

FIRST DIVISIONAL COURT.

JUNE 23RD, 1919.

## \*FAULKNER v. FAULKNER.

*Will—Testamentary Capacity—Capability at Time when Instructions Given—Will Executed three Days after Instructions Given and one Day before Death—Evidence—Appeal—Reversal of Findings of Trial Judge—Establishment of Will.*

Appeal by the defendant from the judgment of MIDDLETON, J., 15 O.W.N. 330, 44 O.L.R. 634.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and LATCHFORD, J.

H. H. Dewart, K.C., for the appellant.

W. N. Tilley, K.C., and H. E. Irwin, K.C., for the plaintiff, respondent.

MACLAREN, J.A., read a judgment in which he referred to and distinguished *Murphy v. Lamphier* (1914), 31 O.L.R. 288, upon which the trial Judge in this case largely based his opinion.

After stating the facts and reviewing the evidence, the learned Justice of Appeal said that, in his opinion, the trial Judge had not attached sufficient importance to what took place on Tuesday afternoon, when the instructions for the will were given; and he did not allude to the fact that the testator, before his last illness, had told Dr. Forrest that he was going to leave his property to the defendant. Too much importance was attached to the fact that certain female relatives, to whom small legacies were left in the previous will drawn by Cameron, were not mentioned in the will now in question. He must have been dissatisfied with the first will when he destroyed it. These relatives were spoken of as "needy relatives," but there was no evidence as to their circumstances nor as to their number or degree of relationship; and, if they were needy, legacies ranging from \$100 to \$500, as stated by Mr. Cameron, would not go far to relieve them, and would be a petty amount out of an estate of more than \$23,000.

The learned Justice of Appeal referred to other circumstances and facts appearing from the evidence which indicated that on the Tuesday the testator was in a condition to dispose of his property and to remember and call to mind those whom he wished to benefit; and the execution, on the Friday, of the document drawn in accordance with the dispositions for which instructions were given on the Tuesday, was to be upheld.

*Parker v. Felgate* (1883), 8 P.D. 171, approved in *Perera v. Perera*, [1901] A.C. 354, 361, referred to.