

agreement of the 8th of May, 1848, (making the allowance to Smith and his mother in lieu of their right to cut wood,) under which the decree was passed, and the only question presented by the petition and answer, is, whether the removal of this wood and rail stuff by Smith, after the sale, is a sufficient reason to reject the return of the commissioners; or whether the court may not itself so far modify their return, as to order a proportion of the value thereof to be deducted from the sums to be paid by the petitioners.

One of the questions, therefore, discussed by the counsel for the petitioners in the argument, is not raised by the petition; and as the respondent Smith was not notified by it, that his entire right to cut wood and timber from this land would be disputed, and, therefore, may have omitted to offer the proof which, under other circumstances may have been in his reach, it might not be proper to permit this question to be brought into view. Smith was not apprised by the petition of Crouch and Lazenby, that the privilege given him by the will of his father, to cut wood and timber from this land, was supposed to be revoked by the codicil. On the contrary, all the previous proceedings in the cause distinctly recognized the continued existence of this right, and the only question which he was called upon to meet, had reference to the effect upon the valuation of the selected appraisers of the parties, which it was alleged ought to be produced by the removal of the wood and rails in question.

It is now, however, said, that the codicil to the will of the testator must be regarded as revoking altogether the privilege in question, given by the will to the widow and son of the testator; or at all events, that if it does not amount to a total revocation of the will in that particular, it must be considered as reducing to some extent the value of the privilege, and that, therefore, the estimate of the commissioners is excessive, and should be rejected.

I am very clearly of opinion, that even if the question was properly before the court, and these petitioners could now, notwithstanding their reiterated recognition of the existence of the