

should be kept wholly separate from her husband. Both husband and the said executors became rival applicants for a grant of administration, and upon their failing to agree, the Judge of Probate appointed the Eastern Trust Co. administrator. On appeal from that order,

*Held*, that upon the well established principle of the Court of Probate that the right to administration followed the right of property, the executors of testatrix's father being trustees who represented beneficiaries exclusively entitled under the will, were prima facie the proper persons for appointment, and that in the absence of evidence of any default on their part as such trustees, there was no principle of law which would exclude them from administration of the estate.

That so far as appeared the appointment of the Eastern Trust Co. was unwarrantable. The mere fact that the contending applicants could not agree did not justify the appointment of a stranger; but that the Court had not the proper materials before it to determine who should be appointed administrator, and that the case should be remitted to the Judge of Probate to determine upon proper evidence, whether or not the said executors or some other person interested in the estate of the testatrix should receive a grant of administration before appointing a stranger.

*Fullerton*, for appellants.

*Harris*, Q. C., *McInnes*, and *J. A. Smith*, contra.

EN BANC]

[March 14.

IN RE MCLELLAN.

*Validity of will—Testamentary capacity—Upon what evidence determined—What considerations relevant.*

The deceased testator, whilst lying ill and in a state of drowsiness or semi-coma, alternating with short intervals of clear consciousness, gave testamentary instructions to his agent, which the latter embodied in a will, and shortly afterwards the same was duly signed and executed. The main conflict in the evidence was not in respect of the facts, but was created by the opinions expressed by the attending physician and another witness in negative answer to comprehensive questions to the following effect: "Was the testator's mental condition such as would enable him intelligently to dispose of his estate." The Probate Court decided in favor of the will, and on appeal the principal contention against the validity of the will was that while admitting the testator's capacity to understand the meaning and effect of each of the testamentary dispositions taken by itself, his condition was such that he was incapable, by reason of stupor and exhaustion, of appreciating and dealing with the testamentary project as a whole and in its different bearings in respect of the value and extent of his property, and the various claims upon his regard.

*Held*, that having regard to the important consideration that the provisions of the will coincided with the feelings and intentions of the testator for a long time previous to his decease, and that he had given sufficient previous thought to the subject of the disposition of his estate to reduce in a large degree the