

JUNE 23RD, 1913.

*BADENACH v. INGLIS.

Will—Testamentary Capacity—General Paretic Insanity—Evidence—Jurisdiction of High Court—Judgment of Surrogate Court Upholding Will on Decreeing Probate—Judicature Act, sec. 38—Surrogate Courts Act, R.S.O. 1897 ch. 59, sec. 17—10 Edw. VII. ch. 31, sec. 19—Res Judicata—Parties.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 716, dismissing the action, which was brought by the brother of Edgar A. Badenach, deceased, to set aside two wills made by the deceased, one dated the 24th August, 1908, and the other the 10th June, 1909.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

G. H. Watson, K.C., and C. H. Porter, for the plaintiff.

A. F. Lobb, K.C., for the defendant, the widow and executrix of the deceased.

MULOCK, C.J.:—The will of the 10th June, 1909, purports to revoke all prior wills or testamentary dispositions of the testator. If, therefore, it is valid, it is unnecessary to inquire as to the validity of any earlier will.

The will of the 10th June, 1909, was signed by the testator on that day, and it is attacked on one ground only, namely, alleged testamentary incapacity; so that the only issue in respect of that will is, whether Edgar A. Badenach was, on the 10th June, 1909, competent to make a will. This is a question of fact.

[Reference to *Wilson v. Wilson*, 22 Gr. 39; *Banks v. Goodfellow*, L.R. 5 Q.B. 549.]

One question raised before us was, where the burden of proof lay. The will was admitted to probate in the Surrogate Court, after contestation by the testator's mother, who withdrew opposition to the will in consideration of a conveyance to her, by the executrix (the defendant in this action), of certain lands formerly owned by the testator; and the present plaintiff, the testator's brother, was not a party to the Surrogate