

appealed from, upon a question of fact, when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case."

The proper inference to be drawn from the whole evidence in this case is, that the testatrix, at the time she made the will in question, had capacity to comprehend the extent of her property and the nature and claims of the plaintiff whom she was excluding from this, although he had been a beneficiary under a former will. See *Harwood v. Baker*, 3 Moore P. C. 290.

I am satisfied that Rose Taylor had testamentary capacity, and I so conclude by a consideration of what she said and did shortly before and at the time of, and shortly after, making her will, as against what medical experts thought her condition ought to have been.

The point as to undue influence was not pressed—the argument was wholly upon the question of testamentary capacity.

Clarke, Cowan, Bartlet, & Bartlet, Windsor, solicitors for plaintiff.

Murphy, Sale, & O'Connor, Windsor, solicitors for defendant.

BRITTON, J.

JUNE 5TH, 1902.

TRIAL.

SLAVEN v. SLAVEN.

Costs—Will—Action to Set aside—Separate Defence.

The plaintiff is a son of Eliza Slaven, who died on the 14th September, 1900, and this action was brought to set aside her will on the ground of undue influence and want of testamentary capacity.

G. F. Shepley, K.C., and C. H. Widdifield, Picton, for plaintiff.

G. Lynch-Staunton, K.C., R. D. Gunn, Orillia, M. R. Allison, Picton, J. R. Brown, Picton, D. L. McCarthy, and John A. Wright, Picton, for defendants.

BRITTON, J.—The parties came to an agreement, and consent minutes were filed, upon all points except as to costs of defendant Milo Slaven. He resisted plaintiff's contention, put in a separate defence by his own solicitor, and did not join in the settlement, but consented to it, claiming however to be entitled to costs.

Milo was a necessary party to the action, and plaintiff assumed the risk of liability for costs in case of failure. I think Milo is entitled to costs, and that plaintiff should pay them. As between plaintiff and defendants other than