

FIRST DIVISIONAL COURT.

DECEMBER 9TH, 1915.

EGAN v. McARTHUR.

*Will—Proof of Due Execution—Judgment of Surrogate Court—Appeal—New Trial—Right of Appeal—Value of Property Affected—Appointment of Administrator with Will Annexed—Costs.*

Appeal by the plaintiff from the judgment of the Surrogate Court of the County of Essex: (1) declaring that the writing propounded by the plaintiff was not the last will and testament of Minard Wheeler, deceased, and that the deceased died intestate; and (2) directing that letters of administration be granted to a brother of the deceased, his next of kin.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

J. H. Rodd, for the appellant.

D. L. McCarthy, K.C., for the defendant, respondent.

MAGEE, J.A., delivering the judgment of the Court, said that the plaintiff, who, as nominee of the two surviving children of the deceased, applied for letters of administration with the will annexed, appealed against both branches of the judgment; but on the argument of the appeal the finding that the brother was next of kin was not challenged, though it implied that the two children referred to were not next of kin. It was, however, pressed that the judgment against the sufficiency of the proof of the due execution of the will should not stand; and that, as it might have affected the decision to award administration to the brother, the latter also should be reconsidered.

The attestation of the will stated that it was signed by the testator and by the two subscribing witnesses, each in the presence of the others; and one of the witnesses, Mrs. Chamberlin, made the usual affidavit of due execution to lead grant of letters of administration with the will annexed.

At the trial, in June, 1915, the other subscribing witness, R. E. Cade, was called to prove the will, which was dated in July, 1905. He, though deposing to the signing by the testator and himself, could not say positively, though he thought, that Mrs. Chamberlin signed in his presence, and was present when he signed. Mrs. Chamberlin was not well, and was not a witness at the trial.