

sister in equal shares. The brother and sister, the now appellants, alleged that the will was not duly executed; that the testator was, on the 10th August, 1916—three days before his death—incompetent to make a will; and that the execution of the document was procured by the fraud and undue influence of Joseph J. Sellers.

The learned Chief Justice reviewed the evidence with great care, and referred to and quoted from the leading authorities.

He then said that the evidence shewed that the alleged will was prepared in circumstances which raised a well-grounded suspicion that it did not express the mind of the deceased. The onus was on the plaintiffs to remove that suspicion by satisfying the Court that the document propounded was an expression of the free will of a competent testator. That suspicion not having been removed, the onus had not been discharged, and those opposing probate were not bound to establish fraud.

The judgment below dealt with the issue of fraud only. There might be an absence of fraud, but there were such suspicious circumstances that the conscience of the Court was not satisfied that the paper propounded was a correct expression of the testator's intentions.

The judgment should be set aside, and there should be a new trial if desired by the plaintiffs or either of them or by Elizabeth Brewer; otherwise the appeal should be allowed and the action be dismissed without costs, except those of the executors, which should be paid out of the estate.

CLUTE, J., agreed with MULOCK, C.J. Ex.

SUTHERLAND, J., agreed in the result stated by MULOCK, C.J. Ex.

RIDDELL, J., was of opinion, for reasons briefly stated in writing, that the judgment should not be reversed, but that there should be a new trial, and that the costs of the appeal and of the former trial should be costs in the cause.

KELLY, J., also read a judgment. He was of opinion that there should be a new trial; he did not deal with the question of costs.

*Order for a new trial in the terms stated  
by the Chief Justice.*