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1904  
 Nov. 29, 30. MARY A. E. A. MCNEIL AND } APPELLANTS;  
 1905  
 \*Jan. 31. ALEXANDER MCNEIL, EXECU- }  
 TORS OF ALICIA CULLEN, DECEASED.. }  
 AND  
 JAMES ROBERT MARY CULLEN } RESPONDENTS.  
 AND LEO CULLEN..... }  
 ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Will—Execution—Evidence—Appeal.*

In proceedings for probate of a will, the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers and if she wished the two persons present to witness it and she answered "yes"; each of the witnesses acknowledged his signature to the will but swore that he had not heard such question asked and answered. The Judge of Probate held that the will was not properly executed and his decision was affirmed by the Supreme Court of Nova Scotia.

*Held*, affirming the judgment appealed from (36 N. S. Rep. 482) that two courts having pronounced against the validity of the will such decision would not be reversed by a second court of appeal.

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\* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

APPEAL from the decision of the Supreme Court of Nova Scotia (1) affirming the ruling of the Judge of Probate that the will in question in the case was not properly executed.

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The facts of the case are stated as follows by Mr. Justice Townshend who delivered judgment for the Supreme Court of Nova Scotia.

"The two principal points in opposition to the will argued before this court, and also before the court below were: (1) That the will had not been properly and legally executed by the testatrix so as to comply with the statute: (2) That in view of the circumstances under which the will was prepared and executed it cannot be taken to express the true will of the deceased.

"The first and all important inquiry is as to the due execution of the will. It was not signed by the testatrix in the presence of the two subscribing witnesses, but as claimed by the executor was properly acknowledged by the testatrix in their presence. The only persons present at the time were the two witnesses, Stanford and Fluck, and Alexander McNeil as well as the testatrix, in Mr. McNeil's office. The two witnesses differ so essentially in their account of what took place on this occasion from Mr. McNeil that it is necessary to extract the testimony of each in order to form a correct conclusion whether an acknowledgment as required by the statute was made. According to Mr. McNeil's testimony Stanford came first to his office door, opened it and then drew away and did not enter immediately. Then he goes on to say:

"Just after Mr. Stanford opened the door Mrs. Cullen got up and went over to the seat, in front of my desk, sat down there, and wrote the signature 'Alicia Cullen'

(1) 26 N. S. Rep. 482, *sub nom. In re Estate of Alicia Cullen.*

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which is appended to this document. After writing the signature she went back to the seat she first occupied, about six feet from the desk. Almost immediately after Mr. Stanford followed by Dr. Fluck came in. I was standing at the desk facing Mrs. Cullen with my left hand on the will when I asked Mrs. Cullen, 'is this your will and signature, and do you wish these witnesses to sign it?' To which she answered 'yes.' On looking then at the witnesses I noticed that one seemed to be urging the other to go first. They then came forward and made the signatures to this document in the order in which they appear. I then delivered the document to Mrs. Cullen and she took it away with her."

"The above extract gives exactly his account of the acknowledgment by the testatrix. Now contrast the above with the evidence of the two witnesses. First, Humphrey Stanford, after stating that he entered the office with Dr. Fluck, proceeds: 'There was nothing said. Mr. McNeil produced the document. I signed it. \* \* \* Dr. Fluck signed it in my presence. The lady was in the room. Mr. McNeil said something about the last will and testament. I do not remember anything else.'

"On cross-examination he says: 'Mr. McNeil just read over about a dozen words at the last of the will. I do not know whose will it was, but had an impression it was the lady's as she was sitting there. \* \* I don't know whether the lady could hear Mr. McNeil reading the last few words of the will or not; I did not hear Mr. McNeil say to the lady, 'is this your will and signature, and do you wish these witnesses to sign it,' nor did I hear the lady say 'yes.' Nothing of the kind was said to my knowledge. There was no conversation whatever. If anything of the kind had been said after I entered the room I could not

help hearing it. When Mr. McNeil was reading the few last words of the will I was about three feet away. \* \* \* Mr. McNeil would be about ten feet from the lady.'

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"Dr. Fluck says: 'To the best of my recollection I did not hear Mr. McNeil say to Mrs. Cullen, 'is this your will and signature and do you wish these witnesses to sign it.' I heard no such statement as that. If any such statement had been made while I was in the room I would have heard it. After I had said a few words to Mrs. Cullen Mr. McNeil pointed out to me where to sign. I hesitated and looked at Mr. Stanford, and then I signed. After I went back to my office I wondered if that was Mrs. Cullen's will. There was nothing said about it being the will while I was in the room. \* \* \* I say positively that the only words uttered by Alexander McNeil while I was there were the words 'you sign here' or words to that effect. \* \* \* If there had been any conversation between Mr. McNeil and Mrs. Cullen I would have remembered it."

On this evidence the learned judge held that the will was not properly executed and did not consider it necessary to discuss the other question.

This decision was affirmed by the the judgment now under appeal.

*Ross K.C.* for the appellants.

*Newcombe K.C.* and *Henry* for the respondents.

The judgment of the court was delivered by :

DAVIES J.—The real question for determination in this appeal is whether the signature of the testator, Alicia Cullen, to the will in dispute was acknowledged pursuant to the statute by her in the presence of the two witnesses who signed the will as such.

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On proceedings taken in the Surrogate Court of Nova Scotia to prove the will in solemn form, the surrogate judge pronounced against the will on the ground, mainly, that it had not been either signed or acknowledged by the testator in the presence of the witnesses. On appeal, the Supreme Court of Nova Scotia upheld this finding.

The question for our determination is whether the evidence is so clear and strong on the point of acknowledgement as to justify us in reversing the judgments of the courts below. I am inclined to the opinion that it is not and that the evidence of what took place at the time of the execution of the will did not involve an acknowledgment by the testatrix that the signature to the will was hers.

Mr. Ross argued that the Court of Appeal in Nova Scotia had drawn a wrong inference from the proved facts, but I take it to be clear from the decided cases on the statute, that, if the testator does not sign the will in the presence of the witnesses and its proof depends upon his or her acknowledgment of a signature previously written, not in their presence, there must be some clear evidence to show the testator's acknowledgment and approbation. From the decision of the Court of Appeal in the case of *Blake v. Blake* (1), it would appear that no acknowledgment is sufficient unless, at the time, the witnesses either saw or might have seen the testator's signature. In that case the signature was hidden by what Brett L. J. called, the accident of putting a piece of blotting paper a quarter of an inch higher or lower, but, while desirous of upholding the will so far as it possibly could, the court had to consider an enactment of a statute in which there was no elasticity and, consequently, found against the will.

(1) 7 P. D. 102.

The subsequent case of *Daintree v. Butcher* (1) was pressed upon us as conflicting with *Blake v. Blake* (2). The distinction between the two cases is vital. In both cases, the testator's signature was written to the will before the witnesses came into the room to witness. In the former the testator's signature was not and could not be seen by the witnesses. In the latter the signature of the testator was so placed that the witnesses could have seen it when they signed their names as witnesses. The Court of Appeal, in this latter case, held that the testator had asked one of the two attesting witnesses to sign it and that it must be taken from the evidence that, after the other attesting witness had come into the room, the first one had, in the presence of the testatrix, asked her, the second witness, to sign as witness.

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This "in the presence of the testatrix" manifestly means from the report, in the "presence and hearing" of the testatrix, and, in fact, is so stated by Butt J. who first heard the case, at page 67 of the same report. In delivering the judgment of the court, Cotton L. J. says, at page 103:

In my opinion, when the paper bearing the signature of the testatrix was put before the two persons who were asked by her or in her presence to sign as witnesses, that was an acknowledgment of the signature by her. The signature being so placed that they could see it, whether they actually did see it or not, she was, in fact, asking them to attest that signature as hers.

In the case now before us, I think it is proved satisfactorily that the testatrix, Alicia Cullen, had signed the will before the witnesses came into the room or office where she was with her solicitor, and that, at the time when they entered the room she had returned to her seat some short distance away from the desk on which the will lay. It is true that neither of the

(1) 13 P. D. 102.

(2) 7 P. D. 102.

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witnesses could, at the hearing, positively affirm that Mrs. Cullen's signature was there at all, but I think that McNeil's evidence satisfactorily settles that point. Then, upon what facts or evidence can we hold that there was an acknowledgment of her signature? As Townshend J. in delivering the judgment of the court, says :

Both of them (the witnesses) swear that, even if there, the testatrix did not, in their presence, acknowledge it to be her signature, nor did they hear her answer "yes" to any such question, nor is there any evidence of any act or conduct on her part which could be construed as the equivalent of an acknowledgment. In fact, both witnesses say she said nothing and appeared to be perfectly indifferent to what was going on.

It is true that McNeil states that almost immediately after the witnesses came in he, standing at the desk and facing Mrs. Cullen, asked her whether that was her will and signature and if she wished these witnesses to sign and that she replied "Yes." But, apart from the fact that they positively deny having heard anything of this, it is not sworn by McNeil himself that they did or could or must have heard it. If they never heard his question or her reply it is difficult, in the absence of other affirmative evidence, to see where there was an acknowledgment.

At any rate, on the facts, both courts have found against the will, and while, if the findings had been under all the surrounding circumstances the other way, I might have found it difficult, making proper allowances for lapse of time and memory, to reverse them, I cannot see, after most careful consideration, how I can, under the evidence and the findings as they are, do otherwise than express my concurrence in the judgment below and dismiss the appeal.

*Appeal dismissed with costs.*

Solicitor for the appellants: *H. C. Borden.*

Solicitor for the respondents: *W. A. Henry.*