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*Nov. 3.

*Dec. 9.

BUDGE McLAUGHLIN.....APPELLANT;

AND

JAMES DEVINE McLELLAN AND INGERSOLL McLELLAN.....RESPONDENTS.

IN THE MATTER OF THE ESTATE OF JOHN A. P. McLELLAN, DECEASED.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Execution of—Testamentary capacity.

A testator, during the time he gave the instructions for drafting and when he executed his will, was suffering from a disease which had the effect of inducing drowsiness or stupor but as the evidence showed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take, and the instrument itself when subsequently read over to him, it was held to be a valid will.

*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) 14 Can. S. C. R. 736.
(2) 19 Can. S. C. R. 243.
(3) Beauchamp's Digest p. 108.
(4) 8 App. Cas. 574.
(5) 12 App. Cas. 101.

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APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the decree of the Judge of Probate for the County of Colchester by which the will of the late John A. P. McLellan was declared valid.

The following statement of the case is taken from the judgment of the court pronounced by His Lordship Mr. Justice Sedgewick :—

" One John A. P. McLellan died on the 21st of January, 1894, in the 78th year of his age, having on the previous day executed the will which is in controversy in this case. The deceased left him surviving his widow Lavinia, two sons, James Devine and Ingersoll, two married daughters, Sarah Hill and Phoebe Budge, and three grandchildren, Eustis McLellan, child of a deceased son, and Pineo McLaughlin and the appellant Budge McLaughlin, children of a deceased daughter. The estate was appraised at $29,914.18, of which amount $6,660 represented real estate. The objects of the testator's bounty were his two sons, his two daughters and his three grandchildren. The two sons received the major portion of the property. The will in question was prepared by a magistrate, Mr. Fulmore, who was a neighbour of the testator. Doctor Fulton had visited the deceased on the afternoon of the 18th, and finding him in a weak condition advised him to settle his business. Mr. Fulmore was sent for and immediately came to him. The two sons of the testator were present, as well as the physician, and there was considerable discussion between the deceased and his sons as to what disposition should be made of the property. Mr. Fulmore took full notes of the conclusions arrived at. After the details had been completed he went home, prepared the will, and returned two hours afterwards, when it was read to the deceased by Mr. Fulmore in the presence of the deceased's two

(1) 28 N. S. Rep. 226.

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sons. He thereupon executed it in the presence of two witnesses, and on the following day he died. There is no doubt but that during the time he was giving instructions, as well as at the time when he executed the will, he was in a drowsy condition, and that there was difficulty in keeping his mind in such a state of activity as to obtain from him what his real wishes were. As his medical attendant said: 'He was in a dozing condition.'

"On the 17th of November, 1894, a citation issued from the Probate Court of the County of Colchester at the instance of the executors named in the will, calling upon all parties interested to appear before the court with the view of having the will proved in solemn form under the statute in that behalf, and upon that citation a contest was had. Budge McLaughlin, Pineo McLaughlin, and William A. Austin (executor of a deceased son of the testator) contested the admission of the will to probate upon three grounds, viz.:—

"1st. Testamentary incapacity on the part of the testator;

"2nd. Undue influence on the part of the two sons; and

"3rd. That the will was not duly witnessed.

"A large number of witnesses were examined and the Judge of Probate decided in favour of the will. Upon appeal to the Supreme Court of Nova Scotia this judgment was unanimously confirmed; and it is from that judgment that this appeal is taken."

Mellish for the appellant. At the time the will was made the testator was in a weak condition bodily and mentally, suffering from a disease which caused him to continue nearly all the time in a state of drowsiness or stupor and exhaustion which incapacitated him and made him indifferent about his affairs. The will was not his spontaneous act but was made at the instance

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of the two sons who are the principal devisees. He was at the time incapable of comprehending the extent of his property or of recollecting the nature of the claims of those whom, by the will, he excluded from a just participation in his estate. *Harwood* v. *Baker* (1). When the capacity is thus impaired strict proof must be made by the propounders of the will; *Durnell* v. *Corfield* (2); *Mitchell* v. *Thomas* (3); *Barry* v. *Butlin* (4). The circumstances are such as excite suspicion; *Tyrrell* v *Painton* (5). Beneficiaries who propound a will must show that it is a righteous transaction; *Fulton* v. *Andrew* (6). As to *indicia* of incapacity, and disposing mind, see *Marsh* v. *Tyrrell* (7); *Combes' Case* (8); *Sefton* v. *Hopwood* (9).

Lawrence for the respondents. The evidence of the physician in attendance, and those present when the instructions were given, when the will was read out and at its execution, shews that although the testator had to be frequently roused up out of sleep, yet when awake he was very clear in his memory and intelligent in describing what he wished to have done with his property, mentioning reasons for certain dispositions and so forth. He mistook the legal rights of his wife, but this was merely a mistaken idea of the marriage laws. The exclusion of the grandchildren as beneficiaries was made deliberately after discussing the subject. The onus is upon those who attack the will after probate to shew incapacity. *Brown* v. *Fisher* (10); *Walker* v. *Smith* (11); *Martin* v. *Martin* (12); *Hall* v. *Hall* (13); *Menzies* v. *White* (14).

(1) 3 Moo. P. C. 282.
(2) 1 Rob. Ecc. 51.
(3) 6 Moo. P. C. 137.
(4) 2 Moo. P. C. 480.
(5) [1894] P. D. 151.
(6) L. R. 7 H. L. 448.
(7) 1 Hag. Ecc. 133.
(8) Moo. K.B. 759.
(9) 1 F. & F. 578.
(10) 63 L. T. 465.
(11) 29 Beav. 394.
(12) 15 Gr. 586.
(13) 1 P. & D. 482.
(14) 9 Gr. 574.

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Sedgewick J.

The judgment of the court was delivered by:

SEDGEWICK J.—We are of opinion that the judgment of the learned Judge of Probate, confirmed upon appeal by the unanimous judgment of the Supreme Court of Nova Scotia, ought not to be disturbed. In my judgment the evidence is conclusive upon the question of testamentary capacity. It is true that the disease from which the testator was suffering had the effect of inducing drowsiness or stupor, but it is to my mind proved to a demonstration by the evidence of not only the two sons, but of the magistrate who drew the will, and the doctor himself, that the testator thoroughly understood and appreciated not only the instructions he was giving to the draftsman as to the form which his will should take, but the instrument itself when it was subsequently read over to him. Neither is there anything, in my view, in support of the contention that the testator was unduly influenced by the two sons in making the will he did. The objection seems to be that the two sons obtained the "lion's" share of the estate. The widow, who receives her dower only in the real estate, does not complain. I am not aware that there is any principle of law which compels a testator to divide his estate in equal proportions among his children or his children's children.

Upon the last ground I have only to observe that, in my view, the evidence shows conclusively that the will was executed by the testator in the presence of two witnesses, and that these witnesses signed at his request and in his presence, and in the presence of each other, pursuant to the provisions of "The Wills Act."

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *James F. McLean.*

Solicitor for the respondents: *F. A. Laurence.*