

FALCONBRIDGE, C.J.K.B.

NOVEMBER 2ND, 1909.

BURCH v. FLUMMERFELT.

*Deed—Construction—"Children"—Absence of Particular Estate
—Title by Possession—Statute of Limitations—Provisions of
Will—Presumption from Knowledge of.*

Action to recover possession of land and for mesne profits and to set aside a conveyance by Johnson Burch to the defendant.

A. C. Kingstone, for the plaintiffs.

M. J. McCarron, for the defendant.

i FALCONBRIDGE, C.J.:—I allowed the declaration of Johnson Burch to be filed as part of the history of the making of the conveyance relied upon by the defendant, but it is not evidence of the facts therein stated, and I entirely disregard it. It is quite clear that the money paid for the land was the money bequeathed to Johnson Burch by his mother's will. Johnson's habits were such that his mother provided that all legacies to him should be invested or applied to the purchase of land to be held in trust by her executors during his natural life, and to be equally divided among his children. The means adopted to carry out the wishes of the testatrix consisted in taking a deed from the vendor of the lot in question to the "lawful children or heirs of Johnson Burch." The introduction of the word "children" renders unnecessary the consideration of whether there is any infirmity in the grant by reason of the absence of a particular estate. The statute R. S. O. 1897, ch. 119, sec. 2, would, no doubt, suffice to cure the objection in any event.

Then as to the contention that Johnson Burch had acquired a title by length of possession. The answer to this contention is that Johnson Burch knew of the will and must be assumed to have taken the land under the trusts of the same, and his possession ought not, under the circumstances, to be treated as adverse: *Kent v. Kent*, 20 O. R. 445.

The case is a pretty hard one on the defendant, who has, no doubt, expended a good deal of money for and on behalf of Johnson Burch under the expectation of getting the property.

The plaintiffs offered in open Court to repay to the defendant the funeral expenses, amounting to \$60 (including the minister's fee), paid by her, and this offer I shall expect them to carry out.

There will be judgment for the plaintiffs for possession of the lands, and setting aside the conveyance from Johnson Burch to the defendant, and \$1 for mesne profits, without costs.