

Eng. Rep.]

RE PHENE'S TRUSTS.

[Eng. Rep.]

Re Benham's Trust Lord Justice Rolt merely said that he desired to have further evidence; he did not say that, if no further evidence could be adduced, he should not act on the rule of Vice-Chancellor Malins. In the case before Vice-Chancellor Kindersley he merely acted as a jury, and that is what the Court has to do now. They referred also to *Rex v. Twynning*, 2 B. & Ald. 386; *Sillick v. Booth*, 1 Y. & C. C. C. 117; *Hubback on Succession*, 175, *et seq.*; *Doe v. Jesson*, 6 East 80.

C. J. Hill for the trustees.

Langworthy, and G. O. Edward, for other parties.

Everitt, in reply.

GIFFARD, L. J., offered the parties an opportunity of endeavoring to obtain further evidence, but the offer was declined on both sides.

Judgment was reserved.

JAN. 14.—GIFFARD, L. J.—This is an appeal from so much of an order of the Vice-Chancellor James as directs the residue of a fund which is standing in court to "The account of the share intended for Nicholas Phené Mill" to be paid to his administrator. The order was made upon the hypothesis that Nicholas Phené Mill survived Francis Phené, the testator. The learned Vice-Chancellor, in making the order, stated that he did so in deference to the authority of three cases which were decided by the Vice-Chancellor Kindersley, and a fourth which was decided by the Vice-Chancellor Malins, but at the same time he dissented from their opinions, and expressed a wish that the whole matter should be brought before the Court of Appeal. The testator died on the 5th of January, 1861. According to one view of the evidence, Nicholas Phené Mill was last heard of in August, 1858; according to another view, about seven months previously to the testator's death. That he survived the testator was treated by the Vice-Chancellor, in deference only to the four cases referred to, as to be presumed. It will be desirable, therefore, to examine those cases and such others as bear materially on the subject, before dealing with the evidence more particularly. The cases decided by the Vice-Chancellor Kindersley were *Lambe v. Orton*, *Dunn v. Snowden*, *Thomas v. Thomas*. They were all decided on the same general principles. The propositions enunciated were, in substance, these:—1st. That the law presumes a person who has not been heard of for seven years to be dead, but, in the absence of special circumstances, draws no presumption from that fact as to the particular period at which he died. 2nd. That a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards. And, 3rd. That the *onus* of proving death at any particular period within the seven years lies with the party alleging death at such particular period. The case decided by the Vice-Chancellor Malins was *Re Benham's Trust*. He adopted and acted on the decisions of Vice-Chancellor Kindersley, but went somewhat further, laying it down "that if you cannot presume death at any particular period during the seven years, then, at the end or expiration of the seven years, you must presume for the first time that he is dead, and you

must also presume that within that time he is alive." *Re Benham's Trust*, was appealed, and the Lord Justice Rolt, in November, 1867, discharged the Vice-Chancellor's order, directing further inquiries, and simply stating, according to the only report I am aware of (16 W. R. 180), that "there was no evidence for the Court to act upon, and that it was a case, not of presumption, but of proof." In *Dowley v. Winfield*, the testator died in September, 1833. One of his two sons went abroad in September, 1830, and was heard of for the last time about twenty months previously to his father's death. The Court ordered a share of the father's residue bequeathed to him to be transferred to his brother as the sole next of kin of the father living at the father's death. Security to refund was taken. In *Mason v. Mason*, 1 Mer. 308, a father and son were shipwrecked together. The rules of the civil law and of the Code Napoleon were relied on. Sir Wm. Grant said: "There are many instances in which principles of law have been adopted from the civilians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. . . . In the present case I do not see what presumption is to be raised, and since it is impossible you should demonstrate, I think that if it were sent to an issue, you must fail for want of proof." An issue was directed whether the son was living at the death of the father. Nothing appears to have come of it. In *Underwood v. Wing*, which was also a case of *commorientes*, a testator bequeathed personal estate to J. W., in the event of his wife dying in his lifetime. The testator and his wife were shipwrecked and drowned at sea. On the question being raised between the next of kin of the testator and J. W., who claimed under the will, it was held, first, that the *onus* of proof that the husband survived his wife was upon J. W.; secondly, that it was necessary to produce positive evidence in order to enable the Court to pronounce in favor of the survivorship; and thirdly, that no such evidence having been produced, the next of kin were entitled.

Underwood v. Wing was heard before Lord Cranworth, Mr. Justice Wightman, and Mr. Baron Martin. Mr. Justice Wightman, in the course of delivering judgment, stated:—"If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide, independent of age or sex; and, if there be no evidence, the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and, of consequence, no judgment can be formed;" and afterwards added:—"We think there is no conclusion of law upon the subject; in point of fact, we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor." In *Wing v. Angrave*, another branch of the same case, the House of Lords concurred in the view which had been taken by Lord Cranworth and the learned judges who sat with him. In *Re Green's Settlement*, Mr. Green was murdered in the Indian Mutiny on the 3rd June, 1857; Mrs. Green on the 16th of November following. Mr. and Mrs. Green's child escaped with its native nurse on the same 3rd of June, but was never