

Eng. Rep.]

RE PHENE'S TRUSTS.

[Eng. Rep.]

Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years." The Vice-Chancellor Kindersley appears to have acted on the passages in both these judgments which are to the effect that the *onus* of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown. Those passages are not essential to the conclusion arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not, and ought not to be, any such presumption of law. If there was such a presumption, it would be no ground for throwing the *onus* of proof on the plaintiffs, where seven years had elapsed from the date of the last proof of existence; on the contrary, it would carry the period of death, as suggested and laid down by Vice-Chancellor Malins, to the end of the seven years. But both the decisions are that it did not, and because it did not the plaintiff failed, and did not recover the property he sought. In the recent case of *The Queen v. Lumley*, it was held, consistently with another judgment delivered by Lord Denman in *Rez. v. The Inhabitants of Harborne*, 2 A. & E. 540, that there was no presumption of law in favor of the continuance of a life up to a particular period, but that it was a question for the jury as a matter of fact. The case was heard before the Chief Baron, Mr. Justice Byles, Mr. Justice Lush, Mr. Justice Brett, and Mr. Baron Cleasby; and Mr. Justice Lush delivered the judgment of the Court in these terms:—"We are of opinion that the direction to the jury in this case, viz., that, there being no circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage, was erroneous. In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is surely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceeding the second marriage the in-

ference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. But the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Rez. v. Twynning*, *Rez. v. Harborne*, and *Nepean v. Doe*, appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage there is no question for the jury. The provision in the Act then comes into operation and exonerates the prisoner from criminal culpability, though the husband or wife be proved to have been living at the time when the second marriage was contracted. The legislature by this provision sanctions a presumption that a person who has not been heard of for seven years is dead; but the provision affords no ground for the converse proposition—viz., that where a party has been seen or heard of within seven years a presumption arises that he is still living—that, as we have said, is always a question of fact."

True it is that *The Queen v. Lumley* was a criminal case, and that the seven years had not elapsed from the date of the first husband having last been heard of; but, though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it cannot be that the rules of evidence in each should be so far different as that there should be a positive legal presumption in the one proceeding, and no legal presumption in the other. A prosecutor and a person seeking to recover property have each to prove his case, and in each instance the object is to arrive at, and act upon, the real truth.

Lord Denman, who delivered both judgments in *Doe v. Nepean*, thus expressed himself in *The King v. The Inhabitants of Harborne*:—"I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe v. Nepean* the question arose much as in *Rez. v. Twynning*. The claimant was not barred if the party were presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption, there was nothing to be submitted to the jury. But this Court held that no legal presumption existed, and set the verdict aside. That is quite consistent with the view which we take in the present case, and *Rez. v. Twynning* may be explained in the same way. I am aware that in the latter case Mr. Justice Bayley founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it." (Other learned judges concurred in this opinion. The notion of a legal presumption in favor of life, originated, I believe, with the civil law, and we