CHANCERY.

Newill v. Newill.

Will—Construction—Gift of property "for benefit of wife and children."

A testator devised and bequeathed all his property to his wife, for the use and benefit of herself and of all his children.

Held, that it was a gift to the wife for life, with remainder to the children.

[19 W. R. 1001, V. C. M.]

This was an administration suit. The testator by his will, dated the 19th of October, 1863, devised and bequeathed unto his wife, Anna Elizabeth Newill, for the use and benefit of herself and all his children, whether born of his former wife, or such as might be born of her, Anna Elizabeth Newill, all his property of every description, real and personal, whether in possession, reversion, remainder, or expectancy, at the time of his decease.

The testator was twice married, and left eight children surviving him, six by the first marriage, and two by the second. He had no real estate, but died possessed of considerable personal estate.

The only children living at the date of the will were those by the first wife.

The suit now came on to be heard on further consideration, and the question was whether the widow and children took as joint tenants, or whether the widow took a life estate, with remainder to the children.

Pearson, Q.C., and *Holmes*, for the plaintiffs, the children of the first marriage, contended that the will created a joint tenancy between the widow and children. They cited *De Witte* v. *De Witte*, 11 Sim. 41; *Bustard* v. *Saunders*, 7 Beav. 92; *Bibby* v. *Thompson*, 32 Beav. 646

Marcy, for the guardian of some of the children, who were infants, supported the same view.

Glass, Q.C., and *Rogers*, for the widow, contended that it was a gift for life, with remainder to the children. They cited *Armstrong* v. *Armstrong*, 17 W. R. 570, L. R. 7 Eq 518; *Audsley* v *Horn*, 7 W. R. 125, 26 Beav. 195; *Re Owen's Trusts*, before Vice-Chancellor Wickens on the 26th of May (not reported); *Ward* v. *Grey*, 7 W. R. 569, 26 Beav. 485; *Crockett* v. *Crockett*, 2 Ph. 553; *Lambe* v. *Eames*, 18 W. R., 972, L. R. 10 Eq. 267;* *Jeffery* v. *De Vitre*, 24 Beav. 296.

Pearson, Q.C., in reply, referred to *Mason* v. *Clarke*, 1 W. R. 297.

Malins, V.C., said this was a mere question of the intention of the testator. It was quite clear he meant his property to go to his wife for the benefit of herself and his children, whether she and they took as joint-tenants, or whether she took a life estate with remainder to the children, but it would make a material difference to her which way it went. If he were to look at this will apart from the authorities, what was the testator's intention? What were the probabilities? What must he have meant? Considering it was his main duty to take care of his wife, he should conclude that it was his intention that she should have it all for her life—upon intention only that was the decision he should arrive at. Was he prevented from so deciding by the the authorities, which were very contrary? The current of authorities latterly had run in a direction opposite to what it did formerly, and it ran in a way which coincided with his opinion, that when a man gave property by will for the benefit of his wife and children he meant it to be for his wife for life with remainder for the children. There would be a declaration in accordance with that view.

* Reported 7 U. C. L. J. 222.

PROBATE.

Pearson v. Pearson and Pearson.

Will—Execution—Signature of testator unseen by witnesses—Insufficient acknowledgment.

The testator asked two persons, who were both unable to read or write, to "make their marks to a paper," and they did so. This paper was the testator's will, but he made no statement whatever as to the nature of its contents to the witnesses. The witnesses were unable to say whether or not the testator's signature was affixed previous to the attestation, and there was no evidence on this point.

Held, an undue execution.

Previous cases reviewed.

[19 W. R. 1014,—P. & M.]

George Pearson, gardener, late of Hockwold-cum-Wilton, in the county of Norfolk, died on the 31st of March, 1870; he left a will bearing date the 9th of October, 1865.

The will was entirely in the handwriting of the testator, and was signed by him. There was no attestation clause, but the will had been witnessed by a man and his wife, who, being unable to write, had subscribed their marks. Opposite to each of their marks was the name of the witness, and the word "witness" written in the handwriting of the deceased. The remainder of the facts are sufficiently stated in the judgment.

The plaintiff, as heir-at-law, propounded the will, and the defendants pleaded that it was not executed in accordance with the provisions of the Wills Act, 1 Vic. ch. 26.

Dr. Tristram, for the plaintiff, cited *In the Goods of Thomson*, 4 Notes of Cases, 643; *Cooper* v. *Bocket*, 4 Moo. P. C. C. 419.

G. Browne, for the defendants.

Cur. adv. vult.

May 13.—Lord Penzance.—The question in this case was, whether the testator's will was duly executed. The following is the evidence of the two attesting witnesses; Henry Whistler said, "The testator asked me to make my mark to this paper. I did so, and he then asked me if my wife was in. I said 'Yes.' He then told me to call her. I did so, and the testator told her to make her mark to the paper. She did so." Whistler's wife said "I was called in by my husband, and made my mark. My husband had made his mark before I was called. I did not see him make any mark." The witnesses were examined at some length with reference to the question whether they were both present at the same time, and it was contended that the wife should be supposed to have been present, because she was in the passage, and might have seen her husband affix his mark to the will. My judgment, however, does not depend upon that question, but I must say that, if it were necessary that it should be decided, I should decide against the witnesses having been present together.