ARGUMENT

OF

JOHN W. EDMONDS,

BEFORE THE

SURROGATE OF NEW YORK,

NOVEMBER, 1857,

In the matter of the Probate

OF

HENRY PARISH'S WILL,

ON THE SUBJECT OF

IMPLIED REVOCATION OF A WILL.

REPORTED BY

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PREFACE.

HENRY PARISH made his will in 1842, being worth about $700,000. In it, he made special bequests of all his estate but $40,000, and made his two brothers residuary legatees. In 1849 he was stricken with paralysis, under which he lingered, though speechless, till 1856, when he died, leaving no children, but a wife, two brothers and two sisters.

After his attack he made three codicils to his will, whereby he revoked his residuary devise to his brothers, and gave the bulk of his estate to his wife.

At the time of his death his estate had largely increased, and more than doubled since he made his will.

The will and codicils were propounded for probate by one of the executors, for whom appeared W. J. EVARTS and FRANCIS B. CUTTING. The codicils were contested by the two brothers, for whom appeared CHARLES O'CONOR, A. L. JORDAN and JAMES J. BRADY, and the will and codicils by the two sisters, for whom appeared A. M. SHERMAN and J. W. EDMONDS.

Surrogate's Court,

NOVEMBER 18, 1857.

IN THE MATTER OF
PROVING THE WILL OF
HENRY PARISH.

ARGUMENT OF J. W. EDMONDS.

When I was retained in this case, my retainer came from the two sisters of the testator and his brother James, for the purpose of contesting, as my instructions were, alike the will and the codicils; upon the broad ground, as they stated it, that either being allowed to operate at this time would work an inequality and injustice, which was entirely inconsistent winh their understanding of his character, disposition and wishes. That such inequality as would give, under the will, to a portion only of the heirs at law, the great bulk of his estate; and such, on the other hand, as would give, under the codicils, to the widow almost the entirety of it, were entirely in conflict with all the feelings that he himself had ever manifested toward his relatives. They therefore felt, bearing in mind the uniform placidity of his temper, the affection of his disposition, although never very warm, yet ever uniform and consistent, and the sense of justice which characterized the conduct of his whole life, that any such inequality as would be worked out by the change of eircumstances, since both will and codicils had been executed, would be inconsistent with what his intentions were when they were made, or at any other period of his life; and my instructions from James Parish, as well as from the sisters, were to resist both, because of this inequality, and the conflict between that inequality

and what they were convinced were the purposes and wishes of their brother. I came, therefore, originally into the case, supposing that I should appear for three out of the four heirs at law, to carry ont that view. So far as Mr. James Parish was concerned, he has expressed his wishes in writing, and it was in obedience to those wishes that I came into the case, so far at least as he was concerned; and, in obedience to the wishes of the three heirs at law that I came to contest the whole testamentary disposition, and insist upon an intestacy. The subsequent arrangement by which Mr. Jordan appeared as his counsel, was a matter with which I had nothing to do; nor do I wish, by any remark that fell from me on that occasion, to be understood as desiring to interfere with that arrangement. I now merely desire, as Mr. Jordan does not appear on this hearing, and as within the last ten days the original desire of Mr. James Parish has been reconveyed to me, to be understood as representing his views, as well as those of his sisters, in saying that I oppose both will and codicils.

Mr. BRADY—If Judge Edmonds is to be recognized as appearing for James Parish, it must be in virtue of some authority, and we ask for the production of some authority, or we claim there is none.

Judge EDMONDS—I will say; in regard to that, that the letter was in the possession of Judge Sherman, who, I think, read it to me, and, he thinks, handed it to me; I have hunted for it among my papers, but cannot find it.

Mr. SHERMAN—I am convinced, now, it is in Newburg; but I can state the contents of it, if necessary.*

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* NOTE—That letter has since been found, and is as follows:

POUGHKEEPSIE, April 3, 1856.

A. M. SHERMAN, ESQ.,

DEAR SIR—My father and my brother Thomas came to see me this afternoon, and, after consulting together, we all came to the conclusion and belief, that both the will and the codicils presented for probate, as the will of the late Henry Parish, are alike unjust to his memory and all parties concerned; and we therefore, desire you to contest the same in our behalf. Yet we would greatly prefer an amicable and equitable arrangement if you can effect the same.

Yours, &c.,

JACOB PARISH.

The SURROGATE—I do not see that I have any thing to do with that; the record is all right, and I cannot alter the record except on the production of some written authority.

Judge EDMONDS—It is of but little moment whether my actual appearance in the case is for the sisters alone, or for them and their brother; nor have I any desire to alter the record in that respect, nor is it of any consequence to me whether I have any authority to speak in the matter for the brother, James Parish; nor will I pretend to speak as one having authority from him, or with any attempt in any manner to bind him by what I may say, but as representing the sisters, and speaking by their authority, in consequence of a message sent from James Parish, who is now an invalid confined in the country, I have a right to say that he is as averse as are his sisters to the inequality that must flow from carrying into effect either the will or the codicils of their brother, and that he and they are alike desirous of being placed on an entire equality with each other and the other heir at law.

It is to carry out this broad view that I am in this case, and have been from the beginning. To that view I have endeavored, throughout this protracted trial, to confine my attention, and to avoid an unwarrantable consumption of the time of the court in an unmeaning or unnecessary examination of the witnesses. I have found myself, throughout the case, in the midst of a severe controversy, between the other parties to it, with which I had nothing to do, and in which my clients had no interest; for if the will is to be sustained, or the codicils—if there is no alternative but to sustain one or the other of the two—then it is palpable that there would be no pecuniary interest of any moment to us. My clients are unaffected by that question, one way or the other, yet I have from the beginning found myself constantly in the midst of such a controversy, carried on by others so earnestly, that I have found it difficult, indeed, to attract any attention to the view which I endeavored to present, or even to be recognized as having

any *status in curiæ*. The effect has been (and I allude to it in order to guard against that effect's extending any farther injuriously to my clients)—that some of the counsel in the case have seemed to think that although we may have under the statute, as being next of kin and heirs at law of the decedant, the right to appear—that yet we have not in fact, upon the merits, any part in the case except as idle spectators. Some of the counsel have spoken and have acted throughout as if that were so. The very arrangement that was attempted to be consummated yesterday, by the introduction of medical opinions, was all without consultation with, or notice to us, and without any consent upon our part, having been either given or sought.

I allude to the matter in this connection, simply for the purpose of saying—so far as any medical opinions are concerned—that I gave no consent whatever to the introduction of them by either of the parties. I stand by the legal testimony, in that regard, and nothing else. Therefore, any such opinions that may be offered by any of the parties, must be considered as subject to my objection. I allude to this for another reason: I have feared that perchance the same idea that had flowed into the minds of the counsel might find its way into the mind of the court, *to wit:* that we had not in fact any merits in the case. The counsel for the contestants, who closed his argument yesterday, spoke so often, in the progress of the case, and so confidently, that we had not indeed any position in the case; that there was not indeed any thing to interfere with the will, under any circumstances, whatever might be said of the codicils, that I began myself to doubt whether my own view of the case, formed after mature consideration and careful examination of the law bearing upon it, was not laboring under some strange hallucination, that was misleading me. I continued under that impression until I found that while the learned counsel was thus earnest in saying that we had no position in court, that there was nothing that could be imputed as an attack

upon the will, that that was as clear as the sun at noon-day, so clear as not to render it necessary for him to say a word upon that point; he was, as I discovered, greatly to my relief, in the habit of dealing in the same summary manner with the arguments of the proponents in this case, and I was relieved to find him, over and over again, saying that the points taken by the other division of his adversaries were equally as clear against them. I therefore had some of my well-grounded alarm removed by this equal-handed mode of dealing with us both; in this state of things, I thought that if he only dealt with me as with his other adversaries, it did not necessarily follow that I was so entirely wrong. Still the idea was left on my mind that the confident tone he used might perchance have some influence on the court. In answer to all this, I have to say, that in presenting my views and asking that both the will and codicils should be thrown aside in this case, I shall attempt to discharge my duty to my clients, not merely in compliance with their wishes, but in compliance with the result of my own judgment, founded upon a careful examination of the case and of the law bearing upon it, to which I have subjected it. I have indeed carefully examined it. I may be entirely wrong. Of that your Honor is to judge. I may be in utter error in supposing that I have any ground on which to rest the claim I present here; but, nevertheless I have not yet been convinced that I am so; and I feel myself authorized, not only as representing the wishes of my clients, but the convictions of my own judgment, to present those views which I shall proceed as briefly as possible to lay before your Honor.

I say, then, I claim, on behalf of my clients, the sisters, and two of the heirs at law, that the will and the codicils must both be thrown aside, and that, in reference to the great bulk of the estate, if not the entirety, Henry Parish died intestate. That is the claim I make here; and whether I shall be able to satisfy your Honor that that claim is well founded will be seen in the sequel.

Our claim then is, that the will of 1842 is by law revoked, and revoked *in toto;* not merely *pro tanto*, but *in toto;* and we claim that total revocation upon three grounds. *First*, because it was the intention of the testator that it should be revoked; *next*, that there was an implied revocation, by law, of the will, growing out of the subsequent action of the decedant and the change in his circumstances; and *third*, that so much of the will was thus impliedly revoked, even independent of intention, that the whole must fall to the ground. That, in brief, is the position we occupy here—that the will was revoked *in toto*, partly because of the intention of the testator, partly by implied revocation in law; and chiefly, because so much of it is thus destroyed that it is impossible, according to the principles of law, that any part could be carried into effect without violating every intention that the testator could have had.

This view nccessarily involves, in some respects, the question of testamentary capacity; I mean testamentary capacity during the whole period that intervened from the making of the will in 1842, to his death in 1856.

That would justify me, perhaps, if your Honor please, in going into the broad question which has occupied your attention so much in the progress of this case; but I do not propose going into it at large. I will not enter with any minuteness into the discussion of that topic. It is not necessary for my purpose that I should do so; and I somewhat fear that if I should attempt it, I might be led into some of those personal recriminations that have already too much marked this case.

Full well do I know that any such line of remark, calculated to wound any single individual in or out of this case, would be as repugnant to the wishes of my clients as it would be to my own feelings. For my own part, and speaking what I know to be their sentiments, I must say that I am much more ready to find in the conduct and feelings of the parties to this controversy, matter to admire and applaud than to censure. I behold, on the part

of my clients, the brother-in-law of the deceased, once on most intimate, friendly and confidential terms with him; intrusted, at the very hour of his attack, with seventy-five thousand dollars of his property, without one scrap of paper to show for it, or to assist in its reclamation to his estate; living on friendly terms, and consulted confidentially on business matters; when the decedant was seized with that blighting and long continuing illness, most naturally repairing to his bedside, with such medical aid as he had himself most confidence in—his own family physician —in the hope that perhaps he might contribute something to his relief. In this I can behold only what is commendable; and if, in the course of that visit, aught happened, in the anxiety of the parties, that gave offence, I can readily discover that so far from offence being intended, but a little forbearance was required to preserve the old and wonted amicable relations; and while we may find cause for regret, we surely need find none to censure, and naught to produce alienation between the unhappy invalid and the sisters to whom he had again and again been most generous, and with whom he had lived in terms of fraternal and uninterrupted intimacy for more than half a century.

So when I behold the brother who had been associated with him during all the active pursuits of life—had been his partner for years---closely bound to him from childhood, through boyhood and manhood to old age, and who was much indebted to him for the easy fortune which had favored him, repairing, in his anxiety, to the sick couch of his stricken benefactor—I cannot see the selfish purpose of the fortune-hunter, but rather the fraternal emotion of a near and dear relative; and if here, too, aught occurred which gave rise to any acerbity of feeling, I cannot feel, while there may be something to regret, that there is any thing to justify us in overlooking the fraternal regard which had endured so long.

I can go yet farther. I behold the wife, surrounded with the appliances of wealth and fashion--with every thing at

her command, to enable her to indulge in all the pleasure and splendor that wealth can give—from habits, from education and from association, calculated to adorn the society in which she was moving—readily and cheerfully surrendering all these advantages, devoting herself, for a period of seven years, to the sick couch of her suffering and helpless husband, and sacrificing for him, during the residue of his life, all her energies and all her enjoyments—sir, I can see in this much to applaud and to admire; and I apprehend that even the learned counsel who yesterday found in this devotion the motive of a grasping desire for wealth, would himself have been the first to proclaim his admiration of it, if displayed by one who had not been so unfortunate as to find wealth standing in her path, and coloring, in the jaundiced eye, a devotion well worthy our regards, and which could elevate even this unhappy invalid, into an object of envy to some whose fate it may be to endure life unsanctified by such affection.

If, in the midst of so much to applaud—so much to win the heart—we chance to find an occasional ebullition of passion throwing its dark shadow over the scene, it seems to me that it better becomes us to search for the sunshine, that even this shadow tells us is not far distant.

At all events, it is with such feelings on our part that I approach the discussion of the questions involved in the view of this case, which it is my province to present.

I have already said that I do not propose to discuss in detail the question of testamentary capacity. Yet I must not be understood as intending entirely to leave it out of view, for it is, in some measure, necessarily involved in the topic of revocation to which my attention is to be chiefly directed, for it is a well-settled rule that there must be the same power to revoke that there is to make a will. Testamentary capacity to that extent, therefore, is necessarily involved in my argument. But the capacity to which I refer, if your Honor please, relates not merely to the period after he was seized with his illness in 1849, to which the

other counsel have confined their attention, but relates to the whole fourteen years that elapsed from the time he made his will to his death. The testamentary capacity to which I refer runs from 1842 to 1856, and it is the whole of that fourteen years that I bring under review. During the portion of that time, from 1842 to 1849, there is no question anywhere, so far as I can find in this case, but that he was beyond all doubt capable of making a will and of revoking it. As to the other seven years—that period I mean embraced from his seizure by this severe, this fatal illness, to his death—the question occurs, so far as the other parties are concerned, as to testamentary capacity, and bears upon the question which I present, because some of the actions to which I shall refer; some of the declarations upon which I rely, in order to show revocation, have their existence during that latter seven years; and having to go within that period for declarations and actions, I, of course, must take them, subject to the question of testamentary capacity.

Now, as to those years of decrepitude, and the capacity during that questionable period of time, I suppose this is the rule. It has been well laid down, by one of your Honor's predecessors, (Mr. Surrogate Robinson,) in a case before him, that testamentary capacity involves not merely the capacity to understand and embrace the idea, but the ability to express it. Now, that must necessarily be so; not only so according to the dictates of good sense, but so according to law, if your Honor please.

Let us take the celebrated case of Alice Lispenard, and behold upon what ground it was that she was held to have testamentary capacity? Upon this, that she knew enough to know when she intended to give away an old garment. She might not have had the capacity to work out a sum in arithmetic or to comprehend a problem in mathematics; but if she knew the difference between *meum* and *tuum*, and knew when she was giving something away, and to

whom, it was held that she had testamentary capacity. There was the power of understanding and embracing the idea and of expressing it both, and that was held to be enough.

Take the case, if your Honor please, of the deaf mutes. In times past they were not permitted to make wills. Their capacity to understand and embrace an idea might be entirely unquestionable, and frequently it was so. Those acquainted with deaf mutes know that frequently their intelligence is remarkable; but they had not the power of expressing their thoughts; until the invention of language for deaf mutes, their wills were nugatory, for the reason that they had not testamentary capacity; they had the capacity to embrace, but not to express the idea. But, sir, since language has been invented for deaf mutes, their wills are good, if the court can once be satisfied that their ideas have been well expressed; and it is just as well for the mute to express his ideas by the language of the fingers, as it would be by the language of the mouth, provided, however, that language is well understood as conveying the ideas which he has embraced.

Now, in reference to the question of testamentary capacity in this case, let us take that test, and ask ourselves to what extent had Henry Parish the necessary capacity? On the one side it is contended that he had clear capacity to understand, and was deprived only of the capacity of expression, except an affirmative or negative. On the other hand it is claimed that he had no capacity to understand. Now, sir, there is not, as I understand it, any fixed and certain and inflexible standard of capacity. It must, in all instances, depend upon the circumstances of the case in hand, as in the case of Alice Lispenard, approaching close on the verge of idiocy, yet she had the capacity of understanding when she intended to give, and that was enough. The deaf mute, incapable of expressing ideas at one time, but capable of learning how to do it afterward, is held to be enough. It is, therefore, dependent on the cir-

cumstances of the case and not on fixed and certain rules. Does it necessarily follow, in this case, that because Henry Parish may not have had the power of expressing what disposition he desired to make of his property, as to the articles to be given and to whom, that he, therefore, had not the power to express the desire to destroy a will? The destruction of a will would be involved in the simple act, if your Honor please, of tearing a paper. The destruction or revocation of a will might be embraced in the simple act of throwing the paper into the fire. If it be clearly made out that the party understood what he meant when the will was thus torn or thus consumed; although it should be also made out at the time that he had not the capacity of saying how he otherwise wanted to dispose of his property, that, unless led, he could not fix upon the amount or objects of his bounty; will your Honor be prepared to say that he had not a legal capacity to destroy or cancel?

It is the capacity to do the act imputed that we are inquiring about, and, therefore, the extent of capacity is in all cases to be governed by the nature of the act and the circumstances which surround it. Suppose he had the power of giving away. Take the case of any ordinary testator, who, by law, disposes, if your Honor please, of his gold watch to some particular person, and after he has thus made a valid bequest of that gold watch, he is, by disease, deprived of the power of speech: he may still have the power to sell that watch—to indicate his wish to sell it. He may perfectly understand the process of selling it, and of receiving pay for it, and also of expending the price of the watch which he receives. He may expend it judiciously. Will it be said in such a case that, that because he is deprived of the power of saying, "I give this to A, B," or any other, that he has not the power to sell? And yet, if under such circumstances he destroys, cancels, or sells, he makes a valid revocation in respect to this particular piece

of property thus sold or given away, or in respect to the paper thus canceled or destroyed.

Therefore, in this case, the question proposed is simply this: Had Henry Parish, during the time of his illness, when his testamentary capacity is questioned, the capacity to understand and to express the idea of destroying or canceling his will? For, if he had, he had all the capacity that was necessary to make valid any act of destruction or revocation.

Now I will concede, if your Honor please, that if Henry Parish was entirely *non compos mentis* after the attack of illness in 1849, no act, declaration, or intention occurring during that period could be available for revocation. But, even if your Honor should come to that conclusion,—if you should yield to the powerful argument that has been already, and that is to be addressed to you on that subject, on the part of my fellow contestants,—if you should come to the conclusion that during those years that have elapsed from the period of his attack in 1849, to the hour of his death, he was entirely incapable of making a will; that he was *non compos*,—of such unsound mind, as to be incompetent to revoke a will,—still that does not dispose of the whole of my claim—for I refer to the previous seven years also; and out of those previous seven years that elapsed between the making of the will in 1842 and the attack in 1849, I draw elements for my claim of revocation.

Let me be understood. I claim that during the period of his illness, after 1849, he had capacity enough to revoke, and that various actions, declarations and intentions of his, occurring during that period, show the desire to revoke; and I claim, independent of that,—even if your Honor should hold that he had not the capacity to revoke,—that out of the action of the previous seven years, I can show sufficient to justify me in holding that the will of 1842 was revoked.

Therefore it is, that I have said that I do not mean to go at large into this question of testamentary capacity. I am

willing, for my own part, and it will be sufficient for me to to rest it upon the testimony of Mr. Lord; and I will say to your Honor here, that conflicting, as that testimony did, with what I had supposed was the case to be presented to you, I yet found, as we progressed, not one particle of testimony calculated to destroy the confidence due to that then given by Mr. Lord; and I confess I have seen much to cause me to admire, not only the integrity with which that testimony was given, but the acuteness with which, during the brief and limited opportunities the witness had had, his observations were made. I am willing to rest upon the testimony of Mr. Daniel Lord the question of testamentary capacity; for it seems to me that throughout the whole of this case, the view of it taken by him is fully sustained. I do not mean, however, to argue that. I should go far beyond the limits I have allowed myself, if I attempted to do so. I state it now, for this reason, that your Honor, having in mind the testimony of Mr. Lord,—it being in the front of this battle,—standing most prominent,—may understand the basis upon which I rest my claim, so far as testamentary capacity is concerned. I take his testimony, therefore, as evidence of the actual condition of Mr. Parish's mind, claiming, as I do, that that testimony is sustained in all its main features by the whole of the testimony; and resting thus upon it, I ask this question: Can any intelligent mind say, from a perusal of that testimony, that Mr. Henry Parish had not the capacity to destroy his will? I do not ask whether he had the capacity of saying, give an arbitrary number of cents to an unknown and arbitrary individual; but had he the power to say of this piece of paper, which was his last will and testament, destroy it! I ask the question again: Can any intelligent man look at that testimony, and say that he had not the capacity to know and express that thought? If he had, he had all the capacity necessary to enable him to revoke his will during the seven years of his illness. The question is, arising out of this view: Had Henry Parish capacity to embrace the

idea of revocation? Had he the capacity to destroy it? For if he had; if he had the power to understand the idea of revocation, and the power to execute it, then he had testamentary capacity enough for my purpose—that of revocation *in toto*.

Now it is evident also, from the whole testimony of this case, Mr. Haven's, Mr. Lord's and various other persons, to which I need not call attention, that Henry Parish, prior to and during his illness, was not satisfied with the will of 1842. When he returned from Europe in 1844, five years before his attack of illness, he expressed his dissatisfaction to his counsel; throughout the case will be found various other evidences of his dissatisfaction with it. There is nothing to conflict with this testimony that he was dissatisfied;—to what extent that went I will not now say; the fact of his being dissatisfied, I am alluding to, and that I suppose too well established to leave room for question here. Now I ask, if that is so, who judges best what was the extent of that dissatisfaction? Did it stop at the point mentioned by Havens, on his return in 1844, or did it run on afterward, during the time of his continuing in good health and on and during the seven years that elapsed after he was ill in 1849? Let the testimony answer that question: Let his efforts to write the word "will," testified to by two witnesses, answer it. Let all that took place, when the will was produced, and when the codicils were made, answer the question: Let his gifts of tens of thousands to his legatees, during his undoubted soundness, answer. There was dissatisfaction; dissatisfaction running through from the time the will was made up to the last moment in which he spoke or acted upon this subject. I ask, then, under all these circumstances, to what extent was that dissatisfaction; who has hit the extent of it at the time of his death, or up to the hour of his death?

Did they who were engaged in making the codicils, executed during his illness, did they hit the extent of his dissatisfaction, or have I hit it? That is the great question if

your Honor pleases between me and the proponents. I claim that the dissatisfaction can only be satisfied by allowing him to die intestate, and letting all his property go to his wife and brothers and sisters, putting them on a natural equality. Upon the part of the proponents, they claim that the dissatisfaction is satisfied by the various codicils, accumulating the estate into the hands of his wife, and disinheriting the heirs at law.

And I ask the question, who is right? and I ask this question throughout the whole of what I shall have occasion to say to your Honor, who is right? who hit the extent of the dissatisfaction most successfully, we, when we claim that he died intestate, or the proponents of the codicils to to his will?

These prefatory remarks bring me to the point upon which I rest this claim. I claim that that dissatisfaction of his with his will can be satisfied only by the entire revocation of it; and I claim that it has been, by his intention, by his acts, and by a total change of circumstances, entirely revoked. Now sir, I am perfectly aware, that in the discussion of this question, I meet *in limine*, the following provisions of our Revised Statutes.

"No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked, ar altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required, by law, to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, 4hall be provcd by at least two witnesses."—2 *Bev. Stat.* 64, ¿ 34, [¿ 42.]

But I am also aware that in that same title of the Revised Statutes, there are cases of revocation recognized that are not in compliance with that section, such as marriage and birth of children, *sect.* 35; the subsequent marriage of a female, *sect.* 36; a conveyance, settlement, deed or other act of the testator by which his estate or interest in the property devised is wholly divested, *sect.* 39; and

even an alteration of such estate or interest, when wholly inconsistent with the will, *sect.* 40.

And so too, I cannot but be conscious that there are certain acts which of themselves, independent of all statute, and of all intention are a revocation. Where, for instance, the testator, in his life-time, has entirely destroyed or consumed or parted with all ownership in the specific article devised, so that there is nothing in existance, or within the testator's control that can pass to the devisee; or where he has, after making his will, and before death, lost all that he purposed to bequeath.

And I propose to show by well-settled rule of law that there are other limitations and qualifications to the strict enactment of the statute, or in other words that there are implied revocations or revocations by operation of law: I propose to examine the principles on which such revocations are founded, and the extent to which they have been carried by the courts, and then to bring this case within those principles and then deduce what I claim is the imperative duty of this court to declare this will and codicils all void, and that this is a case of entire intestacy.

The provision of the statute to which I have referred, is but a revision of the chapter in the Revised Laws of 1813, concerning wills, 1 *R. L.* 364, § § 2, 16; and those two sections are but a re-enactment by our legislature of sections 6 and 22, of the English Statute of Frauds. *Roberts on Fraud*, 467, 473.

The sixth section is that "No devise in writing of lands tenements, hereditaments, or any clause thereof, shall at any time after the said 24th day of June, be revocable, otherwise than by some other will or codicil, in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself, or in his presence, and by his directions and consent."

The 22d section is, that "No will, in writing, concerning any goods or chattels, or personal estate, shall be repealed,

nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing," &c.

Those two provisions of the Statute of Frauds, passed in the time of Charles II, in 1641, are brought down to our Revised Laws of 1813, and thence brought into our Revised Statutes of 1830, in the section to which I have referred.

Now, sir, I will confess that it seems plain, from the first blush, from a perusal of these provisions, that there is nothing in this case that can, by possibility, justify me in claiming a revocation, for here is no writing, and no destruction or cancelation, or burning of the instrument.

Before the enactment of the statute of frauds, the doctrine of implied revocations had firm foothold in the law of England, and for some time after that enactment it was supposed that it had been entirely destroyed. But the courts were soon compelled to yield to that dire necessity of the case to which I have referred, and to feel the force of the sentiment to which Chancellor Kent, some two centuries afterward, gave utterance. "There is not perhaps any code of civilized jurisprudence in which this doctrine of implied revocation does not exist and apply when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator."

Accordingly, as early as 1682, the question came up whether implied revocations were to be yet recognized in the law, and in *Overbury* vs. *Overbury*, 2 *Show.* 242, it was adjudged, "that if a man make his will, and dispose of his personal estate among his relatives, and afterward has children, and dies, this is a revocation of his will, according to the notion of the civilians, this being an *inofficiosum testamentum*."

Allow me to pause here, to make an explanation necessary to a proper understanding of my position. The exist-

ence of the doctrine of implied revocation, and by that I mean a revocation worked out by the law, even irrespective of intention, and which found a place, as Chancellor Kent has said, in every civilized community, resulted from the absolute necessity of the case. Take the instance, if your Honor please, of a man, having by will devised this book, and after he devised it, and while he yet lived, and of course while his will was ambulatory, and he had the power to revoke it, he burned the book; that would be a revocation which no statute could prevent. Suppose a man devised his property, and after making his will, spent it all, that expenditure would be a revocation which no statute could prevent. So long as the will is ambulatory, and does not take effect until the death of the testator, and does not bind the property, until that moment, just so long his power to revoke by implication or by operation of law is a power the legislature can not deprive him of.

The necessity then of recognizing in law an implied revocation, notwithstanding the broad language of the Statute of Frauds, was palpable to the intelligent men who then filled the English bench. Consequently they entered upon the task of again welcoming it to the law and of endeavoring to find a reason, or a ground, if your Honor please, upon which to rest it, and yet not interfere with the provisions of the statute of frauds. There were several different grounds, and I will, as briefly as I can, state them, to which the courts there and in this country resorted, until we come to the state of the law at present established. The first one was that resorted to in the case of *Overbury*, (2. *Showers.*) which I have cited, namely the principle of the civil law of *inofficiosum testamentum*. That principle brought in its train various elements which were unwelcome to the common law, and though the principle of implied revocation was preserved this ground of it was abandoned. Then came the idea of Lord Kenyon and others, as I shall show, that implied revocation was founded upon the idea of a tacit condition made by the testator at the time of making

his will. This was received with favor, because it allowed of a revocation without admitting parol evidence of intention which would be in conflict with the statute of frauds. Then came a still further effort, for the purpose of admitting evidence not in conflict with that statute, which was adopting as the reason for revocation, the presumed intention of the testator. But here arose a difficulty with the courts; that idea of presumed intention of the testator, if introduced upon the one side to establish a revocation, would also give room for testimony upon the other side, showing intention not to revoke, thus conflicting directly with the statue of frauds, whose primary purpose was to exclude parol evidence on that subject. The courts wandered on, as you will observe, through these various principles, looking like the dove from the ark, for some spot of dry ground on which they could rest their feet. The necessity of resting somewhere was apparent. The necessity of implied revocation was a necessity insurmountable by any human enactment, and it was necessary that the courts should find some reason upon which to rest this legal, or implied revocation. They tried that of *inofficiosum testamentum* of the civilians, and abandoned it. They tried that of tacit condition, and of presumed intention, and alternately abandoned and sustained them until in this state we have adopted a system of our own, unlike that in England, and which is to govern us in this case.

In England, the doctrine of implied revocation is founded on the principle of tacit condition attached to the will at the time of making it, which excludes all parol evidence of subsequent intention for or against the revocation.

In this state and in our Court of Chancery, in (*Brush* vs. *Wilkins*, 4 *J. C. R.* 506;) the doctrine is founded on the principle of an intention to revoke, and in order to guard against the consequences deprecated by the English judges, namely, the reception of parol evidence of intention, our statute has excluded such evidence; (2 *Rev. Stat.* 64, § 35.)

And thus both principles, that of tacit condition, because

a part of the common law before the Revolution, and that of presumed intention, because recognized in our courts since then, and now regulated by statute, are established with us as the grounds on which rests the doctrine of implied revocation, and I shall invoke the aid of both in the course of my examination.

Having premised this, I resume my examination of the cases.

The next case to which I refer is that of *Lugg* vs. *Lugg*, *Salk*, 592; which came up in the English Courts in 1696. There it was held that a will of personal estate was presumed to be revoked by alteration of circumstances. In the first case, forty-one years after the passage of the statute, it was held to be a revocation by the birth of children. Here it was presumed to be a revocation by alteration of circumstances. The principle ruled by the judges was "That there being such an alteration in his estate, and circumstances so different, at the time of his death, from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind."

The question was not however fully disposed of, in the English courts even, until the case of *Christopher* vs. *Christopher*, in July 1771, reported in *Dickens*, 445, and mentioned as authority, in 4 *Burr*, 2171 note, and in an addendum, in 4 *Burr*. 2182. There Lord Mansfield says: "As to an *implied revocation*, from alteration of circumstances, that is now settled," &c.,

In the case of *Christopher* vs. *Christopher* it was authoritatively disposed of and has continued the unchanged law in England and America, since that time.

In that case, *Perrot*, *Baron*, said he thought the statute of frauds, meant to exclude all parol evidence in every case of revocation, except the necessary one of an alteration in the attestation, &c., And that the reason of the several cases, why incomplete deeds, as feoffment without liv-

ery, bargain and sale without enrolment, release without lease, will operate as a revocation depends on this; that wills being ambulatory till death, these several informal acts countermand and determine the will. But he insists that the dispute about the birth and legitimacy of children, would let in parol evidence, which would be in conflict with the statute, and he claims that since the case of *Cook* vs. *Oakley*, 1 *P. Wms.* 304. in 1701, there had been no determination in favor of implied revocations.

Adams B. held, on the other hand, that the alteration in the circumstances of the testator amounted to an implied revocation. He said, the doctrine of revocation had arisen since the statute of wills. There can be no revocation but by express declaration of the testator, or by implication of law; by the latter, by acts dóne contradictory to, or inconsistent with, the will upon this principle, that they show the intention that the lands should not pass by the will. Even deeds not fully executed, or improperly, as for want of attornment, &c., are a revocation. *Roll. Abr. Tit. Devise, fol.* 614, not as actual, but implied revocations. So as to inconsistent acts, *Cook* vs. *Bullock, Cro. Car.* 49. So, by subsequent acts, though the fee returns to, or remains in the testator. *Roll. Abr.* 660, and *Parsons* vs. *Freeman*, 3 *Atk.* 741. These cases show how the law watches the intention of the testator, that it should continue as before, until his death. Thus matters stood, he says, until the statute of frauds, for no provision being made in the statute of Henry VIII., concerning revocations, the judges allowed of parol proof, which, being inconvenient, that statute meant to provide against it, but *left implied revocations as before.* He admits the statute is strong; but yet it had been determined, in many cases, that it has not taken away revocation by implication. *Dister* vs. *Dister*, 3 *Levins*, 108. *Lord Lincoln's case*, 1 *Eq. Ca. Abr.* 411. *Sparrow* vs. *Hardcastle*, 3 *Atk.* 798. *Eccleston* vs. *Speke, Carth.* 79. So he says, it was held in *Brown* vs. *Thompson*, 1 *Eq. Ca. Abr.* 413, and the determination of *Love* vs. *Love*, in the

Ecclesiastical Court, is a foundation for us, and this opinion is contradicted by no case.

Smith B., in the same case, says, that revocations, by operation of law, though not actually, yet were virtually excepted in the statute of frauds, as in *Levins*, 108; 3 *P. Wms.* 163, 178; and the danger of perjury lay in allowing parol proof of declarations, not of facts.

Parker, Ch. Baron, on the same side, cited the case of a devise to a papist, who was not capable of taking; yet it was a revocation: 2 *Eq. Ca. Abr.* 771.

In *Brady* vs. *Cubitt*, *Doug. R.* 30, in 1778, the whole subject was elaborately discussed by Le Blanc, Graham and Dunning, and the doctrine fully sustained;—Lord Mansfield saying, in that case, that he had traveled a good deal through the question, and he had no doubt that there might be many circumstances where a revocation may be presumed; but, only where there has been a total disposition of the estate, so that nothing should go to the heirs at law, as is the case here, arising both from the residuary clause, and the appointment of executors. And Buller, J., says: "Implied revocations must depend on the circumstances at the time of the testator's death."

The next that I find is a leading case, for if your Honor please, I do not call your attention to all that are on my brief, nor do I propose now to examine all the cases upon this subject that are reported, during a period that has elapsed, of two hundred years. I content myself with calling attention to some of the leading cases only. One of those is *Doe* vs. *Lancashire*, 5 *D.* and *E.*, 49, (in 1793.) There the subject was again fully discussed, and the question arose, whether the principle extended to devises of land as well as personalty.

Lord Kenyon says: "It, (i. e. implied revocations,) may be taken for granted, because it has been solemnly decided." And, he adds: "perhaps the foundation of the principle is not so much an intention to alter the will, implied from

these circumstances happening afterward, as a tacit condition." (Here your Honor will discover the birth-place of that idea of "condition," which you will find in many of the cases, "as a tacit condition, annexed to the will itself, at the time of making it, that the party does not then intend that it should take effect, if there should be a total change in the situation of his family.")

The expression used by that learned judge, was, "total change." What was meant by "total change," will be discovered as we proceed. In that case it was marriage and birth of posthumous child. It was enough, in case of a single woman, that she should be married. So far as a man was concerned, it was total change enough if he got married and had a child, and so on.

This was said by Lord Kenyon, in reference to the objection of *Perrot, Baron,* in *Christopher* vs. *Christopher,* that such a principle was a repeal of the statute of frauds.

Lord Kenyon meets that question thus, and impliedly gives the reason for thus disregarding the statute of frauds, (page 61): "I disclaim paying any attention to the declarations, &c., because, letting in that kind of evidence would be in direct opposition to the statute of frauds, which was passed in order to prevent any thing depending either on mistake, or the perjury of witnesses; but, when the act intended to guard against frauds and perjuries, it left the courts at liberty to take into consideration those circumstances, which are not liable to prevarication."

Buller, J., says—(p. 61,) "Some points have been fully established; first, that an alteration of circumstances may amount to a revocation of a will of lands. Second, that marriage, and the birth of a child, are such circumstances as will produce that effect; and third, that such a revocation is, by presumption of law, and implied revocations are not affected by the statute of frauds."

Gross, J., says:—"Although this is a question of very great importance, it seems to me to be reduced to a very narrow compass. It is not whether marriage and preg-

nancy amount to an implied revocation of a will of lands, made before marriage, but whether marriage and the subsequent birth of a child will have that effect. The law presumes that the devisor intended, or rather, as Lord Kenyon has said, there was a tacit condition annexed to the will, that in such an event the will should not stand. This depends on another question, whether against the express words of the Statute of Frauds the law will in such a case imply a revocation of a will of lands? On that head I cannot but express a doubt, whether it is not to be lamented that the letter of that statute has not been more strictly adhered to. If this were *res integra*, I should have great difficulty in determining that such a case was not within the Statute of Frauds. But it is now too late to doubt whether, in the case of marriage and the birth of a child during the father's life, the law presumes a will of lands, made before that marriage, to be revoked. That point has been solemnly decided."

And in this case of *Doe* vs. *Lancashire*, much stress is laid on the case of *Parsons* vs. *Lanoe*, 1 *Ves. Sr.* 191, where Lord Hardwicke went around the Statute of Frauds, in his anxiety to avoid the appearance of conflicting with it, and upset the will, (and here we find another excuse for so doing,) not because of marriage and birth of a child, whence a presumed intention to revoke, but because the man made his will just before he went abroad, and he held it to be a *provisional contingent disposition*. And after discussing the question of implied revocation, (against which he leans, by reason of the Statute of Frauds,) he says:

"Where there is such an alteration as this, no liberal or strained construction ought to be made of such a will to make it effectual; but a court of equity and of law would give such a force to such construction as would make the will contingent, to prevent such inconvenience as this from taking place."

Now, sir, having thus traced the principle through these leading cases, from the passage of the Statute of Frauds in 1641, to this case of Lord Hardwicke, I feel warranted in saying that the doctrine obtains now fully. For evidence

of this, I refer to 1 *Jarm. on Wills*, 152, (Perkin's Ed.,) where it is recognized even in cases where the possibility of a birth was not disclosed to the testator, as the doctrine does not suppose in every instance an intention to revoke actually existing; but it annexes to the will a tacit condition that the party does not intend it to come into operation if there should be a total change in the situation of his family. To that point he cites *Kenebal* vs. *Scrafton*, 2 *East.* 530, and *Doe* vs. *Lancashire*, 5 *D. & E.* 49.

In 4 *Kent's Com.*, 521, the doctrine is recognized as existing in this country. That learned commentator says: "A will may be revoked by implication or inference of law, and these revocations are not within the *purview* of the statute."

In *Brush* vs. *Wilkins*, 4 *John. Ch. R.*, in 1820, Chancellor Kent adopts the doctrine in the Court of Chancery of this state. He refers to all the cases, and sustains the principle; but he does this, not on the ground of *tacit condition*, as stated by Lord Kenyon, (in 5 *D. & E.*) and by Ellenborough, (in 2 *East*,) but on the ground of *presumed change of intention*, as stated by Sir J. Nichols, in *Johnson* vs. *Johnson*, (1 *Phill.* 447.) He also sustains the position that the declarations of the testator may be resorted to to ascertain the intention.

In *Marston* vs. *Roe* in 1838, 8 *Ad. & Ellis*, 14, the *tacit condition* principle was recognized in the Exchequer Chamber, before the Judges of Queens Bench, Common Pleas and Exchequer. The case was elaborately argued by Sir J. Campbell, and Sir W. W. Follett. Tindall, Ch. J., in delivering the judgment, stated that "the question was whether the revocation was grounded on an implied intention to revoke under the new circumstances occurring since the will was made, or as the consequence of a rule of law or a condition tacitly annexed by law to the execution of the will, that when the state of circumstances under which the will was made becomes so materially or rather entirely

altered, the will shall be void." And he adds, "we all concur in the opinion, that the revocation takes place in consequence of a rule or principle of law, independently of intention."

Again he says: "We agree entirely with Lord Kenyon as to the ground upon which the doctrine of implied revocation ought to be rested."

And again he says: "We take the rule of law to be this, that in the case, &c., the law annexes the *tacit condition* that subsequent marriage and birth of a child operates as a revocation."

And afterward, in commenting on the question whether a subsequent purchased estate, descending to a child, prevents the operation of the rule, he says: "The proposition is incompatible with the idea of a *condition*, because the condition relates to the state of things *existing at the time the will was made.*"

Now, sir, I have, by and through the instrumentality of these cases, in England and here, both before and after the Revolution, traced down from forty years after the statute of frauds to 1838, and prior to the execution of this will—the principle of implied revocation—a revocation growing alike out of the intention and the action of the party, not manifested by writing as required in the statute of frauds, or in our laws of 1813, or in our Revised Statutes, and not dependent on parol proof of intention; and having thus referred to some of the leading cases only and to the elaborate manner in which the principle has been discussed, I claim that the principle of *implied revocation*, notwithstanding the statue of frauds is firmly established in our courts, and that the grounds on which it rests are alike *tacit condition* and the intention of the testator. And now I proceed to inquire in what cases it has been applied, for the purpose of seeing whether the case we have in hand is one which can be brought within its reach.

Now, the prominent cases in which it has been applied are:—

1. The case of marriage and birth of a child after the will. It was in those cases that the conflict arose, after the enactment of the statute of frauds, and the battle was fought and won in favor of implied revocation, arising out of the act of the party.

2. In the case of marriage of *femme sole*, marriage alone, without the birth of a child, being sufficient, and for the reason that the rule that a will must be ambulatory until death, could not operate in such a case, because during coverture the married woman could not alter her will; and it was, therefore, a matter of necessity that marriage alone should work a revocation.

The alternative was presented in such a case, either to destroy the ambulatory character of the will, or to allow a revocation by operation of law, notwithstanding the statute of frauds. Accordingly the principle of implied revocation obtained in such a case. And here again the courts yielded to the imperative necessity which compelled them to limit the operation of the statute.

3. A subsequent conveyance of lease and release executed for a limited purpose only, to wit, a marriage settlement was a revocation; *Goodtitle* vs. *Otway*, 2 *H. Bl.*, 516.

4. It was applied to the case of marriage prior to will, birth of a child after, the death of the wife, and a new marriage after that; *Gibbons* vs. *Caunt*, 4 *Vesey*, 848.

5. Also to the case of a conveyance by the testator of land devised, even where he takes the property back again; *Watson* vs. *Watson*, 7 *John. Ch. R.*, 258.

6. So when a testator contracts for the sale of parts of devised lands, it is a revocation *pro tanto; S. C., p.* 267.

7. So where the debt or specific chattel devised is extinguished by payment of the debt, or sale or conveyance of the chattel. If the specific thing is disposed of or extinguished, the legacy is gone; *S. C., p.* 262.

8. So it is applicable to the case of inoperative con-

veyances, failing for want of completion or incapacity of the grantee to take.

Lord Kenyon observed in *Shove* vs. *Pincke*, (5 *T. Rep.*, 124,) that a conveyance, inadequate for the purpose intended, would amount, in point of law, to a revocation, if it showed an intention to revoke. A covenant to make a feoffment and a letter of attorney to make livery, but no livery made, were held in *Montague* vs. *Jeffreys*, (1 *Roll. Abr.*, 615,) to be a revocation, as being acts inconsistent with it; and Lord Hardwicke and Lord Ch. J. Alvanly, sitting in equity, have approved of this construction, as those acts imported an intention in the testator to revoke; 3 *Atk.*, 73, 803; 7 *Vesey*, 370, 371, 373.) So a bargain and sale without enrolment, or a conveyance upon a consideration which happened to fail, or a will not executed according to the statute, or a disability in the grantee to take, are admitted by the same authorities to amount to a revocation. The great question, says Lord Alvanley, has been whether inchoate acts, inconsistent, shall revoke; but in all the cases it is admitted that if the act gives power to destroy the will, though the act is not done, yet the will is revoked.

The English cases are to the same effect. In *Dister* vs. *Dister*, 3 *Lev.* 108, the C. B. held a devise revoked by a recovery to the uses of the devisor, because the estate was altered, though the testator took back the old use; and the same principle was admitted by the C. B. in *Darley* vs. *Darley*, 3 *Wills.* 6, because, said Ch. J. Wilmot, it must be presumed the testator intended to alter his will. Yet, in that case, the testator suffered a recovery, which was absurd and useless, and clearly bad, and without any reasonable meaning to be deduced from it; and Lord Camden, on the strength of the opinion of the C. B., held the recovery a revocation of the devise. The opinion of Ch. J. Trevor, in *Arthur* vs. *Bockenham*, *Fitzgib.* 240, is a strong authority on the point, and it is frequently cited as unexceptionably sound. The law, he says, is so very strict that it requires the interest which the testator had when he

made the will, should continue and be the very same interest, and remain unaltered to his death; and the least alteration of that interest is a revocation of the will.

In *Roper* vs. *Radcliff*, 10 *Mod. Rep.* 230, it was conceded by the counsel and the court that a devise to a person disabled by law from taking, was a revocation of a prior devise, on the ground of the intention to revoke. Lord Hardwicke, in *Parsons* vs. *Freeman*, *Atk.* 748, recognized the doctrine, and held that if the testator levied a fine, or enfeoffed a stranger to his own use, it was a revocation, though the testator was in of his old use. He admitted that this was a prodigiously strong instance of the severity of the rule; and Lord Mansfield observed, *Doug.* 722, that the Earl of Lincoln's case, decided on the same principle, was shocking. Still, it was admitted to be a rule of law, settled and to be observed. Lord Hardwicke went at large into the consideration of the same subject, in *Sparrow* vs. *Hardcastle*, 3 *Atk.* 798, 7 *Term Rep.* 416, *n. S. C.*, and laid down the same rule. The testator, after the devise, conveyed the estate, and took back a declaration of trust, which afterward was performed and ceased, so that he and his heirs were entitled to a reconveyance. Still it was a revocation, for the estate did not continue in the same condition; and any alteration, any new modeling of the estate after the will, was, as he observed, a revocation, except in the cases of mortgages and charges on the estate for debts, which are only a revocation *quoad* the special purpose, and they are taken out of the general rule on the fact of being securities only.

In *Bridges* vs. *The Duchess of Chandos*, 2 *Vesey, jun.*, 417, Lord Loughborough ably reviews the cases, and acknowledges the rule which has been stated. But the great case of *Cave* vs. *Holford*, 3 *Vesey*, 650; 7 *Term Rep.* 399; 1 *Bos. & Pull*, 576, *S. C.*, led to a thorough examination of all the law on the subject, and was discussed with infinite ability in the several courts of law and equity; and it was most authoritatively settled, that where a testator,

after the will, conveyed the estate to trustees, in trust for himself in fee, till marriage, and for default of issue of the marriage, to the use of himself in fee, and he married and died without issue, the conveyance was a revocation of the will, both in law and equity. The doctrine of the case is, that by a conveyance of the estate devised, the will is revoked, because the estate is altered, though the testator take back the same estate, and by the same instrument, or by a declaration of uses; and though he did not intend to revoke the will, it is revoked upon technical grounds, because the estate has been altered. And Lord Hardwicke said, in *Sparrow* vs. *Hardcastle*, the rule had been carried so far that if the testator suffered a recovery for the very purpose of confirming the will, it was still a revocation, for there was not a continuance of the same unaltered interest.

In the case of *Walton* vs. *Walton*, there is a very elaborate examination of the doctrine by Chancellor Kent, from which I have freely quoted, and in which he refers to numerous cases, showing the length to which the matter had been carried; ending, however, with this remark, which is pertinent to the point in hand: "We see, then, that either a change of the estate or an act, though nugatory in itself, evincing an intention to revoke, will amount to a revocation, and that the only exception to the rule is a conveyance to pay debts."

9. So where an estate is devised specifically, and afterward, the testator makes an executory contract to sell it. *Knolly* vs. *Alcock*, 5 *Vesey*, 654; *Williams* vs. *Owen*, 2 *Vesey, jr.*, 601; *Cotter* vs. *Layer*, 2 *P. Wms.*, 622; *Mayor* vs. *Garland*, *Dickens*, 563—thus establishing the principle that a valid contract for the sale of lands is as much a revocation of a will in equity, as a legal conveyance of them would be at law.

10. The doctrine was also extended in the case of *Adams* vs. *Winne*, 7 *Paige*, 97, in 1838, to the case of the devise of a specific piece of real estate, which was afterward sold by

the testator, and a mortgage taken back for part. Here it was held to be a revocation as to the whole; not merely that part which is gone, but of the whole; this being not a case of marriage and birth, but of actual conversion from realty to personalty. In that case the Chancellor held that "evidence is admissible to show the situation of the testator's property at the time of making the will, and the changes which took place therein afterward, for the purpose of enabling the court to determine, as a question of law, whether the devise was revoked by a partial or total destruction or change of the subject matter of the devise."

11. In *Beck* vs. *McGillis*, 9 *Barb.* 35, in 1850, these principles were ruled by the Supreme Court:

First, A sale after will made, and mortgage taken back, revoke the devise.

Second, The mortgage is not substituted for the land devised, but goes for distribution, according to law.

Third, That where a mortgage is specifically bequeathed, and afterward there is a foreclosure, and on a sale a new mortgage is taken, it is a revocation though the testator leave a written memorandum that he means otherwise.

Fourth, If a specific *legacy does not exist at the death of* the testator, it is adeemed (or revoked) and this without regard to the intention.

12. The next case I refer to is that of *Colleton* vs. *Garth*, 6 *Simons*, 19, where there was a bequest of a lease and furniture of a house. The lease expired in the testator's life-time, part of the furniture was sold, and the rest removed to another house; it was all adeemed or revoked.

13. The case of *Gardner* vs. *Hutton*, 6 *Simons*, 93, was one where a mortgage was devised, and afterward paid and reinvested, it was held to be revoked.

14. *Hayes* vs. *Hayes*, 1 *Keen*, 97, was a case where there was a gift of all the testator's property in public funds when he had £700 in stock, which he sold, and invested the proceeds on mortgage; it was held to be revoked.

15. In *Marwood* vs. *Turner*, 3 *P. Wms.* 163, it was held that where one seized of a lease, for lives, devised it and renews; the renewal is a revocation, because there was a surrender of the old lease, and nothing for the devise to work on. It is the same as to chattel leases, *Toll. Ex'r*, 23, *n. g.* So the renewal of a prebendal lease, that is a lease for twenty-one years, is an ademption of a bequest of it, *Coppin* vs. *Fernyough*, 2 *Br. C. C.* 291.

16. So in the case of *Barton* vs. *Cook*, 5 *Ves.* 463, it is held that if the testator had sold out part of his stock, the executor would not have had to replace it, for it would have been adeemed.

17. In the case of *Roach* vs. *Haynes*, 8 *Vesey*, 593, the revocation of the appointment of an executor is held to be a revocation of a legacy to him.

18. In 1 *Lee*, 120, and 5 *E. E. R.* 325, it is held that a will by a father, on a false report of his son's death, and of a wife, on the presumption of the husband's death, were revoked by their being alive. They were made on the supposition that the parties were dead, but the parties being alive, therefore the will was adjudged to be revoked.

19. *Toller's Executor*, 19, *citing* 2 *Atk.*, 272, says: If the testator do any act inconsistent with the operation of the will, such act shall amount to a revocation.

20. So if a testator suffer a recovery, after will made, the devise is revoked, though the use result or be limited to himself. *Parsons* vs. *Freeman*, 3 *Atk.* 741; *Darby* vs. *Darby*, *Amb.* 653, *S. C.* 3 *Wills*, 6; *Parker* vs. *Biscoe*, 3 *Moore*, 24.

So if he make a feoffment to the use of his will, a prior devise is thereby revoked. *Sparrow* vs. *Hardcastle*, 3 *Atk.* 804, *Swift* vs. *Roberts*, *Amb.* 618.

21. So if a covenant to levy a fine to the use of such person as testator shall name by will, and he then makes his will, devise the land, and then levy the fine, the will is revoked. *Amb.* 610.

I pause to remark here, that I do not cite these cases to

show that they are the law now with us, because the extreme severity of some of them has been removed by statutory enactment, but I refer to them to show the extent to which the doctrine of implied revocations has been carried, and the principles on which it rests, notwithstanding the statute, and I shall by and by attempt to show that this case comes within those principles, and that is all that it is necessary for me to do in this connexion.

22. So in *Parsons* vs. *Freeman*, 3 *Atk.* 762; and *Bridge* vs. *Chandoes*, 2 *Ves. Jr.*, 432, if A, seized in fee, devise an estate to B, and by conveyance take back an estate from B, in fee, it is a revocation.

23. So if one devise land, and afterward articles to sell or settle it, this is a revocation. *Cotter* vs. *Layer*, 2 *P. Wms.*, 624; *Bennett* vs. *Tankerville*, 19 *Ves.* 170.

24. So if any new disposition be made subsequent to the will, or in other words, any new conveyance of that which had been conveyed by the will, it shall defeat the will—*Toller's Exr.* 22.

25. And I refer to the case of *Knollys* vs. *Allcock*, 5 *Ves.*, 654, to show that an agreement to make a partition, by allotting part of the estate devised, is such new disposition as will work a revocation, and so, if he devise a gold cup and change it—*Abney* vs. *Miller*, 2 *Atk.*, 599.

26. In the case of *Sparrow* vs. *Hardcastle*, 7 *D. & E.*, 416, note, we have the language of Lord Hardwicke, which it is well worth while carefully to examine, for the question was there discussed, by that eminent jurist, and the doctrine recognized, and the principle which I contend for established, in a case where, after the devise of an advowson the testator conveyed it to trustees, to present certain persons therein named, and in default of such persons, to reconvey to the grantor or his heirs.

27. I next refer to a number of other cases, in *Ward on Legacies*, pp. 261 to 276, where the principle has been ap-

plied; for instance: a codicil was held to be revoked, or void, because founded on a mistaken belief that the legatees were dead—*Campbell* vs. *French*, 13 *Ves.*, 321. The devisee of £100 per annum to a wife was revoked by an after settlement of the same amount on the wife—*Mascal* vs, *Mascal*, 1 *Ves., Sr.*, 323. Two devises of the same thing—the same identical article—one revoked the other, or both were void. An advancement to a child is a revocation. The burning of a house, or pulling it down is a revocation, though rebuilt. The devise of furniture in a house is revoked by its removal to another house—*Amb.*, 610; *Green* vs. *Symonds*, 1 *Bro.*, 129.

These particular instances to which I have called your Honor's attention give us some idea of the extent to which the rule has been carried, and something of a basis on which to rest our claim in this case; and I might be content, if the court please, to rest where I am now, without going any further, with reference to the rule itself, the extent of it, and the principle upon which it is founded. I have shown, in some thirty or forty cases, in which the rule has been applied and received, that the extent is broad enough to bring almost every feature of our case within those to which I have referred.

There are, however, three other cases to which I will call your Honor's attention particularly, because they more immediately and directly bear upon the case in hand than any others which I have found; because they are modern cases, and because the circumstances are more like the one now under consideration than any of those.

Your Honor is aware that in this country there is a marked difference between our jurisprudence and that of England. In construing wills there, a great deal more importance is attached to the rules of tenure of real estate than with us. They are governed by a thousand refinements, growing out of their particular system of real tenures, which do not affect us to the same extent. With us the great principle is the intention. In all cases of the

testamentary disposition of real estate we are primarily after the *intention*. While the English lawyer is hunting round to find some principle bringing the case within the technical, and very often refined, rules of the tenure of real estate, we content ourselves with looking for the intention. I do not mean to say by that, that we entirely disregard, or trample under foot, wantonly, the rules affecting real estate. But, even in comparison with them, the great and paramount question with us is *intention*. Therefore, when this doctrine of implied revocation came to find a foothold with us, we find that instead of being founded upon the *tacit condition* principle alone, which seems to obtain in the English courts, it is founded, also, if not rather, upon the doctrine of intention; because, with us, in all adjudications upon testamentary dispositions, the great landmark is *intention*. I make that remark, because in the case to which I am now to refer, the intention has much to do with it; and in the closing part of what I shall have to say, on the application of this principle to the case in hand, I shall speak of the rule as applicable to this case upon both grounds—upon the ground of tacit condition and of intention also.

In the case of *Johnson* vs. *Johnson*, 1 *Phill.* 447; 1 *E. E. R.* 141, the doctrine of implied revocations was fully discussed; and had I time now, and were I warranted by the circumstances which govern your Honor and myself, for going into a full examination of that case in this argument, I might, with very great propriety ask the court to pause, in some astonishment, at the great resemblance there is between that case and this. Your Honor has had occasion, heretofore, I am aware, to look into that case and its principles; but when you look into it in comparison with this of ours, you will find how many of the features of the two cases are alike. In that case, you will remember, that the will was not admitted to probate. It was rejected upon the ground of implied revocation. In that case a man, twenty-two years before he died, had made his will,

being abundantly capable of disposing of his estate at the time, as Henry Parish was in 1842, fourteen years before he died, and when he made his will. But when he died, twenty-two years afterward, his estate (which when he made his will amounted to £10,000 or £15,000,) was worth £200,000—the most of it accumulated after he had made his will. Thus too, it was with Henry Parish, whose estate, when he died, amounted to about a million and a half, and in 1842, when he made his will, it did not amount to half that sum. In both cases, the bulk of the testator's estate was made after he had executed his will.

Then, as in this case, there were alterations in the circumstances of his family as well as his property. In that case there were children. In this case there were no children, to be sure, of the testator, but there were objects of his bounty as much as children would have been; for with us, children, in respect to the estate of their father, are, during his life, objects of bounty, and not, as in the civil law, claimants of right. It matters not here whether the objects of the bounty of the testator were his nephews and nieces—the children of his brothers and sisters—or whether his own immediate children—they were objects of his bounty, and as such alone claiming under the will, as in the case in Phillimore. There some children were born; here there were nephews and nieces born, the testator having no children himself. In one case, some of the objects of his bounty had died, whereby eighty thousand dollars of his specific bequests had lapsed; and there were three children (nephews and nieces) born after the will was made. These were some of the prominent changes in the circumstances of the testator—in his family and his property. In the case in Phillimore, Johnson died twenty-two years after he made his will, worth nine hundred thousand dollars more than when he made his will, and his will was set aside. Mr. Parish died fourteen years after his will was made, worth at least seven hundred thousand dollars more than when he made it.

Let us note other features of the case in Phillimore, and behold the striking resemblance. One was that when the will was made, the testator's property was all specifically bequeathed. So, in our case, all of Mr. Parish's property was specifically bequeathed by his will in 1842. He left nothing undisposed of.

It was held in Johnson's case that the will was good, unless it had been revoked by subsequent circumstances. There was no written revocation—no attempt by writing, either within or without the statute of frauds or of wills, to make a formal revocation. The only question then was whether there was a revocation by the circumstances,—or what is called an implied revocation—-and the court held that this change in his circumstances, from being worth £15,000, when he made his will, to being worth £200,000 when he died, was one of the circumstances upon which a revocation by law could be founded.

Another circumstance was this: that by permitting the will to go into operation after this long lapse of time from the time when it was executed, it gave a large amount to a person for whom he had not designed such amount, but a different one. Now, in our case, how palpable it is, from all the testimony, that when Henry Parish made it in 1842, he intended to give less than forty thousand dollars as the residuum of his estate, to his two brothers. Let his will operate now, if your Honor please, and instead of giving to these two brothers less than forty thousand dollars, it gives them seven or eight hundred thousand dollars.

Another consideration in the case of Johnson, was, that the principle of the will was entirely violated, in not providing for just objects of his bounty, viz: after born children. Now, sir, if in our case there had been after born children instead of after born nephews and nieces, the parallel would have been complete, and the principle of the will would be entirely violated, by not providing for those objects of his bounty. In our case the testator had no children; in the case of Johnson there were children,

who were the objects of his bounty. Here, by providing by the will for his nephews and nieces, Henry Parish makes those nephews and nieces the objects of his bounty, as much as they could be by the fact of being his children; nay, more than they could be made by the mere fact of being his children, unless he had by his will shown that he had intended their being objects of his bounty. If he had had children, and been alienated from them, and said, "they have behaved rudely to me,—I will give them nothing,—they shall not be objects of my bounty; but I will make my nephews and nieces such," and after the will had been made there were other nephews and nieces born; he, having in his will, made every nephew and niece, then living an object of his bounty, the parallel, then, I apprehend, would be complete. The principle of the will, in Johnson's case was violated, because there were objects of his bounty afterward born. In this case, the principle was violated, because there were nephews and nieces, alike objects of testator's bounty, born afterward. In one case the children were made objects of the testator's bounty,—in the other case the nephews and nieces. So I may say in this also, the cases are parallel, that there were, in both, objects of the testator's bounty, afterward born and not provided for.

Again, the court say that one circumstance is, that it makes a disproportion not intended by the testator. Now, sir, take the will of 1842, in this case, and set it in operation now, and is not that precisely true of it? Would there not be a disproportion here between the brothers and sisters, that the testator did not intend? Your Honor sees that by the will he intended to place those brothers and sisters nearly upon a par. To each sister he gives twenty thousand dollars. The brothers were not to receive more than about forty thousand dollars, for his own statement shows that he valued the residuum devised to the brothers at about thirty-eight thousand dollars. A disproportion not intended by him, is then clearly worked out. The court will readily observe, from the testimony, that at

the time this will was made, Daniel Parish, one of the brothers was rich himself, by his own earnings, and the inheritance from his father. James Parish, the other brother, was in independent circumstances, by having had his share of his father's estate, as well as his brother Thomas'. Mrs. Sherman and Miss Ann Parish, the sisters, were both in independent circumstances themselves.

An equality between his bróthers and sisters and their children was most manifestly the great object had in view by the testator, when he made his will. To each brother and sister, four in number, he gave twenty thousand dollars. To each of his brother's children—and he included all who were then living—he gave ten thousand dollars.

He aimed at the same equality among the other objects of his bounty. They were thirty-two in number, and to most of them he gave ten thousand dollars a piece, and to none of them did he give more than about twenty-five thousand dollars. His wife alone, being an exception to this principle of equality, and to her he gave about one third of his estate.

I may well say, then, that equality among the selected objects of his bounty was the great principle of his will, and behold how grossly it will be violated, if the will is now permitted to operate. Eighty thousand dollars of specific bequests will go into hands for whom it was never intended, and the bequest to the brothers, instead of being less than forty thousand dollars, as intended by the testator, will be nearer eight hundred thousand dollars. And well indeed may I add, in the language of the case of Johnson, that "the principle of the will will be entirely violated," and this result will flow, not because of the intention of the testator, but because of the decrepitude which denied to him the power of expressing or executing his intention.

In the case of *Johnson*, there was another circumstance, and that was, the testator's conversations with his wife, in regard to the disposition of his estate, which were regarded, although it was evident from them, that he had not for-

gotten his former will. So did Henry Parish show, by his conversations that he knew he had made a will. And the testator's conversations in that case, with his wife, showed that he was dissatisfied with his will. So it is shown here, and we hear of no declaration from Henry Parish, from the time when he made his will in 1842,—no act of his from that time till he died in 1856, that showed any thing else but dissatisfaction with that will.

In that case, another instance was, that the testator showed an equal degree of affection for the after-born children that he had manifested toward those that were born before the will. There is no evidence in this case, one way or the other, that Mr. Parish had any less regard for the after-born nephews and nieces, than he had for those born before, or that he paid any more regard to one child than he had to another.

In that case, it was said by the judge, that one element was that the subsequent conduct of the testator was regarded as showing no appearance of approbation of, or adherence to, his former will. And it was also held,that the declarations of the deceased are always received as corroborative evidence of intention—both of the *animus testendi* and the *animus revocandi*,—especially confidential communications.

So, also, it was held that a paper not valid as a dispositive paper, and not *per se* a revocation, is yet a circumstance of evidence tending to show that the deceased did not mean his will to operate. And, as the learned judge in that case says, "*it is extremely strong.*" Now, whatever may be your Honor's opinion in reference to the testamentary capacity of Henry Parish, after his attack in '49, or in reference to the validity of the codicils, one thing must be evident to every intelligent mind, that there was, at least some intellect left in that unhappy man,—intellect at least enough to bring it within the rule laid down by Senator *Verplanck* in the *Lispenard case*—to know when to give away five dollars to a servant or two hundred dollars to the church—intel-

lect enough to know that he did not mean that his will should operate. And these codicils, therefore, although they may not be good enough to be a disposition of his estate, are within the language in that case in Phillmore, "very strong evidence" to show that the decedant did not mean his will to operate; and we invoke them, in this case, to perform here that office for us.

The court say, in regard to that, "In its principle of disposition such paper was the same as the will, but in their effect, from the change of circumstances, was very different indeed." "The paper was of moment, as it showed his intention to be variant from the will"—which is the case with the codicils here.

In that case, also, the judge discusses the question that "implied revocations are not within the *Statute of Frauds*, and subsequent birth of children, though not *per se*, a revocation, may, with other circumstances, raise an implication. Intention is the principle of *factum* and revocation. It is the principle of revocation, whether it be by a direct act, or implied by circumstances?"

In that respect he differs from some of the other cases to which I have called attention; but he rules, as has been ruled in this state, that intention is the principle of the revocation; and in that case, the court closes its review, by saying: "Because the court thought the intention was plain, and without doubt, it pronounced for the revocation."

Now I repeat my observation, as to the wonderful parallel of these two cases, and that case stands before us now prominent, if your Honorp lease, as bearing upon this. It is true, it was decided since the adoption of our constitution, and is therefore not of binding force; but it is certainly respectable of itself as an authority, and rests upon those principles which are binding authority with us, because incorporated into our law before the Revolution, and flowing down into it since. Its respectability as an

authority, the principles upon which it rests, and the application of those principles to the case so parallel now before your Honor, all commend it to our earnest consideration.

But I am not compelled to rest the matter here. That case in *Phillmore* has received the sanction of the courts of this state. In the case of *Brush* vs. *Wilkins*, 4 *J. C. R.*, 506, Chancellor Kent distinctly receives it. I will not now pause to read the remarks of the Chancellor, although I find an allusion to it on my brief, that such was my intention. It is enough for me to say, that the principle of the case in Phillmore is fully sustained.

It is also sustained in this court, if your Honor please, in the case of *Sherry* vs. *Lozier*, 1 *Bradf.*, 437, decided in 1851. That was a case, as your Honor will remember, where a man made his will in 1813. He was just going abroad. So was Mr. Parish. He had some estate to will. So had Mr. Parish. The question was, whether seventeen years afterward there had been a revocation. The testator died, being worth considerable more money than when he made his will. Fourteen years after he made his will, Mr. Parish died, worth a great deal more money than he possessed at the time he made it. These cases are parallel to that extent, except only in the short period of two or three years. In that case, your Honor held, that the will was revoked, by the very circumstances to which I appeal to perform that office in this case. There was no express revocation. There was no writing, under the statute, but the revocation grew out of the altered circumstances of the testator. In that case, your Honor examined the case of *Johnson* vs. *Johnson*, in *Phill.*, and recognized it, as Chancellor Kent had done. Your Honor, also, recognized the law of implied revocations, as I have claimed it in this case; and you applied it to the case, as I have stated, of a will made some seventeen years before; and you concluded the opinion in that case by saying: "I am therefore, of opinion, that this will was revoked, and

upon these grounds." The first ground was, that peculiar circumstances attended its execution, *i. e.*, the sailor was just going abroad. Secondly, five children—(not five nephews and nieces,—but five objects of his bounty, and in that respect alike)—five children were subsequently born to him. Thirdly, the alteration in the decedant's circumstances. It was not proved in that case how much the property was worth at the time he made his will in 1813; but it was inferred to be inconsiderable, because he was a common sailor, but he was worth some fifteen thousand dollars or twenty thousand dollars at the time of his death; but that alteration in his circumstances was regarded as one of the grounds upon which the revocation was allowed. But mainly, if your Honor, please, (and here following out the American doctrine to which I have referred, as stated by Chancellor Walworth and Chancellor Kent, in those cases to which I have already alluded)—founded mainly upon the presumed intention of the testator, as manifested by his actions and declarations—the presumed intention that that will of his, made seventeen years before, under an entirely different state of things, should not operate.

I should be trespassing on the time of the court if I extended any more of it, in the minute examination of the cases bearing on this point. I will therefore forbear to do so and content myself with merely referring to a few that are in point, which I have not yet cited. *Rider* vs. *Wager*, 2 *P. Wms*, 332. *Hodgkinson* vs. *Wood*, *Cro Car.* 23, *Parker* vs. *Lamb*, 3 *Bro.*, *P. C.* 12, *Ex parte Ilchester*, 7. *Ves.* 373, *Metheren* vs. *Metheren*, 2 *Phil.* 416, *Tucker* vs. *Thurston* 17 *Ves.* 134, *Ward* vs. *Moore* 4 *Madd.* 368, 4 *Kent's Com.* 521.

Now, if the court please, having shown that the doctrine of implied revocation is the well-settled law of the land, and has been so for nearly two hundred years, notwithstanding the apparent conflict with the statute, and that it is founded with us alike on the ground of a tacit condition annexed to the will at the time of its execution, that the

testator's circumstances would not be materially changed at the time of his death, and upon the presumed intention that the will should not operate, it only remains for me to show the application of those principles to the case now before us.

In performing that part of my task, I shall claim a revocation in this case, both because of the altered circumstances of the testator, and because of an intention to revoke on his part, And in doing so I shall feel no embarrassment from the language of the statute, That is in our statute the same that it was in the original Statute of Frauds, from which it has been transplanted almost *intotidem verbis*. For not only has it been thus well settled that the statute does not interfere with implied revocations, but full aliment is given to the statute by the whole course and current of the authorities.

In the language of an eminent jurist:

"The doctrine, hard and unreasonable as it appears in some of its excressences, and notwithstanding it has been repeatedly assailed by great weight of argument, has nevertheless stood its ground immovably on strength of authorities, as if it had been one of the essential landmarks of property. * * * The doctrines of the English cases, have been reviewed in this country and assumed to be binding as part of the settled jurisprudence of the land. * * * Some of the excesses to which the English doctrine has been carried, have not been acquiesced in, but the essential rules have been taken to be law." 4 *Kent's Com.* 530.

A part of the doctrine, thus well-settled, consists in finding aliment for the statute. That aliment consists in holding parol proof of the declarations of the testator of an intention to revoke, not of itself to be sufficient to revoke, because of the danger of mistakes or perjury in regard to the most precarious of all proof that of oral declarations; and does not exclude the evidence or the force of acts in working a revocation, or even evidence of oral declarations in support of those acts. Thus saith the statute: oral declarations alone shall not revoke a will, but acts alone or oral declarations with such acts may.

And now I proceed to show in this case, various acts and declarations which show a revocation by operation of law, and bring this case within the terse remark of Chan-

cellor Kent." "A will may be revoked by implication or inference of law, and these revocations are not within the purview of the statute." 4 *Kent's Com.* 521.

And I shall endeavor to show:

1. That the testator intended to revoke his will, and this I will show by his declarations and his acts.

2. That there was an actual revocation in part, at least, even independent of intention; and

3. That such revocation, even if partial, is so great, and extends to so much of the whole purpose of the will, that the doctrine of *cy pres* cannot be allowed to operate, but the whole will must fall because its general scope and purpose are destroyed.

First. As to the intention to revoke; And here I first invoke the testator's declarations of such intention, a species of testimony which this court with great propriety received and considered in the case referred to in 1 *Bradford.*

And they are these:

1. When he made his will, it was on the eve of his departure for Europe, and he executed it in duplicate and took one copy with him, that he might alter it while abroad. This was in September 1842.

2. On his return from Europe, and in July and August 1844; he twice spoke of altering his will, and consulted his counsel about doing so. Changes he said, had occurred, during his absence, from death in his family, and changes in his property had occurred, he having sold his Barclay street house, where he had resided, and Chambers street property which he had specifically devised, and bought property in Union square, which he afterward improved as his residence.

3. I invoke the fact, as testified to by Dr. Delafield, and also by Fisher, of his writing the word "will." Dr. Delafield says (vol 1, fol. 30, 45,) he constructed the whole word once and part of it several times, and this without his attention having been previously directed that way. That was after August, 1849, and after he had been for several

days disturbed by the failure of his repeated attempts to make himself understood.

4. Again, Fisher says he heard Mrs. Parish ask him if he wished to change his will, and he answered yes.

5. It is in testimony, that Mrs. Parish told Mr. Lord, in the presence of the testator, that he wanted to alter his will in regard to his brother's children.

There sir, are his declarations alone, showing that he intended that his will of 1842, should not be made to operate; what his acts were, we will next see in conformity with that intention.

1 He consulted counsel in 1844, as to making alterations in the will; he obtained a copy, that it might be altered.

2. With Mr. Lord, he consulted for that specific purpose. No man can read this testimony, and say he did not understand what it was that Mr. Lord came there for; that he came there to alter his will. We find, then that in 1844, in 1849, in 1853 and in 1854. He consulted counsel with reference to such alteration. He went farther, and executed three codicils. Whether he was capable of understanding what was contained therein or not, the fact that he knew he was executing something to effect a change in the testamentary disposition of his property, must be admitted to be well established. I do not deem it necessary to pause upon my way to demonstrate a proposition which strikes me so clearly, as sustained by the whole evidence in the case, for I cannot persuade myself that it is necessary for me to go into details of the testimony to show that he knew he was making an alteration of his will in '49, '53 and '54 No matter whether the disposition he then made was valid as such or not; no matter that it might have failed for want of capacity in some devisee to take under that disposition, or for want of capacity to express exactly what he was desirous of doing; no matter though it failed for want of capacity to explain what his wishes were; let it be but once established that he knew he was making an alteration in his will, and

the act performs all the office that I desire for it in this connection, namely: it shows his intention to alter his will, and revoke it, in part, at least.

It is not necessary that the act should be operative as a will or a valid codicil, in order to work out a revocation. I have already shown that incomplete attempts at or acts of conveyance are sufficient for a revocation, though inoperative as grants. It is the same with inoperative wills. *Roberts on Frauds*, 465, *Bro. P. C.* 450, per Ch. Baron in *Christopher* vs. *Christopher*.

3. The testator placed a large amount of his personal estate in the name of his wife. This began soon after his attack of illness in 1849, and continued during the residue of his life, so that when he died about $350,000 of his estate was thus invested in her name, as absolute owner, or at least under her absolute control.

And no matter, if your Honor please, whether that disposition of that large amount of property was good as gifts *inter vivos* or as *donationes mortis causa*, or not,—it is enough that it shows that he did not intend that that $350,000—all of which had been made since his will had been executed, should be subjected to its operation.

4. There are other acts of his to which these remarks are as applicable—namely, the large amount of gifts that he indulged in after he made the will. Why, sir, he gave away a very large amount and to his devisees too; $45,000 to Daniel Parish, $9,000 to his sisters, $13,000 to his brother James; besides the $75,000 in the hands of his brother-in-law, and over $15,000 to sundry other persons; and thus he scattered by his profuse generosity somewhere about $150,000 after that will was made. Those were gifts *inter vivos*, that were effective. They were gifts that have, with one exception, taken effect. And what is the language that those gifts speak to us, except the intention that this $150,000 should not come in under that will; and that the power of the will, so far as it bore on this amount, should at least be revoked?

5. Again, sir, it is a small matter to which I am now to refer, and yet it speaks to us volumes also. I speak of the pew in Grace Church, specifically devised to his wife. When that will was made, Grace Church was the plain, unpretending building at the corner of Rector street, in the south end of the city. When he died it was that gilded palace of wealth, ostentation and "gingerbread work" now standing at the other end of the town. The pew thus devised, was an interest in real estate, which has long since been sold and converted into stores, and the pew he owned when he died was in an entirely different piece of property, and located elsewhere.

Every principle of law tells us that the devise of that pew is not worth one farthing; its efficacy being destroyed by a change of circumstances, yet it stands here now before us an apparent valid devise. When his interest in that church was changed, and the property in Rector street was converted into a store, and the church removed up town, in the form of an entirely different piece of property, the character of his interest in the property was changed, and there was no valid devise of it. A change of circumstances revoked it.

6. The house in which he resided when he made his will was worth less than $15,000, yet that and his real estate in Chambers street, both of which, by his will, were devised to his wife, were sold by him some twelve years before he died and to that extent at least, he revoked his will and instead of that comparatively humble residence, when he died he occupied a residence which cost him nearly ten times as much.

7. His furniture, library and plate, devised to his wife, of comparatively little value when he made his will, had almost all been changed, before he died, into new and costly articles, valued at $20,000 at least; and so with his horses and carriages, which had all been changed during the fourteen years that had elapsed.

8. Again, sir, in 1842, when he made his will, he made

out a statement of what his property consisted of; and that statement is part of the evidence in this case; and I refer to it in this connection to show how great was the change worked in his estate during this lapse of fourteen years. Every piece of personal property mentioned there is gone. Every thing has departed from him—all is changed—not a thing left. Even the Phœnix bank stock is gone—transferred, as it has been, to Mrs. Parish; and by that transfer subject to the remarks I have already made upon that subject in reference to the $350,000 of the gifts to her. Now, sir, I may well invoke here the well-established law of implied revocation, that the destruction of, or parting with property devised, is, *per se*, a revocation. If any one of these items of personal property enumerated in that inventory, had been specifically devised, and afterward sold by him, that would have been a revocation beyond question. For aught that we know, the whole of that personal property has been expended, and that which is left now is the subsequent earnings of his care. Be that as it may, the whole has been changed, so that no man can lay his finger upon one particle of that personal property—not even the furniture in the house.

But, sir, there were probable motives for these acts and declarations of revocation of his. Let us see a moment what they were; because, when inquiring into intentions, we may well look for motive. Eight of his legatees were dead; eight of the special objects of his bounty had passed away from the power of enjoying it. Three nephews and nieces, of the same class with those whom he had selected had been born after the will was made, and before he died. His estate had more than doubled between the execution of his will and the hour of his death; and there had been an alienation between him and his brother, one of the residuary legatees. No matter from what cause, it is enough to know that Mr. Daniel Parish speaks of it in his letter to his brother, which proves it, as to him; and Mrs. Parish's

declaration herself, that there was an alienation between them, proves it as to her. I may, therefore, without giving offence, speak of that alienation. Whatever it was, whatever its cause, whatever its extent---it was, unhappily, something, and that something existed during the time he had the power to revoke his will, and may well have produced the desire to do so, at least as to the residue of his estate, which had now become larger than was his whole estate when he made his will.

Again, there was another motive which may have had a powerful influence in working a change of purpose in him. Until he was attacked by the unhappy illness, from which he never recovered, and under which he lingered so long, he had never, or at most, in a very contracted degree, indulged in charitable gifts. But now he was helpless and speechless. His great wealth ceased to be of value as contributing to his happiness. On all hands we find that he despaired of ever recovering from his attack, but was, day by day, admonished most fearfully, that his last hour was near at hand. How often was it that he wept like a child at the consciousness of his condition? How distressing was that despondency that settled habitually upon his once cheerful countenance? Influenced by these feelings, he sought consolation by uniting himself to the church, and he became unusually lavish in his gifts for religious purposes. During his last illness, he gave away to such objects, over $11,000, and bequeathed, by his last codicil, $50,000 more for the same purposes.

To that extent, at least, here was a revocation of his will—a plain manifestation of his intention that those sums at least, should not go to his residuary legatees, even if it was not, as I yet claim it was, an equally clear manifestation that he did not mean his will should take effect, as it was written. Behold, how great was the change of his circumstances and condition from what they were when he made his will! At one moment, in the full vigor of health and manhood: gifted with an abundant fortune; with every

means of enjoyment of ease and luxury, and regardful only of the world immediately around him. At another, prostrated in hopeless and helpless decrepitude, his fortune useless to him—all means of enjoyment gone, and hour by hour admonished, that the end was not far distant. Can we say that there was not here opened to his view a source of new duties and new obligations? that there was not in him a change of circumstances, as "total," or "material," as any of those which, in the cases to which I have referred, was held by the courts, to work a revocation by operation of law?

For my own part, I can well understand why, during those very hours when, unable to speak; thus struck down; thus standing upon the verge of the grave, and seeking to make his peace by these charities—I can well understand how, at that moment, of all others in his life, this man, so marked for the equitable justice of his temper, and his equal regard to his brothers and sisters, should not desire to approach that death with this monstrous inequality staring him in the face, which your Honor is now called upon to sanction, in this case, among those relatives. Out of this change of circumstances I can well imagine an ardent desire, with that crippled hand, to destroy the will which he had not intended to operate thus unequally, and mind enough to know, that if his will was then permitted to operate, as he originally drew it, it would act thus unequally; and, with all the feelings that he would naturally have, I can well understand his anxiety to destroy that inequality, or, at least, to prevent it.

10. But, sir, even this is not all the change that was wrought in his condition and circumstances, or all that he did in relation thereto. There was a large depreciation in the value of the real estate which he had specifically devised. In his New York property, that depreciation was estimated by him at $38,000, and was, by his orders, so entered on his account books. His New Orleans property was depreciated by fire to the amount of at least $30,000, and the

insurance thereon had been received by him, and mingled with his personal estate. Here, then, according to the case I have cited, was a revocation of near $70,000 of his devises—$38,000 of it by absolute destruction, and $30,000 by conversion from realty into personalty.

But even that is not all the change in respect to his real estate, for after making his will, he purchased the Union square and Wall street lots, at a cost of about $200,000; and can it be said that he who was so careful as to bring his bequests square with his estate to within $4,000 or $5,000, would overlook so great a change as is here shown?

Now am I not right in saying, if your Honor please, from all these circumstances, that there was an intention upon his part that that will should not operate? It is enough for me to satisfy your Honor that there was such an intention. It is unnecessary that I should go so far as to say he intended it should be entirely destroyed—that even the bequests contained in it should not operate. If I satisfy you that he intended it should not operate in a particular part, for instance, in this residuary clause—that it should not convey $700,000 or $800,000 to persons for whom he had not intended it—I have done enough for my purpose here; because it will be in vain for you to ask the question, when you are satisfied that such was his intention, how far that intention went? That is the misfortune of this case. The testator was unable to express how far that intention to alter should be carried. His declarations; his acts; his emotions, and his expressions of them, all show that he intended the will should be altered; but he was unfortunately so stricken that he could not say wherein. Now, if your Honor once becomes satisfied—if you have arrived at the point, that he wanted it altered or destroyed, and he could not say to what extent, you are placed in the position in which the learned judge was in the case of *Phillimore*, and the cases to which I will call attention presently; that is, you have arrived at the conclusion that the will sought to

be admitted to probate was not the will of the testator when he died.

SECOND.—There is, however, in this case, an *actual revocation*, independent of intention—not founded upon his desires, but upon the alteration of conditions generally. One of the cases I have cited speaks of a "total change" in the circumstances of the party. I hardly know what that phrase means—I cannot receive it in its literal meaning, for I do not know how there could be any such thing. Some of the judges, seeking to guard themselves with particular care, have used that expression, "total change of circumstances,"—others have altered it to "material change"—but when we come to the particular change, in those cases, we find that it was a wife and children obtained afterward, or a large addition to the estate, &c., &c., but that a great many things had not changed with the testator. I suppose the true expression is, an "alteration of condition generally," which comes nearer to it, and is the expression sometimes used.

The death and birth of beneficiaries, and the change of property devised, are all, as the cases show, sufficient of themselves, irrespective of intention, to produce revocation; for they bring the case within the English law, showing a tacit condition—that it should not stand under such a change; and as one of the English judges says, in reference to it: "No strained construction must be resorted to to sustain a will that would thus operate" in conflict with the clearly marked intention of the will.

Now, sir, in reference to this *actual revocation*, there are two considerations alone to which I will call your attention: one is the alteration of condition generally; and the other is the change of property; and we must look to them in order to see how this rule, to which I have called attention, is to be made to bear upon this case. I will remark here, upon the second head, a change of property is at all events a revocation, *pro tanto*, to the extent of the property changed: but whether it should carry it so far as to revoke

the will entirely, is another question, which I will discuss by-and-by.

In discussing those two considerations, of alteration of condition generally, and the change of property, I desire to propound two questions which I claim must be kept ever in view:—Did the testator intend this result when he made his will? And is not that result in irreconcilable conflict with the scope and principle of his will? Let me illustrate my position.

The Barclay street property was specifically devised by the will to his wife. He afterward sold it, and if the will is to be carried out, the avails of that sale, instead of going to the wife will go to the brothers, as part of the residuum. Here I ask my questions, did the testator intend this result? And is it not in direct conflict with his intention?

So as to the New Orleans property devised to his wife. By the fire the greater part of its value is converted into personalty and goes to the residuary legatees. Was that agreeable to his intention or in conflict with it?

Now, keeping these questions in view I propose to call your attention to the particulars of the change in the testator's condition and property. I will barely allude to them, for the details are two well known to the court to render more necessary.

1. The great increase in the value of his estate, swelling up, in fourteen years, from less than $700,000 to nearly $1,500,000.

2. The death of legatees. Mrs. Payne died, to whom had been devised an estate valued by him at about $5,000; then William Delafield, to whom was bequeathed $10,000; Mary L. Parish, $10,000; Henrietta, $10,000; Elizabeth, $10,000; Jane Ann, $10,000; Mrs. Kernochan, $10,000; Emma Delafield, $10,000. There thus lapsing by death legacies to the amount of $75,000, and no matter whether that goes in the residuum or to the next of kin, did he so intend?

3. The birth of others: three nephews and nieces, one of

them a child of Daniel Parish, and except that one, all of that brother's children cared for.

4. An alteration in the homestead and furniture. The furniture devised, with the homestead in Barclay street, was of a very modest character comparatively. What goes by the will, if now sustained? Why, sir, furniture in the establishment of Union square, worth two or three times as much, and all bought since the will was made.

5. Another change in condition was the alienation to which I have already referred, with his brother; and I now add to that the alienation with his brother-in-law, Mr. Sherman. Up to the time of that alienation with Judge Sherman, there was nothing in the circumstances of this case to show that these two men were not upon the most friendly relations with each other; but there was an alienation produced. Here is this man, having lived, when in the full vigor of his body, in entire harmony with his brother and brother-in-law, placed in a condition of alienation. To a man as equitable and just as he seemed, this was a change of no slight magnitude.

6. But there was another important change, and it was this; he had actually, before he died, given away to his legatees, large sums: to Mr. Daniel Parish, §45,000; to Mr. James Parish, §13,000; to Miss Ann Parish, $1,000, and $123 worth of silver; and to the two sisters Garrison's bond of $8,000, as he called it. Now let me take one step further in reference to that, and call your Honor's attention to the $75,000 of city stock given to Judge Sherman. Your Honor has no evidence upon that subject, except that it was given to Judge Sherman. He was clothed with the absolute ownership of it, so far as all the world was concerned. He afterward, at the request of Mr. Kernochan, transferred it back to the estate. Now here was something of a change of circumstances before he died; $60,000 or $86,000 actually given to legatees who were specifically mentioned as objects of his bounty; and $75,000 put into the hands of his brother-in-law, without any pretence or

claim that it was to come back again,—having remained in his hands some two or three years.

This deposit of the $75,000, in the hands of Judge Sherman is worthy of consideration in another aspect, as showing the testator's desire of placing his brothers and sisters on an equality. By his will, he gave to each brother and sister about $20,000; afterward he gave to his two brothers, as I have already mentioned, about $70,000. And about the same time that he did that, he placed in the hands of Judge Sherman, with whom his sisters lived, and ever had since Mr. S's marriage, the $75,000, of city stock. To what end, but for the purpose of equalizing still his bounty, among those equally near and dear to him?

And in this connection, I be gleave to call attention briefly to the different clauses in the will, and show how unlike the intention which the testator had, when he made it, must it be if now allowed to operate, and to show how much of that will has been actually destroyed, not only by the acts of the testator, but by circumstances over which he had no control.

The First Clause, is the devise to his wife of real estate; the Barclay street and Chambers street property, all gone; the Pearl street property diminished $7,500 in value; 54 Pine street diminished $5,000 in value, and the New Orleans property at least $30,000.

The Second Clause, is the devise to her of furniture, all changed. That which in Barclay street was valued at $10,000, probably none of it left. Wines, then upon hand, all consumed. Horses and carriages, all used up, or exchanged before his death; and the pew in Grace Church, entirely changed.

The Third Clause, is the devise to his wife of $200,000 of personal property in trust, unchanged.

The Fourth Clause, is the devise to his nephew Henry of Pearl street property, diminished $15,000 in value.

Fifth Clause, is the devise of the Water street property, diminished $1,500 in value.

Sixth Clause: Louisiana lands, unchanged.

Seventh Clause: Life Estate and Annuity to Mrs. Payne, all gone, by her death.

Eighth Clause: $20,000 to Ann, increased by gifts $5,300.

Ninth Clause: $20,000 to Mrs. Sherman, increased by gift of $4,000; besides the $75,000 City Stocks, in her husband's hands.

The Tenth Clause, bequeaths $50,000 to the persons named as executors, $10,000 of which was revoked afterward, and $10,000 lapsed by the death of one of the parties named,

The Eleventh Clause, declares the devise to the wife to be in lieu of dower, and is unchanged.

The Twelfth Clause, bequeaths $200,000 to sundry persons, $80,000 of which lapsed by death.

The Thirteenth Clause, gives the residuum to Daniel and James Parish, then amounting to only $36,000, now amounting to some $900,000.

Now, sir, let me ask, if looking at those changes in the circumstances of the case—changes which time and events themselves have wrought by an inflexible machinery—your Honor can carry the balance of this will into execution without violating the principle of it, and the clearly defined intention of the testator?

Allow the will now to go into operation, under these great changes of circumstances and condition and behold how almost every clause in it will be violated, and how entirely will the general purpose and principles of it be disregarded.

What then is the duty of the court under such circumstances? The doctrine of *cy pres*, it is well established, must be applied, and as much of a will as possible be sustained, unless doing so shall work out a result utterly at variance with the intention of the testator as derived from the instrument itself. But when the application of that principle shall produce a result such as that intention

never contemplated, then the whole will must fall. That principle will be found recognized and applied in the case of *Hawley* vs. *James*; 5 *Paige*, 318; 16 *Wendell*, 61; in the Lorillard will case, 14 *Wendell*, 385; in *Dupre* vs. *Thompson*, 4 *Barb.*, 279; and in *Tucker* vs. *Tucker*, 5 *Barb.*, 99, and is most succinctly stated by the revisers of our statutes in their notes to this title of their report, and thus incorporated into the very being of our statute law.—3 *R. S.*, 2*d Ed.* 633.

"SEC. 59. *Not enacted*, being rendered unnecessary as to future cases by the new provisions introduced by the legislature." "§ 59. If any will, in writing, purporting to be a disposition of both real and personal estate, shall not be altered and subscribed in the manner required by law, in order to pass real estate, the same shall not be deemed to be a will of personal estate."

"*Original note*—It is one of the most perplexing questions in our law, how, and in what cases, a will that has been framed to make an entire disposition of a man's estate, and fails, in one particular, can be good in another. The provisions of such a will are almost certain to be connected with, and dependent on, each other. By permitting some of them to go into operation, while others fail, the greatest injustice may be done, and the favorite views of the testator, in the disposition of his property, may be defeated. The just rule would seem to be, that the will should be entirely abrogated. The above section has been prepared from these considerations; it is taken from the laws of Massachusetts, 1st vol., page 94, sec. 9."

We may then pause to ask, what will be the result of carrying out the claims of the different parties to this controversy? I speak of the *results*, not because I ask that your Honor should permit them to warp your judgment from its propriety, for I know, that in administering the law, you will, of necessity, be governed by legal principles, and leave results to take care of themselves; but we may look at them when asking the question of intention, to ascertain, whether the party intended them.

Let us first see the effect, if the will and codicils are permitted to go into effect, as they stand here now, and as is claimed by the proponents. Except a few specific legacies, amounting to $200,000, or $300,000 only, the whole of this million and a half goes to one person, to the disinheritance of the heirs at law.

Next, the result of the will alone goes into effect; a few specific legacies, and a gift to the wife, of less than she is

entitled to, according to law, and the great bulk of the estate will go to the brothers, to the exclusion of the two other heirs at law.

But, mark the result of the principle we claim, that there is *intestacy* here. The widow gets her dower in real estate, and a large and liberal share of the personal property; the specific legacies are gone; but the balance is equally divided among the brothers and sisters, the next of kin and heirs at law.

Now, I ask your Honor, and I ask the learned counsel, when they shall come to consider the points which I have felt it my duty to raise, to answer this question; which of these results approach nearest the intention of the testator, as shown throughout the whole of this case? Which approach nearest the principles of the attempted devise? Which is the nearest right, by every principle of justice among relatives? Which of these results is nearest to the law of the land, as we are called upon to administer it?

Sir, I invoke, as the just and proper respondents to these questions, two inflexible and well established principles of the law; one is, that the intention of the testator is the great landmark which is to guide the court in its determination of such a question as this; and the other is, that the heir at law is never to be disinherited, but by the clearly marked and well-ascertained intention of the ancestor; and, when the two combine, as they do in this case, we may well anticipate a determination that will be consistent also with equity, equality and good conscience.