

Kelly became sick, and thereafter required constant attendance and nursing until her death on 4th June, 1901. After the making of the will Mary Kelly ceased to pay the \$10 a month for her board and lodging. Catharine Larose predeceased Mary Kelly, dying on the 1st June, 1901, and her legacy lapsed. The plaintiff claims \$2,190, being one dollar a day for board, care, and attendance on Mary Kelly for 6 years previous to her death. The trial Judge held that the plaintiff had not been relying on bounty, and that under the circumstances the proper remuneration was at least the amount claimed.

The appeal was argued before a Divisional Court (FALCONBRIDGE, C.J., STREET, J.)

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

M. J. Gorman, Ottawa, for plaintiff.

STREET, J.—It appears from the evidence that when the plaintiff became aware of the fact that the deceased had by her will left a legacy of \$2,000 to his wife, besides making her her residuary legatee, and a legacy of \$1,000 to his daughter, he told her, in effect, that he would no longer accept pay from her for her board at his house, and that she must consider it her home for the rest of her life. I do not think it necessary to carefully scrutinize the plaintiff's statement of the precise language he used in conveying to Mrs. Kelly his meaning, for the meaning that he intended to convey is plain, and his recollection of the precise words in which he conveyed it could hardly be relied upon after the lapse of some six or seven years. A contract of some sort was entered into by reason of the fact that both parties must be taken to have acted from that time forward upon the understanding then arrived at. . . . The question is whether the contract was that no money should be charged for board, provided Mrs. Kelly did not alter her will, or whether it must be taken to have been that no money should be charged, provided Mrs. Larose should at Mrs. Kelly's death become entitled to receive the legacy and other benefits bequeathed to her. The latter is the proper construction of the understanding. . . . If Mrs. Kelly had by her own act revoked her will, he would not have been bound to continue to keep her without being paid. The allowance found by the learned Judge below, though liberal, is based on the uncontradicted evidence of Dr. Chabot, who attended Mrs. Kelly during the whole period covered by it.