Second Divisional Court.   October 26th, 1917.

NEWCOMBE v. EVANS.

Will—Testamentary Capacity—Undue Influence—Conspiracy—
Evidence—Execution of Will—Onus—Testimony of Attesting
Witnesses—Appeal—Further Evidence for Appellate Court.

Appeal by the defendant from the judgment of Clute, J.,
12 O.W.N. 266.

The appeal was heard by Meredith, C.J.C.P., Riddell,
Lennox, and Rose, JJ.
D. L. McCarthy, K.C., for the appellant.
J. H. Rodd, for the plaintiff, respondent.

Meredith, C.J.C.P., in a written memorandum, said that the
age, and mental and physical conditions, of the alleged testator:
the manner in which, and the circumstances under which, his
marriage to the plaintiff was brought about; and the time when,
and circumstances under which, the alleged will was said to
have been made, put upon them who propounded and supported
the will the onus of proof of "the righteousness of the transaction,"
under which it was said that all of the alleged testator's property
passed to the plaintiff; that is, proof of the due execution of the
will by a competent testator, not unduly influenced in making it.
And, under all the circumstances of the case, that onus could
not be said to have been satisfied without the testimony of the
second attesting witness to the alleged will, having regard to the
fact that the other attesting witness was the plaintiff's brother,
and the person who seemed to have been a moving spirit in the
strange occurrences relating to the testator's marriage and the
execution of the will.
The other attesting witness should be examined as a witness
in this action, before this Court now; and the final disposition of
this appeal should be deferred until his testimony has been given.
Any question as to the time when, and the manner in which,
such testimony may be given, may be disposed of on an application
to any member of this Court at Chambers.

Lennox, J., agreed with the Chief Justice.

Riddell and Rose, JJ., agreed in the result.

Direction for adducing further testimony.