

FIRST DIVISIONAL COURT.

JUNE 14TH, 1918.

*WANNAMAKER v. LIVINGSTON.

Will—Validity—Testamentary Capacity—Undue Influence—Relationship—Evidence—Action to Set aside Gifts of Property Made by Testatrix in Lifetime—Evidence—Onus—Presumption—Parties—Absence of Personal Representative—Amendment—Findings of Trial Judge—Appeal—Costs.

Appeal by the plaintiff and cross-appeal by the defendants Jane, David, and Minnie Livingston, from the judgment of KELLY, J., 13 O.W.N. 3.

The appeal and cross-appeal were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. C. Mikel, K.C., for the plaintiff and the defendant Frankie Detlor.

R. McKay, K.C., for the three Livingston defendants.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiff appealed from the part of the judgment by which the plaintiff's claim to set aside gifts alleged to have been made by Elizabeth Simpson, deceased, to the three Livingstons, was dismissed; and the Livingstons appealed from that part of the judgment which declared that a paper-writing dated the 4th July, 1913, purporting to be the last will of Elizabeth Simpson, was void.

The parties to the action were all the next of kin of Elizabeth Simpson, who died on the 7th April, 1916; the plaintiff, Eliza Wannamaker, and the defendant Jane Livingston were sisters of the deceased, and the other defendants were the children of Jane.

Down to the trial no personal representative of the estate of the deceased had been appointed, but the plaintiff had obtained, under Rule 90, an order allowing the trial to proceed in the absence of any person representing the estate of Elizabeth Simpson.

The trial Judge made findings in favour of the plaintiff both in regard to the will and the gifts inter vivos; he set aside the will and declared that the deceased died intestate, but he refused to set aside the gifts, on the ground that the right of action in that behalf was vested in the personal representative.

The plaintiff, relying on the order obtained under Rule 90, appealed; but, on the suggestion of this Court, the hearing of the appeal was adjourned to enable the plaintiff to obtain letters of administration. This was done and an application was made to add the plaintiff as a party in her capacity as administratrix. The respondents, the Livingstons, were willing that this should be done