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RE PHENÉ'S TRUSTS.

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have Sir William Grant's opinion, in *Mason v. Mason*, as to adopting presumptions of fact from that law. It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Doe v. Nepean*, and to assert, as an exception to the rule, that the onus of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging death at such particular period, and not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor, when Vice-Chancellor, in *Re Green's Settlement*, or with the dictum of Lord Justice Bolt when he said, in *Re Benham's Trust*, that the question was one, not of presumption, but of proof; or with the real substance of the actual decisions, or the sound parts of reasoning, in *Doe v. Nepean*, or with the judgments in *Rez. v. The Inhabitants of Harborne*, and *Reg. v. Lumley*, or with the principles to be deduced from the judgments in *Underwood v. Wing*. The true proposition is that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence. The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail. This case happens to be one of an alleged member of a class of legatees. A legatee's survivorship of a testator is requisite to clothe him with that character, is a tacit condition annexed by law to every ordinary immediate gift by will, and it follows that the representatives of a person alleged to be a legatee must prove, as against the other members of their class who prove their survivorship, that he survived the testator, otherwise he was not a legatee at all. For these reasons, and upon a review of the authorities and the judgments on which they rest, I am opinion that there is no presumption of law as to the particular period at which Nicholas Phené Mill died; that it is a matter of fact to be proved by evidence, and that the onus of proof rests on his representative. This brings me to an examination of the evidence. At the hearing a further inquiry as to the facts was offered and was declined by each of the parties. It was not admitted by the appellants that Nicholas Phené Mill was the Nicholas Mill referred to in the communications from the American officials, but those communications were not objected to, and were read and commented on by both sides. There are three affidavits. The earliest in point of date is that of Nicholas Phené Mill's mother. She states that she is the widow of William Mill the elder; that she left England many years ago to reside abroad; that Nicholas Phené Mill was born at Ostend in the year 1829; that on the 19th of August, 1853, he left home and went to reside in America; that he wrote letters to her and her family from America; that she received from him a letter addressed from on board the United States' frigate *Roanoke*, dated the 15th August, 1858; that neither she nor, as she believes, any member of the family has heard from him since, and that she believes him to be dead. She speaks of inquiries that have been made for him. The next affidavit is that of the petitioner in the court below. He is a brother of Nicholas Phené Mill.

He speaks of his brothers and sisters, and says that the last that has or can be ascertained or heard about Nicholas Phené Mill is that, being a sergeant of marines in the United States naval service, and unmarried, he deserted from the United States' frigate *Roanoke* on the 16th June, 1860. He further states that he was himself in America from August, 1853, till April, 1862; speaks of many fruitless inquiries and advertisements, and adds that his information as to Nicholas Phené Mill's desertion was derived from an official letter, written in answer to one from his solicitors to the Government authorities in America. The last affidavit is that of the clerk to the petitioner's solicitors. He speaks of letters of administration being granted to the petitioner, and proves the correspondence with the Government officials in America. There were two letters from the petitioners' solicitors; each was answered. The answer to the second was the most explicit, and the only one necessary to refer to. It is endorsed on the letter to which it is an answer, and is in these terms:—

"Navy Department, Bureau Equipment and Recruiting, Washington, Dec. 11, 1867.

"Nicholas Mill was a sergeant in the Marine Corps, and deserted June 16th, 1860, while on leave from New York to join the Philadelphia station. He has not been heard of from since that date.

M. SMITH, Chief of Bureau."

This was in answer to a letter which stated that Nicholas Phené Mill wrote to his mother on the 15th August, 1858, from on board the United States' frigate *Roanoke*, Boston Navy Yard, Massachusetts, stating that he expected to be long absent, but would write on his return from his voyage. If this correspondence is excluded, there is no other evidence than that Nicholas Phené Mill was last heard of in 1858. There would, therefore, be no sufficient evidence of his having survived the testator. Nor does the admission of the correspondence supply the necessary proof; for though I assume that the Nicholas Mill therein mentioned was the Nicholas Phené Mill who wrote from the *Roanoke*, I cannot infer from the statement of his desertion on the 16th June, 1860, that he was alive when the testator died in January, 1861. I should not do so if it was a simple statement of desertion and no more. The statement, however, is not simply that he deserted, but that he deserted while on leave from New York to join the Philadelphia station, June 16th, 1860, and has not been heard of from since that date; the reasonable conclusion from which is that he never reappeared after he went on leave; that his leave was up on or before the 16th June, 1860; and that being so his name was on the books as a deserter. If I am to draw a conclusion at all, I should infer that a person in the position of a sergeant having nothing against his character would not desert, and that he had died while on leave, and so was not heard of by the authorities. It is enough, however, for me to state that, in my opinion, the burden of proof is on the representative of Nicholas Phené Mill, and that he has not proved affirmatively that Nicholas Phené Mill survived the testator—a proof which I consider essential to his title. The order of the Vice-Chancellor must, therefore, be discharged.