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woman of inferior station, able neither to write nor to read, in a transaction such, and so conducted, as, by the facts that are substantially beyond dispute (whatever the true state of the alleged facts that are not substantially beyond dispute) the transaction in question is shewn to have been (no fourth person intervening), they ought not, I think, to wonder much or to complain heavily that she makes the accusation against them concerning it, which she has made, though that accusation, being a charge of stating falsely to her the contents and nature of a deed, to the intent and with the effect of procuring and causing her to execute that instrument,—a document varying, to their knowledge, at the time, importantly in form and substance from her intention,—is, I agree, not proved; but had the charge been, as to one person, of wheedling her weakness and ignorance into committing an act of indiscretion prejudicial to her and useful to him, and as to both persons, of omitting, whether by negligence, through incapacity, from ignorance, or wilfully, to afford to her advice and assistance which she needed, and which from them were her due, my opinion as to such a charge might, I repeat, have been materially different. If the bill is now dismissed it must be without costs.

The plaintiffs afterwards elected not to take the issues offered them; and the bill was dismissed, without costs.

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Nov. 18*th* & 21*st*.
Dec. 14*th*.

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THE bill in this cause was filed by Benjamin Waters, the sole acting devisee and executor, in trust, of the will and codicil of his father Francis Waters, an aged and infirm man, against the eldest son and heir-at-law of the testator, and his widow, and his other surviving children, and certain grandchildren, for whom provision was made by the will and codicil. The bill stated the will and codicil at length. The will was an holograph; it was dated the 12th of January, 1847.

By the will, which was of ~~great~~ some length, the testator gave to his wife Ann Waters two houses and other hereditaments, with his household goods, for her natural life, and, after her decease, for the purposes therein declared; and he also gave to his eldest son, the defendant Thomas Waters, certain hereditaments therein described, which he charged with any debts due by him to Thomas Waters; also, he gave to Benjamin Waters and Richard Jones, their heirs, executors, administrators, and assigns, certain other hereditaments, in the will described, in trust to receive the rents and profits for his son William Waters, and to pay

1. The only course taken in a suit to establish a will, is to direct an issue; but the object of this being to satisfy the Court directing it, a verdict, at once the result of a well-conducted and fair trial, and the affirmation of what is by that Court itself thought to be the truth, ought not to be disturbed without substantial ground for believing, that on a second trial other evidence of a weighty nature bearing against the existing conclusion can and will be produced; and, therefore, where no substantial ground for such belief was shewn, the Court refused to grant a second trial.

2. When an allegation of a matter of fact has been once fairly investigated between the litigating parties, before a competent judicature, the unsuccessful party not having been taken by surprise, nor being able to allege mistake, accident, or any subsequent discovery of a material kind, the investigation should be considered sufficient, and the judgment thereupon conclusive as between those parties.

3. It is within the ordinary practice of the Court of Chancery to make a decree conclusively affecting the freehold and inheritance of land upon one investigation of disputed facts, as well where there must be a jury, as where it is in the discretion of the Court to have or dispense with a jury; and although there has been no consent or acquiescence on the part of the unsuccessful party desirous of further investigation.

4. Where there has been an establishing suit, and verdict in favour of the plaintiff, the heir is not entitled to more favour than a devisee, unless in the sense that the burden of proof is in that case upon the plaintiff.

It is properly incident to an issue between the devisee and heir that one trial should be conclusive between the parties, though the conduct of the unsuccessful party may have been perfectly fair, and although neither consent nor acquiescence can be alleged against him; and this is equally true, whether the issue relates to a will questioned by a plaintiff or a defendant in equity.

2 Y. B 148.

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the same to him weekly or monthly, as they should think it would do him most good, and after his death to go to all his children, share and share alike; also, he gave to his son Benjamin Waters, and Richard Jones, their heirs, executors, administrators, and assigns, certain other premises, in trust, to receive the rents, and to pay the same to his two grandchildren, the defendants, Thomas Lasbury and Benjamin Lasbury, in equal shares, and after their decease to their children; but if they should die without children, then to come back to all his children, share and share alike; also, he gave and bequeathed to Benjamin Waters, certain premises therein mentioned; also, he gave to his said son the plaintiff, Benjamin Waters, and Richard Jones, their heirs, executors, administrators, and assigns, certain other premises, in trust, to receive the rents and profits for his two grandchildren, Sarah Jones and Robert Waters Jones, and after their deaths to their children; but if they should leave no children, then he gave the same to all his own children, share and share alike. Also, he gave to Benjamin Waters and Richard Jones, after the decease of his wife Ann Waters, the two houses given to his wife for life; and also certain other premises in trust for his daughter Ann Smith and her children. And as to other premises which the testator had given to his wife Ann Waters for her life, he gave the same, and certain other premises particularly specified, amongst and between the testator's sons, Thomas Waters, William Waters, Benjamin Waters, his daughter Ann Smith, Rachael Lasbury's two children, Thomas Lasbury and Benjamin Lasbury, Sarah Jones's two children Sarah Jones and Robert Jones; that was, to Rachael Lasbury's children one share, and Sarah Jones's children one share; also, he gave to his son Benjamin Waters, and Richard Jones, certain other premises, particularly described; and whatever was left after all his just debts and law expenses were settled, he gave the same

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unto all his children and grandchildren, share and share alike; and he gave to Benjamin Waters and Richard Jones all rents and monies, and other monies which should be due at the time of his decease, to divide the same amongst all his said children and grandchildren. And he appointed his son Benjamin Waters, and Richard Jones, his executors in trust of his will.

This will was signed by the testator on the day of its date, and purported to be duly attested by three witnesses.

By a codicil, dated the 14th of January, 1847, which was written upon a blank sheet attached to the will, the testator devised and bequeathed certain premises therein described, which were not included in his will, and all other freehold or chattel-real property, which he might die possessed of, and which was not devised or bequeathed by his said will, unto Benjamin Waters and Richard Jones, upon trust, as to one-sixth part, for his son Thomas; as to another sixth, for his son William; as to another sixth, for his son Benjamin; as to another sixth, for his daughter the wife of Richard Smith; as to another sixth, equally to be divided between his two grandchildren, Thomas Lasbury and Benjamin Lasbury; and as to the remaining sixth, equally to be divided between his two grandchildren, Sarah Weight and Robert Waters Jones, children of his deceased daughter Sarah.

The testator's signature to the codicil was attested by two witnesses, being other persons than those who attested the will.

It appeared that the testator was an illiterate person, and that the will was a document consisting of several sheets of paper which he had himself prepared long previously. The codicil, however, was prepared by and was in the handwriting of Mr. Hamlyn, one of the attesting witnesses to its signature.

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The following facts appeared from the statements in the original bill, as they were either proved or admitted:—

That the testator died on the 15th of January, 1847.

That Richard Jones by deed disclaimed all the devises and bequests contained in the will and codicil; and that, in May, 1847, Benjamin Waters applied to the Prerogative Court of Canterbury for probate, but that Thomas Waters, the eldest son, having caused a caveat to be entered, a suit was in course of prosecution in the Prerogative Court between Benjamin Waters and Thomas Waters as to the validity of the will.

The plaintiff, by his original bill, prayed that the rights of the several parties to the real and personal estate of the testator might be declared; and that, if necessary, the will and codicil might be established, and the trusts thereof performed; and that the premises devised by the testator upon trust for the payment of his debts might be sold or mortgaged for that purpose; and that the deficiency might be raised out of the other estate and effects of the said testator in due course of administration; and for an appointment of a receiver of the real estates, pending the suit in the Prerogative Court; and that the personal estate of the testator might be properly secured during that suit.

By a supplemental bill the plaintiff stated, that since the filing of the original bill he had obtained probate in the Prerogative Court, and he sought the appointment of a receiver.

The defendant, Thomas Waters, by his answer admitted the existence of the paper-writing of the 12th of January, 1847, and that it was executed by the testator, in the presence of two witnesses, namely, one William Plummer and one Samuel Baker; but he alleged that such paper-writing was attested as having been executed in the presence of three witnesses, viz. William Plummer and Samuel Baker, and of one Sarah Baker, but who was not, as the

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defendant had been informed and believed, present when Francis Waters executed the paper purporting to be his will; and that a paper-writing purporting to be a codicil to the alleged will, and dated the 14th of January, 1847, was executed by Francis Waters, and was attested in the form required by law; and that such last-mentioned paper-writing was in the words and figures, or to the purport and effect of the alleged codicil in the original bill stated; but he said he believed that the testator, Francis Waters, was not of sound and disposing mind and memory and understanding when the paper-writings, or either of them, were or was so executed by him, and that he was then incapable of making any testamentary disposition; and the defendant said he believed that Francis Waters did make several other wills and codicils, but that he cancelled or revoked the same; and he submitted that the testator, Francis Waters, died intestate as to his real estate, and that the same descended upon him the defendant, Thomas Waters, as his heir-at-law; and therefore he denied that the alleged testator, Francis Waters, duly made and published his last will and testament in writing, dated the 12th of January, 1847, or of any other date, or that such alleged will was duly executed by him, or attested in the manner required by law. And he said that he had been informed, and believed it to be true, that the alleged testator, before his decease, had sold or disposed of the house and butcher's shop, and part of the washhouse and other hereditaments in Sims-alley, and the house in Bedminster-causeway, and the houses and two tenements at the bottom of the gardens, in the amended original bill alleged to have been devised by his alleged will, upon trust for the payment of his debts and law expenses, and otherwise as therein mentioned; and that the said alleged testator had also before his decease received the sum of 315*l.*, stated by his alleged will to have been advanced out of

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his pocket more than all the rest of the partners, before he left the Easton coalwork, in the said original amended bill mentioned; and he submitted to the Court, that the personal estate of the alleged testator ought, in the first instance, to be applied in payment of his funeral and testamentary expenses and just debts. This defendant also alleged, that he believed that sufficient funds had been realised by the plaintiff out of the personal estate of the testator, to pay and satisfy the funeral and testamentary expenses and just debts of the alleged testator, or that sufficient funds could have been realised by the plaintiff for the purposes aforesaid, without resorting to such sale or mortgage as in the original bill mentioned.

This defendant alleged, that he had in his possession a document which he believed contained the instructions for the last will of the testator Francis Waters, which he intended, while he remained of disposing capacity, to make.

The other defendants, the testator's widow and his children and grandchildren, concurred with the plaintiff in setting up the will and codicil.

The plaintiff examined witnesses in the cause to prove the will and codicil.

William Plummer, an attorney's clerk, deposed, that the testator signed the will in question on the 12th of January, 1847, being the day of its date, in the presence of the witness, and of Samuel Baker, a blacksmith, and of Sarah Baker, widow; and that he at the same time acknowledged his name appearing to be set or subscribed thereto as his own handwriting, in the presence of the witness and of the said Samuel Baker and Sarah Baker; present at the same time; and that he and Samuel Baker set and subscribed their names, and the said Sarah Baker set her mark as witnesses, in presence of the testator and of each other. He also identified the several signatures,

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and deposed that the testator was of sound and disposing mind, memory, and understanding; that the testator knew the deponent, and requested that he would see him execute his will.

Samuel Baker, a blacksmith, on his examination said, that the testator signed the will of the 12th of January, 1847, as and for his will, in his presence, and in the presence of William Plummer, and also, as he verily believed, of Sarah Baker, although his recollection did not enable him to say with certainty whether or no she was actually present at the time that Francis Waters signed his name to the will, inasmuch as she was moving about the room in her capacity of nurse at the time he signed the will; nevertheless, he verily believed that she was so present at that time.

Sarah Baker, widow, deposed that the said Francis Waters did not sign the will of the 12th of January, 1847, as and for his last will and testament, in her presence, but whether in the presence of any other person or persons she was unable to depose; but after the same appeared to have been signed by him, she was called into the room from below stairs, where she had been for an hour or two before, and was asked by William Plummer whether she could write, to which she replied that she could not; that the said William Plummer at that time was writing something, but whether he was signing his name as a witness to the will or not she was unable to say; and she said, that when William Plummer had finished what he was writing, she saw Samuel Baker sign his name as a witness to the will, and William Plummer thereupon wrote her name, and she set her mark thereto as one of the witnesses to the will; and she said that, except as thereinbefore stated, whether the said testator executed the said produced paper-writing, or acknowledged his name, appearing to be set or subscribed thereto, as his own handwriting, she was unable to

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depose; and she said that the mark appearing to be set to the said paper-writing as purporting to be her mark as a witness to the paper-writing, was of her own proper hand, and was so made at the instance of William Plummer, in the presence of the testator. She also said, that she set her mark to the said produced paper-writing on the 12th day of January, 1847; and that, during the whole of that day, the said testator was quite sensible, and of sound and disposing mind, memory, and understanding.

Richard Jones, wheelwright, identified the will of the 12th of July, 1847, and deposed that he was present when it was signed by the testator and by the three witnesses; and that the testator's son, Benjamin Waters, who was present, asked him whether he knew what he was doing? to which he replied, "I don't know but I do," which was his customary mode of acquiescing in what was said. He also deposed that the testator signed his will in the presence of the three witnesses, who were all present during the attestation by each. He deposed also, that the testator was perfectly sensible, and under the impression that he was in great danger.

As to the codicil, Mr. Briggs, the surgeon attending the testator at the time, deposed to its signature by the testator, and to its attestation by the deponent and Mr. Hamlyn, the solicitor who had prepared it, on the 14th of January, 1847; that the testator was fully competent; and that, in an answer to an inquiry by Mr. Hamlyn, whether the codicil was what he wished, the testator said it was, and that he considered it was a fair way to have it. And Mr. Hamlyn, the solicitor who prepared the codicil, also deposed to the due signature and attestation thereof; that the testator had given him clear and distinct instructions for preparation of the will; and that, to a suggestion by the witness, that he might make his mark, the testator said, "Why not write my name, then?" and did so.

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The cause came on for hearing on the 1st of May, 1848, when a decree was made, which included the direction of two issues, devisavit vel non, upon the will and the codicil, to be tried at the then next Bristol Assizes.

These issues, as they were settled, raised the two following questions:—

First, whether Francis Waters, deceased, by a paper-writing or document, dated the 12th of January, 1847, purporting to be the last will and testament of Francis Waters, devised the lands therein contained.

Secondly, whether the said Francis Waters, by the said paper-writing or document, and another paper-writing or document, dated the 14th of January, 1847, purporting to be a codicil to the said first-mentioned document, or by either of them, devised the land therein contained or any of such lands.

It was directed that the plaintiff in equity should be the sole plaintiff at law, and that the defendant, Thomas Waters, should be the sole defendant at law.

These issues were accordingly tried at the Bristol Assizes, before Mr. Justice *Coleridge* and a special jury, on the 23rd of August, 1848.

The witnesses whose evidence is above stated, and other witnesses, were examined before the jury on behalf of the plaintiff, in support of the will and codicil. They were cross-examined on behalf of the defendant at great length.

The defendant entered into no evidence.

Mr. Justice *Coleridge*, in his charge to the jury, laid down the general principles by which the jury should be guided in deciding on the case, and stated the purport of the evidence fully.

The arguments and decision upon the motion for a new trial before the Vice-Chancellor, turned very much on the charge of the learned Judge, the short-hand note of which was verified by affidavit. The substance of that charge will be found in a note at the end of this case, p. 619.

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The Jury found for the plaintiff on both issues.

The further particulars of the case are stated in his Honor's judgment, and in Mr. Justice *Coleridge's* charge, post, p. 619.

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A motion was now made on behalf of the defendant, Thomas Waters the heir, for a new trial of the issues. The motion was supported by the affidavits of that defendant and his solicitor, that the testator was for many years previous to the year 1843, the owner of certain property, which was described; and that there was, previously to the month of July, 1842, the sum of 315*l.* due to him, on a specified transaction; and that the same premises and the sum of 315*l.* were devised and bequeathed by the will of the 12th of January, 1847, in trust, for the payment of his debts, though the property had been sold, and the purchase-money had been received, in 1843, and the debt had been received in the year 1842. And that they verily believed that the will of the 12th of January, 1847, had been drawn up previously to the 26th of July, 1842. The defendant, Thomas Waters, also deposed, that the value of the other property mentioned in the codicil, as compared with the Easton colliery, was small, the latter being 1800*l.* or upwards, and the former 600*l.* or thereabouts; and he also deposed, that he had often heard his father, Francis Waters, declare, and he believed that such had always been his intention, that his said father had intended to bequeath his share in the Easton colliery to him Thomas Waters; and that he had, in the sundry books belonging to his said father, which he verily believed to be in the possession of the plaintiff, seen divers entries to the effect that the share of the deceased in that colliery was to go to him Thomas Waters. He also identified a document as having been found amongst the papers of the deceased in his handwriting, containing a specification of his property, and an apportionment thereof amongst his children, in which the Easton coal-work was apportioned to the deponent; and he stated his belief that such document contained what the deceased intended should have been the heads of a will; and he specified circumstances to shew that the document had been drawn up long after the will of the 12th of January, 1847.

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It appeared that this document had been proved to be in the testator's handwriting at the trial, upon a cross-examination of one of the plaintiff's witnesses, but that it had not been then put in evidence by the defendant.

Mr. *Russell*, Mr. *Piggott*, and Mr. *Prideaux*, in support of the motion.—Though the verdict has been against the defendant Thomas Waters, he is entitled, as heir, to have a second trial; indeed, under the old authorities, this was nearly a matter of course.

A Court of law never interferes against the heir, until a verdict against him in a second ejectment. Why, then, should that right be jeopardised by his being brought as a defendant into this Court? The heir is the law's devisee, and the law's will is not to be set aside except upon a case fully established.

But if the Court shall think the defendant bound to shew that there was a miscarriage on the former trial, or that evidence was omitted to be offered to the jury, which might have had some bearing on the issue, then it is submitted that the original paper, which was proved by one of the plaintiff's witnesses, upon cross-examination, to have been in the handwriting of the deceased, is an important document, affecting the present question, and that document was not placed before the jury. If they had taken it into their consideration, it might have had great weight with them against the validity of the will.

That this document was withheld from the jury may

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have been, either owing to the hurry of a Nisi Prius proceeding, or from a mistaken view, at the moment, of what was best for the heir's interest; but the Court will protect the heir from being irremediably bound, in consequence of such accident or mistake. The question here is not whether the counsel at the trial exercised a sound discretion or not; but whether the conscience of this Court can be satisfied with the verdict, when it knows that this document exists, but that it was not presented to the jury.

[His Honor inquired whether there was any affidavit, that, if these issues were tried again, the defendant had any further evidence to lay before the jury.]

There is the evidence of this original document, shewn to have been proved upon cross-examination, but not put in as evidence in the cause; and we now submit this to be evidence. There is also the suggestion in the heir's affidavit, that there are entries in the books of the deceased, shewing intentions different from those expressed in the will.

Another serious ground of objection to the will itself, is that of clandestinity; and it is possible that another jury would come to an opposite conclusion upon the same facts, and find against the will. The circumstances attending the execution of the will, especially the secrecy with which Plummer, the attorney's clerk, who had come accidentally to the house on other business, had been sent away until Thomas, the heir, left, would surely, on these grounds alone, have justified another verdict. It is manifest, at least, that the attention of the testator was never distinctly given to the will; and that, dozing, as by the attesting witnesses he is admitted to have done during the reading of the will, his mind was in a comatose state from extreme debility, and that he was not competent to dispose of his property.

The charge of the learned Judge on the trial adverted

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pointedly to the clandestinity, and the comatose state of the testator's mind, in a way with which a verdict in favour of the defendant, the heir, would be most consonant.

[They read the principal parts of the facts and observations stated and made in the charge of the learned Judge to the jury at the trial, for which, see the note at the end of this case, p. 619.]

It is the practice of this Court to follow, to a great extent at least, the practice of the Courts at common law, in not binding the title to real property upon one trial. Thus, in *Locke* v. *Colman* (*a*), a first trial at law having been unfavourable to the customary heir, in an issue directed out of Chancery, a second trial was granted, and the Lord Chancellor (Lord *Cottenham*) said, "It is sufficient for the purpose of this case to say, that the Court will not bind the inheritance by the result of a single trial, if there be reason for believing that a second trial may afford more satisfactory grounds upon which a final adjudication of the rights of the parties may be founded."

The defendant, Thomas Waters, retired from contesting probate in the Ecclesiastical Court; because he was interested in the testator's real estate, and his rights could be better investigated in this Court. The grant of probate raises, therefore, no presumption against the defendant.

In all Courts, a will written without a testamentary intention will be set aside. In *Nichols* v. *Nichols* (*b*), Sir *John Nicholl*, after stating the evidence of a subscribing witness, said (*c*), "A witness attests a will for the purpose of giving authenticity to the factum of the instrument. The animus testandi is the very point into which the Court of probate is to inquire. The mere act of witnessing or

(*a*) 2 My. & Cr. 42. (*b*) 2 Phil. Ec. R. 180. (*c*) Id. 185.

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signing does not exclude of necessity the absence of the animus testandi, any more than the mere act of cancellation excludes of necessity the absence of the animus revocandi." Apply this principle to the proved facts in this case, and this Court will at least think that the one issue ought not to bind this heir.

In the leading case of *Baker* v. *Bott* (*a*) it was decided, that the burthen of proof of the genuineness and authenticity of a will lies on a party propounding it; and the alleged will must be rejected if the conscience of the Judge is not judicially satisfied that it does contain the last will and testament of the deceased.

The testator, Francis Waters, was, at the time when he executed his will, of impaired capacity, and there is no adequate proof that he knew its contents. This is precisely the state of circumstances under which probate was refused by the Prerogative Court, in *Darnell* v. *Corfield* (*b*); and in a will affecting real property, it is submitted that this Court should be even more cautious than in a case where personal property alone is affected.

They also cited *Middleton* v. *Forbes* (*c*), better known in Courts of equity as *Welles* v. *Middleton* (*d*).

[The VICE-CHANCELLOR referred to *Ingram* v. *Wyatt* (*e*).]

Mr. *Wigram*, Mr. *Butt*, and Mr. *Hallett*, for the plaintiff. —It has long ceased to be a doctrine of this Court, that it requires two verdicts to bind the inheritance, if there ever was such a doctrine.

So far is it from being the practice of this Court to direct a second issue at the request of the heir, that it is in the discretion of the Court whether it will grant a single issue, and where the will has been proved in the cause, to the satisfaction of the Court, this Court will not direct any issue. Thus, in *Man* v. *Ricketts* (*a*), the Court refused an issue devisavit vel non, Lord *Langdale* saying (*b*): "This is, therefore, a clear case of the will being proved, and the question is, whether it is to be established without an issue devisavit vel non. I quite concur in the opinion that was expressed by Chief Baron *Alexander* in the case cited. It is the ordinary course to grant an issue at the request of an heir; but it is not a necessary course, when the special circumstances are such as to make it manifestly improper." The refusal to grant an issue was confirmed by the House of Lords.

(*a*) 2 Moo. P. C. Cas. 317.
(*b*) 3 Notes of Cases in the Ecclesiastical and Maritime Courts, 225.
(*c*) Cited in *Ingram* v. *Wyatt*, 1 Hagg. 305.
(*d*) 1 Cox, 112; *S. C.* 4 Bro. P. C. 245.
(*e*) See 1 Hagg. 305.

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The practice in the Courts of law does not form so clear a precedent for granting a new trial, as it at first appears to be. For though the verdict in one action of ejectment is not conclusive, and another may be brought, the verdict in the first action may be given in evidence on the second action.

If this Court is satisfied with the way in which the trial at law has been conducted, it will not direct a second issue: *Wilson* v. *Beddard* (*c*), and the numerous cases there cited, and *M'Gregor* v. *Topham* (*d*).

Now, upon the trial of the issue in this cause, the trial was fairly had before a full special jury, upon a charge to which the defendant raises no objection whatever, either as to the facts stated, or the observations made.

Upon the present motion no ground is stated, on which it might reasonably be suggested that a second jury ought to differ from the special jury, whose verdict is in favour

(*a*) 7 Beav. 93.
(*b*) Id. 101.
(*c*) 12 Sim. 28.
(*d*) 3 Hare, 488.

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of the plaintiff, except the memorandum, which was proved on the trial, but which the defendant's counsel deliberately withheld from the jury. There is nothing in that memorandum which could or ought to affect the verdict, and there is no reason why a new trial should be granted.

Mr. *Russell*, in reply.

The VICE-CHANCELLOR:—

Dec. 14th.

Francis Waters, a yeoman of the neighbourhood of Bristol, died at an advanced age on the 15th of January, 1847, having, after the 11th of that month signed two instruments; one as his will, which was wholly in his own handwriting, the other as a codicil. Both were proved in the Prerogative Court of the Archbishop of Canterbury, but not before the following June. The probate, which is still in force, is not nor has substantially been the subject of litigation or contest; and the plaintiff in this cause is, by means of it, the legal personal representative of Francis Waters. It is, however, true, that soon after the testator's death his eldest son, Thomas Waters, a defendant in this suit, one of his next of kin, entered a caveat in the Ecclesiastical Court against granting probate of the two instruments; but that caveat, as I collect, was withdrawn or abandoned, or became of no effect, before the grant of probate there that I have mentioned.

The plaintiff, the executor, is a younger brother of the defendant who had entered the caveat, and whom the testator left his heir-at-law.

The will and codicil purport to dispose of freehold as well as personal property in favour of the plaintiff and defendants in this cause respectively, and could not be valid as to personal estate, without being valid necessarily as to the freeholds also.

It may not be out of place for me now to say, that,

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though the will, being that of a man probably of defective education, is generally ill-spelled and expressed awkwardly, the dispositions and provisions which the two instruments, taken together or taken separately, contain, (whether considered by themselves only, or with such evidence as there is of extrinsic circumstances,) do not appear to me such as were unlikely to proceed from a careful man of a good understanding and judgment, as well as right intentions. It is true, as I collect, that the body of the will, wholly, as I have said, written by Francis Waters's own hand, probably before, and perhaps some years before, the year 1847, does among the properties which it specifies as subjects of it, enumerate some that, previously to the time (January 1847) when he signed it, had, to his knowledge, before that time, ceased to exist or to be his; but it is also true, that it has not been proved to my satisfaction, that, with reference to those changes and to the scheme or plan of disposition expressed by the will, it was, for the purpose of obviating any important deviation from that scheme or plan, necessary or material to alter the will before signing it, if it should be his sole testamentary instrument; and, however this may have been, he was, at the time of signing it, in a weak and disordered state of bodily health, likely, at his period of life, to create a belief of its probably approaching termination; and, whatever the effect of the changes, the completion of the will in its actual state at that time may well have been an act much more consonant to his feelings and wishes, and a wiser, safer, and better thing for him to do, than to die intestate,—an event which delay might have caused, and which it seems likely enough would have been a serious misfortune for the majority of those whom he appears to have considered as having claims on his care and bounty.

In May, 1847, the first bill in this cause was filed, having, for one object at least, the protection of the personal estate before probate; after the probate, the second bill

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was filed, in August, 1847,—the two together praying the establishment of the will and codicil against the heir, and the performance of the trusts expressed to be created by them.

The defendant Thomas Waters, in his answer (an answer to both bills together) says, among other things, thus:—

[Here his Honor read the paragraphs from the answer of Thomas Waters, see ante, p. 594.]

It is, I think, to be understood, that the heir by this answer meant to suggest mental incompetency in the testator as the only ground of objection to the will and codicil, or either of them. No cross bill was filed, and the cause came on for hearing before me, it seems, on the 1st of May last, when a decree was taken, as I suppose and understand, without opposition and without discussion; nor do I believe that my attention was called to the manner of wording it in any respect. As drawn, passed, and entered, it contains, among other things, directions which are thus:—[His Honor read that part of the decree of the 1st of May, 1848, which directed the issues, see ante, p. 599]. I may say in passing, that I am not sure that, if my attention had been called to the matter, the decree would have been exactly as it is.

Upon the issues thus directed, the plaintiff and the defendant Thomas Waters went to trial at Bristol in the summer of this year, the record at law being, however, not exactly such as I should have expected to find it; but practically and substantially neither its irregular or informal shape, nor the incorrectness of the decree (if there is indeed any irregularity, informality, or incorrectness in either) has produced any evil or inconvenience.

The question of the validity of the alleged will as a will of freehold estate, and the question also of the validity of the alleged codicil as a codicil affecting freehold estate, were meant to be tried at law respectively, and were respectively so tried. The question of the validity of each

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severally was put by the learned Judge, and answered by the jury—a full special jury—who, by their verdict as to each, have said that the alleged will is a valid will, and that the alleged codicil is a valid codicil. There was not any improper rejection or improper reception of evidence. The attesting witnesses to the will, and the attesting witnesses to the codicil (not the same persons) had, before the hearing, been examined in the cause, and were at the trial produced and examined on the part of the plaintiff, and were cross-examined by the heir's counsel, who addressed the jury, but did not call a witness, or produce any evidence.

It has, however, been admitted that he tendered to one of the plaintiff's witnesses, and, by means of that witness, proved to be in the testator's handwriting, a paper set forth at length in an affidavit, made by Michael Marshall and others, now before the Court, but did not think fit to make that paper part of the case, that is, to lay it before the jury.

Not a portion of the plaintiff's evidence could have taken the heir by surprise, either as to the will or as to the codicil, and I do not collect that a postponement of the trial was asked or desired, or that the total absence of evidence on his part is attributable, wholly or in any degree, to any other cause than his own wish and choice. The learned Judge before whom the trial took place delivered a charge to the jury, against which the counsel for the heir before me having, in effect, described it as faultless, have not uttered a word of complaint or objection; and it seems to me, on the whole, that a case never was more fairly tried. I may add, that if it has been imputed to the plaintiff that there was, upon any occasion, any want of fair or open conduct on his part, such an imputation has not been made with reference to any time after the testator's death.

The motion, however, has been brought before the Court,

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of which I have now to dispose—a motion, namely, by the heir for a new trial of the issues. It was fully argued in Michaelmas term last, when I had the assistance of several counsel, of whom two had been engaged in the cause at Bristol.

Two affidavits were filed in support of the motion, to one of which I have already alluded; the other does not, in my opinion, contain anything important to either party. It was contended for the heir, that there was, or might be, materiality in the paper already mentioned;—that was in the hands of his leading counsel, and proved to have been written by the testator—a paper of the origin, means, or manner of the possession of which by the heir I am not aware, except that he says, in the affidavit of Michael Marshall and others, that since Francis Waters's death, he Thomas Waters found it amongst Francis Waters's papers. Of the possible materiality of this document, however, I have not been able to persuade myself. To say nothing of the election upon the heir's part, to withhold it from the jury at the trial, I am of opinion, that if it had then been before them as part of the case, it would not and ought not to have made any the slightest difference.

It has also been suggested as possible, that the books which the same affidavit mentions, and the papers with or among which the sheets now forming the will were, upon the occasion of making the will, or just before it, might have been, and might be, material to the case of the heir if produced; of this, however, no probability has, I think, been shewn: what were the contents, or what the nature of those books or papers, or of any one of them, I am not aware, nor have any notion, except that the affidavit thus speaks of the books: [Here the Vice-Chancellor read the extract from the affidavit of the defendant Thomas Waters, made in support of this motion, set out ante, p. 600].

There is, however, a total absence of proof that, at or before the trial, any notice to produce, or any endeavour

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to procure the production or any complaint of the non-production of, these books and papers, or any one of them, was given or made by the heir, or on his part. It is not, nor do I think that it ought to be, my belief that the jury, if any one or more or all of these books and papers had been before them, would or ought to have taken a different view, in any respect, from that which they did take of the case. The suggestion upon his part as to the absent books and papers is too vague, too slight, too little supported by evidence, too little in accordance with his own acts and conduct, to carry with it any weight whatever; so at least the matter appears to me: and as to any other additional evidence possibly capable of assisting his case, he has offered not merely no proof, but no suggestion in support of his motion,—an observation which I make, not forgetting Dr. Simmonds, whom, whether actually present at the trial, as stated by Mr. *Butt*, and not admitted by Mr. *Prideaux*, or not so present, the plaintiff was not bound to call, but the heir would, I suppose, have examined, or wished to examine, on that occasion, had he thought that gentleman likely to be a valuable witness for him.

But it has been contended on his behalf, that the evidence before the jury was insufficient to warrant a conclusion in favour of the will, or in favour of the codicil. Having, however, given to this point, as well as to every other part of the case, the best attention in my power, and having very particularly considered the observations made by the heir's counsel on this motion, upon the subject of the drowsiness of the testator on the evening of the 12th, the necessity, or supposed necessity, of rousing or exciting his attention occasionally, while the matter of the will was proceeding, the endeavours, successfully made, to transact the business of signing and completing both the will and the codicil without the presence of the heir, the activity of the plaintiff in the business, and the manner of acting of Mr. Briggs (whose integrity I may say that I do not doubt),

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I continue of the opinion which I entertained at the conclusion of the arguments of the heir's counsel, that, had I been one of the jury, I should have agreed in the verdict that has been given upon each issue: thinking, as I do, their conclusion as to each instrument in conformity with truth and law and justice, and being firmly persuaded that if, as to either instrument, their decision had been different, I should upon application have granted a new trial.

As to identity or attestation, or any formality, there is no question. And it is, I think, a proposition perfectly indisputable, that when on the 12th of January the testator signed the will, and when on the 14th he signed the codicil, he was fully in possession of his mental faculties, and testamentarily capable in the amplest sense, subject to the only questions that have been raised against either instrument at the bar in this Court, being the only questions that could, I think, against either instrument, be arguably or rationally raised; questions which may, I think, be in effect thus described:—

First, whether, when he signed the will on the 12th of January, he had, independently of any reading or communication to him upon that occasion, a sufficient recollection of its contents.

Secondly, if he had not, whether, the state of his bodily health, and his drowsiness, or occasional drowsiness, at the time being considered, he was then sufficiently reminded, or sufficiently informed, of those contents, so as to have the nature of them, and the scheme of the instrument, present to his mind when he signed it.

Thirdly, whether, when he signed the codicil, he was aware of the nature of the contents of the will, and the scheme of the will.

And, Fourthly, whether, when he signed the codicil, he was aware of the nature and scheme of the codicil.

These questions, or the last three of them at least, I have no hesitation in saying, ought, in my opinion, to be

upon the evidence answered against the heir and with the plaintiff; nor do I understand the learned Judge, before whom the issues were tried, to be dissatisfied, as to either instrument, with what the jury have done. His report of the trial not intimating either satisfaction or dissatisfaction upon his part with the result, I thought it right to request a communication from him on that subject, which he has made to me, and from it I find his opinion to be, that, according to the rules and course of the Courts of common law (independently of any question as to the course or practice of this Court), there is no ground for asking for a new trial. It is, however, true that the learned Judge informs me also, that, though not dissatisfied with what the jury have done, he would not have been dissatisfied had the verdict upon each of the two instruments been in favour of the heir.

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This view of the matter, taken by a person of his experience, and weight, and consideration, who saw and heard the witnesses, is one that deserved certainly, and has received, my serious and careful attention. But as I have been unable (I say it with the utmost deference) to come to the conclusion that a verdict against either instrument would not have been unsatisfactory to my mind, or would not have been wrong, and as the trial was directed for the information and assistance of this Court, I think the plaintiff entitled to expect me to act upon my own impressions, however fully I am aware that, if they do not entirely agree with those of the learned Judge, they are (to say the least) not more likely to be correct than his.

It may not, perhaps, be right to lay any stress on the circumstance, that, as I understand the affidavits, not one of the deponents states in either of them a belief that the verdict upon either issue was contrary to truth or justice, or anything to that effect. I remark that in passing merely.

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But it has been suggested on Thomas Waters's part, that, as the present verdict on each issue, if left to stand, must, as it is said, be final, though the questions in dispute have been only once tried—as the case is one of title to freehold estates of inheritance—as the issues were directed in a suit seeking to establish a will against an heir,—and as the heir is the party applying, there ought therefore (even if there is no other ground) to be a new trial. To this reasoning, however, or to such a proposition, I cannot accede. To ask more favour for an heir than for a devisee, unless in the sense of the almost universal maxim, that, to prove is upon him who asserts, not upon him who denies, is a demand too contrary to justice and rational jurisprudence to be entertained for a moment, at the present day at least.

The argument derived from the final nature of this verdict, and its effect upon the title to freeholds of inheritance, being applied to an issue directed by this Court upon a question merely of private right between private persons, in which the failure of the unsuccessful party does not and cannot damage or prejudice any person but himself, or any interest but his own, proves too much, and is, I conceive, unsound. It is equally applicable to every issue similarly circumstanced in these respects. So that, if it is good, there ought in every instance falling within its range to be two or more trials, unless the party failing in the first do not ask for a second, or a case of unfairness relating to the first trial, or of consent or acquiescence, be established against him. That surely cannot be. It is, I apprehend, properly incident to such an issue, that one trial of it may be conclusive for ever between the parties to it upon the question tried, though the conduct of the unsuccessful party asking for a second trial may have been perfectly fair in all respects, and neither consent nor acquiesence can be alleged against him. This, I conceive, to be equally true whether the issue relates to a will questioned by a

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plaintiff in equity or by a defendant in equity, or to any other subject of merely private concern whether a freehold estate of inheritance or any other kind of property.

I apprehend it indeed to be not merely a principle of jurisprudence, but a general rule of the law of England as administered in every part of Westminster Hall, that a disputed fact ought not to be twice investigated between the disputing parties; namely, that, when it has been fairly investigated between them before a competent judicature, the unsuccessful party not having been taken by surprise, nor being able to allege mistake, accident, or any subsequent discovery of a material kind, the investigation, so once had, should as between them be considered sufficient, and not repeated, and that one judgment directly upon a disputed point of fact—the judgment being that of a competent jurisdiction—may by the successful party to the contest be effectually opposed as a conclusive bar between them to the other upon that point. All instances in our courts varying from this doctrine or position are, I apprehend, merely cases of exception, which, depending on peculiar reasons or particular circumstances,—are consistent with the acknowledgment of its truth generally.

I consider, accordingly, that the power in former times of bringing in some cases a feudal action of the highest order, after failing in one of a possessory kind, and therefore of an inferior order, and the power now very frequently exerciseable of re-opening a dispute, by bringing a second, after an adverse judgment in a first, action of ejectment, are not more than examples of exceptions such as I have just mentioned, (if so much,) and are not examples or proofs of a rule.

A plaintiff beginning litigation with a mere writ of right, might so have caused all contest to be for ever concluded by a single proceeding; and there were frequent cases in which a single judgment in a real action,

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even of the possessory class, was necessarily conclusive upon the title, and final.

With regard to the action of ejectment, which does not lie for every kind of tenement, though originally a sincere proceeding according to its apparent purport, it has long been, as we all know, and is universally in practice, a suit in which, the plaintiff being nobody, the original defendant also a phantom, and the substituted defendant judicially compelled, as the price of being allowed a hearing in his defence, to admit the truth of a series of strange fictions,—the question for decision is upon the right of a person that never lived to retain or acquire possession under a lease which never existed, and of which, in each case, the commencement and duration are the creation of the pleader's fancy. A judgment in such an action must often, almost of necessity, be legally inconclusive; but that legal inconclusiveness (when it occurs and so far as it exists—for a judgment in an action of ejectment is sometimes pleadable successfully, as *Doe* v. *Wright* (*a*) has recently shewn,) arises on a ground merely technical, from the singular nature of the particular proceeding, not from any principle favouring the repetition of disputes. I may add, that though the ordinary form of the "consent rule" in use precludes a defendant in ejectment from any plea except "not guilty," a different course may, I apprehend, be allowed, where it is consistent with justice to do so; and (without referring to pleas in abatement, or resorting, as to pleas in bar, to the authorities in 9 Co. and Carth.), I suppose that cases may be easily put, in which special pleas in bar (a plea, for instance, with proper averments of a former judgment, even in ejectment) would be allowed to be pleaded in ejectment, and, being pleaded, would be successful. With respect to the decisions and dicta in

(*a*) 10 A. & E. 763.

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Lord Darlington v. *Bowes* (*a*), *Lord Winchilsea* v. *Wauchope* (*b*), and *Locke* v. *Colman* (*c*), the last appears to me consistent with all that I have said; and as to the two other authorities, I may be permitted to say, that I believe it to be, and for more than a century to have been, a very usual and ordinary thing in the Court of Chancery to make a decree conclusively affecting real estate,—conclusively affecting the freehold and inheritance in various ways—upon the foundation of a single investigation of disputed matters of fact, whether by a jury or without a jury, as well in the instance, or, if more than one, the instances, where there must be a jury, as in more frequent instances, where it is in the discretion of the Court to have or dispense with a jury, though the unsuccessful party, desirous of further investigation, has consented to nothing, has acquiesced in nothing, and has conducted himself in all points fairly. For the purpose of this remark, I do not reckon the examination of the witnesses against or in support of a will or codicil, which takes place in equity before granting an issue devisavit vel non, or directing an action of ejectment on a question of testamentary validity, to be an investigation, nor ought it, I think, to be so reckoned.

I may observe, that Lord *Eldon*, in *Bootle* v. *Blundell* (*d*) (and I suppose with his usual accuracy), has said, that he never knew any other course taken upon an establishing bill than by directing an issue; and I am not sure that it would have been correct at the hearing of this cause to refuse an issue devisavit vel non without the plaintiff's consent. But whether the decree is in a correct or an incorrect shape, is not at present a material question; I must consider it as right for every purpose of this application.

(*a*) 1 Eden, 270.
(*b*) 3 Russ. 441.
(*c*) 2 My. & Cr. 42.
(*d*) 19 Ves. 494.

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The object of directing an issue being to assist and satisfy the Court directing it, a verdict, at once the result of a well-conducted and fair trial, and the affirmation of what is by that Court itself thought to be the truth, ought surely not to be disturbed without some substantial ground at least for believing, that on a second trial other evidence of a weighty nature, bearing against the existing conclusion, can and will be produced. But in the present instance, was the trial in any respect unfairly conducted on the plaintiff's part? Was any attesting witness to either of the two instruments omitted to be examined? Was either of the two instruments omitted to be laid before the jury? Was the heir taken, as to any portion of the evidence or otherwise, by surprise? Was any evidence rejected that ought to have been received, or received that ought to have been rejected? Did the heir adduce any evidence? Was it through accident, or otherwise than from his own intention and design, that he did not? Did the Judge presiding direct or charge the jury in a manner not sufficiently favourable to the heir on any point, or insufficiently or obscurely? Was the verdict, as to either issue, a dishonest, or perverse, or rash verdict, upon the materials before the jury? Has any event or discovery, worthy of consideration, taken place since the issues were directed? Is there any likelihood or reasonable ground to suppose that if there shall be another trial, material evidence to contradict, weaken, qualify, or discredit, any part of that given at the trial that has been had, will or can be given at the new trial? Would the Judge who has heard the motion for it have been satisfied with a verdict against either instrument, upon the materials which were before the jury, or those before himself? Believing a negative answer to be the right answer to each of these questions;—believing that the jury have well and truly tried the issues joined between the parties,

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and a true verdict given according to the evidence, that verdict shall not be disturbed by me.

This I think the right conclusion, whether the necessary result of the verdict remaining finally undisturbed, must be the establishment of the will and codicil, or not,—a point upon which I give no opinion. Before concluding, it may not perhaps be quite a waste of time to say, that among the cases besides those already mentioned, which, while considering this motion, I have read, have been, *Calvert* v. *Saunders* (*a*), *Lomax* v. *Ryder* (*b*), *Camden* v. *Cowley* (*c*), *Vernon* v. *Hankey* (*d*), *Robinson* v. *Lord Byron* (*e*), *Outram* v. *Morewood* (*f*), *White* v. *Wilson* (*g*), *Bullen* v. *Michell* (*h*), *Barker* v. *Ray* (*i*), *Vooght* v. *Winch* (*j*), *Gibbs* v. *Hooper* (*k*).

The latest of these authorities having been before the profession and the public for several years, I must, in refusing this motion, refuse it with costs. Mr. Justice *Coleridge's* report of the trial shall be placed in the hands of the Registrar, in order that it may be produced if it shall be wanted for any purpose hereafter in the cause.

(*a*) 1 West, C. T. H. 693.
(*b*) 7 Bro. P. C. 145.
(*c*) 1 W. Bl. 418.
(*d*) 2 T. R. 113.
(*e*) 2 Cox, 4.
(*f*) 3 East, 546.
(*g*) 13 Ves. 87.
(*h*) 4 Dow, 318.
(*i*) 2 Russ. 63.
(*j*) 2 B. & Ald. 662.
(*k*) 2 My. & K. 353.

The following are the principal portions of the Charge to the Jury, referred to, ante, p. 599.

MR. JUSTICE COLERIDGE :—

Gentlemen of the Jury, this is an issue which one of the Vice-Chancellors has sent down for us to try, and it raises two questions: first, whether or not Francis Waters well devised certain property by a will, which was executed on the 12th of January, 1847; and, secondly, whether he devised lands and other property by a codicil executed afterwards, on the 14th of January, 1847: and it is im-

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portant to take along with us certain admitted facts in this case, which are these, and which will induce you, before you come to the negative of those questions, well to consider the step that you take.

In the first place, it is not pretended here that there was anything like compulsion, nor is there any evidence of any undue influence being made use of, so as to force the will of the party; it is not pretended, nor can it be, but that the party, as far as he was competent to make a will, of his own free will executed the instruments in question when he so executed them. It is not said, that this was a person, who, by the visitation of God, had at any period of his life, or at this period, been subject to mental aberrations; he was neither a madman, nor was he, generally speaking, an imbecile man. Further, it does not appear in the case that he was of extreme old age, or that he was worn down,—his nature worn down by any very long or exhausting illness. All those circumstances are material to be considered. Further, it is also to be considered, that it is put beyond a question by the evidence in this case, that both will and codicil have been executed with the formalities which the law requires. And again, when parties have gone through the formalities which the law prescribes, not merely as forms, but by way of putting testators under proper protection, one ought undoubtedly to suppose that due protection has been given in the first instance, until the contrary is shewn; and we ought rather to presume in favour of the legality of those instruments. But, besides all these things, there is another and most important question which will arise whenever the execution of a will is brought in question and is canvassed by the parties; and that is, whether the party executing the will,—although he has not been forced, and although he has not been over-persuaded,—although you cannot distinctly see he has been deceived,—although you do not think him out of his senses,—still, whether or not he had at the time what is called a sound and disposing mind.

Now, it is very true, as has been said by the counsel for the defendant, that what is meant by that is not the ordinary intellect which would prevent a man from running into a river unnecessarily, or enable him to know that two and two make four, or even answer a physician the questions he may put to him about the state of his health; these things are not enough; the law requires something more, and rightly, I think, before it gives to a person the power of disposing of property; because it is a power which is derived from the law, and is not a natural right that any one of us has.

The questions that I shall put to you on this point, in the end, will be these: whether you are of opinion that the testator had a mind undiseased at the time, and of sufficient memory and understanding, to know *generally* the state of his property, (I use the word *generally*, because you have no right to expect from a man—it would

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set aside many and many a will, probably of men of large property, if you were to require a specific and accurate knowledge of every atom of his property; (but if he is disposing of his property, he ought to know generally the state of his property and what it consists of, and he ought to have a knowledge, memory, and understanding of his relations in life. If a man has six children, and is in such a state of mind that he thinks he has only five, and is not capable of recollecting he has six children, you could hardly then say he is in a proper state of mind to dispose of his property. So, again, he ought to know, he ought to have sufficient memory and understanding to know generally the nature of the instrument he is executing, if it be plainly explained to him. I put in that qualification. I do not know how it may have happened to you. I dare say, if you have not executed such wills, you have all seen wills which have puzzled you (even with the best intellect you have) thoroughly to understand them, in consequence of the legal terms with which they are invested; still, a man ought to be of sufficient memory and understanding to be capable of understanding the general effect of the instrument he is executing, if it is properly and clearly explained to him. Had then the testator a mind undiseased at the time, and of sufficient memory and understanding to know generally the state of his property, and of his relations in life, and of the nature of the instrument he was executing, if plainly expressed?

That will be the ultimate question which you will have to determine in this case. Now, upon that question I am bound to say, that, as the plaintiff asserts that this was so, the burthen of proof is cast upon him. I do not forget the presumptions which I have told you, and which I think are to be made in favour of this will and this codicil, in respect of the particular circumstance I have just now stated; but still, after all, the plaintiff is bound affirmatively to prove that the testator was in such a condition as that which I have just referred to. You have had strong remarks made to you by Mr. *Cockburn*, the counsel for the plaintiff, in his eloquent speech; and you were troubled with the reading of the whole of this will, for the purpose of shewing what a just and equitable disposition of property it made. Now I interposed then, and I say again, that that is a consideration that might tend very much to deceive you, unless you watch your own minds. Remember, the question is not whether we are dealing with a good and just will; the question we are dealing with is this: is it the will of this man? and if you should be of opinion some other person has made for him the wisest will in the world, and the justest will in the world, and he was going to make a most unjust will, yet, if you are satisfied it was not his will, you cannot sustain it. Therefore it is idle to talk of the provisions of the will, as regards its justness, until you are satisfied it is the will he has made. It is of some importance

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to see whether the will is of a simple or complicated character; that is a material circumstance in entering into the consideration, whether or not he was capable of understanding the provisions if plainly expressed.

There is another circumstance in the case, to which your attention has been properly directed, and on which I only make this remark: It is said, that even if the testator in this case was somewhat enfeebled by the state of his body, so that, if this document had been entirely new to him, it might have been something far beyond his ability to understand one word of what it was about, when this long instrument was read over to him, yet in truth he was under particularly favourable circumstances, because in his own hand he had himself, upon some former period, composed this very will; and therefore, it would come to him, not as a new matter, or matter of which he was ignorant, but was really his own original provision, stated by himself in his own language, with regard to the disposition of his property. And no doubt, if the facts quite bear out that view of the case, it is a very material circumstance to make you believe, that, with the slenderest possible amount of intellect almost, he might gather up the facts stated in the will, and the provisions of it, and be perfectly capable of comprehending the whole of it; but then you must be certain that is the true state of facts; and you will remember, when you call the matter back to your mind, that it was not left quite so clear as, in the opening of the learned counsel, it was expected it would come out, because it appears, and all we know of it is this, that the son comes out with a handful of papers, as much as he could carry in his hand; then they select out certain sheets of a fresh appearance, not so dirty and stained as the others, and then the man selects these papers, the attorney's clerk puts them together as he thinks they ought to be dovetailed, one sheet on to the next, and then, having strung them together, you are to infer from that, you have necessarily got the will, the whole will which the man had ready before.

I have been looking at this with some attention, to the end of one page and the beginning of the next, to see whether there was any certainty about the matter, and I remain, I confess honestly, in some degree of uncertainty whether I can depend upon it, that I have before me the original papers, all of them just as the man at some former period of his life had put them together; that is a matter of course for you to deal with some caution about.

Now, with these general remarks, I will very shortly review the evidence in this case.

It appears that the man had been taken ill only a day or two before this time; we hear indistinctly, but on no certain evidence at all, of the previous seizure which he had had. There is nothing laid before you to shew that the man was not perfectly competent to make his will down to, at all events, two or three days before when this transaction occurred. Upon the evening of the same day, it should seem, from the evidence of Sarah Baker, that old Mrs. Waters, looking at his state, had become very anxious about the circumstance of his will; and, according to her, she asks him, on that morning, once or twice, oftener in the course of the day, whether he had made a will. I apprehend that to be the meaning of the evidence. On being asked repeatedly, he says, "No, mother, there is no will; I have done nothing at all." It is very true that he had not made a will, because he had not executed any paper at all. It seems, still further, that he does not appear at that time to have had his attention roused at all to the necessity of doing anything. She says, "Have you done anything?" "No, mother." "What is to be done, then?" "I do not know, mother." So he remained in that state. From that, you go to the fact, that the young man Plummer, the attorney's clerk,—the clerk of the attorney who was properly the attorney of this man, and who, under ordinary circumstances, one would undoubtedly have expected to make his will,—seems to have been sent out to him for some other purpose, to give an account of some action he was then bringing, and one action in which he had been defeated; and he comes to the house, where he finds him ill in bed; he is down stairs, and then starts a circumstance which we did not understand at the time, but upon which Sarah Baker throws some light. You see, unfortunately, who the parties to the matter in dispute are: the two parties litigant here are two brothers, and it appears there was great jealousy. I do not think it is quite distinctly made out; but I think you cannot help feeling that it must be so, that Thomas Waters is the elder brother, and probably heir-at-law of this property. They are both present; they have both been sent for, one may infer, in consequence of their father's illness at this time. He has made no will. Then comes a young attorney's clerk into the house, sent as a kind of God-send, it would seem, on a totally different matter. Now, (and you cannot shut your eyes to this, when you see what the question is, because the imputation here is of gross dishonesty on the part of the plaintiff,—you must watch and see if there is any foundation all the way through for it,) it is said that they contrived to get him out of the way and put him aside, because it was supposed the attorney's clerk would be capable of doing nothing until Thomas Waters, the elder brother, was removed; and, accordingly, Sarah Baker again tells you she saw Thomas, who had come there in the morning, and Plummer; "and I went with Plummer to my house; Benjamin desired me to take him there; Benjamin asked me if the young man could go to my house until Thomas was gone." Now, nobody can doubt, if that be true, nothing could be more improper than for Benjamin Waters to send Thomas out of the way on an occasion of this sort. "I went and left him there; I fetched him again between nine and ten, as soon as Thomas Waters had gone away." There is some further light thrown

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on that afterwards, if you believe the view that first appeared, that, on another occasion, when Benjamin was coming out to have the codicil effectually executed, with Hamlyn, the attorney, there was a misrepresentation then made to Thomas, in order to make him ignorant of the fact, and not to suppose they were then going to his father's house. Under these circumstances Plummer is there and Plummer is brought back. Be kind enough to watch attentively the account Plummer gives. When he comes up he says, or perhaps he told it down stairs and it had been communicated,—it is proof of the old man's mind being alive to circumstances of this kind,—he said, "Oh! then this is decided against me, is it?" I said, "Yes; one action, but the other remains undecided." That shews, certainly, a mind alive to the circumstances of life and his own affairs. Then he says, "At this time the testator told Benjamin to go into an adjoining room and fetch some papers from a box; his wife and Benjamin were nearer the bed than I, and they said something to him further, I believe, which I did not hear." He says, what the father said was, "Go into the back room and you will find papers in a box there, which bring out: papers relating to my will." On that he says, "Benjamin returns to the room with the papers; there was a table by the bed side, and he put them on it." Now observe; he says, "Benjamin selected those which seemed more recently prepared; several were handed to me;" and then he says, "These papers are in the testator's handwriting. Questions were then put. I read the papers out loud." This is what took place when this document, which you have heard read once or twice, is executed by him. The questions were put to the testator by Benjamin, not by Plummer. Before that some other papers were got; "that is, a second time he went, he said, I believe there are some others there; Benjamin fetched them; he placed them on the table; they were selected to follow in the order that we had before, as if he had only got part at first, and not the whole. The whole were read by me to the testator, to Benjamin, and his mother. While I was reading, I do not recollect a single remark that he made, without a question being first put." When you are upon a question of competency, you will yourselves at once see how very much more important an original remark that a man shall start is, than that which he merely makes in answer to a question. "Benjamin asked, 'Are those portions of property to go to the children; do you wish them to go as therein named? Do you mean, that is to say, your property, to go to the different children as named in this will, as it is set down?' I do not recollect what the answer to this was; I believe he said, 'Yes;' but he said something that assented to it. I stopped at intervals, and questions were asked and answers were given. I stopped as the different properties were given. I did so by the direction of Benjamin." He says, "I read through, in effect, what was given to one person, and then asked the question; then stopped, and then went on to another. I did so,

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reading all through the papers; and then, when I had done that, I numbered the sheets you see, 1, 2, 3." And all the figures that are put at the bottom were affixed afterwards on the judgment of this person. They were not so originally; that is the first statement about it. He further says, "Richard Jones and Samuel Baker came in; Sarah Baker was there as they came in; the testator spoke to them and recognised them." We do not find that supported by the witnesses, when they came afterwards. "I found Richard Jones's name in the will, and it was Benjamin who suggested sending for him, and for Samuel Baker, to attest the will. Seeing his name there, and that he was an executor in the will, I thought it not fit he should be one of the witnesses, and so for that purpose we got another,—I myself." As if he thought it necessary there should be a third witness; which, as you know, until the alteration of the law, was necessary. Then he says, "The will was in the handwriting of the testator. These are the papers joined together. I am an attesting witness." Now we come to the formal part of the execution. I have told you it appears to me, that, formally speaking, the requisites of the law have been complied with. Still it is important to see what the testator said at the time, with a view to the question we are discussing:—"I am an attesting witness. I saw it executed." Attesting witnesses ought to see the party execute; and the party who executes ought to see them at the time; and the two witnesses ought to be present at the same time, and see each other. He says, "I saw it executed by the testator; these are his signatures, six in number; it is signed in every page, I believe, and he signed each sheet in my presence; both the Bakers were there at the time he signed." You will find Sarah Baker denies it. "I requested him to say, 'This is my last will and testament, and I desire you to be witnesses.'" It was a very proper thing, to tell the testator what he ought to say. "He was raised up to sign, and he appeared to understand very well what he did; at this time Jones was in the room. I was on the right side of the bed, Samuel Baker was at the foot, and Sarah Baker was standing by. I saw the witnesses sign their names. Sarah made her mark. I was by the witnesses when they signed; they could see each other, and the testator could see them. I gave the will to Benjamin." It seems he took possession of the will, and seems to have been the great manager afterwards, and to have been the person principally interesting himself in the matter.

In cross-examination as to the state the man thought he was in, he says, "By his conversation he did not seem to be dying; he appeared to be weak and reduced, but not by his voice. I do not think that his voice was at all altered. When the papers were brought, Benjamin took them up and just looked them over; he selected several of them, and handed them to me; he said, 'These,

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by the writing, seem to be the more recently written.' Those appeared cleaner, and the others looked older by being stained." Now, as to the state he was in while this long instrument was being read: "I read," says he, "in a moderate tone, that all the others might hear—loud enough for the others to hear. The testator appeared to doze several times; and his son Benjamin, roused him up when he appeared to be dozing. He appeared towards the end of the clause to be dozing rather. He had closed his eyes, but he was very easily wakened. I awaked him three or four times; while I was reading he went off in this way three or four times. I only just touched him and spoke to him, and said, 'Do you understand what was being read?' It was between a doze and a sleep; he would be so two or three minutes at a time. I stopped reading when I saw that. Benjamin, also, awoke him. He did not go off as many as twelve or as many as ten times; nor was he asleep as much as five minutes at a time." To be sure, if the man was asleep five minutes at a time while his will was being read, he could hardly be supposed to have any knowledge of it. "I asked if he understood? He said something—I do not recollect; it was something implying assent—some word I could not understand; but I do not recollect what the word was." It does not appear that it came out in a hearty way:—"Yes, I do understand,"—or that he went into any explanation, or gave proof that he understood; but in some way he expressed assent, which this young man,—you must take his judgment for that,—seemed to understand. To the question, whether he understood, an idiot might say "Yes," and not a bit more understand it; you are to determine after all whether he did. "This was before the Bakers came in; the other papers he did not read; there might be as many as Benjamin could hold in his hand, all in the testator's handwriting. I saw on some of them, 'In the name of God, Amen;' as if on other occasions he had been trying his hand at making a will." This begins, "In the name of God, Amen:" however, many others he may have been making before; and there may be many others of such a kind, that, if they had been brought out to him, he might have adopted the one as well as the other. We know nothing what they are. The witness had once attested a will before; that was in his master's office; there he would be under his master's protection, and would exercise very little discretion about it. Samuel and Sarah Baker were in the room, and he speaks of the man repeating the words; and I think that the substance of what he says is—"He did not seem more than a little exhausted. I observed a perspiration and trembling in his hand when he signed his name." Then there is a minute examination about the order in which these signatures were made. The young man thought three witnesses were necessary, and therefore he had himself, Samuel Baker, and Sarah Baker, to attest. If he knew what was the duty of an attesting witness, he must have known, if Sarah Baker speaks the

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truth, that she was not a good attesting witness to the will. There may be some confusion. It may be, the young man did suppose Sarah Baker saw more than she really did.

Now, he is asked as to certain expressions he has made use of.—He says, "When they had went away, the testator wished them good night, and I wished him a good night; and I think he was the first person who spoke." It would not be very much, but still it would be something, if you found a spontaneous act of that kind. Then he is asked, Whether he would have attested the will, if no members of the family had been present, supposing he had been asked; and he says he would. From that he is asked as to some expressions he is supposed to have made use of, and he admits he believes he said this:—"I should not have liked to have attested the will in the condition in which the man was, unless there had been some person to give me authority." Then he wishes to explain that, and he explains it in this way:—"I mean the condition in which I saw him; he appeared to be ill; if he had not been so ill, I should have deferred it to another time, to let some person prepare a more recent will—some will that he might direct at the time." Clearly, it would have been a much more satisfactory will to have, if he had been in such a state of mind as an attorney could have gone and taken instructions then and there, instead of adopting some former provision, being made when his property would be in a different state, and when it appears, that, as to some part, it certainly was in a different state. He says, "I heard from Benjamin there was property in it which he had disposed of before. I have not seen any of the other papers since. I have said all I did. Under the direction of Benjamin and his mother, sometimes he would answer, sometimes not, until he was revived and roused up." "Some of the questions, at first, he did not seem to understand, but they were put again, when he had been roused. No questions were put more than twice; it was never necessary to put a question more than twice; first, he was in a state of listlessness; he did not seem to understand; on rousing him, his attention was brought to it." You cannot doubt this was a person who was in such a state, that there ought to have been peculiar care in making him execute his will, to see that he was thoroughly understanding what he was about. If a person were to come and take instructions from any one of you, at this moment in perfect health, you would not expect an attorney to ask you many questions; he would take for granted, you knew what you were about. The office of those who make wills, varies from the state of the parties who are to make them. With care, a party may be able to execute a will, who, without care, may not be able. You may by proper explanation, taking your time, and being patient with a person,—you may get him to a degree of understanding, which, unless you do, he clearly would not have. The witness says, "It happened several times the question had to be repeated. I may have said, that when I first began

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to read the will, Mr. Waters fell asleep; when he roused or happened to revive, then I began to read again. I may have said also, I went back and read over again; I believe I did say, that before I went back he did not understand it."

On re-examination, he said, "That was directly he had been roused, and then I read the same part over to him again, and he seemed to understand it; I repeated the question, and he said, 'Yes, I believe it is right,' or he used words to that effect. I believe I read each clause separately, and took care, as far as I could, that he should know and understand what I said; and Benjamin and his mother were anxious he should understand. The plaintiff, that is Benjamin, roused him. And his mother was there when the will was executed, and she did not object that he was unfit." Clearly she did not; and there was abundant proof, if the will had been made sufficiently in her favour, the mother would never have objected. If we were merely trying the case on any evidence of hers, you might judge of it; but we do not act on that evidence.

That is the evidence of the man who, in truth, may be said to have made this will, and to have seen to the execution of it.

Now, you have had called before you Samuel Baker, Richard Jones, and Sarah Baker, who were also present at the time. I shall not trouble you with very much of their evidence, because it is not so very important. Samuel Baker says: "I was asked to sign the will; and I was asked to sign it by Benjamin; there was a table, and the old man was raised up in bed by the help of Benjamin; he leaned over, and signed the will five times; I believe he said, 'This is my last will and testament.' Before I began to write, old Mrs. Waters, the mother, was in the room, and Jones. I cannot recollect seeing Sarah Baker there." After that he says, he remembered she was there. The will was put into the son's hand. Now, says he, "Francis Waters, the testator, was in a perfect and good state of mind." That is the opinion of this man; it is worth just as much as you think his judgment is worth on the matter. As to the materials on which that judgment was founded—This is not a man who has gone, (as an attesting witness would do well if he did), and had five minutes' conversation in the first instance with the testator before he executed the will, if there was the east doubt in his mind about the testator's soundness; but, he says, "He did not speak to me at all." All this amounts to is, "I went into the room, and saw him there, and saw this thing pass; I did not hear any observation fall from the man; only I judged, from looking at him, and from his appearance, and from seeing him, I judge he was in a good state of mind." Of course, that is not very strong authority for it. Then he says, "Francis Waters answered everything that was spoken to him, and did everything in a correct and proper manner." That is important, according to what you know was said to him, and what answers he gave, and what he said. If he was asked, "How are you?"

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and he said, "I am very ill;" or, "Where are you?" and he said, "I am in bed;"—one sees he knew those facts; and it does not prove more. "Benjamin asked him—If he knew what he was about to do? 'I do not know but I do,' says he; and that was a form of words I have heard him use before:" and he understood by it that he meant to say, he did. Assume he did say, "I do know what I am about to do," that is only the man's answer. It is not as if he said to them, "I do; I am making my will, and I am dividing my property among so and so.'" It was like a simple saying, "Yes." It is for you to say what degree of weight you think it is worth. The witness is cross-examined, and he says—He did not hear Plummer say those words; that Sarah Baker had not arrived at the time; that Benjamin said, 'I want you to sign your name to the will;' that he was lying in bed very quiet; did not seem in much pain, nor was much exhausted; that his eyes were sometimes open and sometimes closed, and that he did not seem very sleepy. He continues, "I saw no one rouse him up but Benjamin. Benjamin asked him—if he knew what he was going to do, and if he might help him up in his bed. I do not know what answer Francis Waters made, or whether he made any at all. However, Benjamin did help him up, and Plummer put the pen in his hand. I do not recollect what passed then. When Francis Waters signed, he said, 'This is my last will.' He signed the last sheet first;" and then he says immediately afterwards, "He signed the other sheets; he signed them all before I put my name." He confirms, that he does not recollect seeing Sarah Baker in the room before the will was signed.

Jones adds a fact, which is somewhat new, and there may be a little more importance attached to it; when he comes in, he thinks the rest of the party were standing nigh the fireplace; there were papers on the table, and he saw the testator sign his name. Benjamin said, "I shall help you up to sign your name, or to make your mark." "Oh," the man said, "I can sign my name." That certainly is the act of a man who is exercising somewhat of a free will of his own. The witness says—"I believe he got up himself; the will was put on the side of the bed" (the other persons said it was put on the table) "when he signed it. I believe before he signed it, Benjamin said to him, 'Do you know what you are going to do?' The answer was, what the other witness said, 'I do not know but I do.' It was his way of speaking. I have heard him say so before." You observe, Benjamin seems to be anxious; and it is impossible to take it as a clear case of a man about whom there was no doubt, or else these questions would not have been put as they were; the man says, "He had a seizure about six months before, of wha kind I do not know; he was very ill, and had a bad seizure on the Sunday before; the 12th was the Tuesday, only two days before." (Sarah Baker does not seem to know anything about that seizure, nor does it appear to be of such a kind that Briggs, the apothecary, was called in.)—Jones further says, "I had not seen him between the

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two; he seemed very ill on the 12th, and a good deal altered. When Benjamin asked if he knew what he was going to do, he was lying in bed in the usual way; he was not dozing; I do not know I saw him dozing at all." This witness must have been there for a very short time if he did not see the man dozing, according to the evidence of Plummer. He says also, "I did not say anything to him; I did not like to disturb him." This witness does not trouble himself to ascertain, by any inquiry of his own, or any conversation he had with Francis Waters, what state of mind he was in at the time. "I was there less than an hour, and we did not follow it on all the time we were there." That is rather an odd observation; because, no doubt all they did might have been done in ten minutes; at first it seemed as if they were obliged to stop in consequence of the man being unable to execute. There is no other witness who seems to assert—who speaks from the clock—to having been near an hour in the house. Jones further says, "Plummer was there, and explained what we had to do; it took him four or five minutes to put his name, the witnesses half a minute each; I do not recollect his saying anything when he signed or when the witnesses signed; I do not recollect what Plummer said, except telling us it was a will; I believe the only words that Francis Waters spoke were, I do not know but I do;' I do not know that he said anything to me that I was to be a witness, or as to my not being one." This was the man who was intended to be an attesting witness; it turned out he could not be so.

Then Sarah Baker was called; she was the person attending in the house to a late hour, and then going home. She says, speaking of the day of the will being signed, and the time pressing, which is important to look at—"I took him things sometimes, and he was quite sensible;" that is to say, he would take his physic or comforting things, the possets she brought to him, and he gave sensible answers. She went to Jones and the Bakers, sent by Benjamin—"They came back with me." She gives the account about the table, and says, "I saw him write on the will first." You will see by and by that was not so. "I saw Plummer write on several places; I put my mark several times." She stayed there until three or four in the morning, and then she went home; and in the morning, before she went away, she spoke to him, and he was then quite sensible as any one—"If he wanted anything I gave it to him." She means, he asked for what he wanted. The testator's mind was not wandering, in short, at that time. Then she says, "I did not see him sign his will." She did not see Plummer put a pen in his hand; she says distinctly she did not see Plummer "write his name before he wrote mine; he was at the table before." I do not think that very material; nor did she hear him say anything as to the will at the time of her executing.

That is the evidence that bears directly on the execution of the will, and the state the testator was in, with the exception of that of Briggs,

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the apothecary, who is called in, and who may be, under the circumstances, a very material witness as to the state he was in on the 12th. There can be no doubt that an intelligent and honest medical man is the very best witness you could have to speak to the competency of a party as to making his will, and is therefore the best witness you could have to the attestation of the will, if he be a sensible and honest man, if you take this along with you, that he forms a just estimate of what is meant by a sound disposing mind. Simply for a man to say he thinks he was in a state to make a will, if he thinks at the same time little or no intellect is enough to make a will, gives you no satisfaction at all. I cannot infer what notion Mr. Briggs has of what is required to constitute a person of a sound and disposing mind; and further than that, I cannot but think Mr. Briggs has been a little mixed up in this matter, more than he ought to have been. I am far from imputing to him any dishonest intention whatever; it might be that he thought he was executing the wishes of the family in carrying out the ends of justice; it is certain that a party had much better not do what he did in this case, that is, prepare a codicil on the instructions of one member of the family, without taking the trouble to receive information from the testator himself, from whom, if he was in a competent state at that time, he was perfectly able to get it.

Now Briggs says, that he was called in to the testator on the 12th of January, the first time; he had not been his regular attendant before. He knew nothing about the testator's previous state, as far as we know, in the way of medical adviser; he has known him ever since he was in that neighbourhood. "His mind was perfectly collected, and he answered the questions I put to him as to his complaint." That seems to have been what he said all the way through; you will observe, he limited himself to seeing whether the man could answer his questions about the symptoms, and from that he drew the inference he was in a competent state to make a will. He was suffering from tightness of breathing; that is an important circumstance. It does not appear that his illness was of a kind calculated to affect the intellect: it was something local, nothing, except by exhaustion, to break the reasoning faculties. "I saw him in the evening again, about seven; his mind was as before, perfectly enabling him to answer the questions I put; I saw nothing to make me doubt of his state." A man does not very often make inquiries, if he sees no reason to doubt. If I came to attest a will of either of you sitting here on the jury to-day, I should think it absurd to talk to you to see whether you were in your senses; I should think any little conversation we might have would be enough to warrant me in attesting the will. "I saw him about two in the morning, on the 13th; he was then suffering from great difficulty of breathing, and quite, as before, well able to answer my questions, as when I first saw him." These are still the questions, as I infer, about his health: but he sums it up, "Quite in a fit state to make a will. I

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saw him before mid-day, between nine and eleven, on the 13th; hi mind was as before; I saw no absence and no wandering; he answered the questions just as well as when I saw him in the afternoon, and he was quite capable then of making a will. I prepared a document on that day; I wrote it on the back of one of the sheets, the outside sheet, on the evening of that day." You heard a great many remarks about the state of this will, and, after all, it may turn out that when this will was first put together by Plummer he thought it convenient to put a backing to it; and the party who wrote and who made the first codicil,—I call it by that name,—would have made it there. I do not think it would make much difference. Speaking of the following morning, the 14th,—we are now coming to the codicil,—the witness says, "I saw Hamlyn, the attorney, on the afternoon of that day;"—he puts it later a good deal than Hamlyn does;—"I had seen him in the morning twice before; I saw no absence of mind, but he was quite competent to make the will. I was asked to call in, to attest the codicil; I did go, and saw him in the evening, near seven o'clock. The codicil was produced; Hamlyn, with Mrs. Smith, a daughter, William Waters, the son, Mrs. Waters, and Benjamin, were present." He did not see why they should not let Thomas know of this, and let Thomas be present also. But, says he, "He was quite in a fit state to make a will. The codicil was read over by Hamlyn; he was sitting up in bed. The codicil was very short and very simple. I mean, with a usual amount of intellect, if that was all he had to dispose of, he might be brought, with care, to understand it; and that he paid the attention, which he would consider he ought to do, to a document of that kind." That is rather vague, to be sure; the words were put by counsel, and the witness adopts them "Hamlyn put the codicil on a book, and begged the testator to make a cross, and then he said:—(Here again is an instance of spontaneous and voluntary effort on his part)—"'Why make a cross when I can write my name?'" If he did in that manner, and with those words, speak that sentence, you certainly would infer a good deal in favour of his competency from it. If a man did start up and say, "Why make a cross when I can write my name?" it looks like a man with a good deal of vigour in him. And Hamlyn asked him,—"Is that the manner you wish to dispose of the property not willed before?" He says, "This is what I intend; this is what I consider fair." That alone is very satisfactory, undoubtedly. The next statement is: "Hamlyn handed a pen, and he wrote his name in my presence, and we subscribed our names;" and no doubt that was formally done. "I must have seen him between one and two in the morning of the 15th; he was then very much exhausted, evidently sinking, but still answered my questions as before." So that, when he was evidently sinking, Mr. Briggs would have thought, as he answered his questions as before, that he was still in a competent state to make his will. "From the commencement of his illness I never saw his

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mind at all affected." That is an important thing, and as to which he would be able to form a good judgment.

[After commenting upon the result of the cross-examination of Mr. Briggs, his Lordship continued]—Now, at last, we come to the last witness in the case—Mr. Hamlyn, the solicitor. Mr. Hamlyn knows nothing about the will; he is not the solicitor of the family, but the solicitor of Benjamin, who takes this leading part; and he says, that Benjamin came to him to prepare a codicil to his father's will; that the witness went with Benjamin to his father; that about five miles off they met Mr. Briggs; that in the way a conversation passed, Benjamin asking how the patient was, and being told he was extremely ill, asked whether he was sensible,—a very proper and natural question for him to put. "I was introduced, and the son said, 'Father, Mr. Hamlyn has come.' And I said to him, 'I understand you wish me to make a codicil to your will.' And he said, 'I do.' I said, 'If you please, give me your instructions. I understand you wished some property, that has been omitted in your will, to be comprised in your codicil, and divided between your children. I see the doctor has made a codicil for that; that will not do. What omitted properties are there?'" Now, if upon this the man had stated all the omitted properties, nothing could be more satisfactory to completely shew that he was in possession, at least as regarded those properties, of a sufficient knowledge of what he had to dispose of. He does to a certain extent,—he mentioned the Tabernacle property and the Easton coal property, which will be found in the codicil, and as disposed of. "I observed he spoke with some degree of difficulty; whereupon I said, 'Do not distress yourself, for I can get the minutiæ, that is, the details, of the property, and what you want to have done, from your son Benjamin.'" I think it would have been better if he had got this more distinctly from the testator. "I have no doubt he understood my questions. At the time, I had read what had been written on the back of the will (the doctor's codicil). We retired to an adjoining room." Benjamin accompanies him, and Benjamin gives him the information; and he comes back into the room, and said, "Sir, I have drawn the codicil, and, if you please, I will read it over to you." He assented; he said, 'Very well,' or some such words, shewing he understood what I said; I read it to him loudly, slowly, and distinctly, and he listened with attention, and was giving his mind to it." Afterwards he said, "He was lying in such a way I could see his face and eyes, and he appeared to be attending, at the time, to it. I inquired for pen and ink; I asked for a book, and put it on the bed; he prepared to rise, shewing he knew he had something to do. I said, 'You need not rise to write your name; make your mark: that will be sufficient.'" Here, again, he says, "Why make my mark?"—a second witness to that statement, "Why not write my name?" Then, with the assistance of some one, he wrote. "I gave the pen, and he wrote himself. I have often

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been present when persons have executed wills of my preparation; and I have not the slightest doubt he was competent at the time." The opinion of an honest attorney on this matter is certainly very much to be attended to, if you see no reason to doubt Mr. Hamlyn's honesty. It is part of the attorney's duty to take care, before he suffers any client to execute his will, to see he is in that state, he as an attorney being in the habit of judging of such a matter. And then he says this at the same period when directing his attention to what the doctor had written: "I said, 'This will be struck out;' and he said, 'Yes.' He had laid down, and I assisted him. I gave him the pen and supported him, and in some measure guided his hand; he could not have done it himself without rising."

[After some observations on the evidence as to what had taken place after the testator's death, and after stating that the jury might possibly be of opinion that the codicil was well executed, but the will not so executed, his Lordship said]—If so, you will find as to one part for the plaintiff, and as to the other for the defendant. It has been suggested, that if you should be of opinion that the codicil was well executed, it would have the effect of setting up the will. I do not take that upon myself to say; but I do not think it would have that effect here. If it had been a question of an informal execution, then I think it would; but we have here a will that is formally well executed. I do not think his saying, "I hereby ratify and confirm my said will," would set up the will, unless you were of opinion he had the will present to his mind at the time, and was competent at that time to execute that will.

The jury found for the plaintiff on both issues.

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A bill praying for an account of all dealings and transactions between the plaintiff and defendants, stated, that the plaintiff had transferred shares into the names of the defendants, to secure any possible balance which might become due to the defendants upon the result of transactions at that time contemplated, but that no balance was due, and that the transactions were terminated, and yet the defendants declined to re-transfer the shares. And the bill sought a discovery as to the particulars of the transactions in question. To the whole of the discovery sought the defendants pleaded the Stock-jobbing Act (7 Geo. 2, c. 8), and that the plaintiff alleged, that all the transactions mentioned in the bill related to the purchase of stock, of which the vendors were not possessed at the times of the contracts for sale. But it was consistent with the plea to suppose that there might have been dealings between the parties not affected by illegality. The plea was ordered to stand for an answer, with liberty to except.

The defendants then put in an answer, stating, that, on taking the accounts, a balance of 682*l*. would be found due to them; but they declined answering as to the particulars of the transactions in question, stating, that by reason of the Stock-jobbing Act, and their having been brokers of the plaintiff, they were advised and believed that the discovery of any of the matters which they declined to answer, would tend to subject them to the forfeiture and penalties imposed by that statute:—*Held*, that the statement was sufficient to protect the defendants from discovery, and that it would be too strict to infer, from the allegation of a balance being *due* to the defendants, that some of the transactions must be taken to have been legal.

THIS was a bill for an account of the dealings and transactions between the plaintiff and defendants, and for the transfer of certain railway shares, to which the plaintiff claimed to be entitled.

The bill stated, that in the month of March, 1848, the plaintiff was the owner of 86 quarter shares in the Great Western Railway Company, and was also the owner of 300 shares in the Shrewsbury and Birmingham Railway Company, all which shares were standing in his name in the books of those Companies.

The bill also stated, that at that time there were in contemplation dealings and transactions between the plaintiff and the defendants, (the latter being then copartners in business as sharebrokers); that it was probable that monies might become due from the plaintiff to the defendants, in respect of these transactions; and that it was agreed between the plaintiff and the defendants, that the plaintiff should transfer the railway shares to the defendants as a security for any balance which might thus become due from the plaintiff to the defendants; that, accordingly, the plaintiff, on the 2nd of March, 1848, duly executed a transfer deed, whereby, for a nominal consideration, he assured all his quarter shares in the Great Western Railway Company unto one George Edward Seymour, and at the same time