bate as the last will and testament of Sarah M. McKibben deceased. On the 15th day of April, 1891, the said George E. McKibben filed in said court a petition contesting the probate of said will, and, by leave of the court, filed an amended petition on the 13th day of May, 1891, in which, after stating jurisdictional facts, etc., he alleges, in substance, that at the time of making and executing said will the said testatrix was unmarried; that afterwards on the 10th day of May, 1889, she intermarried said contestant; that thenceforth they lived together as husband and wife until her death; that because of said marriage said will was revoked and void, and prays that the probate of said will be set aside and the said will be declared void and revoked. On the 25th day of May, 1891, the proponents filed a demurrer to said petition alleging that it "does not state facts sufficient to constitute a cause of action."

The sole question raised is, as to whether or not the said will was revoked by the subsequent intermarriage of the testatrix with the contestant. Section 2664, C. L. of Utah, 1888, provides as follows: "Except in cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: 1 By a written will, or other writing of the testator, declaring such revocation, etc. 2. By being burnt, torn, canceled, obliterated or destroyed, with the intent," etc. This section is followed by several others relating to the manner in which a will may be revoked but nowhere do I find a section in our statutes which provides in express terms that the will of a fence-sole is revoked by her subsequent marriage. If then the will in this case is revoked it must be by an implied provision of our statute or by the rule of the common law. And now as to revocation by implication. Section 2670 common laws of Utah 1888, provides as follows: "If after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received." It is contended by counsel for contestant that in construing this statute the words in the feminine should be construed to include the masculine. If this view be tenable the word wife must be construed to include husband, and the same construction must be given to the word wife in the preceding section, 2669 Id.

In the interpretation of statutes words in common use will be given their popular meaning, unless they are defined in the act, or it is manifest from the context that a different meaning is intended.

Southerland on Stat. Cons. Sec. 254 and 262. The intent of the legislature must prevail.

Id. Sec. 238.

To arrive at the legislative intent courts may inquire into the state of society, history of the times, surrounding circumstances, etc., at the time of the enactment of the statute under consideration.

Id. Sec. 300.

Endlich, Interp. of Stat. Sec. 29.

While we have a statutory rule of construction that the masculine shall include the feminine, etc., yet after an examination of the whole chapter on wills and successions, I think it quite difficult to apply that rule to the word wife in construing the sections above quoted and referred to. The very language used in section 2670, points direct to the conclusion that the legislature intended to guard the interests of married women in this Territory. This position is strengthened by the state of society at the time of the passage of the act under consideration and is in accord with sound reason and with the enlightened policy of modern legislation and judicial decisions. The apparent fact that our statute was borrowed from California and that sec. 1300 of the California statute was omitted, I am unable to construe as a *casus omissus*, especially, upon examination of our statute, in the light of the surrounding circumstance at the time of its enactment, but am constrained to believe its omission to have been intentional. It is a matter of history that, at the time of the passage of our law on wills and succession, of which the sections hereinbefore quoted form a part, a system of plural marriage had prevailed here for many years, which was countenanced by the Territorial laws, and that it was a religious creed and formed a part of the social system of a large majority of the people of this Territory. Under the laws of the United States, relating to and enforced in this Territory, plural wives were unprovided for—not entitled to any portion of their husband's estate by descent. The inheritable qualities of their children were shrouded in mystery—involved in doubt, and, under such circumstances, it seems quite reasonable to presume that the legislature, most of whose members were in sympathy with the doctrine of plural marriage, intended to enact no law which would still further restrict the rights of women as to descent, or as to their power of disposing of their property by will. I do not regard this theory of the case in conflict with the case of Silver vs. Ladd, 7 Wall. 219, cited by counsel for contestant, for that case augments rather than abridges the rights of women and this is in consonance with enlightened jurisprudence. I am thus persuaded that there is no statute law in our Territory, either express or implied, whereby the will of a femme, sole is revoked upon her subsequent marriage. It remains but to be seen as to whether or not such a result is effected by the rule of the common law. And, for the purpose of argument, suppose that the omission from our statutes of section 1300 of the California statute is a "*casus omissus*" and that the maxim "*expressio unius est exclusio alterius*" does not apply in this case, will then the rule of the common law be in force?

This leads to a consideration of the reason of the rule and of the condition of married women in this Territory in relation to their property rights. First of the former. The reason of the rule is the ambulatory character of the will during the life of the testator who may revoke it at any time. So in case of a femme-sole as long as her condition remains unchanged. Marriage creates a disability in the wife to dispose of the property bequeathed or devised, destroys the ambulatory nature of the will and leaves it no longer subject to her control. The individuality of the wife becomes merged in that of the husband. Her absolute control of her estate ceases and she can make no testamentary disposition of it during coverture without her husband's concurrence, nor is her will any longer subject to revocation, and therefore cannot be recognized in law.

She is incapable of devising her lands or of making a testament of her chattels without the license of her husband. Her personal chattels belong to him and he can dispose of her chattels real or have them if he survives her.

1 Blackst. Comm., 442.

4 Kent's Comm., 527.

In re Fuller, 79 Ill., 99.

Does the reason of the rule exist under our statute? Is the wife's property subject to the control of the husband as at common law? These questions must be determined by reference to our statute concerning the property rights of husband and wife. Section 2528 C. L. of Utah, 1888, provides as follows: "All property owned by either spouse before marriage, and that acquired afterwards by purchase, gift, bequest, devise or descent, with the rents, issue and profits thereof, is the separate property of that spouse by whom the same is so owned or acquired, and separate property owned or acquired as specified above may be held, managed, controlled, transferred and in any manner disposed of by the spouse so owning or acquiring it, without any limitation or restriction by reason of marriage." This statute is clear and explicit, and makes a material change in the status of a married woman as to her rights at common law. It gives her the same authority over her separate property that the husband has over his property. She can dispose of it just the same as he can. The disabilities to which marriage subjected her at common law have been removed by affirmative legislation. The husband's license is no longer required to enable the wife to make a valid disposition of her estate by will. It therefore follows that to hold the will of a femme-sole void by her subsequent marriage would simply be to impose upon her the unreasonable task, if she desired to exercise her rights, of making another one like it during coverture. This would be to destroy and restore the same thing at the same time which is not the policy of the law. The incapacity of a married woman, which was the destroying power of the will, having been removed by statute the common law rule with its reason has ceased and the will of a femme-sole remains unrevoked by her subsequent marriage.

In re Fuller, supra.

Webb vs. Jones, 36 N. J. Eq., 163.

Noyes vs. Southworth, 55 Mich., 173.

Fellows vs. Allen, 60 N. H., 439.

The demurrer is sustained.

Done in open court, June 20th, 1891.

G. W. BARTCH, Judge.

In Guatemala two editors criticized the president, and now they are at work on the streets. Mr. Dana of the *Sun* had better keep away from that country.