Surrogate's court, county of New York : In the matter of proving the last will and testament of Henry Parish, deceased / Argument of Wm. M. Evarts, esq. November 10, 1857. Reported by Roberts & Warburton, law reporters.

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ARGUMENT.

The case, Mr. Surrogate, that is now at last to be submitted for your determination is one likely to be memorable in the annals of your office, and in the history of your own judicial life.

The death of Henry Parish having occurred on the 2d March, 1856, regular movements were made towards the probate of the testamentary papers that he left behind him, and on the 17th of April of that year, the first actual taking of proofs commenced. It terminated early in July of the present year, and had occupied your attention and ours during more than one hundred sittings of your court, patiently and steadily devoted to the preservation of the evidence that was adduced on either side; and though in the view that I take of this case, its forensic history is likely to be that which is most peculiar and will be most remembered concerning it—though no new or nice questions of law are involved—though the propositions of fact are distinct, determinate and plain—though the evidence, as it seems to me, both affirmative and negative, both that which is before you and the silent influence of that which has not been produced, and whose absence infers that no facts important to be shown can be supposed to exist—will, upon a full and complete survey and just estimate of it, leave rather in your mind, and in the minds of those who shall hereafter have occa-

sion to consult the voluminous report of the case, the conviction that the wonder is that there should have been so much evidence, so much earnestness, and so much labor, in the hope or expectation of success upon the part of these contestants, and will inevitably require that the zeal and pertinacity of the litigation should be referred rather to some general habit or tendency governing or supposed to govern the actual administration of justice and disturbing the adherence to fixed principles of law, imagined to be prevalent, or to be likely to prevail, in some one or other of the tribunals through which, in the course of the history of this litigation, it may pass. This, I say, will be found to be what there is notable and peculiar in the case, rather than anything grave or difficult in balancing or determining the force of the facts and the conclusions of the law.

It happened to me, sir, by a calamity, which the public and profession deplored, and which fell with severity upon my client—the death of Mr. Hoffman—to come into this case, when the documentary evidence had been completed; and from that time to this, by actual attendance, and more lately by a careful examination, I feel that I am possessed of the evidence in the case.

Upon the death of Mr. Parish, certain testamentary papers were found, bearing the proper authentication. Those papers consisted of a will, bearing date and executed in the year 1842—fourteen years before his death—and three codicils, one executed in 1849—seven years after the date of the will—one in 1853, and one in 1854. These testamentary papers, it was found, raised a conflict of interest, not between the heirs or next of kin of the decedent, and the beneficiary, who upon the whole papers would take the bulk of the estate—not a competition between the ties of blood, and the ties of marriage, but a controversy between the will of the testator as expressed fourteen years before his death, and the will of the testator as expressed in the later dispositions of his

property during the last seven years of his life. It raised a question not as in the case of intestacy, not as in favor of the heirs, *as heirs*, whom the law favors, not in reference to those who stand in the relation of expectants of the equal bounty of a decedent, having no other claims on the disposition of his property, but solely between certain residuary legatees, who, if at all, were to take of a property left in the year 1856, by the death of the decedent, to be distributed under the operation of law upon the increasing residuary estate which had been disposed of by the testator in his original will, and another, different residuary legatee who claimed on the testamentary papers made later in his life, nearer to the time when his will was to operate upon his property, and more in view of the amount of that property, and of the situation of the decedent towards it, and towards those whom he should leave behind him. Between these residuary legatees, and between this operation of an old will, and this later attempt of the testator to modify and apply his will in respect to the property, and towards the persons whom he should leave his survivors, this litigation is presented.

It is true that these residuary legatees under the original will were of the blood of Mr. Parish, and that they were among his heirs, but I am at a loss to see how, in the relation of blood, or in the quality of heirs, they stand upon any other or any better right than the two sisters of the decedent, who, at the time of the making of his will, through the whole period of his subsequent life, and to his death, stood in an equal place in his affections, and occupied apparently an equal share of his regard, as manifested in the intercourse of life. So, therefore, it is undoubtedly, both in form and in substance, true that the controversy, as respects the different interests involved, is between two sets of residuary legatees, one consisting of two of his heirs out of four; his two brothers to the exclusion of his two sisters, and the other of his wife.

A general and rapid reference to the position of Mr. Parish, his career, his property, his relations to all those who are now contestants before you, and to all those who were remembered in his will, or shared a near regard in his lifetime, is necessary to preface a more particular examination of the matters in this case. Mr. Parish was born about the year 1788, in an interior and inconsiderable town, and, early in boyhood, removed to Newburgh. From the very earliest period of life possible, he was devoted to trade. From the apprenticeship served in his native town, and under the patronage of a relative, he, in regular progress, sought, acquired and built up his fortune. He was a dry goods merchant, carrying on his trade upon a large scale, the principal seat of it being in the city of New York, its main connection with the Southern country, leading to the establishment either of houses or of collateral and intimate relations with houses, that made a system of business embracing various cities at the South, and the city of New York as its complete circle. By the year 1828, it appears, he had amassed a fortune, then involved, to be sure, in the risks of his business, to the amount of $250,000. He continued in active business until the year 1838. From that time he was engaged only in winding up his affairs, and in such care of his property and its accumulation, by way of investment or otherwise, as occupies generally the attention of retired capitalists. By the year 1842 this property, in his own estimation, and in the view of others who have spoken of it, amounted to some $700,000. By the best estimates that we can make, this property had accumulated in 1849 to about the sum of $900,000, in 1853 to about the sum of $1,100,000, and in 1856, as of the date of his death, to something like $1,300,000. Of these sums, the personal property, of course, could be estimated only as a mass. As to the real estate, no particular opinions, leading to any accurate measure of its value, in its aggregate or particular parcels, have been given. The testa-

tor's own views, as shown in his books, are the estimates on which I have based my valuations of the real estate, that, in the computations of the mass of his property at the different times, I have suggested. The whole of this wealth Mr. Parish, much more than most men, could say, was of his own making. No particle of it had he ever inherited at any of the dates that I have mentioned, excepting what came to him late in life by transmission rather through than from his father; coming originally from the estate of a younger brother who had made a fortune, under his patronage, and left it for distribution ultimately between his brothers and sisters. I refer to Mr. Thomas Parish, who died in the year 1840. Even this money, then, that came to Mr. Henry Parish from his father, came merely by transmission from Thomas; and Thomas, the younger brother, had made it as a share in the commercial energy, activity, success and prosperity which attended the concern of which Henry Parish was the head. So, too, no portion of the wealth of Mr. Parish had any of the qualities or traits which incorporate and identify property with the pride or affection of its owner—not a particle of it. Of course the personal estate, which was always the bulk of his property, was not of that description. It was counted in dollars, and it was so much money and nothing else. It had no past history by which it could be traced to any source of pride or affection. It had no future where, in its volume, it could be directed as a vehicle of pride or affection. The real estate consisted of the dwelling house in Barclay street, and subsequently that in Union square, about which only the domestic affections which belonged to the residence of himself and Mrs. Parish were attracted; two or three stores in Water, Pine and Pearl streets, and, later in life, a piece of property on Wall street, and some property in New Orleans, taken for a debt, or in settlement of some affairs of the firm, or in division among the partners. These composed all the property that had any local name

or habitation. He was thus the master of his own fortune in every sense. He had made it himself. He was not its servant under any of the controling ties or affections which sometimes bind men to their property. But he was also, in a most remarkable degree, in a position of entire independence, and able to follow the bent of his own will and preference in the disposition of this property. He had *nobody* dependent upon him. He had no children who, by a law generally too strong for even prudence, wisdom or the true consultation of their interests—the law of affection and the law of succession, draw a man's property to them. No one of his relatives of his own blood were in any circumstances of either dependence, of necessity or of just expectation; not one. I mean such just expectation as was founded upon any relation he had ever held, or any suggestion that he had ever made, either authorizing or encouraging any expectation from him. His sister, who was unmarried, possessed, in the distribution of her father's estate, some $50,000 or $60,000, and she was past the period of life when the connection of marriage was to be looked for. The other sister, possessing the same fortune, was married to an independent gentleman holding a place of honor and of trust in the magistracy of the State, abundantly able, out of his own unaided resources, to maintain the fortune and the dignity of the married sister of Mr. Parish and of their children. The brother James, of whom we really know very little, but apparently about as much as Henry Parish did for the last ten or twelve years of his life, lived up the river in Poughkeepsie. What he was—whether a farmer or a trader; whether the resident of a village; what his position was, except that he was retired and quite unobtrusive, and that he possessed an adequate and independent property by acquisition from his father, and that he had received pecuniary benefits at times from his brother Henry, we know nothing distinctly. He seems to have been in that independent condition of

having what he desired, and no more than could be readily managed, and caring neither for fortune, nor much personally for his wealthy relations in this city. Daniel, the only other member of the family who survived him, was introduced into business by his brother Henry at the age of twenty-one, and remained in connection with him, under his patronage, in common with Thomas, who died, in the business which was carried on in the various firms. During a great part of this time they were residents together of the city of New York, and their relations seem to have been of the ordinary degree, and nothing beyond the ordinary degree of association which business men, in a near family connection, hold to one another in the steady course of their lives. He (Daniel) possessed a fortune, as long ago as 1842, of some half million of dollars. At the time of Mr. Henry Parish's demise it had increased, undoubtedly, to as much as a million; for beyond the drawbacks of the cotton speculation, mentioned in the evidence, nothing appears that should have retarded or diverted its natural course. Daniel, in right of his wife, stood in expectation of the whole of her father's fortune, and ultimately received it during the lifetime of Henry Parish, amounting to $200,000; so that, as respects Daniel, Henry Parish had been the founder of his fortunes. Henry Parish, in respect of his own family, stood as independent in his own feelings, according to the ordinary principles of human nature and human conduct, as a man possibly could do. To illustrate it: If Henry Parish, standing in this attitude towards those of his own blood—and I am not, so far, considering at all his relations to his wife and his wife's family—if Henry Parish, standing with his fortune in either of the years of testamentary disposition that I have adverted to, and in that relation to the members of his family that I have described, had devoted the whole of his fortune to some great public beneficent trust, to the foundation of a college or a hospital, no man could have said, no man could

have thought that he had built up a public interest by robbing any private obligation that he was under, of its due performance. Everybody would have said and felt that he presented an instance more than most men where his fortune was wholly his own, and where those who, in the relations of blood and family usually have an imperfect claim, by their own independence, absolved him from all implied imperfect obligations of this kind, and enabled him to do a great public benefit, at his own cost only, with his own property. So, too, if we look at Mr. Parish's relations to his wife's family, it will be seen that all of them, though not possessing large fortunes, as we count them in this age of wealth, and in this city, yet were wholly independent men by their professions or their means, and never, in the lifetime of Henry Parish, were indebted to him for anything. Never! No favors of a pecuniary kind, no aid or assistance to any of her own numerous brothers were either afforded by Mr. Parish or asked for by them. The whole record of this case discloses that they were masters of their own fortunes and of their own tempers, and were as independent in their positions in society as any set of men could be. So, too, with regard to Mrs. Parish. His fortune was large, and he could provide for her and yet make a distribution among friends and relatives just as he saw fit. He could leave her well endowed, and yet not deprive himself of the gratification of distributing munificent gifts to his friends, however large the circle of them, that he might choose to include in his testamentary disposition. And he thought, therefore, as emphatically as any man could, at the date of whatever testamentary papers, that he stood able, in the judgment of all, to make such disposition of his property as seemed to him good.

Under these circumstances, the first topic to which I shall invite your honor's attention, is to examine the frame and purpose of the will and codicils. And, first, as to the will. Your honor will find, at page twelve of

the brief, our propositions upon this head. The materials for ascertaining the leading sentiments and purposes which governed Mr. Parish in the distribution of his property by will are: 1st. The text of the will; 2d. The written memoranda in preparation for the will, which exist both as his own deliberations or considerations on the subject, and as written instructions to the professional draftsman; and, 3d. The testimony of Charles G. Havens, the lawyer who drew the will. There is, perhaps, some force, not to be omitted in the consideration, in the negative evidence that he did not consult anybody, friend or relative, in regard to his testamentary dispositions. Mr. Kernochan, who was as intimate with him as anybody, only knew that in 1842, in preparation for his voyage to Europe, he had made a will. He did not know at any period of the life of Mr. Parish that he was named an executor in that will, much less did he know, or was he advised, concerning any testamentary dispositions. What I have said with respect to Mr. Kernochan is true, as to everybody else that stood in any relation of confidence towards Mr. Parish, excepting his wife, and that this was not usual, or of a piece with a complete and general independence of Mr. Parish in regard to advice about business affairs, is clearly made evident from the testimony of Mr. Kernochan that upon the subject of investments, both temporary and permanent, Mr. Parish, as a matter of habit, consulted with him. So, then, we say that not only affirmatively do these three sources of evidence contain all that is to be known, but they exclude, in the light of the testimony about his consultations with others, any other source to assist in arriving at any just judgment.

THE SURROGATE: Do I understand you to say that nobody knew there was a will until after his decease?

MR. EVARTS: No, sir; Kernochan says that Mr. Parish informed him that he had made a will; that he did not know that he was executor, and was never informed of

the contents of the will; of the testamentary provisions before making, or what the will was after they were made. Nobody was consulted about them.

The will, as we say, shows for its clear plan and purpose. 1st. To dispose of the whole of his estate, as he then valued it, in actual bequests, leaving the residuary clause to take effect upon a possible or inconsiderable surplus. In the memoranda, which are in evidence, in respect to his views in preparation for his will, it will be found that he estimated his property at $732,000. Now, that fact is all that we need, in my present view, to bear in mind, when we look at the mere text of the will: for I am now drawing attention to it.

I say that the will shows a clear purpose to dispose of his estate in actual bequests, leaving the residuary clause to take effect upon a possible or inconsiderable surplus.

2. A specific disposition of his real estate, leaving no part of it to fall into the residuum.

3. To make Mrs. Parish the only successor and representative of his wealth, in, or with whom alone did he contemplate the name, dignity, credit or prestige of Henry Parish's wealth or social position as destined or desired to survive him.

He gave her $331,000, and the largest amounts given by his will otherwise to a single legatee, are $35,000, in real estate, to his namesake, Henry Parish Kernochan, and $20,000 to each of his sisters, and a probable residuum of nearly the same amount to each of his brothers.

Now, there was another very clear indication in regard to the real estate, which was, that his whole real estate should go in this direction of representative survivorship in his wife, except such as he devised in the direction of nominal representative survivorship in the persons of his *namesakes*. His namesakes are among the persons cared for in his will, and in regard to his real estate I say the indication is, that his wife was to have it as a mass, except

such parts of it as he directed to the namesakes who represented him in this merely nominal survivorship.

The strength of this sentiment with the testator is shown by his leaving

1st. No real estate to any of his heirs or blood as such; not a foot. Now, if the sentiment of blood or heirship is strong in a testator's mind, it will attach itself, if at all, to the real estate, which is all that is to be kept permanent in the transmission of property. But

2d. By his leaving to his nephew, Henry Parish, the son of Daniel, the only namesake who represented him fully and distinctly with the entire reproduction of his name, real estate to the value of $35,000, while to his other nephews he gives but $10,000 each. The other nephews and nieces who are the children of Daniel or James Parish are all put on a footing of $10,000 each; but he gave $35,000 to the nephew who bears his own name, in real estate only. Now that is giving nearly twice as much as he left to each of his sisters who stood nearest in the relation of blood. It is between three and four times as much as he left to other relatives who, in blood, stood upon the same footing with this favorite for his name's sake. But he left to Henry Parish Kernochan, real estate to the value of $20,000, the son of Joseph Kernochan, who, so far as his relationship to Henry Parish was concerned, was the son of Henry Parish's cousin, the wife of Mr. Kernochan. This again is as much as he leaves to his sisters, and to his brothers, and twice as much as he leaves to his nephews. Then to Henry Parish Conrey, a mere namesake having no relation of blood, or affinity of any kind, he leaves real estate to the value of $5,000.

Another distinct lineament of the will is the preference of the name of Parish over the blood in giving his brother's children bequests *per capita*, and omitting from such remembrance the child of his sister, Mrs. Sherman,

and making no provision for her probable future issue. Mrs. Sherman had not been long married, and she had a child a year or two old, and though he goes through the list of nephews and nieces who bear the name of Parish, he makes no provision for the child then in being of his sister, or for any probable future issue, except by way of limitation of the amount left to her.

Then, having thus indicated his views and feelings in regard to the distribution of property as usually affected by the ties of relationship, heirship or community of blood, the next clear indication that we perceive is a distribution of what property was spared from the objects of ample provision for his wife, and not attracted to his namesakes, into numerous personal gifts (generous and munificent as gifts), rather than such a disposition as would found a fortune for any of his own or wife's blood who did not possess one, or would swell the already abundant fortune of any other.

Your honor will find, that after the disposition that I have referred to, which disposed of all the connections of his blood, and the particular attraction towards his namesakes and his wife, the residue of his property is to be distributed as gifts in sums of $10,000, a round sum, munificent as a present, as a remembrance, but as the foundation of a fortune, or as an increment to an existing fortune, entirely inconsiderable. In thus dividing the property where it should carry a remembrance of his name and his bounty thus diffused, your honor will perceive that his wife's kin in the distribution of these personal gifts are on the same footing as his own. He names his brother's children, and he names the members of his wife's family. He names his friend Mr. Kernochan only in connection as his executor, but Mrs Kernochan he names on an equal footing with his nephews or brothers' children.

The position of Mr. and Mrs. Abeel appears from the evidence. She was his cousin. Mr. Abeel in the draft,

and she in the actual execution of the will, is the recipient of a gift of $10,000.

There is also shown a clear protection of his wife's interest in the appointment of three of her brothers as executors, placing one of them with his own brother and his most intimate friend, Mr. Kernochan, and providing the other two as the only substitutes in case of vacancies in the executorship; he took but one of his own brothers, he took his friend Mr. Kernochan, and in the primary execution of his will he joins Mrs. Parish's brother, Mr. Joseph Delafield, and provides that Henry Delafield and Wm. Delafield shall be executors to take the place of any two who shall be deceased of the three named for the original execution of the trusts of the will. In respect of *compensation*, viz., the donations of $10,000 made to each of his executors, they are put at once on the same footing, the whole five receiving this recognition in this gift.

Another certainly somewhat peculiar provision in this will, as we suppose, shows a clear apprehension of encroachment by his heirs upon the provisions for his wife, and in subversion of his will, if, by inadvertency or mischance in its provisions, a flaw could be picked in her title to the Louisiana property,—a provision which put his heirs under bond, as it were, to observe her rights and his will. This is the fifteenth clause of the will:

"And, inasmuch as the devises and bequests herein "contained, of real estate, situated in the State of Loui- "siana, may prove insufficient to vest the same, as I "have hereinbefore provided, it is my will that my heirs- "at-law, by whom the same real estate would be inhe- "rited, in case it should not pass under this will, do "release or convey the same in conformity with the "devises thereof contained in this will. And the devises, "bequests and legacies contained in this will, to or for "the benefit of my said heirs-at-law, are made upon the "express condition that my said heirs shall so release "or convey the said real estate in Louisiana, in case it

" should become necessary or proper in order to carry " my will in respect to said real estate into effect. And " in case my said heirs-at-law should not so release or " convey said real estate in Louisiana, I revoke the pro- " visions herein made for them, and I give, devise and " bequeath the sums and property hereinbefore devised, " bequeathed or given to them, or to my executors for " their benefit, to my wife, except the sum of $5,000, " which I give to my said namesake, Henry Parish Con- " rey, in lieu and stead of the provision hereinbefore " made for him."

Now, your honor will notice that by this will the provisions in favor of his *heirs* were, to his sisters, $40,000, and to Daniel and James, $36,000, which is the difference between his whole estate and the value disposed of by the anterior bequests before the residuary bequests, making $76,000 of provision in the will for his apparent heirs. Now the New Orleans property, the disposition of which is protected by this clause, gives to Mrs. Parish $48,000, and to Henry Parish Conrey $5,000, making $53,000. That computation, I suppose, tends to show that he did not, in his apprehension, to secure the $53,000 beyond the peradventure of a failure, suppose that he was imposing more than about such a penalty as is there contained. The ordinary provision in such a case would be, that if the heirs should make trouble, or refuse to carry into execution the design of the testator, they should be deprived of the value of that property. It is very plain that he did not feel disposed to leave his wife's interest in regard to property, concerning the rules of succession to which, or the formalities as to the disposition of which, he might be in doubt or ignorance, to any contingency of the disposition of his heirs to carry out what was plainly written as his will: that, in his judgment, a pecuniary penalty of forfeiture was the only bond that would be likely to protect his wife and dissuade them.

The next proposition is, a prevailing tone throughout the will that the existence of residuum was contingent and conjectural, and the full satisfaction even of prior legacies insecure and uncertain; solicitous precautions that his wife's endowment should be free from peril, and that the subsequent legacies should suffer a ratable reduction, if need be; postponing any payment on account of the latter for the lapse of two years, to ascertain its safety.

Now, I will not trouble or detain your honor by reading aloud on my part the text of this will. Your honor, under the guide of these suggestions, will attentively consider this will in your subsequent examination of this case. I believe that every one of the traits that I have named is as distinctly impressed upon the text of this will, as if Henry Perish had, in so many words, disclosed them as the views and feeling in his mind in regard to the disposition of his property. And we are not left entirely to the text of the will as an index to his sentiments; but in his own private consultations we are enabled to see how, in the dubitation or uncertainty, in the balancing of purpose that is indicated before the final result was fixed, this matter lay in his mind. The testamentary memoranda are to be found in part third, page 20, and some subsequent pages, and are Exhibits 85, 86, 87, A, B, C, running from pages 20 to 32. Now, in connection with the will, these show the activity of this sentiment towards his namesakes in the meditated limitation of $75 000, after his wife's death, to Henry Parish and Henry Parish Kernochan equally. That is found in part 3, page 21, folio 61, and the part in italics indicates this unformed or wavering purpose of this project under consideration, being written in pencil, while the ultimate disposition of the $75,000 then contemplated as being made a life provision for his wife, in addition to a provision of $100,000 out and out, and as appears by a note at the foot of this exhibit, and found upon page 23: "The words in brackets are in pencil in the original, and

"the italicized words in brackets are written in pencil, "but though legible the pencil marks have been nearly "effaced or removed." Therefore this phrase on folio 61, now found in italics, stands in the original exhibited as having been written in pencil, and having been obliterated purposely, but still allowing us to discover what is there written.

An inspection of the original will show your honor that this observation made in the note at the foot is entirely correct. It seems that he contemplated at this time a disposition, after making the specific provision for his wife of the real estate, which substantially conforms, I believe, to that made in the will, to leave her $100,000, invested on bond and mortgage, secured for her sole use and benefit, and then a provision for the income of $75,000 more, then the ultimate disposition of that $75,000 on the termination of her life estate, and he wrote down in pencil, "my nephew, Henry Parish, son "of Daniel, and my namesake, Henry Parish Kernochan, "son of my friend, Joseph Kernochan." Afterwards he shaped the disposition of his property differently, leaving to these namesakes only the real estate. Now that that $75,000 to ultimately come to them, was not in the place of the real estate he actually left them, is shown by the subsequent clauses of this same memorandum, which were fully written out in ink, and which gave to Henry Parish, the son of Daniel, and Henry Parish Kernochan, some real estate he did really leave them. He then, under this mere nominal representation of Henry Parish after his death, contemplated a gift of the real estate of $35,000 to one, $20,000 to another, and an equal division of $75,000 between them; a very considerable amount, coming to over $70,000, to one namesake, and to the other $57,000, who stood only in a remote relation of blood, which was quite beyond any disposition in favor of mere blood, whether in the defined provisions of $20,000 to each of the sisters or the probable contin-

gency of $18,000 to each of the brothers. This is shown further in the meditated adoption of these same namesakes as residuary legatees, *pari passu*, with his brothers, and in exclusion of his sisters at page 25, folio 72. The words in brackets are shown to have been written in pencil, but not obliterated. They stand as originally written in pencil: "And after performing and executing "all my requests and legacies of my last will, I hereby "give the residue and remainder of my estate to [Daniel "Parish, James Parish, Henry Parish, the son of Daniel "Parish, and Henry Parish Kernochan, the son of Joseph "Kernochan.]" That is a separate memorandum, and is marked Exhibit 86. It is not the same memorandum, because in that same memorandum which I have adverted to, at folio 63, will be found the disposition of the residue, which was actually made. He did not contemplate both these results in the same meditation, that is, to give his namesakes the ultimate disposition of $75,000, and also to put them into the residuum. In these deliberations of his, the doubtfulness of any residuum is here very apparent, and the precautions against any premature computation to make out one, are equally clear. I refer to pages 23, 24, 25, folios 65, 68, 69, 72. I refer first to folio 65. "After my executors shall have paid or secured "the legacies hereinbefore named, and shall have *acted* "two years as executors of my estate, and are satisfied "that my estate will be sufficient to pay the legacies here-"inafter mentioned, then, and in that case, it is my will "and request that they pay the legacies to the persons "hereinafter named, who may be of the age of 21 years, "and to such as are under the age of 21 years, pay the "interest on said legacies to their parents or guardians, "until they arrive to the age of 21 years; and in the "event of decease of any of the infants or minors here-"inafter named, before they arrive at the age of 21 years, "then to pay the legal heirs of such legatees. And, it is "my further request and will, that my executors do not

" and shall not be bound or compelled to pay the legacies " hereinafter mentioned, nor any part of such legacies, or " the interest thereon, until they are satisfied my estate is " sufficient thereunto; and in the event of my executors " being satisfied of the insufficiency of my estate to pay " the full amount of my legacies hereinafter named, then " it is my request that my executors pay on each legacy, " as soon, and no sooner than they, my executors, may " deem prudent and proper. It is intended that my " legacies hereinafter named shall only be paid by my " executors, pro rata, or rateably, and at such times as " they judge proper, but may begin to pay any part " so soon as they deem best and proper. But none of " my legatees hereinafter named shall have the right to " request or demand any part of their legacies until " these, my executors have acted under this, my will, " two years." (*Page* 6.)

Then comes the residuary disposition: " After all my " bequests or legacies hereinbefore named, are paid and " satisfied, the residue or remainder of my estate, *if any*, " I give to my brothers, James Parish and Daniel Parish."

Then the residuary clause, at folio 72: " And after " performing and executing all my bequests and legacies " of my last will, I hereby give the residue and remain- " der of my estate to [Daniel Parish, James Parish, " Henry Parish, the son of Daniel Parish, and Henry " Parish Kernochan, the son of Joseph Kernochan]."

I suppose, if your honor please, that it is quite as clear as any form of words could make it, that Mr. Henry Parish meant to dispose of his estate substantially,—that he left a mere margin, and being always disposed to be considerate, as will appear from the evidence, in the estimate of his own property, not making himself richer than he really was, he contemplated distinctly, that where so large a part of his estate consisted of personal property, and where so large a part of it was in the unliquidated concerns of the houses with which he was con-

nected, and his affairs open to the amount of millions, as Mr. Wiley says, at the time of the dissolution and retirement from business, in 1838, and still open in 1843, that not only was the contingent upon the best estimate of the residuum, small, but very doubtful; and with some prolixity he not only repeats over the idea that this is only to be done, if there shall be enough,—"if any," upon the face of it, expressing contingency—but he determines there should be no premature or rapid determination of that question; that the residuary legatee should not come in an instant and value his property, at the time of his death, but there should be the consideration, experience, observation and computation of two years, under the execution of his will to determine whether there was then any residuum that could be safely parted with. I do not know, if your honor please, but that a reference to pages 30, 31, now that we are upon these testamentary papers, may be worth while, to show that the children of James Parish are to have $10,000 each, the children of Daniel but $5,000, and while a considerable number of the Delafields are to have $10,000 each, William, Henry and Emma are upon that page, put down at $5,000 each. There is also this memorandum: "the excess "or remainder to D. P. and Jas. P." I see there is no date to this paper, but I shall infer from the general conformity to the actual disposition, and to other papers, that it must have been made in connection with the preparation of this will. Whether it was made at the very time, or in the very period of immediate provision in regard to the execution of the will does not appear; it is only in pencil, I think.

The only other source of light upon this topic is in the evidence of Mr. Havens, which is found in the first part. Now, the testimony of Mr. Havens shows that the preparation of the will was made with great deliberation and frequent consultations. He was comparatively a stranger to Mr. Parish, who but employed him to do professional busi-

ness for him. Doubtless he became acquainted with him as the partner of Mr. Francis Griffin, who was his habitual adviser, and in the absence of the latter gentleman in Europe, he employed Mr. Havens, probably with the feeling of secretiveness in regard to his testamentary dispositions in not going into any other office, though undoubtedly he had personal acquaintance in the way of business, or from the public bodies with which he was connected, with other offices in the city. At any rate he went to Mr. Havens, who is a gentleman of ability, and was fully qualified to carry out his wishes.

The testimony of Mr. Havens shows next that the principal sense of obligation and of affection was directed towards his wife, producing a solicitude that he should not fall short of suitable provision for her. This testimony is at pages 199, 200. At page 199, he says: "Perhaps "in saying that I made no suggestion, I ought to remark "that the only case in which he seemed to wish any "opinion was in relation to the provision for his wife; "that he spoke of, several times, during our conversa- "tion; he stated distinctly that he wished to make a very "ample and liberal provision for his wife, and after enu- "merating property he thought of giving to her, he asked "me whether I did not think that was an ample and "liberal provision for her; I told him he was much the "best judge of that, but I thought it was; he seemed "to be anxious to feel himself satisfied that he had "abundantly provided for her; he spoke several times, "emphatically; I remember, even after the will was "finally engrossed and ready to be executed, he spoke of "it again, mentioning the circumstance on these occasions "that they had no children."

I speak now only of that part of the evidence which relates to the will, and not to the subsequent conversations in regard to the meditated codicil on his return from Europe. But Mr. Havens' testimony shows further that the residuary clause, as it reads, was introduced from the

general intention that all his property should be disposed of by will, and a preference that his brother Daniel, and not his general heirs, should have the advantage of any contingent surplus. This last feeling, however, was made to yield to a nice sense of fairness towards his two brothers, that when the actual gift was to prove more formal than substantial, there should be no room for ill feeling between them. Mr. Havens' evidence is at pages 199, 201, folios 769, 777. He says, at folio 769 : "Dur-
"ing the communications with him in relation to the
"provisions of his will, he spoke more distinctly of Mr.
"Daniel Parish than of any other person, with the excep-
"tion of his wife, and said that Mr. Daniel Parish had
"been his partner a long time, that they made his money
"together, and although he (Daniel Parish) was a man
"of handsome fortune himself, he had a large and expen-
"sive family, and he (Henry Parish) seemed to feel par-
"ticularly anxious Daniel Parish and his family should
"be provided for liberally in the provisions of his will."

Now, at page 201, folio 777, Mr. Havens says: "Mr.
"Henry Parish, at that time, did not, to my recollection,
"inform me as to the pecuniary circumstances of his
"brother James; he may have done so; I think that he
"said he did not wish to make a distinction between the
"brothers, in the 13th clause; although he spoke more
"warmly of Daniel, and dwelt upon him, on account of
"his having been a partner, and having a large and ex-
"pensive family. He seemed to speak more distinctly
"of Daniel, because they had been associated in business
"together, and made his money together."

Now, putting these things together, when you observe that he seems rather to apologize for taking any portion of his property from his wife to give to his brother Daniel who had quite an abundant fortune; and, yet, that he did desire that his brother Daniel should be remembered in his will, because of the relations that had existed between them; if you stop there, you may have, in addition

to what Haven's gives, rather as *his* conclusions than as what Henry Parish said, that he wanted to have Daniel's family provided for liberally in his will; if you stood there alone, you might have some notion or presumption that he did not regard his testamentary disposition as merely of his property as it lay, but as the devotion of the future increase of it, if it should arise, until he otherwise provided. But when you find that, as a part of the same conversation, he, though thus disposed towards Daniel in regard of the residuum, and thus considering the amount of his family, and the fact that they had made their fortune together, yet was not willing to give those considerations the effect of discrimination between the two brothers, when James would take, under that will, so unimportant a provision from his property, we at once perceive that the *smallness* of the residuum stood as much a fixed fact in his mind, as if he had named the amount at $36,000. There was none of this feeling expressed about James. The whole evidence shows that the relations of James and his brother Henry were far from close. The current of their lives, their views of money, were as different as could be. It was a remembrance of Daniel for any possible or contingent surplus. But that that surplus is not to be of such a mass, of such a substance, of such an importance, in reference to the fortunes of Daniel, that it makes it worth while to give it to him, when there would be a nominal discrimination which might injure the feelings of James; to apply such a course of reasoning, such an apology, and such a result, to the devotion of property which was to equal three-quarters of a million is perfectly absurd.

To say "I would like to have Daniel's fortune accumulating by a large amount; I care nothing about James; but it will not do to make a difference in the will;" why, certainly, if those subjects and views, in that light, had been before him, and a large property was being disposed of, he, when the feeling was to govern of making no discrimination, would have included the

sisters, with whom he had more intimacy, and for whom he had certainly an equal affection. Now, the sisters were provided for, in $20,000; as much as he thought it important or useful to abstract from the mass of his property, in their favor, under all the circumstances. Daniel and James, and their families, were largely provided for; the first having $102,000, and the latter, $60,000, putting them, thus, far ahead of the sisters, even in that view; certainly a fair comparison in respect to the newly married sister, Mrs. Sherman, who had, in fact and in prospect, children.

But further, we gather from Mr. Havens' testimony that he regarded his will, as the present disposition of his property as it then was. Making his will was suggested by his contemplated absence in Europe, and he provided himself for any occasion that might arise, and took abroad with him a duplicate of his will. I refer to Havens' testimony, pages 194, 195, 200, folios 750, 753, 772. At folio 750 he says: "Mr. "Parish wished the will to be "executed in duplicate for one reason, that he was going "abroad to be absent some time, and wished to take one "copy with him; I don't remember any other reason."

Then at folio 772, he says: "When he proposed to "take one of the duplicates of his will abroad, he gave "as a reason, that he should be absent some time, and "something might occur to make it proper for him to "add a codicil, and it would be desirable to have the "will."

Now, here we have all that is to be shown in the way of evidence as to the will; and from the preliminary memoranda, from the testimony of the draftsman of the will, in regard to the instructions and the considerations that passed at the time of the directions for the preparation of the will, it is clearly shown that the traits of the will which I have sought to impress upon it are plainly to be found there.

It is only necessary to look at a fact which I asked your honor to bear in mind when going through with the examination of the will, and that is the computation of his property which is found in part 3, page 27. Mr. Parish estimates his real and personal estate "to be "worth at least $732,100 on the 10th September, 1842. "See manner of making his estimate and valuation of "his property and assets, on his balance sheet of the 31st "August, 1842, which sum may prove to be incorrect, "but he supposes he has not over-valued or estimated, "but supposes he has under-valued or estimated both his "real and personal property, yet it may prove otherwise, "as it is impossible at this time to know or ascertain the "correct value of his property." This is indorsed distinctly as the basis, in his mind, upon which he made his will.

"Estimate of the value of property of Henry Parish, "as made 10th September, 1842, on which estimate he "distributed his property and made his will in New "York, 20th September, 1842." (*Page* 28.)

The indorsement of the envelop in which this paper is contained is found on the top of page 26. "Enclosed "is valuation of the property and effects of Henry Par- "ish, made by himself, as nearly as he could, on the 1st "August, 1842, which, of course, will be varied as the "value of stocks, or his interest in the various copart- "nerships may differ in the results from this estimate."

Then, if your honor please, follow the evidence on the point of how much he leaves to Mrs. Parish: "Value put on real estate given to Mrs. Parish," enumerating it and finally terminating with the words, "an "amount in bonds and mortgages, stocks or money "equal in value to $200,000."

There, your honor, will see a computation, by which he gives his wife in real estate and in money, the aggregate there named, making $331,000. Your honor will see, that he then adds up upon the next page all the

dispositions of his will, amounting to $696,000, plainly set down; and his computation of $732,000, leaves $36,000 as the residuum of his estate undisposed of, except by the residuary clause.

Now this shows in the first place, that he had adapted in general the distribution of his property to the condition of his estate,—that the residuum of its amount was present to his mind, being arrived at by a computation insignificant and worthless unless for that purpose, and that he makes the distribution of the residuum according to a selection among those who are in the relation of kin; and here, instead of leaving it as it would be without the residuary clause, to be disposed of as in the case of intestacy, your honor will see that his will makes about an equal provision for his four heirs—$18,000 apiece to each of his brothers, and $20,000 to each of his sisters. It will be perceived that he intended to leave but $10,000 to his unmarried sister, but it was afterwards increased to $20,000,—that he selects his namesakes as the principal legatees after his wife, and that he gives to his brothers' and sisters' children upon the same footing with his friends' and wife's near kindred, the munificent gifts of $10,000 each.

What, then, is the reading of the codicil in this regard? We say that the first codicil shows no departure in plan or effect from the frame or purpose of the will. Now what does the codicil relate to, and what was the position of his property in 1849? His property, as appears by a computation from the evidence, which I shall call your attention to, upon a separate brief in regard to property, was $898,000 in his estimate,—that its increased bulk was made up in part, in his estimate of it, of personal property, and that the additional and new items of property of the quality of real estate were but two,—his Union square property which he acquired by purchase while he was in Europe in 1842–1843, bought through the instrumentality of his brother Daniel, and

his Wall street property, which he acquired in 1847, by purchase.

Now the codicil, your honor will observe, embraces in its provision the disposition of these two items of real estate, and nothing else.

Now we say, that this codicil does not introduce any new element in regard to the disposition of property from what is shown in the will itself. It follows the plan of the will in respect to the specific disposition of all his real estate. It is a codicil embracing all his real estate acquired since the date of the will, and nothing else. That was his plan. He makes a specific disposition of every item. It follows the plan of the will, by which all his real estate is devised to Mrs. Parish, which is not given to his namesakes. Your honor will find that there is no indication to give the real estate, as such, to his heirs or to his brothers. It is to his wife that he gives his real estate in mass, and he separates from that mass only such particular, designated portions as he makes gifts of, to his namesakes. It follows the plan of the will, by which their dwelling house is devised to Mrs. Parish; its operation, so far as the Union square property is concerned, being to make the will apply to the new dwelling house, instead of the old one, which had been sold. Now, in regard to this gift of the Wall street property, it is to be considered, that the increased value and greater style of the substituted dwelling house, required a new provision of productive fortune, to meet the solicitous care of his wife's position which marked his preparation of the will. The devise of the Wall street property carries out the plan of the will in this regard.

Now, if the will had shown any plan to leave his wife only a competency—if it had shown a purpose to leave her only an abundant provision in reference to the mere support of a dowager in society, and to give the rest of his property elsewhere—you might urge that the gift of this considerable property in Wall street was extrava

gantly beyond the purpose of the will. But it is idle to claim that Henry Parish, in the provision for his wife under his original will, contemplated merely a suitable living for her—suitable to her condition of life, and in society in which she was placed as his wife. That is absurd; because a purpose of that kind would have been limited to a provision for life, if the controlling notion was with him the ultimate possession of his property by his blood; and he could have left her a provision of $10,000, or even $15,000 a year—equal to what sum they had spent together, or greater than any sum she would need to spend in maintaining merely a position in society. The purpose of the will, therefore, cannot be stopped at this limited point. It is, clearly, to leave all his fortune to his wife; not considered at all as a provision for her life—not considered at all as merely adequate to her dignity and style of living; but as the surviving possessor of the absolute wealth of Henry Parish, which he and she had enjoyed together; and a separation from that mass, only in the light of gifts as a manifestation, among her kindred and his kindred, of his wealth and kindness.

Now, besides the first codicil, we have the testimony of Mr. Havens; I mean in reference to the making of the codicil. Mr. Parish returned from Europe in the summer of 1844, after an absence of some eighteen or twenty months, and when in town in the summer—that is, after his arrival in the city—he went to see Mr. Havens in reference to some new testamentary provision. He sees him again in regard to it, in the course of that fall, upon his return from the country; and there the matter is left incomplete, but with no change of purpose.

The testimony of Mr. Havens shows that the first and only new testamentary disposition in the testator's mind, after his return from Europe, was to secure to his wife all his subsequently acquired real estate, viz.: the Union square property not yet built upon. It was not then a question of replacement of one dwelling house by another,

for he still owned and lived in the Barclay street house. Now, that I wish your honor to bear in mind. It is not then in his mind, when he speaks to Mr. Havens, to replace the house he had sold; but it was in his mind as a bequest to his wife, of the only item of property that he had acquired since he made the will. Havens, in his testimony, uses the word "substitute," a substitution of the Union square property for the Barclay street house; but the use of the phrase cannot probably be considered as at all determinate upon the part of Mr. Havens, nor certainly as determinate on the part of Mr. Parish, as intending that he meant to leave her vacant lots on Union square, and take away from her the house in which he lived. The idea of substitution was that that ultimately would be the preferred residence of Mrs. Parish. He was too sensible a man to take away a house already over their heads from his wife, and leave her vacant lots on Union square. So you must treat it not as it arose at the time of the codicil of 1849, when it was replaced, but as it then existed in his mind. What then were the circumstances and what the facts on which he approached Mr. Havens? During his absence his brother had acquired this real estate on Union square, entirely vacant, at a very considerable cost, and which, if built upon, would involve a very large expenditure. He goes at once to his solicitor to procure his advice. I refer to the testimony of Mr. Havens, pages 196, 200, folios 756, 757, 758, 772. At page 196, he says: "I saw "him after his return from Europe, twice in my office; "the first time he called, without being able to state his "exact words, he stated in substance, that he thought of "making a codicil to his will, as some changes had taken "place during his absence abroad, from death; that he "had not yet made up his mind definitely as to the "proposed alterations or as to the codicil, and that he "would see me again before long on the subject; as I "had drawn the will he thought I had better draw the

"codicil; Mr. Griffin being then again absent from the "city, I think in Europe; some of the parties benefi- "cially interested in the will, I think he said, had died "during his absence, but I don't remember that he "stated who they were; he asked me in that conversa- "tion whether the making of a codicil would in any way "affect the main feature of the will, affect the will itself "as altered by the codicil; he either stated to me, or I "have a distinct impression from what he said in one or "both of these interviews, that he did not contemplate "any very material alteration of his will; the only sub- "ject that I recollect his speaking particularly of, was "the Barclay street house and the Union Place property; "I can't say that I have a distinct recollection of what he "said in relation to these pieces of property, but my im- pression is very strongly this, that he wished to *substitute*," (that is the word to which I have just alluded), "that "he wished to *substitute* the Union Place property for the "Barclay street property, in the provision for his wife, "in consequence of Barclay street not being a desirable "place of residence for his widow; but this thing was "not definitely spoken of, because he was to see me "further on the subject; one reason for not considering "it further on the first occasion, was that he was going "out of town to be absent a short time, and had just "returned from Europe; after his return to town he "called again and had a very brief conversation with me "upon the subject, and said he would see me again; that "is all I recollect on the subject."

Then at folio 772 Mr. Havens says: "in the conversa- "tions I had with him after his return from Europe, he "alluded to no provisions particularly, with the excep- "tion of Barclay street and Union Square property. He "did not allude to the provision for his wife or his bro- "ther Daniel, except that; he did not, in these conver- "sations, after his return, speak of his brother Daniel "at all."

Now all that we have from Mr. Havens' recollection is, that the object of Mr. Parish's visit was to get instructions or means of judging in reference to a disposition in favor of Mrs. Parish that should carry to her the Union Square lots. Now this was significant, as showing an immediate anxiety to have the newly acquired property taken out of the operation of the residuary clause and given to his wife. This is not only confirmatory of the fixed testamentary purposes of the testator in respect of his real estate above set forth, but clearly shows that the growth of the residuary fund was neither desired nor designed.

Now it happened that during his absence in Europe there was an acquisition of property which under his will would have counted as residuary.

It would have been specifically under the residuary clause, that passed in its shape, the real estate to Daniel and James. But that was entirely foreign from the purpose of his will, and his first care was to provide that that should not go as real estate to anybody but his wife, and should not increase the fund that Daniel or James, under the contingent purpose of his original will, would have taken. How did his property stand on his return from Europe? On his return his property could hardly have increased from its amount at the date of the will (if at all), more than the investment made in the Union Square lots ($34,000). This proposed devise to his wife probably reduced the residuum below its amount when he made the will. But there is no evidence of any acquisition of additional property to Mr. Parish during his absence in Europe. We have no computation of his property at any stage of his subsequent life, that upon reckoning backwards would give him in 1844 more than $732,000. There were no losses *after* 1844—none instanced, or pretended, or given in evidence. The increase from $700,000 in 1842, up to $900,000 in 1849, would

not be a ratio of increase at all commensurate with the natural growth of property.

But, sir, you will notice further, that this intention carries with it a significance beyond the mere gift of the lots. The proposed devise of the vacant lots carried, in intent, all the large investment in building and decoration which was then contemplated, and was afterwards made. The investment, beyond the purchase of the lots, afterwards made in the Union square building, was about $80,000; $80,000 was included in this structure put up upon these vacant lots.

It is not necessary for me to argue that he contemplated the investment of $80,000. He meant that she should have that lot, and that lot, in his plan and intent, included the accretion, from the general funds of his estate, of a very large sum of money which was to grow up upon it, growing itself in value all the while, and drawing down against any probable increase in the residuary fund. So it was not merely significant of the intent to take from the residuary fund, without remorse, what was then there, but in its prospective dedication of any increment of that fund as it should be taken and put upon the vacant lots.

There was the recognition of the brothers' rights to come in after the prior claims were satisfied; and if the prior claims increased, it was the wife first, the namesakes second, the munificent gifts third, and the residuum, if any, fourth. Now, in the then actual condition of his property, when planning the devise of the vacant lots, you have the clear purpose that the residuary fund should not be cherished, for it would be all the while running over into these lots. Now, is there any doubt whether he understood himself? Is there any doubtful interpretation, to be put upon this testamentary purpose that he clearly indicated? Is there any change of that testamentary purpose from 1844 to be pretended? Is there anything, whatever, necessary to explain the fact

that it was not carried into execution, except the fact that wills are not made, because men never expect to die? When they go to Europe, it occurs to them that they may possibly die. If he has a project that may involve one, two or three years of his life, it may occur to him that he may die within that time; but he never thinks that it will happen within a brief space of time; and, therefore, he rests in the security that testamentary provisions can always be made. Now, let us suppose that Henry Parish had been brought to the point of executing whatever testamentary purposes he had formed in 1844, by the consideration either of the approach of death by illness or of a new projected voyage across the Atlantic, is there any reason to doubt that that property would have been given to Mrs. Parish? Certainly not.

We next take up the second codicil. In the second codicil there was no real estate acquired, and it therefore deals with personal property, which otherwise, under the lapsed legacies, which had disappointed the express intention of the testator, and under the accumulation of his property notwithstanding the codicil of 1849, would have gone, to a certain extent, into the residuary fund.

The second codicil, we say, follows the plan of the will, by which his wife is proposed as the sole surviving representative of his wealth in bulk; by which she is to take all his property, but such real estate as pride of name carried to his namesakes, and munificence distributed as gifts, not as fortunes, with equal hand to the numerous list of collateral relations by blood and marriage; and by which the residuary fund was intended to be contingent and nominal. The question, undoubtedly more prominently than in the case of the first codicil, arose as to whether the increment of his fortune should go to his wife, or be in part diffused in additions to the numerous gifts of the will, or go to swell the residuum. In 1849, it cannot be pretended that the actual disposition of that codicil raised any issue of affection or preference

between the brothers and the wife. It was a mere disposition of property that left the brothers, as I shall show, better off than they would have been from a distribution under the will, of his estate as it stood, at its date. I say, then, this second codicil did raise the question of whether the increment should go to increase the wife's fortune, or should in part go to increase the distributed gifts, or should be left, or expressly devoted, if you please, to the advantage of the residuary legatees.

I am dealing now, if your honor please, upon the views spoken by the codicil, and not on any special considerations of any kind governing particular relations. Is there any argument that can be made, that when the property had increased several hundred thousands in 1853, and it came up as a question before him what he should do with that increase — is there any reason why he should not make it distributable, in the absence of any other considerations, in the same proportion as between competing claims, or his competing inclinations in reference to his wife, his friends, his brothers? I should say not.

Now, I think all will agree that it would ill comport with the clear purposes in regard to his property indicated by his will, to have applied its increase to enlarge rateably the bequests to his wife, the gifts to his friends and the residuary fund; nor would it conform to the natural and probable testamentary dispositions of large wealth by its owner. Here are twenty-one distributees and five others as executors, making twenty-six, of $10,000 each. Well, to break up the increment so as to give them $15,000 each, which would be a disposition of $130,000 out of it, would not be a natural disposition. The signification of the gift and its munificence was the same at $10,000 as at $15,000. It was not given as property or fortune to anybody. This leaves only the consideration of whether it should go to amplify the wife's fortune, or be disposed of in the residuary fund. As I

have said, there can be no reason why it should not be divided upon the original purpose of the will in the ratio of $331,000 to about $300,000 distributed. Otherwise, if you put it in the ratio of the residuum, which was only $36,000, you would make a small proportion: it would almost all go to the wife then. Or if you divide in proportions between the wife and the families of Daniel and James, then you would divide it in the ratio of $331,000 to the wife, $102,000 to Daniel and $60,000 to James. There might be another ratio of distribution, by carrying out the plan of the will proportionately; but the only real question would seem to be, if that were passed over, whether it should go to the wife or the residuary legatees. All motives of pride and complacency of wealth, would point to an accretion of his accumulations to the bulk of his property, in whose hands soever that was to survive him, rather than to its accretion to the wealth of another, where its name and identity would be lost. This would carry it to his wife. Whatever Henry left to Daniel, the moment the bequest took effect, it would be Daniel's property. It would so stand. No man could point to Daniel Parish as the representative of Henry Parish's wealth, because Daniel Parish stood *pari passu* with Henry in wealth; and if he got $200,000 in 1853 under the codicil, from Henry Parish's estate, it would not be Henry Parish's property at all. Its identity would be lost, and there would be nothing but Daniel Parish. As for James Parish, it seems to me that it is so entirely foreign from any intention of the testator to leave a large estate to him, upon any plea of any kind, that I cannot suppose it necessary to argue against an indisposition to leave a great estate to James. Now, all the motives of affection and duty (at the date of this codicil not less than when he framed his will) would point n the same direction. I will hereafter consider more distinctly what may be considered the competition between the claims of a wife and those of a brother, if independ-

ent, or in circumstances of no expectation in regard to the wealth of a decedent.

All I say now is, that the motives of affection and duty, in my judgment, and in the common estimate of motives which might probably govern a rich man in the distribution of his property—when you show him by the distribution he has before made to recognize his wife as being every thing a wife should be, and his wish and purpose was expressed that she should survive as the representative of his wealth and position—I say, that you find, not only this motive of pride and complacency of wealth carrying it to where the bulk is already left, but also motives of affection and duty, to carry it to his wife. In 1853, it cannot be said that those feelings of affection and duty towards his wife could be any less than at the time he made his first will, in 1842.

We now, if your honor please, come to the third codicil, which, in its terms, carries the residuum to Mrs. Parish; and, therefore, in the view I have taken of the second codicil, no additional remarks need be made about the third. It exhibits the same purpose, to keep the bulk of his fortune in his wife, as the surviving representative of his name, rather than to break it up to be lost in the bulk of Daniel's fortune, or hidden in the obscure position of James. Had the revocation of the residuary clause of the will been absolute, a new feature would have been introduced, by opening a possibility that, should he survive Mrs. Parish, the residuum would go to his heirs and next of kin, as undisposed of by his will.

The revocation of the residuary clause of the will being dependent on his wife surviving him, makes this codicil conform to the plan of the will and the previous codicils; namely, a preference of the wife's fortune over the brothers', they standing, only after her and before his heirs and next of kin.

Now, I will ask attention to a consideration of the operation of the various papers upon the property. We

had discussed those for the purpose of interpreting the testamentary design and plan of Mr. Parish in reference to his fortune. I will hand your honor a copy of my brief upon this point.

SURROGATE: You say the residuary bequest to the wife does not revoke them?

MR. EVARTS: Under the third codicil. Your honor will take the codicil as it reads with the whole instrument. 'I give, devise, and bequeath to my wife, Susan Maria "Parish, all the rest, residue and remainder of my estate, 'real and personal, as it shall be at my decease, after all "the devises and legacies in my will and codicils, which "shall actually take effect shall be provided for, to have "and to hold," &c.

If you stop there, it would have stood as a revocation of the residuary clause. Although it might not have taken effect if she died before Mr. Parish, nevertheless it would operate as a revocation of the residuary clause. But it does not stop there; it goes on to leave the other residuary clause of the will standing, unless Mrs. Parish shall survive him: "and in case she shall survive me, I "revoke the thirteenth article of my above written will," — that is the residuary clause of the above written will. I cannot be wrong in supposing that if this estate had come for administration under the will, and this third codicil, Mrs. Parish not having survived her husband (after the specific gifts of the will and preceding codicils had been provided for). I cannot be wrong in supposing that the residuum would have gone to the brothers, and not to the next of kin. It depends, I suppose, on that subsequent indication, that he does not mean to have the residuary clause to his brothers revoked if Mrs. Parish, the present legatee in his intent; does not live to derive the benefit of that intent, as you may have successive residuary dispositions of an estate, making one person residuary legatee, and in case of that not taking effect, substituting another, or others.

I say, then, that no new feature is introduced into that codicil—except what is in the other codicil—the preferring the wife to the brothers, and the brothers to the general heirs and next of kin.

I have handed to your honor a copy of the *brief on property*, which shows the operation of the various testamentary papers upon the property—and for the present purpose, the first page only, relating to the indications of the manner in which the different values that I have fixed on the property are arrived at, in considering the effect of the property on the will, The purpose of this is to show how the property of Henry Parish would have passed, under the successive limitations of it, that he made in his different testamentary papers, if those testamentary papers, in their succession, constituted the final disposition of his property as it now exists; for instance, what the effect of the first will, made in 1842, would be upon the property of which he died possessed in 1856; what the effect of the will and first codicil would be; what the effect of the will and second codicil would be, and what the effect of the will and three codicils, and comparing them relatively as between themselves, with the practical result of the declared and definite purpose, about which there is no dispute, of the testator, as drawn from the frame of his will, made before any occasion for controversy as to his capacity or the integrity of his own actions was or could be raised. An estimate of the property on which distribution by will was made, I referred your honor's attention to, in the proofs. It amounts to $732,000.

Amount of this to Mrs. Parish,	$331,000
To his namesakes,	60,000
To his executors acting,	30,000
To his sisters,	40,000
To Daniel Parish's children (seven),	70,000
To James Parish's children (six),	60,000
To Mrs. Kernochan (his cousin),	10,000

To Mrs. Parish's brothers and sisters,.....	$80,000
To Mrs. Abeel (his cousin), ...	10,000
To Mrs. Payne (Mrs. P.'s aunt), ...	5,000
	$696,000

That leaves $36,000 of residuum, undisposed of, being $18,000 to Daniel Parish and $18,000 to James Parish. But we must determine how much of this property to Mrs. Parish was real, and how much was personal estate. All his real estate is given either to Mrs. Parish or to his namesakes. Of Mrs. Parish's share there is, in real estate :

1. No. 49 Barclay street,.....	$18,000
2. No. 88 Chambers street, ...	5,000
3. No. 54 Pine street,.....	30,000
4. Half of No. 160 Pearl street, ...	20,000
5. Four parcels of New Orleans property,	48,000
	$121,000

The furniture consists of $10,000, which I will leave out of my estimate. There is $121,000 in real estate, then, left to Mrs. Parish by the will, as applied to the property then existing, and the values that he then put upon it. Now, supposing he died in 1849, without making a codicil, you must deduct from this provision :

Barclay and Chambers street property, sold,	$23,000
No. 54 Pine street, reduced in value,.....	5,000
No. 160 Pearl street, reduced in value, ...	7,500
	$35,500

There would then be an actual practical provision for Mrs. Parish, out of this property, as it stood in 1849, upon his disposition made in 1842, of but $85,500, instead of $121,000.

In 1849 his property would have been $898,000, and we will suppose he had died before making the first codicil.

His property would have been,	$898,000
Mrs. Parish would have taken (besides furniture),	285,500
Against a provision in 1842, out of	732,000
Of (besides furniture),	321,000
This proportion would give her, out of	898,000
Say about,	400,000

But he did not die leaving that result. He made a codicil. Now how does the effect of that codicil as applied to the then existing property (if he had died immediately after that codicil) place Mrs. Parish as compared with his provision for her in 1842? The will and the first codicil give her as follows:

In the will (besides furniture),	$285,500
The Wall street property,	76,000
	$361,500
(And this is Mr. Parish's own estimate, in his books, before his attack in July, 1849.)	
The Union square property,	60,000
Making in all,	$421,500

Being, in reference to the amount of his property, and considering that the amount in dwelling house was so much ($50,000 Union square in place of $18,000 Barclay street), a less ample provision, really, for Mrs. Parish, than made by the will of 1842.

Thus her provision in 1842 is dwelling house, furniture, &.,	$303,000
His property being,	732,000
Her provision in 1849, after the first codicil, is the dwelling house, furniture, &.,	$361,500
His property being	898,000

His property had increased, between the dates of the will and the first codicil,..... $166,000
The codicil disposes of..... 136,000

Leaving an increase in residuary fund of..... $30,000

Or, $15,000 to Daniel Parish and $15,000 to James Parish. That, then, is the disposition of the will (if unchanged by a codicil) upon his property in 1849, and the disposition of his will and codicil, together, in 1849, and you cannot discover that there is, in practical effect, any diversion from the main intent of the testator, relative to the two bases, to which the will of 1842, and the will and codicil of 1849, would have been applied.

Now, the falling in of the lives of some legatees, if taken into consideration in the computation, would make a difference. Forty thousand dollars of lapsed legacies would have arisen from the great fatality among the children of James Parish (three daughters having died), and from the death of Miss Emma Delafield. Mrs. Kernochan also died, but her legacy would go to her children, I suppose. There is a provision which carries the legacies, in case of issue, to it; and in case of no issue, to appointees. Whether appointees before the death of Mr. Parish would take the legacies which would have gone to the legatee, if he lived, is of no consequence. I suppose Mrs. Kernochan's children would have taken her legacy, and so there is no lapse of that.

Now, the second codicil of September 15th, 1853 (with previous dispositions), substantially absorbs the property (see Mr. Lord's evidence, pages 71 and 72); and I need make no other computation or other statement upon that.

The third codicil carries the residuum to Mrs. Parish.

Now, applying these several dispositions to the amount of property at his death, and between these competing interests, you have these results:

The amount of personal property at his death (which I gather from part 3, pages 635, 636 and 623) would have been..... $1,069,021 16

The amount of real estate, as per values in 1853 (part 1, page 103), of which he died seised, according to the last estimate we find of it in his lifetime, ... 222,500 00

That makes for the whole property..... $1,291,521 16

Or say, in round numbers. $1,300,000.

Of this, Mrs. Parish would receive by the will alone:

1. *Real estate*, per same estimate, as follows:

No. 54 Pine street,.....	$20,000
One-half of No. 160 Pearl street,.....	10,000
New Orleans property,.....	30,000
	$60 000
2. *Personal property*,.....	200,000
	$260,000

By the original will she took $121,000 in real estate, but at the time of his death, the practical result of the real estate clause would carry her but $60,000, which, with personal property, would be $260,000. That is what she would take out of $1,300,000; if the original will alone stand under your honor's probate, that is what she will receive. If he had died the day he made the will, she would have received $321,000; now she would receive only $260,000, or $61,000 less in value under the will, although the property is now worth $1,300,000, and when he made the will was worth but $732,000.

The rest of the property will go:

To Henry Parish's namesakes (real estate),..	$42,500 00
Three acting executors,.....	30,000 00
Two sisters,.....	40,000 00
Daniel Parish's children,.....	70,000 00
James Parish's children (four daughters dying), ...	20,000 00

Mrs. Kernochan's children,.....	$10,000 00
Mrs. Parish's brothers,.....	60,000 00
Mrs. Abeel (Mr. Parish's cousin),.....	10,000 00

Being altogether passing under the will, $542,500 00 which deducted from $1,300,000, leaves a residuary fund of $757,500.

Now, there is a will made in 1842, which leaves a residuum of $36,000, and gives to Mrs. Parish out of the then property, $331,000, or leaving out the furniture, $321,000. The property on which the will was made, was, ... $732,000
The property on which it operates, ... 1,300 000

Making an increase of..... $568,000

Now apply the will at probate to the property of which he died possessed, and you find Mrs. Parish has $61,000 less than at the day he made the will, while the residuary property is swollen to $757,500! It is very clear, that if Henry Parish's estate of $1,300,000 is disposed of under that will, it is not disposed of according to his intention. That is very plain. On the contrary, it is disposed of by a combination of misfortunes, by which the form of the will, which remains — *litera scripta manet* — produces a far different result by the changing fortunes of his life! He parts with property that he had given his wife; misfortune consumes the value of other parts of it. His entire property gains all the while. He lives fourteen years longer with her—doubles their married life and doubles his fortune, and she falls down (not even relatively, for that would be vastly greater), but absolutely falls down $60,000. Daniel Parish, on the other hand, under the iron operation (not of the will of Henry Parish, as he intended it, but) of the will, as made fourteen years before, applied to the property of which he died possessed, would, instead of the half of a residuum of $36,000, come in for the half of a residuum of $757,000, or, say $375,000; and James, who was put

in, in order that there might be no discrimination of feeling, takes $375,000! That, then, is one of the alternatives, in the practical distribution of this estate, which, in the contestation before your honor, your decree will bring you to.

Let us produce the *proportion* that Mrs. Parish takes in the purpose of the will, and in this misadventure, which all must agree it would be, a disappointment of the plan, the purpose and the hope, if this will be applied to the actual property left behind him.

The property on which the will was made was,	$732,000
Property on which it operates, ...	1,300,000
Increase of property, ...	$568,000
Property to Mrs. Parish, intended, and bequeathed by will (besides furniture),.....	321,000
Property passing to her under will,.....	260,000
Decrease to Mrs. Parish,.....	$61.000

The increase of the residuary, as now passing, under operation of the will, above what it was at the date of the will is,..... $721,500

The half of residuary fund of $757 500 to Daniel and James Parish would be each, .. 378,750

In ratios it would be thus:

By purpose of the will, Mrs. P. takes, say,... $\frac{321}{732}$

By operation of the will, Mrs. P. takes, say,. $\frac{260}{1300}$

By purpose of the will, Daniel Parish takes,. $\frac{18}{732}$

By operation of will, Daniel Parish takes,... $\frac{378}{1300}$

And this, in addition to $102,500, which Daniel Parish and his family take in specific legacies.

But if you give effect to the first codicil and to the will (which is one of the alternatives that will be presented to your decision) you still see that Mrs. Parish, out of the actual property, takes a far less proportion than is given her, on the basis of the will. Under the

will, as above, she would have	$260,000
By the codicil, upon valuation, as estimated by Mr. Parish,.....	120,000
	$380,000
Or by the purpose of the will,.....	$321,000
By operation of will and first codicil, ...	380,000
Increase,.....	$59,000

You see, then, that with what she got under the purpose of the will, she takes but $59,000 more in fact, if you establish the will and the first codicil, than she would have taken if Mr. Parish had died at the time he made the first will. He sold away $23,000 of what he left her, and fire burned up $30,000 more; depreciation of property affected it, $12,000. And when you consider besides, that of the increment of fortune, so much is in the shape of a dwelling house, which is not active property, but what rather consumes other estate in the expense of maintenance, you will see that there is no increase under the will and first codicil, in fact, from what would have been taken under the will of 1842, from the property as it then stood.

There is another consideration, in the change of what would be considered the real value of property from 1842 to 1856, which is all the while going on to the disadvantage of persons who are to receive a fixed sum. $380,000 to Mrs Parish in 1856, in the city of New York, is not equivalent to $321,000 to Mrs. Parish in 1842, in the city of New York, nor anything like it. $59,000, the nominal addition in money, by no means counterbalances the depreciation in the value of money, in reference to the style of living and all the expenses of living as existing in 1842.

Thus, then, by the purpose of the will, she takes a ratio of $\frac{321}{380}$. By operation of the will and first codicil $\frac{380}{1300}$. Apply this relatively to properties to which these

ratios are applicable, and Mrs. Parish would take only about $\frac{2}{3}$ as much, relatively, under the will and first codicil together, as under the purpose of the will, although she would actually receive $59,000 more.

How would Daniel Parish stand under the will and first codicil?

He takes under the will,	$378.750
Loss by codicil, one-half of $120,000,	60,000
That is he loses one-half of what Mrs. Parish gains, of course.	
He takes, then,	$318,750
Or, by the purpose of the will, he takes,	$18,000
By operation of will and first codicil,	$318,750
Increase,	$300,750

And comparing the ratios, in the way I have stated, he will take ten times as much in ratio (and more than that in amount) of the amount of Henry Parish's property, of which he died possessed, as he would have had of the property possessed by him when he made his will. If you give Mrs. Parish the will and the first codicil, Daniel Parish will take ten times as much, relatively, as he would under the purpose of his brother's will, as applied to his property.

Nor, even under the effect of the first and second codicils, do you give any considerable measurable increase to Mrs. Parish in the share of her husband's estate. Giving effect to the will, and first and second codicils, Mrs. P. would take:

Under the will,	$260,000
Under the first codicil,	120,000
Under the second codicil, say,	350,000
And for this I have taken the face of the inventory, although I believe the property is depreciated.	
She will thus take,	$730,000

Or, to pursue the same ratios, she will take:

By purpose of the will, ... $\frac{321}{732}$

By operation of will and two codicils, ... $\frac{730}{1300}$

Or, relatively to the properties to which these ratios are to be applied, Mrs. Parish would take (about) $\frac{2}{7}$ more, under the operation of the will and two codicils, than under the purpose of the will. Calling the share which she took under the will 7, she would take 9 now, or about $\frac{2}{7}$ more.

Mr. Daniel Parish would receive, under the will and two codicils, if admitted to probate, $118,750, which would be, relatively to the properties, about four and one-half times as much, under the will and two codicils, as under the purpose of the will.

We now come to the consideration of *intestacy*, and the application of the views I shall present are, it seems to me, sufficiently apparent, in relation to the subject. Now, intestacy would give Mrs. Parish—

One-half the personal estate, ...	$534,510
Share of the Louisiana estate, ...	15,000

This I have put as the share she would take of that estate, treating her as entitled to one-half of it, under the civil law of that state. The estate is not large enough to make it important whether that is an accurate estimate. This property seems to have been acquired in the course of settlement of some affairs of the firm, and after the marriage of Mrs. Parish, and I suppose she would be entitled, under the laws of Louisiana, to one-half the value of it.

Her dower in New York real estate, of which the fee was worth $187,500, would be, ...	$34,773
Making her share, in case of intestacy, ...	584,283

Daniel Parish would take, in case of intestacy, one-eighth of the personal estate, ...	$133,627
Share of Louisiana real estate, ...	3,750
Interest in New York real estate, ...	38,181
	$175,558

Comparing the result in case of intestacy, with the result under the operation of the will alone,

Mrs. Parish takes, under the will,	$260,000
do do intestacy,	584,283
She gains by intestacy,	$324,283

You will find, by a computation of his property in 1842, that instead of reducing it below the amount the law allows her, he gives her very considerably more by his will than she would have by intestacy.

Now, how does Daniel Parish stand under the will, as compared with intestacy?

He takes, as residuary legatee, under the will,	$378,750
By gifts to himself and family,	102,500
Being	$481,250

He takes, under intestacy,	$175,558
Decrease under intestacy,	305,692

If you compare the relative amounts under intestacy, and the result under the operation of the will and first codicil, you will find that Mrs. Parish would gain by intestacy, $204,283; and that Daniel Parish would lose by intestacy, $245,692. And comparing the result under intestacy, with the result under the operation of the will and two codicils, Mrs. Parish would lose by intestacy, only $145,717; while Daniel Parish loses by intestacy, $44,692: so that, under the will and two codicils, Daniel Parish will take $44,692 more than he would if his brother died intestate.

Under the three codicils and will (which is the final disposition of the estate), Mrs. Parish takes $383,217 more than in case of intestacy; and as compared with the result under the will and three codicils, Daniel Parish would have, by intestacy, an increase of $83,058.

Now, between the time of the first will and the demise of Mr. Parish, besides these successive testamentary dis-

positions of his estate, what changes had taken place either by way of gifts on his part to the beneficiaries under his will, or by way of increase or diversity in the condition of the fortunes of the members of his own Parish family? He gave to Daniel Parish, on his return from Europe, $45,000. That is finally and definitely shown in the close of Mr. Folsom's testimony, page 408 of part 1.

"*Q.* Please state what the result of this transaction at "page 344 of the ledger as gift, from Henry Parish to "Daniel Parish, is?"

"*A.* It is a gift of the whole of the $22,311.14, and "half of $45,498.49; the entry is posted into the ledger "as noted in the day book."

That, he gave to him on his return from Europe. He had given to James Parish, as shown by Exhibit 58, page 603, in January, 1846, $7,000. Mrs. Daniel Parish had come into possession of $200,000 from her father's estate. Four of James Parish's children had died, leaving only two surviving. The family of Daniel Parish, in the course of fourteen years (from the time of making the will to 1856), had grown up — certainly the greater proportion of them — and were established in life; and, as appears by the evidence, two of the daughters were married, and, as we all know, well married and well established, with husbands of abundant fortune and means of their own. Now, that so far as the subject of testamentary disposition of his property is concerned, and so far as the relation of the different persons that come into the disposition of his estate are concerned, and so far as relates to pecuniary gifts to them, constitutes the state of things under which Mr. Parish died.

The next subject of inquiry is, what were the actual and particular relations, sentiments, habits and feelings, reciprocally between these different connections of blood and through marriage, towards Mr. Parish, and on his part towards them? For, thus far, we have thrown no

light upon these relations, except what proceeds from the mere name of the connection of wife, of brother, of sister, of wife's relatives, of namesakes and of collateral kin. Undoubtedly it is important that we should understand, as we approach now the inquiry of the validity of these testamentary dispositions, what really and peculiary, treating those personages as actual men and women in those relations, were the circumstances, the feelings, attachments and intercourse of their lives, as exhibited in the evidence.

And first as regards Mr. and Mrs. Parish. Susan Maria Delafield was married in October, 1829, then 24 years of age, to Henry Parish, who was then 41 years of age. Their whole 27 years of married life were spent in the city of New York, excepting the absence for travel in Europe, in 1842, 1843 and 1844.

They lived for some years after marriage as inmates of the house of Mrs. Delafield, the widowed mother of Mrs. Parish, in the city of New York, and until the Barclay street house was built. From that time they lived in the Barclay street house, until 1848, when they removed to the house on Union square, where they resided up to and at the time of Mr. Parish's death, in 1856. But through the whole of this period, Mr. and Mrs. Parish lived for the summers, with Mrs. Delafield, at her country residence at Hellgate until 1840, when she died; and after that date with Mr. Henry Delafield, Mrs. Parish's brother, to whom that property passed.

That, then, shows for a period of twenty-seven years, from the first womanhood of Mrs. Parish to the death of her husband, dating the course of his life in the relation of marriage from the period when he was in full life and health, and in the prime of life, up to his decease, their marriage relations; and it shows you also that for several years they were domesticated in the family of Mrs. Delafield, the mother of the wife; that during the summers, as long as she lived, which was for twelve years

after their marriage, and within two years of the date of the will, they were domesticated for four or five months of every year in the house of the mother of the wife; and from that time to Mr. Parish's death, sixteen years more, during the summer, four or five months of every year, they were inmates of Mr. Delafield's establishment at Hellgate, who took and occupied the property his mother had occupied for her life.

Mr. Parish, at the time of the marriage, had accumulated a property of $250,000. He was actively engaged in the dry goods business in the city of New York, to the chances of which his fortune was of course committed. He was not a millionaire, a retired merchant, or a capitalist; but a successful dry goods merchant, with a prosperous business, whose estate was worth $250,000, and whose establishment, as now estimated by Mr. Kernochan, in looking back to that period, is put at that figure. He continued in this position of merchant up to 1838, when he retired from business. From that time until their departure for Europe, in 1842, Mr. Parish was occupied in collecting or managing his property; and after their return, in 1844, in investing his funds, building his house, and overseeing his property generally. Before his attack, in 1849, he had come to be noted or noticeable, among the rich men of the city, for the considerable magnitude of his fortune. At that time he was worth about $900,000. He had been rated higher, but that was the actual amount. From that time to his death, the accumulation of his property was regular and in accordance with the general laws of increase of property, making him, in 1853, worth $1,100,000, and at the date of his death, in 1856, worth about $1,300.000.

Now, Mr. and Mrs. Parish, during their married life, were never separated in any way, from one another's company. They went to Europe together, and lived always together. I mean he was not absent for any considerable time; and they lived in as close, as intimate, and as con-

tinuous a relation, appropriate to the married union, as can be imagined, or in the course of human events can arise. They lived during that whole period, in a manner that comported with his wealth, and with the social position which he and she, before marriage, had maintained. Nobody has been found to say, that, from the time of the marriage until the time of his death, there was anything whatever in the attachment, in the habits, in the married life of Mr. and Mrs. Parish toward one another, that was not exactly what it should have been. I find upon the testimony no suggestion, that before his illness, or during his illness, Mrs. Parish's conduct towards him (leaving out of question those points of controversy that are to be urged on such evidence as may be found, I know not where), no one has been found to say that Mrs. Parish, at any time, or under any circumstances, ever behaved towards Mr. Parish otherwise than as befitted (and I am certain this is the best as well as the simplest form of expressing it), than as befitted the relation of husband and wife. Nothing occurred to disturb the harmony of their daily life—no diversity of taste or temper—no misfortune or accident of any kind.

What, then, were Mr. Parish's relations towards his wife's family? They are expressly set before you in the evidence. I have seen nothing in them that was not entirely creditable to these parties in those relations.

Towards Mrs. Delafield,—as would be naturally inferred from the fact that after marriage he was for years wholly an inmate of her family, and from year to year during her life, a portion of every year,—his relations were of the most affectionate description. They are described as peculiarly so, as between persons between whom the natural relation of mother and son did not exist, and the witness uses that mode of expressing it: "She behaved like a mother to him, and he like a son to "her." Their relations were peculiarly attentive on his part, and agreeable and acceptable to him on her part.

There is no dispute on this subject. Well, towards the numerous family, the brothers of Mrs. Parish, and her sister Miss Emma Delafield, throughout his life and their lives, as they survived, the relations were like those that should obtain between brothers and sisters by blood. I am not sure that there is any intimation to be made upon the part of the counsel, that either in Mr. Parish's conduct towards them, or in their conduct towards him, is there to be found anything to criticise or animadvert upon as exceptionable, improper, or otherwise than very conspicuously, honorable, appropriate and affectionate. The brothers were all persons who were in perfectly independent positions in society, whether in respect of competency, or fortune or the social position they held.

Through the whole of Mr. Parish's life, though he was richer than any of them, there is not the pretense of any dependence on his favor, or of any offer, even, of favor on his part—of any desire, occasion or opportunity of favor from him to them. Mr. John Delafield was at the head of the bank, with which Mr. Parish had his principal connection. Mr. Henry and Mr. William Delafield were established merchants in this city. At the time of the dissolution of that firm, by the death of William, in 1853, I believe it was the oldest firm in the city of New York, under the same name and partners; the continuance of the firm under the same name having been for forty years. Now during the whole of that time, in comparison of credit, in comparison of honor, and in personal position, they were entirely independent; never a note dishonored, never a charge of irregularity of any kind, but standing, as it were, patterns of the complete independence of the New York merchant. Not accumulating great fortunes, but by steady progress, and attention to their regular business, building up a valuable business, and reaping the fruits of it in, to them, an abundant fortune. As for Major Joseph and Major Richard Delafield, it is enough for me to allude to them to show that they

stood in no other position than that of independent gentlemen; their character, reputation and pecuniary independence making them entirely their own masters.

As to the standing of Doctor Edward Delafield: during the whole of this time he was successful in his profession, entirely independent in his circumstances: and, occupied in the charitable discharge, to a very large degree, of the duties of the profession (which are given by all members of the profession, by way of charity, more than by the followers of any other pursuit) he was noted highly in the city in his professional and private character.

And so it is as to the whole of Mrs. Parish's family. Now, thus standing independent and honorable themselves, they were in fact intimate friends of Mr. Parish during the whole of his life. There was no difference in their friendship, after his illness from what it was before his illness. There was no differenee in the intimacy between them, after the illness and before. There was no difference in the habits of associating with him, after the illness or before. Doctor Delafield was his physician from the time of his marriage to the time of his death; and his recognition of the doctor's services and his estimation of them was shown in the statement of Doctor Delafield, that he never sent a bill to him in his life until after his paralytic illness, it being anticipated by the prompt recognition of Mr. Parish of his obligations to him, at the commencement of every year, in what may be characterized as a fee or gift. Take his will as an evidence, made at the middle portion of his married life, and it shows you that whatever claims, whatever respect, whatever affection grew in the mind or heart of Henry Parish, in respect to the relationships of blood, was felt under that relationship which marriage had brought him into with Dr. Edward Delafield and Miss Emma Delafield, unqualifiedly. Take Mrs. Payne, who was aunt of Mrs. Parish, sister of Mrs. Delafield,

and there is in their relations, in the letters to be found in the evidence, proof of the feeling of Mr. Parish towards the Delafields as individuals whom he esteemed, and towards whom he felt sincere regard. You see it in the very draft or deliberations in anticipation of his will, in which he speaks of his "friend, Mrs. Payne," and afterwards alters it to "my friend and relative, Mrs. Payne." You find it in the letter which he writes to her between the date of the will and the attack, or perhaps in 1841, in which he begs that, as she is always ready to do a favor to her friends, she will continue to live in the house in Chambers street, without feeling that she is under any obligation. Also, three of Mrs. Parish's brothers are named as his executors; all named as distributees of his gifts. So that you have a perfectly clear and pure stream of social regard and personal attachment, shown to exist during the life timeof Mr. Parish, between him and the family of the Delafields. After his attack, nothing occurred to vary it; no change of attention, no change of conduct, no change of expectation, but precisely the same independence in a pecuniary point of view; precisely the same candor in regard to any association with him in the business affairs of life; precisely the same affectionate intercourse which, having no suspicions, did not fear to be suspected, and which, when suspected against its innocence, has disclosed upon the testimony in this case no single foundation for the suggestion of contrivance, design, influence, or operation of any kind with Mr. Parish after his illness.

Now, what were Mr. Henry Parish's relations to his own family? And, first, it would seem, on this evidence (and certainly the proof should have been brought from the other side, if it existed), that there is nothing to show anything noticeable or peculiar, in the way of affection or intimacy, personal relations, or intercourse of any kind, between Mr. Henry Parish and his brother Daniel, his brother James, or his two sisters. The af

firmative proof is such as abundantly to show a reciprocity of affection between Mr. Henry Parish and the Delafields. Their habitual intercourse, seems to show a similarity of tastes, that made them agreeable associates. But there is no evidence to show, that there was between Henry Parish and either of his sisters, or between him and either of his brothers, any relations that would indicate an interest in their society. As respects James Parish (aside from the fact that they were brothers, and that they never exhibited any ill-feeling towards one another), if there be any evidence as to their relations, whatever, it is that no habitual or intimate associations existed between him and his brother Henry. There is nothing in the case about James Parish's relations with Henry Parish, except what is of negative force, and that is very great. James Parish lived at Poughkeepsie, Henry at New York. During the life of Henry Parish, and up to the time of the attack there does not seem to have been any habit of visiting, one way or the other. It would scarcely appear that Mrs. Parish had any intercourse with Mr. James Parish, either at her house in New York or at his place in Poughkeepsie. After the blow by which he was prostrated in health, and for the years he led the life that has been shown, it does not appear that James Parish ever visited him or wrote to him, or knew what his continuing or varying condition was. With regard to James' sons, I do not know that there is any evidence. Mr. Kernochan conjectures, that he saw one of them there, once in the seven years. That is all that is said about the younger branches of James' family. We must, therefore, say that, so far as the testimony shows, there was nothing to make James expect, or to show that he did expect, that he was to receive any portion of his brother Henry's fortune. Nothing whatever.

Now, how is it with Daniel? Daniel Parish, in the year 1818, when he arrived at age, entered into the busi-

ness that his brother had established. There was about ten years difference in their ages. For a considerable period, Daniel Parish lived at Charleston, and until 1824 or 1825. From that time he was a resident of the city of New York. When the Barclay street house was built, it was adjacent to the house that was built by Mr. Daniel Parish. They selected the lots, and built the houses together, and lived there until Henry Parish, in 1848, moved up to Union square. As regarded any projected change of residence, it appears in evidence that, in the absence of Mr. Henry Parish in Europe, or before he left, a treaty had been made by Daniel Parish for the purchase of lots upon which they might build upon Washington square. Some litigation about the title prevented the consummation of that project, and attention was then turned to the Union square locality. During the absence of Henry in Europe (the selection and treaty being under the charge of Daniel), Daniel bought two plots of ground for residences, one being that occupied by Mr. Henry Parish till his death and a lot to the west, not immediately adjacent (for that could not be obtained), for himself. Their plan and design then was to be near neighbors; disappointed, probably, in not being able to bring the lines of their property together, so as to live side by side, as they had done in Barclay street. The property thus standing, Henry Parish went on to build. Daniel did not. Henry commenced in 1846, and completed his building in 1848. Daniel did not make any progress towards building, but lived in Barclay street, although he retained the ownership of the lots. The year after the attack, in 1851, Mr. Daniel Parish sold his lots on Union square, and established for himself his present residence on Fifth avenue. These are the principal traits in the relations of these brothers, if you include the habits of intercourse, by way of business that obtained between them. In that respect it appears that the habit of Henry Parish was to be very prompt, very

regular, and quite continuously during the working portion of the day, at the place of business of the firm, as long as they were in business, going up to the period of 1838. It appears, also, that, after that time, Mr. Henry Parish was in the habit of passing a great deal of his time at the store, not leaving it until the hour of dinner called him home.

It appears that Mr. Daniel Parish was quite irregular in his attendance at the store, both as to the hours of the day and the continuity of days, arising, apparently, from the irregularities of his health, which led to his absence from the store, at all times when some special call or duty did not require his presence. All that Mr. Kernochan says (except by way of opinion that they were friendly, and I have no doubt they were), about their intercourse or the opinion of Henry concerning Daniel, comes pretty much to this: that the whole intercourse between the brothers was of a business kind, and in relation to the conduct of business he has heard Henry Parish speak favorably of Daniel Parish, in his business capacity, and he adds that he never heard him speak unfavorably of him in any other respect. That comes pretty much to this: that all that Kernochan, the intimate friend of Henry Parish (Kernochan saying that Henry Parish was more intimate with him than with his brother Daniel), could bring into this case, by way of affirmative evidence, of Henry Parish's special regard or affection for his brother Daniel was, that he heard him speak favorably of his business capacity, and never heard him speak favorably of him in any other respect; which he puts in the negative form, that he never heard him speak unfavorably of him in any other respect. I do not mean by that, that the suggestion is to be made that Mr. Henry Parish did think unfavorably of Daniel in other respects; but it shows that Daniel was not in all his thoughts, and that, as "out of the fullness of the heart the mouth speaketh," he was not carried by any continuous or active

current of affection, all the time towards Daniel. No particular difference seems to have arisen between them except such as may be attributed freely to the character of Mr. Daniel Parish as an invalid, and which he adverted to in his letter of 1836 to his brother Henry, in which, after going through the subject of his relations to the business, the other partners and his own health, he closes by saying, that he hopes any differences they had on business, may not prevent them meeting as brothers in other relations. All that is of any definiteness goes to precisely the same point: to show that Henry and Daniel were brothers, associated together in the same business, having a mutual regard and respect, but no very strong motives that made them intimates or associates outside of the daily current of their business.

It is apparent that Daniel Parish was not in the habit of any great intimacy at the house of Henry, either at Barclay street or Union square; for although there is no difficulty in proving the intercourse of comparatively remote connections — mere acquaintances — yet Daniel Parish is not shown to have been an habitual intimate. A significant fact, showing the character of that intercourse, is to be found in the testimony of Jas. C. Fisher, respecting the visit of Mrs. Daniel Parish to the house of Henry Parish, when she called with her children, after the attack. It appears that her younger daughter, Helen, was with her, whom she introduced to Mr. Henry Parish as "her child that he had never seen." This was in 1849; and by the correspondence of Mrs. Parish, it appears that Miss Helen was born, during the absence of Mr. Henry Parish in England, in 1843. As, then, they had been back five years, and had lived next door to one another until 1848, and yet this young child had never been seen by Mr. Henry Parish, it would show no very great family intimacy.

So, too, it is not pretended, but that the habits of life and feeling of Daniel Parish were such as, outside of

business and business hours, did not bring him and his brother together. Mr. Daniel Parish seems to have been careful of his health, secluded and unsociable in his manners; and Mr. Henry Parish seems to have maintained the life of a man in vigorous health, fond of society, fond of the ordinary places of public resort of men of fortune, and of his position in society—a visitor at the clubs, a frequenter of the opera, a diner out, and entertainer of company, fond of whist, both at places of usual resort, such as the clubs of gentlemen, and in private families. Daniel seems never to have been at any of those places in any of these connections. Mr. Kernochan was Henry's associate and went with him. Daniel pursued his own inclinations, and was quite in another current of life, from that in which Henry Parish moved.

With Mr. and Mrs. Sherman, Mr. Henry Parish, whether before or after the attack, until a particular occurrence which will be the subject of remark, seems to have been on very good terms. He seems to have had a regard for Mr. Sherman and for his sister; and towards Miss Ann Parish he seems to have held equally or more intimate relations. The residence of both these ladies was at Newburgh, and Mr. Parish never made that a place of summer residence, though occasionally a place for summer visits. Mr. and Mrs. Sherman and Miss Ann Parish stayed at Mr. Henry Parish's house occasionally, spending the night, and Miss Ann Parish was in the habit of spending a week or more.

But it appears by the will, as made by him in 1842, that this respect, affection and association between him and his sisters did not carry with it any implication that he was to make them residuary legatees or sharers of his fortune, otherwise than as recipients, in the way of gifts of double the portion he gives to his friends. Undoubtedly all the considerations of blood and inheritance, which would carry the property to these sisters, with whom he had no difference, would indicate, that if he

had the sentiment of family strong within him, they would have been provided for; and certainly his nephews and nieces, children of Mrs. Sherman, as dear to him as his brothers' children, would have come in for testamentary provisions.

What were the relations of Mrs. Parish to Mr. Parish's friends and family? In the first place, with James Parish she was apparently scarcely acquainted.

There is no evidence that she had any acquaintance with him; no particular acquaintance, it is very plain. He was not a brother to be applied to or referred to, in the case of calamity which happened to Mr. Henry Parish; and he never offered any aid. On the evidence in this case, with Miss Ann Parish, Mrs. Sherman, Mrs. Daniel Parish, and her daughters, Mrs. Parish seems to have maintained relations of the most frank and cordial character. Her letters put in evidence by the contestants, put in evidence with some design (and if with any, I suppose to show this), certainly exhibit a very clear, plain, frank and thorough observance, of all the affections, kindnesses and courtesies which belong to the affairs of life, between near relatives. Your honor will find those letters. They are very long, and occupied about subjects interesting to the ladies to whom they were written, and whose letters to Mrs. Parish are not in evidence. There is a letter, too, from Mrs. Parish to Miss Ann Parish and Mrs. Sherman, written immediately after their brother's attack, which is of the most cordial, affectionate and sisterly character. No one could have written a better letter, a more honest letter, or a letter more suitable to the circumstances in which they were placed. They were the only persons to whom she could or should write any letter, because they were the only persons who did not reside in the city. It was not necessary to write a letter to Mrs. Mary Ann Parish, or Mr. Daniel Parish; but to those who resided in the country she wrote, stating his condition, and making reflections on it, such as

were proper. If there be any feature in it that bears a different aspect, your honor will, without difficulty, preceive it, but I apprehend there is not. So, too, with Mr. Daniel Parish and Mr. Sherman, until some circumstances which occurred after the illness, I do not see it appear that Mrs. Parish exhibited conduct, in any respect other than was in accordance with the relations in which they stood. So far as you can judge from her letters to Mrs. Daniel Parish, they show the maintenance of those relations which belong to their connection, and which belong to well-bred, well disciplined, and well disposed persons. You can find no very great enthusiasm of friendship any where in the connections of this Parish family. There is not any. It does not belong to their nature. The circumstances in which their brother was placed, were such as to call it out if it existed or could possibly manifest itself. During his life, previous to his attack, there is no fact, no circumstance, no occurrence of any kind, that shows want of friendship on their part towards him.

Now, there is but one other particular occurrence towards Mr. Daniel Parish which will call for observation, antecedent to the time of the attack, and that is in connection with the cotton transaction. During Mr. Henry Parish's absence in Europe, there was a very considerable correspondence, of which the letters of Mr. Henry Parish to Daniel Parish have been produced. Whether Mr. Daniel Parish was in the habit of writing as long letters as Mr. Henry Parish I do not know. Mr. Henry Parish's letters are long, and quite frequent, and exhibit no absence of friendly feeling or brotherly regard. They are mostly about business, the price of cotton, prospects of trade, of real estate, the scarcity of money, rates of interest, whether cotton is as good an investment as anything else, &c. No affairs of the heart, or of family relations. During this absence Mr. Daniel Parish had involved himself to a very considerable extent (and I use only the phrase and purport of the testi-

mony as given on the part of the contestants,—for we have not troubled ourselves on that subject at all) had involved himself to a considerable extent in cotton speculations, the result of which was "deep mortification to "him," as Mr. Kernochan says. It resulted in the loss of over $100.000, the possible loss being very much larger. It was the cause of deep mortification to him, not so much, Mr. Kernochan thinks, for the loss of the money, but that he should have been "led into such a gambling "transaction." Undoubtedly it was a departure from the settled principles on which the business of Henry and Daniel Parish had been based, and deserved to be styled, as Mr. Kernochan characterizes it, as gambling in cotton, and resulted in loss. Some operations had been entered into on the part of the firm, which still subsisted as the firm of H. & D. Parish, although only for purposes of liquidation and distribution of assets, for a time, after both retired from active business. After Mr. Henry Parish's return, on looking into the books, he assumed to himself the whole of the loss on the transactions that had been made in the name of Henry and Daniel Parish. He also waived any claim to the rise in value or gain on investments of U. S. stocks and state stocks, which amounted to a considerable sum —thus taking to himself the whole loss on cotton, and giving to Daniel the whole profit on investment in stocks —resulting in a gift of $45 000. That, undoubtedly, does show a kind feeling on the part of Henry Parish towards his brother, and exhibited in a delicate way; not putting Daniel, as it were, under the obligation of an out and out pecuniary present of so much money; but as if he said, "you have had loss enough in your cotton specula- "tions; let the loss which results on the firm transac- "tions fall on me; and as you have had such losses, let "the profit on our common property in stocks go to "you." But it also shows that Mr. Henry Parish, by this large donation to his brother Daniel, equal to any

advance in his property, nearly three times as much as his share as residuary legatee under the will, and by his gift to James of $7,000, made soon afterwards, satisfied his feelings towards his brothers, and the reason for making Daniel residuary legatee ceased by this large gift; and there is no reason to suppose that if he had made his will after his return from Europe, and after making those gifts, it would not have contained every feature of the final disposition of his property under which we are asking the probate of the four instruments. At all events, nobody can argue, that if the residuary clause, in the then shape of his will, in the then projection of his house, and in the then condition of his affairs had carried to Mrs. Parish what were likely to be the accumulations, any one could have seen in it any departure from the purpose of the will, as evidenced in his intention when drafting the first will. I am unable to see it.

A little of general observation, as to the continuance of the habits of visiting, after Mr. Parish's illness, and I shall have done with this topic of consideration. As I said, James never visited before and never afterwards. I am unable to see any difference between Miss Ann's visits after, from what they were before the illness. Mr. Daniel Parish visited, until for some reason or other his visits, a year or two after the attack, terminated; the date of his last visit being the last of December, 1850. Mr. Sherman visited, and was well received, until his visits also, for some reason, came to a termination. Mrs. Sherman visited as before.

In regard to the other occasional, or frequent, or intimate visitors of the family, I cannot perceive any difference, in the testimony, between their names, number and habits of intercourse, before or after the illness; except perhaps that there were more frequent visits after the attack, under the impulse which led them to alleviate the sufferings and seclusion of Mr. Parish as much as

was possible. Mr. Kernochan continued his habits of visiting. Mr. Holbrook, Mr. Wiley and Mr. Gasquet, each of whom had been mercantile partners of Mr. Parish, visited him as much after as before, and were cordially received, and urged to frequent the house. All the ordinary friends and acquaintances who called were introduced to Mr. Parish's presence. Tradesmen, workmen and business callers, all had access to him.

Now, these testamentary papers, having thus far been considered, as they speak upon their face, and in reference to the relations that the testator bore to the different parties and families with whom, as objects of testamentary disposition, these papers are occupied, we come to the consideration of what the occurrence is that has raised or given occasion, to any difficulty or doubt in the premises.

This is the apoplectic seizure in July, 1849, and its consequence, the paralysis; the condition of health and habits of life which followed therefrom. And, in this regard, I shall first call attention to the general effect and course of the testimony, in regard to which I do not anticipate any difference of opinion between my learned friends and myself as to the effect upon the bodily health of Mr. Parish. The attack itself was clearly apoplectic, and it was of moderate violence. The shock which, either by the concussion or compression, put to rout the forces of life and the control of the will and the senses, over the frame, had a very brief duration; for, by the same evidence that you can discover, after a paralytic blow, that a portion of the body is paralyzed, you discover that the rest of the body has recovered from the entire prostration which the whole suffers; that part of the body, not permanently affected, liberates itself by the returning power of nature, from the first impression. On his being carried to his chamber, and from that time forward, within the very first days of his attack, although prostrate on his bed, and so required to be kept by the

conditions of his illness, under the medical charge that he was submitted to, he yet had fully established a means of communication with those around him in a very brief time. From that time forward he "recovered rapidly," in the expression of the medical adviser, sat up, saw visitors, was moved about the chamber, was carried down stairs, and rode out.

It is not my purpose, in the views of the evidence which I shall present to your honor, to attempt to spare you the necessity, of a complete and faithful reading of this evidence, for the purpose of ascertaining what its purport is. In my judgment no useful purpose to the court or cause could be gained by that course. These general leading results of the evidence, certainly until we come very close on contested points, will be all I consider important as suggestions to your honor, or guides or lights to aid in investigating the evidence. Indeed, so far as my judgment or interest in this cause goes, I would regard the intelligent, the faithful, the dispassionate reading of this evidence by a disciplined mind, accustomed to judicial investigations, and also not at fault in the ordinary affairs of life, as the best argument, I think, for truth, and certainly as the best argument in favor of the views I represent, in favor of the probate of these instruments, that can be possibly made. I know no test, no criterion, no judgment, that I would sooner submit to than that of treating Mr. Parish and Mrs. Parish and Daniel Parish, but as the names we read of in reports, after the lapse of a century, and taking within the limits of those volumes the materials of fact, to which the rules of law are to be applied, upon the issues here raised. I would submit to that. I do not believe that any substitution of views of the evidence, or any synopsis of evidence that should attempt, or that should incline your honor to take any other mode of knowing what the facts of this case are, than a perusal of this evidence, would either aid you, tend to fairness and justice, or to the immediate interest

or success of the side of the case which I have espoused. I shall, therefore, present plain and general views of the results and important points of testimony, rather than seek to effect any filtration into your mind of the mass of this evidence by any seive by which it can be sifted.

Now, having thus reached this point of progress from the first attack,—this degree of health,—that from September he was carried down stairs, and that two days after being carried down stairs, he rode out, we find that in October an illness intervened, a very grave and serious illness, of quite a distinct character and origin, so far as any light of medical investigation has been given. Whether his exposure to this very peculiar disease, of intussusception of the bowels, was dependent at all upon the condition of the nervous system, or nervous centre, is impossible for us to say. It is a separate disease, which usually manifests itself in persons of entire health in every other respect. This illness was very grave indeed. It is a disease from which few persons recover. It is a disease concerning which the expectation is not of a favorable character, on the part of medical practitioners; and when it existed as an intercurrent disease, with this apparently reduced vital force and power of Mr. Parish, it certainly must be regarded, whether as promising serious effects upon his constitution, already suffering under this apoplectic blow, or as immediately dangerous to his life, as infinitely more grave than if occurring in health, or in a youthful patient. But from this disease, after the juncture was passed,—after the sloughing of the diseased part of the bowels was over, and after a union had been effected by a remarkable degree of curative force in his constitution—after that crisis was past, and there was no danger mechanically from his being moved, he recovered rapidly, and we find him again within a short time, probably within that month of October, or early in November, down stairs and riding out.

Now from that time until the death of Mr. Parish, six years afterwards, dating say from January, 1850, or from December, 1849, down to March, 1856, six years and three or four months, Mr. Parish, speaking generally, had attained to and preserved a good measure of bodily health. There were casual interruptions in his health, by disease of the lungs, by an abscess under the jaw, by difficulty in the digestive or secretive organs, which were some of them serious. But so far from these indicating an enfeebled constitution, they are, when surmounted, as we know, proof of the strength of the constitution. For health, like virtue, may have a very good reputation until it is exposed to trial. The strength or test of either is from disease of the one, or temptation of the other. Now Mr. Parish's strength was exposed to these tests of serious illness, and the result of the whole is that his health was firm. and strong, and good.

The only indications that need any further notice are what are called the spasms, or convulsions, which first occurred after the October illness. Of the source of the irrritability which produced these spasmodic crises, we have no particular means of judging. If it should be deemed important by our learned friends, they will produce their medical views and theories upon that subject. I am unable to attach much importance to any medical or purely physical reasoning, against the positive evidence of mental condition, which exists in this case. But all that we can say of this, in reference to physical health, is, that after this October illness, these spasms occurred at intervals of three or four weeks; that during the course of his remaining life they gradually were separated by longer and longer intervals, of a month, three months, and finally six months, during the latter years, and if I recollect the medical witnesses correctly, at last an interval of nearly or quite a year. In regard to the indications of general health which followed these spasms, it is apparent that after the accumulation

of nervous excitement or irritability was brought to the point of explosion in spasms, his mind, temper and health were left clearer and better in every respect.

Now, after this stage of health was reached, and until his death, we find that he maintained the usual habits as to hours of rising and retiring, as to meals, as to diet, as to daily drives and as to the occupation of time, which belong to a person of firm health and strength. I speak now so far as mere vital force or nervous energy is concerned. I am not now touching on the alterations of mind, or degree of mental vigor. The whole evidence shows that from six or seven o'clock, his hour of rising, until ten o'clock, his hour of retiring, the day was regularly apportioned, and that at meals he ate the ordinary articles of food, except where a point of limitation was imposed by his physicians. We have in all this, undisputed evidence by every witness, that he did not succumb physically, at all, to the impressions of the disease, and beyond the actual disability which paralysis affirmatively imposed, he did not yield, he did not retire—he stood his ground. He maintained through this period of six years and four months the attitude of a man who was master of his house, master of his habits, master of his time—suffering only under the restrictions of the special condition and derangement of his limbs. Now when you are estimating the condition of the nervous energy and vital force which are here displayed, by that of a person passing through the daily round of life of a city, instead of detracting from them by reason of the existence of a special derangement, embarrassment or impediment, you must enhance them vastly. If you and I, in the possession of all our faculties, able to take exercise, freely moving about as we please, either by impulses from within or attractions from without, and played upon by all the external influences that regulate and sustain the daily movements of the mind—if we consider it evidence of good health and strength, that we

are able from day to day, with unbroken continuity, to fill up the full measure of our time taken from the hours of sleep, in the usual employments—it surely will be greatly more so, to find it done by a man of 60 to 68 years of age, disabled by paralysis, embarrassed and impeded in all his movements. By whatever you detract from the facility, the pleasure and ease of movement, in reference to his daily life, you add immensely to the general force of health and vital power, and no less to the strength and persistency of will, that make him fight against all those disabilities, that hold up his head and enable him to maintain the port and dignity of a gentleman. This, sir, is sound reasoning. Instead of wondering, therefore, at what is conceded to have been the direct effect of the paralysis, and consequent embarrassment of every—the commonest effort—instead of supposing, or arguing, or inferring that Mr. Parish ought to have done more, the great wonder is, that at his time of life, and under the severity of his affliction, he was able thus to keep from his bed, to keep thus active, to keep thus energetic, to maintain in every respect the general form and character of his former course and position in life. To say that he did this is to say that somewhere or somehow, there was within him a power vastly beyond any energy or any capacity, in this regard, that men in the ordinary condition of health are ever called upon to exert.

Now the next subject in regard to his physical condition, relates to his power of articulation, a power which, as your honor is aware, is exerted through the muscles of the mouth and tongue. The voice, as distinguished from articulate voice, is formed in the larynx, and that voice we possess in common with the brute creation. It is only within the cavity of the mouth, and the orifices communicating with it externally, that articulate voice is produced. Now, that power of articulation was paralyzed. He had not the use of speech, in the sense of

being able to express through that manifestation of form and will and purpose, his intelligence—as I mean, a complete and spontaneous expression. He possessed a degree of power in that regard, which enabled him, as we suppose, through the whole of his illness, to use quite intelligibly, and quite distinctly, in the sense of being quite unmistakable (as some of the witnesses say), the affirmative and negative sounds. He seems also to have had the full use of some of the interjections, which to the common apprehension, might be considered to have some of the qualities of articulate speech: such as "ah!" and "oh!"; but really these are but the utterance of the voice, without articulation, or without any complex articulation. Perhaps a movement of the lips is necessary to give the articulation of "oh" and "ah." Beyond these monosyllabic expressions, he occasionally, when his affirmative was especially emphatic, or when it was with a tone of wonder that he was not understood by the simple yes, he sometimes used the two words "why yes,"—in that way. He also used the articulate expression, under the influence of exciting emotion, or the stimulus of pain, whichever it might be, of "oh dear!" an ordinary expression, when used by any of us, involuntarily, under the influence of pain. And under strong emotion, as upon the occasion of some of the deaths adverted to in the evidence, he used the expression, also, with solemnity, of "Oh God!"—the pronunciation of the name of the Deity being imperfect, but clearly indicated, as if spelled "Got." He had various inarticulate sounds, and the voice as from the larynx does not seem to have been paralyzed. It does not seem but that he had the full force of the voice, and that it was manageable in a variety of tones, from the guttural to the higher notes, as the voices of others are. For articulate expressions, too, he used vocal sounds accompanied with gestures. His manner of expression, as given by the witnesses, varies according to the accuracy of their ear; their power of

reproduction and imitation ; from the delicate "nyeh," accompanied with a rising inflection, to the broad and coarse expression of "yanny" and "yonny," as two servants render it. But that this inarticulate form of voice, whether it be rightly described in one form or the other of letters, or whether it be rightly imitated in one form or the other of delicate or coarse apprehension and reproduction had the use and tone of interrogation and produced the effect of an interrogation upon the persons to whom it was addressed, of whichever class, there is no difference of opinion.

You find then that for the practical uses of communication, Mr. Parish, either in the form of an articulate or inarticulate substitute, equally well understood, was master of the three great controlling elements of communication. He could express distinctly, unmistakably, readily, his assent to, or his dissent from everything said to him, and he had the power to attract the attention of those with whom he wished to communicate. He could intimate to them, that the necessary form of communication, which his circumstances required, made it necessary that they should take part in it, and that they should supply, as it were, by their full command of their voice, his want of power over his ; that it was by his adoption or his rejection of their voice and expression, that his voice and expression were to be understood. And consequently you find that all the witnesses, whether on the one side or the other of this controversy, whether standing in one or the other of the various attitudes of intelligence, equality of position, or inequality, all so understood it, and all so acted upon it.

His senses were all entirely good, so far as any impression of this disease upon them was concerned. They were all entirely good in an absolute sense, except that the imperfect condition of his eyesight continued and he had not infrequent trouble with his eyes ; but the paralysis or any of its sequences did not increase this difficulty with his sight, so far as there is any evidence.

His bodily sensation, which together with what we call the senses, make up all the physical force of perceptivity or receptivity, was complete. There was no paralysis of sensation, even in the parts affected by paralysis of motion. His hearing was noticeably acute, as testified to both by those whose own sense of hearing was imperfect, as Mr. Kernochan, and those whose sense was perfect. He would hear remote sounds when in his sick chamber, sooner than his attendant, and direct attention to them. Here again, all the witnesses on both sides agree, that there was not the slightest disturbance, interposition or imperfection, either in the condition or exercise of all the senses. And the readiness and correctness of his sense of hearing became, from the paralysis of his voice, important for a double service, in order that you might be clear that it was reliable, as a mode of communication between him and others. It is noticeable that no witness hesitates for a single moment to be assured of the perfection of his sense of hearing. From the time of the earliest interview that is detailed by any witness for the contestants, that is the interview of Folsom on the 26th of August, in the sick room, down to the end of his life, there is not a witness that hesitates for a moment on that point, or that hesitates to give their reason for observing it in his immediate response by gesture or voice, showing that he heard what was said, and understood it as addressed to him, and as calling for a response, which he failed not to give.

There was in his physical condition a nervous irritability, or excitability, which does not exist in a healthy condition of the body—the normal, right condition of the body in all its relations—with any one. There is a vast range in the nervous excitability, or irritability, of nervous persons,—undoubtedly a vast range; but what would be called medically, nervous irritability, existing temporarily or permanently, indicates some derangement of the nervous system, or else some such disturbance of

the natural relations of mind and body, or of communication between the individual and those around him as drives one into this experience of nervous irritability. But this nervous irritability, or excitability, manifested itself (and this is testified to by the witnesses on all sides) only in connection with mental causes and influences. There is not any evidence of this nervous irritability exhibiting itself, either in gesture or in any of the organs of expression, or in the ordinary expression of the face, which does not connect its excitement, or explosion, if it ever comes to that severity, with mental causes. Every one agrees that, whether from his inability to make himself understood through the natural organs of communication, or the want of success of others in appreciating his desires, or from the operation upon him of some occurrence that excited feeling, such as the meeting of an old friend, such as an occurrence of affliction, or the disturbances of passion, caused by opposition to his will or to his desires, I care not whether of appetite or his purpose in any direction—whether his desire in reference to some gratification of the table, or his fixed purpose that on a certain day he would go to Greenwood or Wall street, and that attendants should accompany him—under every circumstance it is always to mental causes that this nervous irritability owes its origin and its exhibition. What was the extent of the explosion, and whether in all instances, it conformed to the gravity or the importance of the existing mental cause, is a question which may hereafter be discussed; and whether there were a disproportionate expression to the apparent mental cause; an excessive or exaggerated expression of what would be considered the normal sentiment or feeling, whether that would be owing to a diseased or morbid mental affection, or whether shown on physiological principles to be simply a disorganized action, which left the muscles and organs of expression beyond the complete control of the will

that belongs to well-bred persons, and to persons that have become disciplined to the affairs and trials of life, and to preserve a complete control over all their forms of expression, is something that will be a subject of remark in reference to the physiology of the case.

Now this being the occasion, of any difficulty or difference of opinion, and this the physical condition, in the main, which resulted from this occurrence introducing the inquiry and doubt, it is next important for us to inquire what were the general position and relations of Mr. Parish during the seven years that elapsed from July, 1849, to the time of his death, in regard to exposure to observation, the means and occasions of forming a judgment, and the extent and variety both of the tests and of the observers, who were to give evidence concerning this subject of doubt; and then with some consideration of whether from this condition of his life, and from those opportunities, and from these actual observations, a fair or a full collection and presentation of the results of these observations have been made before you, and are now in the record,—we shall have prepared ourselves to consider what the real point of inquiry is in the cause, and what the evidence on that point requires on one side and the other.

Now, that Mr. Parish, during the whole of these seven years, lived at his mansion at the head of Union square, one of the most public places in this city, in the midst of that range of society in which he had moved, and his wife moved, and these contestants moved, and all the beneficiaries named in this will, moved — there is no doubt. That he was apparently the master of his house, and of his household; that that household consisted of a numerous family of servants; that during that period they were as changeable as the servants, under our social system, of every family are — coming at their will and going at their will, independent, — while there keeping up all sorts of social connections in the kitchen of the

house and outside of the house, — having their friends, their confidants, having their opinions, having their views, having their feelings, having their biases, and left as free currents and channels of communication as to whatever happened within the house, to whatever connections, their own choice, their own sense of propriety, their own judgment concerning what was going on, inclined them; that there never was the selection of a servant, or engagement of one founded upon any consideration whatever, even for a moment, of what he or she would see or hear within that house; that there never was the engagement of a servant, even upon any increased rate of compensation; never a preliminary conversation with a servant, as to the attitude of Mr. Parish, as to his intelligence, as to any question of that kind, or as to there being then present in the mind of anybody or remotely expected, any matter of contestation, that made it important and desirable that the views of any one, who came there in the capacity of servant, should be understood; that their fidelity should be secured, and that there should be a purchase of the impressions he was to receive. That anything of this kind was dreamed of, no witness on either side has ventured to say. So, too, they left at their will. No efforts were made to retain them, more than such as any one makes when the services have been satisfactory, and when habituation has made the performance of those services more easy and acceptable than could be possible or expected from a new substitute. They came and went as they chose. On leaving no injunctions of any kind were given to them, not even an intimation that the subject might hereafter come up, and that they should even preserve that equability which is recommended to all persons in a controversy, until the subject is presented for actual discussion and determination.

Now I do not know upon what principles of human nature, this state of that family is to be explained con-

sistently with there being anything to guard in that house from public and general observation and knowledge, consistently with any assumption of a contestation in preparation on the part of anybody concerned in that household, on the questions now mooted before your honor. I know nothing that is consistent with any other view of the case than that which we shall now insist on; that Mr. Parish was master of his mind, of his will, of his family, of his affairs; and that nobody, with an honest purpose and a fair intent was excluded, wherever she or he came from, whoever she or he might be, whether instructed scientifically, whether of a disciplined mind, accustomed to judicial or forensic investigations, whether accustomed to medical and physiological investigations, accustomed to the scrutiny which the affairs of life train one in, or holding with "mother wit" an undisciplined, inferior condition, both as to opportunity, means of preparation, and serenity of judgment, which always in degree belong to the place of servants, when compared with others. Nothing, that is consistent with any other idea than that anybody who chose to see and know what was going on, might do so. I have observed upon servants, and upon servants only; but this house was open, as open as it had ever been to visitors of the same rank in society, of the same course and habits of life, to which this family had been accustomed, before the happening of this disease. It is true that affliction does not always attract the same visitors who come in seasons of gaiety and fashion; and it is also true that the suffering and the seclusion of a relative or of a friend, do not always tend to confirm those affections that seemed growing stronger and stronger during his prosperity; but that was not any trait of the character or conduct, or purposes, of the inmates of that house, but belongs to the character, conduct and purposes, of those without it, who chose for themselves, what degree and what kind of intercourse they would maintain.

Professionally, in reference to these codicils, there needed to be the access of a lawyer to Mr. Parish. There was no selection of either an obscure, a doubtful, uncertain, or unreliable instrument for this transaction; none whatever. Certainly no observation can be made, certainly no observation can be patiently listened to, which should render it necessary for us to make any defence of the adoption of Mr. Lord, as legal adviser, in reference to these testamentary provisions, or, as the depositary of the confidence always necessary in that relation. It would rather be said, in reference to Mr. Lord's position, more than of any one in our profession, in any given case; it would rather need appear that there was some reason for not employing him, than that it should appear that there was some reason for employing him. I believe, if of any lawyer at our bar it can be properly and truly said, that from the commencement of his career to the present hour, his position in the profession, his employment in the profession, and in the confidence of the community, has been always more general and less special than that of almost any other, it can be said of Mr. Lord. We all know that in reference to ability of special kinds, there have been lawyers, during our observation and experience, who have been employed in this or that line of professional life and duty for which they were supposed to exhibit peculiar aptness, and who have gained their reputation, and maintained it, principally, if not exclusively in those special lines of employment. Take from ability in conveyancing, up to vogue and credit in commercial matters, to employment in court, to employment at bar, or before a jury, to employment in the line of ecclesiastical questions before the surrogate, on matters of mere property, on matters involving feeling, on matters involving all the various circumstances of life; here is a lawyer feed for one purpose, perhaps the highest purpose or most difficult ocsasion; here is another whose mental

aptitude and learning lie in other directions. But, speaking from an intimate knowledge in the office of Mr. Lord, where I had the good fortune to complete my legal education, and from a knowledge in daily life of his actual employments during the last eighteen years, I can say that if any one judgment or description of Mr. Lord's business be more true than another, it is this: that there is nothing special about it whatever; that he is employed in matters of property of large consideration, in matters of commercial business of more variety and amount than almost any other man, certainly than any other man until within a few years; that he is employed at his chambers, in court, at bar, before juries, employed in will cases, employed in all matters of a forensic description, that he was employed in matters of confidence, in matters of good sense, in matters of clear judgment, and that he was employed, emphatically, in all matters where there was good faith, and nothing but good faith; for no man can trace, in the life of Mr. Lord, any intimate or continuous association of counsel and client where the client was a bad man, or had a fraudulent purpose. Less than almost any man in the profession will it be found that Mr. Lord has occupied, in the public estimation or private judgment of any one, the position of being the mere instrument to obtain an object.

I speak this without fear of contradiction; I speak it without fear of the slightest reluctance on your honor's part, who know quite as much as I do about it, to join in this observation. And when you find the additional and sufficient circumstance, if none other existed, that Mr. Lord had been for thirty years the commercial adviser of Henry and William Delafield, in purely commercial matters, bills of lading, stoppage in transitu, &c., which have no confidence about them, but require intelligence, learning and experience—when you find that he stood in that relation to gentlemen who were the brothers of Mrs. Parish and her natural protectors, and when

you find that Mr. Francis Griffin, who had been the legal adviser of Mr. Parish, stood in an attitude of such special intimacy with Mr. Daniel Parish, in all the relations of personal attraction, interest and habituation which are described in the testimony, there is every reason why Mr. Lord, known to Mrs. Parish's brothers, should have been adopted as the legal adviser.

Now the adoption of Mr. Lord as legal adviser, in the first place, brought him into the means and duty of observation—the means ample, the duty clear. It gave him the absolute right, and imposed upon him, in my notions, and I doubt not in his, and I know in your honor's notions of professional duty, the absolute obligation, through that whole period of testamentary consideration and action, and through the subsequent stages of Mr. Parish's life, if any doubt or difficulty, any surmise or suspicion found a place in his mind at any time, to see that there was an ascertainment satisfactory to himself; and, when satisfactory to him, I shall wait to hear what expectation there is to infer that what was satisfactory to him will not be satisfactory to any unbiased judgment, upon the principal point involved. Now when in so nice and near a point of observation as that of the professional adviser, of the actor in these testamentary dispositions, there is an entire absence of indirection, of contrivance, of exploration and of secret resort, to this depositary, this keeper of the watch-tower of observation; when all these are clearly absent, and a man is taken who by character, by intelligence, by reputation, has given every bond to society that he is not to take dictation from anybody in his observations, but that whoever introduces him within the veil, if there be a veil, is exposed to the plainest and boldest and fullest disclosure, when the obligations of right and justice require it, of what he saw and what he judged; when such a man is taken, and taken under the simple and direct influence of his relation in commercial business,

as the lawyer of Messrs. Delafield, I say that you have but one of two alternatives to adopt: either that there was nothing that the clearest eyes might not look upon, which the honestest judgment might not observe, and the most truth-speaking lips declare; or else, that with a guilt, that could form a design of the most sacrilegious robbery that can be perpetrated—the robbery of the husband's will by the wife—with that *guilt*, there existed the power of corrupting or obscuring, the intelligence and the integrity, which had stood the proofs of a life-time and the observation of all men.

So, too, the house was open, necessarily, from the moment of the disease, to medical observation. Will any one suggest that some other physician should have been sought out, than he who had been Mr. Parish's professional medical attendant for the last fourteen years of his life? I think not. Is there any medical gentleman in the city of New York to whom, in the absence of the previous relations which existed, such a case would have been sooner entrusted than to Dr. Delafield? Anybody of better judgment, more thorough experience, more natural kindness, more thorough good sense, than Dr. Delafield possesses? Anybody (separating now all consideration of his particular relations to Mr. Parish), anybody more upright, in all his relations to life and to society, more independent in pecuniary position, more independent in professional standing and estimation, or who had given more evidence through his whole professional life that there was something, even in the special art that he had selected for his livelihood, and upon which his fortune and fame were to rest—something more precious than emoluments or dignity—the means and facility of affording charitable aid to the poor and the afflicted? Any man who had shown more clearly, that he was not accessible to any impressions or views, that did not accord with his opinion, his observation, his knowledge?

Well, now, shall it be said that when he thus stood, both in the relation of the regular medical attendant of Mr. Parish, in this position in life, and this high position in his profession, that the mere fact of his being the brother of Mrs. Parish should have excluded him? I think not.

I am sure I do not know what sort of criticism would be made upon the conduct of a wife, who, balancing such a vital inquiry as that of who should care for her husband, in the extremity of physical danger that he stood in, should say, "On the question of property it "would be better that I should have some other physi- "cian than my brother. It may be the turning point of "whether my husband lives or dies, whether the physi- "cian who knows his habits and constitution attends "him; but on the question of property it will look "better, if he does die, that I should have a physician "who is not my brother."

I speak, now, of only that brief point of time, where the selection of a physician depended on the will and choice of others than Mr. Parish; that is, while he was under the first attack of his disease. But so far as concerns any actual choice of the attendance of this physician, on the first occasion of this attack, Mrs. Parish had nothing to do with it. She found Dr. Delafield in attendance when she came in from Hellgate. The selection had been made through the good sense of those who had been near Mr. Parish at the time of the blow, or who were first summoned to him. It was proper and necessary, under all the circumstances, that Dr. Delafield should be the physician.

Then is there anybody that, as a consulting physician in such a grave crisis as this, should be had rather than Dr. Johnston? Was not he selected on the natural indications of professional ability, in society, fame and re pute? It seems to me so. And there you have, as of a lawyer, so of medical attendants, the access of persons

under no possibility of being charged with any indirectness, or unfair or dishonest motives.

Beyond that, there were, in the course of two years, three other medical gentlemen who were brought in to observe Mr. Parish, and treat him in particular maladies. How were they selected? Clearly on the same grounds of fitness and ability. Special advice in regard to the condition of his eyes was sought, at two periods, from medical men most eminent, Dr. Wilkes and Dr. Dubois. When, in consequence of the illness of Dr. Delafield, during a serious disorder of the bowels in Mr. Parish, another physician was necessary, Dr. Bliss, of this city, entirely reputable and able, was in attendance.

You find, then, if your honor please, on all these occasions, where the admission of, or sending for anybody to come into the house was concerned, nothing but plain and direct indications of good sense, on the part of those who were required to determine the choice. It has been our misfortune, by the death of Dr. Bliss, happening some considerable time after the period of his employment, to lose his evidence. The other gentlemen have given their testimony before you. Now these are all the cases, where the will or choice of anybody in the house, had to do with the visitors who entered it. For the rest, it was at the will of the people outside of the house, as to who came into it,— wholly, entirely, and I now speak, having in my eye those relations who may suppose that an exception should be made of them, and I repeat, wholly, entirely and invariably of everybody,— until after and in consequence of free access to the house, a case had been made, an issue had been raised, and a point had been settled, either willfully on their part, or by intemperate passion on their part, that made them either by choice or compulsion exiles from the house; either by the assertion of the necessary dignity of the wife, and the head of the family, and the will of the husband and wife that such visits should not continue until

a new road of access had been paved by some proper explanation or apology, that should place things as they were before this distortion and subversion of all the principles of social intercourse had been effected.

Now is that not so? Was any former partner of Mr. Parish excluded from that house? Not one. Did any one knock at the door, whether it be the outer or the inner door, of that house, for admission, that had occupied any former relations of business with Mr. Parish, and was denied?

Now, if they were not excluded, were they actually and habitually present? Yes, every one of them. Holbrook, Wiley, Kernochan, Gasquet, coming of their own spontaneous regard and affection, coming as they would come because they wished to see Mr. Parish; received, admitted always to his presence, unless some particular disturbance of health rendered it improper or unsuitable, both on their part and on his. Were they frowned upon? Was any coldness exhibited towards them? Not on Mr. Parish's part. There is not one of them but says that he always was glad to see them. Mr. Kernochan says he always seemed pleased to have him with him. So, there was nothing on Mr. Parish's part, that should have discouraged their visits, either by indifference, or by an intimation that their presence was not acceptable. How was it on Mrs. Parish's part? Why, the evidence is all one way, even on their own testimony. Always cordial with Mr. Kernochan, consulting with him about investments, proposing that he should be the fiduciary agent and attorney of Mr. Parish, from the first stage of his illness, and so on, as he would have remained if he had accepted the trust.

It appears, on the testimony of Mr. Gasquet, that she urged him to come and see Mr. Parish as often as he could; that she was cordial and polite to him; the hospitable mistress of an afflicted house, throwing wide its doors to all who would enter as to the house of affliction,

to soothe and cheer and alleviate the privations under which the head of it languished.

In Mr. Holbrook, again, we suffer an unfortunate loss, because he occupied the position of partner; an intelligent, upright, independent gentleman, living in immediate vicinity to Mr. Parish.

So, too, of Mr. Wiley. He is a gentleman who not only had access, and was kindly received, and met this kindness in a like spirit, but received the more formal hospitalities of the house. All of them were in the habit of dining there, and, with Mr. Parish, spending one, two or more hours at table and in the house.

They all give their evidence, wholly bearing in one direction; that upon their clear, ascertained and positive judgment, Mr. Parish was entirely sensible; or give their judgment, partly one way, and partly another, as upon a doubtful subject. But, the fact is clear, that they came there freely, upon their own choice, and were hospitably received; free to observe, as honest men, whatever passed within that house; and, that, at the choice of this lady, at whose door, if anywhere, any contrivance or undue influence is to be laid.

There, you have, again, the same alternative; that there was nothing to hide from common, impartial, yet, intelligent, observation; from those, too, who stood in relations of great intimacy with Daniel Parish, as well as with Henry, who continued to have such ties as rested on interest or association with Daniel, all the while. You must take that alternative or else the other; that the woman who could decide upon and execute these fraudulent purposes, felt it to be a mere trifle to dare the observation and excite the opposition of honest, intelligent men, that she might show her power in controlling them all; and that it was not to be done by words, or looks, or the ordinary appliances of argument used to warp men's judgments or overwhelm their intelligence; but by some charm, which was all the more

potent, that it was the less prominent, and less to be seen!

And so, too, in regard to all persons, whether ladies or gentlemen, at whatever hours of the day, upon whatever occasions they visited, they came at their own choice within that house, whether they came in maintenance of friendly and family acquaintanceship, in attention to which they were more scrupulous by reason of the afflicted condition of Mr. Parish, that gave him no opportunity to select his own friends, and of Mrs. Parish, utterly driven from society by the affliction of her husband; or whether they came on the mere footing of fellow citizens desiring intercourse with Mr. Parish on some particular occasion, as one of the rich men of the city. Mr. Davis, Mr. Grinnell, Gov. Bradish, Mr. Donaldson, Mr. Gibson, all persons, whether as visitors, or coming for the purpose of some special application — all came, all saw him, all remember, and all testify.

Now besides the long list of witnesses, on one side or the other, that have been called to give evidence, we took occasion (the contestants first asking, in reference to a list of servants, about which they seem to have needed very little information from us, as the servants themselves were ready to give it) — we took occasion, either on their requisition, or from our own spontaneous accord, to give them a list of some ninety and more persons, visitors at that house at different periods. We could have called them. They could have called them. They did not. We called whom we chose. They forbore to call any of them. Well, has there been any reluctance on the part of the contestants, in their conduct of this cause, to press inspection or scrutiny into the inmost recesses of that household? I think not. Has there been any timidity, false modesty, or high courtesy, that limited inquiry and withheld it from any topic, any subject, any act, that in the nature of man could occur in a seven years life in

this city? I think not. I do not think that our learned friends have any need to apologize to their clients, or to feel any compunctions themselves, in reference to any lack of zeal, of pertinacity, of persistency, or comprehensiveness in their investigations.

No delicacy was permitted to interfere with the ends of justice. That justice might be done, although the Heavens should fall, and the roof be taken off from this house, everything even to the inanimate walls and floor, the bed chambers, bath room, water closets, are preserved on diagrams for the purposes of this cause. There is nothing that in the ordinary sentiments of civilized society a man feels disposed to hide almost from himself, in regard to the necessities of nature, that has not been displayed upon this record; and this from some loose notion, I suppose, that the greater physical infirmity can be made, by some surprise on your judgment, or some insinuation into the method of your logic, confusion might be produced, in some way, between physical debility and mental disorder. We have it all. We have, then, not only an opportunity, on one side and the other, by a life led through the whole of this time, by a life of three hours every day in the open air, in a carriage, in the public streets, in public places, in the business resorts of this city, as well as during the whole period of the day and night in the house itself, but we have also the employment of all those opportunities, we have the production of witnesses, on their part and on ours, and the opportunity to produce almost an interminable list, by them or us. So that there has failed neither the opportunity nor observance, neither the survivorship of witnesses, nor any absence, to prevent the exposition of all that bears or can bear upon the question in this case, whatever that question may be.

I am not aware that, upon a just survey of this evidence, there can be any limitation of my propositions upon the exposure to observation, and the actual observation of witnesses, having reached the inmost recesses of

that household for seven years. If there be, our learned friends will suggest it to your honor. I omit any special or particular consideration, of course, of Mr. Daniel Parish or Mr. Sherman, that the testimony in this case presents, because that comes under a separate consideration.

Now, if your honor please, ought there to be any doubt? Ought there be any doubt when it appears that the space and period of observation is so large? Whatever way the determination is to be, ought there to be any doubt? When the number, the character, the variety, the intelligence, the discipline, the integrity, the independence of the witnesses are, all, so comprehensive; when they leave uncalled a large number of witnesses, whom they had an opportunity to call, thus showing that they considered the record full, that they had enough, either of evidence or truth, and did not want any more; they cannot say the exploration has not been exhausted or is inadequate, and the existence of any testimony that might have been called cannot be claimed by them by reason of inadequate or unexhausted testimony, because they have left it voluntarily, without adducing it. Now this being so, is anybody at liberty to think or feel that the examination of witnesses upon the stand, and the reduction of their testimony to writing, and its compilation, comparison and investigation by reading attains, in part or in whole, to any greater height of certainty and reliability in respect to truth than the observations themselves of these witnesses collectively. Can you ever feel (I certainly cannot) that opportunities by yourself to see Mr. Parish, to talk with him upon any of the subjects, concerns or affairs of life, half a dozen times, for half an hour each, would not yield as to his condition at those times and during those periods of your honor's observation, a more clear or thorough, or satisfactory judgment in respect to his mental condition, when under your eye, than almost any amount of testimony, which suffers all the loss and de-

traction which belong to human testimony? But even if that be not so, is there anything that should incline this court, or any tribunal, investigating the facts, to feel any disposition to judge *over* the witnesses and *against* the results of their observation on their minds, rather than *by* their testimony, and according to *their* judgment, formed upon personal and intelligent observation, whatever upon the record you shall find the result of those observations and those judgments to be, on one side or the other? I think not. I cannot imagine any investigation which could leave a record more clear and full, and that from as many points of view as were necessary, through as many intelligences as were necessary, and from as unbiased, uninfluenced, impartial and honest observations as were necessary, producing facts and judgments combined, conduct of the party and of those about him, conduct of those holding all relations to him, conduct of the witnesses themselves who were not casual observers, to satisfy your honor that you do not need to supply anything from your own experience and knowledge of affairs. Undoubtedly cases often arise (and judges express themselves so) where the proof is not satisfactory, where there seems to have been proof left out, or there appears not to have been any intelligent observation, no correct memory, no faithful reproduction, either from want of opportunity or capacity. But no complaint of that kind, I think, need disturb your honor's mind. You have got all the material that should be required in any case to make up a truthful judgment, unless the point of inquiry is so very obscure, so very uncertain, so very nice and difficult in the propositions of law concerning it, that after all this inspection, and investigation, and judgment, and comparison, you cannot really say which side of the inscrutable line the testimony carries you; that after all the processes, and all the employments, and all the agents are exhausted, still you are in the position that your microscope is not

powerful enough to discern the dividing line, so that all this agency and investigation fails ; or that your telescope is not far-reaching enough to carry you to the point necessary to have it finally determined.

You must admit that the materials are adequate, reliable and trustworthy. What, then, is the inquiry, and the limits of it? Is it, whether the testator is a man of this or that degree of judgment, of this or that degree of mental power, of this or that degree of instruction or culture, mental or moral, or this or that degree of wisdom, prudence, continency, judgment, self-respect, self-control, affection? No, I apprehend not. I apprehend that the question whether a man can make a will, or not, does not depend upon any such inquiry as that, in the slightest degree. If so, the question whether a man could make a will, would certainly have to be determined, on a long and patient inquiry in every case, that would need, I suppose, judges free from all possible infirmities, in all the points which make up the sum of human character.

Every law suit, upon one or the other side of it, may be stated in its propositions in a syllogistic form. On either of the topics of inquiry in this case, it may be so stated.

Any man can make a will of real or personal estate, who is not an idiot, or of unsound mind. Henry Parish was not an idiot, or of unsound mind. Henry Parish could make a will. Or, on the other side:

No idiot, or person of unsound mind, can make a will. Henry Parish was an idiot, or of unsound mind. Henry Parish could not make a will.

Now, if there be any limit, that mental science, common observation, or the law has drawn, which distinguishes idiots and men of unsound mind, then we can determine whether Henry Parish's case falls on one side or other of that line ; and that is the inquiry before you in respect of capacity.

On the second branch of the case, the propositions are equally distinct. Any person of testamentary capacity, and not acting under undue influence, can make a will. Henry Parish was of testamentary capacity, and acted not under undue influence. Henry Parish could make a will.

On the other side, the converse, as I have stated it, in reference to the other proposition. No person makes a valid will procured under undue influence. These testamentary dispositions of Henry Parish were procured under undue influence. These testamentary dispositions are invalid.

Then we come to undue influence, a far more uncertain inquiry, yet definite and distinct. Undue influence is either fraud or coercion. The influence in this case was fraud or coercion; and according as it was or was not either fraud or coercion, on this inquiry, the validity of the testamentary papers stands or falls.

I am now to consider what in every law suit is the major proposition, undoubtedly—what the law is on each of these points; and here I feel that I shall be but repeating or recurring to what it is the business of your official life to be familiar with; yet I shall have to detain your attention for a while upon the state of the law. The statutory provisions completely and exclusively determine the rule in regard to mental capacity. There is no doubt about that. What the law of any other country or people is, and what the law of this people is, we do not need to inquire from any other source than what is written in the statute book, except for purposes of interpretation and understanding.

"Every male person of the age of 18 years, or up-
"wards, and every female, not being a married woman,
"of the age of 16 years, or upwards, of sound mind and
"memory, and no others, may give and bequeath his or
"her personal estate, by will, in writing." (2 R. S., p.
"60, § 21.)

Now, besides the express statute, which draws the line between those who may and may not make a will, it is very clear that the affirmative proposition does not intend to require any very high degree of either experience, judgment or intelligence, in regard to the subject of testamentary disposition, by placing the limit above which testamentary capacity, or its exercise may be allowed, at sixteen years in a female. We do not go to consult school girls, in the matters and affairs of life, on large dispositions of property, on the relations of society, on the wisdom of this or that venture, on the social and private considerations which press with gravity upon the ablest and most experienced persons, when the trust of finally disposing of great fortunes is thrust upon them by the approach of death. We do not go to school girls to get wisdom on these subjects. But, nevertheless, the school girl of sixteen years, not being an idiot or of unsound mind, or married, can dispose of the largest fortune that the records of society show ever to have been accumulated in a single possessor.

When we come to real estate, the phrase of the statute is varied, certainly with no intention to make a variation, but yet showing more clearly that the persons not permitted to make a will are the exception, not the rule.

"All persons except idiots, persons of unsound mind, "married women, and infants, may devise their real "estate by a last will and testament, duly executed, "according to the provisions of this title." (2 R. S., p. 57, § 1.)

Here the limit of experience and intelligence is raised to the age of 21 years, for either sex; but all persons except idiots, persons of unsound mind, and married women, who are above the age of 21 years, may devise their real estate by last will and testament.

In regard to the alienation of real estate by deed, the provisions of the statute are equally clear.

"Every person capable of holding lands (except idiots, "persons of unsound mind, and infants), seised of or en-

"titled to any estate or interest in lands, may alien such "estate, or interest, at his pleasure, with the effect and "subject to the restrictions and regulations provided by "law." (1 R. S., p. 719, § 10.)

So that, whether in life or in view of death, our statutes and our laws intend that the ownership of property should be in the possessor, or person with whom the title is; and that nobody whatever should have any estate or interest therein, either by a restraint of alienation, or by restraint of devise and bequest; but that the *jus disponendi* is of the very essence of the property, flowing out of the fundamental idea which lies at the basis of the present form of society, as impressed in unmistakable lineaments on every political, every social, every public, every private relation; that the man now presently living is the person that this society regards, and him alone; that neither from his ancestry shall he receive, nor to his descendants shall he transmit any lustre, any splendor, any power; that he cannot hold upon the property of his father any lien, or any restraint; that his children shall not be the masters of his conduct by being the masters of his possessions, in any alternative, in any remote or near relation; that the *jus disponendi* is utterly incomplete, if it is left open only to freedom of disposition during life; but that the very essence of property, by natural right, requires that the power of disposing of it, to take effect on your own interest and enjoyment terminating should exist, and that is but another name for the testamentary power and privilege. For, if your honor please, the moment you reduce the possessor of property to the alternative of choosing, not whether he will part with it, but to whom he will part with it, that deprives him of the enjoyment and control of it up to the last moment of his life, by withdrawing from him the free disposition of it from the date of his death; that moment you encroach on property, intrench on the first ideas which lead to its accumulation, which give it value, which make it a part of the man. If I do not

stand in reference to those who are to come after me in the perfect right of free disposition of my property, except at the cost of stripping myself of it before I die, it is very clear, upon the necessary principles of human nature, those who are to come after me do have an estate in my property, by the strong hold that it must be theirs after my death, unless I deprive myself of it during my life; and on that hold, you may rely upon it that the ownership of property would have much less of the elements of power, that there would be much less of incentive to labor, and toil, and thrift, and frugality; and that that disturbance of the necessary relations of family and of society would break up the whole fabric of civilization, which rests as much upon property as upon any other consideration. I know no more enfeebled condition, than that of a parent who finds his efforts to shape the fate, the character, the dispositions and life of his children defeated, his instructions, his discipline, his control, all paralyzed, because of the fact, that the youths under his hand are yet the masters of him, in the expectation that a few years will make them his survivors, and that their eyes rest always upon the property as already theirs. Barren instruction, fruitless discipline, will embitter the life of the father, and destroy the fate of the children. It is not a matter of indifference, nor a matter of convenience, but a matter fundamental in the notions of property, and essential to the established order of society, that this right of the disposition of property should be put exactly where the statute puts it; that if anybody owns property he may alienate it in his lifetime, or bestow it to take effect after his death, unless he be, though a living man, yet deprived of that reason, that mind which constitutes the difference between man and the lower orders of animals; or that, possessing the organs and faculties and intelligence of man, he shall be under what is but one form of undue influence, the strongest form, not arising in the fraud or the coercion of

another, but in the delusion, which is fraud, or in the oppression, which is coercion, from a disordered condition of the mind itself.

These propositions of law, thus plain upon the statute book, have, in the determinations of the courts of this state (and I think not less in the determinations of this court than any other), been clearly adhered to. I have no doubt, if your honor please, that it does require a pretty firm and comprehensive judgment, and estimate of the substantial ideas that lie at the basis of the provisions of our law, to faithfully adhere to it in certain supposable cases, and in certain cases that have occurred for adjudication. I have no doubt that a loose, general judgment, which yields itself always to a consideration of the special case, and never takes into view the important considerations that govern the subject, would say that the rule of law, which enables persons, who possess only a certain low described degree of intelligence, and power of will, and education, and of self-control, to dispose of a million of dollars by will, was not a sensible rule of law.

In invoking the cases and decisions, which are now settled law in this state, I would not for a moment be understood as imagining that the application of these rules, in the terms in which they are laid down, are at all necessary in this case. We shall give your honor the propositions of what we consider the mental condition of Mr. Parish, before we get through with this case. But I would show that the rule of law in this state is fixed deliberately, and on a case that would most, in its circumstances, excite aversion to that rule of law; a case, the circumstances of which would most invoke criticism, and even ridicule; and that so far from the particular circumstances on which it was decided tending to reduce either the importance or the certainty of that rule of law, they tend, by the strongest possible argument and inference to show that it is fixed, clear, resolute, and so firmly

built together upon the fundamental principles of society that it will ride over the sea of human affairs, not shipwrecked by the hard cases of the law. That is the argument and that is the inference, from those cases to which I will refer.

"Imbecility of mind in a testator will not avoid his "last will and testament. Idiots, lunatics and persons *non* "*compotes mentis*, are disabled from disposing of their pro- "perty by will; but every person not embraced within "either of the above classes, of lawful age, and not under "coverture, is competent to make a will, be his under- "standing ever so weak. Courts, in passing upon the "validity of a will, do not measure the extent of the "understand of the testator, if he be not wholly deprived "of reason, whether he be wise or unwise, he is the law- "ful disposer of his property, and his will stands as the "reason of his actions. A man's capacity may be per- "fect to dispose of property by will, yet inadequate to "the management of other business, as, for instance, "to make contracts for the purchase and the sale of pro- "perty, and therefore a court of chancery may commit "the property of a person incapable of managing his "estate to the charge of a committee, and yet, after his "death, give effect to a will made by him whilst labor- "ing under such incapacity." (*Stewart's Ex'or* vs. *Lispenard*, 26 *Wend.*, 255.)

Your honor will remember the origin of this contest in courts of equity, as to whether the guardian power of the court of chancery could be properly exerted in application to the case of a person not standing within the legal definition of idiocy, or *non compos mentis*. Lord HARDWICKE resisted, as an invasion, any attempt to take the management of the affairs of a person of disordered or enfeebled mind out of his hands, and place them in a committee, except on the distinction between idiocy and *non compos mentis*, on the one side, and the absence of those disabilities on the other, saying that if any change

was needed in this regard, it belonged to the parliament, and should not be accomplished by the courts. Lord ELDON thought differently in later discussions before him, and made the distinction between the power of alienation and the power of disposition, which had reference only to the quantum of mental power, and the great exposure of property, in the hands of the imbecile to the occasions, opportunities and purposes of fraudulent impressions, which, if exerted upon imbeciles, were always held to invalidate the deed or the will. He said, and undoubtedly the reasoning was, that this condition of exposure made the establishment of tutelage within the parental discretion of the court, properly invokable. It was not that the man could not make a deed or will when left to the exercise of his mind, but that standing in the actual circumstances he did, with a large and various property, and this imbecility making him the prey of every designing speculator, the dupe of every deception that men might practise upon him, brought the exercise of the power properly within the range of equity jurisdiction. Chancellor KENT, in a celebrated case (*that of Barker*, 2 *J. Ch. R.*, 232), followed the later ruling of Lord ELDON, in distinction from Lord HARDWICKE, and there is a case holding that the court of chancery may exercise this power when the person thus protected is capable of making a will.

You could not have a case in the actual circumstances of Miss Lispenard that would present a more distinct proposition to the court, of whether the rule of law is absolute, is rational, is necessary, or is not. If it is not, then that of all cases that could be presented to judicial cognizance is a case where the distinction should be made, and an encroachment on the integrity of the rule shaped and limited, for it could be done safely, or more safely than anywhere else. It could not be done safely anywhere; for the moment you begin to fill your law books with exceptions—that this man had not enough of

capacity, you leave an opening for an exception in another case, that *this* man had not; and then, if these two had not, it will be argued that clearly a third had not, and so you would go on, until finally the burden of proof would be thrown on the party seeking probate, to show that the testator was a man of wisdom, honesty and possessed of all the higher qnalities of head and heart. This case of Lispenard is not a single case. It does not stand isolated; but subsequent cases have not attempted to deviate from it. The reasoning of the judiciary seems, and I suppose it does rest upon the most fundamental considerations of social life. In the case of *Blanchard* vs. *Nestle* (3 Denio, 37), the court say: "Mere imbecility of mind in a testator, however great, "will not avoid his will, provided he is not an idiot or a "lunatic. The term 'unsound mind,' in the statute "concerning wills, is of the same significance as *non* "*compos mentis*, and any one otherwise competent, to "whom these terms do not apply, may make a valid will. "One has a right, by fair argument or persuasion, to "induce another to make a will in his favor."

So, too, in the matter of a deed, in the case of *Osterhout* vs. *Schoonmaker* (3 Denio, 37, note): "Our law does "not distinguish between different degrees of intelligence. "It does not deny to a man of very feeble mind the right "to make contracts and manage his own affairs. In the "absence of fraud, proof of mere imbecility of mind in "the grantor, however great it may be, will not avoid "his deed. There must be a total want of understand-"ing."

These are the words of Chief Justice Bronson, in delivering the opinion of the court; and the case of *Odell* vs. *Buck*, an earlier case than that of *Lispenard & Stewart*, is to the same effect. *Lispenard & Stewart* added no new principle. It was a new application of old principles. Upon all the principles of law, the tenor of the courts is unbroken and decisive. "Imbecility of mind,

"not amounting to lunacy or idiocy, in the grantor of "land, is not sufficient to avoid his deed, where, in obtain- "ing it, there is no fraud." (*Odell* vs. *Buck*, 21 *Wend.*, 142.)

In the case of *Jackson* vs. *King* (4 Cowen, 207), there is also a reference to capacity and to the burden of proof. "When an act is sought to be avoided on the ground of "mental disability, the proof lies with him who alleges "it.

"Till the contrary appears, sanity is to be presumed.

"Idiots and lunatics, or persons *non compos*, are inca- "pable of contracting; and the disability is confined to "these.

"One *non compos* is one who has wholly lost his under- "standing. To affect a deed at the common law, an "entire loss of the understanding must be shown. The "common law has drawn no line to show what degree of "intellect is necessary to uphold it."

And in the case of *Thompson* vs. *Quimby* (2 Brad., 509) your honor, in summing up the state of the law, thus expresses it:

"The law treats the right of testamentary disposition "with great tenderness. If questioned, it must be on "strong grounds. To overturn this solemn, deliberate "act, fraud, circumvention, idiocy, or lunacy, must be "*affirmatively* established." I understand that to be as accurate and as substantial a statement of the condition of our law, within that brief compass, and yet as firm, in the maintenance of the rule I am contending for, as any of the preceding cases in our jurisprudence, to which I have referred. The case of *Fisher's* will, in its history, illustrates quite distinctly what the rules of law are in this regard, and is also valuable as showing an instance of what may be considered a debatable case under those rules of law; a case that has been held on the facts one way, by so acute and careful an examiner as Vice-Chancellor SANDFORD, and the other way by Chancellor

WALWORTH, on this point, and which has been disposed of by the Court of Appeals in favor of the judgment of Vice-Chancellor SANDFORD on this point of capacity, though they invalidate the will on the point of undue influence. I would ask no better illustration to exhibit what is a debatable question, or a case that may be brought into court, that may receive the judgment of most intelligent persons either way, and be finally resolved by the court of last resort either way. I suppose the note of the reporter in the Court of Appeals correctly describes the decree of Chancellor WALWORTH, in these terms: "Af-"firmed the decree of the Chancellor, annulling the will "of the late John Fisher, deceased, as obtained by *fraud* "*and undue influence.*"

What do the court of appeals say on the rule of law, as regards capacity? SHANKLAND, J., delivering the opinion of the court, says: "Regarding as I do the "cases of *Stewart* vs. *Lispenard*, and *Blanchard* vs. *Nestle*, "as fixing the standard of testable capacity at any given "point above that of the idiot and lunatic, the will can-"not be declared void for the want of a sound disposing "mind" (*Clarke* vs. *Sawyer*, 2 *Comst.*, 499). And that rests, as the last resolution of the highest court of this state, on this subject of testable capacity.

Now, on the subject of influence; these cases, all of them, show something about influence, and the case of Lispenard is, on the subject of influence, quite as distinct as upon the other ground. But one of the latest determinations on the subject is to be found in a case in the house of lords, where Lord CRANWORTH delivered the opinion, as late as the 13th March, in the present year. The case came up to the house of lords on an appeal from the Irish chancellor. A motion for a new trial, after a verdict of the jury against the will, on the ground of undue influence (there being no exceptionable misdirection of the judge in conducting the trial), was denied by the Irish chancellor. On appeal to the house of lords the decision was reversed, and a new trial ordered.

Of course, every case of undue influence involves facts and circumstances which cannot lead to much instruction in another case, but I am able to hand to your honor a manuscript copy of the case, reported in the London *Jurist*, containing all that I suppose can be useful in connection with this subject. It is a long opinion, as your honor will see, but the part to which I wish to draw your particular attention is this: "Influence in order to "be *undue*, within the meaning of any rule of law which "would make it sufficient to vitiate a will, must be an "influence exercised either by *coercion* or by *fraud*.

"It is, however, extremely difficult to state in the abstract, what acts will constitute undue influence in "questions of this nature. It is sufficient to say that, "allowing a fair latitude of construction, they must range "themselves under one or the other of these heads — "*coercion* or *fraud*.

"One point, however, is beyond dispute, and that is, "that where once it has been proved that a will has "been executed *with due solemnities*, by a person of *competent understanding*, and *apparently a free agent*, the "*burden of proving that it was executed under undue influence is on the party who alleges it*." (Lord Chancellor CRANWORTH pronouncing the opinion of the House of Lords, in Colclough *vs.* Boyse, March 13, 1857. *London Jurist*, May, 1857, p. 373.)

Now I will not trouble your honor with a reference to the cases, in your court, relating to questions of capacity and undue influence. They are familiar to you, and embrace, in number and importance, as many cases of this kind as are to be found in any reports. I shall content myself with a reference to the titles of the cases on my brief:

Hutchings vs. *Cochrane*, 2 Bradf., 302–3.
Minturn vs. *Rourke*, 2 Bradf., 385.
Bleecker vs. *Lynch*, 1 Bradf., 458.
Burger vs. *Hill*, 1 Bradf., 360.

Allen vs. *Pub. Adm.*, 1 Bradf., 378.
Creely vs. *Ostrander*, 3 Bradf., 107.
Morrison vs. *Smith*, 3 Bradf., 209.
Carroll vs. *Norton*, 3 Bradf., 291.
Longcroft vs. *Simmons*, 3 Bradf., 35.
Wightman vs. *Stoddard*, 3 Bradf., 393.

In the most of these cases your honor pronounced for the probate, and in some against it; but your observations seem to be equally satisfactory in reference to any estimate of the law I have occasion to ask you to adopt.

I will cite the note to *Bleecker* against *Lynch* (1 Bradf., 458). "In the absence of any *inconsistency between the* "*provisions of the will and the declarations of the testator*, "*otherwise expressed*, or of any affirmative evidence of fraud "or undue influence, the court will not speculate as to "the motives of the testator, nor upon mere suspicion "presume procuration by artifice or undue means."

I also refer to the case of *Remsen* vs. *Brinckerhoff*, 26 Wend., p. 333.

In the case of Alice Lispenard, Senator VERPLANCK said upon the principal point:

"A few affirmative facts showing understanding, however humble, must in such an inquiry, directed to the point of idiocy or a total want of reason, not of lunacy or disturbed and clouded intellect, outweigh very many negative facts. The affirmative facts prove the existence of mind; and when that is once proven, the negative go to show only its defects and weakness, not its entire deprivation. According to the old rule 'a wise man does not always show his reason; a fool never does.'"

This is a sensible observation, though in the shape of a homely maxim.

Now, upon this subject of testamentary capacity, it will be seen that our law is explicit; that it has stood the trial of hard cases, and has been acknowledged and followed in its first defined statement in 4th Cowen,

up through cases at law, and the cases of probate of wills, and the appeals from them, in all the courts. Upon this subject of testamentary capacity the burden of proof is upon the contestants; and they fail in maintaining the issue upon their side unless by affirmative proof, notwithstanding the proofs upon the other side, they satisfy your honor that Mr. Henry Parish, at the actual dates of the several testamentary papers, was either an idiot or a lunatic, using that phrase as equivalent to *non compos mentis*, which is held by our courts to be equivalent to unsoundness of mind. I am unable to anticipate—because I do not anticipate any argument in this respect, except what will assume to be based upon evidence—that any effort is to be made to show any other defect or difficulty in the understanding of Henry Parish than such as would have reference to the idea of idiocy. It must be in the nature and kind of a reduction by dementia, down to the point of such absolute extinction, as that the person is wholly without understanding in the sense of the law. And that being the proposition in this regard, of which they have the affirmative and we the negative, there is but one other proposition, which is a secondary one, viz.: there being testamentary capacity, under the actual condition of his mind in respect to strength and power, above the point of testamentary capacity, and under the actual proof of influence in the shape of either fraud or coercion, was the will, as evidenced in these codicils — not the will of the testator, but the will of some one else forcibly or fraudulently substituted in the authentic form of his will for his intention. That is the only question. The affirmative is wholly with them upon that question; and that brings us to inquire into the testimony which has been adduced before you. This testimony is formidable in bulk. It amounts to something like 2,500 pages. It occupied over a hundred faithful and laborious sittings, varying from six

to eight hours a day in this court. 1,000 pages are made up of exhibits, of which only the essence or particular point can be material to anybody, and to the greater part of which, in any aspect in which we can view this case, except to satisfy an innocent and laudable curiosity, no importance whatever can be attached. But even after you reduce it to 1,500 pages, it is by no means vital in every part. There is a great deal of it, in amount of folios, that is occupied in the investigation, or hunt after some very small fact finally run down; and, as it was the hare, and not the chase, which was the interesting subject in these cases, when you come to that fact, the length of the doubles of the pursuit is not of very great importance. But there is a great deal else, that does not appear of any importance or influence in coloring your judgment or coloring the case as presented to your observation, under the stronger, clearer and more trustworthy lights that are subsequently shed upon it. And this, I take it, our learned friends will agree in reference to their testimony. Upon our part a great deal of the testimony may be fairly treated, as taken by way of protecting ourselves against the imputation of withholding from the other side the opportunity of cross-examination, rather than from any solicitude upon our part to produce affirmative evidence or from any necessity or occasion on our part to rely upon it. We are free to confess, that if, upon the very complete, very intelligent, very competent and very upright testimony of such men as Mr. Lord, Mr. Davis, Mr. Wiley, Mr. Youngs, Mr. Bradish, Mr. Tileston, Mr. Grinnell and Mr. Donaldson, together with that of Dr. Markoe, Dr. Johnson, Dr. Dubois, Dr. Wilkes, Dr. Taylor, the clergyman, to whom Mr. Parish was exposed from day to day and from year to year, it does not appear that he did have some understanding; it is idle for us to expect to produce that result in your honor's mind from the testimony of numerous other witnesses,

who had less opportunities of observation, and who express a more limited estimate of his conduct, his force and condition. I omitted in this observation the Messrs. Delafield, because they are the brothers of Mrs. Parish. We did not need the testimony of either of those gentlemen. It was thought necessary to bring the testimony of the attending physician and also that of Henry Delafield, because it was not fair for us to say to the other side: "Here is Mr. Delafield, who knows all about it, "and you shall call him if you want to know." He proved, from actual observation, that Mr. Parish's faculties were abundant for the ordinary exercise and application of them to the affairs of life.

When we come to weighing, or numbering, or examining, or scrutinizing the testimony upon this point of testamentary capacity, we do not need to include anybody who stands in any light whatever of affection or favor to Mrs. Parish. I have even in this enumeration left out two principal, important and valuable witnesses; Brown, who attended Mr. Parish for more than three years, and Fisher, who was the attendant at the earliest stages of the disorder. I do not need to appeal to them, if they stand in any position of dependence or gratitude as employees, or honorable obligation not to say anything out of the house, not suitable to be said.

I think that the negative evidence, of what is not proved by their witnesses is a perfect and abundant protection to us against your judgment on this point of testamentary capacity. There was a free observation of Mr. Parish through seven years, and no such thing as idiocy was presented by him. Your honor will bear in mind that while they may parade, inflate and invigorate by the resources of their own intelligence, very unimportant, very insignificant and very undecisive affirmative matters here and there upon their part, leaving our testimony out, you cannot fail to remember, that all the background of the picture is made up, really, of demonstration, that in a lifetime of seven years which they have explored, there

must have been some intelligence, there must have been a clear and abundant energy of the intellect, above the level, or they could have found more facts, and indeed, facts that we could neither gainsay, meet or put doubt upon. I do not understand this business of a man living seven years in public, and yet that no decisive evidence of whether he was an idiot or not—I mean affirmative evidence—should be produced on their side; no foolish thing that he ever did, no stupid thing that he ever did, no indifference, no stupor, no inattention, no disregard of, no outrage or violence upon, the courtesies and proprieties of life, no departure from the dignity of a man, which would have made it clear, that he was reduced to this level. Because it is a level, if your honor please. It is a level, a very low level, a very dead level. And to say that when that is the level, they cannot give you the general features of it in such an estimate as will control your mind, and abash all opposition, and prove that he was but an inanimate agent in this whole life of seven years, is to fly in the face of all probabilities, all calculation, and all common sense, that are the foundation of any confidence in the affairs of life, or in any judicial investigation. If he kept up, under this observation for seven years, you must conclude at once that he was not in a condition of idiocy so as to deprive him of testamentary capacity. Your honor must look to the negative; what they fail to prove. You must look at the magnitude of the mass that was accessible to them, and at the principle of selection. Are these gentlemen to pretend that as far as their industry and zeal in the case has gone, in probing the memories of their and our witnesses, there is any argument on their side to be drawn from the absence of further proof, to influence your judgment in this case? I take it not. I take it that the honest confession of the learned counsel must be, these are the best, these are the whole, these are the clearest of the evidences upon which we ask your judgment that Mr. Henry Parish, during seven years of his lifetime, was not in that condition of testamentary capacity, which the

law prescribes as adequate to the transaction of a testamentary act.

On the other hand, your honor will observe that in looking at our testimony the negative is with us. That is our position. It is the negative. You are to say then first whether we keep back anything—anything, sir. Is there anything they have asked us to produce, that we have not produced? Nothing. Is there any point that they have asked us to explain for them, which we have refused? None. Is there any sentiment, any affection, any pride, any sanctity which we have held up as a barrier to their invasion? None. We have been prostrate before the seat of justice always, in the progress of this trial. We hold the negative, and you should not reinforce the authority of their affirmative by saying there was anything else that they could have proved if we had not withheld the means. Policy would dictate this free disclosure. Policy has dictated it, and it has been pursued. But duty would dictate it, and duty has dictated it, and the strength of duty has been required to make sacrifices of personal feeling and of the inmost and most sacred affections. Policy alone would never have triumphed, whatever may be the pecuniary results here or anywhere. Duty to you, sir, duty to the law, duty to society, duty to the memory of Henry Parish, duty in the completion of the record, of which though no secret page has been withheld from man's observation, many a secret page was filled under no eye to witness it, but the God before whom they knelt. When those impulses come in competition with conventionality, with early affections, and social proprieties, the latter wither before them, but only under what is the strongest expression in the English language, and the strongest obligation in the human character, duty to God and man. This has been the attitude of this lady through this investigation, both before you, before the community, before everybody. In the language of the Scottish law, the learned counsel are the "pursuers," and we are their pursuit. Now, sir, the general estimate

of the testimony I have presented really furnishes almost all the aid, and I am not disposed to overestimate the value of it, that to your experienced and intelligent examination of it, I can afford. Yet, on some general leading propositions of the nature and character of the testimony, on one side or the other as tending to this or that main consideration, in determining the question of fact, I shall be obliged to trouble you a little.

Let us begin, as nearly as we can, at the first movements of anybody, after the attack, towards the testamentary acts. What is the first movement of anybody towards the testamentary act that is brought in evidence before you? It is the movement of the testator himself. That is as good an origin as it can have. Well, sir, are we to be told, and are you to be told, that because this testator had then and recently fallen under a blow of apoplexy, which had receded only to disclose a permanent condition of paralysis—that because he lay prostrate upon his bed, sometimes easing himself by a sitting posture, from the long fatigue of his prone condition? are you to be told, that because he had lost his voice, that because he had lost his physical strength, that because the limb—the right arm—used in communication, was useless, that for those reasons, less importance is to be given to the first testamentary movement proceeding from him? I do not know upon what estimate of the significance of human actions and intent, the design, the strength, the purpose, the distinctness, the object of such efforts are to be diminished, or frittered away, or reduced in significance, by exhibiting an accumulation of impediments against which the effort was made and succeeded.

About the middle of August Dr. Delafield returned from a brief relief that he had allowed himself from the incessant labors of his profession, according to his usual custom, in the heat of summer. He had been absent from the 1st to the 16th of August. Dr. Delafield has described to you, and I shall not dwell upon it again,

the physical condition of Mr. Parish; that long before he left town he was out of danger; that he had established a communication with everybody, sufficient to have his wants supplied. Upon his return he found that some unsatisfied wish of Mr. Parish disturbed him, and disturbed the household; that he had exhibited a pertinacious design, and had accompanied it with every effort within his power to convey, by the use of the lock and key which was to ply between him and all interlocutors, of which he had left only the lock, and they the key,—their questions waiting upon his answers—by the use of that instrumentality to communicate some desire or design; and that it had not been relinquished willingly; and that it was a subject of distress to Mrs. Parish that it had not been accomplished, as well as to the nurse. He asked Mr. Parish finally, after some attempts at inquiry I believe, if he would write. Mr. Parish at first declined, as much as to say, "What you ask me to write, I can-"not write; my hand is paralyzed, I am here in bed. "Did anybody ever write lying upon his back in bed? "Did anybody ever write with his right hand paralyzed?" But the Doctor urged him to try to write. Well, he said he would. Now, there is the first step in the firmness of his purpose, that he would, when he felt that this instrument of interlocution was to fail, that he would try. He can but fail. He must try lying down. He must try with the left hand, which had never been directed to any such motion in health, the left hand weakened, for Mr. Folsom tells you, that upon his visit ten days afterwards, his weakness was deplorable, as evidenced by the helpless position of his left hand. He tries to write. He tries without accomplishing a result that, by its character expresses the object he has in his mind, until various efforts have been made. It is made upon a slate, but the movement of his hand, as it passes over the written portion, blurs and obliterates what he had written, and it cannot be distinguished. The motions are obscure, and do not, of themselves, com-

municate the idea. It is proposed to him to write upon paper; and upon loose, flimsey sheets of paper he makes the efforts, which have been produced before you. That yielding, uncertain surface and substance, it is found, does not supply him with the best facilities, and the flyleaf of a book is presented as the tablet upon which his further effort is to be made; and that book is produced before you, and is in evidence; and at page 701, third part, its facsimile by the art of the engraver is produced. It should be examined with the margin of the page upwards.

Now, is it of any importance whether that is accurate? whether it is well written? Certainly, nothing but a miracle could have produced writing, under these circumstances, that was of an accurate form and legible. That, I believe, everybody will agree to. It was nothing but an approach to the imitation of writing, that could be expected or accomplished by anybody under those circumstances. I do not care what strength of mind he had. I am putting him in that position of body, with his degree of physical strength,—the first occasion of applying the left hand of a sick man, prostrate in his bed, to the act of writing. Now, I do not know whether, in the annals of jurisprudence or medicine, there are any specimens of chirography produced under these circumstances. If there are, we will compare them. If anybody here has produced a writing under those circumstances, we would like to look at it to see whether it transcends or falls short of this effort. But from the evidence of this paper, it is conclusively shown, that he had something which he wished to communicate; that he was willing to try to write it; that he was willing to persist in those trials; that at a certain point he desisted from those trials; and that the point of his desistance was, when, by all the accumulated evidence which the motions of his hand in the repeated labors, and the identity of the effort in movement and in result, whether

less or more imperfect, afforded—when finally, whether it were by inspiration or instruction which came from the writing, it was suggested that what he wrote was "will" or "wills"; then his assent was given, his solicitude satisfied, and the effort had attained a result. I do not know that such an act in that condition of Mr. Parish can be overestimated in importance. Can you rely on the testimony concerning it? It seems to me you can. Why not? Dr. Delafield has stated what I have said, substantially, I think, for I have not gone into the evidence of the previous efforts, before this day when they became successful. They depend upon the testimony of Fisher. But there is where Dr. Delafield finds the unsatisfied desire of communication; there is where he takes it up, and there where he leaves it; and that proves the whole so far as the mental operation is concerned. Is it to be pretended that the strength of a purpose is to be determined by the success of it in result? Is the strength of purpose of a little child that tugs away unsuccessfully to lift an inordinate weight, to be set aside as a feeble purpose because there is feeble strength? Is the continuous, laborious, pains-taking, self-sacrificing toil of a lifetime in poverty to accomplish a reputation by some honest art, failing entirely, from the mediocrity of talent, with which, as capital, the business has been commenced and pursued, whether it be at the bar, whether it be in trade, whether it be in the fine arts, or whatever else, where ambition and energy are inordinate in comparison with power; is that unsuccessful life an evidence of infirmity of purpose? It is clearly a feebleness and failure in result. But, if your honor please, we cannot very well reason about what is a subject of sensible observation. I cannot very well *reason* that the color of that cloth is blue or green. If I argue to you with all the ingenuity in the world that it is green, and it looks blue to you, you will say it is blue. If I argue it is blue, and

you still look at it as green, green it will be to you against my argument. So, here, I see nothing in that configuration except the production of the word "will," or "wills," just as you apply it to the word as a complete writing of it, or as you suppose that the first letter "W," which has the mainstrokes to it, is incomplete on the left side. You will make it "will," or "wills," then, just as you supply or do not supply that stroke. It is not necessary for me to say, what is entirely reasonable, that a tremulous, uncertain effort of this kind may have left no trace of the first movement of the hand quite consistently with any view of the case that it is necessary to take. I do not care whether the word is "will," or "wills." It is remarkable about the word "will," undoubtedly, that it is made up of repetitions of pretty much the same movement of the hand. The "I," and the "L," is but a mere difference in height, and is so written very frequently. The "W" may be made out of a double "L." It is a reproduction of the same movements to a very considerable extent. I do not care whether it resembles the word or not. I see an adequate resemblance of the word "will." If I expressed my opinion I should say that it was the word "will." Every body must agree that it is not, in any of its marks or strokes, inconsistent or contradictory with its being the word "will." It is not anything else, that is certain. Nobody can say that it referred to hat ; that he wanted his hat to walk out, or something of that kind. If he had written the word "hat," it would show that he had a strong purpose to go out and take the air, yet it would be rather an irrational purpose under the circumstances, and would have been a good, affirmative piece of evidence that at that time he was not "wholly in his head," as it is called. I shall spend no more time upon that, because, except as showing a purpose and design, it is not of the slightest consequence. It is no part of this case to prove that

Mr. Parish, in his condition, the first time he used the left hand, was able to write "will" in chirography, unmistakable or evident. I should not believe it if it rested on the testimony of any less reliable person than Dr. Edward Delafield, and scarcely should have believed that, if it had been written in a round, fair, writing-master's hand. That is the first movement.

Whether the movement of Mr. Kernochan, in respect of the power of attorney, was antecedent to this effort of writing, or very soon subsequent to it, perhaps does not distinctly appear. So far as any date is given, I think it is fixed somewhere between the 20th and 25th of August, though I cannot promise to carry, very reliably, all these minute dates in my mind. Now, what was that? He was visiting his friend, and Mrs. Parish said to him, that Mr. Parish wanted him to take his power of attorney. Well, there is the idea started. Mr. Kernochan received it in perfectly good faith. He did not doubt. Certainly it was a very proper suggestion, whether it came from Mr. or Mrs. Parish. It was a wise, proper and useful suggestion, and certainly showed no disposition on the part of Mrs. Parish to hold the reins, or control the management of affairs. But Mr. Kernochan says to Mr. Parish, "Do you wish me to take your power of attorney;" to which Mr. Parish assents. I think the phrase given by Mr. Kernochan is, that he called him "Henry." Kernochan leaves the chamber, with that proposition to become his attorney, derived from Mr. Parish, in the form of interlocution which was used to arrive at his wishes. We have the operation of Mr. Kernochan's mind after he left the chamber. He met going out Dr. Delafield, Dr. Markoe and Dr. Johnston, and asked Dr. Johnston what he thought about Mr. Parish's capacity to transact business. The doctor, as he understood, expressed a doubt; thought that it was doubtful, could not say. That was on the 25th August or thereabouts. Well, Mr. Kernochan goes down town, and reflects that there will be a great deal

of labor and implication in another man's business; and all that is clear is, that he will not get any pay for it. That is clear to his mind. He does not seem to have considered the question of duty on a very high scale. It was a purely mercantile consideration. He, upon cross-examination very distinctly admits, that that was pretty much the substantial idea and consideration in his mind; and he comes back — I suppose it is natural, though there is nothing in the testimony — and sees Mr. Daniel Parish. He saw his most intimate friend, as he states to you, and he was the person most interested in the question, whether Mr. Kernochan or anybody else should be attorney. At any rate, from this consideration that there was no compensation attached to the service, and his attitude in the matter, which is more distinctly discovered now that the death has taken place, he determined not to take the power of attorney, and communicated that determination, I suppose, to Mr. Henry Parish. There was an end of that.

Now, there is their own evidence of one of the earliest acts in reference to business. Is there anything affirmative in the conduct of Henry Parish, in that matter, that indicates want of intelligence or activity? I am at a loss to see it. Where do you find anything, that anybody says he did, at that early stage, that is inadequate, inconsiderate, irrational, or otherwise than would accord with the soundest reason? Everything was done perfectly frankly, on the part of Mrs. Parish. She did not conceal or pervert anything that, either originally or incidentally, conveyed what her husband had impressed on her, that he would like to have Kernochan for his attorney. He says "yes." Kernochan leaves his presence; takes the matter into his consideration; is operated upon by the idea that it is an uncompensated service, and leaves his friend to find another attorney. Whether Kernochan then acted as a wise man, as a just man, as a good friend, it is not for me to say. You are not to pass upon his actions or those of

anybody else, except of Henry Parish, and those who sought to or did control him. That being the position of things within the house, what was doing down town contemporaneously? A bookkeeper of Mr. Parish's, Mr. Geo. W. Folsom, contemporaneously with the writing of the word "will" by Mr. Henry Parish, and this effort to have an attorney, took this singular step. Between the 12th and the 20th of August, he goes, either of his own motion or on somebody else's instigation, to the bank, and takes Mr. Parish's box, in which were the securities and private papers, to which, upon his own showing, he never had access, and of which he never had the custody, in any other sense than as the messenger of Henry Parish, to go to it for an express, special, particular purpose, or else under the implied or constituted authority, for some ordinary, regular and necessary act of business, requiring to be performed, in reference to its contents, when Henry Parish was absent; having no more concern with that tin box, as custodian or as inquisitor, than any man's clerk or messenger has with his valuable papers; goes to that box, opens it, searches its contents, and extracts the will of Henry Parish; thus, making himself an administrator, with the will annexed, of Henry Parish, not deceased. It was a most extraordinary movement. Now, sir, when I see a hand move, that is part of an irresponsible system, towards an intelligent and purposed act, I suppose that its movement is originated and directed by a purpose from an intelligent and interested source that governs the movement of that hand. And when I find the bookkeeper of Daniel Parish clutching from the custody that Henry Parish had given to it, the will of his (Daniel's) brother, and find that, upon every principle of human nature, Folsom cannot pretend that he had a dollar of interest or a single heartstring tendril allied to this subject, or right of any kind, or duty of any nature, as the principal actor in that transaction, I feel, I argue, and, upon my judgment,

I shall decide that it was not the spasmodic act of an uncontrolled and undirected hand; but, the movement of an interested, scheming, contriving person, using that hand. I do not see why he did it; how he dared to do it of his own right; or how he has purged himself, in his direct or cross-examination, of the conditions of absurdity, of impertinence, of irrational usurpation of the rights of others, that this act involves and indicates. He took it out of the bank and put it in his pocket, and carried it, in the pocket of his coat, that day and night, and replaced it, next day, in the box. There had been an expectation in his mind that the box would be taken from the bank, upon the requisition of Mr. or Mrs. Parish, or somebody else; and he meant that, if the box was taken away, without his knowledge, and within a brief period, that the will should not be found in it. That was his purpose; but, whether his own or somebody's else, is a question quite immaterial. But, whatever else your honor may think about my suggestion, regarding this act of Folsom, it is very clear that he assumed some attitude not of conformity to the wishes of Henry Parish, under any intimation he had received from him, not in conformity to any of the wishes of Mrs. Parish, and not in conformity with any right or duty, express or implied, which he could act under. That is very plain. It was either a spasmodic act, without purpose, or else derived from some intelligence that could have a purpose upon the subject.

Upon the 25th of August, Mr. Folsom comes to see Mr. Parish, and has an interview with him. He there upon formed a judgment in regard to his mental capacity, and expressed it, too, at the time in the sick room. And that was his judgment. Nobody seems to have cared what his judgment was at that time. I certainly care very little about it now. But there he is upon the 25th of August, having a long talk with Mrs. Parish, with her mainly, and with Henry Parish, the results of which are all detailed upon the direct and upon the cross-ex-

amination, which of course your honor will read, together with the testimony of the other principal witness, separating what in your judgment are the important and unimportant parts. It is sufficient for me without reading, to direct your attention to the important movements of persons who stood in relation to this subject and to this decedent in the attitudes their testimony suggests.

Upon the 29th of August, Mr. Lord drafted, under previous instructions, the first codicil to this will. It is a very simple one, but in regard to the property it is specific. There are two items of real estate. The object is the gift of the whole of it to the wife. The estate is fee simple absolute, and so contains every element of simplicity. There are but two subjects of inquiry of course, whether he wishes to leave that property, and whether he wishes to leave it to his wife. He does not need any consideration about the property, or any explanation about the object. Now, Mr. Lord and Mr. Holbrook, his partner, and his friend who was his nearest neighbor, a just, honorable and experienced man, who had known Mr. Parish for a quarter of a century in relations of business, and who was in the habit of visiting him; a gentleman equal almost in years, equal in culture, equal in society, and not in the slightest degree dependent upon, or in the slightest degree connected with any purpose of anybody in regard to Mr. Parish or his property, go there with this testamentary paper. Mr. Lord's son accompanies them as a witness. They go into the sick room. There are no servants selected as witnesses. Nobody is taken as a witness who can be imposed upon in any way, and the paper is executed. Mr. Kernochan was informed of the intention to execute that paper. Mrs. Parish had informed Mr. Kernochan before the execution of this paper that it was to be executed. The topic of the disposition of this property to Mrs. Parish, formed the staple of Mr. Folsom's conversation with her, and with Henry Parish in his interview with him. That was the staple. He begins

by telling Mrs. Parish that he knew she wanted the Union square and the Wall street property. How did he know it?

Upon cross-examination he cannot say, and finally admits that he did not know it in any other way than that he supposed it was quite natural that Mr. Parish should give her that house and not turn her out of it at his death. The other supposition got into his head in this way: he thought the Wall street property was a good property for any one to have. He was clear she wanted it, upon his own reasoning on that subject; and she told him, that she had heard he had spoken to Mr. Kernochan in regard to it. He says that he might have told Kernochan, he had no doubt that Mr. Parish intended to give her that house, but that if he said it to Kernochan, he said it upon his own judgment. Then there is no concealment certainly. Mr. Kernochan is under no injunctions of secrecy and observed none. He would not submit to be put under secrecy. It was therefore communicated to everybody concerned, that Henry Parish was going to make a codicil, leaving to his wife the house in Union square, and the Wall street property. After it was executed, and he was so informed, he told Daniel Parish and he said he had heard it from Mr. Holbrook. There was therefore no concealment with reference to that first testamentary paper. The difference between the first testamentary paper and the others in this respect was this: that then Henry Parish was undoubtedly in the attitude of a sick man in a sick chamber, and in feeble and precarious health, and it needed, therefore, if the act could properly be performed, to be performed in a sick room. And undoubtedly, at the first execution, it was the act of a man feeble in his physical condition, obstructed in his mental manifestations, obscure in his indications, and in regard to whom no long experience of any kind, no long observation, and no varied application of tests, either purposed or incidental, had, or in the nature of things could exist. That was the difference. That was

the reason that whoever acted in reference to a codicil in a sick chamber, with a sick man, thus oppressed and impeded, should say at once: "Now this Mr. Parish "you know how he is. There is to be accomplished the "execution of a codicil with this object; giving to Mrs. "Parish this property. Well, if you wish to send a "chancellor's writ *de lunatico inquirendo*, or a constable, "or any other process of law to prevent that act you can "do it, or, if you wish come and see for yourself."

Mr. Daniel Parish was there, talked with his brother, held his hand, and asked him if he knew him. After it was completed, he learned that it had been done. If any after-inquiry was required they might make it—they might take their position and do as they saw fit. That is the thing that has been done in this case. But when the other codicils were executed there was just as much reason, in our apprehension of the subject, and of the case, for telling beforehand that Henry Parish was going to make two or three codicils, or telling after he had done it, as of telling that he had made a will. If anybody needed to be advertised that it was supposed Henry Parish could make codicils, they had all the people advertised of it at the earliest stage of the disorder; and as they saw that the recovery was rapid, substantial, efficient, and during this period of three or four years in the middle of the course of the sickness he was a well man, with well defined, distinct and limited disturbance of his health, they had just as much reason for telling before as after his illness, of the making of a will or codicils. And if you believe the testimony, if people had told of it not in accordance with his wishes, and they believed that he was intelligent and capable of willing, they had no more business to tell of it than they had, that he had made a will. If they had told of it by his directions, or if he had directed it and they had failed to fulfill his wishes, it would have shown a departure from the general conduct he had pursued when he made the first will, for he

did not tell Kernochan anything about that. Folsom's idea seems to have been that he had made a will, and from that he supposed he knew of the will by Henry Parsh's statement of it. He said he very often saw it. He knew the fact by reason of his seeing it in the trunks with other papers. As to his having told Kernochan, he is pretty distinct he did tell him. If he did he is the only person. If he told him he had made his will, he did so as a simple transaction, and not in any deliberate manner. He said, probably, that he was ready to go abroad and should make a will. So that Henry Parish never consulted anybody about his testamentary dispositions. In this respect the term privacy applies, for it is not secrecy. It is privacy belonging to the very act in its nature. It never could be thought a topic of interest to know that he had made a will, unless you wanted him to go further and state what the dispositions of his property were. The mere fact that he has made a will is not important to anybody. It is not customary to disclose the nature of the provisions. Therefore there is nothing remarkable in the fact that there was no statement promulgated before or after the second and third codicils, and there is nothing that makes the absence of that promulgation in those two codicils differ the case in significance from the publication of the fact in the making of the first codicil.

Now, upon the execution of that first codicil, what is there that is doubtful? Nothing, I suppose. When there is a defect of the means of complete spontaneous communication, with the natural senses and faculties, you must have a supplement of some kind, and it must be relied on. If my eyesight fails me, I must have spectacles. If a will is given to me to read, and I read it through the spectacles, you want to know whether the glasses are so constructed that I can read rightly, or whether they had some bad purpose in them that would make the name of James read where Daniel was written. If you are satisfied that those spectacles are not reliable, then you would

not call it reading well through them. A common phrase is, that you look at a thing through another man's spectacles. So in hearing, additional aid is used. So, too, if articulation be imperfect, some natural or mechanical aids may be supplied. When the interlocution between Mr. Parish and somebody else needs to be supplied by the instrumental aid of a living person, whose perfect senses and organs are made to operate in this interlocution, to get at the intelligence which the organs, obedient to the will of the mind that is to operate, are inadequate to express, you want to know whether it is reliable. Now, Mr. Daniel Lord is the living person who thus intervenes, and Mr. E. Holbrook is another person who thus intervenes, and each sees and hears the other. Mr. D. D. Lord is an observer of both, and Mr. Lord and his son testified ; Holbrook having, unfortunately for us, died. Now, is that a reliable instrumentality? I believe that Mr. Lord's instrumentality, in all the affairs of life in which he has had occasion to serve the needs of his fellow-men, has been deemed as adequate, reliable and true as any you could repose upon. Is there any complication about it? Not the slighest. He knows very well whether he could ask him a question, and receive this or that answer. I say, therefore, unless you find an imperfection in the instrumentality for the purpose that it is to serve, and unless you have a doubt and hesitation as to the integrity of the narrative that you get of what did occur, you must believe that Mr. Henry Parish, when he made that codicil, understood what he was doing, and that the gentlemen who saw it made, knew that he understood what he was doing.

Now, who were the persons connected with Henry Parish,—relatives, who were in the sick room during this first illness, the sequel of the blow? Mr. Sherman, Mr. Daniel Parish, Mr. Dillon, Mr. Kernochan, and Mr. Folsom. All those persons were there. There was no exclusion of them during the stage of the first illness,

except such as followed necessarily from the immediate prostration of the blow. There they were. There does not seem to have been any very great necessity for Mr. Dillon coming into the sick room of Mr. Henry Parish upon the errand for a midwife or a wet nurse. Dr. Delafield was amply sufficient for all emergencies, unless the pains of labor were very instantaneous and urgent. But, Mr. Sherman brought a homœopathic doctor there,—Dr. Hull,—who is not permitted to investigate Mr. Parish's condition.

There is nothing that could possibly justify such a procedure on the part of Dr. Hull, except that human life was in imminent danger. It was contrary to etiquette. But Mr. Sherman brought him there. Then we have in the reception room adjacent to the sick room another interview between Mr. Sherman and Mrs. Parish, in which Mr. Parish stamps his foot, makes imputations, &c.

Then Daniel Parish comes to the house, goes up stairs and meets the remonstrances of Mrs. Parish, when Mr. Parish's life hung upon a complete seclusion of body and mind to rescue him from the fatal consequences of this extraordinary disease. Still, what is that? Daniel Parish did not believe in the gravity of the disease. He thinks it is all *seclusion or exclusion*. He thinks it is imaginary that Mr. Parish is ill. He comes there, and the servant, ready and passive, admits him, against orders to keep visitors of all kinds from the house during that crisis. He goes up stairs, meets the expostulations of Mrs. Parish, and pushes rudely by her, she defending the life of her husband in the citadel of her house, the door of the sick room interposing but a feeble barrier against this affectionate brother, who will not take at second-hand any intimation of his condition of health. Well, it may be said that *Fisher* testifies to this. He has, and in regard to him I cannot merely say that Mr. Dillon might have been called upon to contradict him; but I can say that he has been called upon to confirm him, and he has done

so ; and that the substance of the suspicion, the distrust, the motive of rudeness, are all written down by Mr. Dillon, on the information of Mr. Daniel Parish, and are a portion of the evidence in this case, in the letter of instructions that Mr. Dillon writes to the solicitor, Mr Wm. Barber, in California. I refer to Book 3, pp. 563, 564, where Mr. Dillon's letter will be found.

" The will and codicils of Henry Parish, of this city, " are now before the surrogate for probate. The codi- " cils alone are contested. They dispose of about a mil- " lion of dollars in favor of his wife, who has no children, " and revoking the bequests to his brothers, to whom he " gave it by the will. One of these brothers, Mr. Daniel " Parish, is the father of my wife. The will was made " in 1842. He was attacked by paralysis in July, 1849, " and in the following August the first codicil was made, " devising property of the value of $225,000. The sec- " ond codicil was made in 1853, and the third in 1854. " He died in 1856. I have just ascertained that the per- " son who was with him from the date of his attack to " December, 1849, and during the period when the first " codicil was executed, James C. Fisher, is now at the " hospital in San Francisco, a nurse under the patronage " of Dr. Gray. My desire is, that you shall see this man, " and send me a statement of what he can testify to in " regard to the capacity and condition of Mr. Parish at " that period. In order that you may examine him effi- " ciently, I have the pleasure to enclose to you printed " copy of the will and codicils, and the testimony of Mr. " Lord, in regard to the first codicil. You will readily " perceive, from the cross-examination of Mr. O'Conor, " upon what *points we oppose the probate of the codicils*, " and what facts we *should hope to substantiate* by Mr. " Fisher. It is clear that Mr. Parish could neither write " nor speak. We are very much surprised to hear from " Mr. Lord that he could say 'Yes' and 'No.' You will " also see from these papers the grounds upon which the

" widow will endeavor to justify the *spoliation of the bro-*
" *thers.* One of these grounds is the hard treatment, on
" one occasion, by Mr. Daniel Parish to Mrs. Parish, *by*
" *pressing by her into his brother's room against her wishes.*
" *This occurred while Fisher was the nurse, and Mr. D.*
" *Parish thinks he will recollect all about it. The fact is,*
" *that Mrs. Parish, finding that her schemes would be ob-*
" *served by her brother, determined by various pretenses, to*
" *exclude him from seeing Mr. Henry Parish, and on this*
" *occasion she pretended that he was too unwell to be seen,*
" *and that the physicians had ordered that no one should be*
" *admitted. Mr. D. Parish, believing this to be a mere pre-*
" *tense, brushed by her, and entered the room, where he found*
" *his brother lying on the bed, and remained with him for*
" *some time, manifestly without injury or damage to him.*
" *During the same day, we are led to believe that members of*
" *her family saw him without objection. It is probable* that
" Fisher will *recollect the occurrence*, and may remember
" her complaints about it, *and will know the opinion he*
" *then formed about their justice and truth.* We seek to
" establish *incapacity, undue influence, and the exclusion of*
" *his brother unnecessarily and fraudulently.*" Now, we have Daniel Parish's version of the facts, his suspicion, his attitude, and his discovery. Then we have evidence, perfectly reliable, of the date of that occurrence, and of the truth of the injunctions of the physicians, and that the life of Henry Parish was at the mercy, as far as human judgment could go, of exactly such an occurrence as that. But Lord BACON says that " suspicions are like
" bats, and fly by twilight." They fly here in utter ignorance, and in most presumptuous usurpation upon the domain of that family.

Mr. Fisher has stated that occurrence. These gentlemen thought he would know something about it, and they suspected that Mrs. Parish might have said something to him about it, that he would be willing to speak of. He (Daniel Parish) knew it was an outrage, and

wanted Fisher to disclose whether the facts of Mr. Parish's condition justified her being offended. This admits the fact of his passing into the sick man's room over the body of his wife—*that is all!*—over the prostrate body of his wife, in intent and effect, although he accomplished his purpose without the actual prostration of her form. *He pressed by her.* It was over the obstacle that she interposed of her person for the protection of her husband against his brother. Now, they hoped that Fisher would say that he was not sick, that it was a sham, that everybody came to see him who belonged to the Delafields, and that it was a *pretence* for excluding him. Mr. Parish had begun to get well. They thought something was going on, and took it for granted that it was deception, fraud, contrivance and dishonesty. Upon what was this suspicion of Daniel Parish based? Did anybody tell him so? Did Quin tell him so, Quin who kept the door unbarred, and betrayed his trust? Did he tell him so? He told him that the doctor thought, that Mr. Henry Parish would not live, and that if he wanted to see his brother he had better go up. Did he believe it? He did not believe it, because Mr. Dillon, who received knowledge from him, says that he did not believe it, and thought it was a mere pretense and so he went in. Now, show me a fact, show me a trait, show me an occurrence that up to the date of this transaction, justified Daniel Parish or Mr. Dillon, or anybody of the Parish name or interest, in suspecting Mrs. Parish of coercing the person of her husband. Nothing. Nothing but a violent substitution for the natural and declared motives of keeping him quiet by injunction of the physicians; nothing but a violent substitution for those motives of fraudulent control, on mere suspicion, grown and fed entirely by the natures that felt it, can, on the proofs be pretended. Fisher told you the story as he understood it, and he does not differ from Mr. Dillon's recital at all, and Daniel Parish's confession at all. Did Fisher know, when he was examined, that this letter of private instructions of

Mr. Dillon contained these disclosures? No. Barber's evidence was brought to impeach Fisher's motives, after his testimony had been given. I say to this brother, you find originated in your own suspicions and in your conduct, the only ground whereon may be built up any structure of any alleged personal offense against you, in the feeling of Mrs. Parish. Such feeling of offense would find growth and support in the best sentiments of a wife's heart; and if the growth of enmity and hostility between these two opposing interests, if there be interests—these two opposing families—has arisen from this move on the part of Daniel Parish, who shall say that *Mrs. Parish* was to blame--feeling it as a woman, resenting it as a woman—in the double trust in which Henry Parish lay in that house? I will not say, if your honor please, either here or anywhere, that it was an offense to be cherished, and never forgiven. I never will say that of any human offense against any human being. If thy brother offend against thee, I will not say seven times, but seventy times seven, let him be forgiven. But he must be in an attitude to accept forgiveness, and to act upon it as forgiveness. There is no principle of our nature, and no instruction of our religion, which permits that self-abasement shall take the attitude of subserviency or entreaty or cringing, to induce an attitude suitable to receive forgiveness on the part of the offender. If you will show me, in the pages of this testimony, the first approach, direct and personal, or through the mediation of Mr. Kernochan, or anybody else, to apologize for what Daniel Parish knew was an outrage, and never could have been excused, except on the basis of fraudulent concealment or sequestration by Mrs. Parish of the person of his brother—an idea which *must* have been driven from his mind by the spectacle that he saw within the sick chamber; if you find, from the beginning to the end, any such step towards explanation, and so an effort to be replaced in the esteem and in the regard, whether personal or conventional, of Mrs. Parish, as the

mistress of the household and the wife of Henry Parish, and such approach rejected by her, then I admit that you have found some trait of severity of temper on the part of Mrs. Parish.

Now, we have after this the visit of Mr. Daniel Parish to that house at the end of the year 1850. Wingrove is their own witness, and the only witness who speaks of the visit. I cannot but say this, sir, that, upon their own narrative of this occurrence, it exhibits the most extraordinary conduct, conversation, attitude, tone, temper — I do not care whether you put it in the light of affection, taste, breeding, or anything else that is supposed to characterize a gentleman in society, that can be imagined. Wingrove was at this house from June, 1850, to September or October, 1851, as the valet of Mr. Parish. Mr. Parish was quite well during the whole of that period. He was there eleven months only. Mrs. Parish, it seems, was going to leave the house that morning alone in a carriage to go to Root's to have a daguerreotype taken as a present to her aunt. It was, of course, an absence that would be of some duration. It was an office of affection that she was very desirous to perform, and she fixed, to proceed there, upon that day at an early hour. It seems that while Mrs. Parish was getting ready for that expected absence, Daniel Parish paid a visit to her house while she was upstairs getting ready to go out. He found his brother, Henry Parish, in the dining-room, and Mr. Wingrove gives his manner in first addressing his brother. Now, there is a good deal of significance about this. He gives the very words. Mr. Henry Parish coming forward with alacrity, with affection and courtesy, to meet his brother, Daniel addresses him thus:

"Well, Henry, I am glad to have a chance to see the in-
"side of your house before you die, for I shall not be
"able to afterwards." That is an extraordinary observation to make to *an idiot*. You would not make any observation to him at all. You would not want any con-

sent from him to see the house. He could not give any consent. It was not made to an idiot. It was not made to anybody that was supposed to be an idiot, or to a person of unsound mind. If it was addressed *to* an idiot, it was made *by* an idiot. There was the same measure of mind in both persons, as to their conduct and conversation, at that time. It was the observation of a man who knew, saw and felt that his brother had the command of his mind and his will. He saw every demonstration of intelligence and rational emotion upon his brother's part towards him, when he came to meet him, with his halting gait, trying to infuse into his demeanor an air, if not an act, of alacrity. He talked to him about *property*. He did not intimate that he wanted to see *him*, came to see him, or desired to know anything about him ; but, he would like to see his *house*. It was either upon the footing that he did not care about anything except seeing the house, or else he could assume at once toward his brother that attitude and tone of free and careless remark belonging to a person who understood him freely. It was a coarse observation to make; nobody else would have made such an observation under similar circumstances. But it showed further (and this is not our witness, and there is no interest, no confusion, no obscurity), it showed further that he did choose to intimate to Henry Parish, in this form of free remark, that Mrs. Parish was no friend of his ; that there was no cordiality between them, and when the house passed under the codicil, of the existence of which he was aware, to Mrs. Parish, it was not likely he would be a favored guest. There is the whole of that. It is just as plain as if the antecedent and subsequent connection was written down, if you believe he, Daniel, was an intelligent man. So much for the introduction of conversation between this *brother* and his sick, afflicted and sorrowing relative. What then does he do? Wingrove, when he is speaking in favor of that side, not only gives the particular fact but also the information that it was in accordance with Henry Parish's *usual* dis-

position to alacrity. He says he tried "as usual" to follow Mr. Daniel Parish up the stairs to show him the house.

Now, sir, I have dwelt upon this subject as a clear piece of evidence, taken, selected, reduced and verified wholly upon the other side, of the brothers walking together about the house, in the upper rooms of it, under this expressed wish of Daniel Parish, to look at the house, and under this alacrity which, "*as usual*," Henry exhibited as a courteous gentleman. Then we have the appearance of Mrs. Parish coming down stairs, on her way towards her projected call, and she comes across this scene. Wingrove leaves us uncertain as to the tenor of the conversation but Mr. Daniel Parish seems to have made some remark, that Mrs. Parish thought was a little *extravagant*, not very *sincere*, intimating that nothing he had seen in Europe was equal to the magnificence of this house. When you take it with the scene between them in the sick room, which I have described, and Daniel Parish having intimated that, if it depended on Mrs. Parish, he did not think he should see the house after his brother's death—when you have this observation made, in this extravagant expression, it is easy to see by the tone of it that the observation was not altogether sincere, and might have partaken somewhat of irony, which Mrs. Parish thought not exactly the way upon which their intercourse should recommence, from the point at which it left off in the chamber. She made some reply, as much as to say, that he could not have seen much in Europe. What carries us on we do not know, but Wingrove says, that in the commencement of that conversation, high words ensued, which he does not repeat. Daniel Parish was angry. It is quite possible that Mrs. Parish was angry, and used high words, which finally resulted in Mrs. Parish's saying distinctly that he must leave her house. He thereupon proceeded down the stairway, under the impulse of, and followed by, the

resolute tone of this lady to compel him to leave her house, covering his rear only with this observation: "Madam, who gave you the house? This is my brother's." When people are angry, there may be something to pardon on both sides. It is not for me to say that the infirmities of nature do not belong to ladies, as well as to gentlemen, but that a woman sneered at, towards whom high words are used in her own house, by this same person, knowing as she did, the tone, the temper, the disposition, and feeling, the atmosphere, that surrounded all *these outside watchers for the demise*, should be determined and resolute, never should occasion to any right minded person, who shall have to pass upon it as an element in this case, any condemnation or regret.

She did then, as appears by the testimony of this witness, when high words were used towards her in her house, direct his absence from it, his first observation at *this* visit, being "after your death I shall never be able "to see this house," and the last "Madam, who gave "you the house? it is my brother's." The *house*, from beginning to end, seems to have been the subject that lay in the mind and in the heart of Daniel Parish. From that time had Mrs. Parish anything to apologize for? I think not. That she was violently agitated, that she was excited, and that it was an excitement that partook of a physical manifestation, is testified to by this witness who shows that, when she had accomplished her purpose to defend her honor, and defend her sick husband as the obedient servant of his will, she entered the library, which was close at the foot of the stairs, threw herself upon the couch and screamed with hysterical excitement. Now was this acting, was this excitement after Daniel Parish had left, got up for the benefit of Mr. Wingrove? I cannot imagine that.

Well, all this first half year which brings us to the beginning of 1850, there was talk about a writ, in the nature of a writ *de lunatico inquirendo*. Mr. Folsom, who had seen the will, and who had picked up

information *in railroad cars*, public sentiment of the traveling community, thought there should be a judicial investigation, and so he talked with Mr. Griffin, with Mr. Daniel Parish, he thinks with Mr. Sherman, and Mr. Kernochan upon the subject of this writ. If this writ had been issued in the fall of 1849, your honor would never have had occasion to consider this case. That is pretty plain, because the writ would have resulted in an ascertainment of the *fact*. But sir, there was a great difficulty in determining who should "bell the cat." That was the point of trouble, who should start the writ *de lunatico inquirendo*. They were brave in family consultations, in railroad cars, in public opinion. There was great anxiety in professional consultations, written communications, fixed appointments, and all that, but nevertheless somebody had to assume the attitude of suing out the writ, for the court would not take notice of the case, on its own motion. If people are honest, straightforward, and believe in the matter in hand, if they are not solicitous for the *property*, then the question of "belling "the cat" never arises. Well, they went on, and the result of it all was that this man Folsom, from the best light he could gain on railways, in the streets, and in lawyers' offices, thought that the best person to "bell the cat" was *Mrs. Parish*.

Mrs. Parish was the one of all others who should have undertaken this office. Mr. Parish might growl at *her*, but he would not devour her. What a silly business in this affair it is for Mr. Folsom, the *custodian* of the tin box, to take the attitude of trying the title of Mr. Parish to his property and his mind. It is an absurdity. Mrs. Parish believed her husband to be sane, and she could not very well begin a petition by stating that he was a lunatic. You could not very well start by suggesting to the court that you are satisfied he is *not* insane. Of course the court would reply: "If you are satisfied, "Madam, there is nothing to say; we shall not interfere "between man and wife." But how could she have got

any evidence? Could she have got Dr. Delafield, or Dr. Johnston, or anybody else, to swear that he was a lunatic? Would Mr. Kernochan swear he was a lunatic in August, or in any month down to the day he was upon that stand? No, sir; no, sir; not he. The nearest he would bring himself in those early stages was a matter of doubt in his mind. He never decided the matter against him from then till now. Folsom, who was the custodian of the tin box, had made up his mind before he went up to the house that he was a lunatic. You can get him to swear to it. Why did not Daniel Parish, or Mr. Sherman, or James Parish, if they thought he was a lunatic, they not being, of course, solicitous to clutch the property, but only to advance the cause of truth and justice, sue out this writ? Because they did not expect to succeed, and there was nothing so likely to prove fatal to the ultimate chances, either of a testamentary disposition in their favor, from the man whom they had accused of being a lunatic, or of the chances of impeaching the testamentary papers, when the inquisition had decided that he was not a lunatic. That is the whole history of the writ *de lunatico inquirendo*, and so it must be reported in this case.

Now, what can be said upon the other side about this? Was it not too silly, too simple, to talk to *Mrs. Parish*, who always said she thought he was of sound mind, about suing out a writ against her husband? Mr. Sherman could have been put forward as a suitable person with perfect safety, for he got under the will as little as he gets now. Still, that is not the way he looks at it. It was the *heirs-at-law* who wanted to have it ascertained, and wanted to have the property kept together and well managed. There is the whole of it. It shows that they contemplated the condition of his mind, with the best evidence and the best judgment they had, and with the closest consultations that they could compass, and that failing to get Mrs. Parish to accuse her husband of lu-

nacy and run the risk of a comfortable life with him after the writ was quashed, they saw the chances were such as not to encourage the expectation, and there was an end of it. Your honor has noticed in the case of Thompson's will the fact, that during the long period that these vagaries possessed his mind and affected his conduct, he was not disturbed by any parties in interest or expectation in the management of his property, and no effort was made by the proper inquiry to ascertain whether he had intelligence or not, and the court held they had let things go too far, and holding two chances, they were not entitled to any particular favor, and were not to be encouraged in speculations in dead men's estates. (Thompson *vs.* Quimby, 2 Bradf., 449.) But here not only was not the writ issued, but it was talked about, conferred on and resolved against. You have all the weight of these deliberations, and they are not to be disregarded, because they show the actual judgment of those people, at the time, on two points. First, that his property could not be taken from him, that the proceeding would fail, and, second, that they would watch the chances after the progress of time, and after the death, when there was no risk upon the issue whatever, and all was upon their side of the speculation, whether they could produce a judgment against his sanity. *Now*, it is nothing, nothing but the cost of the procedure against the pile that is to be won.

Mr. Parish went into the store for the first time in 1850. He looked at his books for half an hour or more, and they were explained to him. Folsom, Kernochan, Daniel Parish and Mrs. Parish were all there. Mr. Folsom's testimony we will rely upon now. If he had lived a little longer probably a different estimate would have been placed on his visit to the store. But there it is, and it is enough. If you find Henry Parish taken by his wife upon their theory, or upon our theory, going himself and taking his wife, into that store under the eye of

Daniel Parish, under the eye of Joseph Kernochan, under the eye of George Folsom, and under the test of mercantile surroundings, to examine these books, was there any avoidance of the brother? I should think not. Was there any avoidance of this book-keeper, Folsom, who did not disguise his *animus*, who told her plainly that he did not think Henry Parish had any mind? Not at all. Was it the object of Mrs. Parish to make him out to be an intelligent man, master of his own movements in the face and eyes of a malignant interest and acute observation? I agree that if a woman inside of her house can make an idiot for seven years act like a man of sense in the ordinary deportment of life, she can, by exercising over more vigorous and spontaneous minds of men who have sense, much less power, delude *them* into the notion that this senseless man is a man of sense. At all events she braved the test. They showed him his books. All those people stood there half an hour looking over his books with him and explaining them to his satisfaction.

We have, at this interview at the store, every element, both in regard to influence, to observation, to test, to freedom from restraint, that you could wish in any case, and then applying the rule of Mr. Senator VERPLANCK, that upon this inquiry, which is not of insanity or aberration of mind, but of dementia or imbecility, the affirmative facts showing that there is rational conduct, the negative facts only reduce the amount of energy, of control, and capacity.

So that, upon that single interview, from their own witness, you have a narrative of a full exposure of Henry Parish to their interested observation.

The instructive interview which I have alluded to and commented upon, at the store, leads me to apply, perhaps as well here and in reference to it as anywhere, a comparison between the *opinions* or the *tone* of the witness's evidence, and the necessary significance of his own actions and conduct. Mr. Parish's visit at the store, when an examination of the books was made by him,

under the eyes of all those observing parties, terminated in something like discord between Mrs. Parish and Mr. Folsom, in the presence and under the notice of Mr. Parish, and each of them acted towards Mr. Henry Parish and spoke to him as able and competent to be a judge of, and to have an opinion concerning, the right or the wrong of the matter of difference. Mr. Folsom having expressed the opinion that Mr. Parish's judgment would in no case be against him in reference to his conduct or attitude, appeals directly to Mr. Parish, then and there present, if he has any fault to find, and says, "Are you "not satisfied with what I have done?" Well, there is a distinct proposition. Is it in jest? Is it dishonest? Is it a mockery? Is it a dissimulation? Why, no. It is in the presence of all these parties, in the immediate scene of this return to the business place, and this examination of the state of his affairs, upon this disagreeable discord arising in regard to what the parties had felt and done in reference to Mr. Parish's affairs while ill, that this appeal was made. Now what is the response? Is it delayed? No. Was it immediate? Yes. Was it spontaneous? Yes. Was it intelligible, unmistakable, and clear, and the expression of a rational, probable, and suitable sentiment? Why certainly Mr. Folsom so regarded it. He says, "Mr. Parish immediately bowed "his head and put out his hand to me." Now there is a proposition and there is a response. There is a proposition that refers to what had taken place, as a series of transactions coming to a result, as a moral attitude which had been taken and occupied, and which had been complained of. Now was it insensible or irrational for Mr. Parish to meet this question of Mr. Folsom's in this manner? Certainly Mr. Folsom at the time did not think so; and the answer of Mr. Parish, as now repeated by him with satisfaction to your honor, shows as clear an appreciation, so far as any external evidence goes, of the force of the question, and as clear a discrimination of the effect of the answer, as if Mr. Henry Parish had spoken with the tongue.

This notion that the only mode of expressing a sentiment, an opinion, a thought, is through articulate language, is a very great mistake. Although articulate language undoubtedly furnishes the great instrument of thought and feeling, yet to say that, talking to a silent man, you never know whether he understands you or is attending to you — that the only evidence you have of the attention of the judge on the bench before you is by the interruptions by questions, now so fashionable in our judiciary — to say that more complete attention to the matter before the court is shown by those questions than by silent listening, is an observation not founded on the experience of anybody. We are not, in the customary intercourse of life, at all dependent for the great part of our impressions, or reliable satisfaction as to the thoughts and sentiments of those with whom we deal, on the words they use. Indeed, in an artificial state of society, where the relations of men are not always of the direct, sincere and straightforward character they should be, we know quite often that the sarcasm of Talleyrand is true — that the words used in many of the relations of life are not to state, but to conceal the thought and to mislead the observation, by the cunning trick of fair words, from that scrutiny of the conduct and expression of the face which speak louder than words.

Now, can any one contend that in this picture at that store there was needed, to complete the intelligent understanding and satisfactory answer of Henry Parish, any use of articulate speech? I apprehend not.

This period of time brings me to a very noticeable fact, the significance of which, as it seems to me, cannot be overrated. It will be perceived by the testimony of Folsom, of Kernochan, and of Simmons, (for I use only their own evidence now), put together, that from this period of the beginning of January, the visits of Mr. Parish to his store commenced; and you will find that they were not limited to calls in the carriage, at the

curbstone, but from the beginning were entrances into the store, with his wife, in the presence of Daniel Parish, of Kernochan, of Folsom, of Simmons, of everybody; that within three or four days of the beginning of January, when he had regained fully the health necessary to outdoor exercise, he was twice in the store; and, by the testimony of Simmons, from January, the period of his being employed there, Mr. Parish was four times within the store, in the presence of Daniel Parish at least twice, and at all times in the presence of whoever might happen to be there, as a question not controlled by himself.

Folsom tells you this, too, that up to the interview at the house when the will was delivered up, which was towards the end of December, 1849, or at the beginning of January, 1850, he kept memoranda of interviews and proceedings. He did not feel quite clear, when on the stand, whether his memoranda had included that matter; but up to that time he kept them, and after that time he did not. Then you will find that he had been pressing and anxious, up to the limits of decorum, in getting into that house, in getting into the sick room, in making any propositions in that house and in the library that he saw fit, whether regarded as decorous or not. He would go up with Daniel Parish, at his request, with Mr. Sherman, at his request, or from his own curiosity. But after those visits at the store, you find by Folsom's testimony, that he (Folsom) never made any subsequent visit at the house. Had he been excluded? Never. Had there been a quarrel? Never. Had there been any reason, honest and sincere, why, if his object was the investigation of truth, and the results of that investigation, by which the interests with which he sided should stand or fall, that he should not have pursued his visits at that house? None whatever. But it is clear that he never offered or wanted to go. No one wanted him to go any more. He had no doubts to satisfy on this subject. If, then, your honor will remember this very peculiar, and very decisive fact, that immediately after Henry Parish recovered, so that he could visit the store and come at his pleasure within the count-

ing room on the first floor; that on the first of May, 1850, *the office of that firm, which had been on that floor from time immemorial, was carried upstairs*, a straight, inclosed staircase, that no one pretends Mr. Henry Parish could ascend. Now, why was that done? Is there any reason given for it? Was it to save rent? Was it that the first floor might be more profitably occupied by Daniel and his schemes, than with the presence of Henry Parish within it? Was that the notion? What other notion can you give? Do you find this comport with the whole aspect of this case, that the only safe position of these parties was where they could watch, but yet not be exposed to the condition of an alternative of conviction against them, of proof to their own mind, a clear estoppel, in the fact that they saw, and knew, and understood everything? The learned counsel will give such explanations as they see fit—that they were more and more contracting their affairs perhaps. But they never thought of that *before*. There was only one thing that could not be done in the second story and could be on the first floor, and that was, that Henry Parish could not come up there. He had been at the store four times in the beginning of the year, 1850, examining his books and interchanging such courtesies between brothers and friends as are described. Why was he excluded now? Why shut out of the counting room of Henry and Daniel Parish? Not by barring the door, it is true, but by carrying the counting room up a ladder, where a paralytic could not climb. Ingenious! remote! but clear in its purpose when that purpose is suggested, and when comporting with what followed, as the next step of Mr. Daniel Parish. Up to the year 1849 he had preserved the intention of building immediately adjacent to his brother, and had conferred with Mr. Youngs, the builder of Mr. Henry Parish's house, on the subject. But we hear nothing more about the erection of that house after January, 1850, and the lots, as soon as a market could be found for them, were disposed of. And, so, Daniel Parish could live safely down in Barclay street,

and not be nearer to his brother. Why was this? The testimony of Mr. Henry Young, who lived next door to Mr. Henry Parish, and had no relations save that of a neighbor (except for the accident of Henry Parish holding a mortgage on the lot which he had bought), shows that Mr. Young, seeing him as he got in and out of his carriage, now and then, when Mr. Parish would exhibit pleasure and recognition—the ordinary courtesies of life between mere neighbors—Henry Youngs tells you that, from that continuous observation, it was apparent to his judgment that Mr. Parish possessed his mind.

Why, sir, could you live seven years next to a gentleman who was daily outside of his house, who was casually, as chance might favor, thrown under your observation, not less in the movements of himself than in the movements of those about him, and not know whether his disease was bodily disability or mental disorder? I do not think any man's neighbor for seven years would fail to make up, from common observation, from the very atmosphere of the locality, a full and clear impression as to whether he had his intelligence or not. And Daniel Parish, if there resident, would have been under the necessity of bringing the matter to some determination or other; and what the result of that determination would be, is shown by the abandonment of the attempt in regard to the writ *de lunatico inquirendo*. It is therefore by *withdrawal from means of observation* that the estoppel, moral, social and legal, that would be interposed to these parties, is to be avoided. I do not intend to comment on this, upon any of the nicer tones of brotherly affection, because those had been discarded long before the sale of the lots, by these people. But what motive could there be but precisely this: either of shame and confusion at the position he had taken, and at the conduct he had exhibited within that house, or this same motive that had prompted the removal of the counting-room into the second story, viz.: that there should be

none of this silent, resistless evidence accumulating against him; that he, next door for seven years, neither shows care, nor regard, nor renders aid to his brother, nor attempts, while the facts might be scrutinized, to have it ascertained whether this brother, to whom he stood next in duty, if his wife were false to him, was put in the true position, in reference to his property, that the law and justice required. For, look at it. If Mrs. Parish was false and deceitful—and that is the theory here—who was there in the world but Daniel Parish, that should have stood by his brother, and his brother's connections, and his brother's integrity? Fortunate indeed was it for Henry Parish, that the actual removal of Mrs. Parish, by death, had not thrown him into the care of the next surviving protector! Nothing of this. Mr. Daniel Parish's proposition is this: My brother is an imbecile. He is in the hands of a wicked, artful, contriving wife, and there I will leave him! there I will leave him!

The conduct then, of all these parties shows clearly this, that they did not believe that Henry Parish was, in fact, in regard to his mental condition, at all in the position, that it is now necessary for them, by evidence and in argument, in your judgment to place him. Why, sir, could not you tell, without being in the room, whether a lady or a gentleman, if you hear the tones of his or her voice, is talking to a child or talking to one equal in years and intelligence to themselves? You do not hear any words from the person addressed. You do not know whether a boy, or a girl, or a man, or a woman, from any other source of information but what you derive from the tone and tenor of the speaking person. Did any person ever talk to a child, did any one ever talk to an imbecile, in the manner that they talk to persons full grown, intelligent, and of equal discernment? Certainly they never did.

This whole proposition, to which evidence of treatment has been received by the surrogate, and is always received, proceeds on the principle that you are to judge

of the condition of the person whose capacity is under inquiry much more by others' conduct towards him, the manner they speak to him, and act in his presence, than by the opinions that are adduced, or the mere facts that are remembered. Now I have to say this, that until our learned friends shall point out something that will bear the opposite construction, I claim (and my reading of the evidence enables me to claim it with confidence), that you cannot find in the conduct of the witnesses for the contestants, in their tone, their language, or their acts, any thing in the nature of *accommodation*, or *modulation*, or *reduction*, either in the ideas or in the language, that they addressed to Mr. Parish's comprehension. Nothing whatever. Mr. Kernochan talked to him; Mr. Gasquet talked to him; Mr. Folsom talked to him, and the valet talked to him; Simmons talked to him; all of them heard other people talk to him; everybody talked to him. His wife, in the presence of every one; the Messrs. Delafield, doctors, lawyers, friends, all talked to Henry Parish; not as they talk to a child, not as they talk to an idiot, not by any simplification in form, in substance, or in words, in their communications. A gentleman talking in the circle, would, by an intelligent interruption on the part of Mr. Parish, repeat or distinctly address to him what had been the subject of general conversation before. Would he change the phrase? Modulate the tone? Simplify the idea? Never. He repeated what he had been saying. How are you to get over this? Why by the simple process of converting all the persons who talked with him, into the same state of *non compos mentis*, with himself, and then after you have made that change, you have very little difficulty in getting along. Reduce them all, and they are on the same level. But until you reduce these witnesses, it follows that Henry Parish is on their level. The casual intervention of a stranger might excuse the observance of a general tone and language, in addressing Mr. Parish; for there was nothing in his appearance that indicated a lack of intelli-

gence; but how you are to justify all these people, in persisting for years, in considering him of sound mind, and so conversing with him; and then expect, after death, that any one is to shift these scenes at once, and disclose weakness in his mind, without exhibiting folly in theirs, I am unable to say. I had spoken of the satisfactory condition of the evidence, if your honor please; and I take leave of Mr. Folsom's testimony, with a few remarks, such as to direct your honor's attention to the number of notes Mr. Folsom wrote to Mr. Parish, the number of accounts that he furnished him, the balance sheet that he carried him, and especially to one note of Mr. Folsom's, where he addresses him in reference to the execution of a satisfaction piece, and tells him, if he executes it, he will call for it, and witness the acknowledgment of it. (*Exh.* 45 *and* 48, *vol. I. pp.* 429–31.) Certainly you can see nothing, more in accordance with the proper duty of Mr. Folsom, with respect to the action or intervention he was to have, and the character of the transaction, than that Mr. Folsom supposed Mr. Henry Parish had the ability to execute the satisfaction piece. The execution of a "satisfaction piece" is, I suppose, like any other business transaction on which the rights of property are to depend. Your honor will recollect, not only that, but a vast variety of communications of all kinds, requiring action on the part of Henry Parish, in reference to property or accounts, or business, with which Mr. Folsom had intervention, that run through the whole case.

The general satisfaction which those interested in the attainment of truth, and a judgment according to the truth, should feel in the completeness of the evidence spread on the record, is marred only, by one misfortune, and that of a very noticeable character. If the rule of evidence, as held by the surrogate in respect of the introduction of the letters of Mr. Folsom, which came to the knowledge of the proponent, only after his death, should permanently exclude from your honor's judgment, or from any future judgment that shall be given in this

cause, the light which those letters are calculated to throw, not more upon the character of Mr. Folsom's evidence in general, and upon his character in general, than upon the particular points of his testimony,—as being reliable pieces of evidence of intrinsic efficacy, as speaking at the time on those very points, and in writing—if that rule of law as applied by your honor is forever to exclude them, in the decision of this case, no one can deny that by an unfortunate concurrence of accidental circumstances, the rule of law, in its maintenance, will operate very seriously on the completeness of the evidence, that shall be before you. Your honor will consider us now, as heretofore, proposing that those letters are entitled to be received in evidence, and as offering to read them in evidence, as against both sets of contestants, and certainly as against the contestants, by whom, on our notice, they were produced. Whether the position of the record, and the course of dealing with evidence, in such matters, before your honor, permits that to be an open question before you, upon the final summing up, I am not wholly advised. I wish only, the advantage of now proposing, that at the hearing, they are entitled to be commented on in evidence. If your honor decide that they are, the verification of the papers has already been completed, under your honor's directions; and if your honor decide that they are not, I suppose that any subsequent transmission of the record, would include the actual transmission of these papers, in an authentic form, to any other court which might, should a different view of the rule of evidence be taken, require their production. We suppose that, in various aspects, the introduction of those letters would have shed great light on this cause. Indeed our view of them is that, very probably, if not necessarily, they would have put a stop to any disposition, to carry this inquiry further.

But important and controlling as they are, we do not need those letters, to be able to exhibit out of Folsom's

own mind and heart, as we proceed, what his attitude, his feeling, his bias, his wishes, in this controversy are. The pages of his testimony disclose his partiality, and favor towards Daniel Parish; deep and bitter enmity towards Mrs. Parish; rash judgment on the main fact; an arrogant intervention in business that did not concern him; and which cannot be reasonably explained except on the ground of his being an instrument in the hands of others; an inability, on cross-examination, to keep his thoughts in that arrangement that he says his mind was in when giving his original narrative; the reduction of his mind to a complete state of chaos; his inability to understand questions, and begging to be excused, when this order and arrangement had been broken up, by that very disintegration which cross-examination has for one of its purposes. The folly and arrogance of the man, the deep hatred of the man, though not in black and white, as written in those letters, are nevertheless in black and white on this record, open to the intelligent scrutiny of this court, so experienced in such matters, and so able to determine. Now, sir, it is not for me to make out Mr Folsom, to anybody's judgment, since his death, a worse man than he was. Let us call him a worse witness, not a worse man. Let us say of him that he was utterly incapable, in mental or moral constitution, of maintaining anything like an equilibrium. Let us say of him that his zeal always outruns his discretion. Let us feel in respect of him, that he is a man of the strongest impulses, and of the deepest and widest self-confidence. Let us say, that though he has maintained in actual life, only the feeble and subordinate position of a book-keeper; unsuccessful in all enterprises on his own account, that nevertheless he felt and was fully possessed with the conviction, that in respect of mental power, and culture, and ability, he is quite the equal of Daniel or Henry Parish; and that really, instead of his being the fifth wheel of their coach, he is

the running gear of the whole concern; that the moment misfortune happens, everybody looks to him, everybody relies on him, and that he is under all kinds of trust and responsibility at once.

I submit to your honor, that on Mr. Folsom's testimony, taken as it reads, in respect to the intelligence and capacity of Mr. Parish, he shows that in any sense of testamentary capacity which the law requires, Mr. Parish possessed it, and that he thought so. And even now, he gives you as the reasons for the formation of his judgment, an interview of ten minutes on the 25th of August, when he asked Mr. Parish four questions; and this conclusion to him is so clear that it was not worth while to maintain any peradventure, or to observe any delicacy, or consideration which should restrain him from saying in his hearing to his wife: "Madam, he is of unsound mind!" or, "I consider Mr. Parish to be of unsound mind, and incapable of transacting any business."

Dr. Johnston and Mr. Kernochan, from their greater experience and observation of Mr. Parish during that period, could not venture to say that Mr. Parish had not the possession of all his faculties. No one has given you any evidence, up to the execution of the first codicil, that Mr. Parish did not have his mind, in the opinion of the witnesses speaking, except Mr. Folsom; and that was based upon his being in the sick room, on the 25th of August, ten minutes, and asking him four questions, to two of which he gave a negative and to two an affirmative answer, by action, accompanying them with an immediate recognition, showing a perfect condition of his senses. When Mrs. Parish said to Mr. Henry Parish, sitting with his back towards the door, "My dear, Mr. Folsom has called to see you," he turned round at once, recognized him as he advanced, and moved his left hand, feeble as it was, over upon his left knee to welcome him. Now, what a story to tell! that under these touching evidences of consciousness, and courtesy, and regard,

thus shown this man, he should proceed to talk to Mr. Henry Parish about his property and his testamentary intentions—a subject that Mr. Parish had never mentioned to him in his healthier days—that when the answers to these questions did not satisfy—was it his ear or his mind?—did not satisfy his wishes, he should rudely and unfeelingly say, "You are of unsound mind, sir!"

Now, there is a pretty beginning, and a pretty end of a short interview! "Did you lower your tone?" "No!" Spoke it right out; "did not think it was of any consequence whether Henry Parish heard it or not."

A complete judgment; only inferior in rapidity and intelligence to that of *Campbell;* who, on the sidewalk, formed the same judgment from a view of the outside and backside of his head! How strange these things seem? Are they natural? Are they honest? Are they friendly? Are they christian? Does not the attitude of all these people towards Henry Parish, in these first moments of his affliction, call to mind the approach, so significantly, and so gloomily expressed by the pencil of *Landseer*, of the birds of prey that hover over the dying camel in the desert!

Well, when, on cross-examination, you ask Folsom what the ground of his judgment was, he tells you that he "could not understand him;" and that a person who could not make himself understood, he thought, did not understand himself! That is the substance of it. Well, now, it seems to me that this topic, this controlling fact of the physical disabilities and obstructions of Mr. Parish, which is invoked, in one point of view, by the contestants, in order to produce some sort of confusion in your honor's mind, between physical depression and mental disorder, so fixes their attention on this aspect of the case that they do not look at what I suppose to be the true force and value of that element in your consideration of mental power. If Henry Parish had labored under no bodily disabilities; if he had been a sound

man, in limb and voice; if his right hand had preserved its power, and his tongue performed its office of speech, why, then, if the state of the evidence were such as it now is, as to what he did, and what he did not do, the impression would be left, undoubtedly, that what he failed to do (whether it would reduce him below the standard of testamentary capacity or not), was owing, entirely, to mental depression or defect. But, when we present a case of phenomena, which do not require, as reason or explanation of the imperfect manner in which he did things or of the omission to do things, anything but physical disability and physical obstruction, you induce almost the necessary impression, and inference, that, other things being equal, in respect of mental and nervous power, and tenacity of will, as applied to the average character and temperament of mankind, he would hardly do anything that was not absolutely necessary; and when you find that what he does do, in number, character, energy, and success, the vast variety which this record spreads before you, you have to multiply and quadruple the force of will and strength of mind, in proportion to the disabilities that made everything an effort against physical difficulty and obstructions; even those slight actions that, to a healthy man, scarcely require effort. Why, sir, there is not anything he did or was called upon to do, that, successfully done, was not, in comparison with you or me, or any one in the possession of all their bodily faculties and bodily health, as great an effort as for such a man to exert to the utmost his natural gifts. The motive that would induce a movement, by him, against such bodily obstructions, must be substantial; must be important, either in respect of courtesy, interest or duty, one or the other. For many of the actions of life, while we are young, no motive of any kind is required. Old men, in the full possession of their faculties, find that an increase of motive, as a larger weight is needed to operate a creaking or rusty pulley, is necessary to induce a movement of mind or body.

So, too, of Mr. Parish, the original facility and pleasurable co-operation of the body with the mind and with the will was forever gone; and every movement was as with a rusty, disordered machinery, that was out of gear, and irreparably and hopelessly disarranged. So that always there must be present the highest estimate, weight and significance of what was done by him, or with him in reference to his affairs; and you must add largely to the mental force and strength of will, precisely in proportion to the reduction of bodily facility and ease.

Mr. Kernochan is the next witness, and he alone, of all the witnesses for the contestants, speaks with a full measure of intelligence, of previous acquaintance, of subsequent intercourse, of at least decorous observation, of acute perceptions (except so far as his bodily sense of hearing was deadened), and of a reasonable and fair presentation before you of what lay loose and undetermined in his mind in reference to Mr. Parish's condition. In regard to Mr. Kernochan's friendship, and the warmth, the constancy and activity with which it was presented towards Mr. Parish, when we compare it with that of those who stood nearer in blood to Mr. Parish, it may seem very considerable; when we compare it with the attention, and friendship, and courtesies, and ministerings of those who stood near him in affection, it may seem very inconsiderable. Indeed to the standard that has been adopted, as a consummate description of the closest friendship that can be imagined, "a friend that sticketh closer than a *brother*," Mr. Kernochan fully came up. For between this afflicted, suffering, sorrowing man and a brother resident in the same city, a partner in the same business, and moving in the same society, you might have driven a whole regiment of friends—aye, "rich men's friends!" And so Mr. Kernochan undoubtedly stands with the merit of having adhered to Mr. Parish more closely than his brother.

There is nothing in Mr. Kernochan's testimony, upon which, in any sensible view of the law, and upon any confidence in the observance of the law, it can be claimed that a point below testamentary capacity existed in Henry Parish.

I say that fearlessly. I say you may take Mr. Kernochan's testimony (and it is the best testimony they have got, both in the quality of its observation and in the quality of its representation in this court), and it cannot be pretended that he was below testamentary capacity. Mr. Kernochan himself, in giving his formed opinions, or his unformed opinions, at any stage of his observation of Mr. Parish, does not come to the point of an affirmative answer, meeting the burden of proof that is upon these contestants, and saying that he had not testamentary capacity. I do not mean in words, of course, because he could not be asked that question ; but does not, in substance. In August, at the beginning, when the depression was greatest, the manifestations least numerous and certain, and there was added to the specific deprivation of bodily faculties the general depression of severe illness, Mr. Kernochan never professes that even at that time there was any feeling in his mind of Mr. Parish's want of capacity ; he never goes beyond a feeling of obscurity and indefiniteness. Nothing else. I shall read you, in a resumé of the opinions on one side and the other, what his final opinion was. The substance of it is nearly the same, except that the very strongest expression on the point is : "I do not think he had *much mind*." Then he goes on and qualifies that in the manner that will appear. But if the opinions of Mr. Kernochan do not bring the matter up to the point necessary for the contestants, how much is there in his conduct and in his intercourse, as shown either in the direct or cross-examination, that should vary the character and override, as the real information that you are to derive from his testimony, the measure even of that! Why, in the first place, he continues to visit Henry

Parish, on Henry Parish's account, as a friend; to show his attention, to perform his duty, and to alleviate the condition, the affliction, and the seclusion under which Mr. Parish labored. He did that for seven years. Well, now, who ever did that, in reference to a person who stood in the actual attitude of having no understanding at all? Nobody could do it.

It would be an insensible proceeding. An intelligent, quick-minded, prompt, decisive man, like Mr. Kernochan, if there was a clear judgment, or a clear argument tending to that conclusion, could never, for seven years, upon a mere matter of form or feeling, keep up even the external intercourse of visits and courtesy. Well, it is not for us to suggest that there were any motives, for maintaining a continuous and frequent observation, within that house, on the part of Mr. Kernochan, other than such as consisted with feelings of sincere friendship to Mr. Henry Parish, and equally sincere friendship towards Mrs. Henry Parish. Whatever opinion may be formed on that subject, since the death of Henry Parish, there was nothing in the mode of Mr. Kernochan's visits at that house, and nothing in the mode of Mrs. Parish's receiving him, and nothing in regard to his behaviour there, that should lead to the opinion that he was there in any other capacity than as the friend of both Mr. and Mrs. Parish in their common affliction. What does he talk to Henry Parish about? Why, he talks to him, in the first place, on the same level that he ever did before, and in the same tone and language. There never was any simplification of the manner of talking to Mr. Parish, by Mr. Kernochan, or any one else, except for the definite and distinct purpose of aiding him in reference to an answer. Very readily, very naturally, everybody fell into the notion that if an answer were wanted to some proposition, that could be acted and relied on, the question must present a single point. Otherwise, the "Yes," or "No," or confusion of the two, would be distracting, in reference to the double character of the

question; but beyond that, it is not pretended. Mr. Kernochan not only talked to him about the power of attorney, about collecting his rents, the payment of money that was collected on account of notes, and all those proper and definite communications and proceedings in relation to his interests; but after that period had passed by, when the entire performance of the commonest affairs of Mr. Parish, out of the house, needed to be in some one's hands—after Mr. Parish rode about and went to places of business himself—after Mr. Kernochan commenced his continuous habit of visiting, going on Sundays, in the evening, between church services, frequently dining at Mr. Parish's, whether at Hellgate or in Union square; during the whole course of that time—there never was a visit that Mr. Kernochan made, that he did not talk to Mr. Parish.

What did he talk to him about? Well, he talked to him about, I will venture to say, everything that he ever talked to him about before his illness, so far as the nature and description of the subjects went, if you exclude whist-playing and the pleasures of the club. He gives you an enumeration of the heads of his conversation. He talked with him about the news of the day. Well, that forms a considerable staple among the topics between two men who have lived in the city of New York together, as merchants, and having no other culture or discipline.

He talked with him about the price of stocks. That, too, was a fruitful subject, to men who dealt in the fluctuations of stocks and invested in such securities. He talked with him about the money market. And that is the atmosphere in which those people live in regard to that current of their lives that is made up of money and its operations.

He talked with him about a power of attorney to Mr. Conrey, for the transfer of City Bank stocks in New Orleans. He spoke to him about the sale of Texas lands, in which the firm was interested. He frequently advised

Mr. Parish; advised him against railroad securities, and in favor of bonds and mortgages. He conversed with him, advised with him, and had interviews and conversations with Mrs. Parish, in Mr. Parish's presence, concerning his affairs. And there is, in addition to all that he did do, this clear and distinct piece of evidence in regard to what he did not do; he never at any time asked either Mr. or Mrs. Parish, or suggested to Dr. Delafield, or to any friend of Mr. Parish's, that he would like to be alone with his friend Henry Parish for one moment. Never. Why not? Because, as he says, he never had anything to say to him that he was not willing that everybody should hear. In other words, he saw no occasion, for the interest of anybody in whose interests he concurred, to have any test of any kind, even through its application by a common friend, to the condition of Mr. Parish's mind, or the state of the freedom of his will.

Well, now, it seems to me, that there is a vast deal of etiquette about such a statement, if it is etiquette and nothing else — a vast deal of etiquette. The friend of Henry Parish, the friend of Daniel Parish, the friend of Mrs. Parish, a respected and appreciated visitor in the family, seeing all that Mrs. Parish did, all that Henry Parish did, and did not do, all that was seen, thought, felt within that house; that he did not, in reference to the interests of the family peace, the interests of property, the interests of truth and justice, the fidelity of friendship, and the obligations of a member of society—did not see any occasion of any kind for him to desire, to intimate, to propose a moment's consultation, to ascertain the mind or wishes of his friend Henry Parish! If it had been proposed, then there would have been a test, and they would have been obliged to abide by the test, both of Mrs. Parish and of Mr. Parish. For Mrs. Parish would have refused it, or acceded to it. That is the trouble. She would have refused it or accepted it; and Henry Parish, upon that test, would have disclosed

something or nothing. There would have been the alternative; and alternatives did not suit the wisdom of these watchers upon Providence. It is when, after death, the alternatives are of the speculative character, that exist in their cause now, that they can afford to expose themselves to the chances of the trial. Now, for their course in this regard there is but one or the other of three reasons: Mere etiquette. Well, etiquette will cover a multitude of short-comings. A clear opinion that (as Dr. Delafield says with regard to himself), there were tests enough, regular, natural, both in respect of Mrs. Parish's conduct and in respect of Henry Parish's condition. Or else a complicity with, or adhesion to, that plan that was to keep an attitude of observation, of "masterly inactivity."

But why did not Daniel Parish himself, some time or other, at the house, or at the store, or at the carriage, by appointment, or without appointment, by definite proposition, or by insinuation, take the position of satisfying himself on this point? Why not? Let us suppose a brother stands to a brother's person, and not to his property, in mere relationship; that it is a matter of feeling, of affection, of propriety, of family pride and interest, to know how these things are, and not ever a balancing of whether it will do for me to have this thing attempted or not, in reference to its effect on the ultimate object of his desires; not a point of consultation, as about the writ *de lunatico inquirendo*. Why did he not come forward plainly and straightly to his brother Henry, and to his brother Henry's wife, and say: "Now "Henry, if you are the master of your mind, you shall be "master of your fortunes; but if you are not the master "of your mind, you are exposed, as I infer (and I shall "be glad to have my doubts resolved one way or the "other), to the control of your wife, to such a point as "will prejudice the just expectations, not of your heirs, "but of your residuary legatees, and now the short way "between friends and relatives, is to have the thing "cleared up."

See what would have come of that. It would have brought things to some point, certainly. It would have been either the point of Henry Parish's refusing, or accepting it, or of leaving it clear in the mind of Daniel Parish that Henry had no wish on the subject. And then all he would have to do, would be to say the same thing to Mrs. Parish; and she would receive it or reject it. She would have stood on her dignity—stood on the chances of Providence, as these people preferred to do, or she would not; and in either case, you would have had some ascertainment of some kind upon the distinct proposition, that would have aided your judgment on both points, of undue influence and capacity.

Did any one ever propose or intimate it? Did Daniel Parish ever do otherwise than assume the attitude either of the indifference of policy, or of the indifference of real feeling? of the complete self-reliance of an abundant fortune of his own, and that the fortune of Henry Parish was to go as Henry Parish should choose? Where is the answer to this? Is it such as may be found in etiquette? or is it to be found in that he was under no perfect obligation to do anything of this kind? But it is not a satisfactory answer, if you suppose that the relationship was to the person, the reputation, the character, the dignity of Henry Parish, and not to his property.

Mr. Kernochan went about with Mr. Henry Parish in his carriage, to the various offices where his business drew him, getting out of the carriage, as the friendly messenger of Henry Parish, upon any service that was needed in reference to his property; and on one particular occasion, you find it in the testimony of Mr. Kernochan, that Mr. Parish and Mrs. Parish desired to go to Wall street as upon business, Mr. Kernochan being desired to get in; that without any intimation, before they got to Wall street, as to where they were to stop, Mr. Parish himself succeeded in making a demonstration, to the intelligent comprehension of his wife and Mr. Kernochan, by reason of which the carriage was stopped

at an office at the corner of Wall and Hanover streets, the *Fireman's Insurance Company;* where neither Mr. Kernochan nor Mrs. Parish, knew that he had any pecuniary interest; and where it turned out that he had but a small interest of a few hundred dollars' worth of stock. When Mr. Parish stopped the carriage, Mr. Kernochan went in. Well, did he find a mare's nest, showing an idiotic and meaningless intimation on the part of Mr. Parish? Did he find something that showed *non compos mentis?* Or, did he find something that showed the carriage in the mind and attention of Mr. Parish of a trivial investment of his property, that had not attracted the attention of anybody since his illness? He found the latter. He found this small modicum of stock, and two unpaid dividends, collectable, one then recently declared, and one the preceding semi-annual dividend. Then it was all explained; and then Mr. Kernochan gave a receipt for it, and returned with the result to the carriage.

Here, again, I would ask, where is the standard of testamentary capacity? Had he capacity to dispose of that stock, as shown by his memory, and the indication of his care that it should not be left any longer unnoticed? I think if anything can show that consciousness was restored to Henry Parish, fully and continuous with that he had before, this does show it. What do we mean by a man's consciousness being restored? We mean his "coming to himself," which is another and common form of expressing it. You do not mean that he comes to an intelligence belonging to a new created being, you mean that he is restored to that channel of individual consciousness, of intelligent existence, that characterized him before the interruption. People will show that a man never was "wholly himself again," as is commonly said; that the poet has not the same vivacity of genius, or the judge the same acuteness of mind. That is often shown. But in the absence of

proof reducing the condition below its former level, the presumption is that the restoration to the previous state of mind is entire.

Well, Mr. Kernochan sends notes, and a number of them, running through the whole period. He saw Mr. Parish examining accounts, in his carriage, at the door of the store, and in the office on the occasions I have adverted to. He dined with him, receiving from and performing towards him the courtesies of the table. He shows that there was nothing offensive or disagreeable, no want of etiquette or decorum during any of the times that he dined with him, during any of the times he met him in the library, or the sickroom—nothing foolish was said or done. Look at Mr. Kernochan's testimony on the subject of the shedding of tears, as a curious instance of the various weaknesses of human nature. Mr. Henry Parish shed tears when Mr. Kernochan first saw him. He shed tears on one or two other occasions of the same kind with Mr. Kernochan. Mr. Kernochan was asked if he shed tears himself. He thinks he did not in Mr. Parish's presence, but he did immediately after leaving him.

"Q. What, from your observation, was the cause of "Mr. Parish's shedding tears?" "A. I attributed it "both to bodily and mental weakness." "Q. What was "the cause of your shedding tears?" "A. It was afflic-"tion at seeing him in so deplorable a condition, as I "thought."

Now, you have the same deplorable condition, and the same action of shedding tears. You have got the "deplorable condition" a matter of much nearer concern to Mr. Parish than to Mr. Kernochan. You have got no cause but sympathy, on the part of Mr. Kernochan, and those tears of sympathy were honorable to him, and showed not weakness but strength of mind. But you have got in Mr. Parish, the personal experience of this same deplorable condition, a broken life, a broken heart,

ruined pride, an untimely dissolution of almost all the agreeable ties that bound him to this world, and its prosperity, that he was externally still to enjoy. And yet that he with an enfeebled body, should have shed tears on the occasion of first meeting a friend with whom he had stood hand in hand, prominently and proudly, in this city, as men of character, and wealth, and influence; that he with all the pressure of those powerful emotions, and with an enfeebled body, which was to share part of the burden, should shed tears, it was necessary for Mr. Kernochan to find an auxiliary weakness in him, in reference to his mind, to account for! But that he himself could not control his own emotion from expression in tears, never occurred to him to need explanation, either from weakness of body, or weakness of mind! Now there is a curious specimen of human nature and human testimony; an action common to both, and what makes one weep is weakness of body and mind, and what makes the other weep is affection! It is a case applicable to the whole testimony. It is not in the subject, so much as in the intelligence that is applied to it, that the judgment of any one is formed. It is not so much in what is said, but in how it is understood. It is not so much in the mind that makes the expression or exposition, whether in the higher fields of intellect, or in the ordinary affairs of life, as in the person to whom the expression is made and in his understanding of the thought or feeling, that the effect of one or the other is to be measured. Even in the lightest intercourse of life, this is so; and Shakspeare well understood it when he makes Rosalind say to Lord Biron (in Love's Labor Lost):

> "A jest's prosperity lies in the ear
> "Of him that hears it, never in the tongue
> "Of him that makes it."

So it is in every inspection. It is eye, and no eye. It is heart, and no heart. It is will, and no will. It is equilibrium of observation, or bias, or prejudice in the observer, that makes the difference, in this and in other

controversies of this kind; and if you can have any better simple test of an unconscious influence upon men's judgment, and evidence, than this; that Kernochan, upon the same phenomenon in himself and Mr. Parish, should think that one showed only weakness of mind, and the other exhibited only sympathy and affection; I do not know where it can be found.

Having thus, as I suppose, treated of two witnesses, whose evidence being inadequate, it cannot be expected to supply its place, or increase its force, by anything else in the testimony of the contestants, we now come to Wingrove, the first of a new class of observers. We satisfied ourselves with calling the documentary witnesses, and rested there, and they commenced the contestation. They exhausted the list of friends with Kernochan, exhausted the list of business men with Folsom, and now descend at once to the level of *servants*. Now, when I speak of the "level of servants," I do not speak, of course, in any foolish disparagement or discrimination in regard to their social rank, as drawing a difference between them and these gentlemen. That is not to be imputed to me. I trust I shall not be guilty of any such lack of self-respect as to draw any such discrimination. But I mean the level of servants in respect to the attitude from which, the means of observation under which, and the views and construction by which, they look at the proceedings of a family, in which they occupy the position of servants. I mean to refer to them, too, *as a class*, in reference to that condition of society which, observing no fixed rank, places no obstructions whatever, in the progress from any condition of life up to any other condition, that intellect, character, industry and virtue may accomplish for any one. I speak of them in reference to the fact that in this equal condition of society, in respect of *opportunity*, they have remained in the position of domestic servants. Wingrove, you will observe, was not, by profession or discipline, in the more elevated situation of a nurse or

attendant on the sick. He had been, and was nothing but a waiting man, in all his previous employments, except, as he states, that in the family of Mrs. Woolmer Smith, he held a confidential relation; having charge of her child, a lad of 7 years old, taking him to the theatre, London or Paris. That relation; of which we know and accompanying him about the instructive scenes of nothing but what Mr. Wingrove himself tells us, may have put him in the position of "tutor to a young gentleman of fortune," somewhat different from the situation we know he figured in here. He was not a nurse; he was a waiting man, and came in such a capacity to Mr. Parish, who did not then need a nurse, but a waiting man. He tells you his story in his own way about his names, and the various ways in which he spelt his aliases of "Doane," "Doran," "Doren" and "Wingrove," which latter had no similarity in sound to the other names, but was the name of some one he was not the son of, but who had married his mother as a second husband. Well, that is all very well. Men, however, who have risen to the greatest distinction, and held the highest position of fame in society have had but one name. You find, indeed, that the less the credit which attaches to a man, the more names there are to divide it between. Wingrove was a stout, hearty, robust, muscular person. His style of language and degree of education and acuteness are in your honor's memory; his evidence is upon the record. Now, Wingrove, or "Doran," the name he went by in this family, was there eleven months, from July, 1850, to September, 1851.

He takes Mr. Parish in a very good condition of health, and leaves him in a very good condition of health. He described the daily routine of life in the house. He gives the facts of dressing, of rising, &c., and all that he considered irregular or abnormal on the part of Mr. Parish. One of his incidents, was an attempt to discover something in his wardrobe, and another an instance, when, through his

neglect, Mr. Parish fell prostrate on the floor. He carries you through the day: tells you that he read the newspaper to Mr. Parish in the morning, and says that Mr. Parish dozed sometimes, or looked out of the window. Well, I have never had the experiment tried of a person reading the papers to me in the morning; but, I think, if I had I should be very likely to look out of the window; and if anything but the leading articles were read, and I felt disposed to doze or sleep, I would be apt to think that as good a time as another. But, Mr. Parish would sometimes undertake to find out something in the papers; and, after much looking, would not succeed. Wingrove's notion was that Mr. Parish could not find what was in the papers. The difficulty was, perhaps, that he could not find what he wished, because it was *not* in the papers; something, perhaps, that he had heard about otherwise. Why, if your honor please, do you always find what you look for? Certainly not. It is the commonest experience to look in the papers for something that you expect to see there, and which you do not find. That is not set down to weakness of mind. But if your honor makes the hunt, not having the use of your hands, and having a watchful valet by, he will use his judgment that you were looking for something which *was* there, and yet you could not find it. It was by what may be called a duality of mind that Mr. Parish had to conduct his affairs,—his own and some other persons,—and that other is the one to tell the story.

He tells you of three very impressive occurrences that took place while there; and as they are in the way of what are claimed to be irrational demonstrations, more than anything else to be found in this testimony, it is worth while to refer to them. One is, that one morning when starting to come down stairs from the bed-chamber, he turned a different way from the usual one. Well, Wingrove, his *alter ego*, had not moved *his* judgment in favor of a different way, and he attempted to oppose obstructions against this *spontaneity* on Mr.

Parish's part. But Mr. Parish had his own way, there was no yielding to influence or coercion on that occasion. He proceeded his own way, and under difficulties, too. He went up the staircase to the attic, and opened the trap-door leading to it, himself. That did not show irresolution, or incompetence to accomplish physically, under these disadvantages, a certain object, that is, going up stairs, and getting the door opened, notwithstanding Wingrove's timidity.

Well, that he did. Wingrove says he did it; and you can believe every thing that is said by the contestants, without harm to them. Now, when he had got up there, what does he do? It was a most dangerous proceeding, to Wingrove's notion, thus far, and he was exceedingly afraid Mr. Parish would bump his head. But he did not bump his head,—he controlled his head, and he went on till he came to the end of the garret, where there was a wine closet! Well, if that was a terror to Wingrove, I dare say Mr. Parish was glad of it. So far so good. Mr. Parish had gone through all these unexampled dangers to ascertain the state of the wine closet! Perhaps the danger of discovery was the greatest danger that existed to Wingrove. However, it was all right. He looked at the window to see that it was closed. It was. He looked at the door, and at the wine closet throughout, and was satisfied that in there all was right! not only did he find the body of the wine closet, but that the spirit had not departed! Now if he had tried to jump out of the window, or had intimated a desire to be locked into the wine closet, or to get a bottle of wine for his own private drinking, contrary to the restraint imposed by his physician, you might suppose that there was something abnormal or irrational in this excursion. But to wish to see that the wine closet was all right, was not unreasonable. Well, to go down again was very dangerous. In fact, so vivid was Wingrove's recollection of those dangers that he trembled at them on the stand,

and expressed his wonder at the indifference of Mrs. Parish and Mr. Parish to such perils. "You must," says the proverb, "speak well of the bridge that carries you "safely over;" and if the ability of Mr. Parish was sufficient to carry Wingrove through those dangers, which he so tremblingly describes, you must say it was enough for the perils of that occasion.

Another instance is, when he goes to the cellar. We find that he had been in the habit of going out to order breakfast, and then going up to bed. But on this occasion he took it into his head that that was as convenient a time as any other, to look after the wine closet in the cellar. He had not exhausted his research; and, finding that the one in the attic was all safe, perhaps he thought it was the more necessary to look after the one in the cellar. Well, Wingrove accompanies him there, and he does not think the dangers of this subterranean exploration were as great as in the ascent to the attic.

But the strangest occurrence was this: It seems that Mr. Parish, who was in the habit of going to the front door at night, to see to the condition of things, and to the closing of the front gate (which is as near the front door as from *here* to your honor's desks) on a particular night, insisted upon going outside of the door! And it was cold, too! Now, if there had been nothing outside that was not there always, and no motive could be imagined for a reasonable man to go outside that night more than any other, we should have had the argument, what could induce him to go out that night? But when we find that there was something out doors that never was there before; something connected with the same subject of observing that things were right and safe, why, then, in the intelligent observation of this man Wingrove, you add to the *irrationality*, as you add to the *danger*, of the excursion. Some men had been employed outside, at work that required an *excavation*, and this was to be left open all night, and Mr. Parish undertook to see for him-

self what the state of things was. He went out on to the stoop, and Wingrove attends him. That is the first dangerous movement; and then, as "it is the first step that costs," they go on from peril to peril, until Mr. Parish directs his attention to the side where the hole was, rather than to the side where it was not. That, of course, was irrational, if he wanted to see the hole! Then he approached, as Wingrove says, and found that boards were placed over it; and finding that, he tries whether the boards are strong, by putting his foot on them, and they sustain him; poor Wingrove being greatly agitated lest this platform should give way, and he and Mr. Parish be overwhelmed in a common grave. What an escape! The impression produced on Wingrove was "great agitation," to use his own phrase. He was very much agitated. His then judgment was that it was a very grave danger, and his present recollection confirms it. He went back and told Mrs. Parish of it, and Mr. Henry or William Delafield; and they, undoubtedly, yielding to the joy of the recovery, did not expend any sympathy on the peril that was past. That was very extraordinary, he thought, and not only showed weakness of mind on Mr. Parish's part, but in Mrs. Parish a lack of appreciation of the danger.

Wingrove was there eleven months, and under such an inquiry as this, "whether he ever heard, while in that "house, the suggestion that Mr. Parish had not his "understanding?" a question covering the whole period, every occurrence, he, of course going to the very bottom, to bring up the richest pearl, if he brought but one, brings forth this instance, and the only instance. And what is it? That one evening at tea, Mrs. Parish, the Messrs. Delafield, and Henry Parish, being, as usual, at their evening meal, something noticeable happened, something different from anything that had occurred before, and coming up to the requisition of the question, "whether "he had ever, while in that house, heard it suggested "that Mr. Parish had not his understanding." It is an

inquiry into *mind*, seeking to get at anything that had been said by anybody, for eleven months, that would indicate that Mr. Parish had not his understanding. Let us take the result of it. It is a fair question. Now, what is the answer? He says that one night at tea, while they were at table, there were some sweetmeats, and on Mr. Parish being helped to some, he was observed to be taeing them with a steel knife. That shows that he selected his implements for eating, that he had selected them all the time. Wingrove had been there, and this was an extraordinary thing. This is a lack of capacity—a test! Mrs. Parish says to him, "take a spoon, "my dear." He still kept on and used the steel knife. Whether he heard it or did not hear it we cannot tell. He was quick of hearing, and possibly heard it. Was it so complex a proposition, and so connected with abstract matters, that it furnishes us with a clear test, and lifts us up above business and all the other matters that we have heard of heretofore? No, it is down below any of the propositions we have made, upon which mental capacity ought to be decided. We have claimed to distinguish, in reasons for and against lines of conduct, in transactions of all kinds. We have claimed to distinguish in the more solemn and the more ordinary affairs of life. The other side have proposed to give evidence on all the same range of subjects. But, now, on the difference between a steel knife, and a silver spoon, we have got the test of capacity selected by Wingrove. Well, Mr. Parish kept on using the steel knife, and the suggestion was repeated, and after it was repeated, Mr. Henry Delafield says, "He "does not understand you," and then "the whole family "hung their heads and continued their meal." Now, there it is. There is the opinion expressed in that family, unadvisedly, upon the question of mental capacity, that he did not understand. Well, it is intended as an accidental discovery, piercing between the joints of the harness that the contrivance of all these parties had succeeded in keeping round Mr. Parish, and which had defeated the observa-

tion of Mr. Lord, Rev. Dr. Taylor—the observation of every one for two and a half years—and the family showed by their conduct that they were mortified at the discovery that had happened, and which was forever to shut their mouths against the suggestion that Mr. Parish had his understanding and will!

Now here we have a singular evidence of how absorption in one aspect of an incident, will entirely shut out the mind and thought, and apprehension, from the necessary consequence which, on every principle of human evidence, must follow, from this being *all* that Wingrove can say on the comprehensive question, either on the conduct of Mr. Parish, or the action and demeanor of those about him for eleven months;—a tea-table willfulness, or absence of mind, that made him eat a plate of sweetmeats with a knife!

Well, sir, I will not intimate, that any observation by servants that may have lived in your honor's family would be able to disclose any absence of mind or unreasonableness in your conduct; but I certainly would not like to have mine exposed to an observation and judgment of that kind, if my mental and testamentary capacity was to be put to the test of my casually doing something that seemed perverse, against the intimations of those who wished to correct my error, or restore my absent thought. There is no avoiding this conclusion. I take the story as Wingrove tells it, and take as a part of it, that it is *all* he has to tell on such a subject. And when you find that besides being the only incident of the kind within the term of his service, it is the only incident within the whole seven years of illness that shows any intimation or movement of the kind, in that family or out of that family, down in Wall street or Pearl street, or any where and every where that Mr. Parish went—the only one, I am supported in the overwhelming weight of the proposition, that you must look at the thing stated as a selection of the worst thing and the only thing that had been said.

Mr. Henry Delafield says he has no recollection of that; no recollection of the misuse of the knife; no recollection of his having said anything of the kind, and no recollection of the family having hung their heads. Now I suppose it is very unimportant whether Wingrove remembers it correctly, or not. I suppose no learned judge would like to put the determination of the question on that. But probably, as Mr. Henry Delafield does not remember it, a fair view of the matter is: that here stood this waiter; that there sat Henry Parish; and he took up a knife to eat some sweetmeats; and Mrs. Parish said, "My dear, take a spoon," and he did not hear her, or, hearing, did not care to be aided in the matter, and thought he could get along very well; and she repeated it, and then Mr. Delafield said, "he does not "hear you," or, "he does not understand you," and then the parties went on with their meal. Wingrove adds that they "all hung their heads." Now, although man is born to "lift his head towards the heavens," yet in eating he does not take that posture. They went on with their meal in silence, not having much to say, as is very usual among the habitual members of a family.

That is all I shall say about Wingrove's evidence, except, what I had intended to advert to in Clark's testimony—the occurrence at Root's. We have the same trait, that this was an exception to the order of his daily drives. What was it that distinguished that occasion from others? By Wingrove's testimony, taken in connection with Clark's, you find that Mrs. Parish, still preserving the desire to furnish a daguerreotype of herself to Mrs. Payne, on going down town with Mr. Parish one morning, undertook to stop the carriage at Root's in order to have the daguerreotype taken. Clarke says the habit of the drives was to go down town to attend to the business calls of Mr. Parish, and not to stop, on the way down, for any of Mrs. Parish's occasions in reference to shopping. The habit of the drives was, after the com-

pletion of the business of Mr. Parish, on their return, to stop and attend to whatever Mrs. Parish required, in regard to shopping. But on this occasion there was a departure from that rule; Mrs. Parish went in, and was there some time. Now no one speaks of what had passed between Mr. and Mrs. Parish on the subject of her going in. It is natural to suppose that they had spoken of it, and as to the time it would take. Well, after she had been in there some time, Mr. Parish became impatient. Now, Mrs. Parish had told Wingrove if Mr. Parish became impatient to come in for her, but Wingrove thought proper not to go in for Mrs. Parish, and thinking perhaps that she wished to remain a little longer, he undertook to manage the matter so as to serve both master and mistress; a thing that Mrs. Parish, during the long years of her care of Mr. Parish, never undertook to do. She never undertook to make that divided service, and on this occasion she was true to the whole tenor of her life, and recollecting that it was not the habit of Mr. Parish to pause on his way down town, she left directions to Wingrove to call her if Mr. Parish should become impatient. But Wingrove undertook to give her a little more time, and Mr. Parish finding his commands not attended to, becomes irritated, loses the command of his temper, and makes strong indications that he will have his will attended to and obeyed by those servants. He makes the indication of "down town." Wingrove construed it to be "down town;" "Mrs. Parish is out of the carriage, drive me down town." But that is a violent interpretation. The indication was to call Mrs. Parish, that he did not want to wait any longer, but wanted to go down town. Well, Wingrove still did not go. Mr. Parish thinks this is very strange, my servants not obeying my orders! Is it my wife's directions? And then he becomes so demonstrative to these servants, in voice and gesture, that, as is natural, some of the crowd, which is so ready to bestow its attention on what-

ever does not need it, are attracted to the carriage, and the coachman, a man of good sense, at once solves that immediate difficulty by driving on, making a circuit of a block or two, and coming back, and in the meantime Mrs. Parish had come out, she gets into the carriage, and they are all right and regular again.

These are the circumstances they prove, and all of them will be dwelt on, I suppose, in their separate character, as if they were the only evidence in the case ; but I am utterly fearless of these circumstances, as against the general tenor of life, as testified to by those very servants who testify to these exceptions. It is the exception that everywhere proves the rule. I say, that, take their exceptions and take their testimony, and they all prove testamentary capacity.

Now, there was an article about the Phœnix Bank that Wingrove read over to Mr. Parish, at his request, *four times*. There we have a selected instance. He did not attend to other parts of the paper but looked out of the window or dozed, while Wingrove with I know not how drowsy a tone was reading leading articles. But when we come to an article especially relating to the Phœnix Bank, in which he had two thousand shares, where he had kept his account and where his banking transactions of all kinds were carried on, his attention is interested ; and it is a reasonable subject enough to have his attention excited by. Here is a subject: "now read it again." He read it again. He could not tell whether it was a financial statement or not,—whether it contained a date or dates, whether it was an intimation that there was going to be a defalcation, or whether it was any of the ordinary proceedings of banking business. But on the part of Mr. Parish there is interest? Yes. Attention? Yes. Perseverance? Yes. A result accomplished? Yes. With the two intelligences of Mr. Parish and Wingrove, it took a four-fold pouring out of Wingrove into Mr. Parish, to satisfy Mr. Parish that he had read that right. But he stuck to it, until he was sure that the vehicle had not absorbed the substance.

George S. Simmons, the next witness, does not cover so much ground, or detail so many circumstances, or speak as loosely or so coarsely as Wingrove. He fills a gap between Fisher and Wingrove. Then we have a long period after Wingrove, from 1851, where Wm. Brown, our witness, takes up the chain, to 1854. Then after him, we have James Clarke, a witness who fills up four and one-half months,—from December, 1854, to April, 1855,—and there we stop in the course of valets, being a continuous line, I believe, from July 22d, 1849, to some time in May, 1855. The names of two valets, who make up the last year, were known to our opponents. They were not produced. They could have called them if they saw fit. We had no occasion to call them. It never would have done for us to add to this accumulation of testimony from the class of servants, in the face of the multiplied observations from other classes of witnesses, by calling two valets who had lived there four or five months each, and who were there long after the last testamentary act of Mr. Parish.

There are other witnesses who speak to mental *capacity*, and their names are all I have occasion to ask your honor's attention to

Michael Quinn, who was waiter on the door from November, 1848, to October, 1849. He left in October, although his certificate is dated November, and the sick-chamber period, which went far into September, he knew nothing about; that is, in the ordinary course of his employment. Quinn says that, as he saw Mr. Parish lying on his bed, while in his sick room, "he looked half dead and half alive." Well, that is a general and satisfactory description of debility following on such an attack, in its first stages; but I cannot know, how any one is to say that it is an analysis of his mental condition.

Wood Gibson, a saddler, gives no opinion at all. He saw him when Mrs. Parish went there about some harness making.

James Mulligan, a blacksmith, with whom Mrs. Parish had some quarrel about the amount of a bill, does not

express any opinion. He has his notions, and says that when he wanted to speak to Mr. Parish about the matter of the bill, Mrs. Parish said he did not understand. Why would he understand it? Mrs. Parish had charge of the matter, and when Mulligan undertook to appeal to Mr. Parish, she said: "He does not know anything about it." Well, that is a thing of common occurrence in a lawyer's office, when a man comes in and undertakes to speak to one partner or clerk about a matter which another has in charg e.

Whitfield Case. The substance of his testimony is, that he cannot give any opinion. He was the butcher who, we are told, was not so intelligent of Mr. Parish as his partner, Vandewater. Vandewater understood him much better. They might have called him, but did not. We were satisfied with the case we made without calling him.

Theodore Austin, the poulterer, at whom Mr. Parish (as *he* says) shook a cane, through the carriage window, when he flourished a large collection of game in his face! Well, Mr. Parish felt an aversion to that kind of exhibition. Perhaps, too, Austin talked as fast, as vendors of game are apt to do. He says Mr. Parish shook a *cane* at him. No one else testified that Mr. Parish carried a cane, either in or out of the carriage. Shook his crutch, perhaps. Well, Austin must be lacking in capacity, if he could not tell the difference between a crutch and a cane, or else his memory is not good. His opinion is that Mr. Parish was not in his senses, or right mind.

Then we have *Stephen Sammis*, the shoemaker, who gives evidence about the kind of shoes Mr. Parish used. I suppose he does not know very well whether Mrs. Parish, in selecting shoes for Mr. Parish, consulted his wishes or not. She had some knowledge of Mr. Parish, antecedent to the time he went to Sammis' shoe store. She had known what kind he used all his lifetime. If she was parsimonious in the price of shoes, as Sammis thought, looking at it through the amount of money, so be it. That does not touch the question of testamentary

capacity. His statement is this: "I got the impression, "the first time he came to the store, that from some "cause or other he was not capable of doing any busi- "ness, and I never lost that impression." Now, there is a fair statement that he got the impression before he had any observation of him, except the brief one of this first inspection. All that he concluded was that for some cause or other he was not able to do business. Well, it depends on what his business was, very much. He could not have performed the business of ground and lofty tumbling very well, nor any that required activity of body. Whether he could transact the business of lending money on bond and mortgage, or buying notes, or anything of that sort, Mr. Sammis, having no such business of his own, could not determine. The business of buying shoes, if it consisted in going into the store, and picking out the shoes he liked, with his own hands, he was not able to transact, for some cause or other.

Wm. J. Jones, the tailor's foreman, remembers having carried samples of cloth—three shades of olive, and three of drab—to Mr. Parish, and Mr. Parish, in revolving the distinctions between them, did not show that appreciation in the choice, which a tailor's foreman would be apt to exhibit. His testimony is, "I consider he was "imbecile, both in body and mind."

Now, let us see what is the testimony of those witnesses who had more continuous experience on the subject. James Clarke's opinion is: "I think his mind was "not right." "Right" is about the most definite word in the language. If a man is of "right mind," then he is everything that he should be in reference to mind. The meaning of it undoubtedly is, that his condition was not that of complete understanding, and activity of mind, That is what it means. He puts it in the negative; that does not mean anything except the smallest possible deduction from absolute integrity of mind.

Then go back to Simmons, who had months of examination, and he says: "I should not think his mind *per* "*fect*."

You have no difficulty in Campbell, who saw him on the sidewalk, saying he was an "idiot," or in Jones, who saw him on a sample of cloth, saying he was "imbecile," or in *Austin*, who shook fowls at him, that he was "not "in his senses or right mind." But when you come to James Clarke, who had an experience of four months, he says: "I think his mind was not *right*"—all a negative form. You cannot get him to say he was imbecile, because his own statement would contradict it.

Simmons thought his mind was not perfect. That comes about up to the testimony of Dr. Halsam, cited in the Lispenard case, who, when upon examination as an expert, he was asked as to soundness of mind, gave as a preliminary answer, "that he never knew a man whose mind was sound."

Now we come to *Wingrove*, who had an experience of eleven months, and his opinion is so instructive, in the form in which it is presented, that I shall ask attention to the whole of it. (Part 1, p. 463.) "I considered Mr. "Parish very much astray in his mind, and sometimes "much more than others." Then he was sometimes much less astray than at others. If he had stopped there, you would have had a more *expressive* opinion than you get through the whole of these servants, produced by contestants. What does his sense of right lead him to add? "I judged generally from his conduct and actions "with myself, and facts that appeared before me from "day to day. I explained to Mr. Wm. Delafield, as early "as the third day of my being in the service, that if I "thought he was engaging me to attend or wait upon a "gentleman like Mr. Parish, I would not undertake the "situation on any consideration. I said so, my belief "being that Mr. Parish was much astray. That was "always my opinion, and is now — at the present."

Now, here you have an intimate admixture of his own personality with Mr. Parish's, and his consultation of his own comfort, and his own ease, which is evidenced in

his description of the scenes through which he passed, of danger to himself. As early as the third day of his being there, he told Mr. Delafield, that if he understood he was engaging him to attend or wait upon a gentleman like Mr. Parish, he would not undertake the situation. That was a perfectly plain intimation to this family, that he was an observer, who had formed an opinion adverse to the ability of Mr. Parish. Do they discharge him? Three days of observation, and a discharge mutually satisfactory; for he says he wished it? No, he remained as long as he chose, and left on his own account, to go to England. When he came back he called on them at the house, expecting, perhaps, to be restored to his place; but during his absence another person had been employed. They showed no disposition to get rid of him, to shut his mouth, counsel, school, or at all defeat, his observations and his judgment. They knew what was the truth, and they were willing he should be there, with the bias thus early obtained, to complete his observations, and conform his judgment, as it should happen to bring him out, at the end of the service. This is a complete illustration that there was no preparation for evidence in this case. There was not affirmatively, and that there was not negatively could not be more strongly shown than here.

We have *Mr. Nicholas G. Ogden*, who was cashier of the bank and had some transactions with Mr. and Mrs. Parish at the bank. He says: "I could not satisfy "myself upon an interview with Mr. Parish, whether he "was of sane mind and knew what he wanted or not." You have nothing here. He could not upon a single observation satisfy himself one way or the other. It is but negative evidence.

George W. Folsom says: "I think through that whole "period he was not far removed from an imbecile, still "retaining some memory, some lingering ideas of former 'business habits; constant efforts to express himself, "without the ability so to do, without the mind to 'enable him to do so."

That is always the case here.

The reason for this failure to make clear manifestations, although there is so much of bodily disability to account for it, does not enter into his consideration. That his efforts did not indicate what was in his mind seems, to Folsom, to show that he had no mind; and his failure of success was not attributed to bodily infirmity, but that he had not any ideas to express; and that his constant efforts to express them, yet without actually speaking, was a reason why he had no ideas, because the success were so disproportionate to his efforts.

Joseph Kernochan is the only one left who expresses an opinion. He says: "I did not think that he knew "*much*. When a person neither writes, nor speaks, nor "does *much*, it is *difficult to judge*. I don't think that *he* "*had much mind*."

It is very plain that this opinion of Joseph Kernochan, supposing he had stood alone, does not bring us down below the grade of testamentary capacity which any and every court has laid down. He admits as distinctly as possible that he had mind, and that he did know something. Now, when you have that condition, in order to determine what Mr. Kernochan means by not having "*much* mind," you must take *his* standard and habit of thought. He has not been in the habit of considering any person as having much mind who had not rapid and clear intellect, and vigorous self-control and energy. But, the qualifying expressions he throws in, clearly show that Mr. Kernochan did not intend to judge this case by any judgment of his own; that he was willing to state plainly and fairly that what it depended on was the observations that he made, and that when the elements of that observation excluded Mr. Parish from writing or talking, or any physical ability to do much, it was difficult for him, Mr. Kernochan, to judge.

That is all I shall say with regard to the evidence for the contestants, and I have been more full on that than

I shall feel at liberty to be upon the evidence on the part of the proponent, because it is fair that the counsel for the contestants should be aware, in general, of the view and estimate which we take either of a compend or of the separate parts of their evidence. There are fifteen persons testifying for the contestants who do speak—not all in giving opinions—but who do speak on some question or other connected with an observation of Mr. Parish, casual, trivial, or considerable, as the case may be. Of them a very great part speak from that isolated kind of observation that I have remarked upon. The opinion of Mr. Gasquet, who came in later, is: "I should have "judged he was not in a state of mind to conduct any "business. I couldn't understand him. He could not "make himself understood. There were moments when "he seemed to look intelligently, as if he wished to "make himself understood; but I never could get at "anything at all. I should say that his mind could not "have been active and clear."

Unless you have a philosophical observer, who distinguishes between physical disability and mental disorder, you cannot very well get at any other result than that which Mr. Gasquet, a fair man, no doubt, arrived at. He saw Mr. Parish shed tears in his presence himself, and testifies, as I suppose, to acts and conduct on the part of Mr. Parish that raise him quite above the level of testamentary capacity. For, as I have said, when stating the law, it is no part of our view of this case, that Mr. Parish stood, as to testamentary capacity, at this level that the law requires. Our proposition is, that he had the fullest testamentary capacity, and that if there has been any testimony that he had not as full and clear a mind as before, it is to be attributed to physical disability.

On the part of the proponent, then, we have, first, the documentary witnesses. And who are they? Mr. Daniel Lord, as to each of the testamentary papers. Daniel D. Lord, a further witness, and the only surviving one (Mr.

Holbrook having died), of the first and second codicil. Mr. Davis, as witness of the second codicil, with Mr. Lord; and Mr. John Ward, as witness of the third codicil, with Mr. Lord.

The examination of Mr. Lord, as a witness, in this case, consumes 140 pages, of which but ten are in the way of direct examination, in the first instance. I have observed upon Mr. Lord's intelligence, integrity and independence, sufficiently, in regard to his being the professional adviser as to the testamentary papers, to render it unnecessary to say anything upon his position as a witness. So far as he had any social relations, to those two families, you will remember, that he had no acquaintance with Mr. Henry Parish, but that his family were intimate with Mr. Daniel Parish's family, and Mr. Lord himself stood in that relationship of acquaintance, which belongs to a busy man in reference to that family; standing nominally on a footing of acquaintanceship, that was actively supported by the females of the two families. Then, so far as any associations are concerned, and personal intimacy, you have the advantage of Mr. Lord's feelings, in favor of Mr. Daniel Parish's family; and, as Mr. Lord said, he esteemed the intimacy of his family with Mr. Daniel Parish's as most acceptable. I will say nothing of Mr. Lord. Your honor knows him as well as I; and a sad thing will it be, both for bench and bar, when before any judge it becomes necessary to apologize for any act of Mr. Lord's, or to eulogize him.

Dr. Edward Delafield, is the next witness. His examination occupies 110 pages, of which far the greater proportion is in the way of cross-examination, only 36 being occupied on the original direct examination. It employed about a week.

With regard to Dr. Edward Delafield's testimony, it ought to be sufficient in this case (certainly together with Mr. Lord's), against any weight of evidence, found on the other side. And why? This case differs from all

others, that have really attracted much attention, in having been presented, at all times, to the observation of numbers of intelligent persons, whether honest or not, is a matter that every man's case will present for itself. The ordinary cases of obscurity or doubt, have been where there were only uncertain, or casual, or transient opportunities of observation, by this or that person; so that in order to make up anything like a continuous story of the man's life, you have to bring together fragments of observation, and piecing them all together, are still not able to make out one continuous current of observation of the whole. But in this case we have, all the while running on, a numerous body of observations, each forming a complete and continuous survey, by single and intelligent witnesses. Now, take Dr. Edward Delafield, and separate him from his relation of brother of Mrs. Parish for a moment. Take him as a physician, as the physician of Mr. Parish; as familiar with his bodily condition, habits of mind, run of thought, and demeanor of life, antecedent to the attack. Is he lacking in any one of the intellectual qualifications for a correct observer? I should say not. What are these qualifications? Clearness of judgment, habits of observation, discipline and practice in weighing the results of observation. Was he old enough? Why the long discipline of a life in this city, sharpens all a man's intelligence, in respect to the daily workings of men's minds, and as much in a physician's, as in any other pursuit.

But besides that acquaintance with the subject, he did not require to form any impressions about Mr. Parish. He did not need to get at what his habits were, either of mind or body. He knew them and could present both sides of the examination. He had known what Mr. Parish's condition was, physical, mental and social, before the attack, in fourteen years' communication. Then he has the *discipline* of the profession. He is an expert. Did he, after the attack, have opportunities of complete and thorough examination? Certainly he did, if you

consider the number, the occasions, and the necessity of these visits. Did he, in fact, besides mere professional visits, have other intercourse? He did. Out of the 2,400 or 2,500 days which passed from the attack to his death, Dr. Delafield saw him on from 800 to 1,200 days. There you have a body of observation, and a continuity of observation, the result of which he is able to accumulate in his testimony before you. Did he do it? Did he observe? Yes. Did he make any tests for the purpose of determining whether Mr. Parish had mind or not? No. Did he consult anybody in reference to whether he had mind or not? or, for the purpose of examining whether he had mind? No. Why did he not? He had no doubt on the subject, from the manifestations which regular attendance presented to him. He had no doubt, and nothing to consult about; therefore, no intervention of another's judgment was sought by him, judicially, or as an investigating inspection. That is his statement. If his statements are true, in regard to his own actual observation, the means and the result, then clearly he had no reason to consult or doubt. Does he give you on direct and cross-examination a body of evidence adequate to enable you, unassisted by his own judgment, yourself to determine whether he could see, whether he could remember, whether he could honestly detail, and whether the body of his observations determine you one way or the other on this question of testamentary capacity? I suppose he does. He carries you through his whole lifetime, telling you that he acted on the basis of Mr. Parish's full and complete intelligence under his responsibility as a medical adviser; and that is a good deal in treating a man that had as many diseases as Mr. Parish had; apoplexy, consequent paralysis, spasms, difficulties of the eyes, of the lungs, disorders of the bowels, "all the ills that flesh is heir to" accumulated on his suffering body, during that seven years. Besides this necessary and even tenor of observation, what was there special in his medical attendance? It was in regard

to experiments with his sight, and care for it. In the first place, the selection of glasses, and the coöperation of Mr. Parish in reference to the subject and in aid of the selection. So, too, in the process of the experiments in reading, the extent of his capacity to read different sized print, at this and that distance, to discern a picture at a certain distance, so that all the fine lines of the engraving would be visible. Was there any disorder, any violence, any distortion of purpose on the part of Mr. Parish in any of these experiments? None, whatever. Did Dr. Delafield suppose he read? He supposed so, and had just as much evidence that he read as any one would have, looking over the shoulder of another, who was read ing, but not aloud. He asked him, if he saw certain type, at a given distance, and received an affirmative answer. Again, if he saw it at another distance, and was answered in the negative. He conducted all these experiments, and with a result that was ascertained. On the whole, if there be any reason by which the competency of a witness to know what he is speaking of, and to give a judgment concerning it, is to be measured and determined, every such reason brings up Dr. Delafield to the highest possible standard of intelligence and capacity. There remains to be considered but the single notion of whether, in his own personal character he is honest, or whether, being honest enough in the ordinary relations of his life, there is not, in the position of brotherhood to Mrs. Parish, something that should bias his judgment, or warp his observation? Well, it is time enough to defend our witnesses when attacked. With but one single exception, no witness of ours has been exposed to attempted impeachment, and no one to the form of direct impeachment, in regard to character. It is enough to say that Dr. Edward Delafield is to be believed on every other case, than this, in which he speaks. If in this case your honor is to condemn him, because he is the brother of Mrs. Parish, no argument of mine can show that he is

not her brother. If you are to condemn him for anything that appears in the tenor of his examination before you, or lacking in candor and ability, I am ready to rest it on that judgment. It may impress others differently, but it impressed me to this conclusion, and deliberate judgment, that I had never known any testimony to be given, which was so clear from any objection, to be even felt or suggested on the part of those against whom it was given, as being inflamed, influenced, or at all affected or shaped by any feeling, or any kind of favor, towards the party, on whose side he was called. I should rather complain of this witness, as of some others in this case, that the very fact of their relationship to Mrs. Parish has deprived us, by scrupulousness, of much force that we might otherwise have had; and that, from an impression which it is very difficult for a clear-headed, upright witness to avoid, and from a difficulty which it is very hard for an upright judge to avoid, when he stands in judgment between parties towards one of whom he is affected with proper relations of esteem and intimacy. Such a judge and such a witness can readily resist the impression of favor, but he cannot readily resist the impression, the enticement to *disfavor*, towards the party whom he might be supposed to favor, from the very fact of that relationship. And you may rely upon it, that if Dr. Edward Delafield had stood in no relationship to Mrs. Parish except as attending physician, the tenor of that testimony would not have failed from its present force, to the disadvantage of the side that we represent.

Next comes the Rev. Dr. Taylor, in the order of examination. Who is he? What the range of observation on which he is to testify? and what were his relations to Mr. Parish? I will not recapitulate them. He is rector of a church with which Mr. Parish, a head of a family, was connected; an acquaintance of his, who knew him well, had intercourse with him and Mrs. Parish, visited at the house. His early introduction to Mr. Parish, after

the affliction, had reference to the spiritual care of his parishioner, under circumstances of physical debility and those solemn expectations and feelings which a near approach to death should encourage and does usually develop. He formed an opinion. It was as responsible a judgment for him to form as yours will be for you. I apprehend that the interests and dignity of God's worship, in the guardianship of the rector of a church, are not private matters. I think Rev. Dr. Taylor was placed, and felt that he was placed, under solemn obligations, in determining whether the ordinances of religion were to be administered to Henry Parish. They were sought on Mrs. Parish's part, as was natural, on behalf of her husband; but they must be duly received on his part, and those ordinances of religion cannot, without sacrilege, be administered, unless the mind of the person who is to be an actor in them, is properly disposed. Undoubtedly the last ministrations of religion, which proceed from the bounty of the church, so to speak, and in the acceptance of which the mind and heart of the recipient take no part, may properly be administered, when life and sense are so far gone that the moment of dissolution is at hand, and those offices of religion but wait on the soul to the gates of death. But these were not ordinances of that description. They were of the nature that, if applied at all, according to the canons of the church, according to the obligations of his office, according to the necessary respect for religion, there must be a reasoning, well-disposed acceptance of, and action on the part of Mr. Parish, in their communication. And Dr. Taylor, in the ordinance of baptism, and subsequently in the ordinance of the Lord's supper, was put in a position of observation, to see whether the communication of these ordinances was suitable on his part. They could be so only as they were suitably accepted on Mr. Parish's part. Is there any doubt of this? Undoubtedly the ordinance of baptism was postponed at one time, in reference to manifestations that Mr. Parish made. The appointment had been made, and Mr. Parish, on the

approach of the celebration that was to mark his voluntary and final adoption within the church, by the ordinance of baptism, which had never been communicated to him, did exhibit, for some reason or other, a sense of unpreparedness for that office; and when, by the ordinary mode of inquiry, it was discovered that there was nothing external that should postpone it, and nothing left but the condition of the mind and heart, an inquiry on that subject discovered that that was it; and his pleasure and joy that he had been able to disclose the fact that it was not from any perverseness on his part, but from a sentiment or feeling of religion that it ought to be postponed, was exhibited in his face. And when, after the postponement, it is administered, and when, through the whole current of his remaining years, the ordinance of the Lord's supper was administered and received with order and peace on his part, what can you say of the evidence this furnishes of the condition of his mind, and of the condition of his self-control, which induced him to, and supported him in, all these solemn acts of life, and in the judgment of this pastor of his, made him a proper recipient of those ordinances? What should you say about it? Should you adopt what, in vulgar scoffing, is said to be the feeling of many, that "religion was made for fools," and that it is all mummery, and all priestcraft, and all conventional, and all official? Shall it be said that Rev. Dr. Taylor,—under some influence not very well explained, certainly not more than that of the rector of the church of which these persons were parishioners,—that he was not only willing to prostitute himself and his character, his truth and his duty to the purposes of fraud, but that he was willing to do so while clothed in his priestly robes, and with the most solemn emblems of religion in his hands?

Well, be it so. Let us understand what the length and depth of these demands are,—how far they reach,—how deep they cut,—how they will oppress and put to scorn the relation of marriage, which obtained between

these persons; how they will debase the integrity of the law and the lawyer; how they will corrupt the intelligence and integrity of the medical profession; and how they will break down the very institutions of religion and its ministers under some monstrous efficacy of conjury, that can make them all take their places and perform their parts in this act of skillful fraud.

Now, Dr. Taylor being an observant man, accustomed to a variety of characters, sees a great many things not connected with the immediate discharge of his professional duties. He tells you about Mr. Parish adjusting his glasses to read, and then reading. Why, Mr. Parish must have been a co-conspirator with Mrs. Parish, if he would give the appearance of reading, when he was not either reading or able to read. The Doctor tells you, of all the circumstances coming to his knowledge, to the final prayer at his death-bed. There is his testimony. Read it all. See it all. Judge of it all. But there are one or two instances that may be taken up here, as well as any where, in the observation and testimony of Rev. Dr. Taylor, and these are the applications to Mr. Parish for pecuniary donations or subscriptions for charitable purposes. The communion gifts are in the usual manner, and are spontaneous with Mr. Parish. Dr. Taylor had, in connection with the church of which he was rector, certain charities, such as a chapel for the poor, and a school of a particular description. There was a contribution for an organ, a contribution for the school, and a contribution for the Eye and Ear Infirmary of $2,000; and the circumstances under which all of these were made are detailed. Dr. Taylor in this last instance, gives you the way in which Mr. Parish's mind was brought to the limit that he would make for his subscription, and, on the intimation to him that perhaps he would like to give more than $2,000, his immediate, significant and emphatic denial.

Now, I take it, sir, that there is not any rule of law that will make that gift of $2,000 collectable by Dr. Tay-

lor, that will not make this will a valid one. I know of no difference between a deed and a will in respect to statutory requirements. But I do not think, sir, that if an action were to be brought by the administrator of Mr. Parish, to recover that money from the Eye and Ear Infirmary, and Dr. Taylor were the only witness, that a recovery could be had.

Mr. Wiley was examined at great length. His testimony runs through fifty-eight pages, of which there are about twenty-three in direct-examination. He was a a partner in the concern, and was no more friendly to Henry than to Daniel, that I know of. Certainly no enmity to Daniel Parish is shown. They were all partners together. He comes here and speaks. He certainly has experience and intelligence, and knows all about Mr. Parish, both before and after his illness. He gives you an account of their ordinary intercourse, their business intercourse, and some transactions of borrowing money. And no one will say that he borrowed money from Mr. Parish that he could not get elsewhere. He borrowed from Mr. Parish to oblige Mr. Parish, who wanted to invest money safely, just as Mr. Parish had borrowed from the Phœnix Bank some large amount, paying interest thereon, to assist it. Mr. Wiley was a far richer man than Mr. Parish, and could get money wherever he wanted it, and as much of it as he wanted. There is one incident which occurred in May, 1855, in regard to a note for $20,000 for twelve months, given by Mr. Wiley for a loan, that has a peculiar character, and is well worth calling attention to. Mr. Parish had agreed to lend $20,000 to Mr. Wiley. Accordingly, he drove down to Mr. Wiley's office, and Mr. Wiley told his clerk to fill out his note for $20,000, to be paid twelve months hence. Mr. Wiley, without looking at the note, took it out to the carriage. Mr. Parish took the note, read it, pointed to the end of the note, and handed it back to Mr. Wiley. Well, was there anything wrong about it? Was his action rational

or irrational? Was it reasonable, or had he forgotten what it was all about? Why, the only trouble about the note was this, that it was a note which would have restored to Mr. Parish, at the end of twelve months, $20,000, without interest. Mr. Parish did not suppose that was to be the character of the transaction. He saw there was an inadvertence or mistake. Mr. Wiley, on looking at it, saw that the words "interest from date" had been omitted. He took it back, supplied these words, returned it to Mr. Parish; Mr. Parish looked at it as before, bowed his head in acknowledgment that it was right, put the note into a satchel, and they went on in the carriage.

Now, I think that such an incident as that is an offset to any point of negative or doubtful judgment or action, stated by the witnesses on the other side. There is another incident respecting one of those loans, about Mrs. Parish being desired to draw a check when Mrs. P. showed him that there was not that balance in bank, and he persisted in having the check drawn. Now, if the bank agrees with some of its depositors, to permit them to overdraw, there is no irrationality in that.

I do not expect to stand upon any *one of* those actions or occurrences; but neither do I expect, after this, to stand upon any of the mere insignificant and indecisive actions, detailed on the other side. I can rest on the *tenor* of the whole; and I think as safely on the tenor of the contestants' testimony, as of the proponents'.

In *William Youngs* we come to a different sphere of life, but yet not out of the range that includes the elements of accurate observation, previous acquaintance, intelligence, an honest purpose, and an unsophisticated relation of what he heard and saw. William Youngs built the house in Union square, and saw Mr. or Mrs. Parish almost daily during its construction. He had been engaged in the building of Trinity Church, came with the best possible recommendations to Mr. Parish, began the house and finished it to the satisfaction of Mr.

and Mrs. Parish. was paid for it, and occupied, for two years before the attack, the position of superintending repairs, alterations, and all the endless work, that belongs to the building of a house. During Mr. Parish's illness he maintained the same relation and had frequent intercourse with Mr. Parish, rendered his bills, which were read and explained to Mr. Parish who understood them. What else did Mr. Youngs do? Why, he borrowed money of Mr. Parish. Well, is everybody that borrowed money of him to be suspected? Is Wiley to be suspected? He also borrowed money. How did Youngs borrow it. On bond and mortgage. I am at a loss to know, that, when I borrow on bond and mortgage, I am under obligation to the man from whom I borrow. That is not the notion of the street.

Did Mr. Parish make good and safe loans? Yes. Get excellent security? Yes. Has the interest been paid? Yes, everything is regular. What kind of considerations came up on this bond and mortgage? The ordinary considerations. Mrs. Parish was spoken to, and he was referred to Mr. Parish. Mr. Parish did not want to make the loan. What induced him to make it? An explanation of the particular character of the security; that it was a house which Mr. Youngs intended to keep, and not to sell; thus fulfilling the desire of every one who lends on bond and mortgage, that payment shall be made by the party to whom the loan is made. That determined Mr. Parish, and the loan was made. On another occasion he wanted a loan, through friendship, for a mechanic named Coles; and although the security was good (being a loan of $6,000 on property in Twenty-third street, worth $15,000), Mr. Parish refused the loan, until the indication of Mr. Youngs, that there was an element of kindness in the loan, that took it out of the ordinary course of business. There was another application for a loan, equally good, but Mr. Parish refused it. There was the rendering of bills, his reading of them, and his payment by cheques; all sorts of business transacted;

in fact, everything in the routine of life, that a man could do, who was merely quiescent in the use of his money, who could not move about the city, and could not talk. Not only the somewhat important transactions, but the trivial transactions with Mr. Youngs, about the color of his house, the slates on the roof, &c., show that Mr. Parish was of full capacity; that he was consulted, and did act in reference to all the affairs of his household and in the use of his property. Is Mr. Youngs reliable? He certainly is very intelligent. He stands in the very highest place in his business as a carpenter and builder. If he be dishonest or unreliable every one knows it. No one has been called as a witness against him. Neither by anything he has said, nor by anything produced againt him, has there been any impeachment of his testimony.

Thomas Tileston is the next witness. He was president of the Phœnix Bank, of which Mr. Parish was a director. The principal incident mentioned on his part, is the effort on the part of the bank to borrow from Mr. Parish $200,000 of United States stocks, which he owned, for the purpose of depositing them in the state banking department, at Albany, under the requirements of the law. They offered to pay him one per cent additional, or as a bonus on the loan—the interest paid by government being six per cent—and to give him security on the banking house. He thought he would like the loan, if he could get further security, and required the individual security of the members of the board. This could not be given, and he was not satisfied, and Mr. Tileston had to get the stock elsewhere. Was it irrational to refuse that transaction? The persons about him—Mrs. Parish and Messrs. Delafield—wished him to take it, and thought his requirements in the way of security unreasonable. Now, what was the reason these stocks were preferable to Mr. Parish over other investments? Their market value was 120 per cent. They wanted to borrow, and

to pay him 7 per cent (or a bonus of $2,000), and to give him a mortgage on the banking house, that was worth $180,000. He did not do it; he did not like it. If he wanted to lend on bond and mortgage, he could have got 7 per cent on $240,000, the market value of the stock. Would he have owned those stocks, if he lent them? Certainly not. If the Phœnix Bank failed, and the notes were not paid, then that stock would have been sold, and applied to the redemption of the notes, and the whole would have been gone. These are elements that people form their judgment upon. What is the peculiar element of value in United States stocks? That while the fabric of government stands, it is safe. If that fails, why, everything else falls, and then there is no use to keep anything.

Counsel for the contestants asked Mr. Withers whether there had not been a similar transaction, at an earlier time, entered into on the part of Mr. Parish, to show that Henry Parish, in the days of his health and strength, had gone into a transaction of lending stocks to a bank, under somewhat similar circumstances. But it turned out, that the bank with which Mr. Parish was connected as a merchant, wanted some stocks of the United States to deposit at Washington, with the government there, and that the inducement to do that was a very great pecuniary benefit to the bank itself, in getting the deposits of the government, which would amount to millions of dollars. There was a motive—not to give security at Albany—but by this deposit, they could get the advantages of the continuous business of government. The other elements of the transaction were, that money was then only valued at six per cent in the market, and the current market value of this stock was but five or six per cent above par. So you have very different elements in this transaction.

But, if your honor please, how are we to decide this case? Is it upon any such comparison as this that we

are to say whether he was of sound mind or testamentary capacity? because, before he was sick, he was willing to lend stocks to a certain bank, on one transaction; and after he was sick he was not willing to lend $200,000 to another? What does the statement of such an argument as that against his capacity show but a complete elevation of the case above the region of questionable testamentary capacity?

Henry H. Ward, comes next, as to his transactions in stocks. He is a perfectly intelligent witness, with a well disciplined mind. He transacted business for Mr. Parish, and tells you the manner of his intercourse, how notes were selected; and he gives you his judgment.

Dr. Walter V. Wheaton comes under the head of friends. He talked with Mr. Parish, not about business, but about old times, and about incidents in his own life which he thought would interest Mr. Parish. He describes his visits, and the attention and intelligence exhibited by Mr. Parish, as shown by sounds and significant gestures.

Henry Whittaker is an English lawyer, who is established in this city, and who had an acquaintance with Mr. Parish, growing out of letters of introduction which he brought to the Messrs. Delafield from a London house. He was managing clerk in the office of Mr. Dillon, only leaving on the assumption of public office by that gentleman. He was exposed to an able cross-examination, and his answers reflected the intelligence and acuteness of the questions put by the learned counsel, which is saying very much for him.

There is *Edward Clarke*, a domestic servant, standing in the position of coachman, since 1844. He tells you his observation and experience of Mr. Parish, in the sale of horses, buying horses, his daily morning visits, &c.

Then there is *Hon. Luther Bradish*, who had a particular transaction with Mr. Parish. It appears he was in the habit of visiting occasionally; but at one time he received a note from Mrs. Parish stating that Mr. Parish

wished to see him. He went there; the business was opened, and Mr. Bradish describes the interview, which finally resulted in a subscription of $5,000 to the Bible Society, and the appropriation of it to the building fund. Mr. Bradish is an intelligent, experienced, upright gentleman, adorning the position he holds in society by his active charity. I believe he has no employment of a selfish character, and yet his time is employed as fully as if engaged in business profitable to himself. The same observations I made in regard to the charitable contributions obtained by Rev. Dr. Taylor I would apply to this. Is it possible to obtain a more complete, proper and voluntary assent to any donation, than that which Gov. Bradish describes in this interview? If the room had been full of gentlemen during that occurrence, it could not be made stronger than Gov. Bradish makes it.

Mr. James Donaldson, a gentleman of the Presbyterian church, and a connection of the Lenox family, who are among the distinguished people of our city, felt that he had a right to call upon Mr. Parish in reference to the New York Hospital, in which he was interested. He had a previous acquaintance. Mr. Parish was very glad to see him. He had introduced the subject to Mrs. Parish, who said he must go down and see Mr. Parish. There is no concert. Mr. Donaldson goes down. Mr. Parish knows him. They had been together in the Phœnix Bank. They talk together on the ordinary topics of the day, and Mr. Donaldson then introduced the subject of a gift to the New York Hospital. Mr. Parish's manner changed *at once*. Here you have something prompt and decisive. Mr. Donaldson says that, on introducing the subject, "there was an immediate and very striking change in the expression of his countenance, as if the subject were an unpleasant one to him," an expression such as is very common when what seems a call of courtesy is turned into what is called a begging visit.

The object was very good, and the application undoubtedly very proper, on Mr. Donaldson's part, who stood in the attitude of a gentleman of the same position with Mr. Parish. But, nevertheless, Mr. Parish had his own views on this subject, and he was quick and honest in the expression of his face. Well, did the change take place or not? Mr. Donaldson says it did, and that on the transition of the current of conversation, he assumed an attitude of frigidity and discomfort which belongs to people when asked for money, that they do not wish to give. I do not know anything more significant, for a single occurrence, as to delicacy and rapidity. Mr. Donaldson terminated his visit and withdrew. The rejection of the application was decided.

Henry Young, his neighbor, testifies to his judgment from frequent meetings at the front of his door, and his visits to him in reference to the payment of a mortgage that Mr. Parish held on his house. He says that although he offered an anticipation of the interest to induce Mr. Parish to take the money, and release the mortgage, he was decided in his refusal, and never took the money until it became due.

Isaac H. Brown, the sexton of Grace church, who is known to every one, tells you what passed between him and Mr. Parish; how he conversed with Mr. Parish, how he paid his pew rents and made him presents of $10. Mr. Brown had been the first person who yielded Mr. Parish assistance on the occasion of his first attack. Mr. Brown formed his own ideas. He fell into the direct and obvious error which I think some of the other witnesses have fallen into, that is of confounding the lack of means of expression with the absence of hearing. Brown finding that Mr. Parish did not talk fell into the impression that he did not hear, and used to bawl out to him. There was a confusion of one calamity with auother; as some of the contestants' witnesses, because he could not do much, reasoned in the absence of manifestations, that there was a deficiency of the thing to be

manifested. I take it that sort of logic does not give valid conclusions.

Thomas M. Markoe is a physician. What I have said with regard to Dr. Delafield is applicable, considering the difference of age and experience, to Markoe. He was a young careful man, who would take things for granted quite as little as Dr. Delafield. He goes through the whole matter, and gives you instances of his observation. On cross-examination he is shown to have borrowed $10,000 on bond and mortgage. If his testimony is to be reduced $10,000 on that account, very good, but nevertheless he will have to pay that mortgage, and it is hardly fair to have to pay it on his house and in his evidence too.

William Brown, the next witness, was an attendant or sick nurse of gentlemen by profession. He had been in the employment of Chief Justice Reid, in Canada, for eight years, and came on to New York, seeking a similar situation. By some chance he fell into employment in Mr. Parish's house, commencing at the time of the termination of Wingrove's engagement, and he remained three years and one month. The observations I have made in regard to persons standing in the attitude of mere servants are not, I think, applicable to William Brown in his particular employment. He never was in the position of a mere waiting man, having been in an independent employment before this. Be that as it may, however, I will not be guilty of the folly of claiming a difference, as to any rule, between witnesses on my side and on the other. How far his actual exhibition of himself on the stand here, the manner of his testimony, his candor and capacity, places him above the other witnesses examined, your honor will judge. Quiet, cool, intelligent, entirely transparent in his testimony; I am not aware that there is to be found any such reduction, by cross-examination, as would leave it at all diminished from its natural force as originally given. In regard to this witness we feel that the cross-examination, although

applied with the highest zeal, ability and purpose to make it turn out in favor of the side on which it was employed, has produced a body of evidence, having the weight of being thus drawn out, and having the amplitude which can be only thus drawn out, that is entirely serviceable to us. We could not well part with the cross-examination of our witnesses in this case. The cross-examinations bring up really what is the positive and affirmative exposition of the case quite as much as the direct examination. The power of cross-examination is not to be undervalued in reference to distinguishing the capacity, memory and intelligence of the witnesses.

We have no reason to regret its application to any witness here. It has been pressed through days and weeks, and the result is placed before your honor. The learned counsel has not exhausted his own ingenuity, but he has applied the full measure of it to this case; and cross-examination if thus powerful in favor of the party who uses it, is not to lose its force, when resulting in favor of the party against whom it was intended to be used. Well, Brown testifies to almost everything in the way of instances of demeanor, employment, occupation and will, and intelligence, that could occupy or fill up the routine of a man's life in New York. I do not think that the attendant of a sick man could be expected to say anything which was said or done by that sick man, or in the family of the invalid, where there was not any question as to mental capacity, more than he says in this case. We find an abundant reason for not doing other things, from physical disability. We find that which other witnesses had not the observation or acuteness to get a correct view of, in his mind, which was really the true view, seen through the obscurity that had passed over it. Brown gives us a great deal of information about the admission of the members of the Parish family; the fact that there was no exclusion, to his knowledge, and no directions, to exclude; but on the contrary directions,in reference to every one but Mr. Sherman, that they were not to be excluded.

Quinn, I believe, while on the subject of exclusion, spoke of an order that "Mr. Daniel Parish should not be "allowed to come in," but on cross-examination, it would appear that was not the correct order, but this: that "nobody was to be allowed to come into the house,— "not even Mr. Daniel Parish." That would bear a very different complexion. But that comes to nothing; because they were inside of the house, and there was no disturbance, or feeling, until after this first codicil. So, too, Brown tells you about his habits; of the reading of the papers and the Scriptures and prayer-book by him to Mr. Parish, and about all that occurred during three years and upwards that he was his attendant.

It is undoubtedly true, sir, whether you take the scale of witnesses on one side or the other, that just as you rise in that scale in point of intelligence, in point of integrity, in point of responsibility to truth, to society, to justice and duty, just as you rise in that scale, so much do you rise in appreciation and information concerning Mr. Parish's condition.

If you start with the statement that he is an idiot, by a man that knows nothing of him, and that he is an imbecile by one who knows no more, as you run up the whole line of their witnesses to Mr. Kernochan, you find that he stands where he does, and says that Mr. Parish had some mind, but not much, and that that judgment of his is obscure, by reason of inability to distinguish between how much was wanting in mind, and how much was owing to the difficulty of manifesting that mind.

We have Abram Dubois and George Wilkes, professional gentlemen, high in society, coming here, as you would go if called upon, to give an estimate of anything that passed under your notice, and being exposed to such a degree of rigorous cross-examination as was deemed necessary by opposite counsel, to reduce the value of that testimony. There are the opinions of five experts,

on our side, while there are none on the other, if your honor adopts the rule which excludes the opinions of non-professional men. If you adopt the rule which admits the opinions of those, who observe with non-professional and common eyes, there we have thirty-five and they have ten or twelve, who express opinions. It is not then much a matter of interest to us which way the rule is applied; thirty-five to twelve, or five to nothing, is a large disproportion in our favor. We shall be quite indifferent on this question. I do not exactly know whether your honor considers the ruling on that point, of the admission of opinions, not experts, as definitely disposed of or not.

THE SURROGATE: It is in this case.

Mr. EVARTS: Then we will treat it so. With Brown, associated in the position of service, which he held with Mr. Parish, stands Fisher. Fisher was the nurse first called in to attend upon Mr. Parish, and he remained with him until he had regained that vigor of health, which carried him abroad freely. He left of his own choice. From that time forward Mr. Parish was undoubtedly under the observation of any one who chose to observe him, outside or inside. The importance of Fisher's testimony to us is only in regard to this period of his first illness, because during that period necessarily the number of witnesses who could speak from observation, must be few.

It is not our expectation, that during the period of Mr. Parish's illness, during the first attack, any special remark can be made on the limited amount of testimony; for in the nature of things, there could not be many observers. Now, Fisher was a man of acute observation, and very accurate memory — what would be called "a quick-witted man," and he undoubtedly has the faculty of reproducing in his own mind, vividly, transactions which have passed before him, and of expressing them with the fluency that belongs to his nation. I do

not know that there is anything in Mr. Fisher's testimony of any importance to us, as matter of fact to be considered by you in the decision of this case, that is not supported by other witnesses and by the production of documentary evidence, except the single fact of the manner of Mr. Daniel Parish's intrusion into the sick room; and that is abundantly supported by Mr. Parish's own narrative of it — given at second-hand, certainly — but through a reliable channel. I do not see that there is any default or defect of weight in Mr. Fisher's evidence. He has been exposed to that kind of secondary impeachment, which consists in calling witnesses, to whom he has made statements out of court, and not under the sanction of an oath, which are supposed to vary from his statement made in court. How much importance is habitually attached by judicial officers to that kind of contradiction, I do not know. My impression of it is, that the rule is, and there are many reasons why it should be, that what is stated under oath, and with the mind directly applied to the subject, as a continuous deliberate subject of thought and expression, under an obligation of great definiteness; that what is derived from that sort of examination is not to be reduced sensibly by what, in the first place, if it came from the witness, came in a fragmentary form, in a casual form; came under no weight of responsibility, no summoning of memory, no guarding of the expression, no trial of the conscience. But there is always admitted to be a further draw-back, that you cannot feel you get exactly what the witness said seven years before to somebody. I am not disposed to defend or disparage witnesses with very earnest force on one hand, or with great zeal on the other. I think that witnesses generally give, by their own showing, pretty much all the estimate, either of full weight or of reduction, that should be made from their testimony before they leave the stand. That is the general rule of the profession, more valuable than any I can bring, to enable your honor to dispose of all these

questions. At all events, I shall not regard any unsubstantial variations between fragmentary statements made by Fisher seven years ago, to persons who were not under the obligation to preserve and from time to time examine their recollection of them, I shall not regard those things as much diminishing the force of the testimony. Undoubtedly, whatever was said by Mr. Fisher to Barber, does not come within the term " remote conversations," nor does it come under the head of being casual, or without having attention drawn to the relations of the subject that was being presented to him. Undoubtedly, the learned counsel for the contestants, as they have thought it worth their while to single out Fisher, or rather to make some attack on him, and as he is the only witness on our side, any one could dream of attacking in any form, undoubtedly they will present to your honor affirmative reasons why you should discredit his testimony; and they will be replied to with such attention as their importance may seem to demand.

But the view that we have taken of Barber's testimony about Fisher is this: that whatever you may think Mr. Barber reduces from Fisher's statement, becomes of very little importance in view of what we discover of Mr. Barber's conduct in the examination of Mr. Fisher. The whole object of Mr. Barber was to ascertain whether the result of Fisher's memory would benefit Mr. Daniel Parish. There were given to him all the pecuniary means that might be necessary to procure the attendance of Fisher on that side. Mr. Barber was secured by a fee to look into the matter and see the full importance of Fisher's testimony, and the points it should be directed to. Well, Barber advertised for Fisher, who came from Stockton to San Francisco. There was an interview, and, if you are to believe Mr. Barber, Fisher represented to him that there might be some things in his memory that would be desirable to Mr. Daniel Parish's side of the case. He does not seem to have disclosed any of them. The question arises: did the result of Mr. Bar-

ber's examination of Fisher lead him to think that the production of Fisher, as a witness, would be of service to his side? No. He tells you he did not make any arrangement with Fisher. He had had his attention drawn to what he could say that was favorable? Yes. He heard it? Yes. But he did not send him on. What is the necessary inference? Why, that if he had made those loose and general statements about what was or was not favorable to Mr. Daniel Parish, when Mr. Barber, as a lawyer, came to examine them, he saw they would not be favorable. And so we have, as the result of all this, that instead of sending Fisher on here to be a witness for them, they bring Barber to be a witness against Fisher. Well, they come to the money question, direct. Fisher saw the advertisement, which we may suppose to be in the usual form, that by calling on Mr. Barber he "would hear of something to his advantage." He, dreaming, doubtless, of fortune before him, comes down in the boat from Stockton to San Francisco, and finds, on calling upon Mr. Barber, that it is to get what he knows about Henry Parish he requires him. The examination satisfies Barber that he knows nothing which would be of any advantage to Mr. Daniel Parish, and when Fisher asked him if he was going to pay him for coming down on the advertisement, Barber replies: "For all you have told me you might as well have written me a letter," and he did not want to pay him even $4.00, for his passage, when the matter in dispute was a million of dollars, and when Barber had a retainer of $100, to look into Fisher's memory, and had advertised, and Fisher had come down on that advertisement! To be told that his information was not worth $4.00, and that it would be even dear at a penny postage stamp, is a pretty strong answer to the idea that the really honest opinion of Fisher would be of any benefit to Mr. Daniel Parish.

Well, Fisher's evidence, to us, is not of the same importance that it would be to them. Fisher, to us, is

of no importance, except that he should not speak what we believe to be untrue; it is of no importance, as positive evidence, to us. There is no evidence of testamentary condition, by him, that does not stand upon the evidence of other witnesses, entirely satisfactory in number and amount. Undoubtedly, when Mrs. Parish found that there was to be a contestation on this subject of the will, it was clear to her that servants or any one who had a shred of intelligence of what occurred in that house would be called. She never knew from any of them what they thought. She never expected to ask any one, except for the truth. There she stands or falls. She contrives nothing. She conceals nothing. She takes the estimate of the witnesses as she finds them; some of them so high and elevated that any effort of hers to secure their testimony would be but madness, and defeat its end; some so obscure and insignificant that it would be folly to think to prepare their minds or lead them. Indeed, no one can give a consistent statement of so many occurrences, and sustain a long cross-examination, unless testifying under the influence of prejudice or truth. No one can learn a lesson so as to repeat it on the stand, from any source, even if he have no convictions whatever; but, sir, how much less could he have his *real convictions reversed*, without the first hour's cross-examination producing disaster to the witness, and to the character of the cause which had chosen that mode of procuring a favorable judgment in this court. I certainly do not object to their searching out Mr. Fisher, and would not to their calling him. There is no servant of that household we have had any objection to their calling. The servants have said, either truly or untruly, what they have said when brought upon the stand. Mrs. Parish had neither the power nor wish to control them, from the time she employed them until they appeared on the stand, and gave their evidence under the responsibility of an oath.

Mr. Richard Delafield and *Mr. Henry Delafield* are among the principal witnesses on our part. Mr. Richard

Delafield speaking as to particular occurrences, frequent visits, and on one occasion as to Mr. Parish's selection of the plan for a tomb. A noticeable fact is, that although Mr. Parish selected one of Mr. Arnot's plans, yet there was one part of it that he did not like; that on the plan there was written out in full "Henry Parish," with a prominence that he did not like, and it had to come off. Now, there was the selection of a plan, and a rejection of the details. Here you may have the argument that he did not care to have his own name on the monument of his burial place. All that we know is, that he did not like it, and that he took it off because he did not like it.

Mr. Henry Delafield we would willingly have left out of the range of witnesses, if it could have been done, in any justice to himself, to Mrs. Parish, or to the contestants on the other side. On all rules of evidence, we could have said, we have proved enough without going into the domesticity of that house, and exposing any one thus intimately connected with Mrs. Parish to the imputations which will be made on him with regard to the bias of his testimony, or its subjection to social, fraternal and domestic influences so great as to affect the judgment of the most honest; and to remarks which, perhaps, will not be so qualified. However, truth is truth, and Mr. Henry Delafield proves no fact at all necessary to our case. He gives you, in mass, or in detail, what he knows, and fairly says, when he does not remember anything, that he does not. If he is asked to remember the details of this or that circumstance, this or that thing or description, he tells you if he does not remember. But there is nothing in his testimony that is not open, usually, to the same commendation that I have bestowed on Dr. Delafield's—that if there has been any scruple of any kind that has obstructed the full, free and intelligent expression of the truth, it arises from the irresistible bias which belongs to an honest, upright, sensitive mind; a bias against the supposed interests and affections that would tend, in the judgment of men, to draw him

towards the side in which he is thus interested, and so far to deflect him from the straightforward line of the truth.

And so in the cross-examination, stretched over long and broken intervals of adjournments, of the introduction of documentary evidence, until it became wearisome to all concerned, there are no special facts, although of course there is much amplification, but in kind there is not a single fact of which an instance is not to be found in the testimony of other witnesses. There is more particularity of observation in some matters which none but an inmate of the house would see, as that in regard to Mr. Parish's reading. Another witness would be asked, "You have seen Mr. Henry Parish read?" "Yes." "How did you know that he read?" "He made gestures as if he knew the subject." But Mr. Henry Delafield is able to recollect an ordinary occurrence, that Mr. Parish would undertake to look at the paper or his account book, and there would not be light enough, or adequate gas light, he would direct a "pendant," or movable gas light to be lowered. There is a fact showing the delicate touches, put in or omitted, according to the habits of observation of witnesses.

Mr. Charles A. Davis, one of the witnesess to the second codicil, is a man who illustrates quite well, that accuracy and reliability of examination or communication depend quite as much on the acuteness of the observer, as on the intelligence of the party who is supposed to be communicating his thoughts or desires. He is a man of society, acute, ready, who gives you what he has to say, intelligently, promptly and distinctly. He has that facility, which belongs to adepts in society, of giving vitality to a conversation in the manner and expression of the person, which is needed to give it a fair intelligence. He tells you what he thought, about conversations he had with Mr. Parish; how Mr. Parish was interested in improvements going on. He tells you that he had spoken to Mr. Parish about a valuable piece

of property he was interested in selling; and some weeks after, calling at the house, in the midst of general conversation Mr. Parish interposed an inquiry, directed to him. Several things were suggested as being what he wanted to inquire about, and at length Mr. Davis thought of the property he had spoken to him about three weeks before, and asked him, if he wanted to know about that. Mr. Parish instantly exclaimed "yes, yes," and on being told the property was sold, and what it brought, he was satisfied. Mr. Davis thought he understood Mr. Parish, and discovered "no difference in his mind from previous occasions." I do not expect to judge over him. Mr. Davis, besides giviug full testamentary evidence as to the papers of which he was a witness, states an occurrence which throws light on the nature and reason of his bequests. Mr. Davis, about the time of executing the codicil, remarked, "I see you have been very liberal to the New York Eye Infirmary," (to which Mr. Parish had left $20,000), and Mr. Parish said "yes," or "ah, ah," bending his head and pointing to his eyes. That occurrence Mr. Davis produces; and I ask, could there be any expression a man would make, more reasonable or more significant? He was talking about this institution, and his bequest to it, and he wished to express what he had suffered from troubles of the eye himself, and that he was willing to bequeath a small modicum of his fortune to a charity, of which it may well be said that "every eye that sees it will bless it."

Mr. John Ward, the broker for Mr. Parish before and after his illness, was witness to the testamentary paper in 1854. Mr. Parish was a customer at his office in Wall street for such purposes of investment as required the services of a broker, and Mr. Ward describes the circumstances. I need not say anything of Mr. Ward who has been in Wall street, for half a century, where he has preserved a character for absolute integrity, and obtained the confidence and affection of those who have had anything to do with him, in those channels of busi-

ness where confidence and affection are not usual elements. He has given you his testimony as a witness to the codicils.

We have the opinion of witnesses, that Mr. Parish was of full testamentary capacity. Are there any traits shown by the contestants, in the course of the examination of witnesses on which they can rely to prove that his disposition and habits were changed by the attack, and thus showing something substantial in reference to the operation of the attack upon his mind and feelings, as demonstrated by subsequent actions?

Now, before his illness, it is shown that through the instrumentality of a book-keeper, he kept accurate accounts—that is, we suppose Folsom kept accounts accurately. As long as he had an office, as long as there was an active employment of his capital, in contradistinction from the mere purchase of investments, and so long as there were outstanding accounts, he kept books. After 1850 that habit was not continued. There was then no necessity for keeping books of account. All that was necessary was to receive the income from his investments, lodge it in bank, and give checks for current expenses and outlays, all of which would appear in his bank book and check book. If it were important to keep a set of books you will see how easy it was for Mrs. Parish to keep up such a form as that. It was not anything that Henry Parish could take an active part in. There you have a formal kind of action, that did not need the co-operation of Mr. Parish, and if the object of the parties was to produce a form of attention to the observance of a business routine, it would have been wholly within their power. There was nothing done here except to deal with the thing according to the altered circumstances of the case. What is it? It is nothing but money. It comes into the bank and goes out of the bank, and the book-keeper Lawrence, called as an expert, says that in the check-book and in the accounts which were kept, there were

all the materials for stating Mr. Parish's account, from the time of his attack to the time of his death. There might be some exceptions, but that was the substance of his testimony; and if it were important that any one should make a mercantile statement of the course of his life, the materials are preserved.

There are two other points: one is, that he *did not* play cards; and the other is, that he *did give charities*. Well we may have to raise an issue as to what insanity is; and if the other side are to hold that it would have been better for him to play cards, and not to give charity, we will maintain that not playing cards and the giving of charity was more rational, under the circumstances in which Mr. Parish was placed. I think that the physical infirmity of Mr. Parish might have excused him from playing most games of cards. I believe that even the great fame of Mr. English, in that regard, has been earned by the use of both hands. It is said he might have looked over the cards, to see others play. But he never did play with his own family. He only played at the club or at card parties. Whether he was a good player or not does not appear. Fortunately the law has not made that a standard of testamentary capacity; for, if so, gamblers only could make good wills. Well, he did not take an interest in playing cards; did not go to the club to play, or to card parties at any friend's house or have one at his own; and if that is to be a mark of want of testamentary capacity, or unsound mind, then, with or without the question of charity, we must stand by that judgment! But, really, it is trivial, in our appreciation, to argue against the normal condition of a paralytic's mind, under the direction that Mr. Parish's mind had taken, towards the subject and interests of religion, because he did not maintain an active interest in the card table, up to the time of his death.

Charity! Charity! This, too, was a spoliation of the brothers, I suppose! It came out of the *residuum*. Well, let us see. Here is a rich man, whose charities,

during the latter part of his life, are very much greater than before this attack; that is, unless acting upon the wise instruction of Scripture, he did not "let his right hand know what his left hand did," and did not let Folsom enter in his ledger what his charities were. And his charities, after his illness, and during seven years' infirmity, rise into the magnificent figure of thousands of dollars, out of his large estate! Now, I would like to take your honor's judgment, which is the greater evidence of unsound mind; the smallness of his contributions, during a life of wealth and physical health, or the largeness of his charity in his declining years of infirmity, from accumulated wealth? A sound mind! Is regard for money the only criterion of it? Oh! sir, this is the very grossness of the world. Virtue must give place, and "rational men" go for money! A sound mind is to be judged by its accumulations of wealth! That is the test! Ah! sir, there are other gradations of virtue which are set forth, not even enumerating money, or the love of it. There be Faith, Hope, Charity! (what a disregard of money!) "But the greatest of these is charity." If money had been put in the scale, why charity would not have been put before money, of course! It is thus that upon the lowest, grossest, vulgarest estimate of man, of society, and of duty, these traits and pursuits of Henry Parish, before his illness, and Henry Parish, after his illness, are to be weighed by my learned friends, and in your honor's judgment, if you follow their guidance. Sickness, sir, may change almost anything in a man. The approach of death, and the aspect of human affairs, to a man whose physical powers are paralyzed, who sees nothing left in life that is valuable, save kindness and affection, may well lead him to say, what have I done, up to the time of my calamity, that was in the nature of kindness and affection towards suffering humanity? And in that view, and with these considerations, not irrational, let me hope, he may conclude that he that "giveth to the poor" makes as good an investment, in the decline

of life, as he who saves for himself. He may say that there is some common sense in the Italian epitaph:

"What I have spent, I had,
"What I gave, I have,
"What I saved, I have lost!"

That is the record over the tombs of rich men.

Well, it is said he did not *write*. On that subject, connected as it is, undoubtedly, with some not nice, but quite important considerations on the physical condition of his members, I will not at present speak much. He did not show any indisposition to write, until he had found that the effort was irksome and ineffectual in substance. There was not a lack of desire, ever. The first act of writing was produced by a prodigious impulse to communicate something. Other efforts were made. They were painful: and he would not make the effort any more. Powers of attorney were executed, and in those around him, he had enough always ready to write for him: Mr. Kernochan, and Mr. Folsom, so far as mere clerkly aid was concerned; the Messrs. Delafield and Mrs. Parish in other matters. Here was reason enough for his not writing. What was there for him to write? What thoughts are supposed to have slumbered in his brain, that he wanted to express? Is it supposed that he could acquire the art of writing so as to accomplish anything but executing ordinary papers? Is there any instance of a man paralyzed at the age of sixty, remaining in that condition, the right hand paralyzed and the left hand affected by some sympathy in the muscles or nerves,—where any one in that condition ever did learn to write, in any other sense than writing his name? Who is there that has done it? No one. No one in that physical condition has learned to wield the "pen of a ready writer."

Well, perhaps he might have written the name of one of Mr. Sherman's children in connection with a bequest, and as he did not write, one of Mr. Sherman's children

went without it. The affirmative disposition of his will is exclusive of any desire to do anything else. It simply remained as executed, the residuary legatees still as they had been, until by the substitution of Mrs. Parish for the residuary legatees, they were contingently displaced. No revocation—no one suggested it to him. Why did not any one ask the question, or make the suggestion? "We have got three young children, Mr. Parish. "Do you not want to give them something when you "die?" No, their policy was to wait and see what they could do after he was dead; and Mr. Sherman was satisfied to wait and take his chance with the rest. But we have testimony on the other side of great significance. They exalt the power of his left hand. But what, if any, nice operation, requiring steadiness of direction and extension, and a full control of the left hand, is brought into the evidence in this case? None, other than this: the attendants say that the uniform practice was for them to pick his teeth. In that, at once, we have a test. Had he strength in the left hand? Yes. Motion? Yes. But he could not pick his own teeth. Now, if a man can do anything with his hand, he can pick his teeth. That is a personal service that one does not willingly transfer to any one else. They would show, from his having others to pick his teeth, that he had not the personal dignity which would lead him to do this himself. That would be one solution of it, but a strained one.

But we suppose, that whereas he was neat, dignified, decorous and self-dependent to every degree that infirmity permitted, always desiring to walk faster than he could, and to rely more and more on his own energy and strength, your honor has this decisive fact, that he could not control the muscles and motions of his left hand and arm, so as to perform an act, that required less delicacy than writing. But he did not use letters! He would not use a dictionary! What sort of a dictionary is it supposed he would use? and with only his left hand how would he use it? With imperfect facilities, and

without any habit of book reading, that I can discover, whatever, before his illness! I suppose he never read anything but the newspaper, the Bible and Prayer Book. He was not a scholar, and probably the directory was the only book in the shape of a dictionary he had used for years. That suggestion of the dictionary I do not think much of. What would he have looked out in a dictionary? Would he have had some one with the dictionary, and he turn over and find a word, have a note made of it, and go on to another, and when he got to the end of a sentence have it read aloud, to find out what he wanted? If given a dictionary of common names, he could have pointed out Mary Ann, but he could not point out the other, the surname. Really, if your honor please, there is not anything in this notion of a dictionary. Mr. Kernochan thought he could use a dictionary (with both hands) if he could not speak. But it did not strike him that with both hands, if he could write, he would not need it. Mr. Parish had a much more ready language by using the living tongues of those about him; and he did use them, and used them satisfactorily. Fortunately, in his wife, he had an attendant at all times who, by affection and intelligence, was competent to second his efforts at communication.

Well, but block letters or card letters, he did not use them! They were placed before him. Now, if he had been an idiot, or childish, he would do as idiots or children do — look at the pictures, and play with them — unless, indeed, he were at the very lowest point of capacity — so low that he could not pay any attention to them at all. What did he do? Did he have any doubt or uncertainty about them? No. They were placed before him. He saw the idea was that he should use these letters, and he brushed them away. He had made up his mind on that subject — that he did not propose to use those letters as a mode of spelling out words, which required the attendance of a person to see. How many words could you spell out with one set of alpha-

betical characters? You would have to employ several sets of alphabets, and you might as well get a font of type at once. There is not anything about this matter of mechanical facilities that amounts to any relief of the physical disabilities of Mr. Parish. You can suppose a particular juncture, where he had something in his mind which he could not convey. If any one had then said to him: "We cannot get at your meaning; look at these letters!" then you would have had a test of his apprehension, and whether he would avail himself of the means thus afforded to convey his meaning. But the idea that because, when he was sitting before a table, and a valet brings him some card letters, to see whether he can spell, when he has no idea that he wants to express, he brushes them away, that is to be taken to show want of mind, cannot be maintained. If there be any sense in this business, why did not some of these parties have a tablet of letters, and Mr. Folsom or Mr. Kernochan interest himself on some doubtful point, by calling upon him to point it out? And then you would have known whether he could or could not do it.

It is enough to know that in that household Mr. Parish was the master; that his wishes were consulted; and when those letters were rather insufficiently presented to him he rejected them, and that was an end of it.

If the court please, I omitted in my summary of the witnesses, the name of Dr. Johnston. He was repeatedly in attendance on Mr. Parish in the capacity of consulting physician, up to a period terminating somewhere I suppose about the beginning or middle of September, and he speaks with precision and caution, and with that sobriety and judgment that belongs to him. Dr. Johnston stands as high as Dr. Delafield, and as any man can do. He stands in this position of interest, that not only has he no interest for either side, but he has no interest in the subject, or any particular recollections, as I infer, of what took place so long ago. It is worth while to

refer to his testimony, because it results in the expression of this opinion on the question of capacity: "He "appeared to understand simple questions regarding "his health; I cannot say that he might not have "understood questions equally simple regarding other "affairs." Now he tells you that he never had any communication with him except upon the subject of his health. Upon that subject he did put questions to him, and he answered them. He then strictly limits his facts to this: that the simple questions about his health be understood and answered. He does not mean to say that he did not understand other things, when he says that he might have understood simple questions on other subjects. Whether the simplicity of the questions, has much to do with the extent of his understanding, I do not well know upon the evidence before us. The simplicity of the question lay in the doctor's mind rather in reference to the object of Mr. Parish being able to understand it, and understandingly to accept and respond to it. He never tried him upon any other subject, and undoubtedly wishes so to be understood. He will not leave us to sustain an inference that he means to say that he could not understand other things; for he says that the extent of that information would not lead him to any other conclusion.

The aggregate of these opinions, as collected from the testimony of Mr. Lord, Mr. Davis, Mr. Daniel D. Lord, Mr. Ward, Dr. Delafield, Dr. Taylor, and Mr. Wiley, Mr. Bryson and Mr. Dunning, who testify to a particular transaction, and very intelligently indeed; the testimony of Dr. Wheaton, General Webb, William Young, Mr. Luther Bradish, Fisher, Brown, Donaldson, Henry Young, Wilson, Nichols, Whittaker, McIntyre, Prime, Moses H. Grinnell, Dr. Markoe, Edward and Henry Delafield, present, in amount of enumeration enough to supply several times over the statements on the other side. The rule that sensible courts adopt is that witnesses should be weighed, not counted. We suppose that Kernochan, in point of intelligence and veracity, is

the only one of the contestants' witnesses who comes up to the mark of at least twelve of our witnesses. Folsom, in point of intelligence, is the only other one who comes near the grade, in respect to observation; and even during the period that he speaks of, his biased condition of mind and feeling is so clearly shown, that there is no great reason for counting him as very strong.

We suppose then it is clearly demonstrated that Mr. Parish possessed at the date of every one of these testamentary papers in dispute, testamentary capacity. I have said, and say again, without recapitulating the evidence upon the point, that the affirmative evidence on both sides, and the evidence concerning acts and facts is not nearly on the level of the legal rule, but all up above it. All the debatable facts, all the religious, legal, medical, mercantile and social considerations about Mr. Parish, one way and the other, are all in the region of his identity with the condition that he had before the attack, and when they are comparing him with a standard, they are comparing him with their standard. They have no idea that testamentary capacity includes a person over whom a chancellor would appoint a committee. If you were to ask them under the rule as laid down in Stuart's case, whether they thought Mr. Parish was an imbecile, and not an idiot, they would have said he was an imbecile and not an idiot.

The next proposition is, that the evidence of the execution of the codicils, the careful and deliberate communication to the testator of the contents of each of them, and of instructions or assent to each, directly from the testator, is complete. Mr. Lord is a witness on all this subject, so far as instructions are concerned, and so far as the distinct communications of Mr. Parish are concerned, and his testimony is corroborated by other witnesses. Upon this point there is no contradictory evidence.

The only question that remains is, whether it is reliable. I am now speaking on execution, on deliberation, on con-

sultation of the testator, in reference to what had been done or in reference to instructions. The other witnesses who were brought in, had a former acquaintance with Mr. Parish, were persons of intelligence and rank in society, that put them, in their own intelligence and knowledge, under a responsibility. Mr. Holbrook, Mr. Davis and Mr. Ward were not picked out as you pick out a servant, or next door neighbor, or poor relation, or any one of that kind. They were not called in on the instant, knowing nothing of the circumstances. They were not like persons, before whom it was necessary to keep up appearances, during their presence. That is not so. Mr. Holbrook, Mr. Davis and Mr. Ward were constant visitors. The act that was to be done was witnessed by most disinterested and upright persons, who were competent to form and express a judgment. At the time of the execution of the first codicil, in July, how many of these witnesses had seen Mr. Parish? How many on our part, and how many on the other side? On our side we have Daniel Lord, Daniel D. Lord, Edward Delafield, Dr. Johnston, Fisher, Isaac Brown, Edward Clarke, Thomas M. Markoe and Henry Delafield, nine in number. On the other side we have Joseph Kernochan, George W. Folsom, and Michael Quinn, the waiter who saw him through the door upon the bed. That is three, who express the opinion of his then condition, as that formed from their observation, that he had no testamentary capacity.

The only observation on the subject of undue influence that I need to make is, that the codicils were not obtained by undue influence; that is, by either coercion or fraud, or any other of the various forms of expressing undue influence that you choose to adopt from the language of the law. As to the first codicil, how is this question? As to that there can be no pretense of influence by habit or system. There is certainly no evidence of actual influence. As to the first codicil it cannot be claimed, there had been

established any secondary influence of Mrs. Parish's will, by kindness, or by other influence over Mr. Parish. He stood exactly in the position that any sick man did. No habit or system had established any influence. If he had mental capacity he was capable to make a will. All that can be said about influence is, that something must be shown to indicate influence by Mrs. Parish. There is no evidence of actual influence over him at the time of making these codicils. Let the counsel point out any, if they can find it. The effort is, to show that there was an habitual influence established over Mr. Parish by reason of his disability, and her attention. With reference to this codicil, you cannot very well predicate influence in regard to its substance and effect under the testimony that is given in this case; for it accords wholly with the state of affection previously expressed and entertained, and for that reason you do not want any argument about it. There was no concealment, but information was given to the opposing party before it was executed. They were told of it, and of its purport after it was made, and so far as that was concerned, it was done substantially in the presence of Daniel Parish. He was in the sick room. There was no exclusion. No hostility had broken out until after the execution of the first codicil. So we are free from all grounds of possible suggestion. Well, is influence to be presumed or not? I suppose all that there is of influence in this case is, that the codicils gave the property to the wife. Now, if that is influence, if that fact destroys codicils made by a husband, that they give such property as is named in them to the wife, then we must submit to it. The reason, and the only reason, that this charge of influence is made, is that the property was not given to the contestants. The first codicil stands manifestly, as giving her actually less in proportion to his estate as it then stood than he gave her in his will when he made it, in reference to his estate.

The second and third codicils were made in September, 1853, and June, 1854, at which periods all the witnesses

state that Mr. Parish was enjoying in the highest degree, health and vigor. There is no evidence of undue influence in respect to the procurement of either of these codicils. Nobody has suggested that Mrs. Parish, by coercion or threat, compelled any testamentary disposition. Did your honor ever have a question before you, of influence exerted by one party against another, that did not include some element of expression of intention by the one, and of imposition and contrivance attempted to be perpetrated by the other? I find no evidence in this case, upon either side, which says that Mrs. Parish talked to him thus and so, or conducted herself thus and so, that she talked about the conduct of Daniel Parish, or that she asked, suggested, or persuaded him to do this or the other thing. Whatever is to be argued upon the subject of systematic influence, is either by direct evidence or by some collocation of evidence that should be pertinent and instructive, by my learned friends. There is no evidence that Henry Parish did not govern Mrs. Parish in every transaction in which they were associated. There is no evidence that Mrs. Parish did control Henry Parish's will in any subject in which they were associated. There is evidence that she talked to him upon any subject in which he felt an interest, and there is evidence that he did one way or the other, either as his wife did or did not desire, in respect to several matters that were considered by him. If the fact that he was paralytic, dependent for his comfort in life upon her, and the fact that she adhered to him as his guide, friend, clerk and wife, and the fact that he did make these wills in her favor combine to prove that they were fraudulently procured by her, there is no argument that can disprove those three facts. And if the conclusion follows, as a legal presumption, that, because he is disabled and she kind, he leaves his property to her, we come back to the old proposition, that, because he gave it to her, it is not an improper disposition; because, there is no fraud in a

wife being as kind and attentive to a husband as a wife can be. That is not a fraudulent relation. There are relations which are fraudulent in plan and contrivance; as if a man of powerful intelligence, a lawyer, or one in any other capacity, attaches himself to a feeble man, an inmate of his house, consults his wishes, pleasures, vices and follies, and so ingratiates himself into his mind that he becomes a daily part of that feeble understanding, and so obtains a testamentary disposition in his favor. And, perhaps, if a woman, finding a person in a condition of debility, contrives a marriage and becomes a wife, you may consider that it is not the real relation of husband and wife that exists, but that it is a part of the color, form and contrivance to obtain possession of his property.

The case of Fisher was of this kind. He, at the age of 69, was stricken with apoplexy and paralysis, and remained in that condition for three or four years until he died. He was, during the greater part of the time, bedridden and in a condition of fatuity, as shown by the positive as well as by the negative testimony. It was a debatable point whether he possessed mental capacity, and it was finally decided that he did; but if your honor will read the testimony you will see that the evidence of his folly and weakness of mind is clear. His wife died very soon after his illness, and a young woman, his wife's sister, in the course of a year or more, procured a marriage with this old man, paralytic and bedridden. There you have as different a relation of husband and wife as possible; and a will was made giving the property, in a great proportion, to the new wife. I never have known an instance of the assertion of competing claims of those in other relations to the testator against the wife's which did not alter the relation of husband and wife, from the ordinary true, christian relation, in that connection of a lifetime, and had not also, upon the other side, contained, as an element, some deflection of the testator's views and wishes from somebody who stood in near

relation, as for instance, children of the testator by a former wife, or some such natural and necessary direction of the testator's property, unless misconception, fraud or delusion should have intervened to intercept it. I never heard it raised, as a question, where the testator's property all went to his wife, even to the prejudice of their common children; because it is regarded as a choice of the testator whether the joint parentage of the children, represented as well as may be by the survivor, shall occupy the position of the representative of property during the lifetime of the survivor, although the gift is absolute and is exposed to the contingencies of a new marriage, or the whim and caprice of the surviving wife. The question, then, does not present itself in any such position, either of the party in whose favor this deflection from the true control of his property is supposed, or of the party against whom it is supposed.

There is a secondary kind of evidence of influence, not upon the testator directly, but as affecting him towards his relatives, and as to his intercourse with them.

James never sought any intercourse of any kind. I do not know what his interest in this case is. It does not appear that he has any interest here. No part of that kindred has shown itself in this litigation. He never sought any intercourse with Mr. Parish after the attack. Daniel made for himself the only obstacles to a welcome to the house; he had abundant opportunities to see his brother out of the house; but never availed himself of them. At the time Mr. Parish was at the store he made no attempts to have intercourse with him. He did not keep the counting-room where he could come in, but moved it upstairs where he could not.

As to Mrs. Sherman and Ann Parish, it cannot be pretended that Mrs. Parish has operated any diversion of the property. I do not know how Mr. Sherman can suppose that Mrs. Parish has diverted any property from him. Mr. Henry Parish made a will in 1842 and did not

leave him or his children anything actually or prospectively, by description or by class. Mr. Sherman did not visit the house to induce Henry to do for him, as he had for Daniel and for James. But Mrs. Sherman had perfectly free access. She may or may not have felt less disposition to go to the house by reason of the ill feeling of the husband; but she did not exclude herself from the house, and when in the house talked with her brother.

Miss Ann Parish is not defrauded by any influence of Mrs. Parish, that I can perceive here. She was not excluded, and does not seem to have taken offense of any kind. She came and stayed there twice a year, all through the period of Brown's attendance. She has not ceased her visits that I know of, now, to the surviving representative. We must have something in law, that is more substantial than the mere fact that what are supposed to be the proscribed relations, do not go into the house, were not invited to come to the house, pressed cordially to come. There must be something more than that, otherwise we shall be making inferences out of mere shreds, patches and straws. Exclusion, to be an element in such a case, must be systematic, substantial, and against efforts to gain access. They must have something like a desire that is not satisfied, an effort that is repulsed. I do not find any evidence of that kind anywhere, in respect to anybody. I do find this conventional quarrel, its terms and occasion, and its termination in regard to Daniel; and I find, in respect to Mr. Sherman, the same thing. But there must be some defined effort. By that I do not mean the effort of going and ringing at the bell, and being told by the waiter, "you cannot "come in." There must be a proposition by such agency as will produce a determinate decision, which would justify the person excluded in saying, "I am entirely "excluded, to all intents and purposes." A mere fanciful, sentimental or conventional exclusion, under the

rules of society, is not an exclusion in this sense. It must be placed beyond that; and the party who sets it up must have brought it to something that is beyond that. But finally upon this subject of influence, I have to say that undue influence is not predicable of a relation like that of the married life of Mr. and Mrs. Parish.

The considerations upon this subject have been presented to your honor in the course of the summing up. I say, that undue influence is not predicable of such a disposition by a testator, under that discrimination in favor of a wife of twenty-seven years of honorable, faithful and affectionate marriage relations, in the absence of children, and as against brothers, standing towards him in their feeling and conduct as these brothers did. As against Mrs. Parish in their favor, you do not get up a condition of doubt or difficulty on the subject of the rightful exercise of the opinion, the judgment and the wish of the husband. Did anybody ever pretend that the relation of brother was nearer than the relation of wife? I do not know. I never heard that it was. I never have heard that the natural transmission of blood between collaterals from a common ancestor made a nearer social relation than the natural union of husband and wife by choice. I never have heard that, under nature or society, a wife was a distant relative compared with a brother. Never! I do not understand that the law of nature, which encourages and necessitates the union of husband and wife, makes them less naturally related than does descent from common ancestors. They are not children of the same parents, but the natural relation which unites man and wife is nearer, one to the other, than that of parent or child, brother or sister. There is no doubt of it. To talk of blood relations is one thing; but when you talk of the relation of marriage, it is not conventional. It is not a relation of positive statute. It is a relation of nature, out of which the relation of parent and child, and brother and sister grow, as a fundamental relation of

nature and society. There were no children before there was marriage. There were no brothers and sisters before there were husband and wife. The relation of husband and wife is higher, closer, more conformable, if possible, to nature than any other relation. It is for this "that a man shall leave father and mother, and cleave to his wife, and the twain shall be one flesh."

Now, it is the first and fundamental law of society that the marriage relation should establish an absolute unity, which is superior by nature, by necessity and by policy, to what was, except for this, the highest, the closest, the holiest relation, and the most necessary one to society, in the affections. "And the twain shall be one flesh." That is the doctrine of our religion. That is the foundation of our society. The rule of the common law in reference to property, in reference to rights, in reference to morality, adopts just as closely, on reasons of policy, as this divine command does in regard to the necessity of the social and moral training and education of the human race, the ground that a man and his wife are one.

I believe, sir, that if any one attaches the real value to this relationship of husband and wife, when maintained through life on proper principles, it is unnecessary to illustrate by example or to enforce by epithet anything more than the mere recognition of the relationship as defined, by its name, as dear as our language can present. A childless marriage concentrates all these affections and all these duties. I mean a childless marriage that does not produce any disaffection of feeling or of sentiment.

Undoubtedly, the disappointment in having no issue in any marriage may be supposed to be a source of more or less affliction to the parties thus deprived; but if they stand throughout life the test of continual and close affection and regard, fidelity, honor, obedience, truth and love against that disappointment, they show only the more that that earthly relation of complete identity, both in the notion of religion and the common law, is

their actual fate, made more essential and more complete, as filling up the sum of human relations to them, than if there had been any diversion of the united current of their affection to an object having a claim upon that united affection. Now, how is it with Mr. Parish? How did he speak of the subject when he was drawing the will, of his not having any children? Did he give it as a reason why he should not leave his wife a large provision? No; it was a reason why he should give her the bulk of the property. "I have no children. We have no children." Mr. Havens knew nothing about it. Why should he leave to his wife all his fortune, and his collateral relations but these small sums? Why, "I have "no children. They have no claim upon us in that "regard. I am at liberty to dispose of my fortune as I "like, and I wish to leave it to my wife." That is in 1842.

Suppose that, in 1842, the marriage relations and affections of Mr. and Mrs. Parish were such as they are described to have been, and that was his sentiment; double the marriage life, to 1856, and divide the added life of 14 years between seven years of continuous harmony, prosperity, and affectionate intercourse, spent, more and more, in one another's society; in the leisure of their domestic love, and the indulgence of their tastes and pursuits; his tastes expanding, and hers expanded in his service, in building and decorating his house; and then the blow; and then the reduction of Henry Parish to the condition in which his wife was the only one upon whom he could depend; that the very nature of his physical debility was such that none but a wife could properly attend upon him; take the fact that those services were continuing; that he had capacity, and she did not exert the influence of fraud or coercion, and that he does make wills giving the increment of his property to continue in her, the surviving representative of his name, his wealth, and his affection, with no spoliation of

anybody having any claim of any kind upon him, or any pledge or promise of any kind; who shall say that this is not a disposition of property, really, honestly, representing Mr. Henry Parish's views; that he left on earth behind him, no survivor but his wife, who, in relationship, in duty, in affection, he should wish to continue as the possessor and enjoyer of his wealth, in the absolute sense of owning it, and disposing of it, when she came to die, as he had owned, and disposed of it, when he came to die.

These sentiments of affection to wives, do not perhaps express themselves demonstratively always, but they are sometimes found as the pervading sentiments of dying men when least to be expected. I know of no more notable instance of this than is represented in authentic history to have been the dying wish and sentiment of Louis the magnificent, who undoubtedly had enjoyed in his lifetime as much of the power, splendor, pleasures, glories and pomps of this life, as were ever recorded as being in the possession of any man. Yet, when he came to die, and to die the husband of Madame de Maintenon, never his queen, but his *wife*, never his in any sense until virtue and religion attended at the marriage as witnesses—a lady who had attracted by her personal charms his admiration, by the graces of her mind had enchained his judgment and his taste, and by the firmness of her moral sentiment had enslaved his homage and devotion—when he came to die, his last words were these:

"I regret only you. I may not have made you happy, "but all the sentiments of esteem and affection which you "merit, I have always felt toward you. The only pang I "suffer is in leaving you, but I hope soon again to meet "you in another world."

This was said when Europe was civilization, when France was Europe, and Louis was France. The only sentiment of regret that he expressed when crossing the threshold of death was that he left his wife behind. She was not his queen but his wife, and the only sentiment

that he thought to bear forward with him into the next world that had relation to anything that he had left in this, was the hope of again meeting his wife.

Now, sir, these are sentiments that belong to the best affections of our nature, and I do not know what room there is to warrant a suspicion, or doubt, or cavil, at any disposition of the property which any man, the husband of such a wife to him as this lady was to Henry Parish, bearing every test either of good or evil, and of every temptation either to her temper or her comfort, but still ever adhering to the husband; what is there that can be suggested that should need an explanation of any disposition of worldly possessions on such a survivorship as that?

Intestacy would give, as the figures I shall place before you will show, much more than twice as much to Mrs. Parish as she takes under the probate of the will alone. It will carry to Daniel Parish not more than one-third of what he will take under the will alone, and that is the arrangement of the law for the *average* of cases. And is this the average of wives and brothers? If that were so, that is the judgment of the law; that when you come to the distribution of a man's estate, leaving a wife, without children, that is her right. There is no "spoliation" of brothers or sisters in view of the law in preferring the wife, absolutely, to them to the extent of half of the estate.

What did Mr. Parish do? How much did he extend it beyond that? Why he gave her, under the circumstances of his life, and his death, perhaps, one-third more, in amount, than intestacy would give her? He gives to Daniel's family about half of what intestacy would give him, and he is not needy. So, your honor will perceive, that you do not introduce any considerable elements of disparity in the disposition of fortune, applied to the particular circumstances of this case, from what even the cold, dry and formal judgment of the law would give her.

I have spoken thus far of this case in its application to the disposition of wealth. It is very clear, that so far as it may be considered that the interests are of any value or importance to the contestants, and somewhat so to Mrs. Parish, the possession of the property according to one or the other direction of it, does not touch very nearly any question of the practical value and advantage that property is calculated to give. Mr. Daniel Parish has an abundant fortune. He will not enjoy any more from it, if it is increased, than he enjoys now. So, too, Mrs. Parish, placed far below what the law would give her, has a fortune which will enable her to live independently, and there is therefore none of that close interest that belongs to a discrimination one way or the other, between poverty or independence, or even, in a general sense, the position of what is called affluence.

But this is not a question of dollars and cents. It is a matter of right, and if property is to be well used one way or the other, it is a matter perhaps of some concern, that property should be held in the mass. But the difficulty about this case is here. It is a difficulty that these contestants cannot surmount, and it increases the burden of their case. It is a position that Mrs. Parish cannot neglect, and that her relations and friends cannot omit from considering, and that is this : that nobody can say, that nobody can think, nobody can suppose, that Henry Parish was below the grade of testamentary capacity, and that Mrs. Parish did not know it. That is plain. If there is evidence that can bring your judgment to that conclusion, there must have been facts enough that brought it to her knowledge.

There cannot be any inadvertency or misconception on this point. If that were so, then Mrs. Parish, from the time of her husband's injury, until the time of his death, was playing the part of fraud, contrivance, and imposition; not upon her husband, because if there was no testamentary capacity, no injury was done to him, his

feelings, his views, his independence, but a party to a fraud against conscience, right, and duty, and against the just claims of whoever it might concern in the disposition that the law would make of that testate. If that were so, she abandoned the relation of identity in feeling, thought, interest, and affection with her husband, which is the marriage relation, which it had been between them up to that time. She considered him in a position where it became possible for her, and she yielded to the temptation, to divert that fortune into her own possession. She did it by a simulation of all the best and holiest affections through a long period of time beyond the detection and the scrutiny of any observers. For nobody has professed to have seen through the veil which hid from the observer her true motives and character. Nobody saw in her conduct anything towards Mr. Parish, or in respect of him, except the existence of obedience, devotion, attention, sacrifice and affection. And so she carried it through. She drew into her train in this scheme of fraud, clergymen, lawyers, merchants, friends, partners, everybody, either as in complicity, or as dupes.

Now, that is the case that they present to your honor, and to make out that Henry Parish was an idiot, or *non compos mentis*, or an imbecile, they must establish his wife to have been a person of superhuman intelligence, in coercing the integrity and involving the complicity of all these witnesses, or overwhelming their understandings, and obscuring their observation. One or the other. But we, upon our part, have no such difficult views to take. We say that Mrs. Parish neither changed her conduct, attitude, feeling or relationship of any kind to Mr. Parish from the moment of the attack down to his death; that whatever change there was of conduct, whatever change there was of habit of life, whatever change there was in participating in the enjoyments of life and society, the concentration of her time, her thoughts, her hopes, her

schemes, her plans, her love for Henry Parish, was effected by the dreadful blow that made it necessary for his comfort, and for his claim upon a wife called to discharge her duties in the altered circumstances of their common lives, that she should be at once subjected, as if they indeed were one person, and the apoplectic blow had fallen upon her with him, to become the supplement of his life, and that from the moment that "his right hand forgot its cunning, and his tongue cleaved to the roof of his mouth," her voice and lips obedient moved to the impulse of his will, no longer master of the motions of his own. She was in the highest and holiest sense but part of his being, acting, living for him in the ministration of a wife's duties through the whole.

You cannot, sir, pronounce a judgment against the codicils without turning into gall the best flow of affection, in the purest form, that the relations of our nature permit to exist. You change it all from what is lovely, and pure, and of good report, reverse all the experience of our nature, which denies that suddenly anybody can at once become wholly base, and make the apoplectic blow that struck him, fall on Mrs. Parish, in the attitude and sense that I have described, upon her whole moral nature, which, up to that time, had been untouched, untainted and unsuspected, and transform it to the nature of a vicious, wicked woman. If there be something in the apoplectic stroke that is to touch the mind of Henry Paris, oh! what is there in it that can so crush the soul of Mrs. Parish! All this, while under the eye of everybody, without dissent, without difference of judgment or expression upon the part of any witness in this case, she was leading the life of a virtuous and devoted wife.

I do not see how any one can hold that the apoplectic stroke effected such a change upon the intelligence of Henry Parish, and such a change upon the moral nature of Mrs. Parish as the contestants argue, and must argue for. If your honor cannot sustain their views, you must pronounce for these codicils.