this court is the *law of the case.* In *Page* v. *Fowler*, 37 Cal. 100, the rule of law that precludes the re-examination of legal propositions, once settled by the appellate court in the same case, is thus stated: "The legal propositions which arose and were decided on the former appeal, whether they were correctly decided or not, have become the law of the case, so far as they are applicable to the facts developed on the second trial. There would be no end to the litigation, if the same question in the case, once decided by the appellate court, were open to examination on every succeeding appeal." To the same effect is *Lucas* v. *City of San Francisco*, 28 Cal. 591; *Polak* v. *McGrath*, 38 Cal. 666; *Pico* v. *Cuyas*, 48 Cal. 639. From these views, it results that the decision of the court below in overruling the demurrer to the amended complaint was right.

The appellants' counsel suggested at the hearing that, in case the decision overruling the demurrer should be sustained by this court, the appellants should be given leave by this court to answer over. The practice in such cases has never been settled. This court in some cases has granted such leave, but we have concluded that it would be more consistent with the authority and jurisdiction of this court, as established by the constitution and laws of the state, that such application should be made in the court below, leaving this court to exercise only an appellate jurisdiction, in case the lower court should abuse the discretion confided to it. We therefore announce it as a rule of practice in such cases that, whenever the court does not make a final disposition of the cause, but remands the same to the court below, it will be open for that court to determine, in the first instance, whether the defendant shall be permitted to answer or not. This discretion, of course, is a judicial discretion,—not arbitrary,—and is always to be exercised in furtherance of justice. This cause will therefore be remanded to the court below for such further proceedings as may be proper. *McDonald* v. *Cruzen*, 2 Or. 259.

(All concur.)

(14 Or. 66)

WELLS and others *v.* NEFF and others.

(Supreme Court of Oregon. June 29, 1886.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER—EQUITIES—NOTICE.
   The *bona fide* purchaser of real estate for a valuable consideration buys it free from equities of which he had no notice.
2. SAME—HOLDER OF EQUITIES ESTOPPED BY PERMITTING PURCHASE.
   Such a purchaser cannot be charged with the equities of one who stands by and sees him purchase, without giving him notice of his equities.
3. SETTLEMENT—MISTAKE—WHAT MISTAKES WILL NOT AFFECT.
   A voluntary settlement will not be disturbed for any ordinary mistake, either of law or fact, in the absence of conduct otherwise inequitable, since its very object is to settle all such possible errors without controversy.[1]

Sidney Dell and *Chas. Gardner*, for appellants. *B. Killin*, for respondent Wells. *T. V. Holman*, for respondent Budd. *J. W. Whally*, for other respondents.

LORD, J. This is a suit in equity for the partition of certain lands known as the Marcus Neff donation land claim, in which the plaintiffs and defendants were interested as tenants in common. Without adverting to much preliminary matter now unnecessary for the consideration of the case, it is sufficient to say that the object of the answer of the Neffs, and the evidence they produce to support it after issue joined, was to establish their equitable ownership to the respective portions of the land claimed by each and all the

[1] See Zimmer v. Becker, (Wis.) 29 N. W. Rep. 228; Wells v. Neff, *post*, 88.

other parties to the suit, and to have the deeds held by them, respectively, to the same, set aside and canceled, and declared to be null and void. The cause was referred to a referee to take the testimony, and report the finding of facts and conclusions of law, which resulted adversely to the Neffs. Subsequently, upon the report of the referee coming up before the court below on motions of the respondents to confirm, and the exceptions thereto of the appellants, the court, after argument and advisement, confirmed the report of the referee, and rendered the decree herein, from which this appeal is taken. In the course of the argument of the appellant, the court being satisfied that no case was made against Whalley, Fechheimer, and Page, the suit was dismissed as to them; but, not being so satisfied as to the other respondents, ordered the argument to proceed as to them.

The case is almost purely one of fact. The record is quite voluminous, involving many and various transactions, covering a period of more than 10 years last past. It would not be possible, without very much embarrassing the length of this opinion, to point out all the particular matter in detail upon which our conclusions rest, nor shall we attempt it. All that we propose to do is to state the result, which the very able argument of counsel, together with our examination of the evidence, has enabled us to reach.

And first, as to the respondent George F. Wells. His interest in the property comprised the interest in the Neff claim of George Neff and Mary A. Lousignont, (Neff,) children of Marcus and Margaret J. Neff, and the life-interest of Margaret J. Neff. As to these interests, it is not disputed but that the respondent Wells paid a valuable consideration to each of the parties of whom he made the purchase; nor are any of the parties of whom he made the purchase, except the appellant Margaret J. Neff, parties to the suit, or making any charges of unfairness or want of good faith in the several transactions; and the only inquiry in respect to the respondent Wells is whether he was a *bona fide* purchaser.

The evidence shows that, while Wells was negotiating with Mrs. Neff for her life-lease, she knew that he was at the same time negotiating with George and Mary for the purpose of purchasing their respective interests in the land which they held by deeds from the appellants, and that his object in purchasing her interest was, in the event he concluded the bargain with George and Mary, to have the property free from that incumbrance, so as to make it available for the purposes of speculation and sale, and to enable him to give a clear title to purchasers. During all the time this negotiation was proceeding, and while thus understanding that Wells did not wish to purchase any of the different interests held by them, unless he could have a clear title, Mrs. Neff neither represented nor made any claim to the respective interests held by George and Mary, but, we think, by her acts and conduct, led him to believe that she had no such claim, and that the interests in the land of George and Mary were valid and *bona fide;* nor do we find any other circumstances calculated to put him on inquiry, or which impugn the good faith of his purchase. The consideration which he paid for the different interests amounted to nearly $10,000; and, taking the testimony altogether, we are of the opinion he made the purchase in good faith, and without notice of any outstanding equities. The result is that the decree must be affirmed as to him.

We now come to the contention between the appellants and the respondent Budd. His interest in the land was derived from the appellants by deed duly executed by them, the alleged consideration for which was services rendered as an attorney, and money advanced. This deed is claimed to be without consideration, and fraudulent. It appears that while the appellant resided in Stockton, California, where the respondent Budd then and now resides, the father of Margaret J. Neff died, leaving certain property to her children; and that, upon her application, the respondent Budd was appointed their

guardian. The names of these children were Nancy, George, and Mary. In May, 1875, Nancy became of age; and the respondent Budd, after having paid over and delivered to her all the property he had received as the guardian of her estate, filed his account, and was, by a decree of the probate court, discharged from his duties and obligations as such guardian. Subsequently the appellants executed to their daughter, Nancy Neff, a deed to one-sixth of their interest in the donation land claim in Oregon. On the fourteenth day of February, 1877, Nancy Neff made a will, whereby she bequeathed and devised all of her property to the respondent Budd; and on the fifteenth day of February, 1877, she died, leaving property in the city and county of San Francisco. And thereafter, in March, 1877, the said last will was duly admitted to probate under the laws of California, and by the probate court of said county; but no steps were ever taken to record such last will in Oregon, or other proceeding had to make it available against the property here. On March 18, 1878, the appellants executed a deed, for certain considerations alleged, to Mary Neff, George Neff, and the respondent Budd, to certain undivided interests in said donation claim, in which a life-lease was reserved for the benefit of Margaret J. Neff in the interests held by Mary Neff and the respondent Budd. This sufficiently states the interest which the respondent Budd held in the land.

Thus matters stood until this suit was instituted for the partition of the respective interests of the parties, when the claim made by the appellants was set up in the answer to set aside the deeds held by the adverse parties to the suit. A great deal of testimony was taken in respect to the will of Nancy Neff, and to the matter of the alleged professional services and money advanced which constitute the consideration for the deed to the respondent Budd. But the chief defense relied upon is a settlement in which all matters between the parties were fully adjusted and liquidated. The number of acres to which the respondent Budd would have been entitled by the partition was about 67. But this was subject to the life-estate of Margaret J. Neff, appellant. By the settlement the respondent Budd transferred, by deed, to the appellants, all his interest in said claim in excess of 50 acres thereof, which was to be and remain his property, free and released from the life-lease of Mrs. Neff; and at the same time, as part of this transaction, the appellants by deed released and forever quitclaimed to Budd all their right, title, and interest, including the said life-lease to said 50 acres in said donation claim. And the referee found, which was confirmed by the court, that these deeds were executed freely and voluntarily by each of the parties therein named, and that the deed from the appellants to the respondent Budd was not obtained by fraud or misrepresentation.

The evidence shows that the will in favor of the respondent Budd, whatever the rights to which he may have been entitled under it, and all other matters of difference between the parties, were included in this settlement. In a word, that it was intended to be a full and complete settlement of all differences and questions of property rights between them. It is claimed, however, that the appellants were led into this settlement by misrepresentation in respect to the will. There is no doubt but that compromises of doubtful rights, or voluntary settlements between parties, which are characterized by good faith and a full disclosure of all the facts, are favored by the courts. Mr. Pomeroy says: "Voluntary settlements are to be favored; that if a doubt or dispute exists between the parties with respect to their rights, and all have the same knowledge, or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by them in their agreement may not be that which the court

would have decreed had the controversy been brought before it for decision. Of course, there must not only be no misrepresentation, imposition, or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others. In the words of a distinguished judge: 'There must not only be good faith and honest intention, but full disclosure: and without full disclosure honest intention is not sufficient.' If these requisites of good faith exist, it is not necessary that the dispute should be concerning a question really doubtful, if the parties *bona fide* consider it so. It is enough that there is a question between them to be settled by their compromise." Pom. Eq. Jur. § 850.

The evidence shows that, after the answer for the appellants was drawn, the leading counsel, Mr. Dell, sought and procured an interview with the respondent Budd, and made known the contents to him, for the purpose, it would seem, of affording Budd an opportunity, if he desired it, to effect a settlement without litigation. The result of this interview was an agreement that the parties should meet at Dell's office at 4 o'clock, when all matters of difference could be submitted and discussed with a view to an amicable and satisfactory settlement. At or about the time appointed, the appellants were present with their attorney, Mr. Dell, and the respondent, who is also a lawyer, with his attorney, Judge Woodward, when, after considerable discussion, a satisfactory arrangement was effected, which resulted in the interchange of deeds, as above stated. The testimony in respect to these interviews, what was said, and what took place as heard and seen, is fully set forth in the record, as testified to by those who were present. In some respects there is a conflict in the testimony, probably more particularly as to what occurred, and what was the understanding at the first interview. But this was more of a preliminary character, and not irreconcilable with the after result. As Mr. Dell had prepared the answer of the appellants, we must suppose that he was conversant with the facts by which it was expected to be sustained; and, as to the will, that he knew the law as to its validity as well as Budd, and was therefore well equipped to advise and protect his clients, and not liable to accede or accept any settlement that did not secure a just and proper recognition of their rights and interests.

The evidence shows, too, that Budd had never attempted to perfect his rights under the will, so far as the property in this jurisdiction was concerned; and he seems to have referred to the matter more to show that he had a further and another distinct claim to a portion of the property, quite liable, it is true, to be contested whenever he should attempt to establish such rights, but which he was willing to throw in and abandon in order to facilitate and bring about a full and complete adjustment and settlement of all matters in dispute, and to prevent further litigation. And where parties meet, as here, for the purposes of a settlement, and to avoid litigation, courts of equity are strongly inclined to favor and uphold such compromises or settlements when effected. And it is said that they will not be disturbed for any ordinary mistake, either of law or fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without judicial controversy. Looking at much matter which has come into this record, in the absence of the settlement, it probably would wear a different aspect, and compel us to regard it in a different light than we do now, in adjusting the rights and equities of the parties; but it seems to us that one of the principal objects which induced the respondent Budd to compromise and settle, and put an end to all controversy, was the exclusion of this very matter, which otherwise would necessarily be involved in the case. In view of all the facts, we are inclined to think that the settlement must be upheld, and that the decree of the court below must be affirmed in all matters and things, except that the respondent Budd shall not be entitled to recover costs and disbursements in either court.

WALDO, C. J., was of opinion that the will of Nancy Neff, of February 16, 1877, was void by reason of the nonage of the testatrix; and that, the extent to which this fact might affect the decree as to the defendant Budd not having been considered by the counsel or the court, further argument should be had upon the point.

WELLS and others *v.* NEFF and others.

(*Supreme Court of Oregon.* November 2, 1886.)

1. CONFLICT OF LAWS—WILL—COLLATERAL ATTACK—JUDGMENT OF SISTER STATE.
   A will duly proved, and adjudged to be the last will of the deceased, in a sister state, cannot be collaterally attacked in Oregon.[1]
2. SETTLEMENT—REPUDIATION—CONDITION PRECEDENT.
   A party seeking to repudiate a settlement must tender all the advantages it may have given him.[2]

For opinion on former hearing, see *ante*, 84.

PER CURIAM. The opinion heretofore filed in this cause disposed of every question presented, but, in a petition filed for a rehearing by counsel for the appellants, it was insisted that the court had not given full effect to the evidence in their favor touching the alleged settlement with Budd referred to in their answer. For the purpose of hearing further argument on this point, a rehearing was ordered, and, the cause having been again argued as to whether Budd was guilty of fraud in procuring that settlement, we will now briefly state our conclusions thereon.

The settlement occurred in the office of Mr. Dell, attorney for the appellants, on May 26, 1883, and at the time the same was concluded, and the deeds exchanged, there were present the defendant and J. H. Budd, Judge Woodward, Marcus Neff, Margaret J. Neff, and Sidney Dell. By the terms of that settlement, Budd was to have 50 acres of the Neff claim, under the deed of March 18, 1878, the same to be discharged from a life-estate of Margaret J. Neff therein, and to be set apart to him in the then pending partition suit, and he was to release and convey to Margaret J. Neff all of his interest, if any, in the residue of the Neff claim, and the necessary deeds were executed and delivered at the time to carry the same into effect. By the deed of March 18, 1878, referred to, Marcus Neff and Margaret J. Neff had conveyed to the respondent Budd and to Mary A. Neff and George Neff all their interest in the Neff donation land claim. For the purpose of setting this settlement aside, it is attacked by the answer of Marcus Neff and Margaret J. Neff for fraud in its procurement. The fraud consisted in the claim of Budd to an interest in the Neff donation land claim of a one-sixth part thereof under and by virtue of a will of Nancy Neff, deceased, made in favor of Budd. It is also claimed that the will was invalid; that Budd knew it at the time of the settlement, and that the respondents did not know it; and that Budd omitted to tell the facts showing its invalidity at the time of the settlement. The will of Nancy Neff was filed for probate in the superior court of the city and county of San Francisco on the thirteenth day of March, 1877, and such proceedings appear to have been thereafter regularly taken in the matter, until on the twenty-seventh day of March, 1877, it was duly proven in said court, and adjudged to be the last will of Nancy Neff, deceased. These facts fully appear from a certified copy of the proceedings had in said matter, now before us. It does not appear that this will has been probated in this state, but, with this record and judgment before us, we cannot say that it is not the will of Nancy Neff, deceased. It is the judicial record of a sister

[1] As to the conclusiveness of a judgment of a court of another state, see Lewis v. Adams, (Cal.) 11 Pac. Rep. 833, and note.

[2] See Zimmer v. Becker, (Wis.) 29 N. W. Rep. 228, and note; Wells v. Neff, *ante*, 84.

state, and it is entitled to full faith and credit, under the constitution and laws of the United States. The validity of a will executed in another state cannot be tried in this collateral manner. It has become a judicial record in the state where it was proven and filed, and it must receive full credit here.

But it is charged that this will was forged, and that the respondent Budd was a party to the forgery. This was stated in the argument by counsel for the Neffs, but we have sought diligently for evidence to support it; it is not in the record. Presumptively, all of the transactions of these parties were fair and honest, and the settlement in question was fairly made. Whoever alleges otherwise must support that allegation by a preponderance of evidence. Fraud is never presumed. Taking all that is testified to by Dell and Budd at the 12 o'clock meeting in Dell's office, when Dell and Budd only were present, and all that occurred at the 4 o'clock meeting at the same place, when Judge Woodward, Marcus Neff, and Margaret J. Neff were also present, and when the settlement in question was finally consummated, and we fail to find in it any evidence whatever of fraud on the part of Budd. Dell has given his version of it, but we would hardly be justified in accepting his statements without any qualification, and rejecting the others. The Neffs must produce evidence which is stronger,—in other words, make a better case than Budd; and if they have not done this, under well-settled principles of law, they must fail. And this, in our judgment, they have failed to do.

There is one other question that appears upon the face of the answer of the Neffs, and that is, they have not tendered back to Budd a deed for any interest they may have derived from him in the Neff claim by the terms of the settlement. They could not repudiate the settlement, and at the same time hold on to any advantages it may have given them. "He who seeks equity must do equity." Having determined that the settlement is unimpeached, we decide this case solely upon that ground, though the objection last stated would be alike fatal to the respondents' case. A party prevailing in this court in a suit is entitled to his costs, unless, for special equitable reasons presented by the case, we should order otherwise, and this, we think, we ought not to do here, no such reasons appearing.

The decree of the court below will be affirmed, with costs; and it is so ordered.

BALFOUR and others *v.* DAVIS and others.

(*Supreme Court of Oregon.* October 28, 1886.)

1. USURY—USURY AS A DEFENSE—PLEADING—EVASION OF LOCAL LAWS.
   An allegation that the note was made payable in S. F., in another state, for the purpose of fraudulently evading the local usury laws, is bad, as not alleging any agreement between the parties to make it payable where it was made payable for any fraudulent purpose.

2. SAME—FOREIGN STATUTE.
   To sustain an allegation of usury under the laws of a foreign state, the foreign statute must be pleaded as a fact, and such facts must be alleged as bring the case within the law.

3. SAME—WHAT CONSTITUTES.
   Four things are essential to a usurious contract: (1) A loan, express or implied; (2) an understanding between the parties that the money lent shall be or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned.

4. MORTGAGE—FORECLOSURE—COSTS AND FEES—STIPULATION FOR ATTORNEY'S FEE—VOID AS UNCONSCIONABLE.
   The court will not enforce an unconscionable allowance for attorney's fees in a mortgage, and, being unauthorized to make a new contract for the parties, will make no allowance therefor.