

HIGH COURT OF JUSTICE.

BOYD, C.

NOVEMBER 3RD, 1911.

*McALLISTER v. McMILLAN.

Costs—Action to Set aside Will—Undue Influence—Want of Testamentary Capacity—Failure to Establish Grounds of Attack—Incidence of Costs.

An action to set aside a will on the grounds of undue influence and want of testamentary capacity. The action was dismissed at the trial; but the question of costs was reserved.

W. H. Wright, for the plaintiff.

W. S. Middlebro, K.C., for the defendants.

BOYD, C.:— . . . The will was attacked on two grounds—of undue influence and testamentary incapacity. The former was abandoned at the opening, and at the close of the hearing the latter failed on the facts.

The testatrix was a childless widow, aged 70, who lived at Owen Sound with her niece, the chief beneficiary, and her sister, also a beneficiary. The chief cause of her death was pneumonia, which developed rapidly from the first appearance about midnight (Friday or Saturday), ending in her death at 5 p.m., on the next day, Sunday. She was minded to make a will on Friday night, and spoke of going to her lawyer on Monday for that purpose. But the progress of the disease led to the calling in of a solicitor early on Sunday morning. He asked her how she wished to deal with her property, and she told him. . . . He returned in about an hour. . . . The will was read over clause by clause, and her assent given, and she affixed her signature with a firm hand . . . about ten o'clock in the morning. Just before this . . . another doctor had been called in to diagnose the case, by the attending physician, who had been the family doctor for seventeen years, and was an intimate friend of the testatrix. The other was not asked to examine with a view to testing the state of the patient's capacity for the disposal of her affairs, but confined himself to her physical condition. He does not agree with Dr. Brown, who was in charge, as to the character of the pneumonia; he found her in a state of unconsciousness, if not of stupor, and, while she was able to respond to suggestions, she was not, in his opinion, capable of

*To be reported in the Ontario Law Reports.