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VOLUME 7. WOODSTOCK, N. B., THURSDAY, APRIL 18, 1861. NUMBER 41.

OUR OWN ADVERTISMENT.

The Woodstock Journal is a large eight-page weekly, devoted to the advancement of the industrial, commercial, cial and moral interests of New Brunswick.

The primary objects at which it aims in the present circumstances of our Province are:—

. The promotion of immigration, and the settlement of the wild lands.

2. The opening of the country, and the facilitation of intercourse, by the improvement of the means of internal communication.

3. An increase in the Representation in the House of Assembly.

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The Woodstock Journal is published every Thursday morning at Woodstock, N. B., for Wm. Edgar, Proprietor

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Single copies, Two dollars a year,
Clubs of six, one and three quarter dollars each,
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These terms are in advance; if not paid in advance, $2 1-2, and if not paid until the expiration of the year $3, will be charged.

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Woodstock, Oct 11th. 1860.

SURROGATES COURT.

GURNEY WILL CASE.

(*Continued.*)

Mr. Needham, then addressed the Judge, in substance as follows.

The evidence in this investigation having been brought to a close it now became his duty to present to His Honor the points upon which he relied, as being in Law sufficient to prevent the Proponant from proving the will in solemn form. There were two grounds which he should urge. One,—"*That the attestation by the Witnesses was not made in the presence of the Testator as by law required.*" The other,—"*That the paper proved in common form pretended by the Proponant as a will was not the will of Robert Gurney, the deceased.*"

But before calling His Honors attention to these several points, he felt it his duty at the present stage of the proceedings, to remark that he had felt it his duty as Council for the contestants, in which his learned friend, Mr. Winslow, their Attorney coincided, to act upon the suggestion of His Honor, made yesterday; that this contest should be narrowed down, to the point that the execution was informal, and to forego the producing of numereas witness, to the other points, viz—of insanity of the Testator, of undue influence, fraud and deception of L. R. Harding, leaving them to be determined by a Tribunal, whose decision alone could affect the Real Estate. The personal property which alone the probate could affect, it was pretty clear from the amount of debts of the deceased, and the expenses would leave no remainder for the Executor, Mr. Harding, and it would indeed be folly further to contest this case before His Honor, whose decision even if against Probate, would not be binding on the Executor, as he equally with the Heirs had the right, to commence an Ejectment, and before the Supreme Court, try the validity of the Will.

The first point he wished to call his Honor's attention to, was the last named, viz. "That the paper proved in common form pretended by the Proponant as a will, was not the will of Robert Gurney deceased" and here he would remind His Honor that before He could grant Probate, He must be satisfied that the document sought to be proved is a will and contains the last wish and Testament, and the last of the wishes (so far as related to the disposition of his property,) of the Testator as declared and made known by him to the party he instructed to write his will, and he thought before he finished he would be able to show conclusively to His Honor that the will produced, and proved in common form did not contain the intentions of Robert Gurney and that his expressed wish to the Executor who wrote the will was purposely left out. He would now call His honor's attention to the facts proved; that Leonard R. Harding the Executive wrote the will,—that to him was bequeathed by the will, the whole of the Real Estate after the death of Gurney's Widow, who by the Will had the sole use thereof during her life, and further that after the debts and funeral expenses of deceased were paid and *there was need* to appropriate the personal property, or any part thereof towards the support of the Widow—all that remained after such application, would by the Will fall into the hands of said Executor. It was a well known principle and title of the law that where a party wrote a will who was beneficially interested therein, suspicion attached to the Will, and the rule was the suspicion, increased with the *quantum* of benefit. If he were correct in this statement, surely, when the man who writes the will eventually becomes entitled to the whole of the property, with the exception of two small lagicies, then was suspicion attached to this will to the full.—The learned Counsel then cited 1st Vol. Williams on Executors, page 263, and read and commented on the authority; showing such was the rule, he then argued that this will, came for proof before His Honor, stamped with gross and palpable suspicion of fraud, and before His Honor could decide in favor of said Will, he must be judicially satisfied, that all that amount of suspicion was fully removed. Instead of the evidence tending to remove such suspicion, it was clear from the testimony of the Executor himself who had been admitted as a Witness, that the Will he sought to prove, bore on its face evidence of deceit; he the Executor has testified, that there were two wills, that on the 14th day of November last, Gurney had made a will similar in its provisions to the one produced; that after that will had been executed, he, Harding, had read it over to Gurney and asked him if it was all right. He said "Yes, but I intended and want to give to William R. Newcomb, a certain portion of my property; can't that be put in now!" "*No, said Harding unless I write a new will, but I will give you a Bond to convey to Newcomb such portion, after your decease and that will be sufficient.*" To which he says, Gurney assented; that he went home, wrote the instrument produced, came with it to Gurney, read it, he says to him and offered it to him. Gurney said it would do, he did not want to keep it. but told Harding to keep it." So said Executor Harding, the *Will manufacturer*. His honor would remember that subsequently on the 26th Nov. so swore Harding he in order to insert the Christian names of the two Legatees, which had been omitted in the first will, wrote a new one, the same he said in all respects as the first with the exception of said Christian names, and without putting in the devise to Mr. Newcomb. His honor must remember that said was the evidence without one word of explanation by Harding as to his reason for not inserting it. There was no evidence of any change in the mind of Gurney, on the contrary the testimony of Harding up to that very day shewed that such was his, Gurney's wish, and yet with those facts before him his honor was called upon to pronounce in favor of said will before any evidence had been given to clear the instrument from the foulest of suspicions. Surely Gurney's act, asking Harding to keep his own Bond, was not the act of a sane man. But was it a Bond? No, it was a paper purporting to be the declared intention of Gurney commencing thus, "I Robert Garney," and yet not signed by Gurney but by L. R. Harding. It was not a sealed instrument,—it was in the possession of Harding; 'twas in his possession when he wrote the second Will, he owned. yet he purposely and fradulently left it out of the second Will, and thereby deceived Gurney, and committed and perpetrated a gross and infamous fraud. His honor must surely feel the force of the argument, must see that the legal suspicion attached to the will is increased by such an act, and ought to demand and require, before he granted Probate in solemn form, that all such suspicion should be fairly and fully not inferentially removed.

If then his honor was bound to be judicially satisfied that the will sought to be proved was the last will and testament of Gurney, he, the learned counsel, contended that even if the execution was proved in all several parts to have been been done legally and properly, the mere fact of the legal execution of said will would not, unrelieved from these suspicions, justify his honor in granting Probate. While they had consented, for the reasons already stated, to contest the execution only at the present time, they had not by such consent relieved his honor from the necessity of determining whether he should grant Probate of that will, simply, because he might determine the execution legal, if at the same time, the suspicions with which the will was stamped were not removed.

He must now call his honor's attention to the other point, *that the will was not duly executed*, and he thought he could shew clearly that an essential element to establish the due execution was wanting, viz:—*that the witnesses did not attest in the presence of the Testator.* He then cited same Book as before, Page 69, to shew that the rule was plain, and had not been controverted, that the witnesses, must sign in such a place, or such position, that the Testator could see them if he looked. It was not necessary that he should see them, but only that he could if he looked. In this case it was clear, from the testimony, that Gurney could not see the witnesses sign their names unless he had possessed etherial vision, and could see through a plastered wall. They had the diagram; Mr. Hartley, the surveyor had gone out and surveyed the room in the presence of the Executor, the three witnesses to the will and others. The three witnesses, Armstrong, and the two sons of L. R. Harding, each placed the table in the position they each believed it was in, on the night they attested to the will, and the range of vision was taken from the place in the bed, in which the witnesses declared Gurney lay in bed when they left the bedroom to sign on the table in the outer room; and though they all three differed as to the exact position of the table as well as the position of Gurney's head; yet, as between the two Harding's, the difference was slight. They differed however materially from Armstrong, placing the table a little more than two feet nearer the south east corner of the room. The difference betwern them as to the position of Gurney's head was about twelve inches,—Armstrong had been there frequently, had seen where Gurney usually lay,—the boys had not. Armstrong had sat up frequently with Gurney and the boys had not. Armstrong had placed him in bed, taken him out, the two boys had not. Armstrong remained all that night after the execution of the will, with Gurney, the boys did not. Surely then he would be able to give the best testimony on that point.—His testimony was that Mr. Gurney lay about 18 inches from the front of the bed. His head against the north side of the house, the bedroom door opening back towards the bed, and about 18 inches from the bed, the table against the South side in front of a window just opposite the Bedroom door, about 4 feet 6 inches from the west end of the room. Taking Mr. Hartley's plan, and his range of vision, with the door open close to the bed, and Gurney laying in the position described by Armstrong, no object could be seen by any person, as proved by Mr. Grover, unless placed within two feet from the South East corner of the outer Room—but if the door was as Armstrong had sworn, then, a person laying on any part of the bed could not see in the adjoining room at all. Place the table where Mr. Harding, Senior, told Mr. Hartley it was the night of signing, and a person lying in either of the three positions as stated by the witnesses, and the door fully open, and then Gurney could not have seen any person standing at the east end of the table—where all except Harding Senior swore they did stand. And there was a very remarkable discrepancy between the witnesses. Harding, Jr. before the survey was made, swore that he stood at the West end of the table about two feet from the West end of the House when he signed it, but when he placed the table for Mr Hartley on Saturday morning and stood at the west end, he was then all of five feet away. His swearing as to the position of the table at the time of signing was two feet nearer the western end than Armstrong's, but when he got there, and saw that Gurney to see them sign, must have seen through a wall, he then gave what he thought would be margin enough, but in this he failed, notwithstanding he had stretched it all of three feet, yet Gurney could not see. There was no evidence to them, that the table was, on that night, nearer the South eastern corner than five or six feet. The only witness who swore, where the table stood was Harding, Jr., and he placed it within two feet of the west end, which would bring the east end of the table in a line with the casing of the bedroom door, a few inches ins ide the front of the bed.

If the placing of the table by the witnesses on Saturday before Mr. Hartley, were all guess work, as his learned friend hinted in his cross-examination then the only evidence His Honor had before him, was the direct oath of Harding, Jr., and if it was, as it was, physically impossible that Gurney could have seen the witnesses when they signed, the table being placed according to the oath of Harding Jr., and not according to the guess work of the three, then His Honor could not entertain a doubt, that the law had not been complied with, and the witnesses did not sign in such a position, as to be in the presence of the Testator. True, the witness, Jonathan Harding swore, that when Harding, Jr., and Armstrong signed, he saw Gurney looking at them; but as an offset, Armstrong swears, that when and where he signed it, Gurney could not and did not see him.

Under no circumstances could he have seen them, if placed where Harding, Jr., swore the table was, and Gurney was, or where he placed the table and Gurney on Saturday. Then as to Jonathan Harding seeing Gurney when the other two signed, that might be, if he stood out in the room, two or three feet nearer the door, but even then he could not see Gurney looking at the witnesses if Armstrong and Harding, Jr., spoke truth.

L. R Harding swore that he could see Gurney where he stood, about one foot from the north side of the table, and that Gurney could see witnesses if he looked, yet Armstrong swore, that when he signed, Harding had his hands on the will and his back to Gurney, and that he stood in the same position when they all signed. If therefore Gurney saw the witnessess sign, while lying in that position he must have seen *through* Harding,—if he did, he was the first, and likely would be the last man who ever had seen or likely would see through Leonard R. Harding, the notorious *will-manufacturer*.

Couple all these statements of the witnesses, with the testimony of James Grover, Esq., a gentleman of unblemished character, and his evidence puts it beyond a doubt, that if the table was where Harding Jr., swore it was, and the bedroom door back to the bed, and the witnesses signed at the east end, Mr. Gurney in order to see them, would be obliged to lean 18 inches out of the bed, and turn his head in a westerly direction. This position of Gurney is negatived by all the witnesses. But if Harding, Jr., stood at the west end, Gurney must have got out of bed, to have seen him at all. If the door was half closed, Gurney could not see in the room, from the bed at all, and lying as Armstrong supported by Welsh's testimony, given in a clear and distinct manner swore he did—and the door against the bed. Gurney could not see two feet from the south east corner—a distance of six or eight feet from the east end of the table placed by the testimony of Harding, Junior,