
PREROGATIVE COURT.

OCTOBER TERM, 1875.

In re,
The will of Dr. Gideon Humphrey,
late of the county of Burlington, and
codicils thereto. } *Opinion.*

On appeal from the decree of the Orphans' Court of Burlington county.

MR. F. VOORHEES and MR. J. WILSON for appellants.

MR. M. B. TAYLOR and MR. BROWNE (of Philada.) for respondents.

THE ORDINARY :

Dr. Gideon Humphrey, then of Beverly, in the county of Burlington, made his will on the twenty-eighth of August, 1866. By it he directed that his debts and funeral expenses be paid, and that his real estate be sold by his executors.

He gave to his son Henry certain articles by way of specific legacy, and to his grandson, Gideon Moore, certain other articles in like manner. He gave to Rachel Cavis, his housekeeper, \$300 and certain articles of household furniture. To his daughter Adelaide Josephine Hardcastle he gave one of his portraits of himself, and household furniture not before disposed of. To

his two grandsons, David Hays Humphrey and George M. Humphrey, he gave \$300 each, to be paid to them respectively on their attaining to the age of twenty-five years, with the interest accruing thereon from the time the money should come to the hands of his executors. If either of his said grandsons should die before attaining to that age the survivor was to take his share, and if both should die under that age the legacies bequeathed to them were to be equally divided between the testator's two daughters, Eliza Moore and Adelaide J. Hardcastle.

- 10 To his granddaughter, Kate Hardcastle, he gave one thousand dollars, The residue of his estate he directed to be equally divided between his two daughters above mentioned, to be held by them independent of the control of their respective husbands. In case of the death of either of his daughters her children were to take her share.

He states that he has not given much of his property to his son Henry because of the the latter's being possessed of a competency, and that Henry's sisters therefore had more need of the testator's property than he had. He appointed his friends

- 20 James Sterling and John C. Deacon his executors.

On the 31st of January, 1867, he executed a codicil to the will by which he revoked the gift to his daughter Adelaide, who was then dead, of the half of the residue of his estate, and gave the half given to her by the will to her daughters, Kate Hardcastle, Belle Hardcastle, Adelaide Kedenburg, Lavinia Jenkins, and Anna Pennock, their heirs and assigns forever.

On the 2d of March. 1869, he executed another codicil substituting his son Henry as executor in place of Mr. Deacon.

- 30 On the 3d of June, 1872, he made another codicil as follows: "All that is contained in my said will relating to my daughter Adelaide Josephine Hardcastle, and children, and also all that is contained in my first codicil thereto, dated January thirty-first, A. D. one thousand eight hundred and sixty-seven, relating to the same, I do hereby revoke and declare null and void.

"After the payment of all my just debts and funeral expenses, and all the legacies mentioned in said will not hereby revoked, the residue of my estate, real, personal or mixed, I bequeath to my daughter Eliza L. Moore, for her use and disposal, in whatever manner she may think best. The last item of my said

- 40 will, appointing James Sterling and John C. Deacon my execu-

tors, I hereby revoke, and in their stead nominate and appoint my only son Henry M. Humphrey, of Stamford, in the State of Connecticut, my sole executor."

The controversy is in regard to this last or third codicil.

The testator died on the 3d of August, 1872. The will and codicils were admitted to probate by the surrogate of Burlington county on the 21st of August, 1872. Henry M. Humphrey the executor named in the second and third codicils having renounced the execution of the will and codicils, letters of administration *cum test. ann.* were granted to Peter Powell on the last mentioned day. The testator's estate in New Jersey was inventoried at \$6,871.90. 10

It appears by the final account of the administrator, filed in October, 1873, that the entire estate (which was in three States, New Jersey, Connecticut and Pennsylvania) amounted to \$17,097.25. The estate has been settled, and Mrs. Moore has received, pursuant to the provisions of the last codicil, the entire estate, after payment of debts and expenses of administration, except a balance of \$671.26. Mrs. Jenkins, one of the daughters of Mrs. Adelaide J. Hardcastle, on the 23d of 20 December, 1872, appealed to the Orphans' Court of Burlington county, from the order of the Surrogate admitting the will and codicils to probate and the grant of administration.

The Orphans' Court, by their decree made in September term, 1874, admitted the will and the first two codicils to probate, and rejected the last codicil, and ordered that the taxable costs of the litigation before them be paid out of the estate with a counsel fee of \$1,000 to the counsel on each side.

The last codicil was executed on the 3d of June, 1872, two months before the testator's death. 30

It is insisted, on behalf of the appellant, in the Orphans' Court, that the testator at the time when that codicil was executed, was not possessed of testamentary capacity, and that it was the result of undue influence on the part of Mrs. Moore.

Though the testator was a very old man, his age at the time of his death having been about ninety-four years, he appears to have retained to a remarkable degree his mental faculties and characteristics, among which were firmness, independence and decision. He was blind. Of his two daughters, Mrs. Hardcastle resided with him for the greater part of the time from the 40

death of her husband, about the year 1859 or 1860, until her death, which occurred in or about the year 1867. She had six children, five of whom were daughters. Some of them the testator brought up. After the death of Mrs. Hardcastle, none of her children remained with him, except for short periods, except Kate, who had lived with him from the time when she was about three-and-a-half years old. She married in the early part of the fall of 1871, and left him and went to Europe to live. Her last visit to him, was the last of August or first of September in that year.

From that time to the time when Mrs. Moore came to live at his house, about Christmas 1871, the testator's family consisted of himself, Rachel Cavis, his housekeeper, and a colored boy.

He appears to have often complained that his nieces neglected him and did not treat him with due respect after their mother's death. Rachel Cavis says "it hurt the doctor very much when Kate left him," and that after Kate's visit he said that if she had stayed with him till his death he would have left her one thousand dollars, but as she had left he was going to "make a
20 change in his writing." She says he spoke about this several times, but did not say what change he intended to make. C. B. Gregory, a witness produced by the appellant below says he does not remember hearing Dr. Humphrey refer to his granddaughters, the Hardcastles, during the last six months of his life. This witness was in the habit of visiting him once a week unless prevented by his own health or the weather. Except Kate, who lived in Europe, none of these granddaughters lived farther off than the city of New York during the last year of the testator's life. They were all married.

30 One of the daughters, Mrs. Kedenburg, says that she visited the testator in February, 1872, about the 8th or 9th, and stayed from three to five days; that she thinks he was then enjoying his ordinary health, that she left him physically well and that she is not positive, but thinks he talked about matters in the same way he usually did. After leaving him in February she did not see him again until the following July, she thinks it was the third week in July, and she then stayed about three hours. She says that she had not seen him for a year or two before the visit in February. Mrs. Jenkins, the appellant below, who resided
40 in the city of New York, says that the last time she saw the

testator was in May, 1871, which was more than a year before his death. Mrs. Pennock, another of Mrs. Hardcastle's daughters, testifies that the last time she saw the testator was in February, 1872—the same time Mrs. Kedenburg visited him—that he was then in his usual health both of mind and body.

She says she had remained at his house a short time at different times, that she had spent several months there at a time, and that the last time she spent several months there was in 1868. She did not know of his death until three weeks after it occurred. 10

She was traveling in Canada at the time. Mrs. Parrish, another of Mrs. Hardcastle's daughters, who seems to have resided in Jersey City, testifies that the last time she saw the testator was in July, 1871, about a year before his death. It appears from the admissions of those of the granddaughters who have been sworn, that there were occasional disagreements, at least between the testator and these granddaughters of his. Mrs. Jenkins says he was "rather a spunky old gentleman." Nor would there seem to be any excuse for this apparent neglect of the testator in the alleged fact that these granddaughters 20 were unable to hear from him in response to letters addressed to Mrs. Moore; for his advanced age gave assurance of continued and increasing infirmity; his blindness made society and attention unspeakably more acceptable and valuable to him than it would otherwise have been, and naturally increased his sensitiveness to inattention on the part of his family. None of these granddaughters except Kate, was at any considerable distance from him, and it seems not uncharitable to conclude that if they had felt an interest in their grandfather's welfare, some of them at least, would have visited him, the rather because as 30 they allege they could get no tidings of him.

That he felt the apparent neglect keenly there seems to be no room to doubt, and it appears that he was likely to remember such things in disposing of his property, for Mrs. Kedenburg says that some time before his death, but when she does not state, the testator in speaking of her brother Jerome, to whom he gave nothing, said the latter had lost between \$2,000 and \$3,000 by the way he had acted.

Before Christmas 1871, and before Mrs. Moore come to live with him, he sent for the scrivener, Mr. Powell. Rachel Cavis, 40

the housekeeper, says that the testator sent her for Powell before Christmas, and said he was going to "make a change in his writings," and wanted to see Mr. Powell, and that she then went for Mr. Powell, but he could not come.

She is corroborated in this by Mr. Powell. She testifies also that, before the last codicil was written, the testator told her to send the colored boy for Mr. Powell. She did so. Mr. Powell says that about the last of May or first of June the colored boy came for him. Powell lived about four blocks distant from the
10 testator's residence.

He says that the boy did not tell him what the testator wanted to see him for; that he went the same day and found the testator sitting up; that the testator told him he wished to make some change in the disposition of his property; that the testator told him he had sent for him in the winter for the same purpose, but he had not come; that the testator sent for his will to be brought; that the housekeeper brought it; that no one was in the room; that the testator knocked for the housekeeper, and she came; that the testator told her what he wanted, and
20 where she would find it; that she brought it and retired; that after she retired there was no one in the room but the testator and the witness; that the testator asked him to break the seal and open the will; that he did so, and read the will and the two codicils; that the testator then stated that he wished to make a change, in two or three particulars, in the original will; that one of the particulars was, he wished to revoke all that he had said in his will in regard to Adelaide Josephine Hardcastle and her children; that he gave no reason for it; that he said he wished to revoke the appointment of James Sterling as one of
30 the executors, and appoint his son, Henry M. Humphrey, sole executor; he says he does not remember any other changes; that he noted them down; that he went home and wrote them off as nearly as he understood it; that he took the will home with him, and, on reading it over, suspected that he had not understood the testator about Kate Hardcastle's special legacy—the legacy of \$1,000 to her; that he wrote as he understood the matter, with the exception of that and then went back for an explanation; that the testator said he intended to include all Mrs. Hardcastle's children, and that the witness
40 does not remember that he said anything else except that he

included that special legacy. Powell further says that on that visit he took a draft of what he had prepared and read it to the testator; that the draft left the \$1,000 stand valid; that the testator objected to that. He says there was no one in the room with them at this visit; that the testator was sitting up; that he then returned home and made another copy; that he drafted another codicil when he got home, and drafted it according to the testator's direction, and returned to him, he does not know whether on the same or the next day, and took the draft with him and read it to the testator, and he said it was right, it was what he wanted; and he says he then went home and copied it on the paper which was executed. He says there was no one in the room with them on that visit; that he returned the next day by appointment to have it executed; that the appointment was made when he read the last copy to the testator; that he does not remember that any arrangement was made as to witnesses then; that when he returned at the time appointed, which was four o'clock in the afternoon, he was told, he thinks by the testator, that they expected to have John Thompson and James D. Bennett as witnesses to the codicil; that he does not remember that the testator said he had sent for them, but he did send for them; that he sent a colored boy; that they did not come; that the boy brought word that they were not at home; that the testator then sent the same boy for Ezra C. Tompkins and Mr. Pritchett, the latter of whom was a stranger to the witness; that on that visit, and before the witnesses came, he read the codicil to the testator; that the testator and he had no talk about it further than to ascertain that it was the testator's mind, and that the testator said it was what he wanted. The witness details the formalities of the execution, from which it appears that the codicil was duly executed. He testifies that the testator was "decidedly" of sound and disposing mind, memory and understanding when the codicil was executed. The witnesses both testify that they considered the testator of sound mind. One of them, Tompkins, appears to have been intimately acquainted with him; he says he knew him for three years before his death; that he considered him at the execution of the codicil of sound mind, and that he could see no difference in him then from what he was when he was first acquainted with him. His action and conversation in regard to to the last codicil

10

20

30

40

were in accordance with the firmness and persistency which marked his character. The testamentary capacity of the testator at the time of making the third codicil is established.

The charge that the codicil was the result of undue influence on the part of Mrs. Moore, seems to be wholly unsupported. She does not appear to have said or done anything to induce the testator to make that codicil.

She spoke reproachfully in his presence of the fact that the daughters of Mrs. Hardcastle paid so little attention to him.

- 10 It appears also that she and the testator both complained of like inattention on the part of the Gregorys, who lived in Beverly.

This is, according to the evidence, the extent of her influence. Such expressions are not enough to justify the conclusion that the codicil was the result of undue influence. She neither had the will nor interested herself, as far as appears, in any alteration of it. The will was kept by the housekeeper who, in taking charge of it and producing it, acted under the directions of the testator himself.

- 20 It is said there was a feud between Mrs. Moore and her nieces.

The evidence shows only that she spoke reproachfully of them in regard to their neglect of their grandfather, and, according to one witness, spoke of them as liars, not, however, in the testator's presence. Whether, in any given case there was undue influence, must be determined from the facts. It is not a presumption, but a conclusion. Mrs. Moore may have disliked her nieces. She may have spoken reproachfully of them for neglecting to visit their grandfather. She may have

- 30 said to the witness referred to, that they were liars.

She indeed lived in the same house with the testator and was in daily and nightly attendance upon him, and the codicil is wholly in her favor.

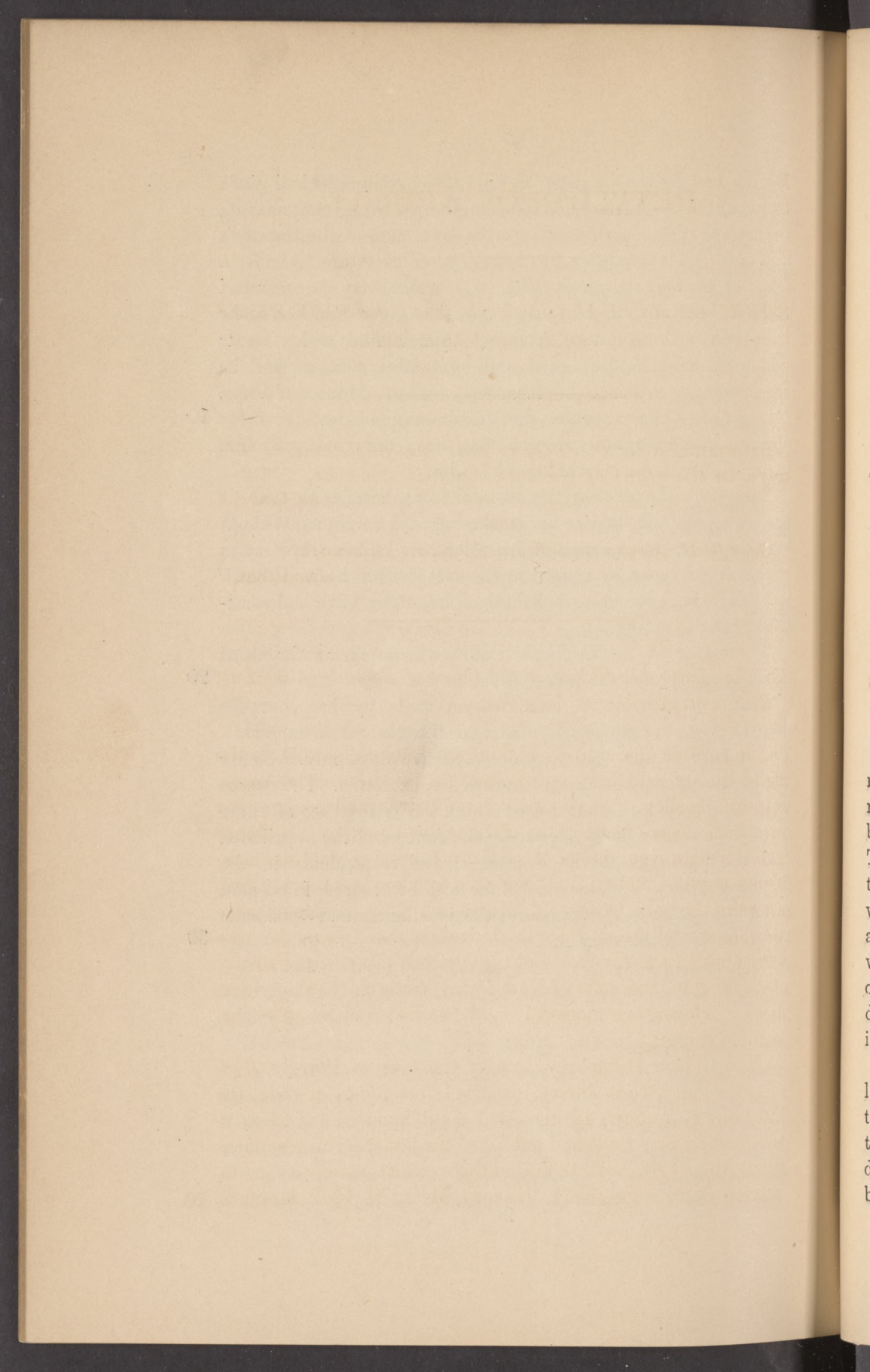
- 40 Notwithstanding all these things, the testator's mind may have been, and for aught that appears it was, wholly free to dispose of his property as he pleased. The testator seems at no time to have contemplated an equal division of his property even among his children. His will, which no attempt is made to impeach, gives nothing of consequence to his son Henry, and to the sons of his son Washington, it gives only \$300 apiece.

By the first codicil, he gave the half of the residue he had given to his daughter Adelaide, to her daughters alone, giving nothing to her son. A discrimination made by a man of the testator's age and in his condition, in disposing of his estate by will in favor of his only daughter (who, in this case, may be presumed to have been advanced in years) who has given him her whole time and with assiduous attention administered to his wants when he most needed care and sympathy, can neither be regarded as evidence of incapacity or of undue influence. Especially is this so when the discrimination is in her favor 10
 against granddaughters, who, having been brought up by him in his family, have married and left him.

There is evidence that the testator considered also that he had done his full duty towards these granddaughters without leaving them any portion of his estate, for in his conversation with the scrivener in regard to the last codicil, he said that if it had not been for his grandchildren he might have had something worth leaving.

The decree of the Orphans' Court, will so far as the third codicil is concerned, be reversed. 20

Complaint is made of the allowance made by that court for counsel fees, one thousand dollars to the counsel of each side. The taking of the testimony occupied five days only. Under the circumstances the amount awarded is excessive. The decree will be reversed in that respect also. A counsel fee of three hundred dollars will be allowed to the counsel of the appellants, and the like sum to the counsel of the respondents in the Orphans' Court. A like counsel fee will be ordered to be paid out of the estate to the counsel of the appellants and respondents 30
 respectively in this court.



PETITION OF APPEAL.

*COURT OF APPEALS IN THE LAST RESORT AS OF
THE TERM OF JUNE, 1875.*

*Between Smith O. Jenkins and Lavinia Jenkins, his
wife, in the right of the said Lavinia Jenkins,*
Appellants,
and
George H. Moore and Eliza L. Moore, his wife,
Appellees.

*To The Honorable Judges of the Court of Appeals in the Last
Resort of the State of New Jersey :*

The petition of Smith O. Jenkins and Lavinia his wife, in the right, &c., of said Lavinia, appellant in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Prerogative Court by his Honor Theodore Runyon, judge of said court, bearing date the nineteenth day of October, A. D. eighteen hundred and seventy-five, wherein the said George H. Moore and Eliza L. Moore were appellants, and the said Smith O. Jenkins and Lavinia his wife 10 were appellees to the decree of the Orphans' Court of the county of Burlington, and state of New Jersey, made on the thirty-first day of October, one thousand eight hundred and seventy-four, in these respects, to wit :

That Gideon Humphrey, late of the town of Beverly, Burlington county, New Jersey, departed this life on or about the third day of August, one thousand eight hundred and seventy-two, having first made and published his last will and testament dated August 20, A. D. 1866, and three codicils attached thereto, bearing date, respectively, January 31, A. D. 1867, March 2, 20

A. D. 1869, and June 3, A. D. 1872. Which said will and codicils were admitted to probate on the 21st day of August, A. D. 1872, by the surrogate of the county of Burlington, from which admission to probate, as to the third codicil to said will, an appeal was taken to the Orphans' Court of Burlington county on the eighteenth day of December, A. D. 1872. Testimony in support of said appeal was presented to said Orphans' Court, supported by argument of counsel for said appellant and appellees. And the decision of the said Orphans' Court rendered thereon

10 on the 31st day of October, A. D. 1874, *ordering and decreeing the said third codicil to said last will and testament, and dated June 3d, A. D. 1872, be not admitted to probate; and further ordering that the taxed costs of said proceedings on both sides be paid out of the estate, and a counsel fee of one thousand dollars be paid also of said estate to the counsel for said appellants, and a like counsel fee to the counsel of said appellees*; that from said decree from said Orphans' Court the appellees in said court filed an appeal on the 13th day of November, A. D. 1874, to the Prerogative Court, complaining of such

20 portion of the said decree as is above set forth, and which said appeal to said Prerogative Court came on to be heard before the said Theodore Runyon, judge of said court, at the March term, 1875, of said court, to wit: on the — day of May, A. D. 1875, at which time the testimony of the witnesses as presented before the said Orphans' Court of Burlington county, together with the proceedings thereon were produced, and argument of the respective counsel for the appellants and appellees were heard; and the said Theodore Runyon, judge of said Prerogative Court, having taken time to consider the same, did, on the

30 19th day of October, 1875, announce his decree in effect as follows:

“That the testamentary capacity of the testator at the time of making the third codicil, is established,” and “the charge that said codicil was the result of undue influence, seems to be wholly unsupported;” and that, “therefore, the decree of the said Orphans' Court, refusing to admit to probate the said third codicil to said will of said testator, should be reversed.”

And your petitioners respectfully appeal from that part of the decree of said judge of said Prerogative Court, which decrees as

40 aforesaid and reverses the said decree of said Orphans' Court,

refusing to admit to probate the said third codicil to said will, upon the ground that the same is erroneous, and that the testamentary capacity of the said testator at the time of making said third codicil, is not established, and that the said codicil was the result of undue influence upon him.

Your petitioners therefore pray that the said decree of said judge of said Prerogative Court may be in the particulars aforesaid, be reversed, set aside and for nothing holden, and that said decree of said Orphans' Court, in refusing to admit to probate the said third codicil, be affirmed, and your petitioners 10 may have such relief in the premises as this Honorable Court shall direct.

M. B. TAYLOR,

Solicitor, and of counsel with appellant.

Dated November 2d, 1875.

INVENTORY.

A true and perfect inventory and appraisement of the goods and chattels, rights and credits, moneys and effects, and all other the estate, real and personal, being in the State of New Jersey, of Gideon Humphrey, M. D., late of the county of Bur- 20 lington, deceased, made by Peter Powell, administrator with will annexed, and William Craythorn and Charles C. McElroy, two disinterested freeholders, this 19th day of August, A. D. 1872.

1 bureau, 1 mahogany breakfast table, 1 bedstead, 1 wash stand, 6 cane-bottom chairs, 2 sheets, 2 blankets, 2 coverlets, 1 carpet, 6 knives and forks,	\$46 90	
1 book case and contents,	20 00	
1 rocking chair, \$5.00; 1 do. \$8.00,	13 00	30
1 sofa, \$10.00; 10 stuffed chairs, \$10.00,	20 00	
4 mahogany stools, \$5.00; 1 marble top table, \$15.00.	20 00	
1 looking glass, \$8.00; 2 candle sticks, \$5.00,	13 00	

	2 pictures and frames,	\$3 00
	40 yards velvet carpet,	50 00
	1 mahogany what-not and contents,	4 00
	1 lot of chinaware and 3 demijohns,	6 00
	1 hat rack, 1 hall lamp and floor cloth,	6 50
	1 mahogany work stand,	5 00
	1 clock, \$5.00; 1 stove and pipe, \$6.00,	11 00
	20 yards Brussels carpet,	15 00
	1 rocking chair, \$2.00; 1 cook stove, \$8.00,	10 00
10	1 extension table, 10 stair rods,	10 50
	1 mahogany wardrobe,	12 00
	1 rocking chair, \$1.00; 1 stand, \$1.00,	2 00
	12 yards carpet,	5 00
	1 bureau and dressing glass,	10 00
	1 marble stand and chamber set,	5 00
	1 bedstead and bedding,	40 00
	1 carpet and rug,	6 00
	3 quilts and lot of floor cloth,	5 00
	1 mattress, stair carpet and 2 pillows,	8 00
20	1 bed spread and 1 quilt,	3 00
	2 pair blankets and 1 looking glass,	4 50
	1 table and 3 chairs,	1 75
	1 stove, \$5.00; 1 bedstead, \$3.00,	8 00
	1 washing machine, wringer and clothes horse,	5 75
	3 wash tubs and 1 bench,	2 00
	1 house and lot in Beverly,	6,500 00
Total amount of deceased's estate in New Jersey,		\$6,871 90

30

PETER POWELL,
Administrator will annexed.

CHARLES C. McELROY,
WILLIAM CRAYTHORN,
Appraisers.

State of New Jersey, Burlington County, ss—William Craythorn, one of the appraisers of the within inventory, being duly sworn according to law, did depose and say—That the goods, chattels and credits in the said inventory set down and specified

were by him appraised according to their just and true respective rates and values, after the best of his judgment and understanding, and that Charles C. McElroy, the other appraiser, whose name is thereunto subscribed, was present at the same time and consented in all things to the doing thereof, and that they appraised all things brought to their view for appraisement.

WILLIAM CRAYTHORN.

Sworn and subscribed at Mount Holly, county and State aforesaid, August 24th, A. D. 1872, before me. 10

WM. I. EMLEY, *Surrogate*.

State of New Jersey, Burlington County, ss—Peter Powell, administrator with the will annexed, of the within named Gideon Humphrey, deceased, being duly sworn according to law, did depose and say—That the annexed writing contains a true and perfect inventory of all and singular the goods chattels, and credits of the said deceased, so far as have come to his knowledge or possession or to the possession of any other person or persons for his use.

Sworn and subscribed at Mount Holly, county and State aforesaid, August 24th, A. D. 1872, before me. 20

WM. I. EMLEY, *Surrogate*.

ACCOUNT.

Burlington Orphans' Court—September Term, A. D. 1873.

The account of Peter Powell, administrator will annexed of Gideon Humphrey, late of the county of Burlington, deceased, as well of and for the estate which hath come to his hands to be administered as for his payments and disbursements out of the same.

This accountant chargeth himself—

Dr.

1872.

	Aug. 24,	To inventory and appraisement,	\$6,871 00
	" " "	amount of personal property in Pennsylvania,	6,000 00
	" " "	amount of personal property in Connecticut,	4,000 00
	" " "	premiums on two U. S. bonds,	90 00
10	" " "	" " " " " "	85 35
	" " "	interest received on mortgage,	50 00
			————— \$17,097 25

This accountant prays allowance—

Cr.

1872.

	Aug. 24,	Cash paid witnesses, expenses proving will,	\$9 00
	" " "	appraisers for appraising,	2 00
	Aug. 24,	Cash, Wm. I. Emley, Surrogate,	22 95
20	" " "	Surrogate for extra certifi- cate,	3 50
	" 15,	" E. Marston, undertaker,	167 00
	" " "	for flowers for deceased,	45 00
	" " "	E. Marston, for carriage hire at Chester, digging grave, and dinners, &c.,	72 00
	" " "	traveling expenses for fami- ly and party, also myself for making arrangements for funeral,	62 00
30	" " "	E. Marston, for services attending on deceased, per receipt,	100 00
	" " "	Rachel Cavis for 11 mo.'s services, at \$10 per mo'h,	120 00
	Sep. 21,	" insurance policy, per re- ceipt,	14 75
	" 26,	" goods bequeathed to Rachel Cavis, appraised at	46 90

Sep. 26,	Cash	Rachel Cavis, on account of legacy,	\$300 00	
" "	"	goods bequeathed to Eliza L. Moore, appraised at	335 00	
" "	"	Eliza L. Moore, one hundred shares of Pennsylvania R. R. stock,	5,000 00	
" "	"	Eliza L. Moore, two one thousand U. S. bonds, as residuary legatee,	2,000 00	10
" "	"	paid Eliza L. Moore, on sale of house and lot in Beverly, as residuary legatee,	6,500 00	
M'ch 8.	"	William W. Harding, advertising sale of house, per receipt,	2 70	
Oct. 3,	Cash	Eliza L. Moore, on account of legacy,	107 87	
Nov. 26,	"	E. E. Marston, for enlargement of monument and finishing two sets of headstones, per agreement,	240 00	20
" "	"	Charles R. Fenimore, collection of tax, 1872,	40 69	
" 2,	"	Elias B. Hall and son, medical attendance,	70 25	
Sep. 16,	"	New Jersey Express Co., per receipt,	2 00	
" "	"	George M. Humphrey, special legacy,	300 00	30
" "	"	David H. Humphrey, special legacy,	300 00	
" 26,	"	goods bequeathed to Eliza L. Moore,	00	
" "	"	court criers, fees, copying, recording,	3 94	
" "	"	advertising notice of settlement, making, setting up copies, filing proof,	6 50	40

Sep. 26, Cash Surrogate, for auditing, stating, reporting and filing this account,	\$30 00
“ “ “ commission on \$17,097 25,	521 94
“ “ “ balance in accountants’ hands,	671 26
	—————\$17,097 25

Burlington County, ss.—Peter Powell, accountant within
named, being duly affirmed according to law, did declare and
10 say—That the within account is in all things just and true, both
as to the charge and discharge thereof, according to the best of
his memory and belief.

PETER POWELL.

Affirmed and subscribed, October 1st, 1873, before me.

WM. I. EMLEY, *Surrogate*.

I have audited and stated the within account and do report
the same to the court for allowance.

WM. I. EMLEY, *Surrogate*.

20 In the matter of the account of Peter Powell, administrator will
annexed, of Gideon Humphrey, deceased.

The surrogate having audited and stated the within account
and placed the same on the files of his office, and notice of the
settlement thereof having been published according to law, and
the same being now reported for allowance and settlement, and
no objections being made thereto, it is ordered and decreed that
the said account be allowed in all things as reported.

CLAYTON LIPPINCOTT,
JOSEPH L. MORTON,
JOSEPH CARR.

ESTATE OF GIDEON HUMPHREY, Dec'd.

Brief of Fact of Appellants as condensed from the Evidence.

The decedent died August 3, 1872, at Beverly, New Jersey, at the great age of 96 or 98 years. For nearly twenty years prior to his death he had been totally blind. He outlived his wife. Two sons, Henry and Washington, and two daughters, Adelaide Hardcastle and Eliza Moore were his issue. Henry and Eliza alone survived him. Adelaide widowed and poor, died in his house in 1867, leaving five daughters and one son. All these daughters had spent a portion of their respective lives with the decedent, and one of them, Kate Hardcastle, had been a constant member of his family and attendant upon him from 10 infancy until the date of her marriage in the fall preceding his death. Some slight estrangement, but not of a serious nature existed, between the decedent and the sons of his deceased son Washington. His son Henry was a wealthy merchant in Connecticut.

August 28, 1866, the decedent made his will, giving specific legacies to his son Henry, his grandsons, sons of Washington, his granddaughter Kate, and making his two daughters, Adelaide and Eliza, his residuary legatees, share and share alike. In January, 1867, Adelaide having died, the testator annexed the 20 first codicil to his will, which merely set forth that Adelaide's share was to be divided equally between her five daughters therein named. On March 2, 1869, the testator annexed a second codicil merely for the purpose of substituting his son as executor. No objection is raised as to the will and the first two codicils.

On June 3, 1872, exactly two months before his death, the testator is alleged to have annexed a third codicil to his will, which revoked the appointment of an executor, and which was also a complete revocation of the residuary bequest to the five granddaughters of the decedent. All the remaining bequests in the original will remained intact. No reason is assigned in the codicil nor does any reason whatever appear in the testimony to account for or explain this singular action on the part of the testator. No estrangement had existed, at any time, 10 between the testator and any one of these disinherited granddaughters. On the contrary he was lavish in his expressions of affection for each of them up to the day of his death. There is no denial of this in any portion of the evidence. Four of these granddaughters at the date of this codicil were in very reduced circumstances, while Eliza Moore the sole residuary legatee, with her husband, were in comfortable if not wealthy condition, Mrs. Moore having in the preceding December returned from Europe, where she had been indulging in a tour.

At the date of the signing of the third codicil, the grand- 20 daughters were all married and living with their husbands, three of them having been married and located elsewhere before even the first codicil was written. From December to June Eliza Moore was visiting at the house of the decedent, where she remained until his death. No other relative was in the house at or about the date of the codicil. The decedent was then a broken down, helpless, old man, blind and bedridden, totally dependent upon those around him. He was frequently out of his mind, was sometimes under the effect of opiates which were administered to lull his pain, and seems to have been laboring 30 under mental delusion, evidenced by his talking about mediums he had seen, and by his craving to meet spiritualist clairvoyants, who at this time were allowed to visit him. His granddaughters all swear that they were not apprised of his condition at the time, although Mrs. Moore told the decedent that she had written them and they did not answer. It is in evidence also that Mrs. Moore spoke of these granddaughters in harsh and unkind terms in the presence of the dying man.

The will and first codicil appear to have been witnessed by the attorney and professional advisor of the decedent, Mr. Ben- 40 nett. The second codicil was witnessed by Mr. Thomason, who

had for years the charge and supervision of the business of the decedent. Both these gentlemen were very near neighbors of the decedent, and the latter one an almost daily visitor at his house. The existence of the third codicil was totally unknown to them, until after the death of the testator. The third codicil was signed by the testator with his mark, his hand being held and directed by Peter Powel, who had drawn the codicil, but who did not read the codicil to the blind testator in the presence of a single witness. The subscribing witnesses who were called in, were both very young men, one of them, Pritchell, being a 10 complete stranger to the decedent. They remained but a few moments in the sick chamber, and heard no allusions from Powel or the testator as to the contents of the paper they witnessed. Powel was very old and very deaf, and the testator was very feeble and spoke in a whisper. Powel is the only witness as to the testator's desire of disinheriting his granddaughters; while Thomason, the neighbor and old confidential friend of the decedent, asserts that, shortly before the date of the codicil, the decedent had talked with him as to the 20 disposition of his property among his grandchildren, and how it was apportioned among them.

The proponents of the will bring but four witnesses to sustain their case. Powel, an infirm, deaf justice of the peace, who drafted the codicil; Pritchell, the grocer, a young stranger, called in at the moment; Tompkins, the young apothecary, and next door neighbor of Powel, and Rachel Cavis, the housekeeper of the decedent, whose testimony is confused and contradictory. This last witness, whom they reserved for open examination before the judges of the Orphans' Court, just before the argument, asserted that three doctors were in attendance upon the 30 dying man, and yet not one of these professional men has testified as to the sanity of their patient.

No notice was given to any members of the family, other than to Eliza Moore and her brother Henry, of the reading of the will. The executor renounced, Powel was appointed administrator forthwith, one of his two securities being Eliza Moore, who was a married woman at the time. The will was hurriedly probated, a partial inventory was filed at once, and although an appeal was shortly thereafter taken by one of the granddaughters and her husband, and evidence was being taken in support 40

thereof, yet the first and final account of the administrator was filed and confirmed without notice to the appellants or their counsel to examine the same. This account showed the net value of the estate to be \$17,097.25.

In October, 1874, the Orphans' Court of Burlington county, after hearing the testimony on both sides, which by consent had been taken before a Master in Chancery, and after witnessing the examination, in open court, of Rachel Cavis, the housekeeper of the decedent, refused probate to the third codicil. Counsel
10 for Eliza Moore and her husband forthwith appealed to the Prerogative Court, which latter court, in November, 1875, reversed the decree of the Orphans' Court and sustained the codicil. An appeal was forthwith taken therefrom to this court by Jenkins *et ux.* the original appellants.

Court of Errors and Appeals of New Jersey.

Between

Smith O. Jenkins and Lavinia Jenkins,
his wife,

Appellants.

and

George H. Moore and Eliza L. Moore,
his wife.

Respondents.

COPY OF WILL AND PROBATE.

In the name of God, Amen. I, Gideon Humphrey, of the city of Beverly, in the State of New Jersey, being of sound and disposing mind and memory, do hereby make this, my last will and testament.

First. It is my will, and I do hereby order and direct, that all my just debts and my funeral expenses be duly paid as soon as convenient after my decease.

Second. It is my will, and I hereby direct, that all real estate of which I may be possessed at the time of my decease shall be sold as soon as my executors shall think it prudent and safe for my heirs so to do. 10

Third. I give to my son, Henry M. Humphrey, my military sash and sword, my gutta percha cane and my gold spectacles.

Fourth. I give to my grandson, Gideon Moore, my gold watch and chain.

Fifth. I give to Rachel Cavis, who has been in my family many years, three hundred dollars, one bureau, one mahogany breakfast table, six breakfast knives and forks, one wash stand, one bedstead, one of my best carpets, two of my best blankets, two of my best sheets, two coverlits and six cane-bottomed chairs.

Sixth. I give to my daughter, Adelaide Josephine Hardcastle, my portrait last painted of myself, and all my household and kitchen furniture, not otherwise disposed of before my decease.

10 *Seventh.* I give to my two grandsons, David Hays Humphrey and George M. Humphrey, three hundred dollars each, to be paid to them when they shall arrive at the age of twenty-five years, with interest from the time the same shall come into the hands or under the control of my executors. If either of my said grandsons should die before arriving at the age of twenty-five years, it is my will that the survivor shall take the share of his deceased brother; in case of the death of both of my said grandsons before arriving at the age of twenty-five years, then
20 it is my will that the sum herein bequeathed shall be equally divided between my two daughters, Eliza and Adelaide, share and share alike.

Eighth. I give to my granddaughter, Kate Hardcastle, one thousand dollars.

Ninth. It is my will, and I hereby direct, that the residue of my estate shall be equally divided between my two daughters, Eliza Lavinia Moore and Adelaide Josephine Hardcastle, to be held by them for their own sole use and benefit, independent of their husbands; and I do constitute and appoint my said daughters, Eliza and Adelaide, my residuary legatees. In case of their
30 death, or the death of either of them, before my decease, it is my will, and I hereby so order and direct, that the children of the daughter or daughters so dying shall receive, respectively, their mother's portion, share and share alike.

Tenth. It is my will, and I hereby direct, that the foregoing legacies, except the legacies to my two grandsons, David H. and George M. Humphrey, shall be paid or delivered to the respective legatees within one year, or sooner, after my decease.

As I have not bequeathed much of my property to my son, Henry, I wish it to be distinctly understood that this is not

done from any want of affection, but because I think he has sufficient, and that his sisters have more need of it than he.

Lastly. I hereby constitute and appoint my friends, James Sterling and John C. Deacon, of Burlington, New Jersey, my executors, to carry into effect this, my last will and testament.

In witness whereof, I have hereunto set my hand and seal, this, the twenty-eighth day of August, in the year of our Lord one thousand eight hundred and sixty-six.

His
GIDEON \times HUMPHREY. [L. s.]
Mark.

Signed, published and declared to be his last will and testament, in the presence of us, who were present at the same time and subscribed our names as witnesses in his presence.

NOTE.—The words “of twenty-five years,” interlined in the second line of the second page was done before signing.

HENRY MCKENNEY.

PETER POWELL.

J. D. BENNETT.

I, Gideon Humphrey, the within named testator, do hereby make and publish this, my codicil to my last will and testament, bearing date the thirty-first day of January, A. D. one thousand eight hundred and sixty-seven, in manner following, to wit :

Item. I do revoke the devise, in my said will contained, to my daughter, Adelaide, of the one moiety of the residue of my estate, and do give the same to her daughters, Kate Hardcastle, Belle Hardcastle, Adelaide Kedenburg, Lavinia Jenkins and Anna Pennock, their heirs and assigns forever.

In witness whereof, I have hereunto set my hand and seal, this thirty-first day of January, in the year of our Lord one thousand eight hundred and sixty seven. 30

His
GIDEON \times HUMPHREY. [L. s.]
Mark.

Signed, sealed, published and declared by the said Gideon Humphrey as and for a codicil to his last will and testament, in the presence of us, who in his presence and in the presence of

each other have, at his request, subscribed our names as witnesses thereto.

J. D. BENNETT.

HENRY MCKENNEY.

I am desirous of substituting the name of my only son, Doctor Henry M. Humphrey, of Stamford, State of Connecticut, as one of executors of my last will and testament, in place of John C. Deacon, of Burlington County, New Jersey, to which I subscribe, this day, March second, one thousand eight hundred
10 and sixty-nine, my hand and seal.

GIDEON HUMPHREY. [L. S.]

Witness :

JOHN THOMASON, Beverly, Burlington County, N. J.

I, Gideon Humphrey, the testator named in the foregoing will, dated the eighth day of August, A. D. one thousand eight hundred and sixty-six, and also in the two codicils thereunto annexed, dated respectively January thirty-first, one thousand eight hundred and sixty-seven, and March second, one thousand eight hundred and sixty-nine, do make and publish this, my
20 third codicil to said will, to wit :

Item 1st. All that is contained in my said will relating to my daughter, Adelaide Josephine Hardcastle, and children, and also all that is contained in my first codicil thereto, dated January thirty-first, A. D. one thousand eight hundred and sixty-seven, relating to the same, I do hereby revoke and declare null and void.

Item 2d. After the payment of all my just debts and funeral expenses, and all the legacies mentioned in said will not hereby revoked, the residue of my estate—real, personal or mixed—I
30 give and bequeath to my daughter, Eliza L. Moore, for her use and disposal in whatever manner she may think best.

Item 3d. The last item of my said will, appointing James Sterling and John C. Deacon my executors, I hereby revoke, and in their stead nominate and appoint my only son, Henry M. Humphrey, of Stamford, in the State of Connecticut, my sole executor.

In witness whereof, I have hereunto set my hand and seal,

this third day of June, in the year of our Lord one thousand eight hundred and seventy-two.

GIDEON ^{His} ~~X~~ HUMPHREY. [L. S.]
Mark.

Signed, published and declared to be his last codicil to his last will and testament, in the presence of us, who were present at the same time and subscribed our names as witnesses in his presence.

EZRA C. TOMPKINS.

W. F. PRICKETT.

PETER POWELL.

10

1872, August 21—Will and codicils admitted to probate at Mount Holly.

1872, August 24—Inventory of the estate filed.

1872, Dec. 23—Petition of appeal of Lavinia Jenkins, *nee* Hardcastle, from the decision of the Surrogate of Burlington county admitting to probate the third and last codicil to the will of the deceased, filed.

1873, Oct. 1—Account of Peter Powell, administrator, *cum testamento annexo*, filed. Value of estate as per account \$17,097.25.

20

TESTIMONY.

[Filed October 31st, A. D. 1874].

Depositions of witnesses, &c., taken in the matters of the appeals from the order of the surrogate of the county of Burlington, admitting to probate certain paper writings purporting to be the last will and testament of Gideon Humphrey, and the codicils thereto, taken before the subscriber at his office in Mount Holly, on Wednesday, May 7th, 1873, by consent, in the presence of William H. Browne, Esq., attorney of the petitioners, and of Frederick Voorhees, Esq., attorney of probates.

30

JNO. C. TEN EYCK, *M. C. C.*

Mary A. Kedenburg, a witness produced on the part of the appellant in the above stated case, being duly sworn, deposeseth and saith—

I am a resident of Brooklyn, New York; I expect to sail for Europe on the 15th of May, instant, with the intention of residing there permanently; I am the grand-daughter of Gideon Humphrey, the decedent; I am the daughter of Adelaide J. Hardcastle, deceased; I was at his house in February, 1872, and remained there several days; I was also there
 10 in July of the same year, about ten days before his death; at that time I was only there a few hours in the middle of the day; I was there the week before he died, one or two days before his death; we supposed him to be ninety-eight years old at the time of his death, he admitted he was ninety-six; he was blind and had been for a good many years before his death; there had been no dissension between the decedent and myself and sisters at any time that I know of; nothing since we were children that I know of; nothing to influence grandfather that I know of; I was born in 1836; in February, 1872, I visited
 20 my grandfather; I had been in Maryland; I was treated by my grandfather on that occasion with his usual affection and kindness; he never gave me an unkind word in his life; his feelings at this time, with regard to my sisters; soon he spoke with his usual interest, asked how each one was getting along separately; his language was affectionate and interested; I can't say he referred to them more than once; he spoke of Mrs. Eliza Moore on the occasion of this February visit; he was very impatient that she did not return to her husband in San Francisco; he was impatient and irritated at the sound of
 30 her voice, and when she would begin to talk of something he would push his chair back; again in July I was there (1872); I received letters from my sister Kate, living in France, making inquiries about him, complaining of not hearing from him; she wanted me to go and see grandfather, she was so anxious; I could not go conveniently; if I had known he was ill I would have gone; I wrote Miss Adeline Thompson to go to Beverly and report to me how grandpa was, and the cause of his long silence; she wrote me she thought grandpa was dying, and I had better go on immediately; I had not an idea of his sickness up to this
 40 time; (Mrs. Moore is my aunt, she was staying at the house of

decedent at the time); I went on the day following the receipt
 of Miss Thompson's letter to Beverly to see grandpa; I saw
 Mrs. Moore there first before I saw grandpa; at first she was
 not going to let me see him, she said he was too ill and too
 weak, she did not want him disturbed; I did see him; he was
 very low indeed; it struck me terribly to see him so broken and
 changed; he received me in a most affectionate manner, he was
 completely overcome, he cried like a child; he made allusions
 to my sisters; he asked me about Kate especially, she had
 spent all her early life with him; he spoke affectionately and 10
 kindly of every one of my sisters; he blessed Kate repeatedly,
 and blessed me; when Rachel (the housekeeper) came in and
 found him crying, she asked him what was the matter; he
 replied that he was so overjoyed at seeing this blessed child,
 saying how good I was to come on and see him; he had a little
 ring, just a wire, at one time for a great many years, which I
 thought of, and knew would be a treasure to my sister Kate; it
 had been a ring but was worn down to a thread; it was of no
 intrinsic value; I said, grandpa where is your little ring? he
 put his hand up to the finger where he used to wear it, he 20
 found it was gone, and he said where is my ring? oh, my God,
 where is my ring? and got very much excited, and said I have
 worn that ring for forty or sixty years, I forgot which, it was a
 long while; he kept saying it over and over again, oh, God,
 who took my ring, where is my ring? he was not weeping, but
 just crying out in this way; Mrs. Moore heard him calling out
 in this way, and came in; of course he could not see her, but
 she spoke right away; she said, pa, you mustn't excite yourself
 in this manner, what is the meaning of this; he said, my little
 ring, Eliza, who has my little ring? oh, God, who has my little 30
 ring; she said, pa, you must compose yourself; she said, you
 know very well, at your express desire, I took that ring off your
 finger, and sent it to my son Harry, in Africa or Algiers;
 grandpa just cowered down and said, oh, my God, my God! he
 did not contradict it or deny anything; he was cowed; when
 Rachel, the housekeeper, came in and asked me to come out
 and take a cup of tea, he begged her to let me stay and not
 take me away; he clung to my hand—I had his hand in mine
 —and he wept again; I was not going, and Rachel says,
 Doctor, you don't want her to have a headache, she will be sick, 40

and then he let me go ; he seemed to have paroxysms of pain—suffered greatly at times ; he was just like a child ; I was there again two days before his death ; stayed, I think, two nights and left the day before his death ; he was dying then—he told me so ; he told me he had been dying two weeks ; there was no change in his affection then towards me, and in speaking of my sisters.

Quest. From what the decedent has said in your presence, what estimate do you place upon the amount of his property shortly before his death ? [Objected to by Mr. Voorhees].

Ans. I don't know that he said anything to me shortly before his death about it ; some time before, in speaking of my brother, Jerome, he said Jerome had lost between \$2,000 and \$3,000 by the way he had acted ; he said we were to have between \$2,000 and \$3,000 apiece, and what little we were to have was not to go into the hands of our husbands.

And being cross-examined, saith—

My grandfather died on August 3d, 1872 ; he left at the time of his death two children ; their names are Eliza L. Moore, wife of George H. Moore, and uncle Henry M. Humphrey ; he resides at Stamford, Connecticut ; my mother and uncle Washington died before him ; my uncle died in Philadelphia ; I think he left three children, George, Hays and Mary ; I think they are all now living ; I don't know that either of them are married ; my mother died in January, I think it was in 1867 ; she lived at grandpa's, at Beverly, at the time of her death ; she left six children, one son and five daughters, Lavinia M. Jenkins, wife of S. O. Jenkins, living in New York (Brooklyn) ; myself—my husband's name is John F. Kedenburg ; Anna Pennock, wife of Homer Pennock ; Kate H. Lomer, wife of Edmund Lomer, in France ; Belle E. Parrish, wife of William W. Parrish, of New Jersey, and Jerome H. Hardcastle, of Maryland ; my mother resided with my grandfather for several months immediately before her death ; prior to that she kept a boarding-house in Philadelphia for a time—about a year, I think, on Spruce street ; in 1862 she was keeping a boarding-house in Beverly ; how long she continued to keep it I do not know ; I then went to Europe with my husband ; I can't tell now what she was engaged at from that time till she took the boarding-house ; I

shall have to sit down and think it all over ; she was off and on at grandpa's ; the visit I refer to in February must have been just after the 8th or 9th ; I was there only a few days at that time—from three to five ; I can't say positively, he was not then confined to his bed ; he was then enjoying his ordinary health ; not in very good spirits, somewhat depressed ; I had not seen him before that for a year or two, I think ; I had a boarding-house after our troubles, and could not go down ; (I refer to my husband's business troubles) ; no one of his family lived with him, except his daughter, Mrs. Moore ; I don't know much of 10 the doings or movements of Mrs. Moore ; I believe she was there from the time of her return from Europe until his death ; she made her home there, I think ; she was away on a visit sometimes ; in February I left my grandfather physically well ; I am not positive, but I think he talked about matters in the same way he usually did ; after leaving him in February I did not see him again until the next July ; I think it was the third week in July ; I stayed at that visit ; was several hours—I think about three hours ; no one of his family then resided with him except Mrs. Moore ; I found him very ill then—all broken, 20 just like a child ; I got there about 1 o'clock P. M., and left on a 4 or half past 4 train, I think ; I think it was about the 20th or 21st of July ; he was then confined to his bed ; there was a male nurse who had been there for weeks ; after that I did not see him again until about the last day of July ; he was then very low ; I stayed there until August 2d, I think ; he was very feeble indeed, but he knew me and was glad to see me.

MARY A. KEDENBURG.

Sworn and subscribed, this 7th day of May, A. D. 1873, before me, at Mount Holly. 30

JNO. C. TEN EYCK, *M. C. C.*

Adjourned to November 28th, 1873, by consent.

November 28th, 1873. The following testimony was taken by consent, in pursuance of adjournment, in the presence of Wm. H. Browne, Esq., attorney of petitioners, and of F. Voorhees, Esq., attorney of probates.

M. Adeline Thomson, of the city of Philadelphia, a witness produced on the part of the appellants or petitioners, alleging herself to be conscientiously scrupulous of taking an oath, and being duly affirmed, declareth and saith—

I have resided in Philadelphia since 1832; I am a sister of J. Edgar Thomson, President of the Pennsylvania Railroad; I was intimately acquainted with Doctor Gideon Humphrey, deceased; he was my mother's physician; I have known him since I have known anything; I was intimately acquainted with all the
 10 daughters of Mrs. Adelaide J. Hardcastle, except Mrs. Jenkins; have known her for the last two years; I am acquainted with Mrs. Eliza Moore, the daughter of the deceased; I have visited the late Doctor Humphrey, at his late residence in Beverly, a number of times; he was about 98 years of age at the time of his death; he had been perfectly blind for a number of years before his death—twenty, I think; I visited his house only once in the year 1872 (the year he died); I visited him at the request of Mrs. Kedenburg, one of his granddaughters, about twelve days before his death; she said she could not get to hear
 20 from her grandfather, and was anxious to know what was the matter. [What she said objected to.] I went up to see him; when I went into the house I saw Mrs. Moore; she held up her hand for me not to speak to her, and motioned me to go in the parlor; she came to me immediately in the parlor; said she didn't think I could see her father, but would ask him; she did ask him and requested me to come right in to him; I went in; she told him who I was, and he knew me; he asked after my sister; I told him what I had come for; that his granddaughter wanted to hear from him; that they had not been informed of
 30 his sickness; he asked after them all kindly, and wished to see them; I was not in the room longer than 15 minutes; Mrs. Moore was in the room with me besides the Doctor; I left the room and returned again; I was in there afterwards on the same afternoon; when I went in the second time, Rachel, his housekeeper, had to tell him it was me; he made the same inquiries that he did the first time I was in; he asked kindly after them all; in his physical condition he was suffering very much, so that I had to leave the first time; the second time I could not hear what he said, his voice was so weak; Rachel had
 40 to interpret for him; the first time Mrs. Moore repeated what

he said, but I heard him ; the first time I was sitting by his bedside, as near as I could get to him—leaning over towards him ; he was very feeble ; he could not help himself at all ; his housekeeper then requested me, in his presence, to write to his granddaughter, as she had not time ; I had a conversation with Mrs. Moore at that visit, in relation to the granddaughters ; it was in the parlor, not in the Doctor's presence ; she entertained me by telling me how his granddaughters had scandalized their dear grandfather.

Quest. Did she at that time endeavor to prejudice your mind 10
against his granddaughters ?

Ans. That is the way she impressed me ; she spoke in such an unnatural manner that I thought there must be something wrong, and wrote to Mrs. Kedenberg, after I got home, to come and see her grandfather and attend to him ; I never had so strong an impression in my life that there was something wrong ; [The whole of this testimony in relation to this conversation of the witness and Mrs. Moore, and the impressions of the witness, objected to by Mr. Voorhees]. One of the Doctor's granddaughters, Kate Lomer, had lived the most of her life with him ; 20
Anna Pennock, another granddaughter, had lived with him at different times ; also Belle Parrish, a third granddaughter ; all his granddaughters (the children of Adelaide J. Hardcastle) visited him frequently within two years preceding his death ; in June, 1868, I remember I was at the Doctor's, and he told me he would leave his granddaughters two thousand dollars each ; he seemed, at that time, to be as well as he had been for years ; he laughed and joked ; I never heard the Doctor speak harshly of one of them, always in the kindest manner ; he seemed to be 30
proud of them.

Quest. Do you know what his feelings were towards their mother up to the time of his death ?

Ans. Very kind ; I always thought he thought more of her, in fact, she was a favorite daughter ; I do not know whether any estrangement did exist between Doctor Humphrey and the children of Washington Humphrey.

And being cross-examined, witness saith—

I am not a relative of these parties, I am a friend of Kate Hardcastle and all the family ; I was not at the Doctor's in

1871, but I usually visited him twice a year; I was there in 1870; he was extremely ill the time I visited him in 1872—he was suffering intense pain; that was the only time I saw him after the year 1870 up to the time of his death; I never knew of any estrangement between Dr. Humphrey and the children of his daughter, Mrs. Adelaide Hardcastle; Mrs. Hardcastle died at Dr. Humphrey's home in 1867.

MARY ADELINE THOMSON.

Affirmed and subscribed before me, at Mount Holly, this 28th 10 day of November, A. D. 1873.

JNO. C. TEN EYCK, *M. C. C.*

George McGonigal, of Beverly, Burlington county, N. J., a witness produced on the part of the petitioners, being duly sworn, deposeth and saith—

I have lived in Beverly twenty-four years last June; I was fifty-six years old last March; I was with Dr. Humphrey at the time of his death; I was there as his nurse; I first went there in that capacity on the sixth of June, 1872, and remained with him until his death; I occupied the same room with him during
 20 the whole time; the members of his household during that time were his housekeeper (Aunt Rachel), and Mrs. Moore, and a colored boy they had there; I was sent for to come there by Mrs. Moore, and she employed me; at the time I went there I found the old doctor pretty much exhausted; he was laboring under continual hic-coughing; his mind seemed to wander; he was not taking any medicine, and had no medical advisers at that time; he seemed to be racked with physical pain; his whole system seemed to be shocked; it was continued hic-coughing; he was totally blind; he was very feeble generally;
 30 he was not able to speak above a whisper; while I was staying there I have heard him speak of his granddaughters several times; he always spoke of his granddaughters in the kindest of terms; he expressed a desire to see them; I can't remember just exactly any words he made use of; he expressed this desire to see them in the presence of Mrs. Moore; the first time I ever heard him speak in regard to it, he asked Mrs. Moore why they hadn't come; she said she had wrote to them and had received no answer; I think this was the week in the beginning of July;

I don't know that I ever heard him speak to her again on the same subject; not to speak to her; he spoke to the housekeeper in my presence; he said: "Rachel, why is it that my dear grandchildren do not come?" she said she couldn't know; that Mrs. Moore had wrote to them.

Quest. Did Mrs. Moore, during this time, ever prevent you from carrying out any request of Doctor Humphrey for the presence of any of his friends in his room?

Ans. Well, I think it was two days before the Doctor died, he requested to see Mrs. Gregory, and said he must see her, and wanted me to go up for her to come down, (she was some relation of his, I don't know how); I went out of the room, got my hat that hung up in the hall; Mrs. Moore came out of the room onto the piazza; when I got out there she told me that she didn't want me to go; she said the way that family had used pa, I would not allow them in the house; I didn't go, being her request.

Quest. Did you ever hear Mrs. Moore make any remark about those granddaughters?

Ans. I have heard her say they had treated pa very unkindly; I once heard her speak that way in the presence of the Doctor (Dr. Humphrey).

Quest. Did you ever hear the Doctor speak of what he intended to do with his property?

Ans. I never did.

Quest. During this time did you ever hear Mrs. Moore speak of the disposition of his property, or what he intended to do with it—anything on that subject?

Ans. At one time she told me that everything was arranged; that pa had made her executor;— [Mr. Voorhees objects to all the testimony respecting the above conversation]. I am acquainted with the administrator of the estate of Dr. Humphrey, Mr. Peter Powell; during this time I never saw him at Dr. Humphrey's house; I never heard Dr. Humphrey speak of Washington Humphrey's children.

And being cross-examined, saith—

During the time I was there, he suffered a good deal more at some times than he did at others; when the pain came on it would reduce him very rapidly.

Quest. How would he seem or appear between the intervals of pain?

Ans. It would be some time after he had those racking pains before his mind would seem right; he would get talking about some medium that he had seen.

Quest. After his mind got right, as you have above stated, it would remain so until the next return of pain, would it not?

Ans. Yes.

Quest. Did the return of pains become more frequent as he
10 approached the time of his death?

Ans. They did; the pains continued longer when I first went there than afterwards, and had continued so, Dr. Humphrey told me, for a week before I went there; [Mr. Voorhees objects to the testimony what Dr. Humphrey told him, as being no answer to his question and volunteered.] When I heard him speak of his granddaughters, as above stated, it was in the intervals between pains; beyond these occasions he seemed quite pleasant and cheerful; he talked socially upon different subjects, and was pleased to see his friends, too, on these occa-
20 sions, but could not see them, he was blind; he was pleased to have his friends with him; he got relieved of the hic-coughing soon after I went there; I stayed with him until the time of his death; was not discharged before that time.

And being re-examined in chief, says—

Quest. What friends visited him during that period you was there?

Ans. Several of the neighbors—Mr. John Thomason, Mr. Burroughs, Mr. Tompkins, and there was a lady from Philadelphia, and Doctor Paxson, and during that time one of his
30 granddaughters, Mrs. Kedenberg, and Doctor Bryan used to call in and see him occasionally; Dr. Humphrey sent for Dr. Paxson (the clairvoyant) and the lady; he sent her to Philadelphia for another; she did not come, she was sick.

GEORGE MCGONIGAL.

Sworn and subscribed this 28th day of November, A. D. 1873, before me, at Mount Holly.

JNO. C. TEN EYCK, M. C. C.

The will of Dr. Gideon Humphrey bears date August 28th, 1866, with codicil dated January 31st, 1867; with second codicil dated March 2d, 1869, and third and last codicil dated June 3d, 1872, with the probate attached, and marked by me *Exhibits A, B, C and D*, on the part of the probates, were produced to me by William J. Emley, Esq., Surrogate of the county of Burlington.

It was understood and agreed by and between the respective counsel and attorneys of the parties in this case, viz.: Mr. Voorhees on the part of the probate, and Mr. Browne on the 10 part of the petitioners, that no exception is taken to the probate of the will or of the first and second codicils thereto, as above, but that the appeal is taken solely to contest the probate of the third and last codicil to said will of Dr. Humphrey, as above stated and referred to, dated June 3d, 1872.

Ezra C. Tompkins, of Beverly, New Jersey, a witness on the part of the probates, being duly sworn, deposeth and saith—

I have lived in Beverly six and a half years; I am a druggist and apothecary, and keep a drug store there; I was acquainted with Dr. Gideon Humphrey in his lifetime; I knew 20 him about three years before his death; he lived during that time in Beverly; I was quite intimate with him during that time; I visited him, probably, on an average, once in two weeks, from the time of my acquaintance to the time of his death; my visits were social, strictly; I found him generally out of bed; he was blind; generally when I called he was social—pleased to see me, and I would probably spend from one to three hours with him at a time; this was up to a very short period previous to his death; I stayed so long, generally, because I enjoyed his conversation; I understood at the time of his death he was 98 30 or 99; he was not feeble as most people are at that age; with the exception of his blindness, I always considered him a remarkable man for that age, so far as his intellect was concerned and the use of his other faculties; I considered his memory very good, as he often conversed with me upon subjects that had occurred during his life, from a very remote period up to the present time; I considered him remarkable in that respect; his physical condition during that time was very good for one of that age; I never considered there was any difficulty, except his

blindness, to prevent him from going about; of course he was feeble to a great extent necessarily for one of that age; he often remarked to me if it was not for his blindness that he would come down to the store and see me frequently; the difficulty with him towards the close of his life was a stomach disease; I cannot explain it, for the physicians didn't know; the first I knew of his suffering from it was something in the vicinity of two months before his death; when those attacks came on he suffered intense pain, and at first was almost constantly

10 troubled with hic-coughing; sometimes during these attacks he was unconscious, his mind would wander, and, of course, knew no one at those times; after the attack ceased he would rally and appear as he always did, though, of course, he was weak; he died early in August, 1872; I am one of the subscribing witnesses to his third and last codicil—[*Exhibit D* being shown to witness, it being the third codicil above referred to, he says this is the paper]. The name, Ezra C. Tompkins, signed there as a subscribing witness, is in my handwriting; I saw Gideon Humphrey sign his mark to that codicil; he so signed it in my

20 presence; Mr. Peter Powell and Mr. Pritchett were present at that signing; I signed my name in the presence of the testator and of the other two subscribing witnesses, Mr. Pritchett and Mr. Powell; Mr. Pritchett and Mr. Powell also signed their names as subscribing witnesses at the same time that I did, and in the presence of the testator; we all four signed together and in the presence of each other; we were in the Doctor's room when this last codicil was signed, in Doctor Humphrey's home; no one was in the room at the time beside us four; I heard him declare that to be a codicil to his last will; if I remember cor-

30 rectly, I went there at the request of the Doctor; I do not remember that he told me before to meet at that time; when we were in there, Mr. Powell, in the presence of Dr. Humphrey and of us all, explained the nature of the instrument that we were desired to sign; he stated (that is Mr. Powell,) that it was a codicil that we were called there to sign; that was when we four were all together; at the time Doctor Humphrey executed this codicil to his will I considered him of sound and disposing mind and memory; I have no recollection of any other talk there that day about any other matters; at the time the

40 codicil was executed he was not as well as formerly; he was

physically weak ; he was exhausted ; I considered him in that respect, that is his intellect, of sound mind ; I could see no difference in him then from when I was first acquainted with him ; this codicil was executed some weeks before his death.

And being cross-examined, saith—

If I recollect right, the Doctor sent for me to witness this codicil ; don't remember how he sent ; I cannot state positively how I know the Doctor had sent for me, but my impression is that the person who came for me told me the Doctor had sent for me ; I am under the impression a colored boy came for me ; 10
 won't state positively ; I don't recollect the time of day it was—think it was in the afternoon ; when I entered the Doctor's room I don't recollect who was in there ; I think Mr. Powell was there with the Doctor and Mr. Pritchett came there afterwards ; I saw Mrs. Moore and the housekeeper when I entered the house ; I have no recollection of having any conversation then with Mrs. Moore, only passing the time of day with her ; Mrs. Moore did not tell me what was wanted of me ; I don't remember who ushered me into the room of the Doctor, but it is my impression it was the housekeeper ; my impression is that he 20
 was sitting up when I entered the room, but was put to bed before we left ; I can't say positively whether he was in the bed or not when he put his mark to the codicil ; I mean by his sitting up he was in an easy chair that he usually sat in ; don't recollect whether he was propped up with pillows ; he was not suffering at that time from this hic-coughing ; I was not there over fifteen minutes all the time ; don't recollect how long before the codicil was signed ; I do not recollect how long I was there before Mr. Pritchett came in ; if I recollect rightly, the Doctor spoke above a whisper all the time we were there ; I don't 30
 recollect that he spoke in a whisper any part of the time ; I heard him speak while I was there ; I was standing very near him at the time he spoke to me ; when I came in either the housekeeper or Mr. Powell, don't know which, said that I had come ; I had no conversation with him myself, more than that saying—how d'ye do, Doctor, as I came in ; Mr. Powell did the talking ; the Doctor conversed with Mr. Powell during that visit ; I heard everything that was said—that the Doctor said ;

Mr. Powell took the codicil in his hand and read a portion, and explained to us the nature of this codicil that we were requested to sign; I have no recollection of the words that Mr. Powell said, nor how much he read, he merely read enough to satisfy me what I was going to sign; it was read in quite a loud tone—loud enough for the Doctor to hear it; it was my supposition that he heard it; I cannot say whether the Doctor was lying down or sitting up at that time; I have no recollection that the Doctor made any remark about the contents of the paper;

10 when Mr. Powell spoke of the nature of the codicil he did not speak of the contents of it; no conversation took place in my presence with any one about the contents of it; I did not at the time know the contents of the paper; I have no recollection what Dr. Humphrey said; he and Mr. Powell conversed together; I heard what was said, but have no recollection of it; as I stated before, Mr. Powell did all the talking about this, but I don't recollect what it was.

Quest. Did Doctor Humphrey make any declaration whatever at this time?

20 *Ans.* My impression is he did, I can't say what he said; Mr. Powell gave the Doctor a pen and directed his hand while he made his mark; I can't answer what hand he wrote with; I don't recollect that the Doctor said anything at the time he signed or immediately after; the conversation between the Doctor and Mr. Powell took place both before and after he signed; that is my impression; I do not remember anything that was said to the Doctor.

Quest. Then what led you to think that the Doctor was of sound and disposing mind and memory at the time, as you have

30 stated in your examination in chief?

Ans. Because he appeared to me the same as he always had since I had known him, but he was weak and feeble from his sickness; I could see no difference so far as mind was concerned.

Quest. Was his memory tested at that interview?

Ans. All I can say is that he and Mr. Powell conversed at different times while I was there in reference to this codicil; I said nothing, but signed it when I was requested to; the Doctor addressed no remarks to me except the salutation when I entered the room; he always said good-bye whenever I left; I can't

40 recollect whether any seal was on the paper when I signed; my

recollection is that the Doctor made his mark before we signed ;
 [probate to this codicil shown.] This is my signature ; the
 affidavit was either read to me or I read it before I signed it ;
 the Doctor used a little opium during his illness once, but only
 a short time, but I think it was before his last illness—before
 this time ; I presume I saw him eight or ten times after this
 interview before his death—I did not always converse with him
 though ; this codicil was never referred to in any of those sub-
 sequent conversations ; I am thirty-one years of age ; Mr.
 Powell's office is on Laurel street, near 3d street, in Beverly— 10
 right back of my store ; Mr. Powell is quite deaf.

EZRA C. TOMPKINS.

Sworn and subscribed this 28th day of November, A. D.
 1873, before me, at Mount Holly.

JNO. C. TEN EYCK, *M. C. C.*

William F. Pritchett, of Beverly, N. J., a witness produced
 on the part of the probate, being duly sworn, deposes and
 saith—

I have lived in Beverly three years ; I keep a grocery and
 dry goods store ; I was not acquainted with Gideon Humphrey 20
 in his lifetime ; I was sent for by a colored boy to come and see
 him ; it was a boy that lived at Doctor Humphrey's ; I went
 right away ; I was introduced to the Doctor there ; when I went
 in there were in the room the Doctor, Mr. Powell and Mr.
 Tompkins, I think, no one else ; the Doctor died in August fol-
 lowing the time I was there ; it was in 1872 ; I am one of the
 subscribing witnesses to the last codicil of Dr. Humphrey's will ;
 [*Exhibit D* being shown to witness, he says]—The name W. F.
 Pritchett, subscribed to that paper as a subscribing witness, is
 in my handwriting ; it was put there by me at the time above 30
 referred to ; I saw Doctor Humphrey make his mark to that
 paper at that time ; I saw Ezra C. Tompkins and Peter Powell
 sign their names to that same paper as subscribing witnesses ;
 we all four signed it at the same time and in the presence of
 each other ; after being in the room a short time Mr. Powell
 made known the business that we were called there for ; he
 gave us to understand this was a codicil to Dr. Humphrey's
 will ; Dr. Humphrey then signed the codicil and we followed ;

I recollect there was a conversation between Peter Powell and Dr. Humphrey about this codicil; I could hear it; I don't know the purport of it; in and by that conversation it was acknowledged that this was a codicil to his last will and testament; this was done in the presence of all of us, while we were all there together; Mr. Powell was standing by Dr. Humphrey and held the paper in his hand, while he explained to us what we had been called there for.

10 *Quest.* While standing there, did he not, in your presence, ask of Dr. Humphrey if he did not sign, seal, publish, pronounce and declare that instrument to be a codicil to his last will and testament, or other words to that purport and effect? [Objected to as leading.]

Ans. I think he did; I think this codicil was signed in June, 1872.

Quest. At the time the testator executed this codicil, was he of sound and disposing mind and memory? [Objected to as leading.]

Ans. I thought he was, I had no other impression.

20 And being cross-examined, saith—

I did not see Mrs. Moore at any time during this visit to the house; I saw the housekeeper; I think the Doctor was sitting in bed when I entered the room; I think he was resting on pillows; Mr. Powell introduced me to him; I thought he was very sick; I had some conversation with the Doctor myself; I don't remember though what was said—it was in relation to outside matters; Mr. Powell and Mr. Tompkins were present then; they could hear the conversation if they had been disposed; the Doctor said nothing to me about the codicil; I heard
30 the codicil mentioned, but can't say I heard the word will; Mr. Powell mentioned the word codicil; don't remember it was mentioned more than once; I think Mr. Powell, when he mentioned that word, was addressing Mr. Tompkins and myself; there was nothing said as to the contents of the codicil that I remember of; I did not know of the contents of the codicil at that time; I never saw the Doctor at any other time—that was the first time and the last.

W. F. PRITCHETT.

Sworn and subscribed this 28th day of November, 1873,
before me, at Mount Holly.

JNO. C. TEN EYCK, *M. C. C.*

Adjourned to Friday, December 5th, 1873, at 10 A. M.

FRIDAY, December 5th, 1873.

Parties met. Mr. Voorhees, on part of probate, calls

Peter Powell, of Beverly, New Jersey, a witness produced on the part of the probate, being duly sworn, deposeth and saith—

I have resided at Beverly nineteen years; my business there is conveyancing principally; I am a justice of the peace also; I 10 have been a justice nearly ten years; I knew Gideon Humphrey in his lifetime; I knew him for about twenty years; I was acquainted with him intimately only in business matters; I drew his last will; [paper *Exhibit A* being shown to witness]. This is the last will; it is in my handwriting; it was executed at or about the time it bears date; I subsequently drew a codicil to that will for Gideon Humphrey; I drew the third and last codicil; [paper marked *Exhibit D*, on part of probate, being shown to witness, he says]—This is the third and last 20 codicil to Dr. Humphrey's will; it is in my handwriting; it was executed the date it bears—the third of June, 1872.

Quest. When did Dr. Humphrey first send for you to write a third and last codicil to his will? [Form of question objected to].

Ans. He first sent to me some time in the winter of 1872; I could not go, owing to the state of the weather; his house-keeper (Rachel Cain) came for me.

Quest. Were you afterwards sent for to draw this third and last will and codicil, and if so state about when?

Ans. Yes; I was sent for about the last of May or first of 30 June, 1872; a colored boy came for me; I lived about four squares from Dr. Humphrey's residence.

Quest. Did the colored boy state to you what the Doctor wanted of you ?

Ans. He did not, only that he wanted to see me ; I went the same day ; I found him in his room sitting up ; he told me he wished to make some change in the disposition of his property ; he sent then for his will to be brought ; his housekeeper brought it ; no one was in the room ; she brought it ; he knocked for the housekeeper ; she came ; he told her what he wanted and where she could find it ; she brought it and retired ; after she
 10 retired there was no one in the room but our two selves ; he asked me to break the seal and open the will ; I did so ; read the will and the two codicils ; he then stated that he wished to make a change in two or three particulars in the original will ; one of the particulars was he wished to revoke all that he had said in his will in regard to Adelaide Josephine Hardcastle and her children ; he gave no reason for it ; he said he wished to revoke the appointment of James Sterling as one of the executors, and appoint his son Henry M. Humphrey sole executor ; I don't remember any other changes ; I noted them down ; went
 20 home and wrote them off as nearly as I understood it ; I took the will with me, and on reading it over I suspected I had not understood him about Kate Hardcastle's special legacy—that is, the legacy of one thousand dollars in the will that I refer to ; I wrote off as I understood, with that exception, and went back for an explanation ; he said he intended to include all Mrs. Hardcastle's children ; I don't remember that he said anything else, except so far as to say that he included that special legacy ; I took a draught with me of what I had drawn on that visit ; I read it to him ; that draught left the one thousand dollars stand
 30 valid ; he objected to that ; there was not any one in the room at that second visit except ourselves ; he was sitting up ; I then returned home and made another copy ; I drafted another codicil when I got home ; I drafted it in such way as he directed me to ; I returned to him ; I don't certainly know whether it was the same or the next day ; I took my draught with me ; I read it to him ; he said it was right ; there was not any one in the room but ourselves ; I don't remember any other special conversation, except he said it was what he wanted ; then I went home and took it and copied it off on this paper ; [*Exhibit D*] this paper
 40 [*Exhibit D*] is a true copy of what I read to him on that last

visit; I returned the next day, by appointment, to have it acknowledged; that appointment was made at the time that I read the last copy that I took to him; I don't remember that any arrangement was made as to witnesses at that time; when I returned at the time appointed; which was four o'clock in the afternoon, I was told that they expected to have John Thomason and James D. Bennett as witnesses to this codicil; I think Dr. Humphrey himself told me so; I don't remember he said he had sent for them, but he did send while I was there for them; he sent a colored boy; they did not come; the boy brought 10 word they were not at home; he then sent the same boy for Mr. Ezra C. Tompkins and Mr. Pritchett, the last of whom was a stranger to me, I never had seen him before; on that visit, and before the witnesses came, I read this codicil [*Exhibit D*] to him; he and I had no talk about it, no further than to ascertain that it was his mind; I don't distinctly recollect whether he was in bed or not at this time when I went there; he said it was what he wanted; those witnesses (Tompkins and Pritchett) subsequently came; I think the housekeeper brought them to the room; [paper *Exhibit D* being shown to 20 witness]—The name Peter Powell signed to this codicil as a witness, is in my handwriting; when I signed my name there Ezra C. Tompkins, W. F. Pritchett and Gideon Humphrey were present; I wrote the name Gideon Humphrey signed to this codicil; Gideon Humphrey made the mark in that name; it was done in my presence; Mr. Tompkins and Mr. Pritchett signed their names in my presence and in the presence of the testator; I heard the testator, in the presence of these witnesses, declare that paper to be a codicil to his last will; I asked him in their presence if he declared that to be a codicil to his 30 last will; he said it was, in reply.

Quest. At the time that the testator executed this codicil, was he of sound and disposing mind, memory and understanding? [Objected to].

Ans. He was, decidedly so; I don't remember who suggested the names of Tompkins and Pritchett as witnesses; he (Dr. Humphrey) directed the boy to go and bring them; he or his housekeeper must have suggested their names; there was no one else present.

And being cross-examined on part of petitioners says—

I am in my eighty-second year; I am a good deal deaf, and have been so for five or six years, but not quite so much so as at present; I have known Dr. Humphrey for twenty years; I knew him in Burlington first; I understood the Doctor was about ninety-five when he died; he resided in Beverly about seven or eight years; he lived in Edgewater before he went to Beverly; how long he resided there I do not know; my acquaintance with him was solely of a business nature; I did
 10 not see him very frequently during those twenty years; I had various other business with him when he lived in Beverly besides this will and codicil; sometimes to draw up articles of agreement; sometimes to take depositions for him; I think I drew the articles of agreement when he purchased that property in Beverly, I don't remember very distinctly; that was six or seven years before his death; I can't answer the question with any certainty, but I took several depositions for him when
 20 some of the family went to Europe; the parties who were going to Europe were strangers to me; I only, generally, came to the Doctor's when I was sent for on professional business; I made some social visits to the Doctor's; he had no family except his housekeeper; Mrs. Moore was there the latter part of the time; I had four interviews with Dr. Humphrey altogether about this codicil—three before the signing; at that time himself, Rachel Cain, Mrs. Moore and a colored boy constituted his household; I don't know of any one else; I judge the colored boy was twelve or thirteen years old; I don't remember his name; have heard it; I didn't know at the time I was sent for in the winter of '72 what I was wanted for, but I learned afterwards from
 30 him that it was this same thing; the Doctor told me this the last time he sent for me; he told me he had sent for me in the winter but I did not come; he did not send for me between the time he sent for me in the winter of '72 and the summer of '72 I speak of; I had not seen Dr. Humphrey between the time Rachel came for me in the winter of '72 and when I was sent for in the summer of '72; when I found Dr. Humphrey sitting up in his room I don't recollect whether it was in an arm chair or an ordinary one; he was never propped up by pillows when I was there, except the time when he signed the codicil; he was
 40 quite blind; I don't know how he knew me; he would always

know me when I spoke ; I don't remember who took me in the room ; I don't remember that any one introduced me ; when I would go in the room I would always speak to him ; his physical condition at the time I first went in the summer of '72 was feeble—(the time I went to write the codicil) ; he could speak above a whisper ; he could speak loud enough for me to hear him very distinctly ; it required an effort ; I don't remember that he mentioned the object of my visits to any one at any time but myself.

Quest. Did you test his memory in any of these interviews 10
in the summer of '72 ?

Ans. I did not test it in particular, but in conversation I learned that his memory was uncommonly good ; I mean for any age ; during those interviews I had with him in 1872 I had conversations with him in relation to the past ; I thought it fatigued him for him to speak loud enough for me to hear ; I have not now in my possession the original draught or any of the notes from which this codicil was made ; I always destroyed such things as soon as the use for them is accomplished ; I never heard the doctor, at any of these interviews with him, 20
speak harshly of his grandchildren.

Quest. Did Doctor Humphrey ever assign any reason to you, or in your presence, for making this change in the disposition of his property ?

Ans. Not directly ; indirectly he did ; that if it had not been for his grandchildren he might have had something worth leaving ; he did not explain anything further than that they had relieved him from being encumbered with unnecessary wealth ; this was all he said to that purpose that I remember ; I don't know to whom he referred in particular ; he did not 30
mention any names ; he did not speak of the children of his son Washington Humphrey to me ; I do not know nor never heard that he drove his son Washington Humphrey from his house ; I never conversed with any one but the Doctor in relation to this codicil up to the time of his death, other than the subscribing witnesses when they came there to sign it ; I first knew Mrs. Moore in the month of November (I think) preceding the time of the codicil ; when she returned from Spain she called on me to take an affidavit ; she told me who she was ; I think I saw

Mrs. Moore during my interviews with the Doctor in 1872, probably each time, but she immediately retired upon my entering; I did not read any portion of the codicil in the presence of the subscribing witnesses except the acknowledgment of it; I don't know who attended to his business during the last years of his life except his housekeeper, except he had some stocks in Philadelphia and John Thomason collected the dividends for him; Dr. Humphrey paid me for drawing this codicil; Mr. Thomason and Mr. Bennett, who were sent for, were near
 10 neighbors of the Doctor; I don't remember with certainty who told me they expected Mr. Thomason and Mr. Bennett, but I think the Doctor did; the Doctor sent for them in my presence; I think the housekeeper called the colored boy, and he came and the Doctor gave him his message; after the boy returned to the room the Doctor told him to go for Tompkins and Pritchett; the last time before the summer of '72 I have no distinct recollection when I saw Doctor Humphrey, I think within a year; I do not remember how often I saw him within a year or when.

Quest. Since the death of Doctor Humphrey, have you had
 20 an interview with Mrs. Annie Pennock and Mrs. Lavinia Jenkins, granddaughters of his, and daughters of Adelaide Josephine Hardcastle?

Ans. I had an interview with two ladies who said they were granddaughters of Doctor Humphrey, but whether they were the two referred to I can't say; I think the two ladies present are the ones.

Quest. At that interview did you not make use of the following expression to them, or words to the effect, that you were under the impression, when you drew up the codicil, that it was
 30 merely for Mrs. Moore to make a proper distribution of the estate, and that you did not suppose there would be any trouble about it?

Ans. I don't think I stated language quite as strong as that; I may have stated, and probably did, that the Doctor stated that he wished Mrs. Moore (or Eliza he called her) to have the disposal of what was left; this interview took place in my office at Beverly; it was in the autumn of 1872, probably the latter end of October or November; I did not notify any parties of the intention of the opening of the will of the testator; the will
 40 was opened in my office, two or three days after Dr. Humphrey's

funeral; I do not know who had the custody of that will from the time I drew the codicil; Henry M. Humphrey and Mrs. Moore came together to my office; I don't know which had it in custody; I had never met Henry M. Humphrey before; no other persons were present in my office but us three when the will was opened; the will was in an envelope sealed up; I don't remember whether there was anything more than the mucilage that is commonly on the envelopes; I had originally placed it in that envelope and sealed it; I took out letters of administration the next day; Mrs. Moore and her brother requested me to attend to it at once; he was the executor; he declined to act; I furnished the security on my administration bond; Mrs. Moore signed her name to the original administration bond; I thought she was a widow at the time she offered to go on it; she hurried me, and I told her the man I wanted to go on the bond I could not get for a couple of days, unless she would go on the bond I could not attend to it until that time, and she agreed to do so. 10

And being again examined in chief says—

The Henry M. Humphrey above referred to is one of the children of Dr. Humphrey; he is the one that was made the sole executor by the last codicil; he was unwilling to act, and he and Mrs. Moore brought the will to me. 20

Quest. What kind of a man was Dr. Humphrey as to his mind?

Ans. Uncommonly clear and strong.

Quest. Was he a man of decided views?

Ans. I think he was.

Quest. Did his mental vigor appear to be impaired by age?

Ans. Not at all; his mind was very clear at the time I made these four several visits respecting his codicil. 30

Quest. Did you ever know it to be clearer than it was then?

Ans. No, I never did; I saw him once after he executed this codicil—three or four days, I think; his mind then appeared to be as clear as usual; I don't remember that I saw him after that; I think it was about the beginning of his last sickness when this codicil was executed; on these four interviews in relation to the codicil, I heard distinctly the words stated to me by Dr. Humphrey in regard to the codicil.

And being again cross-examined says—

Quest. How do you know when his last sickness began?

Ans. Only from rumor; have no personal knowledge of it; I had heard he was sick; when I called three or four days after the codicil was executed the Doctor could speak above a whisper and was sitting up; he did not appear to be suffering more than from general weakness; he was not hic-coughing either of these times I visited there; McGonigal, the nurse, was not present; I never saw him there; the last visit was a social
10 visit; I was not sent for, he merely requested me, on the signing of the codicil, to call and see him again; I merely done so in obedience to that request; I have a faint impression that Mrs. Moore was in the room; I do not remember particularly.

PETER POWELL.

Sworn and subscribed this 5th day of December, A. D. 1872, at Mount Holly, before me.

JNO. C. TEN EYCK, *M. C. C.*

Mrs. Lavinia Jenkins, a witness produced on the part of the petitioners, being duly sworn deposeseth and saith—

20 I am one of the daughters of Mrs. Adelaide J. Hardcastle, wife of Smith O. Jenkins, of New York, and granddaughter of Dr. Gideon Humphrey; I reside in New York city, State of New York; I last saw my grandfather in May, 1871, at his home in Beverly; I had been spending the previous winter with him; during that winter the members of his family were Mrs. Moore, Rachel, the housekeeper, and myself; Mrs. Moore was there the winter previous and until the early part of the summer; I saw Mrs. Moore frequently; constantly in the company of my grandfather during that time.

30 *Quest.* What effect had Mrs. Moore's presence, actions and words, at that time on your grandfather? [Objected to].

Ans. Sometimes agreeable, sometimes the reverse.

Quest. Did she exercise any control over him in any way?

Ans. She was very decided in the manner of her expression sometimes; she generally carried her point with him whatever it might be; her husband was at that time in California, San Francisco.

Quest. Has there ever been any estrangement between Dr. Humphrey and yourself or your sisters?

Ans. Nothing of any especial moment; grandpa used to get out of patience, sometimes with me and then the others of the family, Mrs. Moore included; we never thought anything of it; nothing serious; he was rather a spunky old gentleman; I left him in May, 1871, on the most pleasant and affectionate terms; he requested me to visit him again; was very much affected on my leaving him; said what a comfort I had been to him.

Quest. In what way had you been a comfort to him? 10

Ans. I used to read to him three or four hours a day and endeavor to cheer him up; he was given to moody fits sometimes; he said that he wished he could have me always, and if it wasn't for my husband and children he wouldn't have me leave him; Kate, my sister, was with him a good many years; was brought up by him; he was particularly attached to her; I think all my sisters were with him at different times, making visits; Mrs. Moore never wrote to me of the Doctor's last sickness; she did not write to me for a long time before; I did not know he was ill until we wrote to a mutual friend to come to Beverly and see what was the reason our letters were not answered; what was the matter; Doctor Humphrey during the winter I was with him was not childish, his memory was feeble; he repeated things; he seemed to forget; Mrs. Moore and myself used to remark this indication of feebleness; Washington Humphrey's children are my cousins. 20

Quest. Do you know how Dr. Humphrey has acted or spoken in relation to them?

Ans. He never seemed to care much about the boys, in fact otherwise, but the sisters he spoke kindly of—seemed to take some interest in them. 30

Quest. Do you know any act that he did to show his ill-feeling?

Ans. Hays, the youngest son, came home from a school ship where he had been placed; he had returned and grandpa was very angry and denied him admittance; would not allow him to remain over night, so he was compelled to sleep in an out-house; he was very severe in his treatment to Hays, who was partly brought up by him when his mother died; I have had an interview with Mr. Powell, the administrator of the estate, 40

in the fall of '72, last of September or first of October, at his office in Beverly; I went there to find out the true state of matters; we had never been notified of the reading of the will; Mr. Powell appeared to be very much surprised when we told him we had never been notified of grandpa's sickness; he said he understood that we had and had not come, and he was surprised there was any trouble about it; he said he had the idea, as far as I can remember now, that this codicil was drawn up in order to give Mrs. Moore the authority to act for grandpa in our behalf; the impression he gave me was that Mrs. Moore was only an agent for grandpa; I waited three or four weeks and did not receive a line from Mrs. Moore, after grandpa's death; I wrote to Dr. Henry Humphrey and got from him the information that he had resigned acting as executor, and that a codicil had been attached leaving the property to Mrs. Moore.

MRS. L. JENKINS.

Sworn and subscribed this 5th day of December, A. D. 1873,
before me, at Mount Holly.

JNO. C. TEN EYCK, *M. C. C.*

20 *Mrs. Annie Pennock*, of the city of New York, a witness produced on the part of the petitioners, being duly sworn deposeth and saith—

I am a daughter of Adelaide J. Hardcastle and wife of Homer Pennock, of New York city, and granddaughter of Dr. Humphrey; the last time I saw my grandfather was in February, 1872, at his house in Beverly; I went on purpose to see him; I came from New York; I saw at that time at the house my aunt Mrs. Moore, my sister Mrs. Kedenburg, and Rachel the housekeeper, and my grandfather; he seemed to be in his usual health, both mind and body; he received me very kindly; he manifested his interest and usual affections; there has never been any estrangement of any account between Dr. Humphrey and myself and any of my sisters; I have visited Dr. Humphrey's house since my marriage; I have remained at his house a short time at different times; I have spent several months there at a time; the last time I spent several months there was, I think, in 1868; I boarded in Beverly and used to see him almost every day; while I was living in Beverly Mrs.

Moore lived with him a part of the time, which was after her return from Europe ; I was not at all notified by Mrs. Moore of his death and sickness ; I did not know of his death until three weeks afterwards ; I was traveling in Canada at the time of his death ; I was present in Mr. Powell's office, in Beverly, in the year 1872, in September or October after grandpa's death ; I and my sister, Mrs. Jenkins, called upon him ; we called upon Mr. Powell to see what had become of the furniture in my grandfather's house that belonged to my mother, and to enquire about the will of my grandfather ; my sister and myself have received some of that furniture, but not all ; Mr. Powell seemed to be surprised that we were going to have any trouble, and said that he supposed that Mrs. Moore was left to distribute the money ; he did not anticipate any trouble, and thought there were only friendly relations between us. 10

ANNA PENNOCK.

Sworn and subscribed this 5th day of December, A. D. 1873, at Mount Holly, before me.

JNO. C. TEN EYCK, *M. C. C.*

TESTIMONY, &C.

20

[Filed October 31st, A. D. 1874].

Testimony taken on the appeal from the probate of said will before C. V. D. Joline, a Master in Chancery of the State of New Jersey, before William H. Browne and Frederick Voorhees, Esquires, counsel ; taken at the house of G. M. Britton (Steamboat Hotel), Beverly, New Jersey ; said testimony taken before said Master, by consent of the counsel, July 22d, 1874.

George McGonigal recalled on the part of the contestants—

[The re-examination of this witness, objected to by Mr. Voorhees on the ground that he has been once examined, and there has been no order for his re-examination. Mr. Browne replies that the testimony of the contestants not yet having 30

been terminated, he feels justified in recalling any witness, Mr. Voorhees having an equal privilege of cross-examination].

I was present at an interview between Mrs. Kedenburg and Dr. Humphrey during his last illness; I was with the Doctor at the time she arrived; at the time she arrived I was the only one in the room with the Doctor; it was announced that she was there; then Mrs. Moore came in; I think that this was two or three weeks before the Doctor's death; the Doctor was glad to hear that Mrs. Kedenburg was there; he treated
 10 her very kindly, and asked why she stayed away so long; she answered that she had not received word of his illness; a general talk took place between them; I think it was in regard to her sister; it was very friendly in regard to her sisters; his manner towards Mrs. Kedenburg was very affectionate; he kissed her.

Quest. Did Mrs. Moore, during the time you were there, ever prevent your carrying out any request of Dr. Humphrey's for the presence of any of his friends in his room? [Objected to by F. Voorhees, Esq.]

20 *Ans.* A couple of evenings before the doctor died he asked for Mrs. Gregory (I believe she was a relative) she lived about half a mile from Beverly, from the Doctor's residence, on Wood Lane; Mrs. Moore said she was not there; at the Doctor's; he requested to go for her; I left the room, went in the hall to get my hat; Mrs. Moore met me on the portico and told me not to go; she would not have her there for five hundred dollars; I did not go; I never saw Mr. Powell at Dr. Humphrey's house while I was there; I generally left the Doctor about nine o'clock in the morning; I then left him until about two, and
 30 from that time was with him until nine in the morning every day; I was there from the sixth of June until the third of August, when he died; sometimes I went home from nine until two; sometimes I slept in the Doctor's house; I never heard tell of Mr. Powell being there while I was there; he might have been and I not have heard of it; the Doctor never mentioned it to me; when I first went there the Doctor was not able to converse above a whisper; Mr. Powell was very deaf.

Cross-examination—

Dr. Humphrey's voice improved after I got there; he talked

in his natural tone; this was about a week after I went there; from that time until about two days before his death his voice remained in its natural tone; it then began to fail.

GEORGE MCGONIGAL.

Subscribed in my presence, the witness having been previously sworn, this 22d day of July, A. D. 1874.

C. V. D. JOLINE.

John Thomason, a witness called on the part of the contestants, alleging himself to be conscientiously scrupulous of taking an oath, being duly affirmed, deposeth and saith— 10

I reside in Beverly; I have lived there about fourteen years; I am eighty years of age; I knew Dr. Humphrey ten or twelve years before his death; for the last four years of his life I lived a neighbor to him; I was an intimate friend of his; I had charge of his financial matters and of the improvements of his buildings, &c.; his property was estimated at about seventeen thousand dollars; I drew the second codicil of the Doctor's will, dated March 2d, A. D. 1869, in which he appointed his son executor in place of Mr. Deacon, of Burlington; I continued on intimate terms with the Doctor until the moment of his death; 20 I was present at his death and had hold of his hand about that time; during the last six months of his life I visited him nearly every night; there may have been intervening nights when I did not go; I went there often during this time on account of his imbecility and sufferings, and weakness; during this time these was only a general weakness from age; this general weakness affected his mind as well as body; the physical always affects the mental; on account of infirmities of age there was a weakness of mind as well as body.

Quest. How did that weakness of mind manifest itself? 30

Ans. That is a question which requires more than my ability to answer; it did manifest itself.

Quest. Was there any defect in memory?

Ans. There was some little defect observant.

Quest. Was he under the influence of opiates during this time?

Ans. He was very considerably.

Quest. In what way did they affect him ?

Ans. My dear sir, I could not tell.

Quest. Mentally, I mean.

Ans. I cannot answer that question in direct terms ; I can say that it affected him considerably ; his ideas were more lucid under the immediate effect of the opiate.

Quest. What was the remote effect ?

Ans. A sleepy drowsiness.

Quest. Did his mind wander ?

10 *Ans.* Frequently.

Quest. During the last three months of his life did Dr. Humphrey speak to you of his granddaughters, the daughters of Adelaide J. Hardcastle, deceased ?

Ans. He did so, to the best of my knowledge, within that time ; it was some few months before his death ; that conversation related to the disposition of his property to his grandchildren, how he should proportion it ; I do not remember what he said ; he spoke of them in favorable terms, particularly Kate, whom he brought up ; prior to his death I did not know of the
20 existence of the last codicil, disinheriting them.

Quest. Did Dr. Humphrey ever state to you that he intended to disinherit them ?

Ans. No sir, he did not ; he never intimated anything of the kind ; during the last month of his life he did not refer to his granddaughters ; he was too much afflicted to refer to his worldly affairs ; during the last two months of his life there lived with him Rachel Cavis, his housekeeper, Mrs. Kedenburg, and his son's wife ; they lived there a week or two before his death ; they constituted his household as far as I know ; Mr.
30 McGonigal was also there ; Mrs. Moore was there all the time ; Mrs. Kedenburg was visiting there two weeks before his death.

Quest. Has Mrs. Moore, in your presence, ever expressed ill feeling on her part towards the granddaughters ? [Mr. Voorhees objected to question as illegal testimony].

Ans. She has expressed strong predilections against them ; always in Doctor Humphrey's presence ; I mean by predilections, unfavorable views as far as character and position is concerned ; I will qualify this by saying that these talks sometimes happened on the porch, right outside of the building, on the road
40 to the gate.

Cross-examination by F. Voorhees, Esq.—

I am about eighty years of age ; I am rather deaf ; my own physical and mental powers have somewhat abated so far as age will justify it.

Quest. Does not age usually bring an abatement of mental and physical powers ?

Ans. I presume it does ; I was very intimate with Dr. Humphrey ; I found him an agreeable, pleasant companion ; he was a man of extraordinary mental powers for one of his age ; he talked intelligently and fluently on most all subjects. 10

Quest. He continued to do so, did he not, until near the time of his death except when under the paroxysms of great pain ?

Ans. I observed his mental powers and memory failing him one or two years before his death ; my visits were more frequent during the latter part of his life ; I was not present when the last codicil was signed ; I have no personal knowledge when it was signed except as I learned from the date ; I should presume that the doctor was confined to his bed three or four months before his death.

Quest. He was a man of very decided views was he not ? 20

Ans. Very much so.

Quest. Was he not fond of arguing metaphysical and philosophical questions ?

Ans. Yes, sir ; very.

Quest. Did he usually enforce his own peculiar views very strongly ?

Ans. He did with much energy ; for three or four months prior to his death we had very little conversation on these subjects ; I did not talk so much with him three or four months prior to his death as before ; it was, I presume, three or four 30 months before the Doctor's death that I had the talk with him about his granddaughters.

Quest. When Mrs. Moore was speaking of the granddaughters in the manner you have above referred to, was she not complaining of the granddaughters because they had not visited their grandfather during his illness ?

Ans. Yes ; there was an original feud between Mrs. Moore and the grandchildren, which feud, no doubt, accelerated the answer she gave ; the burden of her complaint was that they had neglected to visit their grandfather. 40

Re-examination in chief—

Quest. Has age in your case brought an abatement of mental and physical powers?

Ans. Probably I may be a fortunate exception.

JOHN THOMASON.

Affirmed and subscribed this 22d day of July, A. D. 1874, before me, a Master in Chancery of the State of New Jersey.

C. V. D. JOLINE, *M. C. C.*

Alice Richardson, a witness produced on the part of the con-
10 testants, being duly sworn, deposeth and saith—

I reside in Beverly; I have lived there eighteen years; I knew Dr. Humphrey during the last eight years of his life; I was a frequent visitor at his house during the last year of his life; I don't know whether Mrs. Moore resided there during this time; she did during the last few months; I saw Dr. Humphrey frequently during his last illness; during that time I have often heard him refer to his granddaughters; the daughters of Adelaide Hardcastle; he always spoke of them in the kindest terms; I never heard Mrs. Moore refer to them until
20 after the Doctor's death; I think that it was two weeks after.

Quest. What did she say of them? [Objected to by Mr. Voorhees as irrelevant and illegal. Mr. Brown says the object of the question is to show the animus of the woman.]

Ans. She said they were notorious liars.

ALICE RICHARDSON.

Sworn and subscribed this 22d day of July, A. D. 1874, before me, a Master in Chancery of the State of New Jersey.

C. V. D. JOLINE, *M. C. C.*

No cross-examination.

30 *Friend H. Gregory*, a witness called on the part of the con-
testants, being duly sworn, deposeth and saith—

I reside at Edgewater, about three-quarters of a mile from Dr. Humphrey's late residence; I have lived there some fourteen years; Dr. Humphrey was my great-uncle; as near as I can recollect I saw Dr. Humphrey some two or three weeks

before his death ; I saw him at intervals of one, two and three weeks during the six months before his death, as near as I can remember ; I cannot say whether I saw him during the month of May or early June before his death ; I saw him during that spring.

Quest. In what condition was he mentally and physically when you saw him that spring ?

Ans. He was physically prostrated and failing mentally.

Quest. Did his mind wander ?

Ans. I have known his mind to wander, but I can't state the 10 time ; it was not many months before his death ; I can't say whether I heard him refer to his granddaughters during that time ; my visits to him were brief ; they were mere calls ; during that spring he conversed in his usual tone, faintly ; frequently in a whisper.

Quest. During that time were you ever prevented from seeing him when you called ?

Ans. A few weeks before his death I recollect being prevented by his being asleep ; Mrs. Moore told me he was asleep ; I was not prevented more than that time that I recollect of. 20

Quest. Did you ever hear Mrs. Moore speak of the Doctor's disposition of his property, or of his will prior to his death ? [Objected to by F. Voorhees as irrelevant and illegal].

Ans. Yes ; I don't remember the time ; it was during the year preceding his death ; it was relative to the equal division of his property ; I can only give a general idea ; the children of his son Washington should share with the rest ; his grandchildren.

Quest. Did she say anything in regard to his will ? [Objected to by Mr. Voorhees as irrelevant and illegal]. 30

Ans. Some remarks were passed ; I know nothing further.

Quest. Did she speak of any change in his will ? [Objected to by F. Voorhees].

Ans. Yes, sir ; it was in regard to a previous change ; in regard to changing executors previously ; that is all I know.

Quest. Do you know whether any feud or ill feeling existed prior to the Doctor's death between Mrs. Moore and the granddaughters of the Doctor ?

Ans. Yes, sir, it did exist.

Cross-examination—

The Doctor's disease was one which, at times, produced intense pain; those paroxysms would last sometimes for hours; I was not present but have heard so; I was told that opiates were sometimes administered; I have not seen him in severe paroxysms, but have under the subsequent depression; I have seen him under such circumstances several times; I never remember his mind to have wandered more than once under such circumstances; when not under such circumstances he
10 talked freely and pleasantly in the ordinary way.

Ques. Did he converse intelligently on almost any subject?

Ans. He did; at times his mind was clear, very clear; the clearness of his mind was not so remarkable during the last few months of his life; in other words he was failing; I would go in and spend an hour or two with him generally; he would talk for a while when a subject was discussed with his former fluency but soon seemed to lose the train of thought; he was very easily exhausted; hence it was, I thought, that he was failing.

Quest. Do you not know of the fact that a feud or ill-will
20 existed between Dr. Humphrey and his granddaughters, or some of them, a short time prior to his death? [Mr. Browne objects on the ground that no such feud or ill-will has heretofore been stated or attempted to be proven, and hence, cannot be termed a fact].

Ans. I can't say; I do not know.

Quest. Did you not understand that there was? [Objected to by Mr. Browne as not evidence].

Ans. No, sir, I did not understand such to be the case.

Quest. You never heard of such a thing did you? [Objected
30 to by Mr. Browne as hearsay and inadmissible].

Ans. So far as the word feud is concerned, I did not; but I knew of occasional disagreements, but it was all immaterial; these grandchildren lived a considerable distance off, scattered around the country; I am personally acquainted with all of them but one.

Quest. Was there not, a short time before Dr. Humphrey's death, some estrangement between your father's family, or some of the members of it, and Dr. Humphrey or Mrs. Moore, and, if so, did it not arise from some impression that your father's family
40 were not as attentive to Dr. Humphrey, in his illness, as they

should be? [Objected to as not cross-examination and totally irrelevant].

Ans. There was an estrangement on the part of Mrs. Moore to our family; she complained of nothing, but it seemed to be her impression, and the Doctor's also, that we were not attentive enough.

Re-examination in chief—

Quest. Do you know where the granddaughters resided during the last year of the Doctor's life?

Ans. Yes, sir; excepting one in Europe, none further off than 10 New York.

FRIEND H. GREGORY.

Sworn and subscribed this 22d day of July, A. D. 1874, before me, a Master in Chancery of New Jersey.

C. V. D. JOLINE, *M. C. C.*

C. B. Gregory, a witness called on the part of the appellants, being duly sworn deposeth and saith—

I reside in Beverly township; I have lived there about fourteen years; I married Dr. Humphrey's niece; I am father of the last witness; I have known Dr. Humphrey about fifteen 20 years; I went to his house once a week, every Sunday, unless my health or the weather prevented; my last visit was somewhere about the first of June before his death; I did not see him at that time; Mrs. Moore was staying there at that time and said that he was asleep, and that his health would not permit his being awakened; the Sunday previous to this last visit I also called, and from the same cause, was not permitted to see him; I saw Mrs. Moore at that time also and no one else; I last saw him in the month of May, before his death.

Quest. What was his physical and mental condition at that 30 time?

Ans. Apparently very weak; I could not hear him above a whisper, and it was with great effort that I could distinguish his words; I don't think that I am at all deaf.

Quest. Did you notice any mental prostration before this last visit?

Ans. Yes; I noticed it in his repetition of the same thing,

and in a disconnection of ideas ; I knew his mind to wander during the last six months of his life ; no more than that ; Mrs. Moore and his old housekeeper, Rachel Cavis, lived with him during the last few months of his life ; Mrs. Moore had, I judge, been living there about a year ; I can't say positive ; all of her time since her last trip to Europe, I think.

Quest. Do you know of any feud or ill feeling existing between Mrs. Moore and the granddaughters of the Doctor prior to the Doctor's health ? [Objected to by F. Voorhees].

10 *Ans.* I only know from what I heard both parties say.

Quest. Did you ever hear Mrs. Moore speak of the Doctor's disposition of his property, or of his will, prior to his death ? [Objected to by F. Voorhees as irrelevant and illegal].

Ans. Yes ; at my house I have heard her express the wish that the Doctor would will his property to her ; this was said in connection with the conversation about the unequal disposition of his property among his grandchildren ; her reason was that her brother Washington's children might come in equally with the Hardcastle children—she would distribute equally among
20 them.

Quest. Do you not know that Doctor Humphrey cherished ill feeling toward Washington Humphrey's children ? [Objected to by F. Voorhees].

Ans. I do not ; I do not know that he had any trouble with Hays Humphrey, a son of Washington, in particular ; during the last six months of the Doctor's life I do not remember hearing him refer to his granddaughters, the Hardcastles ; he might possibly have spoken of them within the last six months of his life in my presence ; I have heard him frequently speak of them
30 affectionately.

Cross-examination—

I knew all of these granddaughters personally ; I saw some of them seldom, others frequent ; they visited at my house—all of them did.

Quest. Did you ever hear any of them speak of Doctor Humphrey in a disparaging or fault-finding way ? [Objected to as not cross-examination and irrelevant].

Ans. I don't recollect.

Quest. You have heard of disagreements between him and

them, or some of them, have you not? [Objected to as hearsay].

Ans. I have heard Mrs. Moore speak of the disagreements between the Doctor and the grandchildren; I don't recollect ever having heard them say anything.

C. B. GREGORY.

Sworn and subscribed, this 22d day of July, A. D. 1874, before me, a Master in Chancery of the State of New Jersey.

C. V. D. JOLINE, *M. C. C.*

DEPOSITIONS, &C.

10

[Filed October 31st, A. D. 1874].

Depositions of witnesses, &c., taken in the matter of the appeal from the order of the Surrogate of the county of Burlington, admitting to probate a certain paper writing, purporting to be the last will and testament of Gideon Humphrey, deceased, and the codicils thereto, taken before the subscriber at his office in Mount Holly, on Friday the seventh day of August, A. D. 1874, by consent and agreement, in the presence of Wm. H. Browne, Esq., attorney of the petitioners, and of Frederick Voorhees, Esq., attorney of probate.

20

JOHN C. TEN EYCK, *M. C. C.*

Mrs. Belle H. Parrish, a witness produced on the part of the appellants in the above stated case, being duly sworn according to law deposeth and saith—

I reside now temporarily at Morristown, New Jersey; in June, 1872, I was living with my husband and family in Hudson City, in this state; I am the wife of William W. Parrish; we were married in 1867; I am a granddaughter of Gideon Humphrey, deceased, and a daughter Adelaide J. Hardcastle, deceased, and the niece of Mrs. Eliza L. Moore; I last saw my grandfather about a year before his death; it was in July, 1871; after my marriage it was my custom to visit him every summer;

at my visit in 1871 my grandfather acted very kind and affectionate towards me, as he has always been towards me; nothing occurred to my knowledge to occasion a change in his feelings towards me; he was on very good terms with my husband.

Quest. At your visit in the summer of 1871, did your grandfather refer to his intended disposition of his property or any portion of it? [Objected to].

Ans. Well, when I was bidding him good-bye he said he thought it was very doubtful if he lived to see me again, and
10 that it was his intention to leave me something, and that he wished me to have it put in trust; I never received a letter from Mrs. Moore or any one else in relation to his death or sickness.

Quest. What was the financial condition of Mrs. Moore at the time of Dr. Humphrey's death, and for a long time previously? [Objected to as irrelevant].

Ans. We always considered she was well off.

Quest. Was her husband a man of wealth at that time? [Objected to for the same reason—irrelevant].

20. *Ans.* Yes; I believe so.

Quest. What was the financial condition of your sisters and yourself at the same time—during the spring and summer of 1872? [Objected to].

Ans. My eldest sister, Lavinia, was giving readings or lectures for the support of her children and herself; her husband was sick at the time; he hadn't anything in relation to money matters; he had failed in business; he was not a dissipated man; there was no blame attached to him; the next sister was
30 Adelaide; she was keeping a boarding house in New York and had been for several years previously; the next was Anna; she was then in Canada with her husband, and they were then in very moderate circumstances; the next was Kate; she was then living in Europe; her husband had merely a salary; I am the youngest; my husband had a position in a gas office at Hudson City; we were not very well off financially; he has since failed in business; I am now sewing for a livelihood partially, and am living with my husband's sister, and have three young children.

BELLE H. PARRISH.

Sworn and subscribed before me, this 7th day of August, A. D. 1874, at Mount Holly.

JNO. C. TEN EYCK, *M. C. C.*

William I. Emley, a witness produced on the part of the appellants in the above stated case, being duly sworn, deposeseth and saith—

I am the Surrogate of Burlington county, and I was such in June, 1872; the will and codicils of Gideon Humphrey, deceased, were probated before me; the administration bond and appraisement were filed in my office by Peter Powell; the total amount of the appraisement filed was six thousand eight hundred and seventy-one dollars and ninety cents; and upon the settlement of his account in the court he charges himself with having received of the estate of the deceased about seventeen thousand dollars—between \$17,000 and \$18,000. [The above testimony is objected to as illegal]. 10

Quest. State what occurred when Mr. Powell brought the will and codicils of the decedent to your office? [Objected to].

Ans. I can't remember exactly; he seemed to me to be in quite a hurry to have the will proved; I don't remember his saying anything particularly about it. 20

WM. I. EMLEY.

Sworn and subscribed, this 7th day of August, A. D. 1874, before me, at Mount Holly,

JNO. C. TEN EYCK, *M. C. C.*

The following testimony of Rachel Cavis was taken in the presence of the court, and of the respective attorneys, by mutual consent:

Rachel Cavis, being duly affirmed, says—

I will have lived at Woodbury two years next spring; I knew Gideon Humphrey in his lifetime; he lived at Beverly at the time of his death; I resided with him; I resided with him thirty-three years before his death; I think he lived at Beverly twelve years; the latter part of his life I was his housekeeper; I was his housekeeper for fourteen years previous to his death; he was ninety-four years old at the time of his death; he died 30

August 3d, 1872; he was nearly blind—could only discern light from darkness; he was so for ten years before his death; he needed during this time much care and attention; I attended to him; I waited on him and acted as his nurse; he had a will of his own; when he saw fit to do a thing he did it; he was of a determined, decided disposition; he had a very strong mind—was fond of reasoning and argument; his mind was clear the latter part of his life; it was clear until a week or so before his death; the last few months of his life I saw him perhaps
 10 twenty times a day; there was no change in his mind or mental ability up to a few days before his death.

I recollect the time when the codicil was executed to his last will, June 3d, 1872; Mr. Tompkins and Mr. Pritchard were there; the Doctor sent for them; he told me to tell the colored boy to go for them; they came; Mr. Powell was there, and Mrs. Moore and the colored boy; his mind that day was very clear; he was in bed; it was in the afternoon; he most always took a rest in the afternoon; had done so for years; I knew they were there for this purpose; I got the Doctor's will for
 20 him; he sent me for it; his will was got that day; the Doctor gave the will to me to put away after these parties had gone; it was sealed; I was not present when it was executed; the colored boy went for Mr. Powell to execute the will; Doctor told me to send him; the Doctor had before this sent me for Mr. Powell; he sent me before Christmas; Doctor Humphrey said he was going to make a change in his writings, and wished to see Mr. Powell; I went for Mr. Powell, but he could not come; he did not then tell me what change he wished to make in his writings; I know Kate Hardcastle; she is granddaughter
 30 to Dr. Humphrey; she was brought up with Dr. Humphrey from the time she was three-and-a-half years old till the time of her marriage; she was married in the early fall; the year before the Doctor's death; when she got married she went to Europe; it hurt the Doctor very much because she left him; I think her last visit to the Doctor, was the last of August or the first of September, 1871; after her last visit he said if Kate had stayed with him till his death he would have left her one thousand dollars, but as she had left he was going to make a change in his writings; he spoke to me about this several
 40 times; he did not say what change; the family, before Mrs.

Moore returned, consisted of Dr. Humphrey, myself and the colored boy; Mrs. Moore was Dr. Humphrey's daughter; at this time and at the time of these talks, Mrs. Moore was in Europe; Mrs. Moore did not get home from Europe until near Christmas; she then came to the Doctor's to reside; she stayed there until his death; Dr. Humphrey asked me only that once to go for Mr. Powell; it was before Mrs. Moore came home; I once, after Mrs. Moore came home, heard him ask her to go for Mr. Powell; he did not say what for; Mrs. Moore did not go; Adelaide Hardcastle was the daughter of Dr. Humphrey; she 10 had some five or six children; her husband died fourteen or fifteen years ago; Adelaide and her daughters for the most of the time after that resided at Dr. Humphrey's; he, in fact, brought up some of them; Adelaide Hardcastle died four or five years before Dr. Humphrey; after her death the children, except Kate, did not stay at the Doctor's long at a time; the Doctor thought these nieces neglected him; that they did not treat him with that respect they should, after the death of their mother; I often heard him express himself so.

Mrs. Moore, as well as I, waited on the Doctor; Doctor told 20 me to send the colored boy for Mr. Powell before the last codicil was executed; Mr. Powell came; Mr. Powell made some two or three visits about this codicil before its execution; I think it was the first time Mr. Powell was there I brought the will; the Doctor sent me for it; it was in my charge and custody.

On a cross-examination, witness says—

I can write a little; cannot read writing much; I brought that will to the Doctor only once during the summer that he died; I at that time laid the will on the table by Mr. Powell's side; I kept the will locked up in a tin box in his own room; it 30 was not the room on the first floor, where he died; the will was in a box on the second floor; it was a spare room; the box was locked; I kept the key; the will had been there ever since it was made; I put it there; I kept the key; I was not present when the will was made; the key was in the possession of no one but me; the will was not taken out of the box from the time it, the original, will was drawn, till the summer of the Doctor's death; I know it was not taken out; the Doctor and Mr. Powell were in the room when I brought the will; the

Doctor was then setting up; the Doctor was confined to his room perhaps ten weeks before his death; he had not been outside of the gate since the first time President Grant was elected; I brought the will and gave it to Mr. Powell; he sent right away for Tompkins and Pritchard, and they came; came in about an hour; the colored boy's first name was Herman, his last name I don't know; the Doctor mentioned Tompkins' and Pritchard's names; he was going to send for Mr. Tomlinson and lawyer Bennett; he sent the same boy for them; they were not at
 10 home; he knew Tompkins and Pritchard; I think Pritchard was not there before; Tompkins was a frequent visitor there: the Doctor had heard persons speak of Pritchard; I took the will again as soon as Mr. Powell got it signed and sealed up again, and put it away the same afternoon; I brought it out but once; Mrs. Moore was up stairs when I brought the will to the Doctor; she was in this spare room when I got the will; she was there when I returned it to the box; I did not name to Mrs. Moore what I was doing when I got the will; I do not know if she saw the will in my possession; I had no talk with
 20 Mrs. Moore about it; when the codicil was signed, Dr. Humphrey was in bed; he was sick in bed in early June; he was not very sick; he was not then taking opiates; not a bit of it; the two last weeks of his life he took opiates; not before; when the will was brought down he was not suffering from hiccoughing; he had had attacks of hic-coughing in the early part of his sickness; he might have had some attacks of hic-coughing when McGonigal, the nurse, was there; the daughters of Mrs. Hardcastle visited the Doctor after their mother's death, but not so much as he thought they ought; I think none of them lived
 30 nearer than New York; Doctor gave Kate two wedding outfits; all the daughters were married; I think Mrs. Moore wrote once or twice to Kate for the Doctor, after her departure, but I am not sure; he spoke affectionately of Kate after she left; that was what hurt him so, because she left him.

I think Lavinia spent part of several months before his death with him; think Mrs. Kedenburgh visited him the year before his death; she was there twice during the summer he died; I did not witness the interview between Ada and the Doctor while she was there; I was in the room, and there was nothing particular while I was there; his manner was affectionate towards
 40

all the granddaughters; clairvoyants visited the house in the last few months of Doctor's life, at his request, not at my request; I did not send for them; don't know who did send for them; believe they came of their own accord; can't tell how many clairvoyants were there during the last summer; there might have been two or three of them there; I think they paid only one visit each.

I received a legacy of \$300 under the will; I, soon after the Doctor's death, bought a house in Woodbury for \$1,000; Adelaide Hardcastle died at Dr. Humphrey's; she lived there when not engaged elsewhere; she was in an impoverished condition, and kept a boarding-house; I don't know that he had any favorite daughter; I don't know that he was on bad terms with any one, if they let him alone; Mr. Moore was wealthy once, but I guess he lost it all; he was not wealthy at the time of the Doctor's death, Mrs. Moore was in Europe with her son; after the last codicil was signed Dr. Humphrey did not speak to me about it; it was not opened till after his death. 10

In chief.

Friend H. Gregory and his father, C. B. Gregory, were spiritualists; they sometimes visited him; Dr. Humphrey was a decided man; no one moved him if he took a stand; after he took a stand, if any one opposed him it irritated him; he always wanted his own wishes carried out, and would do it; as to changing his writings, I told him he had best not change them, as they were all fixed; he told me to mind my own business, and I did it; Drs. Bryant, Taylor and Hall visited him; he did not take much medicine; I usually administered his medicine; sometimes Mrs. Moore did it; I do not know what it was I gave him; if he thought the medicine would do him no good he would not take it. 20 30

The tin box was kept in the closet up-stairs; the closet was kept locked; I had the key to the closet; there was fire in the room, in a stove; when Mrs. Moore was home she used it as her sitting room; the Doctor altered his will only once that I recollect of till the last codicil; the other alteration I speak of was before the death of Mrs. Hardcastle; I had the will in my possession after I kept house for him; Powell executed the other alteration; when these codicils were written I produced

the will ; when Bennett prepared the codicil I produced the will ; I did so at every time a codicil was written ; after the execution I put the will away ; beside these the will was not out of my possession ; how could Mrs. Moore have any influence when she was in Europe ; she, Mrs. Moore, came back from Europe at Christmas ; I never knew or heard Mrs. Moore do or say anything to Dr. Humphrey to influence him to alter his will ; kind relations existed between Dr. Humphrey and Mrs. Moore ; it was always so.

10 On a further cross-examination witness says—

I am nearly sixty-five years old ; the Doctor's mind never wandered until within the last two weeks of his illness ; I was not in the room when Miss Thomson was there ; I did not produce the will at any other time except when it was given to Mr. Powell ; when Dr. Humphrey sent me for Mr. Powell, he just said he wanted to see him ; it was about Christmas ; I never heard Mrs. Moore express any desire to have the Doctor will his property to her ; Mrs. Moore was a remarkably intelligent woman ; she took it from her father ; she was a woman of strong
20 will ; she was sometimes alone with the Doctor, and sometimes not ; the Doctor, while Mrs. Moore was there, was confined to the house ; I never heard Doctor accuse Mrs. Moore of gross immorality, or blame her for being absent from her husband ; after the Doctor's death I gave the will, &c., to Dr. Humphrey's son.

RACHEL CAVIS.

Affirmed and subscribed this September 30th, A. D. 1874,
before me.

G. S. WOODHULL.

30

DECREE OF THE ORPHANS' COURT.

In the Orphans' Court of Burlington county, of the Term of September, in the year of our Lord one thousand eight hundred and seventy-four (1874).

In the matter of appeal from the order of the Surrogate admitting to probate the last will of Dr. Gideon Humphrey, deceased, and the three codicils thereto attached.

This matter coming on to be heard on the deposition and proofs taken before a master pursuant to an order of this court, and on the testimony of Rachel Cavis, one of the witnesses examined in open court, and the court having heard and examined the testimony of the several witnesses, and taken time to consider thereon, it is, therefore, on this thirty-first day of October, A. D. eighteen hundred and seventy-four (October 10 31st, 1874), ordered by the court in open court, that said last will and two first codicils be admitted to probate, and that the third and last codicil to said last will and testament, dated the third day of June, eighteen hundred and seventy-two (June 3, 1872), be not admitted to probate; and it is further ordered that the costs of the proceedings to be taxed on both sides, be paid out of the estate, and that a counsel fee of one thousand dollars be paid out of said estate to the counsel of the appellant, and a like counsel fee to the counsel of the appellee.

JOSEPH L. MORTON, 20

JOSEPH CARR,

WILLIAM PARRY.

[Appeal filed October 31st, A. D. 1874].

Burlington County Orphans' Court, October the thirty-first, in the year of our Lord eighteen hundred and seventy-four.

In the matter of appeal from the order of the Surrogate of the County of Burlington, probate of the last will and testament of Gideon Humphrey, deceased, and the three several codicils thereto annexed.

George H. Moore and Eliza L. Moore, his wife, the said Eliza 30
L. Moore being one of the children of the said Gideon Humphrey, deceased, and a legatee under his last will and testament,

by Frederick Voorhees, their attorney, hereby appeal from the decree of the Orphans' Court of the County of Burlington, signed in the above stated cause, at the court house in Mount Holly, on Saturday, the thirty-first day of October, eighteen hundred and seventy-four, to the Prerogative Court of said State.

Dated October 31st, A. D. 1874.

GEORGE H. MOORE
and ELIZA L. MOORE, his wife, by
FREDERICK VOORHEES,
Their Attorney.

10

ORDER TO ANSWER.

[Filed November 17th, 1874].

The petition of appeal in the above stated cause having been filed, it is, on this seventeenth day of November, in the year of our Lord one thousand eight hundred and seventy-four, ordered—That the Surrogate of the county of Burlington transmit to this court the depositions, proceeding and order, or decree, had and made by the Orphans' Court of said county, in the case
20 aforesaid; and it is further ordered—That the said respondents file their answer to the said petition of appeal within twenty days after the service of a copy of the petition of appeal and of this order, and that in default thereof the appellants be heard *ex parte*.

THEODORE RUNYON, O.

DECREE OF PREROGATIVE COURT.

This appeal coming on to be heard at the regular term of this court, held at Trenton on the twenty-seventh day of May, in the year eighteen hundred and seventy-five, in the presence of

Frederick Voorhees, proctor for, and James Wilson, of counsel with the appellants, and Marmaduke B. Taylor, proctor for, and William H. Browne, of counsel with said respondents, and the petition of appeal and the answer thereto, and the depositions taken and the exhibits marked, having been read, and the arguments of counsel for the respective parties having been heard and considered, and it appearing that on the twenty-first day of August, in the year eighteen hundred and seventy-two, the last will and testament of Gideon Humphrey, and the three codicils thereto, were admitted to probate by the Surrogate of the county of Burlington (no caveat having been filed against the same), and that said will and said three codicils were then duly proven before said Surrogate, and that he thereupon granted letters of administration, *cum testamento annexo*, upon the estate of said testator unto Peter Powell, Henry M. Humphrey, the sole executor named in said will, having previously renounced, in due form of law, the office of executor of said will; and it further appearing that from the decision of said Surrogate admitting said will and codicils to probate, Lavinia Jenkins, wife of Smith C. Jenkins, filed an appeal to the Orphans' Court of said county, and that after hearing said appeal, the said court did, by an order and decree made at the term of September, A. D. 1874, order, among other things, that the said will and the first two codicils thereto be admitted to probate, and that the third and last codicil thereto, dated the third day of June, in the year eighteen hundred and seventy-two, be not admitted to probate; and that, from so much of said order and decree as orders that said third and last codicil be not admitted to probate, the said George H. Moore and Eliza L., his wife, have appealed to this court; and it now satisfactorily appearing to this court that the said Gideon Humphrey, at the time of the execution of the said third codicil to his last will and testament was of sound mind and disposing mind, memory and understanding, and that said third codicil was not the result of undue influence brought to bear upon the said testator in and about the making of the same, and that said third codicil ought to be admitted to probate; and it further appearing to this court that the allowance of one thousand dollars to the counsel of each side, made by said Orphans' Court for counsel fees, is excessive; it is thereupon, on this twenty-

first day of December, in the year of our Lord eighteen hundred and seventy-five, on motion of Frederick Voorhees, proctor for the appellants, ordered, adjudged and decreed that so much of the order and decree of the said Orphans' Court of the county of Burlington as orders that the said third codicil to said will be not admitted to probate, be and the same is hereby reversed, set aside, made void, and for nothing holden; and it is further ordered, adjudged and decreed that the amount of counsel fees in said Orphans' Court be reduced to three hundred
10 dollars to the counsel of appellants, and the like sum to the counsel of the respondents, and that a like sum for counsel fee be paid out of the estate of said Gideon Humphrey, deceased, to the counsel of the appellants and respondents, respectively, in this court; and it is further ordered that the record and proceedings in this cause be remitted to the Orphans' Court of the county of Burlington, to be proceeded upon according to law, and in conformity with this decree.

THEODORE RUNYON, O.

COURT OF ERRORS AND APPEALS.

Smith O. Jenkins and Wife, }
Appellants, } On appeal from
vs. } decree of Preroga-
George H. Moore and Wife, } tive Court.
Appellees. } Points of Appeal

Points to be relied on by said Appellant in the argu-
ment of said appeal :

1st. That ~~it has not been established~~ that the testa-
mentary capacity of Gideon Humphreys, the testator, on
10 the third day of June, A. D. 1872, at the time of execut-
ing the third and last codicil to his said last will and
testament, ^{has not been} ~~is not~~ established.

2d. That the said third and last codicil to the said last
will and testament was the result of undue influence ex-
ercised upon him.

M. B. TAYLOR,

Solicitor, and of Counsel with Appellant.

Dated March 1, 1876.

3^d. Imposition of the instruments
upon the testator, without a full
knowledge on his part of its contents.

IN THE COURT OF ERRORS AND APPEALS.

Between Smith O. Jenkins and Lavinia Jenkins, his wife, in the right of said Lavinia Jenkins, <div style="text-align: right;">Appellants,</div> <div style="text-align: center;">and</div> George H. Moore and Eliza L. Moore, his wife, <div style="text-align: right;">Appellees.</div>	}	On appeal from the Prerogative Court. Answer.
---	---	---

The answer of George H. Moore and Eliza L. Moore, his wife, respondents to the petition and appeal of Smith O. Jenkins and Lavinia Jenkins, his wife, in the right of the said Lavinia Jenkins—Appellants. 10

These respondents, not confessing or acknowledging all or any of the matters and things in the said petition and appeal mentioned to be true, as the same are therein set forth, and reserving to themselves all benefit and advantage of exception to the many errors, defects and imperfections in the said appeal contained, for answer thereunto say, that they admit that the said Prerogative Court did make such decree in said cause as in said petition and appeal is mentioned and complained of, but as to the date and contents of such decree, these respondents, for greater certainty, refer to the said decree, when the same shall be produced. 20 But these respondents are advised and humbly apprehend that the above-named decree of said Prerogative Court, in said petition complained of, is agreeable to equity and justice, and therefore humbly pray that the same will be affirmed, and the appeal dismissed with costs. 30

FREDK. VOORHEES,

Solicitor for and Counsel with Respondents.

Dated November, 1875.

Court of Errors and Appeals of New Jersey.

Estate of Gideon Humphrey, Dec'd.

BRIEF OF LAW OF APPELLANTS.

M. B. TAYLOR, }
W. H. BROWNE, } Counsel.

I. THE WILL ITSELF.

1. *Redfield on Wills*, Vol. 1, edition of 1869, foot page 43, section 4. (In edition of 1866, the foot page is 41). When it is sought to establish a posterior will and to overthrow a prior one, made by the testator in health and under circumstances of deliberation and care, and which is free from all suspicion, and when the subsequent will was made in enfeebled health and in hostility to the provisions of the first one, in such case the prior will is to prevail, unless he who sets up the subsequent one can satisfy the conscience of the Court of Probate that he has established a will, and the prior will is to prevail also, unless the subsequent one is so proven to speak the testator's intentions as to leave *no doubt* that it does speak them. 10

2. *Section 3*. If upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question does contain the last will of the deceased, the court is bound to pronounce its opinion, that the instrument is not entitled to probate. *Parish Will Case*, 25 *N. Y. Court of Appeals*, page 9.

3. *Page 479*. Where the will is unreasonable in its provisions,

and inconsistent with the duties of the testator, with reference to his property and family, this of itself will impose upon those claiming under the instrument, the necessity of giving some reasonable explanation of the unnatural character of the will, or at least of showing that its character is not the offspring of mental defect, obliquity or perversion. *Reiterated in 9 C. E. Green, 435.*

4. *Den v. Vanderve, 2 Southard 675.* The execution of a will is not the prompt and unpremeditated effort of the moment, 10 but the tardy effect of long observation on family and property, on the claims of duty and the calls of affection. It is frequently the result of the combined reasoning and feelings of years, often meditated on, often resolved and not unfrequently divulged. *Also Sloan & Maxwell, 2 Green Ch. 570.*

5. *Goble v. Grant, 2 Green Ch. 635.* If the will had been made by the testator in extremis in favor of those around him to the disinherison of other heirs towards whom he had always exhibited an equal degree of natural affection, such fact would be entitled to great consideration.

20

II. SUBSCRIBING WITNESSES.

1. *Thornton v. Thornton, 39 Vt. 122.* If it appear from his own testimony that a subscribing witness to a will did not use his opportunities for observation as to the testator's capacity, the special value of his opinion ceases.

2. *Scribner v. Crane, 2 Paige C. R. 147.* Where a person subscribes his name as a witness to a will without being clearly satisfied that the testator is of sound and disposing mind, it is a fraud upon those whose rights are affected thereby.

3. *Ciley v. Ciley, 34 Maine 162.* The opinions of subscribing 30 witnesses as to the condition of the testator's mind at the time of the execution of the will may be received in evidence, when the facts on which such opinions are founded are stated, but the opinion of the witnesses is not conclusive, and the court or jury must draw their own conclusions from the facts proved.

4. *Den v. Vanderve, 2 Southard 666.* Where a total stranger to all the parties and all their concerns is called in as a witness, merely to fulfil the requirements of the law, there can therefore be no great claims upon his memory, further than

merely to attest his signature, and certainly there can be no great reliance upon his opinion, as to the mental capacity of the deceased, whom he had never before seen, and in whose chamber he then was but during the few minutes occupied by the transaction.

5. *Orser v. Orser*, 24 *N. Y.* 51. Upon application for the probate of a will, the question of the due execution is to be determined like any other fact, in view of all the legitimate evidence in the case. No controlling effect is to be given to the testimony of the subscribing witnesses. 10

6. *Stackhouse v. Horton*, 2 *McCarter* 208. The opinion of a witness must be brought to the test of facts, that the court may judge what estimate the opinion is entitled to. It is proper and legal to ask a witness his opinion as to the mental capacity of the individual to discharge the duty in question. He must state the facts upon which his opinion is based. The court will judge of the intelligence of the witness upon the subject to which he testifies, and the proper weight to be given to his opinion from the facts and circumstances upon which he founds his opinion.

7. *Turner v. Cheesman*, 2 *McCarter* 261. The mere fact of a man's having affixed his signature to a will as a subscribing witness does not of itself entitle his opinion, as to the competency of the testator, to any more weight than that of any one else who may be called upon to testify. If the subscribing witness is a stranger, which is sometimes the case, called upon to meet the exigencies of the moment, and having no opportunity in a sick chamber to ascertain and judge of a man's capacity, his opinion is not certainly entitled to as much weight as that of a friend, who saw the testator about the same time, and who was afforded an opportunity of conversing with him and testing the sanity of his mind. The opinion of any one, whether a subscribing witness or not, is but of little value unless he can give us the reasons for the opinion he expresses, and can show that he had an opportunity to justify him in forming the opinion he expresses. Whether a subscribing witness or not, we must look at the intelligence of the man, and the means he enjoyed of forming the opinion he advances, and give weight to his opinion accordingly. 20

8. *Garrison v. Garrison*, 2 *McCarter* 269. It is not the opinion of the witness upon which the court relies, but the court draws 40

its own conclusion and forms its own judgment from the premises which have produced the conviction in the mind of the witness. The mere opinion of a subscribing witness is entitled to no more weight with the court than that of any other witness. Our experience in these matters is sufficient to satisfy us that the subscribing witnesses seldom if ever take any pains to ascertain the capacity of a testator, and are generally those who know least of his general character and disposition or of his mental capacity. The opinion of a witness, who is a stranger to the testator, and who
 10 sees or hears nothing except what is necessary to enable him to attest the instrument as a subscribing witness, is not as much to be relied upon as that of a neighbor and familiar acquaintance of the testator. The truth is, the opinion of neither is of any weight with the court, except as it proves itself to be a correct and sound conclusion from facts which justify and warrant it. It is a frequent occurrence for a will to be refused probate, notwithstanding the strongest kind of testimony in support of the mental capacity of the decedent.

9. *Scribner v. Crane*, 2 *Paige* 147. One ought not to sub-
 20 scribe as a witness, unless he knows from the testator himself, that he understands what he is doing, and unless he is satisfied of his own knowledge that the testator is of sound and disposing mind and memory.

10. *Wilson v. Hettrick*, 2 *Bradford* 427. Inability of the witnesses to remember any testamentary declaration in the case of a will recently executed, held fatal.

11. *Nexen v. Nexen*, 3 *Abb. Ct. App.* 360. The opinions of
 30 witnesses as to the capacity of a testator are only entitled to weight, when accompanied by facts upon which they are based, and it is the duty of the tribunal to consider, whether the conclusions of the witnesses are sustained by the facts detailed by them.

12. *Harper v. Harper*, 1 *N. Y. Supreme Ct. Reports*, 356. *Decided Sept.* 1873. Witnesses to a will are often called from a class of persons, not experts, not competent to express opinions of capacity. Except that they occupy that position, and are thus by law allowed to give opinions (which is an exception to the general rule), they would not be allowed. Their testimony, like other witnesses, is to be weighed by their incompetency to
 40 express opinions as experts. Testamentary capacity may be

established against their opinions. The will itself, with its reasonable, logical and systematic provisions in consonance with the correspondence and expressions of the testator, is much stronger evidence of his capacity than any possible theoretical, inexpert opinions, based upon particular acts or sayings of the testator at occasional interviews, and perhaps at the most unfavorable moments of acute suffering of the testator from a painful illness, affecting in degree at such times the strength of his mind.

III. QUESTION OF MENTAL INCAPACITY.

10

1. *Jackson v. Jackson*, 32 *Ga.* 325. A mind sufficiently sound for the regulation of one's affairs in general is not a disposing mind, if the exercise of its discretion is prevented by the dominance of another.

2. *Clark v. Fisher*, 1 *Paige*, 171. In an action to set aside a will, if it is proved that there was a derangement of the mental powers of the testator for any considerable time, it will rest upon the party supporting the will to show that such incapacity had ceased prior to the making of the will.

20

3. *Bates v. Bates*, 27 *Iowa*, 110. A party competent to make a valid will should possess a mind capable of exercising judgment, reason and deliberation, a mind capable of weighing the consequences of his will and its effects to a reasonable degree upon his estate and family.

4. *Mintzer Will*, 5 *Philada.* 206. *Daniel v. Daniel*, 3 *Wright*, page 191. The law requires at the time of the making of the will, the testator shall have a full and intelligent consciousness of the nature and effect of the act he is engaged in, a full knowledge of the property he possessed, an understanding of the disposition he wishes to make of it by the will and the objects he desired to participate in his bounty.

30

5. *Idem.* If by deceit or fraud a man is led into making his will or if importunity is resorted to and exists to such an extent as to deprive a testator of his free agency and he is too weak to resist it, the will is not the act of a free agent, and therefore void.

6. *Lord Coke says* : It is not enough that the testator, when he makes his will should have sufficient memory to answer

familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his lands with understanding and reason. This he adds is such a memory as the law calls sure and perfect.

7. *Phillips on Evidence*, vol. 4, page 292. It has been said that where there is delusion of mind there is insanity, as where persons believe things to exist only in their own imagination, and of the non-existence of which neither argument or proof can convince them, and which no rational person could have

10 believed.

8. *Idem*. 295. The strongest and best proof as to a lucid interval is that which arises from the act itself, and if it can be proved and established that it is a rational act, rationally done, the whole case is proved.

9. *Leech v. Leech*, 9 *Harris* 69. Weakness of intellect from extreme age, from great bodily infirmity, or from intemperance to the extent of disqualifying a testator from knowing and appreciating the nature, effect and consequences of the act he is engaged in, is as much testamentary incapacity as raving

20 madness.

10. *Van Pelt v. Van Pelt*, 30 *Barb. N. Y.* 134. Where the testator is unable to read or write, is ignorant, weak in understanding, and is susceptible to influence, or the victim of passion or prejudice, a simple compliance with the statutory forms of execution will not be sufficient to render the will valid. The burden of proof is shifted in such a case, and the party offering the will must show the testator's mental competency to make it.

11. *Stedham v. Stedham*, 32 *Ala.* 525. Mental incapacity avoids the will, where such incapacity is occasioned by

30 medicines.

12. *Moore v. Moore*, 2 *Bradf. N. Y.* 261. In case of diminished capacity, it is important for the proponent of the will to show that it accords with the testator's intentions.

13. *Weir v. Fitzgerald*, 2 *Bradford N. Y.* 42. The execution of a will by one of advanced age, impaired sight and hearing, should be scrutinized for traces of undue influence.

14. *Mowry v. Silber*, 2 *Bradford, N. Y.* 133. The will of an aged person of impaired mind and memory must be shown to be fairly made of his own motion, without interference, and

40 to accord with his intentions, expressed or implied by family

relations. It is not sufficient to show instructions, especially if he were exposed to undue influence.

15. *McTaggart v. Thompson*, 14 *Penna.* 149. A testator need not be shown to have been insane to destroy a will. A less degree of mental imbecility is necessary to invalidate a will, than would be ground of acquittal from a criminal charge.

16. *Redfield on Wills*, Vol. 1, Edition of 1869, page 48, foot. There can be no question that persons incapable of reading, whether from defect of sight, want of instruction, or sickness or other cause, require that instruments to be executed by 10 them in the presence of witnesses, should be read over in the presence of the witnesses and of the person executing them, in order to afford the fullest assurance of the execution being understandingly done.

17. Page 50. The New York statute does not require a will to be read to the testator in the presence of witnesses, but it is proper to do so when the testator is blind or cannot read. 3 *Bradford* 42.

18. Page 51. Besides the mere formal proof of execution, which is required in all cases, something more is necessary to 20 establish the validity of a will, when from the infirmities of the testator his impaired capacity or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution, additional evidence is required that the mind accompanied the will, and that he was cognizant of its provisions.

19 Page 52. Mr. Jarman's rule is the least that will insure safety. That in proportion as the infirmities of the testator expose him to deception, it becomes imperatively the duty and should be anxiously the care of all persons assisting in the tes- 30 tamentary transaction, to be prepared with the clearest proof that no imposition has been practiced, but that the testator did in fact fully understand every portion of the paper which he executed in his will.

20. *Harris v. Vanderveer's Exr.*, 6 *C. E. Green* 563. A blind and deaf person may make a will, but it must be shown by the proponent to the satisfaction of the court, that he knew its contents and was not imposed upon in its execution. There can be no absolute *presumption* that a man of testamentary

capacity would *not* execute a will without understanding its contents.

21. *Deu v. Trumbull*, 2 *Zabriskie* 133. The test which the law applies is a practical one. Was the testator, at the time of executing the will, capable of discerning and feeling the ties of kindred and obligations of family and blood? Had he a mind to recollect the property he means to dispose of? The persons who are to be the objects of his bounty, and the manner in which it is to be distributed between them? To sum up the
 10 whole, in the most simple and intelligible form, were the testator's mind and memory at the time he executed the will, sufficiently sound to enable him to know and understand the business in which he was engaged? Where the testator was very infirm and the will executed in the article of death, it has been rightly held that the preparation of the will by the principal legatee was conclusive against its validity; it induced the belief that the will was not the will of the testator, but of the party benefitted by it.

22. *Den v. Johnson*, 2 *Southard* 458. The mere acknowledging of a writing by a blind man that it is his will, is not
 20 sufficient, unless there be satisfactory proof that the will has been read over to him. The same precautions are requisite in the cases of persons who cannot read, or who by sickness are incapacitated to read the will at the time. The terms sound and disposing mind and memory, so commonly used on this subject, stand opposed not only to idiocy and lunacy, but to all derangement of mind, occasioned by melancholly, grief, sorrow, misfortune, sickness or disease. The word "*sound*" signifies whole,
 30 and "a disposing mind and memory," is a mind and memory which have the capacity of recollecting, discerning and feeling the relations, connections and obligations of family and blood.

23. *Den v. Vancleve*, 2 *Southard* 669. One of the great distinguishing marks of insanity is the total change of mind, feelings, affections and inclinations of the afflicted object.

24. *Page* 675. Suppose the capacity of a testator, and it is alleged that he had been fraudulently imposed on, in a state so weak and feeble, that he could not distinguish between right and wrong or distribute his property discreetly, and it could be
 40 shewn that the devise was in direct contradiction to the dictates

of justice; to the deliberate resolves of his judgment; to his warmest affections and the bitterest animosities of his heart, nurtured for years, and repeatedly and feelingly proclaimed; what would we say? would we not infer that the devise was not his? that he had been imposed upon? that he had not been himself? that he had not possessed sufficient mind, at the time, to recollect his family and estate; to reason; to dispose of his property with discretion?

25. *Page 678.* He who claims lands under a will must show that the testator executed it with due forms, and that he possessed a sound and disposing mind and memory; a mind and memory having a capacity to remember and discreetly to dispose of his property and to recollect, discern and feel the relations, connections and obligations of family and of blood. 10

26. *Day v. Day, 2 Green Chancery 552.* If the testator is incapable of reading the will, whether the incapacity arises from blindness, sickness or any other cause; the burden of proof is thrown on the person offering the will, that the contents of the paper were fully made known to the testator and when the capacity to read is doubtful, it must be shown that the will was read over, or that it conforms to the instructions given. 20

27. *Matter of Welsh, 7 N. Y. Leg., Obs. 153.* The court is bound to be vigilant in ascertaining that the decedent was acting on his own impulses, where capacity is impaired.

IV. QUESTION OF UNDUE INFLUENCE.

1. *Goble v. Grant, 2 Green, Ch. 629.* Though the omission of a testator to make any provisions for a part of his children will not of itself suffice to establish incapacity, yet such an omission, not satisfactorily accounted for, is entitled to great consideration, where there is any evidence of a fraudulent procurement of the will, or where the will is made by the testator *in extremis* in favor of those around him. 30

2. *Harvey v. Sullens, 46 Mo. 147.* If the jury are satisfied from the evidence taken as a whole, that the will would not have been executed by the deceased, but for the influence exercised over him by the devisee, they should find that the will was procured by undue influence and was not his last will.

3. *Boyd v. Boyd*, 66 *Penna.* 283. Whenever a person under circumstances which enable him to exercise a strong influence over the mind of a testator, such as great age or a confidential relative, procures such testator to make a will in his favor, the burden of proof is upon such proponent to show that no undue influence was exercised, but the testator acted voluntarily and with a full knowledge of what he was doing.

4. *McKinley v. Lamb*, 56 *Barb.* 284. Where doubt has been cast upon the testamentary capacity of a testator, less
10 proof of undue influence is necessary on the part of the contestants.

5. *Kevil v. Kevil*, 2 *Bush. (Ky.)* 614. Gross inequality in the disposition of property is not in itself sufficient to invalidate a will, but it may be considered as bearing on the question of capacity, fraud or undue influence.

6. *Tyler v. Gardiner*, 35 *N. Y.* 559. Where it appears that a will was made by the testatrix on her death bed, when her faculties were enfeebled by long wasting disease, that she had been for some time under the constant and immediate influence
20 of the principal beneficiary, that during the period she had been imbued with false impressions in regard to the conduct of her son and had been induced to expel him from her house, that the will was entirely hostile in its provisions to a former will made several years previously when she was in perfect health, that it was made under false impressions vitally affecting its provisions, &c. It was held that these facts coupled with gross inequality, and apparent injustice in the disposition of her property, raised a strong presumption of undue influence on the part of the chief beneficiary, the burden of repelling which was
30 cast upon her.

7. *Fountain v. Brown*, 38 *Ala.* 72. Where a will is contested upon the ground of undue influence or incapacity, it is permissible to inquire whether the provisions of the will are just and reasonable and consonant with the state of the testator's family relations, the fact of the will making an unnatural and inequitable distribution of the property is a circumstance tending to indicate incapacity, fraud or undue influence.

8. *Harrel v. Harrel*, *Duval, Ky.* 203. Gross and unaccountable inequalities in the dispositions of a will require satisfactory
40 evidence that it was the free and deliberate offspring of a

rational, self-poised and clearly disposing mind, and when such evidence is wanting, the will shall be set aside.

9. *Turhune v. Brookfield, Redfield, (N. Y. Surog.)* 220. Where suspicions of undue influence are created by reason of the advanced age, blindness and imbecility of the testator, a presumption is raised against the will, which must be removed by clear and satisfactory evidence, beyond the mere fact of the existence of the will, and the capability of the testator.

10. *Marsh v. Tyrrell, 2 Hagg. (English)*. Where the wife, of advanced age, eight months after marriage, executed a will 10 under a power, varying only from her former disposition of her fortune, in making a reasonable provision for her husband and and his eldest son, and notwithstanding continued and severe bodily infirmity from paralytic attack, having never expressed any dissatisfaction or wish to vary such disposition, but on the contrary, referred to it with anxiety to secure her intended benefit to the family of one of the objects who had become bankrupt, after the lapse of nine years, and shortly before her death executed another will, giving the whole to her husband, the court, regarding the total improbability of such a change of 20 disposition, the previous anxiety of the husband to acquire possession of the former will, and the control of the affairs, and the facts of her being at the time of executing such second will in a state of very weakened and doubtful capacity, and the fact of the will originating with and carried on entirely by his means and interference, and by contrivance to prevent the access of other persons at the time in her confidence, pronounced against its being the real mind and will of a capable testatrix, and condemned the husband in costs.

11. *O'Neill v. Murray, 4 Bradford* 311. It is not necessary 30 always to show undue influence by direct testimony, but it may be deduced from circumstantial evidence, and when the testamentary dispositions are unnatural, unreasonable and not easily accounted for, unless upon the hypotheses of persuasion and improper influences, the court will require clearer proof to sustain the transaction than would otherwise be demanded.

12. *Tenbrook v. Lee, 5 Penna. Law J.* 37. A testator must enjoy full liberty and freedom in the making of this most important instrument, and if such importunities are used as he is

either too weak to resist, or which show it was not his free and unconstrained act, the will would be void.

13. *Idem.* A will made under false representations to the testator of a child's habits, &c., is void; void not alone as to the person by whom the will has been so procured, but as to all intended by it; it is not the testator's will, but a thing imposed upon him, on which his free agency had no action.

14. *Jarman on Wills, page 37.* The amount of undue influence which will be sufficient to invalidate a will, must of course vary with the strength or weakness of the mind of the testator. The influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance or any other cause might have no effect to overcome or mislead a mind naturally strong and unimpaired. (Reiterated in 9 *C. E. Green*, 431).

15. *Page 39.* Undue influence to avoid a will must be a control, intentionally exercised by one mind over the will of another, so as to deprive the other of the free agency of option, such a seducing of the mind from its purposes by artful flattery, harassing it into submission by continued and excessive importunity, or overcoming it by false information and improper menaces.

16. *Page 40.* There is another ground which, though not so distinct as actual force nor so easy to be proved, yet if it should be made out, would certainly destroy the will—that is, if a dominion was acquired by any person over a mind of sufficient sanity to general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind, and perhaps the most probable instance of such a dominion being acquired is that of an artful woman having taken possession of a man and subdued him to her purposes.

17. *Page 41.* Where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear. If a man makes a will in his last sickness by the over-importunity of his wife, to the end that he may be quiet, this shall be said to be a will made by constraint and shall not be a good will.

18. *Redfield on Wills*, vol. 1, edition of 1869, page 474, foot. Any important abuse of the testator's confidence, by making him believe unfounded imputations against those entitled to his bounty, if done understandingly, is held fraudulent.

19. *Dietrich v. Dietrich*, 5 *S. and R.* 207; 13 *S. and R.* 323; 6 *S. and R.* 56. (Penna. cases.)

20. *Redfield on Wills*, vol. 1, page 479. Where the will is unreasonable in its provisions and inconsistent with the duties of the testator, with reference to his property and family, this of itself will impose upon those claiming under the instrument, 10 the necessity of giving some reasonable explanation of the unnatural character of the will, or at least for showing that its character is not the offspring of mental defect, obliquity or perversion.

21. *Page 477.* It is obvious in practice that by far the largest proportion of wills procured by undue influence, is brought about by flattery and affected devotion, and that comparatively a very small number are induced either by fraud or actual menace. It is well known that in extreme old age, the nervous system not unfrequently becomes more than ordinarily 20 sensible of intimidation.

22. *Page 484.* Anything in the character of the will which renders it contrary to natural affection, as where children or others entitled to the estate, in case of intestacy are wholly disinherited, or if not wholly deprived of a share, it is given in such unequal portions as to indicate that it is done without any just cause, and wholly dependent upon caprice or over persuasion or deception, it must excite apprehension of undue influence at the very least.

23. *Page 489.* We have always found juries disposed to 30 infer undue influence or want of proper capacity or both, where the will itself seemed to indicate in a high degree, injustice and want of proper consideration in the testator, if there was the slightest evidence in support of it. It is upon the ground of apprehension that the will may not be the act of the testator, that his previous declarations of his intentions to have made a different or a similar will, are recorded.

24. *Sutton v. Sutton*, 5 *Harrington, Del.* 459. If from age or imbecility, a testator is induced to change his will, contrary

to his intentions and against his own wishes, that is undue influence.

25. *Means v. Means*, 5 *Strobhart* 167. In order to establish undue influence, as in questions of capacity, the contents of the paper and previous indications of purpose made by the testator may all be given in evidence, but only as pertinent to the inquiry—is this his will?

26. *Lee v. Dill*, 11 *Abb. Pr.* 214. If the provisions of a will, executed by an old and feeble man, differ from his previously expressed intentions, and differ in favor of those who stood in confidential relations with him, it is evidence of fraud and undue influence.

27. *O'Neill v. Murray*, 4 *Bradf.* 311. Repeated statements of testamentary intentions made to acquaintances may have weight in ascertaining whether the will accorded with his mind.

28. *Reynolds v. Root*, 62 *Barb.* 250. The gift to a son having intimate relations to the testator's affairs, of all the property, to the exclusion of another child, is a case where the question of undue influence should go to a jury.

29. *Exrs. of Eliza Moore v. Blauvelt*, 2 *McCarter* 367. In this case the will was overthrown, although mental capacity was proven. Undue influence was evidently exerted, and false representations were made to the testatrix, who was aged, helpless, blind and dependent.

30. *Lynch v. Clements*, 9 *C. E. Green* 431. The will in this case was overthrown, solely on the ground of undue influence exerted by a son. It was not suggested there was any want of testamentary capacity.

31. *Marvin v. Marvin*, 3 *Abb. N. Y. App.* 192. Undue influence may be inferred from circumstances. A testator, 81 years of age, but of sound, disposing mind, having two sons, by one of whom she had five grandchildren, after going to reside with the other son, revoked a previous will, by which she had divided her estate equally between her sons, and executed a new will, giving her estate to the one with whom she was living. *Held*, that on the question of undue influence, it was proper to inquire into the reasons for such a disposition of the property, and the probability that it was stimulated by the suggestions of

those attending her. (A verdict for annulling this will was sustained).

V. QUESTIONS OF EVIDENCE.

1. *Jackson v. Jackson*, 32 *Ga.* 325. The sayings of one who is at the same time executrix and legatee under a will, made before and at the time of making the will, are admissible to show that she exerted an undue influence over the mind of the testator.

2. *Fairchild v. Bascomb*, 35 *Vt.* 398. Upon the trial of the question of the sanity of the testator, it is competent to show 10 he had brothers and sisters who were poor, for whom he cherished feelings of affection and yet made no provision for them in his will.

3. *Shailer v. Bumstead*, 99 *Mass.* 112. Declarations of a testatrix, made subsequent to the execution of the will are admissible to sustain allegations of fraud and undue influence and ignorance of the contents of the will where a foundation has been laid by evidence of a previously existing condition of mind rendering the testatrix susceptible to such improper influence, and such subsequent declarations tend to show its con- 20 tinued existence.

4. *Wigram on Wills*, Vol. 2, 15. The declarations of a testator are evidence of his testamentary capacity, and also of the question, whether the will has been obtained from him fairly or by undue influence. On principle there seems to be no ground for rejecting as regards fraud, the testator's declaration made after the date of the will more than those made before it was executed on a question of capacity. The contents of a will and the whole state of the testator's affairs and conduct are relevant subjects for evidence. 30

5. *Page* 54. A testator's knowledge of the contents of his testament will be presumed, if he were of sound capacity; but if he were mentally weak, proportionately strong proof must be given that he was aware of the contents of the instrument.

6. *Jarman on Wills*, p. 42. On an issue to try the validity of a will. *Dietrich v. Dietrich*, 5 *S. & R., Penna.* 207. The person attempting to impeach it on the ground of imbecility and imposition was permitted to give evidence of the false repre-

sentations of the principal devisee, as to the character of the wife of another who was equally entitled to the testator's annuity, by reason of which he was disinherited. Same point recognized in *Musser v. Arnold*, 13, *S. & R.* 323 to 328; 5 *Vesey*, 633.

7. *Landis v. Landis*, 1 *Grant, Pa.* 248. When once mental incapacity is established, and a general derangement or imbecility of mind clearly proved at any time prior to the execution of the alleged will, the burden of proof is changed.

10 *Allen v. Public Admr.*, 1 *Bradford, N. Y.* 378. The harmony of the will with the testator's disposition and affections, and his declarations in regard to it when in health, are facts to be considered.

9. *O'Neill v. Murray*, 4 *Bradford, N. Y.*, 311. The previously declared intentions of the testator are admissible evidence in support of a will, which it is attempted to overthrow, on the ground of undue influence, and when they agree with the terms of the will, have been made often, to many persons, and for a long time, and no change of affection towards the legatee appears, they are an important element in support of the will.

10. *Roberts v. Trawick*, 17 *Ala.* 55. The declarations of a testator made two or three weeks before the execution of the will, are admissible evidence to prove fraud or undue influence in its procurement.

11. *Davis v. Calvert*, 5 *Gill & Johnson*, 269. Fraud will vitiate a will. Such fraud need not be proved by direct and positive testimony; any facts, however slight, bearing at all upon the point, and not wholly irrelevant, may be admitted, 30 provided they are strong enough, when combined, to satisfy the jury of the existence of the fraud.

12. *Den v. Vancleve*, 2 *Southard* 674. When the competency of a man, when his sanity at a particular moment is questioned, what more conclusive mode is there of ascertaining it, than by comparing what he then said and did with what he said and did at other periods of his life?

13. *Boylan v. Meeker*, 4 *Dutcher* 279. Upon the issue of the sanity of the testator when he executed the paper, his conduct and declarations, both before and after that time, tending

to show his want of capacity at the time, were competent evidence. All the authorities support that position.

14. *Turner v. Cheesman*, 2 *McCarter* 265. Where the sanity of the testator is in question, and where undue influence is sought to be established, it is competent to give in evidence the declarations of the decedent to show that the disposition of his property by the writing which is propounded for probate, is in opposition to his intention as manifested by his repeated declarations on the subject.

15. *Lake v. Ranney*, 33 *Barb.* 49, and 2 *Moore* 481, *N. Y.* 10
In every case where a will is offered for probate, the burden of proof is on the proponent, and he must satisfy the conscience of the court that it is the last will of a free and capable testator.

16. *Theological Sem. v. Calhoun*, 25 *N. Y.* 42. If, on examining all the witnesses, and considering the attending circumstances, a reasonable doubt remains whether one or more of the directions of the statute have not been omitted, the probate must be refused, although it may appear probable that the paper expresses the testator's intentions.

17. *Taylor Will Case*, 10 *Abb. Pr. N. S.* 300. The rule that 20
declarations of the testator made subsequent to the execution of the will are inadmissible, does not justify the exclusion of such declarations when offered to show or disprove undue influence.

18. *McGinnis v. Kempsey*, 27 *Mich.* 363. The burden of proof is on the proponents of a will to establish the capacity of a testator, by other evidence than the presumption of sanity, and that presumption cannot have the force of an independent fact to serve as a substantial make-weight against counter proof.

