THE

DISTRICT REPORTS

OF

CASES DECIDED IN ALL THE

JUDICIAL DISTRICTS

OF THE

STATE OF PENNSYLVANIA

DURING THE YEAR 1910.

VOL. XIX.

FROM VOLUME 67 OF THE LEGAL INTELLIGENCER.

PHILADELPHIA:
HOWARD W. PAGE, 700 WEST END TRUST BUILDING.
1910.

criminals, but to relieve dependent wives and children by providing for their maintenance. Under its provisions, the court of quarter sessions of any county where the complaint is made has jurisdiction of the proceedings without regard to the residence or settlement of the defendant, and without reference to where the original desertion took place. The main inquiry is whether the exigence and wrongful neglect contemplated by the statute exist," citing "Demott *v.* Com., 64 Pa. 302; Keller *v.* Com., 71 Pa. 413; Barnes *v.* Com., 2 Penny. 506."

In the case at bar the defendant is domiciled within this commonwealth and within this county. His daughters, being minors, of tender years, the domicile of the father is clearly the legal domicile of his minor children, and he is responsible for their maintenance, both in law and in good morals. If these children should die, leaving an estate, the father would inherit under the intestate laws, and his right of inheritance surely cannot be held to be superior to his duty to maintain. The Act of April 13, 1867, P. L. 78, provides that if any husband or father, being *within the limits of this commonwealth*, has, or hereafter shall separate himself from his wife or from his children, or from his wife and children, without reasonable cause, or shall *neglect to maintain* his wife or children, it shall be lawful for any alderman or justice or magistrate, upon information, . . . to issue his warrant, etc. The act clearly contemplates two causes of action: First, desertion; and second, neglect to maintain. The defendant is "within the limits of this commonwealth," and has "neglected to maintain his children," and we are of opinion that the duty of such maintenance clearly rests upon him. We are also of opinion that this case is ruled by Com. *v.* Hart, 12 Pa. Superior Ct. 605, in which it is said by Beaver, J.: "Desertion is a continuing offence, and although the original act may have occurred in another state, when the defendant comes within the jurisdiction of this commonwealth, and continues the desertion of his family and the failure to support it, he undoubtedly brings himself within the provisions of the Act of 1867."

An order will, therefore, be made and entered against the defendant for the maintenance of his two minor children, Alice and Grace Thatcher.

NOTE.—An order was made on defendant to pay $2.50 a week for each minor and give security, with one or more sureties, in the sum of $500.

Kenworthey's Estate.

Wills—Construction—Class legacies.

Though the general rule of construction is that, where a bequest is made to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation, they will all take *per capita*, the rule will yield to a very faint indication in the context of a different intention.

The testator, after giving certain pecuniary and specific legacies, bequeathed the residuary estate to his executors therein named in trust to be safely invested and the interest "to be equally divided between" his two brothers, C. D. and J. R., and at their death the principal to be "divided between" W. B., son of his brother James, "and the children of" his brother J. R., "share and share alike." *Held*, that on the death of C. D. and J. R., one-half of the principal of the fund should be awarded to W. B. and the other half divided equally among the children of J. R.

Exceptions to adjudication. O. C. Phila. Co., Oct. T., 1898, No. 162.

The facts appear in the following adjudication by

LAMORELLE, J.—"Samuel R. Kenworthey died July 18, 1887. In and by his will, after giving certain pecuniary and specific legacies, he bequeathed his residuary estate to the executor therein named, in trust, to be safely invested,

and the interest 'to be equally divided between' his two brothers, Charles D. and Joseph R. Kenworthey. At the death of his said brothers the money was to be 'divided between' Dr. William B. Kenworthey, son of his brother James, 'and the children of' his brother, Joseph R., 'share and share alike.'

"Charles D. Kenworthey, executor, and entitled as a legatee for life to one-half of the income, died June 18, 1908, whereupon Henry C. Loughlin was appointed trustee in his place and stead.

"Joseph R. Kenworthey, the remaining *cestui que trust* for life, died Dec. 20, 1909.

"The present accounting is had because of the death of the survivor of the two brothers entitled to the income for life, thus terminating the trust.

"Dr. William B. Kenworthey survives, and there are four living children of Joseph R. Kenworthey.

"Two questions arise: In what manner is the principal to be divided, and what disposition is to be made of one-half of the income collected after the death of the equitable life tenant who died first?

"And first: Is the principal to be divided into halves or into fifths?

"Testator in apt words provided for a division into halves, when he said that, upon the death of his brothers, the money was 'to be divided *between*' the son of his brother James, Dr. William B. Kenworthey, and the 'children' of his brother Joseph, share and share alike. While the word 'between' may be interpreted 'among,' and *vice versa*, as occasion demands or the will requires, yet such meaning is not to be given unnecessarily. 'Between,' belonging to, or participated in, by two, expresses the exact thought of testator, in that he himself constituted *two* classes, one composed of his nephew, Dr. William B. Kenworthey, and the other of the 'children' of his brother Joseph. The class 'children of . . . Joseph,' might diminish or it might enlarge, and to such extent would the share of William be affected; his share, however, was not to be affected in case he had, or might have had, brothers or sisters of his own. Is it reasonable, therefore, to suppose that chance should be more potent than design? Testator had in mind the one child of his brother James, and, in terms, named him; he could not have had in mind any particular children of his brother Joseph, in that he classed these recipients of his bounty under the general term children. It is true that the law favors equality among those in the same degree of consanguinity, but rules of construction are not invoked unless the meaning of the will is doubtful, and then only to carry out a presumed intent. The words 'share and share alike' are not conclusive, either one way or the other, for the expression is appropriate, not only to a division among individuals, but also to a division between classes, or to a division between an individual and a class. Authorities on this question are many and are not always harmonious, but in all cases of interpretation of wills the individual will, like the play's 'the thing.' In Scott's Estate, 163 Pa. 165, the court, in interpreting that will, laid great stress upon the fact that after the enumeration of certain nieces and nephews, testatrix said that '*each*' was to take, share and share alike; therefore, it was decided that the distribution should be made *per capita;* but in that case the word 'between' was not used, nor have counsel called the attention of the auditing judge to any case wherein, from the use of language similar to that in the will now under discussion, a *per capita* distribution has been decreed. Though the general rule of construction is that, where a bequest is made to a person described as standing in a certain relation to testator and the children of another person standing in the same relation, they will all take *per capita.* 2 Jarman on Wills, 756, says that this 'will yield to a very faint glimpse of a different intention in the context.'

"In the present case, the auditing judge finds not only the 'faint glimpse,' but the expressed intent, in the use of the word 'between.' That testator understood the meaning of the word 'between' and used it correctly is further emphasized by the fact that in the previous clause of the will he directed that the income was to be divided equally 'between' his two brothers; this would seem to be controlling."

Exceptions to the award were filed by the four children of Joseph R. Kenworthey on the ground that they and their cousin, W. B. Kenworthey, should have been awarded the fund *per capita*, each one-fifth.

Morton Z. Paul, for exceptants.

Samuel W. Woolford, Jr., and *Loughlin & Bracken*, contra.

ANDERSON, J., Nov. 12, 1910.—This is a close case; but there is nothing in the will to indicate the testator did not use the word "between" except for its proper purpose, that is, to indicate a division in classes, to which the words "share and share alike" can be referred as well as to a division amongst all the beneficiaries: see Osborne's Estate, 149 Pa. 412; Green's Estate, 140 Pa. 253; Ihrie's Estate, 162 Pa. 369.

The case has been carefully considered by the auditing judge, and we confirm his adjudication upon the reasons therein assigned by him.

The exceptions are dismissed.

Smith's Estate.

Legacies—Identification of legatee—Mistake in corporate name of cemetery company.

Where a bequest is made to the "Mount Peace Cemetery Company for the care of our lot in said cemetery" and the testatrix is buried in a lot in a cemetery of that name owned by the "Odd Fellows' Cemetery Company," that company is the legatee.

Petition and answer. O. C. Phila. Co., April T., 1909, No. 669.

The petition of the Odd Fellows' Cemetery Company, owner of the Mount Peace Cemetery Company, filed June 11, 1910, averred that the decedent bequeathed "to Mount Peace Cemetery Company $150, to be placed at interest, and the income thereof to be applied to the care of our lot in said cemetery;" that by the adjudication, confirmed *nisi* June 30, 1908, the said legacy was awarded to "The Mount Peace Cemetery Company" without notice to petitioner; that no such company existed, and the intended legatee was the petitioner, owner of the cemetery, and grantor to the decedent of a deed for lot No. 223, in which the decedent was buried; and prayed for an order directing the payment of the legacy to the petitioner. The answer denied knowledge of the material facts and prayed for due proof thereof.

W. H. R. Lukens, for petitioner; *M. W. Sloan*, for respondent.

DALLETT, J., Nov. 5, 1910.—In view of the fact that the testatrix is buried in Lot No. 223 in Section G of the cemetery known as "Mount Peace" there can be no doubt as to the identity of the legatee she had in mind when she gave $150 to "Mount Peace Cemetery Company" for "the care of our lot in said cemetery."

The adjudication filed June 30, 1908, is recommitted in order that proof of the petitioner's ownership of the cemetery in question may be properly presented.

NOTE.—Description and identification of legatee: See 19 Dist. R. 241, and note.