principles of the common law, in contending for their retention in this country, and are deemed appropriate in this connection.

31. "Common law," says the learned pamphleteer, "is but another name for common sense, tested and systematically arranged by long experience. What governs the manners of men towards each other? It is the common law of social intercourse. What constitutes the habits and customs of a country, but a common law, gradually growing with civilization, and always accommodating itself to the situation of the people? Nor is the common law of jurisprudence less pliable. It is one of its excellencies that it is capable of change, of modification, of adapting itself to new situations and varying times, without losing its original character, its vital principles, its most useful institutions:" 5 Law Tracts 21, 22. And, again by the common law "every crime is now defined with mathematical certainty; and all its various modifications, shapes and circumstances, defences and palliations, distinctly provided for, either by general rules and principles, or by particular decisions. So of the modes of trial, the competency, credibility, and examination of witnesses. Everything is so constructed as to shield innocence from corrupt persecution, and to bring the guilty to punishment; at least as far as human means can effect it:" Ibid. 58.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

KEVILL *v.* KEVILL.

Gross inequality, apparently unjust or unreasonable, is not alone sufficient to invalidate a will.

But it is entitled to weight as evidence of testamentary incapacity or undue influence.

These principles applied to the facts of the case.

APPEAL from the Caldwell Circuit Court.

Thomas Kevill, of Caldwell county, Ky., in June 1855, when he was seventy-one years old, published, as his will, a testamentary document whereby he disposed of his whole estate, worth $50,000, unequally among his children by two wives, giving to those of his first wife comparatively but little, and the residue to

those of his then living wife, to whom he devised the most of it during her life. After probate in the County Court, the document was re-contested in the Circuit Court for the alleged incapacity of the testator and imputed control of his wife. The jury found a verdict against it, and the court thereupon adjudged that it was not his will, and overruled a motion for a new trial. From that judgment both parties appealed, the unsuccessful party because, as alleged, the verdict was not authorized by the evidence, and the successful party, because the court refused a new trial on the discovery of additional evidence against the will.

John L. Scott, in support of the will.

Harlan, Attorney-General, contrà.

The opinion of the court was delivered, October 9th 1866, by

ROBERTSON, J.—Admitting that, anomalous as the procedure in this case certainly is, the party succeeding on the issue might be entitled to a new trial for the purpose of making the case stronger in the Appellate Court, nevertheless the discovered testimony in this case, being only slightly cumulative, was of such a character as not to have sustained a verdict which, without it, should be set aside as unauthorized by the evidence heard by the jury; wherefore we cannot grant a new trial to the appellants, who obtained the judgment in the Circuit Court.

But, in our opinion, the Circuit Court erred in refusing a new trial to the other party.

Gross inequality, apparently unjust or unreasonable, is not alone sufficient to invalidate a will which otherwise would be unassailable. The testamentary power is of great value in both its enjoyment and its results, and therefore it should be well guarded by the law and sternly upheld by the judiciary. Every competent and self-poised mind has, and should always have, an unquestionable right to make *its own will* according to the law of the land, and no person, either wife or child, has any legal right to deny that conservative power or gainsay the free and voluntary exercise of it. But apparent inequality or unreasonableness in a testamentary disposition is entitled, in proportion to its degree of flagrancy, to some auxiliary influence on the question of capacity or fraud or controlling influence, and, unexplained and combined with other corroborating evidence, it may be entitled to great influence.

This is the uniform and undeviating doctrine of this court, and it was never, in any instance when rightly understood, adjudged otherwise.

The apparent inequality in Kevill's will may in some degree be reconciled with parental justice and impartiality by the fact that when the testator married his last wife he was comparatively poor; considerably increasing his estate as he did by the accession of her property, he may have thought it his duty to give to her children the value of her original property and its increase. But, however this prudential consideration might have operated, the apparent inequality on the face of the will is not sufficiently fortified by other evidence of incapacity or sinister influence to invalidate it as the testator's last testament.

Few wills have ever been sustained by more consistent and satisfactory evidence of testamentary capacity. The writer of the will testified that the testator dictated and fully explained every provision and was clearly of sound and disposing mind. Three other subscribing witnesses testified to his capacity with equal confidence. And all these witnesses had been long and intimately acquainted with the testator. Several other like acquaintances fully and confidently concurred in favor of his capacity, which is also corroborated by proof of his provident and successful attention to his business even after the publication of his will, and nearly or quite to his death, seven years afterwards. This mass of opinions and facts, made almost conclusive by the internal proof arising from the testator's calm and intelligent dictation of a will so minute and elaborate, is scarcely affected, in any rational degree, by any opposing opinions or facts concerning capacity. Indeed, when carefully analyzed, the opposing testimony does not essentially impair the overwhelming evidence of capacity at the date of the will, but may be consistent with it.

We are, therefore, of the opinion that the will is unimpeachable for want of disposing mind.

On the question of the wife's imputed influence, there is some doubt, but not enough to sustain the judgment against the will. The effect of all the testimony on this point is only that the wife had certainly some and probably great influence over the testator's mind in concerns of trivial importance. But it fails to show any instance of the successful or sinister exercise of it in *any*

important matters. On the contrary, all the testimony exhibits him as a man of sound judgment and strong self-will in all important concerns. Now, although it may be true that stepmothers often feel jealous of their husband's children by other wives, and sometimes successfully plot dissension and alienation, and even though there may be some ground for *suspecting* that this case may afford some illustration of that fact, yet there is certainly no proof of it, or of the exercise of any subjugating influence in the moulding of the will of Thomas Kevill.

Wherefore the judgment setting aside the will is reversed, and the will is established by the judgment of this court, and the cause remanded to the Circuit Court, with instructions to set aside the verdict and judgment in that court and certify this judgment to the County Court.

The fact that the foregoing case seems to assume grounds, in some respect, different from those maintained in the majority of cases involving similar questions, will not render it of less interest to the profession. A somewhat extensive and careful study of cases bearing upon analogous questions, and large experience in the trial of similar cases, has convinced us that it is not practicable to lay down any general rule in regard to them which will not require frequent and marked modification in its practical application.

The learned judge places great reliance upon two facts as tending to show that there was no satisfactory proof of *undue* influence in the case: 1. That the testator, although more than seventy years old, was possessed of abundant capacity to execute a will of the character in question, understandingly, when left to his own free will and voluntary action. 2. That although his wife had confessedly very controlling influence upon his mind, in matters of trivial concern, the evidence failed to show any instance of such influence of a sinister character "*in any important matters.*" It is also stated, as the result of the evidence, that in *all important matters* the testator was a man of sound judgment and strong self-will. Considerable reliance is also placed upon the fact that the testator dictated the will in such a manner as to show evident capacity and the most unquestionable freedom of action. It is confessedly true that these considerations have an important bearing upon the question of *undue* influence in the factum of a will.

But there are two species of influence in the production of a will which may properly be regarded as undue. One where the testator is a mere passive instrument in the hands of those who produce the will; the other where he lacks that active control in the affairs of his household which enables him with reasonable firmness to resist the importunities and especially the dictation and offensive annoyances of those about him who desire to control the disposition of his estate, and where he is consequently driven by the dread of such silent but intolerable grievances to make such a will as he understands will alone give him quiet and peace.

In regard to the former species of influence, this case is certainly free from all question, and it would rather seem that most of the argument of the court

is directed towards rebutting any inference of that species of influence. But in regard to the other kind of influence, it does not appear to us the case is equally free from all doubt.

The testator was aged, and unquestionably, to some extent, infirm both in body and mind; he was living with a second wife who clearly had very marked influence over him; he made a will giving most of his property to the children of the second marriage, to the virtual disinheritance of those of the first marriage.

Here, then, was a clear case of an unequal and, on general principles of natural justice, an unjust distribution of property among those equally entitled to the testator's bounty. The will, then, was of that character which if produced by any extraneous influence, such influence would be regarded as *undue influence*. For it is not the extent, but the character of the influence, which the law regards as unlawful. A wife or a child has the legitimate right to influence the husband or parent to the extent of doing justice. And although it should be shown that without such influence the will would not have been made or would have been differently made, it will nevertheless be valid if it be not in any marked degree unequal and unjust. But the same degree of influence, when exerted to produce a vicious result—an unequal or unjust distribution of the estate among those equally entitled—would be held unlawful, or what the law denominates "undue influence."

We have examined the authorities and the principles involved in this and kindred inquiries in the first part of our work on Wills, § 38, pp. 507–538, where it is shown that undue influence partakes partly of the nature of fraud; and if the person in favor of whose influence the will is made, either for his own benefit or that of others, is conscious, as a person of common experience and wisdom must be presumed to have been conscious, that an unjust result was being obtained in having the will made as it was, and such result is secured by personal solicitation or influence of any kind, although not by words or by any distinctive and definable acts, still if such result is attained through the agency of other minds than that of the testator, the will cannot be maintained. This is well illustrated by *Gilbreath* v. *Gilbreath*, 4 Jones's Eq. 142; *Dean* v. *Negley*, 41 Penn. St. 312; *Floyd* v. *Floyd*, 3 Strobh. 44; *Woodward* v. *Jones*, Id. 552; *Means* v. *Means*, 5 Id. 167. The cases bearing upon this point are too numerous to be here referred to. They are cited very much in detail in the treatise above referred to.

The precise degree of proof required to establish undue influence it is not easy to define. It is generally held that a will proved to have been understandingly executed, although in favor of a stranger, to the exclusion of near relatives, is *primâ facie* valid, and that those who oppose the will must show distinct grounds upon which it should be set aside: *Sechrest* v. *Edwards*, 4 Met. (Ky.) R. 163. But in a later case in this same state (*Harrel* v. *Harrel*, 1 Duvall 203) it is said: Gross inequality in the dispositions of the instrument, where no reason for it is suggested either in the will or otherwise, may change the burden and require explanation on the part of those who support the will to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly-disposing mind. But it must appear, either by direct proof or reasonable presumption, that the will is not truly that of the testator, freely and understandingly made. The character of the will, as applied to the testator's character and surroundings, may show this as fully as more direct and express testimony. But, in general, no doubt, there should be proof of

distinct effort (and under such circumstances as to raise the presumption that it became successful) to produce a different will from what the testator would otherwise have made, in order to invalidate the instrument.

But in cases where the testator is confessedly under the control and influence of the principal legatee, and especially if the testator were laboring under infirmity or disability, as if his mind were enfeebled, or he were deficient in one or more of the important senses, or if he were deaf and dumb, or blind, or unable to read writing from defect of education, the courts have very justly exercised great circumspection to have it appear by satisfactory proof that the instrument was understandingly made. And in many cases it has been determined by courts of authority that in this class of cases if the will is unequal, and especially if it is unnatural, by the disinheritance of the children of the testator, it cannot be maintained unless the proof removes all reasonable doubt or suspicion in regard to it having been freely and understandingly made by the testator. By this we do not of course understand that the courts making such declarations of the rule of evidence intend to require exactly the same measure of proof in such cases as in criminal cases. But where the facts surrounding any claim tend to excite just suspicion that there is something factitious in its character, that implication should be entirely removed. And so long as any claim is presented in a questionable guise, to any extent, it ought not to receive the indorsement of the courts until that characteristic is satisfactorily explained and removed. These views are abundantly and ably maintained by the opinion of the court in *Watterson* v. *Watterson*, 1 Head. 1.

I. F. R.

Supreme Court of Connecticut.

JOHN R. BURROWS *v.* NEHEMIAH M. GALLUP AND ANOTHER.

Where the owner of land has been dispossessed, a mere casual or stealthy entry by him does not disturb the adverse possession of the disseisor. His entry must be intended as an act of possession.

Where therefore the court charged the jury that a party who claimed a prescriptive right to a public landing must have excluded the public and every member of it, it was held that the charge was open to exception, as implying an actual exclusion of every member of the public from the premises, while it should have required only an exclusion from the possession.

Where a highway is laid out to navigable water and there terminates, the terminus may be regarded as presumably intended for a public landing as incident to the highway.

Where, however, a highway, running from place to place, is laid out along the shore of a navigable stream and in immediate contact with it for a considerable distance, the reason for the presumption does not exist.

The question in such a case depends on the circumstances, and is one of fact for the jury.