

RE CASSIE, TORONTO GENERAL TRUSTS CO. v. ALLEN.

[BORD, C., FERGUSON, J., ROBERTSON, J., 12TH MARCH, 1897.

Action to establish will—One of the witnesses not "right wise"—Onus—Costs—Prima facie competency of witness.

W. R. Riddell, for defendant, Hannah Maria Allen, appealed from judgment of Rose, J., in establishing the will and codicil of Mrs. Pamela Cassie, in so far only as it establishes the will, the appellant contending that the will was not properly executed because one of the witnesses, a maid servant named Jennie Watkins, was insane at the time, and had since died insane. The evidence showed that she was not "right wise," or was strange or flighty, before the execution of the will, and very soon afterwards became insane. The appellant contended that the onus was upon those propounding the will to show that she was sane at the time of the actual execution of the will. H. Cassels, for the Presbyterian Church and Knox College, opposed appeal, and also moved to quash it upon the ground that appellant has no interest, because if the will is set aside and the codicil remains, the appellant takes nothing. W. C. Chisholm, for plaintiffs and the Presbyterian Church at Port Hope. The Court held that the competency of the maid servant as a witness was prima facie shown by the evidence of the other witnesses to the will, who did not know her previously, and the onus was on the appellant to show that the maid servant was non compos mentis at the time of the execution, which onus had not been satisfied. Appeal dismissed with costs. Judgment reserved as to whether, in the

event of the respondents not being able to obtain payment of costs from the appellant, they should be allowed costs out of the estate.

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JORDAN v. PROVINCIAL PROVIDENT INSTITUTION.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 5TH MARCH, 1897.

Action of policy of insurance—Defence of fraud and misrepresentation—Not necessary to show fraud if material misrepresentations—Untrue answers.

Judgment on appeal by plaintiff from judgment of Falconbridge, J., upon the findings of the jury at the trial in favour of defendants and upon motion to set aside certain of the findings. The action was brought to recover the amount of the policy of life insurance. The defence was that the defendants were induced by fraud and misrepresentations to issue the policy. The jury found that the deceased made untrue answers to questions put to her as to her health before the issue of the policy, and that such answers were material, but that they were not untrue to the knowledge of the deceased. It was contended by the plaintiff that defendants could not succeed in rescinding the contract of insurance in the absence of fraud on the part of the deceased, and that the jury had negatived fraud. The Court held, however, that it was unnecessary to show fraud, that there having been material misrepresentations, the contract must be rescinded, and the plaintiff could not succeed. Meredith, C.J., also held that upon the undisputed facts there was fraud in the legal sense, as the deceased undoubtedly knew of the disease with which she was afflicted. Appeal dismissed with