Ibid — Tenner — Nº 160. — Ryley ol. Proser. v. Ryley — Bishop

Dr Wynne — Dr Marriot

By ye Words my dear Wife Mary is ye Wife de jure or ye Wife de facto meant

Ind. fo. 269.....

The Decd by Will gives "all his Estate of what kind soever & where soever to his Dear Wife Mary, & he thereby appoints his said Wife Mary Sole Execr. of his Will.

The Case was he had a legal Wife, from whom he had been long separated, & had no Intercourse with; he had also a Wife de facto, (who says she was duly married to him subsequent to the other Marriage) with whom he lived at his death, & for 30 Years preceding, & in whose possession he had entrusted his Will; both Wives Christian names were Mary & the Question is which of them is meant by the Words of the Will?

Judge — Dr May.....

The Expression of the Decd creates all the Difficulties; I give "all my Estate &c to my dear Wife Mary." it is admitted the Decd had a Wife Mary, with whom he did not live, but whom he married, before the Mary with whom he lived, & who has taken Probate; therefore the legal Wife wd. have a preferable Right under an Intestacy; She has called in the Probate, & cited ye 2d Mary to shew Cause why it shd not be reworked, & a new Probate granted to her as the Execr. therein named; the 2d Mary appears, & confesses the Plt to be the Wife of the Decd but denies she has any Testamentary Interest; the first Consideration is a Point of Law, wh. Evidence can be received to explain whom the Testator meant; If I had been clear, No Evidence Ds be admitted to explain the Testators words, I must have rejected the Allon, reversed the Probate, & decreed a Probate to the legal Wife Mary; but upon hearing the Allon & Argument thereon, I was of opinion, this was a Case, where Parole Evidence might be received, & that the Words "my dear" "Wife Mary," might apply either to the Wife de facto, or ye Wife de jure; I could therefore look into the Intention of the Testator; So, if a Person has 2 Sons, a legitimate, & a natural Son, & a Legacy is given, "to my Son". Evidence may be received to explain which Son is meant; but you cant enter into Evidence to alter the necessary Purport, or shew a different meaning; for that would be leaving it to the Witnesses to make the Will; but tho, you cant controll or contradict, the obvious meaning of a Testator, you may clear up & ascertain what is doubtfull in the Will; it was essential for her to prove her being Wife de facto otherwise she wd. not answer the description mentioned in the Will, upon the Principle abovementioned, nor wd. the Evidence if ever so strong, apply to this Case, nor be admissible to contradict the Will; She pleads a Marriage at the Fleet 23 June 1738 The Doubt with me, is, as to the proof of it, which is essential, else they lived in a Criminous Conversation; No Witnesses who were present at the Marriage, are examined, the only Evidence of the Fact is a Declaration of the Husband of the Sister of the Party, that he was present at the Marriage in the Fleet; But here is a reputable Cohabitation; a constant, uniform owning for 26 Years, which I take to be a sufficient proof of a fact of Marriage, at this distance of Time; If the Question had been on the Grant of Admon, between the next Kin & her, the Fact thus proved, wd. have entitled her to the Admon as Widow; If it is sufficient in that Case, why not in this? Where is the Difference between a Claim by a next of kin & a Person calling herself the Wife? On the whole, I think the fact of Marriage is sufficiently established, by the presumption from the Cohabitation & Reputation — There are certainly Difficulties in this Case, which is a Compassionate one; The fact of Marriage being established, the next Point, is, wh. she is the Person meant by the Testator? in regard to which, 6 Ws speak of repeated Declarations of the Decd to leave it to her; the Equivoque must have been merely accidental; the name happens to be Mary otherwise the Question could not arise; as to the Decds Intention, the fact of the Will being in her Custody, & of their living together so long, is better than the Declarations of the Decd — The Declarations of the Daur, are long ago, but she is a competent W. having only a consequential Interest; if I can weigh Declar.s I am at liberty to do so. I think the Decds Declar.s to .... very extraordinary, when asked relative to the disposition of his Affairs, he is said to reply, "I made my Will many years ago, & left Mary Ryley, my lawfull Wife, Exor — I ground my Opinion on the fact of Cohabitation, wch induces me to believe, he meant the Wife with whom he lived, not her whom he had forsaken, & that the Person who is possess'd of the Probate, is the Party entitled.

Sentence for the Wife de facto

Consistory — Trin. T. 33 S. — Dr Calvert

Nº 161 — Hervey v. Coghlan

Dr Collyer & Harris — Dr Calvert & Wynne.

Will ye Lord: offerd, if proved, induce ye Ch to pronounce for the Marriage....

I am Council for Mrs Hervey, ol. Coghlan, Wife of the Hon.le Thos Hervey, who has cited to answer him in a Suit of Jactitation of Mariage; We are now before you with an Allon, stating, the Circumstances & Family of Mrs Hervey, the Commencement of the Courtship at Bath, the Proposal of Mariage wch was accepted by my Client, & her Mariage at the Fleet, by a Clergyman who was a Stranger to her; we plead a constant owning of each other, as Husband & Wife, her being visited as Mr Herveys Wife, by all his Acquaintance, & esteemd, acknowledged, & received as such by all Mr Herveys Family; We plead the Birth of a Child, the Person who were present at his Baptism, & the Clergyman who christend him, at wch time he was looked on as the Son of Mr Hervey born in lawfull Wedlock; we plead also the last Will of the Earl of Bristol, Father to Mr Thos Hervey, who entailed his Estate on his Grandchildren, & among others on Mr Thos Hervey Child abovementioned.

Dr Collyer.....

I admit Mrs Coghlans Pedigree; but object to the 3d Art: pleading ye Courtship in the Way of Mariage, as incapable of Proof; for no kind of Traffic is laid if he addess'd her in the way of Mariage; it is probable he wrote Love Letters to her, or made some Declarations to her at Bath; therefore this Article shd be more explicit —

The 4th Art: is very extraordinary; She pleads that she has forgot the Day on which she was maried; which is always so imprinted on the Memory of every Woman, that I never met with such an Instance of forgetfullness before; after going to the Fleet on such a remarkable Errand; She dont say, that she made any subsequent Declaration of what had been transacted; nor any previous Declaration; no Body went with her in the Hackney Coach; no body was present at the Ceremony, Her Justification depends on these two Articles; they rest contain no more than what she has confess'd, the Jactitation; the Mariage Act has establish'd a new System of Law.

Dr Harris.....

I object to the Particulars mentiond in the 1 Art: relative to Mrs Coghlans Sister, & who she maried; the 2d Art: says Mr Hervey went to Bath, where he exprest a Regard for the Deft but it is not said, in the way of Courtship; a Marriage inter vivos, cant be pronounced for merely on Reputation, Cohabitation, Acknowledgement, or presenting at Court; we shall shew, she was brought to Bed 2 or 3 Mo after the pretended Marriage.