

mitting on behalf of defendant the money to re-margin the deals, the defence failed. Judgment for plaintiffs for \$1,446.58 with interest and costs. Counterclaim dismissed with costs.

MACMAHON, J.

JUNE 19TH, 1903.

TRIAL.

McFADYEN v. McFADYEN.

Will—Action to Set aside—Want of Testamentary Capacity—Undue Influence—Findings of Judge—Costs out of Estate—Conduct of Testator.

Action for a declaration that a certain document dated 2nd September, 1902, purporting to be the last will of Angus McFadyen, of the township of Fenelon, farmer, should not be admitted to probate because of undue influence and want of testamentary capacity. This will gave the bulk of testator's property, worth about \$3,000, to his nephew, the defendant John S. McFadyen. The testator died on the 14th September, 1902, being then about 70 years old. His wife died in the preceding June. They had been married at least forty years. There were no children of the marriage. In 1884 he made a will giving his wife a life estate in all his property, with a devise in remainder to his step-daughter.

G. H. Watson, K.C., and G. H. Hopkins, Lindsay, for plaintiffs.

E. E. A. DuVernet and J. McSweyn, Lindsay, for defendant John S. McFadyen.

H. O'Leary, Lindsay, for the other defendants.

MACMAHON, J., found upon the evidence that the testator, when he executed the will of September, 1902, had full testamentary capacity and understood the contents of the will, and that he was not unduly influenced. But the conduct of the testator between the 21st and 29th August was somewhat strange, and that, coupled with the fact that he was an inmate of John S. McFadyen's house from the 29th August until his death, may have provoked the litigation, and it was not wholly unjustified. Costs of plaintiffs out of the estate. See *Orton v. Smith*, 3 P. & D. 23.