

CARTWRIGHT, MASTER.

APRIL 23RD, 1903.

CHAMBERS.

## LEMOINE v. MACKAY.

*Evidence — Foreign Commission — Postponement of Trial — Delay — Security for Costs.*

Motion by defendant for a commission to examine witnesses in England and Ireland, and to postpone the trial in the meantime. The action was at issue, and the plaintiffs had given notice of trial for the jury sittings at Ottawa commencing on the 30th April. The action was brought to establish the will of defendant's father.

R. McKay, for defendant.

A. B. Aylesworth, K.C., for plaintiffs.

THE MASTER.—The action is really one by the defendant to set aside the will of his father, who died on 1st December last, leaving an estate of between \$1,200,000 and \$1,300,000. The testator left seven children. To six of them the whole of this estate was left, with the exception of a comparatively trifling amount to defendant. The testator in his lifetime had given each of the seven children \$100,000 by way of advancement. The allegations in the statement of defence are the usual charges of want of testamentary capacity, undue influence on the part of the other beneficiaries, etc. The usual affidavit is made by the solicitor for defendant, stating that the evidence of the witnesses sought to be examined under the commission is "absolutely necessary in the interests of the defendant." . . . Affidavits were filed in answer alleging that the evidence sought for by defendant would be immaterial and of no assistance, and asserting that there were strong reasons why the trial should not be postponed. These, however, are fully met by the powers given to the executors under the orders of 4th February and 14th March appointing them administrators ad litem, and empowering them to invest the funds of the estate pending the result of this action. They need have no hesitation in making any necessary advances to any of the six substantial beneficiaries, as counsel for the defendant undertakes not to dispute any of the payments so made.

I am, therefore, clearly of opinion that my discretion can only be exercised by allowing the motion as asked. The usual time for the Ottawa autumn assizes is early in September, so that no great delay will result from the postponement of the trial. . . .

The hardship of delay was the main argument urged by the counsel for the plaintiffs. . . . But fully recognizing the hardship, I will say that, looking at the facts of the