succeeded to the office of the executor of the estate

of Benigno Barreiro, deceased, without the necessity of court action and that it is the duly appointed, qualified and acting executor of that estate. We are aware that this conclusion is contrary to the weight of authority on this question in Massachusetts.

[6] Appellants' second specification of error naturally divides itself into two phases, namely: (1) Is the finding that the Compania had an existence separate and apart from deceased during his lifetime supported by the evidence? And, (2) is a like finding concerning the Compania and the executor supported by the evidence? We cannot see how the first of these two questions possesses any such materiality as to deserve extended discussion here. This appeal is taken in a probate proceeding, the purpose of which is to settle and distribute the estate of deceased under the terms of his will, and is from an order of the court made after extended hearings on an account. The executor was required to take charge of the property of the estate of the deceased as it existed at the time of the death. Whether or not deceased during his lifetime operated in Mexico through the Compania as his *alter ego* is no concern of the probate court, as the *alter ego* question between deceased and the Compania is not material and can have no bearing on the conduct of the executor in the administration of the estate. Whether or not the executor used the corporation as its *alter ego* in taking possession of and operating the properties of the Compania in Mexico is more directly involved in the appeal in case Civil No. 488 [ *Estate of Barreiro*, <sup>FN\*</sup> (Cal. App.) 13 Pac. (2d) 1033], the opinion in which is this day filed and is referred to for a more extended discussion of and \*178 decision upon this question. It is not necessary to repeat here the facts there stated nor the reasons given for upholding the conclusions of the trial court.

FN\* REPORTER'S NOTE.-A rehearing was granted by the District Court of Appeal in the case of *Estate of Barreiro* (Civ. No. 488) on August 24, 1932. The final opinion of the District Court of Appeal,

filed September 13, 1932, is reported in 125 Cal. App. 752 [ 14 Pac. (2d) 786].

Appellants' third assignment of error is necessarily involved in the second phase of their second assignment and is also considered and decided in the opinion filed this day in case Civil Number 488 (*supra*), which we refer to and incorporate herein.

[7] Appellants complain that the finding that the estate has not been damaged, prejudiced nor confronted with loss because of a failure to have ancillary letters of administration taken out in the Republic of Mexico is not supported by the evidence. In considering this question we must bear in mind that the principal estate of the deceased consisted of shares of stock of the *Compania* which were in his possession in California at the time of his death. This stock was personal property (secs. 657, 658, and 663, Civ. Code) and "if there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile". (Sec. 946, Civ. Code; *Estate of Lathrop*, 165 Cal. 243 [ 131 Pac. 752].) Where there is no ancillary administration it has been held, on the grounds of comity, that the domiciliary representative may administer on stock of a foreign corporation and may be required to account for funds in a foreign jurisdiction of which it takes possession. (*Reed v. Hollister*, 44 Cal. App. 533 [ 186 Pac. 819]; *Brown v. San Francisco Gas Light Co.*, 58 Cal. 426 .) We have been cited to no law of the Republic of Mexico under which an administration by a California court on the stock of a Mexican corporation would not be recognized there. It appears from the record that proceedings to probate the estate were started in a Baja California court by officials of that state but were discontinued as unnecessary. The termination of this proceeding, if it can be considered terminated, seems to have met with the approval of the parties interested because of the great expense of such proceedings in Mexico which appear to be considerably larger than in similar proceedings in California. The assets of the estate in Mexico, ex-

clusive of those whose title is of record in the *Compania*, are of comparatively small and questionable value. It was the conclusion of the trial judge that the value of the property to be\*179 recovered to the estate by ancillary proceedings in Mexico would not exceed, and might be much less than, the cost of the proceedings to the estate. This conclusion is amply supported by the evidence and it does not appear that the lack of administration proceedings in Mexico has yet caused proven loss to the estate. It should be the object of the administration of an estate to conserve its assets and not waste them. Should it prove advisable to take out ancillary letters in Mexico at any time in the future there is nothing to prevent such proceedings being instituted.

Appellants, in addition to their objections to the fourth annual account and the amendments and supplements thereto, ask the removal of the executor under the provisions of section 1626 of the Code of Civil Procedure because of waste, embezzlement and mismanagement of the estate. They present many grounds in support of this petition, some of which are considered in this opinion, and others in the opinion in case Civil No. 488 to which we again refer for a discussion of these questions. [8] Many of the grounds urged for the removal of the executor and a revocation of its letters concern matters directly involved in the first, second and third annual accounts which were heard and settled by the court in the regular course of the probate proceedings. No appeals were taken from the orders settling these accounts and inasmuch as they have now become final they are not subject to review here. (*Estate of Clary*, 203 Cal. 335 [ 264 Pac. 242].) [9] Up to and including the settlement of the third account these include what appellants refer to as lavishing money upon the family of deceased and paying a family allowance out of all proportion to the assets of the estate and its income. These allowances, including those made after the settlement of the third account, were made upon petitions to and under orders of the court. They were large, and in view of the facts now disclosed as to the actual value of the

estate and its present income, appear to have been extravagant, but this was undoubtedly due to a mistaken estimate of the actual value of the property belonging to the estate and the permanency of the very considerable income from this property which existed at the time of the death of Mr. Barreiro and for some little time thereafter. These mistakes were indulged in by Mrs. Barreiro, all the parties interested in the probate proceedings and their \*180 then attorneys. They were honestly made and the amounts of the allowances can furnish no grounds for the removal of the executor under the facts disclosed by the record. The order settling the fourth account made a substantial reduction in the family allowance.

[10] Appellants urge that their rights were not properly protected in the estate affairs and in the settlement of the first three annual accounts because Norman R. Morison and Dean M. Plaister, who were the guardians of their estates, were at the same time the trust officers of the executor and acting as its representatives in the active management of the affairs of the estate and therefore occupied adverse and hostile positions in the two offices. No suit in equity has been brought to vacate any of the orders settling these accounts. We cannot conclude that the sole fact of the same person being the guardian of the estates of minors who are distributees under a will, and at the same time in charge of the affairs of the estate for the corporate executor in itself demonstrates that he occupies two hostile and adverse positions rendering his acts conclusively illegal in either of them. It is a common custom to appoint the parent of minors, who take under a will, the executor of the will and the guardian of the persons and estates of the minors. That both these offices may be filled by the same person is recognized by the laws of this state. (Secs. 1365, 1751, Code Civ. Proc.) When both offices are held by the same person that fact of necessity is known to the court hearing the accounts. It may be a reason for a more careful scrutiny of such accounts but it cannot be said that one and the same person cannot fill both offices. The fact that one person fills both of-

fices cannot be made the sole ground for his removal from either of them.

[11] Appellants complain that the executor wasted large sums of money in needless and useless litigation. They have reference to litigation in the Republic of Mexico which we have considered in the opinion in case Civil No. 488 and to which we refer for a discussion of this question. They also refer to the litigation resulting in the decision in the case of *Estate of Barreiro*. 86 Cal. App. 764 [ 261 Pac. 509]. That proceeding was started by Mrs. Barreiro in her petition for partial distribution to her of that portion of the estate which she claimed belonged to her as "community \*181 property", in reality being the property which she owned as tenant in common with her husband after the divorce. This litigation arose out of a mutual mistake indulged in by all the attorneys then connected with the estate and the proceedings. They apparently assumed that Mrs. Barreiro would take the property which belonged to her, through the estate, rather than adversely to it. Her attorneys chose the forum in which she sought to assert her rights. She instituted the proceeding which was contested through all of the courts of this state having probate jurisdiction. The order of partial distribution which was made was vacated by the trial court on the ground that it was beyond the jurisdiction of a probate court. No appeal was taken from this decision. In his findings, conclusions and judgment under attack here, the trial judge held that as the mistake resulting in the order of partial distribution had been honestly made it afforded no ground for removal of the executor under the provisions of section 1626 of the Code of Civil Procedure. It is apparent from the record, and from the final order of the trial judge settling the account wherein he refused the allowance of further fees to the executor and its attorneys at that time, that in the future, in fixing fees for unusual services he will exercise a sound discretion taking into consideration the extra services performed and to be performed in the probate proceedings. Under this state of the record we conclude that the finding of the trial court, that the expenses of

this litigation do not furnish grounds for the removal of the executor, finds support in the record.

[12] Appellants further urge that the executor should be removed and its letters revoked because of a payment to Mrs. Barreiro of some \$1300 under what is termed an "advancement" to her. She was given \$1 under the will of deceased and was not entitled to receive any greater sum under the provisions of that document. This "advancement", of course, should not be credited as a lawful expenditure by the executor out of the funds of the estate, as Mrs. Barreiro, having been divorced from her husband, was neither his widow nor his heir at law at the time of his death. She was, however, the owner of a portion of the property in the possession of the deceased at the time of his death and which the executor took over when appointed \*182 and has since held. These advancements should be charged against Mrs. Barreiro's portion of the property when it is carved out of the assets held by the executor and an accounting had between them. We believe that the trial court was justified in holding that these payments did not furnish any sufficient ground for the revocation of letters testamentary as the mistake was honestly made.

[13] Appellants complain of a finding of the trial court to the effect that the inventory and appraisal returned and filed in this proceeding was greatly in excess of the actual value of the property appraised. They direct their arguments chiefly to the appraisal of the shares of stock in the Compania. Three appraisers were appointed by order of court, one of whom was an inheritance tax appraiser. They appraised the 1,000 shares of stock in the Compania at \$500,000, including within this appraisal the stock belonging to Mrs. Barreiro. It is of course immediately apparent that this was a mistake as the executor could not administer upon any property not owned by the deceased at the time of his death. The valuation placed upon this stock was seemingly measured by the income derived from rentals. This was an attempt to value property by its use rather than its market value. The diffi-

culty of obtaining a reasonably accurate appraisal of this or like property of the estate may be demonstrated by an exhibit from the record showing appraisements of Mexicali property made over a short interval of time. For the purposes of illustration only here follow the total appraised values of practically the same properties: In Mexican money-the first, \$399,256; the second, \$399,256.98; the third, \$1,040,064.76. The same properties appraised in money of the United States-the first, \$131,500; the second, \$199,268.34; the third, \$111,500. The last appraisal in Mexican money, \$1,040,064.76, seems to have been based upon cadastral values and is so in excess of the other appraisements as to cast a decided doubt upon the reliability of cadastral values as measures of the market value of property. We cannot disturb the finding of the trial court that the appraised value of the shares in the Compania was greatly in excess of its market value.

[14] Appellants complain of what are denominated in the accounts as "liquidating dividends" taken from the \*183 Compania by the executor and used by it in paying the expenses of administration, the family allowances, repairs to the property in Mexicali damaged by earthquake, and other such purposes. The record discloses that in excess of \$83,000 was so used. They maintain that this amounted to an unlawful distribution of the capital assets of the corporation and was conclusive evidence of waste, mismanagement and embezzlement of estate funds by the executor requiring its removal from office.

The Compania was incorporated with 1,000 shares of capital stock with a par value of \$100 per share in Mexican money which would give a total capital value of approximately \$50,000 in money of the United States at the rate of exchange prevailing at the time of the death of Mr. Barreiro. The excess of the actual value of the property owned by the Compania over the par value of its stock was more than \$83,000. If the corporation were in California this excess could be considered as surplus, undi-

vided profits, or a reserve for dividend purposes. The distribution of a portion of this surplus or undivided profits for the benefit of the stockholders would not in itself be illegal as the assets of the Compania were not reduced in value below the par value of its capital stock. The fact of the withdrawal of this money, in itself disassociated from the actual expenditures made, does not furnish grounds for the removal of the executor. [15] The conclusions of the trial judge in refusing to revoke the letters testamentary and remove the executor from its office because of waste and mismanagement of the estate or embezzlement of estate funds were based upon a great mass of conflicting evidence. Some of this evidence sustains his conclusions that the executor was not guilty of the acts charged. We therefore conclude that the order refusing to remove the executor and revoke its letters finds support in the evidence and may not be disturbed by us. (*Estate of Bottoms*, 156 Cal. 129 [ 103 Pac. 849].)

We now pass to the consideration of the Manuel Lujan accounts, the so-called Cardinale notes, the Johnson note, the accounts of Victoriano Sanchez as liquidator of Compania Internacional, and money spent on the mining claims, upon all of which, except a portion of the Lujan accounts, the trial court reserved its ruling. The account of the executor was virtually surcharged in the net amount of \*184 \$4,782.95 to be paid to the Compania out of its own funds, and 500 out of the estate funds. This was held to have been illegally paid to Manuel Lujan. [16] Appellants claim an additional amount of \$3,506.68 should have been surcharged as having been illegally paid to Lujan. This latter amount was one among a number of items upon which the trial court reserved its ruling. Appellants complain of the refusal to surcharge the account with the various amounts upon which ruling was reserved. They maintain that all of these amounts should have been surcharged to the executor and it required to pay the money into the assets of the estate. We have examined the evidence and agree with the trial judge that in many respects the account is most incomplete and unsatisfactory. We

can see no reason why he could not reserve his rulings upon the allowance or disallowance of any portion of the account wherein the evidence was unsatisfactory and incomplete. (*In re Farmers & Merchants Bank of Imperial*, 213 Cal. 33 [ 1 Pac. (2d) 422].) It would be a manifest injustice to the executor to surcharge the account with items if the payments were lawfully made and would be a like injustice to the distributees to fail to surcharge the account with them if they were not made in accordance with law. The right of a probate judge to reserve his rulings upon any items of an account concerning the legality of which there is reasonable question was recognized in the early case of *Reynolds v. Brumagim*, 54 Cal. 254, where it was said: "The court could in terms have settled the account as rendered, expressly reserving all questions as to liability for the omission now complained of."

[17] Appellants make one further criticism concerning the account of Manuel Lujan of which we must take notice. The trial judge found that Lujan had received from the executor and the Compania \$10,050. Appellants assert he received an additional amount of \$300 which the court failed to consider and which should have been surcharged against the executor. Without making any further explanation or comment upon this payment they merely refer to the clerk's transcript "Volume Two, page 431". On this page appears the following entry under date of January 1, 1927: "Southern Trust & Commerce Bank sight draft drawn by L. Lujan, \$300.00." We presume that in the long record \*185 before us there is some valid explanation of this payment to Lujan and vouchers therefor. Error cannot be presumed and we do not feel called upon to search the entire record to determine whether or not this expenditure, relatively small in amount, was legally made. We rely upon the well-established rule that error is not presumed and that an appellant must show error before an appellate court can hold that it has been committed by the trial court.

Appellants complain of the ruling of the trial court in refusing to surcharge the executor's ac-

count with \$35,000, alleged to have been lost on the sale of Tia Juana real property; with \$500 per month on the lease with the Compania Commercial; with \$50 per month rent of a storeroom occupied by Eustaquio Valle, and with loss of interest from the payment of the claim of Ernestine Belindez. The trial court found against appellants on these items and that no loss resulted to the estate therefrom. This finding is attacked as not supported by the evidence and contrary to it.

[18] The real property in question consisted of portions of lots nine and ten in block forty, Tia Juana, Mexico. These were sold to Mariano Escobeda and the Compania Commercial then owned by Miguel Gonzales. Escobeda paid \$25,000 in lawful money of the United States for one portion of the property, the Compania Commercial paying \$15,000 in like money for the other. The portion of the property purchased by Escobeda had been rented to him by deceased at \$300 per month, and that purchased by the Compania Commercial had been rented to it at \$100 per month. Appellants maintain that this last lease was very much below what it should have been and that it could have been rented for from \$300 to \$350 per month. They argue that this property should have been producing a net revenue of seven per cent upon a valuation of \$80,000. They produced two witnesses who attempted to testify as to the reasonable market value of the property. One Silvio Blanco, a business man and resident of Tia Juana, estimated the fair market value of the property at \$65,000. It was evident from his testimony that this value was based largely upon its rental value. He knew of no sales of, nor offers for, similar property in that city. The other witness, Juan J. Cervantes, an engineer in the Department of Public Works of Tia Juana, estimated the value of the property at between \*186 \$68,000 and \$75,000. He knew of no sales of, nor offers for, similar property in Tia Juana but seemingly placed his valuation on what is known there as cadastral values. Fixing market values in Tia Juana according to standards adopted in the United States was a very difficult problem as there was no available evidence

of sales of property in that city and the estimates of values given by these witnesses were based upon rentals. The futility of attempting to fix the market value of these properties by the rentals produced at a given time is immediately apparent from the record. The properties of the estate in Mexico were used for the sale of liquor and kindred enterprises which are prohibited by law in California. These uses are not stable and rentals fluctuate with the conditions of business prevailing in the different localities. Property belonging to the Compania in the city of Mexicali which a few years ago rented for several hundred dollars a month is now untenanted. It nowhere appears in that portion of the record cited by appellants whether the valuation placed upon this property by either of the above witnesses was in Mexican money or in money of the United States. If it were in Mexican money it would make their estimated valuations, measured in money of the United States according to the rate of exchange prevailing at that time, not more than \$37,500, or \$2,500 less than the executor actually received for the property.

Just before the sale of the Tia Juana real estate, the property belonging to the Compania in the city of Mexicali had been seriously damaged by earthquake and repairs were necessary to keep it suitable for rental purposes. The greater portion of the income of the estate was derived from rentals there. Sufficient funds were not available for these repairs and it seemed necessary to sell the Tia Juana property. Accordingly the executor made efforts to secure a purchaser. The best price offered for the property as a whole was \$25,000. With the exercise of considerable diligence and effort no purchaser could be found who would pay more than \$40,000. This was the amount actually received.

Courts have experienced considerable difficulty in arriving at a rule which will always govern the fixing of the market value of property where there has been no actual demand \*187 for it, or where there have been no sales of similar property in the neighborhood. In the case of *San Diego etc.*

*Co. v. Neale*, 78 Cal. 63 [ 3 L. R. A. 83, 20 Pac. 372], such a situation was before the Supreme Court. In that case it was held that the value of the use of property, or its rental value, could not be used solely as a basis for fixing its market value; that by market value was meant the price the owner could obtain after a reasonable effort over an ample period of time in finding a purchaser and making a sale of the same or similarly situated property. While the value of the use of property, or in other words, its income, may be considered as an element in fixing its value, the value of the use cannot alone be taken as a standard upon which to estimate and fix its market value. We can find nothing in the evidence cited by appellants which would justify us in setting aside the conclusion of the trial judge that no loss was occasioned by the sale of the property in question for \$40,000 in lawful money of the United States.

While appellants have not specified any error committed by the trial court in refusing to surcharge the accounts of the executor with alleged losses from sales of property in Mexicali and in Algodones, they devote many pages of their briefs to a discussion of these two questions. What we have said concerning the alleged loss through the sales of the Tia Juana property applies to the sales of property in Mexicali and Algodones.

[19] Appellants next complain of the loss of \$500 per month in a renewal lease for rentals of Mexicali and Tia Juana properties to the Compania Commercial. The record discloses that Barreiro during his lifetime had leased these properties to this corporation which was owned and controlled by his friend Miguel Gonzales. The lease contained an option for a renewal over a period of years. It seems that the original lease contained a provision requiring that notice of an intention to exercise this option be given Barreiro at a Mexicali address. The notice was not sent to the Mexicali address but was given to and personally received by Barreiro in San Diego and also in Tia Juana. Upon this technicality of the notice not having been given at the Mexicali

address, Barreiro, shortly before his death, started suit in the Mexican courts to cancel the lease and recover possession of the property. This suit was pending at the\*188 time of his death. Subsequently a higher rental was offered by another party but was rejected by the executor. A renewal lease was executed to Gonzales at the rental specified in the original lease. Appellants maintain that loss to the estate was occasioned by not accepting the higher rental offered by the prospective new tenant. They particularly refer to a conference held in San Diego between Mr. Morison, representing the executor, Gonzales, various attorneys, and others, during which Gonzales offered to cancel his lease and surrender the property to the possession of the executor. We have carefully examined this portion of the transcript and find that Gonzales did make a statement in one portion of his testimony that he would cancel his lease, but all the evidence bearing on this subject would lead to the conclusion that this statement was not an offer of a present cancellation and surrender of the leased premises but a request that the executor examine the legal rights of the parties under the original lease and option for extension, together with the notices of intention to exercise this option actually given to Mr. Barreiro, and, if after such investigation it was of the opinion that the suits against the Compania Commercial could be prosecuted to a successful termination he would peacefully and without further litigation cancel his lease and surrender the property to the executor. We are of the opinion that the investigation made by the executor and its attorneys correctly disclosed that the action instituted by Barreiro could not have been brought to a successful conclusion. The new lease was for the same term and at a similar rental as specified in the option for an extension executed by Mr. Barreiro. Under this state of facts no loss was shown.

[20] Appellants complain of an alleged loss of rental of \$50 per month on a storeroom occupied by Eustaquio Valle. It is not questioned that this storeroom had a rental value of the amount stated. Valle had been employed by the executor to take care of

certain business connected with the Mexican properties and was paid a monthly salary and as part of his compensation was furnished this room for use as an office. While the total compensation, including the use of the office, was somewhat in excess of that paid for like service in California, we have been referred to no evidence that would indicate that the total amount paid Valle \*189 was an unreasonable amount for such services in Baja California. There being no evidence to the contrary, we cannot disturb the finding of the trial court that the amount paid to Valle by the executor, including the free rental of the room in question, was a reasonable amount to be paid for his services, and that the estate suffered no loss thereby.

[21] Appellants make objection to the payment of the Belindez claim which had been allowed and which consisted of \$750 and \$2,855.75, paid on October 17, 1927, and December 21, 1927, respectively. They contend that the state succession taxes and the federal estate and income taxes ought to have been paid first because they bear a higher rate of interest than ordinary allowed claims and thereby a loss of interest resulted to the estate. Section 1643 of the Code of Civil Procedure classifies obligations with reference to priority. Debts given priority under the laws of the United States are assigned to the third class while liens generally are assigned to the fourth class and general obligations of the estate to the fifth class. The Belindez claim was a recognized debt of the estate and no objection can be made to its payment except, perhaps, as to time. From the opinion of the Honorable Charles C. Haines, trial judge, we quote and adopt the following: "In my judgment there can be no question about the propriety of paying it (the Belindez claim) prior to the payment of either the state succession tax or the federal estate tax. The state succession tax is a tax on the individual shares passing from the decedent by will or otherwise to other persons, and though the executor is liable for it, it is paid out of their shares, not out of the gross estate, and obviously cannot be intended to have any priority over the claims of any creditors of the decedent.

The federal estate tax is reckoned on the value of the estate rather than any shares in the estate, but it is reckoned on the net estate, and obviously was not intended to prejudice creditors. The situation as to the federal income tax is, indeed, different, as that was a debt or obligation of the decedent incurred in his lifetime and which undoubtedly has a priority under the laws of the United States. There was, however, prolonged uncertainty about what it amounted to, and it is not clear from the evidence just when its amount was finally arrived at and fixed and placed in shape to be paid. In the meanwhile the Belindez claim bore seven per \*190 cent interest. Were it clear from the evidence that the income tax demands were liquidated and fixed before the payments complained of on the Belindez claim were made, so that the executor deliberately preferred in time of payment a claim of the fifth class, bearing seven per cent interest, over one of the third class, having priority by law and bearing twelve per cent interest, doubtless it would be accountable for the five per cent difference in interest so lost. But in the circumstances it is not sufficiently plain that the executor did not use reasonable business judgment in that matter to make me feel justified in surcharging it on that account. As far as the principle of both obligations is concerned it would have to be paid in any event before the net share of the minors in the estate could be freed of the claim."

[22] Appellants' twelfth assignment of error refers to an alleged misconduct of the executor in entering into a contract with Mrs. Barreiro and in attempting to get her to execute a trust agreement placing her portion of the estate properties in trust with the executor for her use during her lifetime and for the benefit of appellants after her death. This contract was prepared before the appointment of the executor. The declaration of trust was not executed by Mrs. Barreiro. If executed it might have resulted in benefit to the appellants as it would have given them a fixed and present interest in the property of their mother which they do not now have. Neither the estate nor appellants were prejudiced by this contract or by the unexecuted declaration of

trust.

[23] In the opinion this day filed in case Civil No. 488 (*Estate of Barreiro*, <sup>FN\*</sup> *supra*) we have affirmed the order of the trial court directing the executor to pay the sum of \$4,782.95 out of its own funds into the treasury of the Compania on the ground that it was negligent in not collecting this sum from Manuel Lujan, the Mexican attorney who disappeared before making payment of this money to the executor of the Compania. In that case we held that the probate court could examine the conduct of the executor in its control of the Mexican property of the deceased and the Compania because it had disregarded its corporate entity and managed the property in Mexico without due regard to \*191 the existence of the corporation. In the instant case we have examined in great detail some of the actions of the executor in its management of the Mexican property and sustain the ruling of the probate court in refusing its removal, even though, through its negligence, it lost the money taken by Lujan. A return of this money by the executor will prevent its loss to the estate. The trial court was of the opinion that the executor and its then attorney, now deceased, were honestly mistaken in the position taken in the earlier years of the administration and that a refund of the money lost was all that the equities of the situation required, the removal of the executor not being necessary under the circumstances disclosed by the record. We have not disturbed these findings. Rulings were reserved on a number of questions involving possible loss to the estate. Because such rulings were reserved for future hearing and determination, these questions are not before us on either appeal except as to the right of the trial court to reserve its ruling.

FN\* See Reporter's note, *ante*, p. 177.

[24] As we have repeatedly stated, the property owned by Mrs. Barreiro should be removed from the possession of the executor. The income from this property, if any, does not belong to the estate. The expense of caring for and maintaining her portion should not be charged to the estate. It is evid-

ent that an accounting must be had and some adjustment made. Whether this will result in the executor being charged with a greater amount than its account now shows, or being credited with expenditures in excess of those now claimed by it, cannot now be determined. The order of the trial court should be amended by reserving to it the right to credit to, or charge against, the executor any sums that an accounting between it and Mrs. Barreiro may show necessary and proper under the circumstances of such an accounting.

It is ordered that there be, and there is hereby added to the order of the trial court filed on June 27, 1930, a paragraph numbered eighteenth, in words and figures as follows:

“Eighteenth: It is further ordered that the court reserve unto itself the right to further correct and modify the accounts of the executor by reducing from the total value of the property in the accounts charged to it, the value of that portion of such property as may be determined to belong \*192 to Gertrudis Marquez Barreiro, if any, and to modify the accounts of the executor by adding thereto, or deducting therefrom, as the case may be, any income received by said executor on the property held by it during the course of administration which actually belonged to Gertrudis Marquez Barreiro, and any expense incurred by it which should have been properly charged against or credited to the said Gertrudis Marquez Barreiro, if it should finally appear that such credits or charges should be made.”

The orders appealed from, as so modified, are affirmed.

Barnard, P. J., and Scovel, J., *pro tem.*, concurred.

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In re Barreiro's Estate  
125 Cal.App. 153, 13 P.2d 1017

END OF DOCUMENT

**C****Effective:[See Text Amendments]**

West's Annotated California Codes Currentness  
Code of Civil Procedure (Refs & Annos)  
Part 2. Of Civil Actions (Refs & Annos)  
Title 5. Jurisdiction and Service of Process (Refs & Annos)  
    ▣ Chapter 1. Jurisdiction and Forum (Refs & Annos)  
        ▣ Article 1. Jurisdiction (Refs & Annos)  
            → → **§ 410.10. Basis**

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

## CREDIT(S)

(Added by Stats.1969, c. 1610, p. 3363, § 3, operative July 1, 1970.)

## HISTORICAL AND STATUTORY NOTES

## 2004 Main Volume

Section 30 of Stats.1969, c. 1610, p. 3375, provides:

“(a) This act shall become operative on July 1, 1970.

“(b) In any action commenced prior to July 1, 1970, in which a summons was properly issued but not served before July 1, 1970, the summons shall be served as provided by this act. However, if an order for publication of summons was made before July 1, 1970, but actual service of summons was not completed by that date, the service may be completed as provided by the law in effect prior to July 1, 1970.

“(c) In any action commenced prior to July 1, 1970, in which a summons has been served but no return thereon made by July 1, 1970, the return of summons may be made as provided by this act or as provided by the law in effect prior to July 1, 1970.

“(d) In any action commenced prior to July 1, 1970, in which a default or default judgment was entered prior to July 1, 1970, the law in effect prior to July 1, 1970, shall govern the right to seek relief.

▷

MERTON L. MILLER, Respondent,  
v.  
CHARLES J. McCOLGAN, as Franchise Tax Com-  
missioner, etc., Appellant.

L. A. No. 17355.

Supreme Court of California  
February 20, 1941.

HEADNOTES

(1) Corporations § 344--Relation and Rights of  
Stockholders--Interests, Rights and Remedies--  
Rights in Corporate Property.

A corporation has a personality distinct from  
that of its shareholders, and the latter neither own  
the corporate property nor the corporate earnings;  
each has simply an expectancy in each, and be-  
comes the owner of a portion of each only when the  
corporation is liquidated or when a portion of the  
earnings is set aside for dividend payments on the  
declaration of a dividend.

(2) Taxation § 458--Miscellaneous Taxes--Income  
Tax--Credits and Deductions--Tax to Other State--  
Dividends on Stock of Foreign Corporation.

Under section 25 (a) of the Personal Income  
Tax Act of 1935, Deering's General Laws, 1937,  
Act 8494, providing for a credit "whenever a resi-  
dent taxpayer ... has become liable to income tax to  
another state or country on his net income ... de-  
rived from sources without this state," a California  
resident owning stock in a Philippine Island corpora-  
tion who pays the Philippine Government an in-  
come tax on dividends received is not entitled to a  
credit therefor, since the source of the dividends is  
the stock itself as distinguished from the income of  
the corporation, and under the doctrine of *mobilia  
sequuntur personam* the stock has a situs at the res-  
idence of the taxpayer.

See 27 Am. Jur. 416.

(3) Conflict of Laws § 18--Property--Personal  
Property--Situs at Residence of Owner.

Under the doctrine of *mobilia sequuntur perso-  
nam*, shares of stock in a corporation have their sit-  
us or location in the state or country wherein their  
owner resides, unless they have acquired a business  
situs elsewhere. This doctrine is applicable not only  
in connection with property or inheritance taxation,  
but to income taxation as well.

(4) Statutes § 185--Construction and Interpretation--  
Presumptions-- Legislative Knowledge--Judicial  
Decisions.

Legislation should be construed in the light of  
court decisions existing at the time of its enactment.

(5) Taxation § 458--Miscellaneous Taxes--Income  
Taxes--Credits and Deductions--Construction of  
Statute.

A provision in an income tax law allowing a  
credit to the taxpayer is in effect an exemption from  
a tax, and must be strictly construed against him.

(6) Taxation § 458--Miscellaneous Taxes--Income  
Taxes--Credits and Deductions--Tax to Other State--  
Gains on Sale of Stock.

Under section 25 (a) of the Personal Income  
Tax Act of 1935, Deering's General Laws, 1937,  
Act 8494, a California resident is not entitled to a  
credit for tax paid to the Philippine Government on  
gains on a sale of stock in a Philippine Island cor-  
poration where the stock has not acquired a busi-  
ness situs there. Under the rule of *mobilia sequun-  
tur personam* the stock has a situs in California at  
the domicil of the owner, and profit from the sale is  
income from a source in California, even though  
the certificates were in the Philippine Islands, and  
the sale was made to a Philippine customer through  
a Philippine broker.

SUMMARY

APPEAL from a judgment of the Superior  
Court of Los Angeles County. Henry M. Willis,  
Judge. Reversed.

COUNSEL

Earl Warren, Attorney-General, H. H. Linney, James J. Arditto and Valentine Brookes, Deputies Attorney-General, for Appellant.

Claude I. Parker, Bayley Kohlmeier and Stuart T. Baron for Respondent.

CURTIS, J.

This is an appeal by the defendant as Franchise Tax Commissioner of the State of California from a judgment directing a refund of that part of the income tax for 1935 theretofore paid under protest by plaintiff.

There is presented here for our consideration a single question of law, to wit: Under section 25 (a) of the California Personal Income Tax Act of 1935 [Deering's Gen. Laws, 1937, Act 8494], is plaintiff entitled to a credit against his California tax in the amount of the tax paid by him for said year on the same income to the Philippine Government? \*434

The facts upon which this appeal is based were stipulated and are substantially as follows: Plaintiff is a resident of the State of California. During the year 1935 plaintiff owned stock in the Balatoc Mining Company, a Philippine corporation, engaged in the mining business. All of the properties and activities of that company were in the Philippines, and it did not carry on any business in California. During the year 1935 plaintiff received dividends from the Balatoc Mining Company in the amount of \$104,130.50, of which the sum of \$29,055, accrued and payable as dividends in 1934, was eliminated from consideration here, and the balance of said dividends, or \$75,075.50, was taxable and was taxed by California.

During the same year 1935 plaintiff sold certain stock of the Philippine mining corporation for a profit. The sales were made in the Philippines, and the certificates representing these stocks were delivered by plaintiff's agent in the Philippines to brokers in the Philippines, and after the sale thereof the proceeds received were delivered to plaintiff's

agent in the Philippines and were by him transmitted to plaintiff.

During the entire year 1935 there was in full force and effect in the Philippines a net income tax law which imposed a tax upon the entire net income of residents of the Philippines and also upon the entire net income of nonresidents of the Philippines derived from sources within the Philippines. Under the income tax law of the Philippines, as it is interpreted by their taxing officials, dividends paid by Philippine corporations to nonresident stockholders and gains from sales of stocks in the Philippines by nonresident aliens constitute income derived from sources within the Philippines, within the meaning of their tax law, and are subject to their income tax. Furthermore, it has been held by the Supreme Court of the Philippines that dividends paid by Philippine corporations to nonresident stockholders are subject to the Philippine income tax. (*Manila Gas Corp. v. The Collector of Internal Revenue*, Supreme Court Decision No. 42780, Jan. 17, 1936 [62 P. I. \_\_\_\_].)

Pursuant to the law of the Philippines, plaintiff filed an income tax return with the Collector of Internal Revenue of the Philippines, in which he reported the dividends received by him from the Balatoc Mining Company and the gains derived by him from the sale of stocks in the Philippines, and \*435 paid a tax thereon to the Philippines for the year 1935 in an amount of \$6,638.54.

Plaintiff as a resident of California filed his income tax return for the year 1935 with the Franchise Tax Commissioner of the State of California and included in his return the dividend received by him from the Balatoc Mining Company in the sum of \$75,075.50 and the gain derived from the sale of stock in the Philippines in the sum of \$7,830.72. It is agreed that the amount of \$3,434.99 of the \$6,638.54 paid by plaintiff as income tax to the Philippines for the year 1935 was paid upon income which was also included in plaintiff's taxable income for 1935 for California personal income tax purposes. Pursuant to the terms of section 25 (a) of the California Personal Income Tax Act, plaintiff

claimed a credit on his California return for the taxes paid by him to the Philippine Government on the same income. In computing plaintiff's tax liability to California for the year 1935, defendant, as Franchise Tax Commissioner, disallowed the deduction and, as a result thereof and after protest by plaintiff, assessed a deficiency tax against plaintiff. The latter paid the deficiency tax and brought this action to secure a refund. It was agreed by the parties that if plaintiff was entitled to a credit for income taxes paid by him to the Philippines upon income which was also included in plaintiff's income tax return for California, the amount of that credit was \$3,434.99. The trial court concluded that the credit should have been allowed, and defendant brings this appeal from the judgment rendered in favor of plaintiff.

Section 25 (a) of the California Personal Income Tax Act of 1935 [Deering's Gen. Laws, 1937, Act 8494], provided:

"Whenever a resident taxpayer of this State has become liable to income tax to another State or country upon his net income, or any part thereof, for the taxable year, derived from sources without this State, and subject to taxation under this act, the amount of income tax payable by him under this act shall be credited with the amount of income tax so paid by him to such other State or country, but such credit shall not exceed such proportion of the tax payable under this act as the income subject to tax in such other State or country bears to the taxpayer's entire income upon which the tax is imposed by this act." \*436

The important words are "income ... derived from sources without this State," for if the income was derived from sources *within this state*, the credit provision is inapplicable, and respondent is not entitled to recover.

Appellant contends (a) that the source of the dividends received by respondent in California was the stock itself and therefore the income was not from sources without this state; and (b) that the

source of capital gain from the sale of the shares of stock was also in California and therefore no credit was permissible in respect to the tax paid to the Philippine Government. In support of this position appellant relies primarily on the common law doctrine of *mobilia sequuntur personam*, a well-established guiding principle in the taxation of intangibles.

In our approach to the problem presented here let us first consider the nature of this property-corporate stock-and the status of corporations and shareholders. (1) It is fundamental, of course, that the corporation has a personality distinct from that of its shareholders, and that the latter neither own the corporate property nor the corporate earnings. The shareholder simply has an expectancy in each, and he becomes the owner of a portion of each only when the corporation is liquidated by action of the directors or when a portion of the corporation's earnings is segregated and set aside for dividend payments on action of the directors in declaring a dividend. This well-settled proposition was amplified in *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69, 81 [46 Sup. Ct. 256, 70 L. Ed. 475], wherein appears the following cogent language: "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property." Since the shareholder by reason of his stockholding is entitled to share in any dividends which may be declared, it logically follows, as appellant urges, that the source of dividends is the stock, because income which comes to one solely because of ownership of property has a source in that property. \*437

(2-4) At this point it is pertinent to draw a distinction between the *immediate* source of the in-

come with respect to a particular recipient, and what might be called the *ultimate* source of the same income. For example, the Balatoc Mining Company owns its mines and the machinery and materials therein. Its legal ownership is complete. Respondent owns stock in this corporation, which stock represents a number of intangible rights in him legally distinct from the ownership rights of the corporation in the mine and supplies. When we think of source, it seems safe to say that the corporate income has its source in the mining and management process. When the same income reaches respondent as dividends, it is arguable that its source as well is to be found in the corporate activities. However, the dividends, so far as respondent is concerned, represent a yield of the wealth invested in his legally recognized property interest, the shares of stock. Thus, to respondent the source of the income is the corporate stock, the legally created property interest owned by respondent and without which he would not receive this benefit. The shares of stock are the *immediate* source of the income *to the recipient*, though the *ultimate* source is to be found one or more steps back in the process where the new wealth was first called into existence. It is this fundamental differentiation which underlies the well-established principle that "the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed (*Van Allen v. Assessors*, 3 Wall. 573, 584 [18 L. Ed. 229]; *Farrington v. Tennessee*, 95 U. S. 679, 687 [24 L. Ed. 558]; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 137 [6 Sup. Ct. 645, 29 L. Ed. 830]; *New Orleans v. Houston*, 119 U. S. 265, 277 [7 Sup. Ct. 198, 30 L. Ed. 411].)" (*Hawley v. Malden*, 232 U. S. 1, 9 [34 Sup. Ct. 201, 58 L. Ed. 477].)

In harmony with this line of decision, it appears that there is in the beginning an income to the corporation, and that part of such income in turn is passed on to the shareholder in the form of dividends. As such it represents in law an income to the shareholder quite distinct from the income to the corporation. Therefore, in the absence of an ex-

press statutory mandate to the contrary, it logically follows that the source of the income to the shareholder (the dividends) is the corporate stock. \*438

Respondent contends that the activities, the property and the earnings of the corporation, and not the stock, are the source of dividends, and in this connection he cites the Philippine case of *Manila Gas Corporation v. The Collector of Internal Revenue*, *supra*, as establishing that his income was from sources within the Philippines. However, it appears from the opinions in that case that the Philippine statute expressly declared that interest on bonds (intangibles) paid by corporations resident in the Philippines was taxable. Further, it may be gleaned from the Philippine court's opinions that prior to the enactment of the statute there concerned that court had held that interest paid by Philippine residents to nonresidents was not from sources within the Philippines.

Also, it should be noted that the federal practice, which allows American residents a credit for income taxes paid to foreign countries on dividends, is not applicable here because it is dictated by specific statutory provisions. And *Lord Forres v. Commissioner*, 25 B. T. A. 154, *Bence v. United States*, 18 Fed. Supp. 848, and *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84 [55 Sup. Ct. 50, 79 L. Ed. 211], relied on by respondent, all involved the construction of section 217 of the Federal Revenue Act [26 U. S. C. A., Act 1926, p. 170], which expressly declares that dividends paid to nonresidents by corporations doing business in the United States are derived from sources within this country. The courts had no alternative but to apply the statute as they did unless they were to hold the statute unconstitutional. This they could not do in view of the principles enunciated in *Burnet v. Brooks*, 288 U. S. 378 [53 Sup. Ct. 457, 77 L. Ed. 844, 86 A. L. R. 747], to the effect that Congress had the power to enact such a statute as construed and applied to the property in question. These cases cited by respondent turned on constitutional considerations of the scope of the taxing power of the fed-

eral government and because of the distinct differentiation in legal principles involved there, those decisions have no bearing on our determination of the present question, whose pivotal point centers on the proper construction of the precise language employed in the statute subject of interpretation.

Having fixed upon the source of the particular income as the corporate stock, the next task is to assign to this \*439 source a taxable situs. Under the doctrine of *mobilia sequuntur personam*, shares of stock in a corporation have their situs or location in the state or country wherein their owner resides, unless they have acquired a business situs elsewhere. The possibilities of this case being affected by the doctrine of business situs will be discussed later in this opinion.

In 1935 when the Income Tax Act was enacted by our legislature the courts of California and the federal courts had declared that the taxation of intangibles was subject to the rule of *mobilia sequuntur personam*. (*First Nat. Bank v. Maine*, (1932) 284 U. S. 312 [52 Sup. Ct. 174, 76 L. Ed. 313]; *Beidler v. South Carolina Tax Com.*, (1930) 282 U. S. 1 [51 Sup. Ct. 54, 75 L. Ed. 131]; *Baldwin v. Missouri*, (1930) 281 U. S. 586 [50 Sup. Ct. 436, 74 L. Ed. 1056]; *Farmers Loan & Trust Co. v. Minn.*, (1930) 280 U. S. 204 [50 Sup. Ct. 98, 74 L. Ed. 371]; *Safe Deposit & Trust Co. v. Virginia*, (1929) 280 U. S. 83 [50 Sup. Ct. 59, 74 L. Ed. 180]; *Blodgett v. Silberman*, (1928) 277 U. S. 1 [48 Sup. Ct. 410, 72 L. Ed. 749]; *Estate of McCreery*, (1934) 220 Cal. 26 [29 Pac. (2d) 186]; *Westinghouse Elec. & Mfg. Co. v. County of Los Angeles*, (1922) 188 Cal. 491 [205 Pac. 1076]; *Hinckley v. County of San Diego*, (1920) 49 Cal. App. 668 [194 Pac. 77].) The principle is well established that legislation should be construed in the light of court decisions existing at the time of its enactment.

Moreover, long prior to the adoption of our Income Tax Act of 1935 the Supreme Court of the State of Wisconsin in the case of *State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commr.*, 161 Wis. 111 [152 N. W. 848], had held as a matter of stat-

utory construction that interest on bonds paid by residents to nonresidents was not income from sources within Wisconsin and consequently could not be taxed by that state. That case involved construction of the language of that part of the Income Tax Act of 1911 which provided for taxation of nonresidents "upon such income as is derived from sources within the state or within its jurisdiction" and in concluding that the assessment against non-resident bondholders was invalid, the court said at page 850:

"... The situs of a bond remains at the domicile of the bondholder. So the interest in question did not as to nonresident bondholders, constitute an income derived from sources within the state. ..."  
\*440

If the rule of *mobilia* is applicable to income from bonds, it necessarily is equally applicable to income from stock. So it may be said that the situs of a share of stock is at the residence or domicile of the owner (*First Nat. Bank v. Maine, supra*).

In support of his contention that the earnings and property of the corporation are the source of dividends, respondent cites the later Wisconsin case of *State ex rel. Froedtert, G. & M. Co. v. Tax Com.*, 221 Wis. 225 [265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478], which involved the application and validity of the Privilege Dividend Tax of that state. Wisconsin desired to share with nonresidents their dividends from corporations deriving earnings and profits from Wisconsin. In *Newport Co. v. Tax Commr.*, 219 Wis. 293 [261 N. W. 884, 100 A. L. R. 1204], *certiorari* denied, 297 U. S. 720 [56 Sup. Ct. 598, 80 L. Ed. 1004], the Wisconsin Supreme Court held that income from stock owned by a non-resident corporation had its source at the domicile of the owner. Concluding that an income tax on dividends paid to nonresidents by Wisconsin corporations would be held invalid, Wisconsin in 1935 imposed a tax on corporations doing business in Wisconsin for the privilege of paying dividends to nonresidents to the extent the dividends were paid from income earned by the corporations in Wisconsin. In

the Froedtert case, wherein suit was brought to procure a declaratory judgment as to the constitutionality of the Privilege Dividend Tax statute, this tax was upheld, but the reason assigned was that the tax did not purport to be an income tax, or in any way to be a tax upon the dividend of the shareholder, but was an excise tax "for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state." Then in *J. C. Penney Co. v. Tax Com.*, 233 Wis. 286 [289 N. W. 677, 126 A. L. R. 1333], when the question of applicability of this tax statute to a locally licensed foreign corporation came before the Supreme Court of Wisconsin, it was held that under those circumstances the statute ran afoul of the due process clause. This case was then taken to the Supreme Court of the United States on the sole question of whether or not the Wisconsin Privilege Dividend Tax offended the Fourteenth Amendment of the Constitution. That court in its decision of December 16, 1940, 311 U. S. 435 ( 85 L. Ed. 222, \*441 61 Sup. Ct. Rep. 246), quite properly recognized the logic of the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, and because the "taxing power exerted by the state" of Wisconsin bore "a fiscal relation to protection, opportunities and benefits given by the (said) state," this statute was held constitutional as being within the confines of the due process clause.

Careful examination of these Wisconsin cases reveals that the basis of the Froedtert and Penney decisions was constitutional considerations of the Privilege Dividend Tax, an excise tax on corporate earnings as distinguished from a tax on the income of the shareholder, and the question of local source of income as related to taxable situs was disregarded therein. In the instant case we have the definite problem of statutory interpretation, and in this connection it is particularly significant that the two Wisconsin cases based on the proper construction of phraseology practically identical with that now under consideration here—*State ex rel. Manitowoc*

*Gas Co. v. Wisconsin Tax Commr.*, *supra*, and *Newport Co. v. Wisconsin Tax Commr.*, *supra*—applied the rule of *mobilia* to income taxation and held that the place in which the intangibles had their taxable situs was also the place in which the income therefrom had its source.

In support of his argument that the source of dividend income is the place where the corporation earns its profits and carries on its business, respondent also cites the recent case of *Union Electric Company of Missouri v. Coale*. (Mo.) 146 S. W. (2d) 631, wherein it was held that dividends received by a domestic corporation from a foreign corporation not doing business in Missouri was not income "from sources in this state (Missouri)" within the meaning of the Missouri income tax law. However, we note an important distinction present in the Missouri decision which prevents it from being completely analogous to the instant case. The issue in the Missouri case was whether certain income was taxable, and the Supreme Court of Missouri held that the point must be strictly construed against the government. Apparently, this rule of construction was a governing factor in the conclusion reached. (5) In the case at bar the provision allowing a credit (sec. 25 [a]) is in effect an exemption from liability for a tax already determined and admittedly valid, and such \*442 statute must be strictly construed against the taxpayer (*The Pacific Co., Ltd., v. Johnson*, 212 Cal. 148 [ 298 Pac. 489], affirmed in 285 U. S. 480 [52 Sup. Ct. 424, 76 L. Ed. 893].) Furthermore, the Missouri court in its opinion made no mention of either *Newport Co. v. Tax Com.*, 219 Wis. 293 [261 N. W. 884, 100 A. L. R. 1204], *certiorari* denied 297 U. S. 720 [56 Sup. Ct. 598, 80 L. Ed. 1004], or *Domenech v. United Porto Rican Sugar Co.*, 63 Fed. (2d) 552, *certiorari* denied 289 U. S. 739 [53 Sup. Ct. 656, 77 L. Ed. 1486], each of which considered at great length the question of source of income in its relation to taxable situs for intangibles. Both these cases decided the exact issue involved in the Missouri decision squarely *contra* to the latter and applied without exception the rule of *mobilia* in such circumstances.

As the result of these pertinent observations, the limitations of the holding in *Union Electric Company of Missouri v. Coale*, *supra*, in so far as they reflect on the present case, must be recognized.

Respondent urges that the long line of federal cases (*First Nat. Bank v. Maine*, *supra*, *Beidler v. South Carolina*, *supra*, *Baldwin v. Missouri*, *supra*, *Farmers Loan & Trust Co. v. Minn.*, *supra*, *Safe Deposit & Trust Co. v. Virginia*, *supra*, and *Blodgett v. Silberman*, *supra*), as well as the California case of *Estate of McCreery*, *supra*, cited by appellant as supporting his contention that the situs of the stock owned by the respondent was in California and that the source of the dividends was also in California, has no application to the instant case because those cases involve inheritance and property taxes. But it appears to us that if there is any reason for the rule of *mobilia sequuntur personam* in connection with property or inheritance taxation, there is every bit as much reason for that rule in income taxation. The practical difficulties inherent in the application of any other principle in determining the source of income have undeniably constituted an important factor in the adoption and survival of this well-established common-law tenet (*Rhode Island Hospital Trust Co. v. Doughton*, *supra*). Respondent cites as authority for his statement that this rule has not been applied by the courts to income taxation, the case of *Lawrence v. State Tax Com.*, 286 U. S. 276 [52 Sup. Ct. 556, 76 L. Ed. 1102], in which the court held that Mississippi had constitutional jurisdiction to tax a resident on compensation for personal services \*443 performed in another state. However, the income in question was not derived from the ownership of intangibles, but from the performance of personal services. The references made by the court to intangibles were made in support of the right of Mississippi to tax under the facts of the case and were not made to indicate that the income in question was from intangibles. No corporation intervened between the performance of the services and the right of Lawrence to the income. He acquired the right to the income immediately on completion of the service. The intan-

gible, if any, was merely a note for his compensation and was not the source of his income, but instead was mere evidence of it.

The doctrine of *mobilia sequuntur personam* has been repeatedly and consistently maintained in determining the taxable situs of intangible property, and as recently as the 1938-1939 term the Supreme Court of the United States again recognized it in *Curry v. McCantless*, 307 U. S. 357 [59 Sup. Ct. 900, 906, 83 L. Ed. 1339, 123 A. L. R. 162], wherein the majority opinion stated:

“In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, (citations omitted) by saying that his intangibles are taxed at their situs and not elsewhere, or, perhaps less artificially, by invoking the maxim *mobilia sequuntur personam*, (citations omitted) which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains. ...”

(6) The discussion regarding the source of the dividend income is equally applicable to the source of profit from the sale of the stock. As the rule of *mobilia* gives this stock a situs in California, all income from it was from sources in California. Its sale to a Philippine customer through a Philippine broker does not mean that the profit from its sale was income from Philippine sources. Respondent made a profit from the sale of property located in California, so the profit is derived from sources in California, and the mere \*444 fact that the certificates, the evidences of title, were in the Philippines does not alter this conclusion (*First Nat. Bank v. Maine*, *supra*, *Beidler v. South Carolina*, *supra*; *Baldwin v. Missouri*, *supra*, and *Farmers Loan & Trust Co. v. Minn.*, *supra*).

At this point it should be noted that the general principle in relation to situs for the purposes of taxation of intangible personal property embodied in the maxim *mobilia sequuntur personam* has a well-established exception to the effect that there may be a business situs of intangibles distinct from the domicile of the creditor. But respondent has not divided his activities so as to bring himself within this exception. He did not set his property aside in a Philippine trust or engage in business in the Philippines. In consequence, nothing appears here to indicate that the *mobilia* rule is not applicable to this case.

By virtue of express statutory provision the Philippines do not apply the maxim of *mobilia sequuntur personam* so as to avoid their taxation of nonresidents on dividends received by them from Philippine corporations or on the income from sales of property having a situs in other jurisdictions. That the Philippines may impose such a tax does not mean that under our theories and our act such income is derived from the Philippines. Rather it simply indicates that the Philippines have adopted a theory and philosophy of taxation different from that adopted by California, which has uniformly applied the well-recognized principle of *mobilia sequuntur personam* in determining the situs of intangibles for purposes of taxation.

In accord with the foregoing analysis it is our conclusion that respondent is not entitled to a credit for taxes paid to the Philippines upon the dividend income and the gain from the sale of these stocks.

The judgment is reversed with direction to the trial court to enter judgment for the appellant in accordance with the views herein expressed.

Edmonds, J., Shenk, J., Carter, J., Spence, J., *pro tem.*, and Gibson, C. J., concurred.

Traynor, J., took no part in the consideration or decision of this case. \*445

A petition for a rehearing was denied March 20, 1941. Traynor, J., took no part in the consideration or decision of this matter.

Cal.  
Miller v. McColgan  
17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424

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L. D. LOWRY, as Executor, etc., Appellant,  
v.  
COUNTY OF LOS ANGELES, Respondent.

Civ. No. 2576.

Court of Appeal, Second District, California.  
September 7, 1918.

TAXATION--STOCK OF FOREIGN CORPORA-  
TION--LEGAL TITLE IN FOREIGN TRUSTEES-  
-SITUS.

Where a testator, owning stock in a foreign corporation, had in his lifetime transferred the legal title to non-resident trustees, domiciled where the corporation was organized, and where it had its principal place of business, and had given the trustees full power to hold, manage, and control the stock, vote it, and collect the dividends, and to sell, transfer, or otherwise dispose of it, the stock held by the trustees was property having its *situs* in the state of their domicile, and is not to be considered as within the jurisdiction of the taxing power, and his executor could recover from the county a tax assessed upon it in California which he had been required to pay.

ID.--DOUBLE TAXATION NOT FAVORED.

Double taxation is never favored unless clearly required by the statute of the particular state which claims that right.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge.

\*158 Jones & Bennett and James S. Bennett, for Appellant.

A. J. Hill, County Counsel, and Robert B. Murphey, Deputy County Counsel, for Respondent.

JAMES, J.

A demurrer to the complaint of plaintiff was sustained and plaintiff declining to amend, judgment followed in favor of the defendant. The appeal is from the judgment so rendered.

The facts which we will detail are fully expressed in the complaint: In January of the year 1912 William Morgan died. He was at that time a resident of the county of Los Angeles. In February, 1912, his last will was duly admitted to probate and the appointment of plaintiff as executor thereof confirmed. Morgan, in his will, bequeathed his interest in two thousand shares of the capital stock of a safety vault company (that being a corporation organized and existing under the laws of Illinois and having its principal place of business at the city of Chicago) to three persons, the interest\*159 being divided by apportioning 750 shares to each of two of such persons, and five hundred shares to the third. The person to whom the interest in five hundred shares of the stock was bequeathed, at the time of the death of Morgan, resided in California. One of the other two was and has continued to be a resident of the state of Illinois, while the third was a resident of the state of Illinois up to the twentieth day of November, 1912, and thereafter became a resident of the state of California. On the 3d of March, 1914, the superior court in probate entered its order decreeing that the legacies to the three persons referred to were specific legacies and ordered the distribution thereof. The assessor of the county of Los Angeles made no assessment for the year 1912 as against the interest of Morgan in the shares of stock, but in the year 1913 an assessment was entered against the executor of the estate wherein the total number of shares of stock were assessed at a net valuation of two hundred thousand dollars, and by reason of the stock having been omitted from the assessment in the year 1912, the assessor doubled the valuation for the year 1913 and levied an assessment as for a total value of four hundred thousand dollars and a total tax of \$6,280, which the executor, the plaintiff here, was required to pay.

This action is brought to recover from the county that sum of money on the ground that the assessment was illegal and void because the property attempted to be assessed was not property having a *situs* within the state of California, but was property in the hands of trustees all of whom were residents of the state of Illinois. The further facts appearing by the complaint are: That in the year 1907 William Morgan, being then the owner of the two thousand shares of stock heretofore mentioned, entered into an agreement by which he transferred to the three trustees in Illinois the shares of stock. Among other terms, the trust agreement contained these provisions:

“This conveyance is made to the grantees as trustees, upon the following uses, purposes and trusts: To have and to hold said stock, to manage and control the same, to vote said stock in their discretion, to collect the dividends thereon and, from said dividends, to pay taxes, municipal or other governmental charges, if any, thereon, to pay court and other costs and expenses, and fees of attorneys for services concerning or in connection with litigation, if any, concerning this agreement \*160 or the stock herein referred to or the rights and duties of the trustees hereunder, and to pay the net income thereof, and of any share or shares hereof, as and when the said income shall be collected, to the first party or the owner or owners of the beneficial interest or interests in said stock or said share or shares thereof, or the legal representative or representatives of said owner or owners, during the continuance of this trust. The trustees shall have full power to sell, transfer, or otherwise dispose of said stock, or any share or shares thereof, at any time prior to the termination of this trust, upon, but only upon the joint written agreement of the trustees, on the one side, and the first party or the owner or owners of the beneficial interest or interests in said stock or said share or shares thereof, or the legal representative or representatives of said owner or owners, on the other side. And in the event of a sale, transfer or other disposition of said stock or of any share or shares thereof, the proceeds of any

such sale, transfer or other disposition shall be by said trustees transferred, set over and delivered to the said first party, or the owner or owners of the beneficial interest or interests in said stock, or in said share or shares thereof, or the legal representative or representatives of said owner or owners, freed from the obligation of this trust. ... This trust shall continue in force for fifteen (15) years from the date hereof, and until there shall have been made payment by said corporation of its entire bonded indebtedness, and of any extension thereof, and of any renewal thereof, and of any extension of any part thereof, or of any renewal of any part thereof, or of any new bonded indebtedness of said corporation but not for a longer time than twenty-one (21) years from the date of the death of the last survivor of (the trustees), excepting that this agreement may be terminated at any time as to said stock or any share or shares of said stock by the joint written consent of all the trustees, on the one side, and the first party or the owner or owners of the beneficial interest or interests in said stock or said share or shares thereof, or the legal representative or representatives of said owner or owners, on the other side; and, upon the termination of this trust, as to said stock or any share or shares thereof in reference to which this trust has been terminated, held by the trustees, their successors, successor, survivors or survivor, shall be transferred and set over to the first party or to the \*161 owner or owners of the beneficial interest or interests in said stock or in said share or shares of said stock, or to the legal representative or representatives of said owner or owners.”

Appellant insists that under the facts stated the legal ownership of the stock was in the trustees and for purposes of assessment its *situs* was therefore in the state of Illinois, where the trustees had their residence and where the stock was held. It is clearly expressed by the complaint that the assessment made was upon the whole value of the full number of shares, and was not an assessment upon dividends or upon any contingent or equitable interest of the testator. Respondent supports the right of the

county to collect the tax with the argument that as to personalty the presumed *situs* is always at the domicile of the owner, and that such legal *situs* is not affected by the fact that the personal property may have its physical location outside the limits of the state. It is true that it is a general rule that the domicile of the owner determines the *situs* of the personalty of which he may be possessed. This rule has its exceptions. Generally, we think it may properly be said that for the purpose of distributing the estate of a decedent it will be presumed that his personalty, or any interest that he may have therein, is situated at the domicile maintained by him at the time of his demise. This rule is shown by the decisions not to have invariable application and for purposes of taxation the *situs* of personalty has been determined under particular facts to be different. In *Catlin v. Hull*, 21 Vt. 152 (found in 8 Vermont Annotated Reports, p. 150), the court said: "It is undoubtedly true, that, by the generally acknowledged principles of public law, personal chattels follow the person of the owner, and that, upon his death, they are to be distributed according to the law of his domicile; and in general, any conveyance of chattels, good by the law of his own domicile, will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce and to enable persons to dispose of their property, at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country, where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country, where the property is in fact, which contravenes the \*162 law of his domicile; for if there is, the law of the owner's domicile must yield to the law of the state, where the property is in fact situate. But we do not consider this doctrine, in relation to the *situs* of personal chattels and relating to its transfer and distribution, as at all conflicting with the actual jurisdiction of the state, where it is situate, over it, or with their right to subject it, in common with the other property of the state, to share the burthen of the

government, by taxation." The case from which we have quoted is referred to in *Stanford v. San Francisco*, 131 Cal. 34, [ 63 Pac. 145], as being a leading case touching the subject of which it treats. The Vermont court held that property of nonresidents which consisted of notes and choses in action held against individuals of that state, placed in the hands of an agent with power to handle the proceeds, invest, and reinvest, was property within the state and subject to the payment of taxes therein. In that case there had been no transfer of the legal title to the agent, but the agent held the same for the purpose of transacting the business of investing the funds for his principal. In a Rhode Island case, *Anthony v. Caswell*, 15 R. I. 159, [1 Atl. 290], the question was "whether a trustee, resident in another state, who has no property as trustee in this state, is liable to taxation in the town where his *cestuis que trustent* reside." The court decided in the negative. Judge Cooley in his work on Taxation, volume 1, page 660, thus declares the rule: "In general, personal property in the hands of a trustee is to be assessed to him at the place of his domicile, and if one of two trustees is a nonresident the trustee living in the state may be taxed in respect to their interests; but such property is often made taxable to the persons beneficially entitled, if they are residents of the state. If the fund is in charge of a court, it is taxable in the jurisdiction having control of it, although personalty having an actual *situs* elsewhere may be taxed where it is." In *Mackay v. San Francisco*, 128 Cal. 678, [ 61 Pac. 382], the court made its decision in accordance with this rule. There the property consisted of bonds which were kept in the city of New York. They came into the control of two trustees, one of whom resided in Nevada and one in San Francisco, by a distribution of the estate of Theresa Fair. Theresa Fair was a resident of San Francisco at the time she died and her will was probated there. The assessment was made after distribution, against \*163 both trustees for all of the bonds held by them, and the court decided that as to the trustee resident in Nevada the assessment was void. Respondent lays great stress upon the language of the court, expressed in its decision, where it is said: "In

*Mackay v. San Francisco*, 113 Cal. 397, [ 45 Pac. 696], these plaintiffs, as executors of the will of Theresa Fair, deceased, contended that the bonds upon which the taxes were levied in this case, or a portion of them, were not property within the state, and not taxable to the estate of Theresa Fair, deceased. But it was held that the bonds had their *situs* in San Francisco, and were there taxable. The court said: 'The bonds in question were held here. Their *situs* was the city and county of San Francisco. They could not be taxed in Arizona, where the property mortgaged to secure them is situated.' In that case the court followed the general rule sustained by the weight of authority. The rule is, that the personal property of decedents is taxed at the domicile of the decedent. As said by law-writers: 'During the settlement of the estate it must have a *situs* somewhere, and none so appropriate as where the decedent lived.' " The court goes on to declare that a different situation was shown after the property had been distributed into the hands of the trustees, one of whom was a nonresident, and Judge Cooley's declaration of the general rule is referred to. We find no difficulty in enforcing an agreement between the holding there made and the contention as advanced by appellant here, and the question may be propounded: Did the fact that the *situs* of Morgan's interest in the stock for purposes of probate, fixed itself at the place of his domicile, also fix the *situs* of the stock for the purpose of an assessment at the same place? We do not think that such a legal situation as last suggested follows. We think the situation is no different than had this same assessment been levied against Morgan's stock by the assessor of Los Angeles County during the lifetime of Morgan and while he was domiciled here. There was not a transfer of interest to the trustees by distribution of the estate under the will, for the trustees for a long time prior to the death of Morgan held the legal title and possession of the stock, and continued so to hold it after his death and at the time distribution was had. If the assessor could not have assessed Morgan for the stock while he lived, surely then the executor of his estate could not be subjected to a similar assessment. \*164 It seems

very clear to us that the stock in the hands of the trustees is within the jurisdiction of the taxing power of the state of Illinois. And to hold that it may be assessed in California also, would be to subject it to double taxation, which is never favored unless clearly required by the statute of the particular state which claims that right. "While it is not practicable to formulate a rule, where the cases depend upon the construction of different state statutes and involve their phraseology, both as to what shall constitute taxable property in the state and as to the place in the state where the personalty shall be assessed, it has been frequently held that where bonds, notes, and mortgages have had an independent *situs* given them in another state, and have been localized there through a resident agent, or otherwise, so as to become subject to the taxing power of that state, they were not subject to taxation in the state of the domicile, unless expressly made so by statute. In other words, it is a rule of construction, repeatedly recognized by the courts in taxation cases, that double taxation will not be presumed to have been intended, and will only be enforced under express mandate." (Judson on Taxation, sec. 425, p. 543.) The decisions of our own state, the leading ones of which we have made reference to, by fair interpretation support this rule. Our conclusion is that the two thousand shares of stock held by the Illinois trustees was property having its *situs* in that state and is not to be considered as within the jurisdiction of the taxing power of California.

The judgment appealed from is reversed.

Conrey, P. J., and Shaw, J., concurred.

Cal.App. 2 Dist. 1918.  
*Lowry v. Los Angeles County*  
38 Cal.App. 158, 175 P. 702

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228 Cal.App.4th 184, 175 Cal.Rptr.3d 65, 2014 Daily Journal D.A.R. 8271, 2014 Daily Journal D.A.R. 9622  
(Cite as: 228 Cal.App.4th 184, 175 Cal.Rptr.3d 65)

**H**

Court of Appeal,  
Second District, Division 5, California.  
The PEOPLE, Plaintiff and Respondent,  
v.  
Kenneth Charles RADER, Defendant and Appellant.

B247088  
Filed July 23, 2014  
Certified for Partial Publication. FN\*

FN\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110(a), parts I, II, and III(A)-(C) and IV are certified for publication.

**Background:** Defendant was convicted in the Superior Court, Los Angeles County, No. KA098088, Victor D. Martinez, J., of one count of second degree burglary, two counts of felony theft, and two counts of forgery. Defendant appealed.

**Holdings:** The Court of Appeal, Turner, P.J., held that:

- (1) defendant could only be convicted of a single count of theft, and
- (2) defendant could have been tried either for petty theft or misdemeanor charge of defrauding an innkeeper.

Affirmed in part; reversed in part; modified in part with directions.

## West Headnotes

**[1] Criminal Law 110 ↪29(10)**

110 Criminal Law  
110I Nature and Elements of Crime  
110k29 Different Offenses in Same Transaction  
110k29(5) Particular Offenses  
110k29(10) k. Larceny offenses. Most

## Cited Cases

Defendant, who was convicted of two counts of petty theft for using counterfeit bills on a single occasion to pay for a meal at a restaurant, could only be convicted of a single count of theft; the two relevant counts involved the same theft of the identical meal on a single occasion at restaurant. Cal. Penal Code §§ 484(a), 666.

**[2] Criminal Law 110 ↪29(10)**

110 Criminal Law  
110I Nature and Elements of Crime  
110k29 Different Offenses in Same Transaction  
110k29(5) Particular Offenses  
110k29(10) k. Larceny offenses. Most

## Cited Cases

When a single theft occurs at the same time as part of one transaction, only one theft conviction may be returned. Cal. Penal Code §§ 484(a), 666.

**[3] Larceny 234 ↪23**

234 Larceny  
234I Offenses and Responsibility Therefor  
234k23 k. Grand or petit larceny, and degrees. Most Cited Cases

A petty theft, ordinarily a misdemeanor, may be elevated to a felony when charged as a petty theft with a prior conviction. Cal. Penal Code §§ 484, 666.

**[4] Larceny 234 ↪23**

234 Larceny  
234I Offenses and Responsibility Therefor  
234k23 k. Grand or petit larceny, and degrees. Most Cited Cases

Felony petty theft is not a substantively different offense than misdemeanor petty theft, as the elements of petty theft as a misdemeanor or a felony are precisely the same; the difference between the misdemeanor and felony theft is not because they have different elements, but, instead,

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it is because petty theft is made a felony because of a sentencing statute. Cal. Penal Code §§ 484, 666.

**[5] Criminal Law 110 ↪12.7(1)**

110 Criminal Law  
110I Nature and Elements of Crime  
110k12 Statutory Provisions  
110k12.7 Construction and Operation in General  
110k12.7(1) k. In general. Most Cited Cases

Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute; in effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute.

**[6] Statutes 361 ↪1217**

361 Statutes  
361III Construction  
361III(G) Other Law, Construction with Reference to  
361k1210 Other Statutes  
361k1217 k. General and specific statutes. Most Cited Cases

The *Williamson* rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict.

**[7] Criminal Law 110 ↪12.7(1)**

110 Criminal Law  
110I Nature and Elements of Crime  
110k12 Statutory Provisions  
110k12.7 Construction and Operation in General  
110k12.7(1) k. In general. Most Cited Cases

The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent.

**[8] Criminal Law 110 ↪12.7(1)**

110 Criminal Law  
110I Nature and Elements of Crime  
110k12 Statutory Provisions  
110k12.7 Construction and Operation in General  
110k12.7(1) k. In general. Most Cited Cases

**District And Prosecuting Attorneys 131 ↪8(6)**

131 District and Prosecuting Attorneys  
131k8 Powers and Proceedings in General  
131k8(6) k. Charging discretion. Most Cited Cases

Under the *Williamson* rule, there must be a conflict between the two statutory provisions at issue before the general and specific statutes jurisprudence can limit prosecutorial charging discretion.

**[9] Larceny 234 ↪6**

234 Larceny  
234I Offenses and Responsibility Therefor  
234k4 Property Subject of Larceny  
234k6 k. Value. Most Cited Cases

**Larceny 234 ↪23**

234 Larceny  
234I Offenses and Responsibility Therefor  
234k23 k. Grand or petit larceny, and degrees. Most Cited Cases

Theft is divided into two degrees, petty and grand theft; the demarcation between grand and petty theft is \$950, so when the value of the property taken exceeds \$950, the crime is grand theft. Cal. Penal Code §§ 486, 487(a).

**[10] Criminal Law 110 ↪29(10)**

110 Criminal Law  
110I Nature and Elements of Crime  
110k29 Different Offenses in Same Transaction  
110k29(5) Particular Offenses

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110k29(10) k. Larceny offenses. Most Cited Cases

### Criminal Law 110 147

110 Criminal Law

110X Limitation of Prosecutions

110k147 k. Limitations applicable. Most Cited Cases

Defendant, who used \$100 in counterfeit bills on a single occasion to pay for a meal at a restaurant, could have been tried either for petty theft or misdemeanor charge of defrauding an innkeeper; the two offenses did not conflict, both offenses permitted conviction when food was taken and not paid for, the potential sentences for both offenses were the same, and the general misdemeanor statute of limitations applied to both provisions when there was a taking of food. Cal. Penal Code §§ 484, 537(a)(1), 802(a).

See 2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 12, 13.

**\*\*66** APPEAL from a judgment of the Superior Court of Los Angeles County, Victor D. Martinez, Judge. Affirmed in part; reversed in part; modified in part with directions. (No. KA098088) Jin H. Kim, San Francisco, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney **\*\*67** General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

TURNER, P.J.

#### **\*186** I. INTRODUCTION

Defendant, Kenneth Charles Rader, enjoyed a meal at a steakhouse and then paid \$100 of the bill with counterfeit \$20 bills. He left the restaurant and was arrested shortly thereafter. He stands convicted of: one count of second degree burglary (Pen.Code, § 459) <sup>FN1</sup>; two counts of felony theft (§§ 484, subd. (a)(484), 666); and two counts of forgery (§§

472, 476). Defendant admitted he had sustained a prior violent and serious conviction within the meaning of sections 666, subdivision (b)(1), 667, subdivisions (b) through (i) and 1170.12. Defendant also admitted he had sustained prior nonviolent and nonserious theft-related felony convictions within the meaning of sections 666, subdivisions (a) and (b). Defendant was sentenced to 5 years, 4 months in state prison. In the published portion of this opinion, we hold defendant can only be convicted of a single count of theft. Further, we conclude that defendant may be convicted of felony petty theft rather than the misdemeanor charge of defrauding an innkeeper (or in this case a restaurant).

FN1. Further statutory references are to the Penal Code except where otherwise noted.

#### II. THE EVIDENCE

On Friday, May 25, 2012, at approximately 2 p.m., defendant entered an Outback Steakhouse restaurant in the City of Industry. Defendant was joined by a man identified only as Jeff. When arrested later and interviewed in a nearby mall security office, defendant claimed the person identified only as Jeff was a nephew. But when interviewed by a detective at a sheriff's station, defendant refused to provide any identifying information including the man's first and last name. For convenience's sake, we shall refer to the otherwise unidentified individual who ate with defendant in the Outback Steakhouse as **\*187** Jeff. Jeff was accompanied by a young woman, Julian Fernandez. All three ordered food and drinks. The dinner bill came to \$100.53. Someone paid the bill with five counterfeit \$20 bills and two \$1 bills.

Melissa Rodriguez had waited on defendant's table. Ms. Rodriguez did not see who left the cash. But she recognized the \$20 bills as counterfeit. Ms. Rodriguez went outside. She saw defendant, Jeff and Ms. Fernandez walking across the restaurant parking lot into a mall. Ms. Rodriguez called out to them. Defendant turned his head slightly to look at Ms. Rodriguez. But he turned back and kept walking. Ms. Rodriguez described what happened next,

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“[Defendant] and the other two people that were with him started zigzagging in and out of cars.” Defendant walked into the mall.

Ms. Rodriguez and the restaurant manager followed defendant into the mall. Ms. Rodriguez gave a description of the three individuals to a mall security guard. Ms. Rodriguez located Ms. Fernandez and summoned the security guard. As the security guard detained Ms. Fernandez, Ms. Rodriguez saw defendant exit one store and enter another. Defendant glanced in Ms. Rodriguez's direction, looked down and kept walking. Ms. Rodriguez, accompanied by a second security guard, approached defendant. The following transpired, according to Miss Rodriguez: “Q And then what happened? [¶] A I approached him. He was looking at shirts. He looked up and looked back down. And I then said, ‘Excuse me.’ And that's when \*\*68 he looked at me, and I said, ‘We have your friend.’ [¶] And that's when he said, ‘I know. I heard something about that. What's going on?’ [¶] ... [¶] Q What happened next? [¶] A And I said, ‘Oh, you know, we have a problem.’ [¶] And he said, ‘Okay. But I didn't pay the check.’ [¶] ... [¶] A I said, ‘Okay. But can you just please come with us[?]’ [¶] Q And what, if anything, did he do? [¶] A He followed.” When Ms. Rodriguez asked defendant whether he could pay the restaurant bill, he said he did not have any money.

Ms. Rodriguez returned to the restaurant where she was met by Deputy Bob Chu. Ms. Rodriguez told Deputy Chu she had three customers who paid with counterfeit bills. Deputy Chu examined the five \$20 bills and determined they were counterfeit. Deputy Chu and Ms. Rodriguez returned to the mall. Defendant was inside the mall security office. Ms. Rodriguez identified defendant as the person who had been in the restaurant.

Defendant was advised of his rights. Defendant agreed to talk to Deputy Chu. Deputy Chu testified: “[Defendant] told me that he was in the area because he saw the Outback Steakhouse right off the freeway. And he decided to go there and get some

food. He said that—he told me he went there to eat, and he did not have any money on him because he had spent his money buying gas going from Ocean-side to Riverside.” Defendant said Jeff paid the \*188 restaurant bill. Defendant said he did not know the \$20 bills were counterfeit. Defendant said he did not see Ms. Rodriguez trying to stop him in the parking lot. Defendant said he was going to Sears to buy a car battery. Defendant did not have a car battery in his possession when he was detained.

Detective Alfredo Gomez was the detective assigned to the case. On May 26, 2012, Detective Gomez spoke with defendant in a jail cell. The interview, which lasted 10 to 15 minutes, was not recorded. Defendant was advised of his constitutional rights. Defendant agreed to speak with Detective Gomez. Detective Gomez testified he believed he was going to be lied to. Thus, while interviewing defendant, Detective Gomez decided to engage in a ruse. Detective Gomez described the ruse and defendant's response as follows: “I told the defendant that the arresting deputy didn't have an opportunity to view the surveillance video at the restaurant and that I did. And I told him I already knew what happened and I saw what happened and who paid for it. So then he admitted to me that he paid for the—for the food.” In fact, there was no surveillance video system at the restaurant. According to Detective Gomez, defendant made the following statement, “He told me his nephew Jeff had given him the money earlier in the day for gas and food.” Defendant denied knowing the bills were counterfeit. Detective Gomez confronted defendant about having lied to Deputy Chu about paying for the food. Defendant said nothing in response when confronted about having lied to Deputy Chu. Detective Gomez then described his efforts to find out about the individual identified only as Jeff: “I wanted to go into trying to find out who Jeff was, his nephew, and he didn't want to give me any details, any identifying information as far as first name, birth date, last name, you know, so maybe I could speak to Jeff. And that's where I concluded the interview.”

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### III. DISCUSSION

#### A. Procedural History

Many of the issues presented by the parties involve the interplay between sections 484, subdivision (a) and 666. We begin by setting forth the information's \*\*69 allegations concerning counts 2 and 3. In count 2, the information alleges in part: "On or about May 25, 2012 ..., the crime of PRIOR [PETTY] THEFT-290/STRIKE, in violation of PENAL CODE SECTION 666(b), a Felony, was committed by [defendant], who did unlawfully and in violation of Penal Code section 484(a), steal take and carry away the personal property of OUTBACK STEAKHOUSE. It is further alleged that defendant was previously convicted in the State of California of the crime(s) listed below and served a term for each crime in a penal institution and was imprisoned therein as a condition of probation." The information alleges three nonviolent and non-serious felony convictions sustained in San Diego County: \*189 a January 21, 1993 conviction for violating Vehicle Code section 10851, subdivision (a) (case No. CRN23272); a June 23, 2004 conviction for receiving stolen property in violation of section 496 (case No. SCN180434); and a September 13, 2011 conviction for second degree burglary in violation of section 459 (case No. SCN278526). In addition, the information alleges as to count 2 defendant had sustained a prior violent or serious felony conviction on October 30, 1978, in San Diego County for robbery in violation of section 211 in case No. CRN5384. Finally, as to count 2, the information concludes, "It is further alleged that prison custody time for the offense is to be served in state prison."

Count 3 of the information alleges a theft count arising out of the same incident at the Outback Steakhouse against defendant: "On or about May 25, 2012 ..., the crime of PETTY THEFT WITH 3 PRIORS, in violation of PENAL CODE SECTION 666(a), a Felony, was committed by [defendant], who did unlawfully and in violation of Penal Code section 484(a), steal[,] take and carry away the personal property of OUTBACK STEAKHOUSE. It is

further alleged that defendant was previously convicted in the State of California of the crimes listed below and served a term for each crime in a penal institution and was imprisoned therein as a condition of probation." The three San Diego County nonviolent and nonserious prior felony convictions are the same as those alleged in count 2—vehicle theft, receiving stolen property, and second-degree burglary. Count 3 does not reallege the prior October 30, 1978 San Diego County robbery conviction alleged in count 2. Unlike count 2, count 3 contains no allegation that any sentence must be served in state prison.

Prior to trial, defendant admitted all the allegations of four prior San Diego County convictions were true. In this way, defendant precluded the jury from learning of those prior convictions. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480, 279 Cal.Rptr. 847, 807 P.2d 1076 ["Under established case law ... applying [§§ ] 666, 1025, and 1093, defendant had a right to stipulate to the prior conviction and incarceration and thereby preclude the jury from learning of the fact of his prior conviction."]; *People v. Witcher* (1995) 41 Cal.App.4th 223, 233, 48 Cal.Rptr.2d 421 [same].) Consistent with CAL-CRIM No. 1800, the trial court indicated it would not identify the charged offense as either a petty or grand theft when explaining the charges to the jury. With the consent of both counsel, the trial court stated, "I would not identify either as a petty theft or a grand theft, but it would just be going in as a theft as a felony."

The trial court stated that only one theft offense would be presented to the jury: "So based upon counsels' agreement, the jury will not be presented with the separate offenses based upon defendant's request of 666(a) and (b). Those \*190 will be considered sentencing issues for the court if the defendant is convicted of count 2.... [¶] \*\*70 And the jury will not be making separate findings as to count 2 and 3 but will be relying upon the modified count 2, again which will only support a sentencing issue if the defendant is convicted." The trial court

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then directed the prosecutor not to mention the alleged prior convictions. The deputy district attorney, John F. Urgo, was advised to instruct the prosecution witnesses to make no mention of defendant's prior convictions. The case was presented to the jury after renumbering the counts to reflect there was a single theft charge. The jury was advised that: count 1 involved the burglary charge; count 2 involved only a single theft charge; count 3 charged defendant with forgery; and count 4 involved possession of a counterfeit government seal.

In compliance with the parties' agreement, the jury was instructed with a modified version of CALCRIM No. 1800.<sup>FN2</sup> The jurors returned a single verdict as to the renumbered theft charge in count 2, "We, the jury in the above-entitled action, find the defendant ... GUILTY of the offense charged, to wit: the crime of THEFT, in violation of Penal Code section 484, a felony, as charged in Count 2 of the Information." But defendant was sentenced on two counts of petty theft. As to counts 1 through 4, defendant received a midterm sentence of two years. The trial court ruled, "Those counts will merge pursuant to Penal Code section 654." As to count 5, possession of a counterfeit seal, the trial court imposed a consecutive term of eight months. Thus, the trial court orally calculated the sentence of two years, eight months. The trial court doubled that term because of defendant's prior San Diego County robbery conviction for a total sentence of five years, four months. In the unpublished portion of the opinion, we discuss various sentencing issues.

FN2. The jurors were instructed in connection with the theft charge: "The defendant is charged in count 2 with theft. [¶] To prove that the defendant guilty—to prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took possession of property owned by someone else; [¶] 2. The defendant took the property without the owner's or owner's agent's consent; [¶] 3. When the defendant

took the property, he intended to deprive the owner of it permanently; and [¶] 4. The defendant moved the property, even a small distance, and kept it for any period time, however brief. [¶] An agent is someone to whom the owner has given complete or partial authority and control over the owner's property. [¶] For theft, the property taken can be of any value, no matter how slight."

#### B. Pleading And Trying Two Petty Thefts

[1]As noted, defendant stands convicted of two counts of petty theft for using counterfeit bills on a single occasion to pay for a meal. Defendant argues that he may not be charged in both counts 2 and 3 for the same petty theft. Defendant reasons that counts 2 and 3 involve a single offense—the petty theft from the restaurant. (*People v. Bouzas*, *supra*, 53 Cal.3d at p. 469, 279 Cal.Rptr. 847, 807 P.2d 1076; *People v. Witcher*, *supra*, 41 Cal.App.4th at p. 233, 48 Cal.Rptr.2d 421.) Because both counts \*191 involve a single offense, defendant argues either the conviction under count 2 or 3 must be vacated. We need not address any issue of pleading or trying count 3. As we will note, the judgment as to count 3 must be reversed.

Defendant correctly argues that section 666 does not define an offense; rather it is a sentencing provision. Our Supreme Court explained in some detail why section 666 is not an "offense" as follows: "Section 666 is—and has been since 1872—part of title 16 of the Penal Code, which is directed primarily to sentencing and punishment matters, to the exclusion of statutes defining\*\*71 substantive crimes (see [*People v. Cooks*] (1965) 235 Cal.App.2d 6, [10, 44 Cal.Rptr. 819] [history of former §§ 666 & 667]). This supports our conclusion that the Legislature has long intended that section 666 establishes a penalty, not a substantive 'offense.' [¶] The language of section 666 affirms this view. It is structured to enhance the punishment for violation of other defined crimes and not to define an offense in the first instance. It simply

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refers to other substantive offenses defined elsewhere in the Penal and Vehicle Codes and provides that if a defendant has previously been convicted of and imprisoned for any of these theft-related offenses, and thereafter commits petty theft (defined in section 484), the defendant is subject to punishment enhanced over that which would apply following a ‘first time’ petty theft conviction. [¶] In other words, a charge under section 666 merely puts a defendant on notice (see § 969 [prior convictions must be alleged in the information] ) that if he is convicted of the substantive offense and if the prior conviction and incarceration allegation of section 666 is admitted or found true, he faces enhanced punishment at the time of sentencing. We conclude that, on its face, section 666 is a sentence-enhancing statute, not a substantive ‘offense’ statute.” ( *People v. Bouzas*, *supra*, 53 Cal.3d at pp. 478–479, 279 Cal.Rptr. 847, 807 P.2d 1076; see *People v. Shaw* (2009) 177 Cal.App.4th 92, 101, 99 Cal.Rptr.3d 112.) Section 666 defines the potential penalties for petty theft with specified theft related prior convictions and incarceration requirements. (§ 666, subd. (a)-(b); *People v. Bouzas*, *supra*, 53 Cal.3d at p. 471, 279 Cal.Rptr. 847, 807 P.2d 1076 [“section 666 ... provides that a defendant who has been convicted of and imprisoned for enumerated theft-related crimes (certain misdemeanors and felonies) and who is subsequently convicted of petty theft ‘is punishable....’ ”]; *People v. Robinson* (2004) 122 Cal.App.4th 275, 281, 18 Cal.Rptr.3d 744 [“Section 666 ... is a discretionary sentencing statute which, upon the establishment of a qualifying prior conviction, allows the trial court to punish petty theft as either a felony or a misdemeanor.”].) Thus, counts 2 and 3 charge the substantive offense of petty theft.

[2]We agree defendant may not be convicted under both counts 2 and 3. When a single theft occurs at the same time as part of one transaction, only one conviction may be returned. In *People v. Nor Woods* (1951) 37 Cal.2d 584, 586–587, 233 P.2d 897, a used car dealer was convicted of two grand theft counts. The used car dealer took both a

1946 Ford and some cash in \*192 exchange for a 1949 Ford. The 1946 Ford was taken as a trade-in for the newer 1949 model. The used car dealer then failed to deliver the new 1949 Ford or to return the 1946 Ford and the money to the victim. Our Supreme Court held under these circumstances only a single theft occurred: “Defendant contends that at most he was guilty of the commission of one offense. We agree with this contention. It is unnecessary to determine under what circumstances the taking of different property from the same person at different times may constitute one or more thefts. (See *People v. Howes* [ (1950) ] 99 Cal.App.2d 808, 818–821 [222 P.2d 969], and cases cited.) In the present case both the car and the money were taken at the same time as part of a single transaction whereby defendant defrauded [the victim] of the purchase price of the 1949 Ford. There was, accordingly, only one theft....” ( *People v. Nor Woods*, *supra*, 37 Cal.2d at pp. 586–587, 233 P.2d 897; see *In re Johnson* (1966) 65 Cal.2d 393, 395, 54 Cal.Rptr. 873, 420 P.2d 393; *People v. Neder* (1971) 16 Cal.App.3d 846, 853, fn. 3, 94 Cal.Rptr. 364.) Our Supreme Court later characterized\*\*72 the decision in *Nor Woods* as holding the used car dealer was improperly convicted of two counts of theft rather than only one count. (See *People v. Correa* (2012) 54 Cal.4th 331, 339–340, 142 Cal.Rptr.3d 546, 278 P.3d 809.) Here, counts 2 and 3 involve the same theft of the identical meal on a single occasion at the Outback Steakhouse on May 25, 2012. Thus, the judgment as to count 3 must be reversed. Upon remittitur issuance, count 3 is to be dismissed. We need not address defendant’s remaining contentions concerning count 3.

#### C. Defendant May Be Convicted of Felony Petty Theft

##### 1. Defendant’s contention

Defendant argues his count 2 four-year sentence (§§ 484, 666, subd. (b)) must be reversed because his conduct can only be prosecuted under section 537, subdivision (a), not section 484, subdivision (a). Defendant relies on *In re Williamson* (1954) 43 Cal.2d 651, 654, 276 P.2d 593 ( *William-*

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son ), and *People v. Fiene* (1964) 226 Cal.App.2d 305, 306, 37 Cal.Rptr. 925 ( *Fiene* ). We disagree.

## 2. The statutes

Both sections 484 and 537, subdivision (a) involve theft-related conduct. Section 484 provides, “Every person ... who shall knowingly and designedly, by any false or fraudulent representation or pretense, *defraud* any other person of money, ... or personal property ... is guilty of theft.” Where the value of the thing taken is less than \$950, the offense is a petty theft. (§§ 487, subd. (a), 488.) Section 490 states, “Petty theft is punishable by fine not exceeding one thousand dollars \*193 (\$1,000), or by imprisonment in the county jail not exceeding six months, or both.” (§ 490.) Petty theft is generally punished as a misdemeanor. (§ 17, subd. (a); *People v. Williams* (2004) 34 Cal.4th 397, 404, fn. 4, 19 Cal.Rptr.3d 619, 98 P.3d 876; *People v. Crossdale* (2002) 27 Cal.4th 408, 410–411, 116 Cal.Rptr.2d 686, 39 P.3d 1115.)

Section 537, subdivision (a), proscribes conduct including defrauding an innkeeper. Section 537, subdivision (a), states in part: “Any person who obtains any food [or] services ... at a ... restaurant ... without paying therefor, with intent to *defraud* the proprietor or manager thereof ... or who, after obtaining ... food [or] services ... at [a] ... restaurant ... absconds, ... with the intent not to pay for his or her food ... is guilty of a public offense punishable as follows: [¶] (1) If the value of the ... food ... is nine hundred fifty dollars (\$950) or less, by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in the county jail for a term not exceeding six months, or both.” (Italics added.) The punishment for petty theft and defrauding an innkeeper are the same.

[3][4]As noted, the prior conviction facet of section 666 is not an element of section 484. ( *People v. Bouzas*, *supra*, 53 Cal.3d at pp. 478–479, 279 Cal.Rptr. 847, 807 P.2d 1076; see *People v. Shaw*, *supra*, 177 Cal.App.4th at p. 101, 99 Cal.Rptr.3d 112.) Thus, a petty theft in violation of section 484, ordinarily a misdemeanor, may be el-

evated to a felony when charged as a petty theft with a prior conviction under section 666. ( *People v. Williams*, *supra*, 34 Cal.4th at p. 404, fn. 4, 19 Cal.Rptr.3d 619, 98 P.3d 876; *People v. Artis* (1993) 20 Cal.App.4th 1024, 1026, 25 Cal.Rptr.2d 63.) But felony petty theft is not a substantively different offense than misdemeanor petty theft. The elements of petty theft as a misdemeanor or a felony are precisely the same. The difference between the misdemeanor and felony theft is not because they have different elements. It is because petty theft is made a \*\*73 felony because of a sentencing statute—section 666. Defendant was sentenced on count 2 pursuant to section 666, subdivision (b). At the time defendant committed the present offense, section 666, subdivision (b) stated: “Notwithstanding Section 490 [specifying the punishment for petty theft], any person [who has a prior violent or serious felony conviction, as specified in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7] who, having been convicted of petty theft ... and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.” (§ 666, subs. (b) & (b)(1); Stats. 2011, ch. 39, § 21, eff. June 30, 2011.) Section 666 was amended effective January 1, 2014, i.e., subsequent to the present offense, to add “a conviction pursuant to subdivision (d) or (e) of Section 368” to the qualifying prior convictions in subdivisions (a) and (b). The amendment also made minor grammatical changes. (Stats. 2013, ch. 782, § 1.)

## \*194 3. The *Williamson* rule

[5][6][7]In *Williamson*, our Supreme Court held: “ ‘It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.’ ” ( *Williamson*, *supra*, 43 Cal.2d at p. 654, 276 P.2d 593, citing *People v.*

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*Breyer* (1934) 139 Cal.App. 547, 550, 34 P.2d 1065.) We will discuss the “conflict” aspect of the *Williamson* rule shortly. The general and special statutes must be construed to carry out the legislative objective. (*Williamson, supra*, 43 Cal.2d at p. 655, 276 P.2d 593.) The *Williamson* rule is further explained in *People v. Murphy* (2011) 52 Cal.4th 81, 86, 127 Cal.Rptr.3d 78, 253 P.3d 1216: “Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute. (*Ibid.*) ‘The rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict.’ (*People v. Walker* (2002) 29 Cal.4th 577, 586 [128 Cal.Rptr.2d 75, 59 P.3d 150].) ‘The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent.’” (Citing *People v. Jenkins* (1980) 28 Cal.3d 494, 505–506, 170 Cal.Rptr. 1, 620 P.2d 587; accord, *People v. Walker, supra*, 29 Cal.4th at pp. 585–586, 128 Cal.Rptr.2d 75, 59 P.3d 150.)

In *Williamson*, the defendant was charged with conspiring to act as a contractor without a license in violation of the general conspiracy statute, section 182, subdivision (a)(1). The charged conspiracy was punishable as a misdemeanor or as a felony under section 182. However, Business and Professions Code section 7030 specifically provided that conspiring to act as a contractor without a license was a misdemeanor. Our Supreme Court held the specific statute controlled over the general one because, “To conclude that the punishment for the violation of section 7030 of the Business and Professions Code is stated in section 182 of the Penal Code, which deals with conspiracies in general, would be inconsistent with the designation of the particular conspiracy as a misdemeanor.” (\*\*74 *In re Williamson, supra*, 43 Cal.2d at p. 655, 276 P.2d 593; see

*People v. McCall* (2013) 214 Cal.App.4th 1006, 1012–1013, 154 Cal.Rptr.3d 471.)

#### 4. *Fiene*

In *Fiene, supra*, 226 Cal.App.2d at page 306, 37 Cal.Rptr. 925, the defendant was convicted of violating former section 667—petty theft with a prior felony conviction. \*195 (Stats. 1941, ch. 106, § 11, pp. 1082–1083.)<sup>FN3</sup> The defendant had exited a restaurant without paying his bill. Division Four of this appellate district held section 537 (see Stats. 1959, ch. 1990, § 1)<sup>FN4</sup>, prevented the trial court from acquiring jurisdiction in the case. (*Fiene, supra*, 226 Cal.App.2d at pp. 307–308, 37 Cal.Rptr. 925.) Both parties agreed the elements of section 537 were the same as those of petty theft in violation of section 484. The Attorney General argued, however, that the Legislature did not intend that section 537 apply when a defendant who committed a petty theft had a prior conviction that qualified him for greater penalty under section 667. The Attorney General asserted, “The Legislature ... ‘would not want to give less protection to ... restaurant proprietors if the defrauding was carried out by a released felon.’” (*Fiene, supra*, 226 Cal.App.2d at p. 308, 37 Cal.Rptr. 925.) The Court of Appeal disagreed. The Court of Appeal held the defendant’s conduct came within a special statute—section 537. The *Fiene* opinion does not discuss how the theft and defrauding an innkeeper statutes were in conflict. The conflict issue was never raised nor discussed. The Court of Appeal reversed the judgment. (*People v. Fiene, supra*, 226 Cal.App.2d at p. 308, 37 Cal.Rptr. 925.) *Fiene* has not been followed for this proposition in any published California case.

FN3. In 1963, when the defendant in *Fiene* committed his offense, section 667 stated, “Every person who, having been convicted of any felony either in this State or elsewhere, and having served a term therefor in any penal institution, commits petty theft after such conviction, is punishable therefor by imprisonment in the county jail not exceeding one year or in the State pris-

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on not exceeding five years.” (Stats. 1941, ch. 106, § 11, pp. 1082–1083.)

FN4. In 1963, when the defendant in *Fiene* committed his offense, section 537 stated in part, “Any person who ... after obtaining ... food ... at [a] ... restaurant absconds, ... without paying for his food ... is guilty of a misdemeanor.” (Stats. 1959, ch. 1990, § 1, p. 4597.)

#### 5. *Artis*

As noted, the *Fiene* opinion never discussed the “conflict” element of a defense the accused’s conduct is only subject to a more specific, less onerous offense. Since *Fiene* was decided, courts have clarified that there must be a conflict between the general and specific offense in order for the accused to benefit. For example, in *People v. Artis*, *supra*. 20 Cal.App.4th at pages 1025–1026, 25 Cal.Rptr.2d 63, the defendant took a refrigerator from his leased apartment and sold it. The defendant was charged with petty theft with a prior conviction under sections 484 and 666. A section 995 motion to set aside the information on grounds defendant should have been prosecuted for embezzlement under section 507 was granted. The Court of Appeal reversed the dismissal order.

Section 507 states in part, “Every person entrusted with any property as bailee, tenant, or lodger ... who fraudulently converts the same or the proceeds thereof to his own use ... is guilty of embezzlement.” The Court of \*196 Appeal for the Fourth Appellate District, Division One, held: “Although *Artis* refers to his crime as a mere conversion, the Legislature has \*\*75 expressly declared it to be a form of embezzlement. As embezzlement, it is theft. (§ 490a.) As theft it is chargeable as a violation of section 484 and, critical to *Artis*, it is an offense which may be elevated to felony status when charged as petty theft with a prior. (§ 666.) [¶] ... [¶] The starting point is whether the general and special statutes which include the same subject matter contain provisions which conflict. ( *In re Williamson* [, *supra*.] 43 Cal.2d [at p.]

654 [276 P.2d 593].) In *Williamson*, a conflict existed because a special statute declared an offense to be a misdemeanor, while a general statute would permit the People to elevate the crime to a felony.... [¶] ... [¶] Unlike the cases *Artis* cites, there are no conflicts between the elements to prove, or the punishment for, embezzlement under section 484 and embezzlement defined in section 507. Each is punished ‘in the manner prescribed for theft of property of the value or kind embezzled.’ (§ 514.) Thus, had *Artis* been a first-time theft offender, he would face a misdemeanor sentence for this ‘petty’ theft regardless of how it was charged. Because there is no conflict between these statutes, *Artis* currently may be charged under section 484 and thus is subject to the felony enhancing provisions of section 666.” ( *People v. Artis*, *supra*. 20 Cal.App.4th at pp. 1026–1027, 25 Cal.Rptr.2d 63, fn. omitted; see 1 Witkin, Cal. Crim. Law (4th ed. 2012) Introduction to Crimes: Criminal Statutes, ch. I, § 77, p. 136 [“because there is no conflict between [section] 507 (embezzlement of property by tenant) and [section] 484 (general theft statute), tenant who embezzles property may be charged under either statute”].)

The *Artis* analysis, which clarifies the necessity of a conflict between the general and specific crimes, is consistent with other authority. While discussing the general/special statute jurisprudence, the Court of Appeal for the Third Appellate District explained: “As for the *Gilbert– Gasaway* interpretive principle of a special statute being the exception to a general one on the same subject, that principle’s application has been described succinctly as pivoting on whether there are ‘conflicts between the elements to prove, or the punishment for,’ the statutes at issue. ( *Artis*, *supra*, 20 Cal.App.4th at p. 1027, 25 Cal.Rptr.2d 63.) If so, the special statute is considered an exception to the general statute. ( [ *People v. Gilbert* [ (1969) ] 1 Cal.3d [475,] 479 [82 Cal.Rptr. 724, 462 P.2d 580]; *Gasaway v. Superior Court* (1977) 70 Cal.App.3d 545.] 550 [139 Cal.Rptr. 27].)” ( *Bradwell v. Superior Court* (2007) 156 Cal.App.4th 265, 271, 67 Cal.Rptr.3d 163.) We turn now to *Gilbert* and *Gasaway*, the two

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decisions cited *Bradwell*.

In *People v. Gilbert, supra*, 1 Cal.3d at pages 480–481, 82 Cal.Rptr. 724, 462 P.2d 580, our Supreme Court explained the relationship between two misdemeanor welfare fraud and grand theft statutes. In *Gilbert*, the defendant was convicted of violating the general grand theft statute, a felony. Our Supreme Court held the more specific provision, a misdemeanor violation of former \*197 Welfare and Institutions Code section 11482, <sup>FN5</sup> was the greatest offense of which the defendant could be convicted. Our Supreme Court then described the \*\*76 type of conflict *Williamson* was designed to mitigate: “Inasmuch as the clause as to false statements applies only to statements made in *obtaining* unauthorized assistance, it follows that any conduct which violated that clause would also constitute a violation of the theft provision of the Penal Code. This overlap of provisions carrying conflicting penalties typifies the kind of conflict which we envisioned in *Williamson*; it requires us to give effect to the special provision alone in the face of the dual applicability of the general provision of the Penal Code and the special provision of the Welfare and Institutions Code.” (*People v. Gilbert, supra*, 1 Cal.3d at p. 481, 82 Cal.Rptr. 724, 462 P.2d 580; accord, *Patterson v. Municipal Court* (1971) 17 Cal.App.3d 84, 89, 94 Cal.Rptr. 449 [discussing the *Gilbert* conflict analysis in the context of an amendment to an accusatory pleading in welfare fraud case]; *People v. Superior Court (Fuller)* (1971) 14 Cal.App.3d 935, 949, 92 Cal.Rptr. 545 [applying *Gilbert* conflict discussion in the context of Vehicle Code violations with varying penalties].)

FN5. As it was in effect at the time pertinent to the *Gilbert* decision, former Welfare and Institutions Code section 11482 stated, “Any person other than a needy child, who willfully and knowingly, with the intent to deceive, makes a false statement or representation or knowingly fails to disclose a material fact to obtain aid, or who, knowing he is not entitled thereto, attempts to

obtain and or to continue to receive aid to which he is not entitled, or a larger amount than that to which he is legally entitled, is guilty of a misdemeanor.” (Stats. 1965, ch. 1784, § 5, p. 4018.)

In *Gasaway v. Superior Court, supra*, 70 Cal.App.3d at pages 547–548, 139 Cal.Rptr. 27, the defendant was accused of four counts of welfare fraud occurring between October 1973 and March 1974. (Former Welf. & Inst.Code. § 11483, subd. (2).<sup>FN6</sup>) The information was filed more than three years after three of the four alleged acts of welfare fraud. The Court of Appeal ultimately held that the controlling statute of limitations for welfare fraud was three years. But the statute of limitations for grand theft was three years from the *discovery* of the offense, not its commission. Thus, in the view of the Court of Appeal, the limitations period for theft, with its discovery statute of limitations, was more onerous than that for welfare fraud. That aspect of the holding is not controlling to our case. Rather, the relevant discussion in *Gasaway* relates to the conflict analysis in *Gilbert*.

FN6. As it was in effect between 1973 and March 1974, former Welfare and Institutions Code section 11483, subdivision (2) stated: “Whenever any person has, by means of false statement or representation or by impersonation of another fraudulent device, obtained aid for child not in fact entitled thereto, the person obtaining such aid shall be punished as follows: [¶] ... (2) If the amount obtained or retained is more than two hundred dollars (\$200), by imprisonment in the state prison for not less than one year or more than 10 years or by imprisonment in the county jail for not more than one year.” (Stats. 1970, ch. 693, § 1, p. 1322.)

In *Gasaway*, the Court of Appeal digested the conflict analysis in *Gilbert* thusly: “[I]n *People v. Gilbert, supra*, 1 Cal.3d 475 at page 479 [82 Cal.Rptr. 724, 462 P.2d 580], the Supreme \*198

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Court specifically held that ‘welfare fraud cannot be prosecuted under section 484 of the Penal Code.’ Gilbert was convicted of fraudulently obtaining more than \$200 in aid to families with dependent children in violation of section 484 of the Penal Code. The court held that Welfare and Institutions Code section 11482, as a special provision of the Welfare and Institutions Code dealing with welfare fraud, precluded prosecution of such fraud under the older general theft provision of the Penal Code. [Citation.] ‘As we stated in *In re Williamson* [supra.] Cal.2d [at page 654, 276 P.2d 593], “It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.” [Citations.]’ ( 1 Cal.3d 475, at p. 479 [82 Cal.Rptr. 724, 462 P.2d 580].) The court pointed out the conflict in the penalties provided for in \*\*77Welfare and Institutions Code section 11482 (a misdemeanor) and Penal Code section 484 (a felony if over \$200 is taken; see Pen.Code, §§ 19, 487, subd. 1, 489; see also *People v. Legerretta* [ (1970) ] 8 Cal.App.3d 928 [87 Cal.Rptr. 587]).” ( *Gasaway v. Superior Court*, supra, 70 Cal.App.3d at pp. 549–550, 139 Cal.Rptr. 27, fn. omitted.)

In *Gasaway*, the Court of Appeal noted in the case before it, there was no conflict in the penalties. The Court of Appeal explained: “Here, there is no conflict in penalties, since the penalty for violation of either [Welfare and Institutions Code] section 11483, subdivision (2) or Penal Code section 484 (see Pen.Code, § 489), is imprisonment in state prison for not more than 10 years or county jail for not more than one year. (Welf. & Inst.Code, § 11483, subd. (2); Pen.Code, § 489.)” ( *Gasaway v. Superior Court*, supra, 70 Cal.App.3d at p. 550, 139 Cal.Rptr. 27.) However, the Court of Appeal held that the theft offense with a longer statute of limitations was the more onerous provision. As we will explain, no such issue is present here.

[8]To sum up, the *Williamson* decision requires

there be a conflict between the two provisions before the general and specific statutes jurisprudence can limit prosecutorial charging discretion. *Gilbert* exemplifies how a conflict can arise in the sentencing context. *Gasaway* explains when there is no conflict in the sentencing context. And *Artis* describes in the theft-related context how there is no conflict in the elements of an offense.

## 6. Conclusion

[9]We respectfully disagree with the Court of Appeal's decision in *Fiene*. As noted, the information alleges in relevant parts in counts 2 and 3 that defendant “did steal[,] take and carry away the personal property of” the steakhouse. As to count 2, the jury was instructed in part: “The defendant is charged in Count 2 with theft. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took \*199 possession of property owned by someone else; [¶] 2. The defendant took the property without the owner's or the owner's agent's consent; [¶] 3. When defendant took the property he intended to deprive the owner of it permanently; [¶] AND [¶] 4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief.” Thus, as charged and as tried, the theft counts were premised on the following language in section 484, subdivision (a), “Every person who shall feloniously steal, take ... the personal property of another ... is guilty of theft.” The information's allegations and instructions were premised on the theory defendant committed a petty theft by larceny. (See *People v. Gomez* (2008) 43 Cal.4th 249, 254–255, 74 Cal.Rptr.3d 123, 179 P.3d 917; *People v. Davis* (1998) 19 Cal.4th 301, 305, 79 Cal.Rptr.2d 295, 965 P.2d 1165.) Theft is divided into two degrees, petty and grand theft. (§ 486; *People v. Crossdale* (2002) 27 Cal.4th 408, 410, 116 Cal.Rptr.2d 686, 39 P.3d 1115.) The demarcation between grand and petty theft is now \$950. When the value of the property taken exceeds \$950, the crime is grand theft. (§ 487, subd. (a); see *Breceda v. Superior Court* (2013) 215 Cal.App.4th 934, 953, 156 Cal.Rptr.3d 130; *People v. Wade* (2012) 204

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Cal.App.4th 1142, 1150, 139 Cal.Rptr.3d 529.) The \$950 differentiation between grand and petty theft was adopted effective January 1, 2011. (Stats. 2010, ch. 693, § 1; Cal. Const., art. IV, § 8, subd. (c)(1).) The punishment for petty theft is as follows, “Petty theft is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both.” (§ 490.)

**\*\*78** The parties agree the following language in section 537, subdivision (a) covers the same conduct charged in the information. Section 537, subdivision (a) states in part: “Any person who ... after obtaining ... food ... restaurant ... absconds ... therefrom with the intent not to pay for his or her food ... is guilty of a public offense punishable as follows: [¶] (1) If the value of the ... food ... is nine hundred fifty dollars (\$950) or less, by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in the county jail for a term not exceeding six months, or both.” When the value of the food taken exceeds \$950, the defendant can be convicted of a felony. (§ 537, subd. (a)(2).) The \$950 differentiation between section 537, subdivisions (a) and (b) was adopted effective January 25, 2010. (Stats. 2010, ch. 28, § 27; Cal. Const., art. IV, § 8, subd. (c)(1).)

[10]Defendant could be tried either for petty theft or a violation of section 537, subdivision (a)(1). The two offenses do not conflict. Both offenses permit conviction when food is taken and not paid for. When the food's value is \$950 or below, the offense is a misdemeanor under sections 490 or 537, subdivision (a)(2). And the potential sentences for petty theft and a violation of section 537, subdivision (a)(1) are the same. Further, the general misdemeanor statute of limitations applies to both provisions when there is a taking of food. (§ 802, subd. (a).) There is no conflict in the elements, punishment or **\*200** statutes of limitations. Hence, as there is no conflict between the petty theft statute and section 537, subdivision (a), the *Williamson* rule is inapplicable. (*People v. Gilbert*, *supra*, 1

Cal.3d at p. 481, 82 Cal.Rptr. 724, 462 P.2d 580; *Bradwell v. Superior Court*, *supra*, 156 Cal.App.4th at p. 271, 67 Cal.Rptr.3d 163; *People v. Artis*, *supra*, 20 Cal.App.4th at pp. 1025–1026, 25 Cal.Rptr.2d 63; *Gasaway v. Superior Court*, *supra*, 70 Cal.App.3d at pp. 547–548, 139 Cal.Rptr. 27.)

We now return to the *Fiene* decision. As noted, the *Williamson* conflict issue was not raised by the defendant. (*Fiene*, *supra*, 226 Cal.App.2d at p. 307, 37 Cal.Rptr. 925.) Rather, the Attorney General raised the *Williamson* issue in this sole context: “However, the Attorney General, with commendable objectivity, raises a much more serious question, one which is raised for the first time in these proceedings, and, one which, we believe, requires a reversal of the judgment. [¶] The question presented is whether the existence of Penal Code, section 537 (the innkeeper statute), making it a misdemeanor to defraud an innkeeper, prevents the superior court from acquiring jurisdiction in this matter.” (*Fiene*, *supra*, 226 Cal.App.2d at p. 308, 37 Cal.Rptr. 925.) The Attorney General made a vague generalized non-factually supported legislative intent argument as to why the accused could be convicted of petty theft with a prior conviction. (*Ibid.* at p. 308, 37 Cal.Rptr. 925.) At no time did the Attorney General argue section 537 was in conflict with the petty theft with a prior conviction statute.

Here, the Attorney General expressly raised the conflict issue. The language chosen by our Supreme Court in *Williamson* requires a conflict exist between the two offenses. And in the one half-century since *Fiene* was decided, the California Supreme Court and the appellate courts have specifically delineated what the conflict language in *Williamson* means. Thus, we are more persuaded by those decisions as to what constitutes a conflict in the statutes than we are by the analysis in *Fiene*, *supra*, 226 Cal.App.2d at pages 307–308, 37 Cal.Rptr. 925. The trial court was thus free to sentence defendant for felony petty theft.

**\*\*79** D.–G. <sup>FN\*\*</sup>

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FN\*\* See footnote \*, *ante*.

END OF DOCUMENT

#### IV. DISPOSITION

The judgment as to count 3 is reversed. Upon remittitur issuance, count 3 is to be dismissed. The judgment is modified to impose four Penal Code section 1465.8, subdivision (a)(1) court operations assessments in the sum of \$160. Further, the judgment is modified to impose only four \*201 Government Code section 70373, subdivision (a)(1) court facilities assessments in the sum of \$120. The abstract of judgment is to be so modified. In addition, the abstract of judgment must be amended to include the \$10 local crime prevention programs fine (Pen.Code, § 1202.5, subd. (a)) together with penalties and a surcharge as ordered by the trial court, specifically: a \$10 state penalty (§ 1464, subd. (a)(1)); a \$7 county penalty (Gov.Code, § 76000, subd. (a)(1)); a \$5 state court construction penalty (Gov.Code, § 70372, subd. (a)(1)); a \$1 deoxyribonucleic acid penalty (Gov.Code, § 76104.6, subd. (a)(1)); a \$3 state-only deoxyribonucleic acid penalty (Gov.Code, § 76104.7, subd. (a)); a \$2 emergency medical services penalty (Gov.Code, § 76000.5, subd. (a)(1)); and a \$2 state surcharge (§ 1465.7, subd. (a)). The clerk of the superior court is to deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

We concur:

KRIEGLER, J.  
 FN\*\*\*  
 MINK, J.

FN\*\*\* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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**Effective:[See Text Amendments]**

West's Annotated California Codes Currentness

Revenue and Taxation Code (Refs &amp; Annos)

Division 2. Other Taxes (Refs &amp; Annos)

▣ Part 10. Personal Income Tax (Refs &amp; Annos)

▣ Chapter 1. General Provisions and Definitions (Refs &amp; Annos)

→ → **§ 17001. Short title**

This part is known and may be cited as the “Personal Income Tax Law.”

## CREDIT(S)

(Added by Stats.1955, c. 939, p. 1655, § 2, eff. June 6, 1955.)

## HISTORICAL AND STATUTORY NOTES

2010 Main Volume

Section 151 of Stats.1985, c. 1461, provides:

“Sections 711 to 714, inclusive, of the Tax Reform Act of 1984 (Public Law 98-369) enacted numerous technical corrections to the Tax Equity and Fiscal Responsibility Act of 1982 (Public Law 97-248). Many of those technical corrections modify provisions of the Internal Revenue Code which are incorporated into Parts 10 (commencing with Section 17001) and 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code by specific reference to portions of the Internal Revenue Code. Unless specifically provided otherwise, those technical corrections made by Public Law 98-369 to the provisions which are incorporated by reference are declaratory of existing law and shall be applied in the same manner as specified in Public Law 98-369.”

Section 187 of Stats.1987, c. 1138, provides:

“Sections 1800 to 1899A, inclusive, of the federal Tax Reform Act of 1986 (Public Law 99-514) enacted numerous technical corrections to provisions of the Internal Revenue Code which are incorporated into Parts 10 (commencing with Section 17001) and 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code by specific reference to portions of the Internal Revenue Code. Unless specifically provided otherwise, those technical corrections made by Public Law 99-514 to the provisions which are incorporated by reference are declaratory of existing law and shall be applied in the same manner as specified in Public Law

**Effective:[See Text Amendments]**

West's Annotated California Codes Currentness

Revenue and Taxation Code (Refs &amp; Annos)

Division 2. Other Taxes (Refs &amp; Annos)

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▣ Chapter 1. General Provisions and Definitions (Refs &amp; Annos)

→ → **§ 17004. Taxpayer**

“Taxpayer” includes any individual, fiduciary, estate, or trust subject to any tax imposed by this part or any partnership.

## CREDIT(S)

(Added by Stats.1955, c. 939, p. 1655, § 2, eff. June 6, 1955. Amended by Stats.1996, c. 952 (S.B.715), § 2.)

## HISTORICAL AND STATUTORY NOTES

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The 1996 amendment added “or any partnership” and made a nonsubstantive change.

Section 56 of Stats.1996, c. 952 (S.B.715), prior to amendment by Stats.1997, c. 604 (S.B.1106), § 44, eff. Oct. 3, 1997; Stats.1997, c. 605 (A.B.1040), § 109, provided:

“Except as otherwise provided, the provisions of this act shall be applied to taxable years beginning on or after January 1, 1997.”

Section 56 of Stats.1996, c. 952 (S.B.715), as amended by Stats.1997, c. 604 (S.B.1106), § 44, eff. Oct. 3, 1997; Stats.1997, c. 605 (A.B.1040), § 109, provides:

“Except as otherwise provided, the provisions of this act shall be applied to taxable or income years beginning on or after January 1, 1997.”

Former Notes

**C****Effective:[See Text Amendments]**

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▣ Chapter 1. General Provisions and Definitions (Refs & Annos)

→ → **§ 17006. Fiduciary**

“Fiduciary” means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporate, acting in any fiduciary capacity for any person, estate or trust.

**CREDIT(S)**

(Added by Stats.1955, c. 939, p. 1655, § 2, eff. June 6, 1955.)

**HISTORICAL AND STATUTORY NOTES**

2010 Main Volume

**Former Notes**

Former § 17006, added by Stats.1943, c. 659, § 1, defining “fiduciary”, was repealed by Stats.1955, c. 939, § 1, eff. June 6, 1955. See this section.

**Derivation**

Former § 17006, added by Stats.1943, c. 659, p. 2354, § 1.

Stats.1935, c. 329, p. 1090, § 2; Stats.1937, c. 668, p. 1831, § 1; Stats.1941, c. 1226, p. 3042, § 1; Stats.1941, c. 1275, p. 3220, § 1.

**CROSS REFERENCES**

Individual defined for purposes of this Part, see Revenue and Taxation Code § 17005.

Person defined for purposes of this Part, see Revenue and Taxation Code § 17007.

**LIBRARY REFERENCES**

C

**Effective: January 1, 2011**

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 Division 2. Other Taxes (Refs & Annos)  
     Part 10. Personal Income Tax (Refs & Annos)  
         Chapter 2. Imposition of Tax (Refs & Annos)  
             → → § 17041. Rates; inflation adjustment; adjusted gross income

(a)(1) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state who is not a part-year resident, except the head of a household as defined in Section 17042, taxes in the following amounts and at the following rates upon the amount of taxable income computed for the taxable year as if the resident were a resident of this state for the entire taxable year and for all prior taxable years for any carryover items, deferred income, suspended losses, or suspended deductions:

If the taxable income is:	The tax is:
Not over \$3,650	1% of the taxable income
Over \$3,650 but not  over \$8,650	\$36.50 plus 2% of the excess over \$3,650
Over \$8,650 but not  over \$13,650	\$136.50 plus 4% of the excess over \$8,650
Over \$13,650 but not  over \$18,950	\$336.50 plus 6% of the excess over \$13,650
Over \$18,950 but not  over \$23,950	\$654.50 plus 8% of the excess over \$18,950
Over \$23,950	\$1,054.50 plus 9.3% of the excess over \$23,950

(2) For taxable years beginning on or after January 1, 2009, and before January 1, 2011, the percentages specified in the

table in paragraph (1) shall be increased by adding 0.25 percent to each percentage.

(b)(1) There shall be imposed for each taxable year upon the taxable income of every nonresident or part-year resident, except the head of a household as defined in Section 17042, a tax as calculated in paragraph (2).

(2) The tax imposed under paragraph (1) shall be calculated by multiplying the "taxable income of a nonresident or part-year resident," as defined in subdivision (i), by a rate (expressed as a percentage) equal to the tax computed under subdivision (a) on the entire taxable income of the nonresident or part-year resident as if the nonresident or part-year resident were a resident of this state for the taxable year and as if the nonresident or part-year resident were a resident of this state for all prior taxable years for any carryover items, deferred income, suspended losses, or suspended deductions, divided by the amount of that income.

(c)(1) There shall be imposed for each taxable year upon the entire taxable income of every resident of this state who is not a part-year resident for that taxable year, when the resident is the head of a household, as defined in Section 17042, taxes in the following amounts and at the following rates upon the amount of taxable income computed for the taxable year as if the resident were a resident of the state for the entire taxable year and for all prior taxable years for carryover items, deferred income, suspended losses, or suspended deductions:

If the taxable income is:	The tax is:
Not over \$7,300	1% of the taxable income
Over \$7,300 but not	
over \$17,300	\$73 plus 2% of the excess
Over \$17,300 but not	over \$7,300
over \$22,300	\$273 plus 4% of the excess
Over \$22,300 but not	over \$17,300
over \$27,600	\$473 plus 6% of the excess
Over \$27,600 but not	over \$22,300
over \$32,600	\$791 plus 8% of the excess
Over \$32,600	over \$27,600
	\$1,191 plus 9.3% of the excess over \$32,600

(2) For taxable years beginning on or after January 1, 2009, and before January 1, 2011, the percentages specified in the table in paragraph (1) shall be increased by adding 0.25 percent to each percentage.

(d)(1) There shall be imposed for each taxable year upon the taxable income of every nonresident or part-year resident when the nonresident or part-year resident is the head of a household, as defined in Section 17042, a tax as calculated in paragraph (2).

(2) The tax imposed under paragraph (1) shall be calculated by multiplying the "taxable income of a nonresident or part-year resident," as defined in subdivision (i), by a rate (expressed as a percentage) equal to the tax computed under subdivision (c) on the entire taxable income of the nonresident or part-year resident as if the nonresident or part-year resident were a resident of this state for the taxable year and as if the nonresident or part-year resident were a resident of this state for all prior taxable years for any carryover items, deferred income, suspended losses, or suspended deductions, divided by the amount of that income.

(e) There shall be imposed for each taxable year upon the taxable income of every estate, trust, or common trust fund taxes equal to the amount computed under subdivision (a) for an individual having the same amount of taxable income.

(f) The tax imposed by this part is not a surtax.

(g)(1) Section 1(g) of the Internal Revenue Code, [FN1] relating to certain unearned income of children taxed as if parent's income, shall apply, except as otherwise provided.

(2) Section 1(g)(7)(B)(ii)(II) of the Internal Revenue Code is modified, for purposes of this part, by substituting "1 percent" for "10 percent."

(h) For each taxable year beginning on or after January 1, 1988, the Franchise Tax Board shall recompute the income tax brackets prescribed in subdivisions (a) and (c). That computation shall be made as follows:

(1) The California Department of Industrial Relations shall transmit annually to the Franchise Tax Board the percentage change in the California Consumer Price Index for all items from June of the prior calendar year to June of the current calendar year, no later than August 1 of the current calendar year.

(2) The Franchise Tax Board shall do both of the following:

(A) Compute an inflation adjustment factor by adding 100 percent to the percentage change figure that is furnished pursuant to paragraph (1) and dividing the result by 100.

(B) Multiply the preceding taxable year income tax brackets by the inflation adjustment factor determined in subparagraph (A) and round off the resulting products to the nearest one dollar (\$1).

(i)(1) For purposes of this part, the term "taxable income of a nonresident or part-year resident" includes each of the following:

(A) For any part of the taxable year during which the taxpayer was a resident of this state (as defined by Section 17014), all items of gross income and all deductions, regardless of source.

(B) For any part of the taxable year during which the taxpayer was not a resident of this state, gross income and deductions derived from sources within this state, determined in accordance with Article 9 of Chapter 3 (commencing with Section 17301) and Chapter 11 (commencing with Section 17951).

(2) For purposes of computing "taxable income of a nonresident or part-year resident" under paragraph (1), the amount of any net operating loss sustained in any taxable year during any part of which the taxpayer was not a resident of this state shall be limited to the sum of the following:

(A) The amount of the loss attributable to the part of the taxable year in which the taxpayer was a resident.

(B) The amount of the loss which, during the part of the taxable year the taxpayer is not a resident, is attributable to California source income and deductions allowable in arriving at taxable income of a nonresident or part-year resident.

(3) For purposes of computing "taxable income of a nonresident or part-year resident" under paragraph (1), any carryover items, deferred income, suspended losses, or suspended deductions shall only be includable or allowable to the extent that the carryover item, deferred income, suspended loss, or suspended deduction was derived from sources within this state, calculated as if the nonresident or part-year resident, for the portion of the year he or she was a nonresident, had been a nonresident for all prior years.

#### CREDIT(S)

(Added by Stats.1955, c. 939, p. 1659, § 2, eff. June 6, 1955. Amended by Stats.1959, c. 830, p. 2854, § 1, eff. June 8, 1959; Stats.1967, c. 963, p. 2478, § 30, eff. July 29, 1967; Stats.1971, 1st Ex.Sess., c. 1, p. 4897, § 11, eff. Dec. 8, 1971, operative Jan. 1, 1973; Stats.1973, c. 1180, p. 2462, § 1, eff. Oct. 2, 1973; Stats.1978, c. 569, p. 1925, § 1, eff. Aug. 30, 1978; Stats.1979, c. 1198, p. 4707, § 1, eff. Sept. 30, 1979; Initiative Measure (Prop. 7, § 1, approved June 8, 1982); Stats.1982, c. 327, § 179, eff. June 30, 1982; Stats.1983, c. 488, § 5, eff. July 28, 1983; Stats.1984, c. 938, § 1.7, eff. Sept. 7, 1984; Stats.1987, c. 1138, § 15, eff. Sept. 25, 1987; Stats.1988, c. 627, § 1; Stats.1989, c. 581, § 1, eff. Sept. 21, 1989; Stats.1989, c. 1352, § 7, eff. Oct. 2, 1989; Stats.1991, c. 117 (S.B.169), § 10, eff. July 16, 1991; Stats.1991, c. 474 (A.B.31), § 5, eff. Oct. 2, 1991; Stats.1992, c. 698 (A.B.2425), § 3, eff. Sept. 15, 1992; Stats.1993, c. 877 (S.B.673), § 8, eff. Oct. 6, 1993; Stats.1997, c. 611 (S.B.455), § 3, eff. Oct. 3, 1997; Stats.2001, c. 920 (A.B.1115), § 2.5, eff. Oct. 14, 2001; Stats.2003, c. 62 (S.B.600), § 280; Stats.2004, c. 13 (A.B.1740), § 1, eff. Feb. 11, 2004; Stats.2005, c. 22 (S.B.1108), § 183; Stats.2009-2010, 3rd Ex.Sess., c. 18 (A.B.3), § 9, eff. Feb. 20, 2009; Stats.2010, c. 14 (S.B.401), § 5.)

[FN1] Internal Revenue Code sections are in Title 26 of the U.S.C.A.

#### HISTORICAL AND STATUTORY NOTES

2010 Main Volume

As enacted in 1955, this section read:

**C****Effective:[See Text Amendments]**

West's Annotated California Codes Currentness

Revenue and Taxation Code (Refs & Annos)

Division 2. Other Taxes (Refs & Annos)

▣ Part 10. Personal Income Tax (Refs & Annos)

▣ Chapter 1. General Provisions and Definitions (Refs & Annos)

→ → **§ 17008. Partnership; partner**

“Partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this part, a trust or estate or a corporation.

“Partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

A person shall be recognized as a partner for income purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

## CREDIT(S)

(Added by Stats.1955, c. 939, p. 1656, § 2, eff. June 6, 1955.)

## HISTORICAL AND STATUTORY NOTES

## 2010 Main Volume

## Former Notes

Former § 17008, added by Stats.1943, c. 659, § 1, amended by Stats.1952, c. 11, § 1, defining “partnership” and “partner”, was repealed by Stats.1955, c. 939, § 1, eff. June 6, 1955. See this section.

## Derivation

Former § 17008, added by Stats.1943, c. 659, p. 2354, § 1, amended by Stats.1952, c. 11, § 1.

NO. 72657-9

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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In Re the Matter of:

The Beverly C. Morgan Family Trust dated  
April 3, 1985 as Amended and Restated  
In its Entirety on November 6, 2013.

Thomas E. Morgan,

Appellant,

v.

Nancy Shurtleff,

Respondent.

**CERTIFICATE OF SERVICE**

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Bruce A. McDermott, WSBA #18988  
Teresa Byers, WSBA #34388  
GARVEY SCHUBERT BARER  
Attorneys for Nancy Shurtleff

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I, Jill M. Beagle, certify under penalty of perjury under the laws of the State of Washington that on March 25, 2015, I caused to be served on the persons below, in the manner indicated for each, true and correct copies of the following:

- Brief of Respondent Nancy Shurtleff; and
- This Certificate of Service.

Bruce R. Moen  
Moen Law Offices, P.S.  
Puget Sound Plaza  
1325 4<sup>th</sup> Avenue, Ste. 1025  
Seattle, WA 98101  
*Via Legal Messenger*

DATED this 25<sup>th</sup> day of March, 2015.

GARVEY SCHUBERT BARER

BY   
Jill M. Beagle  
Legal Assistant

GSB:1172666.4 [18196.00100]

CERTIFICATE OF SERVICE