

CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION 2

In re Barnhart's Estate, 37 Cal. Rptr. 909

In re Barnhart's Estate, 37 Cal. Rptr. 909, 226 Cal. App. 2d 289 (Cal. App. 1964) · No. Civ. 27796

SUMMARY

**\*\*Summary:\*\*** This case construes a holographic will where the testator devised real and personal property to his daughter with instructions to "turn it over to the State of California as a museum" after her lifetime. The court held that the language created a fee simple devise to the daughter, not a life estate with remainder to the state, because the subsequent words were precatory recommendations rather than mandatory limitations. Regarding the residue from any lawsuit, the court found the testator intended to divide the balance equally among the eight previously named beneficiaries, rejecting the state's claim and the trial court's finding of partial intestacy. The opinion addresses will construction, the use of extrinsic evidence, the distinction between precatory and mandatory language, and the preference against intestacy.

CASE DETAILS

|                       |                                                                                                                                                                                                                      |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | California Court of Appeal, Second District, Division 2                                                                                                                                                              |
| WRITING FOR THE COURT | Kincaid; Herndon, Acting P.J.; Roth, J.                                                                                                                                                                              |
| JURISDICTION          | California                                                                                                                                                                                                           |
| DOCKET                | Civ. 27796                                                                                                                                                                                                           |
| DISPOSITION           | reversed                                                                                                                                                                                                             |
| PROCEDURAL POSTURE    | Appeal from judgment of the Superior Court of Los Angeles County in probate proceedings                                                                                                                              |
| STANDARD OF REVIEW    | Construction of a will is a question of law; findings of fact based on extrinsic evidence are binding if conflicting, but here the evidence is generally without conflict, so the construction is a question of law. |
| PRECEDENTIAL VALUE    | Published                                                                                                                                                                                                            |
| PARTIES               | Edward J. Cummings (as guardian and executor), Robert Cummings, William Harris (as guardian ad litem), State of California v. Patricia Chalgren, Joan Pengra                                                         |

TOPICS

probate

probate procedure

estate administration

statutory interpretation

standard of review

appellate procedure

## PRACTICE AREAS

Probate

Wills

Trusts

## QUESTIONS PRESENTED

1. Whether paragraph 1 of the will created a life estate in Patricia Chalgren with remainder to the State of California, or a fee simple devise with a precatory request.
2. Whether paragraphs 7 and 8 of the will disposed of the balance of the net proceeds from any lawsuit, and if so, to whom.

## HOLDINGS

1. Paragraph 1 of the will does not create a life estate with remainder to the state. Instead, it devises the real property and personal property (books, tools, machinery) to Patricia Chalgren in fee simple, with a precatory recommendation that she turn them over to the state as a museum upon her death. The bequest of 100 shares of McCord stock to Patricia is an outright gift.
2. The testator intended to bequeath 10% each to Oscar Watson and Glenn Ogg, and the remaining 80% of the net proceeds from any lawsuit to be divided equally among the eight previously named beneficiaries (Patricia Chalgren, Joan Pengra, Imogene Warner, Joanne Cummings, Ed Cummings, Robert Cummings, Wayne Cummings, and William Harris). The state is not entitled to any portion of that balance.

## KEY QUOTATIONS

*“I, George Edward Barnhart, being of Sound mind & I believe body, wish to make provision for the disposition of my property, if for any reason God should wish to call me.” (909)*

*“It is a fundamental and indisputable proposition that wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is one of law.” (913)*

*“While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not when addressed to his legatee be construed as a limitation upon the estate or interest which he has given to him in absolute terms.” (915)*

## FACTUAL BACKGROUND

George Edward Barnhart died in 1962, leaving a holographic will. He had two daughters, Patricia and Joan. He was an inventor. The will devised real property to Patricia with a direction to turn it over to the State of California as a museum after her life, and bequeathed stock to various individuals. It also provided that 10% of the net proceeds from any lawsuit go to Oscar Watson and Glenn Ogg, with the balance equally divided. The trial court found the will ambiguous and that the residue passed by intestacy.

## PROCEDURAL HISTORY

The decedent's holographic will was admitted to probate. A petition to determine interests in estate was filed by the daughters. The trial court entered findings and judgment, which the appellants challenged on appeal.

## DISPOSITION

reversed

## REMAND INSTRUCTIONS

The superior court is directed to enter a new judgment in conformance with the views herein expressed.

## CASES CITED

- Estate of Donnellan, 164 Cal. 14, 127 P. 166
- Estate of Jones, 55 Cal. 2d 531, 11 Cal. Rptr. 574, 360 P.2d 70
- Estate of Thompson, 50 Cal. 2d 613, 328 P.2d 1
- Estate of Axcelrod, 23 Cal. 2d 761, 147 P.2d 1
- Estate of Wilson, 184 Cal. 63, 193 P. 581
- Boggs v. Boggs, 63 Cal. App. 2d 576, 147 P.2d 116
- Estate of Collias, 37 Cal. 2d 587, 233 P.2d 554
- Estate of Richards, 154 Cal. 478, 98 P. 528
- Estate of Marti, 132 Cal. 666, 61 P. 964
- Estate of Kearns, 36 Cal. 2d 531, 225 P.2d 218
- Estate of Ford, 169 Cal. App. 2d 174, 336 P.2d 981
- Estate of Akeley, 35 Cal. 2d 26, 215 P.2d 921
- Estate of Blalock, 95 Cal. App. 2d 463, 213 P.2d 100
- Estate of Beldon, 11 Cal. 2d 108, 77 P.2d 1052
- Estate of Deacon, 172 Cal. App. 2d 319, 342 P.2d 261
- Estate of Swallow, 211 Cal. App. 2d 359, 27 Cal. Rptr. 235

## OPINION

Barnhart's Estate, In re, 37 Cal.Rptr. 909, 226 Cal.App.2d 289 (Cal. App. 1964) Page 909 provision for the disposition of my property, if for any reason God should wish to call me. 37 Cal.Rptr. 909 226 Cal.App.2d 289 "1. One payment of \$1000.00 from Patricia In the Matter of the ESTATE of George Chalgren as final settlement, [226 Cal.App.2d Edward BARNHART, Deceased.

293] the property at 2228 New York Dr. Altadena Edward J. CUMMINGS, Guardian of the & 407 & 411 Waldo Ave. Pasadena to be deeded to Estate of Wayne R. Cummings and also Patricia

Chalgren to have and to hold intact all Executor of the Estate of Joanne J. books, tools & machinery during her life time Cummings, and Robert Cummings, then turn it over to the State of California as a 'William Harris, Guardian ad litem for museum at 2228 New York Dr. plus 100 Shares 'William Harris, a Minor, State of McCord---- California, Appellants, vo '2.

Joan Pengra--100 Shares McCord---- Patricia CHALGREN and Joan Pengra, Respondents. '3. Imogene Warner 100 Shares U. S. Steel. Civ. 27796. District Court of Appeal, Second District, '4. Joanne--Ed--Robert--Wayne--all the Lots Division 2, California. as of in L.A. County except lot 4 T 7330--which I April 13, 1964. now own. plus 100 shares of McCord---- Rehearing Den Nay. pd byte '5.

Bill Harris Jr. 100 G. Unilever---- Hearing Denied June 3, 1964. '6. Lot 4 T 7330 to Scar Watson-- he to act as Page 910 trustee for my Estate. [226 Cal.App.2d 292] Joslyn & Joslyn, Hahn '7. All residue from any LawSuit 10% to Mr. & Hahn, William S. Johnstone, Jr., Loren H. Oscar Watson & the Balance Equally divided--Mr. Russell, Pasadena, Stanley Mosk, Atty.

Gen., Carl Watson to have the full & complete say in all Boronkay, Deputy Atty. Gen., for appellants. matters. George Edward Barnhart Holmes, Ross, Woodson, Millard & Ryburn, Dec. 30, 1961." John W. Holmes, Pasadena, for respondents.

In addition to the above, there is written KINCAID, Justice pro tem. along the left side of said document, '8. Mr. Glenn Ogg 10% of any LawSuit Residue,' and along the The decedent herein, George Edward right side, '10% to Mr. Ogg! Barnhart, died on April 26, 1962, a resident of the i. Lo. County of Los Angeles. Judgment admitting his A petition to determine interests in estate was will to probate and appointing Oscar E. Watson, filed by Patricia Chalgren and Joan Pengra, the executor of said will, was filed September 21, daughters and only heirs at law of the decedent.

1962. Said will, holographic in form and on one In response to said petition statements to interest page reads: were filed by William Harris, as guardian ad litem of William Harris, Jr.; by Oscar E. Watson; by 'II, George Edward Barnhart, being of Sound Edward Cummings individually and as guardian mind & I believe body, wish to make of the Estate of Wayne R. Cummings and Robert Cummings and as executor of the Estate of Page 911 Joanne J. Cummings; and by the State of California. ---d --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr.

909, 226 Cal.App.2d 289 (Cal. App. 1964) Following a court trial findings of fact, Altadena and on Waldo Avenue, Pasadena to conclusions of law and the judgment were filed. A Patricia; notice of appeal from the judgment was filed by the State of California; by William Harris, in his Page 912 capacity as guardian ad litem, and by Edward J. Cummings, in his own behalf and in his capacities that although the testator intended that some part as guardian and executor. or all of the real properly, books, tools and machinery referred to in paragraph 1 should be The decedent was born in California in 1895 turned over to the State of California as a museum and had a long

career as an inventor and after the death of Patricia, the court is unable to engineer, particularly in the field of aviation. ascertain whether said intention related to only Some of his inventions were used by the United part of said property and, if so, to what property, States Government during World War II and later or whether said intention related to the whole of he [226 Cal.App.2d 204] carried on his research said property.

The court then further found that in a shed at the rear of his residence 2228 New the books, tools and machinery mentioned in York Drive, Altadena. paragraph 1 are a part of the residue of the estate and the property at 2228 New York Drive, Decedent and his wife divorced in 1931 and Altadena, is not and cannot be made physically she moved to Minnesota taking the two children, available for museum use; that the court cannot Patricia and Joan, with her.

Patricia visited ascertain what property referred to in paragraph 1 decedent twice and there was extensive of the will, including books, tools and machinery, communication between them with exchange of the testator intended should be turned over to the gifts. Joan spoke with decedent by telephone State of California as a museum; or what purpose upon several occasions, and exchanged some the museum was intended to serve; or who were letters with him receiving occasional gifts.

She the beneficiaries thereof; or whether the testator never saw him after the separation in 1931. intended Patricia to administer some or all of the property so referred to as a trust; or whether he In aid of construction of the intent and intended some or all of said property to be [226 meaning of testator's will, extrinsic evidence was Cal. App.2d 295] administered as a trust only by offered by various of the parties and received by said estate or by both Patricia and the state. the trial court without objection.

In addition to Under paragraph 1 the testator intended to the foregoing, such evidence showed that bequeath 100 shares of the stock of McCord decedent and Watson had been long time friends Corporation to Patricia. and business acquaintances. William Harris, Jr., referred to in the will as 'Bill', lived next door to As to paragraphs 7 and 8 the court found that the decedent who was fond of him.

He had known testator intended to bequeath to Watson and Ogg Imogene Warner since 1939 and they had visited each 10% of the net proceeds realized by his estate and conversed frequently. The Cummings family from any lawsuit but as to any balance remaining consisted of Joanne, Ed, Robert and Wayne, all of the court is unable to ascertain the intention of whom had known the decedent since 1934, had the testator as to whom he intended to give all or received substantial gifts from him and had any part thereof; that by his will the testator did visited him from their home in Chicago on several not dispose of all or any said balance and all occasions. thereof is therefore included in the residue of the estate of said decedent.

As to the residue of the After receiving the extrinsic evidence the trial estate the court found that it is not disposed of by court found that as to paragraph 1 of the will the the will and as to said residue the decedent died testator intended to devise all of his interest in the intestate. real properties located on New York Drive, —Z --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr.

909, 226 Cal.App.2d 289 (Cal. App. 1964) The state contends that the trial court erred Estate of Donnellan, 164 Cal. 14, at page 19, 127 P. (1) in failing to construe the meaning of 166, at page 168: 'It is a fundamental and paragraph 1 of the will as giving Patricia Chalgren indisputable a life estate only in the real and personal property (excluding the McCord stock) described therein Page 913 and as giving the state the remainder interest in said property; (2) in failing to construe the proposition that wherever doubt arises as to the language of paragraph 7 of the will disposing of meaning of a will, such doubt is resolved by the balance of the net proceeds which are realized construction, and that construction is one of law. by the estate from any lawsuit in equal shares to It is an application of legal rules governing each of the legatees named in the will, including construction, either to the will alone, or to the state, who were not otherwise given specific properly admitted facts to explain what the shares of such proceeds. testator meant by the doubtful language.

In those cases where extrinsic evidence is permissible, Appellant Harris contends that in addition to there may be a conflict in the extrinsic evidence his bequest of stock the court erred in failing to itself, in which case the determination of that construe paragraph 7 of the will so as to entitle conflict results in a finding of pure fact. But when him to a sum equal to 1/10 of all residue from any the facts are thus found, those facts do not solve lawsuit and that the state should be excluded the difficulty.

They still are to be applied to the from participation in such residue. written directions of the will for the latter's construction, and that construction still remains a Appellants Cummings contend that in construction at law.

In such cases, where the addition to the bequests to them specified in evidence of the facts is in conflict, it is permissible paragraph 4 of the will, they are each entitled to for the court, or for the jury, to find the facts; and 10% of all residue from any lawsuits, the state to those findings, under firmly established be excluded from participation therein. principles, will not here be disturbed.

But the application to the will itself of the facts found, The only existing lawsuit of decedent admitted, or established without conflict presents disclosed by the record herein is an action a question of legal construction, which is as pending in the United States Court of Claims purely a question of law as is a construction of the entitled Barnhart v. The United States, No. 4-59. will without resort to extrinsic evidence."

The inventory and appraisal filed by the executor failed to list this as an asset of the estate. Extensive evidence was received at the trial but certain of the heirs maintain it has substantial value. Including a personal visit to and inspection of the properties by the trial judge. An examination of the record discloses that this evidence is generally It is the contention of the respondent without conflict and concerns essentially the daughters that, because extrinsic evidence from relationship of those claiming to be decedent's which claimed conflicting inferences were sought heirs at law, his regard for them, his regard for to be drawn was received by the trial [226 Cal.App.2d 296] court, any findings based upon the legatees in his will, particulars as to his life Cal.App.2d 296] court, any findings based upon and career, his intention, varying from time to such evidence are binding upon the reviewing time, to benefit different individuals or classes of court of appeal.

The construction of a will is a question of law, and the identification and nature of question of law but a trial judge or jury may pass upon various property described in his will. The upon such issues of fact as are developed by findings of the trial judge based upon this evidence properly received as an aid in the evidence are not conclusive as to an appellate resolution of ambiguities which appear in the will. court but where, as here, doubt arises as to the (Estate of Jones, 55 Cal.2d 531, 536, 11 Cal.Rptr. meaning of the will, the facts adduced should be 574, 360 P.2d 70.)

The settled rule is set forth in applied on appeal to the written directions of the —d --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr. 909, 226 Cal.App.2d 289 (Cal. App. 1964) will for the latter's construction as a question of clear and distinct, or by inference \* \* \* from other law. parts of the will \* \* \*! [226 Cal.App.2d 297] Appellants, other than The paramount rule in the construction of a the state, are concerned only with the will is that the will must be interpreted according construction of paragraphs 7 and 8 of the will. to the intention of the testator and that intention Appellant state claims an interest in the estate not must be given effect as far as possible.

(Estate of only by these paragraphs but also by virtue of the Thompson, 50 Cal.2d 613, 617, 328 P.2d 1, 65 provisions of paragraph 1. We first address our A.L.R.2d 805.) The real question is, what did the attention to the latter. This paragraph reads: 'One testator mean in view of the language he has used payment of \$1000.00 from Patricia Chalgren as in his will, in the light [226 Cal. App.2d 298] final settlement, the property at 2228 New York afforded by certain rules of interpretation which Dr. Altadena & 407 & 411 Waldo Ave. Pasadena to must prevail where a contrary intent does not be deeded to Patricia Chalgren to have and to clearly appear on the face of the will.

(Estate of hold intact all books, tools & Machinery during Axcelrod, 23 Cal.2d 761, 766, 147 P.2d 1; Estate of her life time then turn it over to the State of Wilson, 184 Cal. 63, 67, 68, 193 P. 581.) California as a museum at 2228 New York Dr. plus 100 Shares McCord--\*--".

The words contained in paragraph 1 <sup>TM</sup>\* \* \* the property at 2228 New York Dr. Altadena & 407 & The state contends that, contrary to the trial 411 Waldo Ave. Pasadena to be deeded to Patricia

court's findings, paragraph 1 should be construed Chalgren \* \* \* clearly mean a fee simple devise to the effect that the daughter of decedent Patricia her unless the prior and subsequent words with is entitled to a life estate only in the real and equal clarity and distinctness indicate a different personal property mentioned therein and the result was intended by the testator.

(Section 104 state is entitled to the unlimited remainder of Probate Code.) interest thereof with the words <sup>TM</sup> \* \* as a museum at 2228 New York Dr. \* \* \* merely expressing the The words next following, viz.: <sup>TM</sup>\* \* \* to have recommendation or wish that a musuem be and to hold intack [sic] all books, tools, & established, but imposing no legal obligation to machinery, during her life time then turn it over do so by way of condition subsequent, trust or to the State of California as a museum \* \* \* plus otherwise.

The state offers no explanation as to 100 Shares McCord--' can have several different the meaning of the first line of this paragraph: meanings, some of which would import an 'One payment of \$1000.00 from Patricia intention to limit the estate devised to Patricia, Chalgren as final settlement \* \* \* but concedes and others of which would leave the devise in fee the correctness of the court's findings that the last of the real property unaffected. four words of paragraph 1, "\* \* \* plus 100 Shares McCord--' means that the testator intended an Paragraph 1 bears internal evidence of outright gift of such stock to Patricia. organially having been written to read as follows (omitting interlineations): "1.

One payment of Section 101 of the Probate Code provides in \$1,000.00 as final settlement, the property at part: \* \* \* A will is to be construed according to 2228 New York Dr. & 407 & 411 Waldo Ave. to be the intention of the testator. Where his intention deeded to Patricia Chalgren to have and to hold can not have effect to its full extent, it must have intack during her life time then turn it over to the effect as far as possible.' Section 104 provides in State of California as a museum at 2228 New York part: 'A clear and distinct devise or bequest can Dr. plus 100 Shares McCord----' not be affected by any reasons assigned therefor, or by any other words not equally Several ambiguities immediately appear: (1) How could these widely separated properties, one Page 914 in Altadena, the other in Pasadena, be a museum —d --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr.

909, 226 Cal.App.2d 289 (Cal. App. 1964) 'at 2228 New York Drive'? (2) Was it intended from him of '100 Shares McCord', or did he that Patricia devote these properties to some kind intend that she have a life estate in 100 shares of of museum use during her lifetime so that she McCord stock, the remainder interest to be an could literally 'turn it over to the State of endowment of the museum, or did he intend a gift California as a museum' upon her death, or was it of McCord stock to the state?

If so, did he intend a intended that Patricia's estate in these properties present gift of said stock or a future gift of stock during her life be unlimited as to use except that when the real properties were

turned over to the they be held intact?

(3) What kind of museum was state at Patricia's death? intended? (4) Are the said words intended as a limitation on the estate devised to Patricia, or are The evidence shows that the testator was they the expression of a command or wish that particularly fond of his daughter Patricia. A Patricia establish and maintain said properties as steady correspondence was maintained between a museum of some kind and give it to the state them.

In a letter written to her some eleven upon her death? If the beginning and ending months before his will was executed he told her words of the paragraph and the interlineations he loved her and that he thought she was also are considered, the above-mentioned wonderful. uncertainties become compounded.

(5) By using the words 'One payment of \$1,000.00 from It seems unlikely that this testator, so Patricia Chalgren as final settlement!, did the demonstrably concerned for his child's welfare, testator intend that Patricia should pay \$1,000.00 would intend to leave her a heavily mortgaged life as a condition[226 Cal.App.2d 299] precedent to estate in these properties and charge her with the receiving the devise of the two properties, or as a duty of holding them intact, paying the taxes and condition subsequent attached to her devised upkeep on them, the interest on heavy loans, estate therein?

Did the testator mean that Patricia devoting them and any income from them to was to pay only \$1,000.00 of any outstanding maintenance of some kind of a museum and indebtedness for which these properties were requiring his daughter to pay \$1,000.00 for the security and that the balance, if any, was to be privilege of receiving such an inheritance.

The paid by his executor, so that Patricia would record shows that at the time the will was receive an unencumbered title? (6) Did the executed there was an encumbrance against the addition of the interlined wrods, "all books, tools, New York Drive property of \$1,407.88, one & machinery', mean that testator intended against the property at 407 Waldo Avenue of Patricia to hold intact not only the two parcels of \$8,855.82 and against the 411 Waldo Avenue real estate, but also to hold intact said items of property of \$17,531.10.

A construction applied to personal property, and if so, were they to be held this first section of the will requiring Patricia to intact as part of a museum presently, or in assume payment of any part of the [226 anticipation of some museum to be instituted Cal App.2d 300] outstanding trust deed after the death of Patricia?

(7) Was the insertion ~~ indebtedness against the properties devised of the interlined words, 'all books, tools, & would be inconsistent with the obligation machinery', intended by the testator to modify the normally borne by life tenants who usually are original and ambiguous concept of devoting two required to pay only the interest on secured debts. unrelated parcels of real estate to a

museum at (Boggs v. Boggs, 63 Cal. App.2d 576, 580, 147 P.2d only a single location by limiting the museum 116; 31 C.J.S.

Estates § 48, p. 100.) concept to his books, tools and machinery? (8) } } Did the testator intend that Patricia should have a 'The trial court was entitled to accept and give gift effect to that which was a clear and distinct devise to Patricia and to reject those other provisions Page 915 which are unclear.

In Estate of Collias, 37 Cal.2d 587, 233 P.2d 554, the will provided that all the residue of the estate was bequeathed to a nephew. —d --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr. 909, 226 Cal.App.2d 289 (Cal. App. 1964) A sentence followed: 'It is my desire and wish that to the application[226 Cal. App.2d 301] of any of my nephew \* \* \* will give half of my estate to my its provisions, the testator's intention is to be nearest relative heir in Greece \* \* \*.'

The court ascertained from the words of the will, taking into held that no trust was created by the will. By the view the circumstances under which it was made, first sentence the entire estate is bequeathed excluding \* \* \* oral declarations' of the testator as outright and unconditionally to the nephew.

The to his intentions. As we have been there is an desire and wish which followed were addressed to uncertainty upon the face of the will as to the the devisee and not to the executor. The "desire application of clause 5, which contains language and wish' provision is not equally clear and having both mandatory and precatory distinct as the provision preceeding it and, implications, and evidence of the circumstances applying the rule stated in section 104 of the under which the will was made was therefore Probate Code and resolving any doubt suggested admissible.

In cases involving a similar problem it by the subsequent words in favor of the estate has been said that the trier of fact may consider first conveyed it cannot be said that a trust or such matters as the size of the estate, the property equitable charge was created which limits the involved in the gift, the circumstances of the absolute bequest to the nephew. parties, and their relation to each other and to the testator.' To like effect is Estate of Richards, 154 A somewhat similar situation is found in Cal. 478, 492, 98 P. 528.

Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 965; 64 P. 1071. There the court said: "While the desire The language of paragraph 1 of the will does of a testator for the disposition of his estate will not create a life estate in Patricia Chalgren with be construed as a command when addressed to remainder to the State of California, but, instead, his executor, it will not when addressed to his declares that full ownership is bequeathed to her legatee be construed as a limitation upon the without limitation, the words following having the estate or interest which he has given to him in effect of a precatory recommendation of the absolute terms.' In our instant case the direction

testator to his devisee that, upon her death, she is of the testator to "then turn it over" is addressed to then to turn it over to the state as a museum.

This the devisee Patricia and not to the executor. is the only reading of paragraph 1 that allows Patricia to fulfill the active, dispositive role In Estate of Kearns, 36 Cal.2d 531, 225 P.2d enjoined upon her by the words "\* \* \* the property 218, 220, a will, following a specific bequest of \* ¥ \* to Patricia Chalgren to have and to hold \* \* \* property, contained a subsequent clause: 'I hereby during her life time then turn it over \* \* \*.'"

These direct my Executor \* \* \* to provide for any other quoted words, read in their ordinary grammatical kin \* \* \* At page 537 of 36 Cal.2d, at page 222 of sense (§ 106 of the Probate Code), vest in Patricia 225 P.2d, the court said: 'It is apparent from the Chalgren the power to do the act which would foregoing discussion that clause 5 of the will is not 'turn over', i. e., dispose of the property upon her on its face equally as clear as the provision in death.

They are not consistent with the contention clause 1, and accordingly, in view of section 104 of that the testator was presently making a gift of a the Probate Code, it cannot be said that a trust or remainder interest for if this were so Patricia equitable charge has been created which would could not carry out her declared function of limit the absolute bequest to respondent unless disposing of the property upon her subsequent the intent of the testator to do so can be shown by death. extrinsic evidence.

Section 104 must be read with section 105 of the Probate Code which provides Since the testator also directed that all his that 'when an uncertainty arises upon the face of a 'books, tools & machinery' be likewise held by will, as Patricia during her life time then turned over to the state, they too are part of the devise to her Page 916 subject only to his recommendation that they likewise be turned over upon her death.

Finding —d --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr. 909, 226 Cal.App.2d 289 (Cal. App. 1964) number VI, that the books, tools and machinery The conclusion of the court that these words are a part of the residue of the estate of decedent are so uncertain as to the intent of the testator as is disapproved.

The finding that the testator to preclude a determination as to whom were the intended to bequeath 100 shares of McCord intended legatees is violative of not only section Corporation stock to Patricia is approved. Other 101 of the Probate Code heretofore quoted but than as herein modified the findings of the trial also section 102 thereof: "The words of a will are court as to paragraph 1 of the will are approved. to receive an interpretation which will give to every expression some effect, rather than one [226 Cal.App.2d 302] As to paragraphs 7 and which will render any of the expressions 8 of the will the trial court properly found that the inoperative; and of two modes of interpreting a testator intended to bequeath to Oscar E. Watson will, that is to be preferred which

will prevent a and Glenn Ogg 10% each of the net proceeds total intestacy.' The ambiguous clause should realized by the estate of the testator from any likewise be construed in the light of section 103 of lawsuit.

Finding number XIX, that the court said code, as follows: "Where the meaning of any cannot ascertain whether the testator intended to part of a will is ambiguous or doubtful, it may be dispose by his will of all or any of the balance of explained by any reference thereto, or recital the net proceeds realized by his estate from any thereof, in another part of the will.

All the parts of lawsuit, or to whom the testator intended to give a will are to be construed in relation to each other, all or any part of said balance, but the testator did and so as, if possible, to [226 Cal.App.2d 303] not dispose of all or any of said balance by his form one consistent whole; but where several will, and all of said balance is included in the parts are absolutely irreconcilable, the latter must residue of the estate of said decedent, is prevail.' disapproved.

A somewhat analogous situation was Paragraphs 7 and 8 read: "7. All residue from presented in Estate of Ford, 169 Cal.App.2d 174, any Lawsuit 10% to Mr. Oscar Watson & the 336 P.2d 981. The testator there provided in a Balance Equally divided--Mr. Watson to have the holographic will, after making pecuniary bequests full & complete say in all matters.' '8. Mr. Glenn to different persons in different amounts, that Ogg 10% of any LawSuit Residue.' In addition to "The ballance of the pool divide the children of the the above there is written along the right side two families receiving the same amount as the '10% to Mr. Ogg." parents Parents should see that they spend there money wisely and mostly toward there [sic] Among whom did the testator intend to education.' (P.

175 of 169 Cal.App.2d p. 982 of equally divide the 80% balance of all residue from 336 P.2d.) The court said: 'When the testator any lawsuit in addition to the 20% specifically directs 'the ballance of the pool divide' the bequeathed to Watson and Ogg?

The will is question arises, among whom is to be divided? \* \* specific as to those whom the testator wished to \* [Clonsidering those words to be a complete make the objects of his bounty. Ten persons are sentence, the only reasonable construction is that named as such objects. At the end portion of his the residue should be divided among those will, after previously naming the eight devisees previously named in the will as beneficiaries.' and legatees Patricia, Joan, Imogene Warner, ficiaries.'

(P. 176 of 169 Cal.App.2d, p. 982 of 336 Joanne, Ed, Robert and Wayne Cummings, and P.2d) Harris, he provided for Watson 10% and then Ogg, 10% of all residue from any Lawsuit, In Estate of Akeley, 35 Cal.2d 26, 28, 29, 215 followed by the final expression '\* \* \* & the P.2d 921, 923, 17 A.L.R.2d 647, the testatrix by Balance Equally divided \* \* \*' holographic will gave '\* \* \* all

the rest, residue and remainder of my estate \* \* \* twenty-five per cent to each of three charities.

The State of California contended that by virtue of the —d --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr. 909, 226 Cal.App.2d 289 (Cal. App. 1964) language of the will a finding is required that the does not appear to be a reasonable construction testatrix failed to dispose of one-fourth of the to include the State of California as a participant residue of her estate which therefore is in such 'Balance'.

Neither the will nor the distributable to it as escheated property. In extrinsic evidence shows testamentary intent to upholding the trial court that each charity was include the state. The state's interest under the entitled to take one-third of the residue the court will is in the nature of a possible future interest said: 'The controlling rule is stated in Section 101 limited in purpose by virtue of the language of the of the Probate Code which provides that a Will is will to be construed according to the intention of the testator.

All other rules of construction are The will does not contain any general subordinate to this cardinal rule and in its residuary clause. Paragraphs 7 and 8 provide for application presumptions are to be indulged the balance of all residue from any lawsuit to be which will prevent entire or partial intestacy \* \* \*.! equally divided and this residue is limited to that particular portion of the estate of decedent.

As "Words denoting percentages have a technical pointed out in Estate of Beldon, 11 Cal.2d 108, 77 meaning and '25 per cent' mathematically equals P.2d 1052, the making of a will raises the one-fourth of the whole. The Attorney General presumption that the testator intended to dispose assumes that the probate court was bound by the of all of his property, and residuary clauses are mathematical percentages specified by the generally inserted for the purpose of making that testatrix and that the use of any other language disposition complete, and these clauses are could not be deemed to create ambiguity with the always to receive a broad and liberal specified percentages.

However, there is no rule of interpretation, with the view of preventing construction which would prevent the court from intestacy of any portion of the estate of the applying the language of a Will in accordance with testator, which general rule is in harmony with the manifest intention of the testatrix even though the general declaration of our code, that the to do so would require an interpretation not in provisions of the will must be construed, if accord with the technical meaning of words used. possible, so as to effect that purpose. 'But there is On the contrary it is the duty of the court so to no room for application of the rule if the testator's construe the language that it will conform to the language, taken in the light of surrounding testatrix' intention as disclosed by the [226 circumstances, will not reasonably admit of more Cal. App.2d 304] Will rather than to defeat such than one construction.

A court's inquiry in intention by strict adherence to the technical construing a will is limited to ascertaining what sense of particular words. Especially in cases the testator meant by the language which was where the Will is not drawn by an attorney words used. If he used language which results in which are repugnant to the clear intention intestacy, and there can be no doubt about the disclosed by other parts of the instrument may be meaning of the language which was used, the regarded as surplusage or restricted in application court must hold that intestacy was intended.

A since to do otherwise would be to defeat the testator has the right to make a will which does intention. [Citation.]' To the same effect, Estate of not dispose of all of his property [226 Cal. App.2d Blalock, 95 Cal.App.2d 463, 213 P.2d 100; and 305] but leaves a residue to pass to his heirs Estate of Wilson 184 Cal. 63, 193 P. 581. under the law of succession.

Such a will is not the usual one, but when the language which leads to Page 918 that result is clear the will must be given effect accordingly.' To like effect Estate of Deacon, 172 From both the evidence and the provisions of Cal.App.2d 319, 322, 342 P.2d 261; Estate of the entire will it seems clear that the testator Swallow, 211 Cal. App.2d 359, 362, 27 Cal.Rptr. intended the balance of 80% of all residue from 235. any lawsuit to be divided equally among those eight persons previously mentioned in the will.

It ———d --- Page Break --- Barnhart's Estate, In re, 37 Cal.Rptr. 909, 226 Cal.App.2d 289 (Cal. App. 1964) The finding of the court that the residue of the estate of the decedent is not disposed of by his will and as to such residue he died intestate, and the conclusions that his daughters Patricia and Joan are each entitled to one-half thereof are approved.

The judgment is reversed and the superior court is directed to enter a new judgment in conformance with the views herein expressed. HERNDON, Acting P. J., ad ROTH, J. concur. Ia last