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Common Place Book

Sir Walter Wyndham Burrell.

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Common Place Book of
Sir William Burrell Bt LLD

This volume contains reports of proceedings in the Ecclesiastical Courts (Arches, Prerogative, Consistory of London, Admiralty, Delegates) from 1765 - 1769. - and 1796.

This, I believe, is the work of Sir William Burrell, who practised at Doctors Commons from 1760. He was Chancellor of Worcester & Rochester.

J. Edenborough 1905.

Arches Ct
Mich: Term: Easter
2 Sess:
Hay. Judge

Delahay agt Price
Stevens ..... Fountain

Appeal from Hereford on the Admon of an Allon

Dr Wynne

I am Counsel for Geo Price, in the original Business of passing Ch: Wns Accounts from 1761. to 62., on the refusal to allow them, on 11 July 62. He had a Citon agt the Ch: Wns Accountant, to shew Cause, with Intimation &c. The Pth Proctor exhibited the Accounts, the Defts gave an Allon objecting to sundry Items, viz. £ 2. 7. 6. paid to an Attorney, £ 12 for the Promoters Expences, stating these Expences are not incident to the Office of Ch: Wn, & that the Suit agt Delahay (for recovering 120£ pons money out of his Hands, for want of Security) was carried on agt the Approbation of the Pth at a public meeting - Mr Price made Oath of the Expenditure, & it was proved, that the Sp: Ct has no Jurisdiction in passing Accounts; but this was soon given up:

The Proctor for the Promoter pleaded that the Bond of 120£ was given by Mr Delahay in 1758, that Mr Price was required by some of the Pth to call in the Bond from Delahay, his personal Security being insufficient, that he gave Counsel orders to call it in, & had spent more than was charged, & ought to be paid the Attorneys Bill & his own Expences -

The opponents Proctor gave an Allon pleading that the Vestry was held in consequence of Public Notice, that the Order of Vestry was 13 April 1762 &c. the Charge in Question &c. 8. A.C. on 3 May. 1762.

The Pth at first appeard under Protest to the Jurisdiction - They said the Eccles: Ct is only to receive the Accts when audited, not to audit it -

The Money left to the Poor of the Pth is lent by the Minister, Vestry to Delahay on his Bond, on advice that it was in improper hands, Proceedings were commenced during the Subsistence of the Bond

they have pleaded an Order of Vestry, instead of wch they shd plead the Notice to the Ch: Wn, of their Sentiments, my Objection is that their Plea is out of time, wch must be fatal, otherwise, a Suit may be protracted for ever -

This is an intended Suit, has been delayd 2 Years, Delahay has subscribed the Order of Vestry, he was unwilling to part with the Money - No Direction subsequent to Price's leaving the Office, can operate - A Ch: Wn is bound to take care of the Poors Money

Hay. Judge — I am clear the Ch: Wn did well, the Bond is given to him, (21 Jas) he shd take care the Money is secured - the whole depends on the Order of Vestry in April 1762, I do not see how I can reject a Plea to verify an Allon admitted, which being admitted, this follows of course

a Plea to verify an Allon admitted must also be admitted of course —

Rules in an Allon are material — I admit the Allon, give no Costs till the end of the Suit, & retain the Cause. A Ch: Wn is a but Honsom Office, & must be supposed at his charge &c. for it —

2 Geo 2. Sch: Houghton Cal. Ch: Wns of St Albans
Woodstreet & Kendrick Cal.
M: S Geo 2. Ch: Wns of Hammersmith. Hutton & Robinson

13. Geo. 2. Lee. C. J. Adams v Bush
a Prohibition was granted after Sentence allowing the Ch: Wns Accounts, & an Appeal to the Arches; for by the Cts, the Sp: Ct has no Jurisdiction to settle Ch: Wns Accounts.

7 Geo. 2. D Hardwick. C. J. Wainwright v Bagshaw
a Prohibition granted, for the Vestry, not the Ordinary is to take the Accounts: He can only give a Judgment quod computavit —

Prerogative. 2 Sep.

On Grant of Admon de Bonis non —

2. Wife Representative of Husband, or next of Kin of Wife, is entitled to Admon of Goods left unadministered by Husband?

No 2

Walton v Jacobson
Stevens Jun: ... Collings

Sept 1758. Letters of Admon of the Goods of Hester Walton was granted to her Husband Jn Walton; who having intermeddled, died, leaving part unadministered she made a Will, & therein appointed his Brot Thos sole Extor & Resid: Legy.

21 July 63. Thos proved the Will of Jn's Will.

14 Dec: 64. Theodore Jacobson Esq & Edel. Engel Verpoorten, the Uncle & Aunt & only next of Kin of Hester the Intestate, by special Proxy renounced Admon de Bonis &c. to her, & consented they shd be granted to Thos the Brother of John.

15 Dec. Thos was sworn Admor, but the Admon was stopped in the Office by Caveat — then Theodore Jacobson appeard in Person, retracted his renunciation, made Collins his Proctor, & prayd, Admon of the Goods of E.W. left unadministered by her Husband might be granted to him as Uncle & next of Kin, Stevens dissenting & alledging, J. had no Interest — Collings now sets forth that J. has an Interest in Goods left E.W. by the Wills of Sir Gilbert Heathcote, Dame Anne Jacobsen, her Mother & Grifather, this Stevens denys & alledges, that

NB He was Ch: Wn again in 1761, he took proper legal Measures for securing the Money He was empowered by one Vestry, & the whole depended on it

whatever right was in Jn the Husband, vests in Thos his Brother
That these are 2 Parcels of 4% Stock. of 1250£ each expectant & due to E.J.
as follows viz.
Sir Gilbert Heathcote. gave by Will 8 Aug: 1732 to Sir Wm Heathcote & Theodore
Jacobson Esq 2500£ upon Trust that they shd pay the yearly Dividends to his
Dr Dame Anne Jacobson for her life, for her sole & separate Use, & from &
after her Death, transfer & dispose thereof unto all & every, or such one or
more of her Children or Grandchildren who shd be then living, in such
Proportions, as she, notwithstanding her Coverture, by her last Will
shd appoint. 17 Decr 1735. Ly Jacobson, by Will made the following appointment
of the same, viz that the Dividends of 1250£ shd be paid to the proper
hands of Hester her Dr then wife of Jn Walton, during her Life, for her
sole & separate Use, & after her death, to all her Children that shd be living
at sd H. W.s death, Share & share alike, & for default of Issue, the sd Dividends
to go to her Dr Anne, in like manner, for her sole & separate Use, & after
her Death to such Child or Children as shd be then living & for default of
Issue of sd Annes, to be transferd to the Exors, Admors, or Assigns of Hesther.
H. W. died intestate; her Husband J W. took Admon & died, & then Ly
Morgan (the other Dr of Ly: J.) died without Children. There was a Suit
in Chancery between Mrs J. W. & the Trustees under Sir G. Heathcote's Will, & Ly
Morgan, J W. in his Bill prayd the sd Trustees might transfer sd
2500£ or a Moiety thereof according to the Will of Sir Gilt.

6 Dec: 1740 The Cause was heard before the sd Chancellor who declared that so much of
the sd Appointment, made by the said Dame Anne Jacobson touching the respective
moieties of the sd 2500£ E.J. Stock, as directed the same to be transferd to the Child or
Children of sd Hesther Walton & Anne Jacobson, that shd be living at their several
Deaths, was void, as not being warranted by the Power given to her by the Will
of Sir Gilbert Heathcote, but that so much of the Appointment, as gave over the
sd Sevl Moieties to sd Hesther & Ann, on the respective deaths of either of them
without leaving any Child living at the time of such Death, was warranted by
the sd power, good, & therefore ordered that the Dividends of sd 2500£ shd be paid M.M.
during her life, the other Ya to sd Ly A. pr during her life accordg to Ly A.'s
Will, & after their Deaths, or the Death of either of them, any Person or Persons
interested in, or entitled to any part of sd E.J. Stock might apply to the Ct concerng
the same, as any of the Contingencies shd happen.

The other parcels of Stock consisting of 4288. 15. 0 S Sea Annt being the residue
of Ly Jacobsons Estate was devised as the former sum

Dr Wynne for Jo: Walton ..... The Question is wh: the Representative & next of Kin of John, admor of Hester
Walton his Wife, is entitled to the Admon de bonis, of Hester, or her next of
kin? which Goods did not fall in during Hester's life time?

Stat: of Frauds Ds Cont: extend to Husbands Admon to y Husb: because he has a sole property in his Wifes Goods

The Husband has undoubtedly a right to the Admon of his Wife in exclusion of
her next of kin by y 29 Car 2. because they are not mentioned 22 Car 2. which does
extend to y Estates of Femes Covert dyeing Intestate. Whatever is in possession or
reversion, must be the Husbands, who has a right to dispose thereof & if he dies
intestate, it wd go to his Admor. They say the right wch H. W. had to 2 Sums
of money by the two Wills, was not certain, but meerly contingent or eventuary
that therefore Mrs W's next of kin have a right to the Admon, & that her Husb:
did not transmit them to his Exor. But in truth 1250£ E.J. Stock, was an immed-
iate reversionary Interest depending on the life of one person only, the
Ct of Chancery has determind that Lady J. had exceeded her Power, this was certainly
a reversionary Interest transmissible to the Husband & by him to his Representative.

reversionary Int: transmissible ....

The Case of Scrubb v Wynne 1 Peer Wms 378. is in point, there it was determind
a Chose in action goes to the Representative of the Husband. The right of Admon
follows the Right to the Estate. Where Admon is granted to the Representative of

Chose en Action ....

the Husband, who is a Stranger. Where a Privity is continued, as in the case
the Wife, he must be a Trustee for the Representative of the Husband, so determ:
Mr Yorke has given
in the Case of Humphrey v Ballowin. Trin: 1 Geo: 2. B.R.
his opinion conformable thereto.

Dr Calvert for Exor Jacobson .....

an Admor conveys no privity to his Exor; an Admor is only considerd as a
Trustee. The Statute of Frauds is silent with respect to the Death of the Husband
therefore it remains upon the footing of the Statute of Henry 8. The Representative
of the Decd. 2 Sess Rul. S. 1701. Admon had been granted to
the Ct Creditor of the Husband, the Ct revoked it & granted it to the Brother of the
Wife. 8 Oct: 1713 1736

NB The Husb: de jure has a right to y Admon, in exclusion of y next of kin to y Wife, as y most faithfull Friend by
Ch: 21. Edw. 3. c. 11 — 2 Co. Car. 166 Johnson's Row — Coke Lib. A. fol. 51. And: Ognels Case. It is past out of doubt by 29 Car 2
because y Case of Femes Coverts Intestates not mentioned in 22 Car 2 — 29 Car 2 leaves it only looking it was by law the
Death that Adm

came by Appeal from Exeter, was between the Exor of the Wife & the Admor of the
Husband, from the Arches it went to the Delegates, who affirmd the Decree of the
Arches. These Cases I shd apprehend to be sufficient, we pray a general Admon, & say
these are Effects wch will not go to the Husband, who has only a contingent eventual
Interest, whilst Ly Morgan lives; By such Int: the Husband acquires no property-
It is not a chose en action, in wch he wd have a present right tho, not a present
possession

NB

Dr Wynne. Judge .. This Case has depended from 19 Decr last, there can be no detriment for me to
consider a little longer, of my Judgement: I shd always pay a great deference to
Authorities in this Ct tho perhaps I might be of a different opinion, if the
Point was open, I wish Dr Wynne wd look into the Cases cited by Dr Calvert
agt the last Session, when I will give Judgement. . . . . .

Dr Wynne .....
next of kin may declare he renounces and incautiously any time before Admon passes under Seal

Sir Walter Jones Exor &c

I apprehend the Retractation of Mr Jacobson is res integra, as the next of kin
may declare he renounced incautiously, at any time before Admon has passd
under Seal. The Question now before me, is, to whom the Admon de Bonis non
of Esther shall be granted, wh: to the Representative of her Husband, or to Mr
Jacobson her next of kin? the first claims it as being entitled to the Interest
in right of the Testator; the last as next of Kin to Esther, or under 31 Ed: 3.
as next Lawfull Friend. In this point the determinations are various;
it is scarce to be conceived how fallacious the Cases quoted from the Books
are, Compton & Wells 1701. There Admon was granted to a Creditor of
the Husband; the Ct revoked it, & granted Admon to the Wifes Brother:
Dr Andrew, in his Notes on that Case, says, the reason was, because there
were Choses in Action wch did not vest in the Husband, but went to the
next of kin of the Wife. Amherst v Amherst 1713. was determind on the same
Principles. So was Fowler & Downes & Powell & Fowler. Every thing in the Wife
vests in the Husband, who is considerd as her next of kin, as to her Choses en auter Droit. The late Determinations in Chancery have said so.
Hall v Coleman 1736. The Husband died without taking Admon, &
the Ds was, who shd have the simple Admon, it was decreed to the next of
kin of the Wife. Dr Bettesworth, Dean said the Ct was ministerial in the grant
of a simple Admon, & that it was not to attend the Interest, but to go to the next
kin of the Wife who wd be only a Trustee.
Kindleside v Cleaver. 1745. The Question was, wh: Admon de Bonis of many
Kindleside. shd be granted to the Exor of her Husband, or the Daughter of the
Wife who was her next of kin. Dean Bettesworth decreed Admon to the
Daughter of the Wife, saying, he saw no difference between an Admon de Bonis
& an original Admon, he did not think y Admon shd follow the Interest, as
Doubts may arise concerning the Interest, wch may lay the Ct under difficulty
when it has no Jurisdiction in that point, that the Ct was ministerial by
the Statute. 31 Ed: 3. has given it to the most lawfull Friend, & 31 H. 8. said
who that Friend is; consequently the next of kin will be a Trustee for the
ptys interested; this may be hard but the Law has said so. A Resid: Legatee,
who is equivalent to an Exor, is equally entitled to the Admon tho there shd
be no residue, it has been so determind in Ventris; because the Testator
had reposed that trust in him, to manage the Estate for the Benefit of
all Parties. As to me, the Ds is res judicata, in Kindleside & Cleaver, where
Dean Bettesworths Sentence was affirmd by the Delegates unanimously
1 July 1748 & 8 l nomine expensarum given to Kindleside. This Judgment
precludes me from entring into the Question; as I must always pay
great Regard to the Determination of the Supreme Ct, I decree the Admon
de Bonis of Esther, to her next of kin, in preference to the Representative of
the Husband, who is a Stranger. Where a Privity is continued, as in the case
of a Residuary Legatee, or an Exor, or an Admon with the Will annexed, it
is different &c.

to the Repres: of the Husband ....

NB There is another reason why at least a general Admon shd not be granted; for we say
there are Effects wch will not go to the Husband, as such; This was an uncertain
Interest, a contingent eventual Interest only, for during Lady Morgans life, she may
have children, the Husband, as such, dont acquire a property in an eventual
Interest; it is not like a Chose en Action, wherein he has a present right, this
not a present possession; here he has no right till after possibility of Issue
extinct of Lady Morgan; if therefore you are of Opinion, notwithstanding, to grant
Admon to y Exor, of the dec: Husb: I hope, you will decree only a limited one.

3d Sitt: East: T.? Admiralty ...

10

Mascoll agt Scaife

Dr Wynne. Fuller ..... Crespigny. Dr Harris

This Cause was in the first Instance determin at Nova Scotia on a Seizure made, in 1758 by his Majesty's Ship Vulture, Capt: Scaife, of the Schooner Love

Certificate discontinued ... & appeal

Mascoll de Burnos for illicit Trade: from that Sentence there was an Appeal, wch has been prosecuted, but the Certificate has been discontinued for 2 years, (the Question therefore is wh: the Appeal is not to be considered as deserted?) by reason of a Treaty of Agreement wch was on foot between the Proctors of the contending Parties.

Desertion of the appeal .....

Treaty of Agreat ..

Crespigny appears & alledges that he knew nothing of the Cause till within these ten days. For that it had been under Treaty of Agreement wch is now at an end, & prays that Fuller may be assigned to extend his Protest. Fuller alledges there was no Cause before the Ct, by reason of it being deserted, for 2 years, & that he knew nothing of the Agreement: The Affidavits of Capt: Scaife & his Agent Wm Maugar, were read, stating that they knew not or had given Orders for entring into such Treaty of Agreement. An Affidavit also of ..... was read, wch set forth that he knew there had been such a Treaty on foot

Dr Harris.

Their Affidavits do not contradict ours, for the Agreement was between the respective Proctors (Mr Crespigny Senr & Mr Farrar, who are both dead) they alledge it in the Continuation, & on this Acct Crespigny is justified in doing nothing for 2 years, the Treaty being now broke off, he has a right to proceed in his Appeal; The Inhibition, Monition, & Certificate not being continued, is no reason for decreeing the Appeal to be deserted. If the Proctors Protest is bad, he must appear: There is no use in continuing the Certificate from Ct day to Ct day The repetition of such Assignation to be nugatory, & no Practice can be right wch is not founded in Reason; It was so determind by the Lds. even where

No Certificate ...

there was no Certificate at all, in the Case of Capt Scaife's Love 1757, upon an Appeal from Gibraltar, the Monition & Inhibition being returnd without a Certificate, & tho Sir Geo. Lee spoke an Hour, with respect to the Practices: Ld Granville asked wh: the Effect of the Precep was obtaind, & being answered in the affirmative, said, a nicety of Practice ought not to be regarded, in Cases, where there was a sufficient Constat, the purpose being answerd, was all that was requisite, & that the minutiæ of Practice, was not to overset Essentials.

Dr Wynne

The Love was seized in 1758. the Monition was not returnd till 1761, & the Certificate was continued for some time, but since 1763 nothing has been done in the Cause, & there being no Continuations, it must be considerd at an End. The Dr wd willingly take it up, on the Reason of the Practice at large; I may agree with him, that no practice shd be received, wch is not consonant to reason, for this of Continuations is highly reasonable as I apprehend; it puts the Ct in mind, that such a Cause is before it, & the Ct has thereby an opportunity of calling it on: But for want of proper Continuations, the Ct is quite uninformd what Causes stand out; a Cause sleeps, & may rest for 7 Years, & then the Parties may take it up at pleasure: The Treaty shd have been alledgd & taken down in Acts of Ct: it is not sufficient for the Parties only to be satisfied, whilst they are in Treaty, & using the Authority of the Ct as a Bugbear to frighten each other, but it is for the Honor of the Ct, that Causes shd not appear in their Books many years, wch must be the case, if the Continuations are not regularly made, By Clarke, Graves & Ld Mansfield Stats. 32 H. 6 c. 5 & 25 Geo. 2 c. 19 Appeals must be finished within 3 years. Besides as to the Pretence of an Agreement, affids of the Principal persons interested have been read, saying, they are ignorant of any such Agreement. Indeed one Person swears he knew there was a Treaty on foot. But the Proctors were not authorized, & cd not of their own accord enter into such Agreat Fuller alledges, he knew of no such Accomodation. I say however there might have been a Treaty on foot between the Parties, yet the reason subsists for continuing the Cause, that it may appear in the Book, what the Motive was, for delaying the Conclusion; it is a Justification of the Ct to the World, it is a satisfaction to the Judge: In this Case the Hardship is very great, it is 8 years since the Sentence, Mr Farrer died in 1762, & nothing has been done since. Upon the whole, I Hope you will be of opinion the Cause is deserted.

Mr Bishop Dep: Register, was asked by the Judge, how the Practice stood with respect to Certificates, who said, all Certificates were continued of Course in the Admiralty Ct.

Sir Thos: Salisbury, decreed the Cause to go on, but gave no Costs of the motion

Cause to go on

Prerog: Ct.

Grant of Admon

Whiting v Willford in the Goods of Holland Wootton, Widow, Decd ... No 1

Dr Collier ... Dr Wynne.

Holland Wotton, Widow died intestate, the 16th Feb: 1763. leaving her Son Robt Holland Wootton an Infant aged 11 Yrs, & her Daughter Miles Pembroke Wotton, aged 10. Yrs, & no other relations: Admon was granted to Ann Whiting, who was an Acquaintance of the Deced, & had unknown to the Schoolmaster, where the Boy was educated, carried Robt Hld. to Drs Commons, & persuaded him to chuse her his Guardian, by virtue of wch she obtaind the Admon; afterwards a Caveat was entred by Wm Willford, as next Friend to the Minor, but no relation, who has persuaded the Boy to retract his Choice of Mrs Whiting, as his Gdn, to nominate him, by virtue whereof, he now prays the Admon granted to Mrs Whiting may be revoked, & a new Admon granted to him. Willford appeared to have been acquainted with & entrusted by the Decd to have got Robt a minor into the School belonging to Greenwich Hospital & to be bound in a Bond of 50£ to indemnify the Hospital. The Decd had put 50£ into his Hands, 22£ of wch he had repaid her.

Dr Collyer for Mrs Whiting urged the Admon being already granted to her, whom the Girl had chosen her Guardian, under whose Care the Mother had left her, that it was not necessary to cite Kindred & ask the Schoolmasters leave, that the Boy desird to chuse her his Guardian, as well as his Sisters. that the whole Effects did not amount to more than 60£. that Willford was indebted to the Estate

Dr Wynne for Willford. ... Increases of Admon, where it is applyd for by a Man & a Woman, the Ct always favors the Man, especially if the Woman is a Spinster, because she may marry, & then the Ct will not have the same Controll over her, besides, her being no Housekeeper, is another Objection.

Man preferred to a Woman, partic: if unmarried .....

Dr Hay Judge

So determind

If Admon had past the Seal without Objections it wd have stood. now the Cause is open before me. The Rule is to grant the Admon to the Man in preference of the Woman: here the Reason holds strongly for appointing Willford, because several Persons swear to his Honesty, & that he was in the Confidence of the Deced, has put her Son to School & been bound for him, before the Death of the Widow. Mrs Wh: shd not have taken the Boy without the Masters leave. As the Case is open, & Willford's Character unexceptionable, I think the Admon granted to Mrs Whiting shd be revoked, & a new Admon be granted to Willford, her being a Spinster is an Objection, as she may marry.

105

Consistory of London. Dr Bettesworth Chancellor

Tenill v Cecil

Dr Wynne .... Altham ..... Major. Dr Collyer ...

Sequestrator call'd to account .....

The Revd Chalmers Rector of Little Waltham & Vicar of Earls Colne in Essex, being indebted by Bond & Judgment 400£ to Jn. Tenill Esq his Livings were put under Sequestration, for a Debt of 250£ James Cecil to save Chalmers Credit, applied for & was appointed Sequestrator, being first bound with Mr Wallace, in a Bond, to render a true & faithfull Account to the Bp of London or his Vicar General & save harmless the Bp & all his Officers. Mr Cecil appears to have paid into the Hands of the late Mr Wm Skelton as Regr to the Bp of London 2 Different Sums, viz. 16. Nov: 1763. £84. 16. 3½ to wch he signd a Rect: Wm Skelton Registrar, & 16 Jan: 1764. £89. 0. 0. to wch he gave a Discharge, signed Wm Skelton. Mr Skelton is since dead, insolvent, without having paid over the 2d Money to Mr Tenill, who now cites Mr Cecil to bring in the Account of Monies received by him since he was named Sequestrator

Money paid to the Registrar out of Ct. if Legal Salaries allow'd Regr dies insolvent .....

Major appeared for Cecil, & brought in 2 Schedules, containing the Payments & Rect. Skelton's Receipts for the same. The Question now is whether these Rect & Receipts are to be considered only as a Private Transaction between S. & C. or as done in the Name & Behalf of Mr Tenill.

Dr Wynne for Mr Tenill. It is impossible to consider this as transacted by the Authority of the Ct, because it was not done in Ct, before the Judge, nor is Suggested so to have been in the Affidavits. It is contrary to the Canon that the Register shd make any Acct without the Judge being present, or any body for him. Extraordinary that a Lawyer & C. be obliged to pay the Money over again, or wh I must be left to his Remedy agt the Representatives of S. at all events he cant be charged for he has notified to Brograve & Adams that he has paid the Money to S. & B. had used his Diligence, the Money wd have been out of S.'s Hands, to whom & when made 14½ & 2d all clear ago.

The not proceed regularly - In Causes of Legacy, the Parties pay them into Ct into the Registrars hands who makes the Acts in the presence of the Judge, the Sequestrator may cite the party to see the money paid, & proceed in poena to pay it into Ct: or he might have retaind the Money in his own hands till he was cited to pay it. Tho the Sequestrator was bound to pay it to the Registrar yet that Transaction was to pass in Ct, not in Mr Skeltons private office; for then he can be considerd only as a private Person - Is not this Account to be audited, by somebody, who is to take it, Mr Cecil dont pretend, he gave Mr Ferrill notice, how does it appear to be the true Sum, The Account sho have been made before the Bp or his Vicar General - Mr Cecils presence is insufficient, tho his affidt stand uncontradicted; for tho Mr Ferrill had the notice, if he did not receive it he might come upon Cecil, at any time for the money. Mr Prograve swears positively, he did not understand till the 26 of June, that he had any right to receive the money by himself; if these were not his Sentiments, why sho he frequently solicit Cecil to go with him - It may be very hard upon Mr Cecil, but if he has paid it in his own wrong, & not taken the proper Steps to secure himself, as Reason & Caution must dictate he will be liable to pay it over again, & have his remedy agt Skelton, Representative -

Dr Collyer for Mr Cecil - The Authority of this Ct goes no further, than to appoint a Sequestrator for the Profits of the Living, & to make him account. He has given in an account, suppose he wd not part with the money, the Ct cannot oblige him to pay it into Ct: what he does with the money is no part of this Citation - It is said this is not done by Acts of Ct, & therefore a private Transaction. The Registrar carrys his office about with him, & is every where the Officer of the Ct - Is not money continually paid into the Registrars hands out of Ct - Mr Altham does not object to this account -

determine the Sequestrator must pay it over again

Dr Wadsworth Judge -

This Case is very particular: The Rev: Mr Chalmers is indebted by Bond to Mr Ferrill, to secure the payment whereof his 2 livings are sequestred - The Sequestration is not granted in the usual manner to the Churchwardens, but to Mr Cecil at his own request, who is an Acquaintance of Mr Chalmers, but not an Inhabitant of the pish - Mr Cecil is cited to account before the Ordinary, he brings 2 Schedules, containing the Account, & 2 Receipts for money paid into the hands of Mr Skelton - The Qu: is wh: these Schedules contain a satisfactory account, wh: the Ct can take Cognizance of payments not suggested to be made by its order? I think it is a private Transaction between S. & C, a Payment made by Mr Cecil in his own wrong - The Registrar can be considerd only as a private person out of Ct: the Ct wd be the proper parties to recover the money from Skelton & Cecil, if the money had been paid by their Order - Mr Cecil appears to have received money, & has given no regular account of his payments - I must order a fuller Account, & decree a Monition agt Mr Cecil to bring the money into Ct within a Month, but give no Costs. . . . .

Arches. 4 Sess: Hil: Term: 1765.

Nº 6 Rees v Rowlands

Dr Collyer — — Crickett . . . . Bishop . . Dr Burrell

This Cause in the first Instance was a Cause of Substraction of Legacy brought by Mary, the Wife of John Rees, a Legatee in the last Will of Wm Crumpton late of St Andrews pish in Worcester decd, agt Jn Rowlands Admor, with the Will annexd of the 3d decd, unadministred by Eliz: Crumpton the Relict & sole Exx: - The Citation was to exhibit an Inventory, & to answer to 3d Mary Rees in a Cause of Substraction of Legacy - Jn Rowlands appeard by his Proctor under Protestation, to the Citation, & alledgd, he was an Inhabt of Mabely in the Diocese of Hereford, & therefore unduly serve; the other Proctor alledgd, that he was found in the Diocese of Worcester, & there personally serv'd, & therefore the Service was good; & the Judge below, when he heard the pleas of both Proctors pronounced the Service to be good - Upon this Rowlands Proctor made another Protest, that the Pls name was Reece, & not Rees, this was also overruled 4 Nov: 1764, & the Cause ordered to be proceeded in; Hand for Rowland then declared he appealed, & Holyoake for many Reece had the Defts three called, & prayd him to be decreed excommunicate, on wch the Surrogate took time to deliberate to next Ct; And In the next Ct viz. 8 Nov: 1764 (without assigning any reason) the Surrogate at Hands Peton dismiss the Deft with Costs, in y presence of Holyoake protesting of a grievance & of appealing -

15 Dec: 1764. Holyoake serv'd the Judge with an Intibition -

Protest to the Jurisdiction . . . . overruled . . . . .

Protest to a misnomer overruled

1 Sess: Hil: Term: 21 Jan: 1765. The Intibition was returnd, when Bishop for the Appellate, appeard under protestation, & was assigne to extend his Protestation on the Peton of both Proctors the 3d Session, & the Certificate was continued to the same time; Collins on behalf of the Registrar of the Ct of Worcester, brot in the Proces

3 Sess: Hil: Term: Bishop alledged, this Cause is appealed on the part of Rees from a Grievance in dismissing Rowlands, on account of a misnomer of Rees, the party Agent, whose name was Reece, & that his Protest will appear from the proceedings in this Cause below, when duly transmitted, & when the merits of the Appeal come to be heard, & therefore reserving such Protest, until the hearing the Grievance, prayd a libel, & alledging the Proces is not full, as it dont appear on what foundation Rowlands was dismissed; prayd a Monition for Omissa, & the Judge at Bishops Peton, reserve his Protest until the hearing the Grievance, assigned Cricket to Libel next Ct, & decreed a Monition for Omissa retorn the Bye Day -

Bye Day after Hil Term - Bishop gave a negative Issue to the Libel; Alexander for Cricket alledged the Cause to be appealed from a Grievance, & the Judge at his Peton concluded the Cause, & assigned the same for Informations a Sentence in the Grievance on the first Session of next Term, saving the Appeal, Protest, & entire Proces -

1 Sess: East: Term 22 April. 1765. Bishop returnd a Monition for Omissa; Collins on behalf of the Reg: of the Ct below brought in the same, Cricket exhibited his Appeal, & Bishop was assigned to answer thereto next Ct, & the Cause was assigned for Sentence & Informations in the Grievance the 3d Sess: at the Peton of Cricket saving the entire Proces -

2 Sess: Bishop confessd the Subscription of the Notary publics, & Witnesses to the Appeal, & the Identity of the Persons therein named to be true.

By the Omissa it appears the Surrogate below dismissed the Cause for want of the Continuance of the Certificate

Discontinuance of certificate . . . .

Dr Burrell - The Continuance of Certificate of the Original Citation however it has been adopted by Practitioners is entirely useless & Nugatory, when the Ct is once in possession of the Cause by the Appearance of the Deft: In the present Case, the Appeal is from a Grievance, wch must be heard ex officio actis, & there is no Cause assigned in Acts of Ct for the Dismission, therefore it cant be supposed to be on account of the discontinuance & the Certificate, for the Certificate of the Judge in return to the Monition for Omissa, cant be regarded:

Citation . . . .

Dr Burrell - The Question now before the Ct is whether the Appellate was not entitled to his dismission in the Ct below, on account of the misnomer, if not, wh: the Judge below did right in dismissing the Deft with Costs on account of the Pls Proctor has discontinued the Certificate of the original Citation?

With respect to the first, I apprehend the Xtian & Surname of Pl & Deft ought to be inserted in every Citation, that their Identity may be ascertained & that Deft may know wh: he is the Person cited, & wh: there is any material Defect in the Proces, wch will direct him in the Issue he is to give - Conformable to this Doctrine we are told by Gail Lib: 3. Observ: 29. Nº 1. Citationis requisitum est, ut in ea, nomen, cognomen citandi, discrete exprimatur, ubi veritatis aequivocatio; ut cognoscat citandus, utrum citatio ipsum concernat, ubi frivolus obvietur, ne actor amplius variare possit . . . Gail Lib: 3. Obs: 50. Nº 5. Requiritur, ut in citatione, nomen, & cognomen, citantis, exprimatur; ut citatus deceat, qui ipsum citari curavit; certus sit, ad hoc deliberare seeum possit, an contendere, vel cedere velit; possint enim plures esse, ejusdem nominis, & pluralitas nominis induxit obscuritatem, & aliter citatus repetit sumptus lites & damna -

Upon this Principle, many Causes have been dismissed in the Spl Ct

1719 Clarke & Burwood shew real name was Barwood, It was determined to be a misnomer & the Cause was dismissed -

1732. Berry; Ct: Kennick & Ayres, where the real name was Lyres, the Citation was held void, & the Cause dismissed with Costs

July 2. 1735. Arches. Johnson, Richardson. Johnson was decreed excommunicate for Brawling in Church, with Costs; he appeald, to the Arches, & the dean observing he was styled Rector of Nelford in Norfolk viee Suffolk, sch aside the whole proceedings, tho the misnomer was not appeald from.

Nothing has been said, to make me doubt, about the Jurisdiction of the Ct, & y words of y Sequestration clearly point out, that y Sequestrator can account no where else.

In this Case it is very remarkable. the Misnomer is on the part of the Plt: whose Proctor appears to be ignorant of his Clients name tho' he had before taken out a Decree of marriage, & signed his name to a Bond for the due performance of the same. That the Plt: shd not be accurately acquainted with a Defts name is not surprizing but that he shd be ignorant of his own, is scarce to be credited. Having spoke to the Misnomer I proceed now to the Discontinuance of the Certificate, & as that stands on the same foundation, with the Certificate & Citation itself, it is necessary, something shd be said touching both as to the necessity of a Citation. I believe Dr Collyer will not controvert it, because it is one of the first principles of Justice, without which the Accused wd be cut off from an Opportunity of defending themselves - for want of this essential, the case of St Johns College Camb. Vide Phillimore 4 Mod 253. Comberback. 279. A. & W.m. Bx Regina agt the Master, Fellows & Scholars of St Johns Coll: in Cambridge about 20 Fellows refusing to take the Oaths at the Revolution, pursuant to Act of Parl: a Mandate was directed to the Master, from the Attg Gen: requiring him to declare their Fellowships void, & the Case had a long time depended, the Attr: Gen: at last demanded Sentence (Holt Lyons being then on the Bench) but he was answerd, that his Omission on not having cited the Fellows themselves was a fatal Error.

Discontinuance of Certificate

Citation

Certificate

As the Citation is necessary for the safety of the Defr: so is the Certificate of that Citation being duly servd for the Satisfaction of the Plt, that he may be satisfied with respect to the fairness & legality of the Citation. Every Writer on practice considers it in the same light as essential to the promotion of Justice.

1 Oughton. Tit: 23. Mandatarius tenetur personaliter interesse coram Judice, ad certificandum, & fidem faciendum, per Juramentum corporale; de executione Citationis & forma ejusdem.

Gail. Libs. Observ. 48. nº 2. In praxi diligenter ab Advocatis partium animadvertendum, an Citatis aliquo vitio laboret, sit ne Citatum ad comparendum non citra Citatio enim invalida, nullum producit effectum, nec constituit aliquem in mora; adeo absit super hac Citatione procedatur, Processus & Sententia nulla sint.

Conformable to this Doctrine, the case of Mees & Gratewood was determind in the Arches on Appeal from the Consistory of Wells.

On wch day Sutton obtaind a monition for payment of Costs then, Gratewood, being thrice called, & not appearing, the Judge at Suttons petition, who alledgd, the monition had been duly executed upwards of 15 Days, & that the Costs were not paid him or his Client & pronounced Gratewood contumacious, but reserved his pain, to Saturday next to the Adjournment.

6 May. 1749. On wch Day Gratewood being thrice called, not appearing, the Judge at Suttons petition (alledging the Costs taxd were not paid him, or his Client & accusing Act) pronounced him contumacious, & on pain of his Contumacy, decreed him to be excommunicated -

8 Decr: 1749. Gratewood is decreed to be excommunicated, on wch day Sutton procured a Schedule of Excommunication, & the Judge at his Petition, read the same, & decreed Excommunication to be published in the face of the Church -

From this Decree Gratewood appeals, on account of a Certificate not being given before the Decree of Excommunication past -

Fountain appeard for Mees & gave a negative Issue to the Libel

2 Sep. Trin: S. 1751 ... Fountain exhibited a special Proxy, under the hand & Seal of his Client, by virtue whereof he retracted the Negative Issue, & gave an Affirmative Issue to the Libel; & the Judge thereupon pronounced for the Appeal & condemnd Fountains Client in Costs.

Continuation of the Certificate

The Continuation of the Certificate appears to be founded on the same reasons & equally important & requisite: The Proctors & Doctors Commons have constantly & universally adopted it, & I cant suppose them so stupidious, as to continue any particular part of Practice, without they were convinced of its Utility - I do not find, after the strictest Search any Case wherein this Point has been called in Question, & what is very surprizing the Writers on Practice are silent in this respect, the only one I can find who speaks to it, is Consett: who Pa: 3. Ch: Sect: 6. §§ 3. 6. 7. 8. The Proctor who obtains Sentence, must procure a Monition, for payment of the Charges; wch must also contain the Excommunication, &c. duly executed on the party condemnd: but if the Pty obtaining such Decree, does not execute in due Time, or dont certify the Execution, so that the Certificate, upon such Execution, is discontinued, the Proctor must acquaint the Judge, that the Decree is perish without any Success.

In matrimonial Causes, where the Defr is excommunicated, for not appearing to a Citation, viâ mobis, & is afterwards, called by public Edict, to see Proceedings (with Intimation vse of the Judge in pain of this Contempt proceeds to a definitive Sentence, the Plts Proctor must take care, that nothing be done, but in pain of the Defts contempt, that this may be lawfully done, the Certificate of the 3rd Citatory Decree, shd be continued from one Ct day to another; for that Certificate being at a Period, or discontinued, the 3d Citatory Decree, is at a period also, & nothing can be done, so as that the Act may avail, in contempt of the Defr

If A cites B to an Inventory & account, & B puts A. to the proof of his Sickness, A Proctor must take care, to get the Certificate of the Citation continued from one Ct day to another, until the Interest be proved, wch being proved, the Defr may be excommunicated if he dont satisfy the Contents of the Mandate - If the Certificate of the Citation, be discontinued, the Defr cant be excommunicated, tho' he do not satisfy the Contents of the Mandate -

The Certificate being discontinued, there is no Cause before the Ct -

We never appeard except under protest; Roly sake shd have prayd our Proctor to be extended, & that we shd be assigned to appear absolutely

The Question before me, is wh: the Decree of the Surrogate in the Ct below, on the 8th of Novr 1764, (dismissing Rowland with Costs) was right: this depends on the Proceedings in the Cause: It is admitted, the Protest to the Jurisdiction was overruled & not appeald from: then Hand appears again under Protest, objects to the misnomer: What effect that shd have as to the Citation, I apprehend is not before me: In the Cases cited, all were dismissed for misnomers on the part of the Defr this Objn arises on the part of the Plt, on wch point I am not at Liberty now to determine, because that Objn has been overruled without appeal. The present Appeal being from a Grievance, I must judge ex tempore Acta; You must shew the Fact to be true, or are not justified in your Objection: I cant take notice of the Surrogates Certificate on the transmission of the Omissa, (that he dismissed the Cause on acct of the discontinuance of the Certificate) I am not to judge from his reasons but from what appeard on the Cause - In my opinion the Doctrine of continuing Certificates, shd hold only where no Appearance is given, when the Plts Proctor shd proceed agt the Defr for Contumacy, & continue the Certificate of the Citation, or he will not be entitld to the Excommunication - It is true, the Pty here appeard under protest; I look on an appearance under Protest, to be an Appearance before the Ct with respect to the Citation, saving the particular point of the Protest, wch is brought in Issue thereby - There is no Appeal from the Misnomer, if there had, I shd have given my opinion thereon - Roly sake shd have prayd Hand to be assigned, to extend his Protest, & appear absolutely, before he prayd him to be excommunicated -

When the Pty has appeard, the Certificate is only continued for greater caution, but is not necessary - I cant suppose the Surrogate dismiss'd the Cause for the reason assigned, as it dont appear in the Acts transmitted - I must therefore pronounce for the Appeal by Interlocutory, without Costs, & retain the Cause

Being asked his Opinion, by the Judge, said he apprehended the Continuance of the Certificate, after Appearance given, to be unnecessary. Wr Altham Proctor was of the same Sentiments, & added even tho, the Appearance was under Protest.

said, Sir Geo. Lee determind in the case of Wr Raymond & the Baron Von Watteville, that it was unnecessary to continue the Certificate of a Decree for Answers, wch of all Points, is the most necessary -

Prerogative Ct
1 Session. P. T. ...
Nuncupative Will.

Nº. Drs Collyer & Wynn - Pugolas v Pugolas. Drs Harris & Bever
... Major ... Fountain

Henry Pugolas of St Mary le Bone, Esq, a Widower, died without Children or Parents, leaving John Pugolas, his Brother, & Sarah Pugolas his Sister (now the Wife of Clk Wm Medley) his only next of kin, entitled to distribution, in case of an Intestacy

23 May 1764 the Deced being at his dwelling house at St Mary le Bone, (& sick of the Illness whereof he died about 8 o'clock the same Day) did between 5, 6 o'clock on the same day nuncupate his last Will & Testament, as follows, "I believe I shall dye; & if I do, I give "every thing I have to my Sister" meaning the aft Sarah Pugolas, wch he so nuncupated

in the presence of Tho: Collins, Wm Sutton, Dianna Abbess, & Susanna Pyolas: immediately after the Deed had so nuncupated his Will, it was reduced into writing as signd by the sd Tc. WS. & D. A.

26 May 1764 the sd nuncupative Will was reduced into a proper form, sworn to by sd Tc. WS. & A.

4 Sess: Easter Term The Caveat was entred by Sarah Pyolas, & was warnd by by J.P. the Brother of the dece, when the Ct assigns Fountain to bring in the Nuncupative Will, & to answer to Majors Clients Interest the next Ct.

1 Sess. Trin: J. Fountain brought in the nuncupative Will, & confessd Majors clients Interest, who was assigns to declare, wh: he opposed the same next Ct.

2 Sess: Major opposd the Will. Fountain propounded the same, & asserted he gave an Allon on Admission last Session, & was assigns to exhibit Scripts & Scrolls at the same Time - An Affid: of Script was afterwards brt in with the minute of the Nuncupative Will, & a draught of a Will wch the Dece never executed

1 Sess. Mr. J. Fountain brought in his Allon

2 Sess. . . . It was admitted WS. D.A. & S.P. were produced as Witnesses

3d Sess. — Tc. was also produced as a Witness on such Allon, & sworn. These Witnesses have been exam: Publication decreed, & the Cause assigns for Sentence -

From the Evidence the strongest proofs of Sanity will appear in the Testator, at the time he had nuncupated the Will propounded in the presence of 3 Witnesses in his last Illness, & in his Dwelling house, & every other requisite prescribed by the Statute

Henry Pyolas left 3975 £. appointed no Exr in his nuncupative Will. Mr Collins appears to have been very busy about the Deed, having visited him 5 times that day, saw there was a necessity for H.P. to have a Will, & owns he got a Will made. There is no Identity of this Nuncupative Will, when, where, & in whose presence it was made - It likewise is in some degree inofficious, as there appears no dispention between the Brothers, nothing to lead the Ct. to believe any thing had happend to induce the Dece to leave every thing to his Sister - no Stress is to be laid on the Evidence of Mrs Abbess, who says she knew Collins 9 months, by his visiting her Master, with whom she lived only 3 months.

Rogatio Testium

By the Statute of Frauds, there must be a rogatio Testium: Of the 4 Witnesses only 2. say the Words, "Take notice" were used, however numerous the Witnesses present may be, their Evidence will be useless, if there is no rogatio Testium, if they are not called upon, by the Dece to take notice that he dic nuncupated. NB. The Ct. wd not give the Council on the other Side the trouble to speak, being satisfied of the Nuncupation

Nuncupative Wills are authorized by the Statute, under restrictions. The Witnesses shd be called on to take notice, that such Nuncupation was his Will, therefore where there is no rogatio Testium, tho. 3 Witnesses are present, the Will wd not be good under the Statute of Frauds: in short all Solemnities must be fully complyd with - Here all the Witnesses to the Will, when it is reduced into writing, depose to the rogatio: If the Dece has called only on one of the Witnesses present, it is sufficient: Only 2 on their Examns speak to it - The Nurse confirms it - It is unnecessary the Witness shd speak the exact Words, the Statute says, "or to that effect" It is called inofficious, by Dr Collyer because the Brother is excluded - the Law of England allows it - I think the Evidence is sufficient to establish the Will, & the Statute is sufficiently complyd with, & therefore pronounce for this Nuncupative Will -

On further Security

V° 8

Dr Wynne ... Neale v Ell: Neale & Piper Dr Harris
Cumberlege ..... Grene .....

Dr Wynne ..... Neale died, leaving 6 Children, all Minors, three of them at 7 years of Age, elected, & the Judge assigns the Gr: father their Guardian for the purpose of citing Mrs Piper, Jol: Male, to give an Inventory, wch was exhibited 7 Jan: 1764 - It appeard the personal Estate amounted to £300. the Judge ordrd Grene's Securities to justify, & in failure thereof, that the Admr: shd find Sureties in £200. The Cause has continued in that State from Augt to the present time. Grene says his Client cant give better Security on Acct of her Coverture -

Dr Harris She is not cited to bring in the Admon, therefore it is not necessary for her to bring it in - Doubtfull wh: it can be revoked, & wd be very prejudicial to do so, as all her Acts wd be vacated thereby. She may call for a distribution -

I think it wd be proper for the Husband to join with her in giving Security. She stands at present in Contempt of the Ct

. In y^e Case of Minors if Ct is particular & attentive to prevent embezzlement &c & grants Admon, I shd be inclined to do it. But I think, the Ct have granted Admon to the Widow in Punctilio Officis. If this Objection had been made when Admon was applyd for, I might have granted to the Curator of the Minors, as next of Kin; but it is now granted, & she has given Security; she has been called upon for an Inventory, by wch the Estate appears more considerable, than it was first thought to be, & all I can do, is, at the Prayer of the Proctor, to proceed on the Contempt. She has not obeyd the Order of the Ct, to justify, or give farther Security - I am not authorized to revoke the Admon, but I may enforce my own Decrees -

Dr Harris Stott. v Stott. Dr Wynne.
Altham .. Stevens

N°9

Mrs Stott was sued in a Cause of Divorce by reason of Adultery with Persons unknown. The Evidence was, her being brought to bed of a Daughter, in the Absence of her Husband, Capt: Stott, who was proved to leave England in 1758. & not to return till 1760, & that she was not out of England during that Time, therefore they cd have no Commerce together - The Question therefore was, wh: such Evidence was sufficient to prove the Adultery?

Dr Wynne No Witness speaks to any particular fact, with any Person, at any time; nor to any indecent behavior in Mrs Stott - It is rested on Capt: Stotts Absence so long, as to render it impossible to be the Father: if this is proved, she must have had some Criminal Commerce; Critchett says Capt Stott was appd to command a Ship at Louisburg in June 58. & that he took possession thereof in August, & that he thinks Capt Stott could not be in England within the time specified - this Evidence is not conclusive -

Dr Harris I apprehend Capt: Stotts Absence is fully proved from Feb: 1758 to June 1759 by Kirkwood & Critchett carrys it on thence to 1760 - in [illegible] Case the Birth of a Child was determined to be sufficient Evidence

Sir Wm Scott Judge

Divorce pronounced for

No Fact of Adultery is attempted to be proved, except by Circumstances, wch must necessarily imply it; viz. the Birth of a Child in June 1759. To shew this, the time of Capt: Stotts Sailing is stated, his Continuance abroad & when he returnd; Kirkwood says he sailed 17 Feb: & arrived at Louisburg in June 1758, Critchett confirms K. (whose Evidence otherwise wd not be sufficient) the Birth of a Child during that Time is proved clearly. Therefore I think it right to pronounce for a separation by reason of Adultery Disproved he did not return till 1761, & that his Wife was never absent from England during that time

Trinity Term 1765 36 Sess. Prerog: Ct.

N°10

Dr Calvert Griffin & Griffin v Dr Wynne
Collins .. Fuller .... For Sentence

Frances Griffin of Grimsbury in Northamptonshire died suddenly December 26. 1763. intestate, without Parents, leaving the Revd James Griffin his only Brother, & several Nephews & Nieces entitled to Distribution

26 Feb: 1764. near 2 months after the death of Francis Griffin Admon issued under Seal to James Griffin the Brother, who continued in quiet possession till [illegible] Feb: 1765 following, when he was cited to bring in the Admon & to shew Cause why it shd not be revoked, & Probate of a pretended Will granted to the dece: & to Collins Exr therein named

A Sess: Easter. T. the Citation was returned

1 Sess: Trin: T. Fuller appeard for the Party cited, & both Proctors were assigned to bring in Affids of their respective Clients, as to Scripts & Scrolls, & Fuller was assigns to bring in the Admon at the same time

3 Sess: Trin: T. [July] Fuller brought in the Admon, with his Clients Affid: dated 3 July

4 Sess. . . . . Collins brought in his Clients Affid: of Script, with a Draft of a pretended Will annexed, & prayd Probate thereof to his Client.

Caveat Day, 17 Augt Fuller exhibd his Proxy & opposed the pretended Will marked A. . . .

1765 — 2 Sess. M. T. Collins propounded Schedule A

4 Sess: Easter T. The Cause was assigned for Sentence . .

Collins has examined 7 Witnesses on his Allon given 23 Jan: 1765 . .

Benjamin Applin in his deposition says, the Deed sent for him to make his Will, but in his Answer to the 6th Interrog: cant tell from whom he received the Message, or wh: it was verbal or written - Tho. the sending for Applin is fully pleaded in the Allon, no Witnesses are examined to the fact, nor any reason assigned why the Messenger was not examined - Applin dont swear the Instructions were read over

Bignall the 2d Witness differs from Applin & speaks more positively than he does himself—

The Paper A. appears to be Instructions for a Will & is as follows.

A. Francis Griffin of Grimsbury Northton Yeo-
as to my Freehold Lds at Farmboro' Warr: To Wm Griffin
and
my Leasehold Estate at Cleydon Oxon . . . . } his Sole of
Griffin ~~nephew~~ of Watergall & Richd
his Hrs &c &c

The Devise to his Father in trust till 21 & to apply—
Proof for Breeding up Wm
Provided that if Wm Thos from ill behaviour be—
undeserving of this Devise Then he gives same to such—
of his Sons & their Hrs &c as he Father shall appoint
As to q personals to Jas Rd subject to Legacs
Wm Griffith Son of my Nephew Tho Griffin of Kidwell
Warr Yeom 20 with Int a 4 within 12 mos
Judith Griffin Daur of Jas Griffin of Horley Oxs Miller
40 with Int a 4 within 12 mos
Rd Exr

Dr Calvert) for Richard Griffin.

Mr Applin appears to have taken the Instructions from the Dece mouth, carried them home & was to return them by 5 or 6 o'clock— The Clark brought them at 7 the next morning, when he was told G. was dead—
The Deed was blooded soon after the Attorney left him & said he believe he shd sleep if he went to Bed— 2 Persons sat up with him, who saw no alteration till within 1/2 an Hour of his death. We have pleaded Declarations of affection to the said Rd Griffin, so that it rests on the Testimony of the 7 Witnesses exam: on the Allon given in 23 Jan: 1765.

Dr Wynne for James Griffin

Applin says it was his general Practice to read over the Instructions, but can't positively say whether he did or not, he believes the Letters Rd Exr were inserted by him for his recollection, & that they mean Richard Griffin, because if any other person had been meant he shd have wrote the name at length— Bignall speaks positively, he verily believes the Dece intended Rd Griffith the Exor, because, when the Deed was asked, whom he wd have Exor, he said Richard, & no other Person had been named, & he had shewn several Instances of regard for Richard who propounds this Paper
Applin believes these were the Instructions given him by the Dece, because they are of his own hand writing, & his Clerk Bignall was present—

Cr Interrog. The Instructions being shewn, that he made the alterations at the time he received them.
2d do — That he received a message, but can't say whether verbal or Written or by whom.
3d do — Verily believes he read them over, in the form, manner & words they now appear, except those in the margin
Bignal to Interrog . . . says the Instructions were read over, but can't say wh: as they now appear because he did not look over Applin.

Dr Calvert

The Paper propounded contains only Instructions given to an attorney: Unexecuted Papers must be clearly proved; the Presumption being agt them; the Onus probandi lies on the Propounder: If the Deed fixed a time for executing & nothing appears, but that the Hand of God prevented the Execution, the Intention of the Dec: will be supposed to have continued till his Death
Woodman & Woodman 1752. Instructions were taken by an Attorney who was sent to several times, talked to about his Will, the Sanity of the Testator being proved. Sir Geo Lee pronounced for them & quoted so well known, the Cases of
Wilkenson & Wolsley. Prerog:
Sellers & Garnett. Delegates. . . .
If Instructions therefore can be established, provided they are proved, the next Question is wh: we have made such necessary proof. I hope you will think we have, & that the motion came from the Dec: himself:
Applin speaks very cautiously, by reason of the Distance of Time being near 2 years, & the Variety of Affairs wch have since intervened.

The Sanity is proved by Bignall, & all the Witnesses confirm the account that the Deed was the Manner of the Transaction. The Identity is proved by Applin who says the Paper was wrote by himself, & Bignell his Clerk who is well acquainted with Applins Handwriting, & that W—C was by him altered to Watergall. If it is asked why the Paper was not executed, the Answer is obvious, the Deed intended it, but was prevented by Death. As to the Paper, it is made in favor of one whom the Dece educated from 7 years of age, settled him in 2 Farms, released one to him, & behaved with uninterrupted affection towards him, till his death. Upon the whole we hope you will pronounce in favor of the Will & decree Probate to Rd Griffin.

Dr Wynne) It appears extraordinary that A. G. has delayd so long to apply for the Probat, & allow the next of kin to obtain Admon. In this Will almost all the Relations are past over.
Imperfect Papers have unquestionably been pronounced for, but then there was no doubt about them so far as they went, & Parol Evidence was only called in Aid of that wch on the face of it did not support them. Parol Evidence where a Paper is unintelligible on account of a Chasm or nonsence, you will not allow Evidence to explain what can have no meaning. Supposing Parole Evidence is to be receivd, we will examine the Deposition— Applin speaks not as of the fact was impress on his memory but from the reference; Bignal speaks in the same manner, how what opinion can the Ct have of a Man's Accuracy, who is so incautious as when he is taking Instructions, to omit asking for the Surname of him to whom so considerable a share is given—
The Personals to Rd Rd. They have not even pleaded that Rd Griffin was the Person to whom the Personals are given. There is no devise to Rd only descriptive of Wm's Father. You must prove that the Deed had an Intent of making a Will that the Instructions were the same: no other Proof than there being those wrote down were read— It is usual for Witnesses to give some account of the Words of the Expression of Affections, that the Ct might compare the Evidence with the Paper itself. Applin believes they were such Instructions as the Deed cod have read over— What Intention did he shew to execute them, & step did he take, the Deed dont appear to have spoke a word relative thereto. If he was doing an Act he was anxious about, it is natural he shd have said something to the Apothecary & Father of the Legatee—
Dr Calvert) I agree with the Dr that parole Evidence can be received only in dubious Cases. It must be clear to you that the Letters standing in the Memorandum, must stand for an Exor on account of the necessity, tho it cod not denote an Exor if it stood single in another Paper. The Question is, who that Exor is. It is objected Mr Applin is not positive enough. This not likely a Man of Business, cod write a name at length twice, Rd Griffin being once named, Rd must refer to him only. The Attorney speaks to his belief & corroborates that Belief, by assigning the reason of it—
Dr Hay. Judge—
The Question arises on the validity of the Will, why Mr Rd Griffin, did not apply before, or how prevented, is not my Business to enquire) He might think it cod not be established— I am to determine from the Paper & the Evidence, This disadvantageous to the Proponent, that the Witnesses are not so accurate as in recenti actu; I must take it on y fact, that a Message went from the Deed to Mr Applin, to make his Will. There is no doubt of the Deeds Capacity: after dinner Applin & Bignell are left alone with him. A. swears the Deed said he wanted to make his Will & to dispose of what he had. His first proposition was to bring the Will at 5 in the Afternoon if any Alteration happened, otherwise the next morn: there is a little variation wh: y Dec: or A. desired the paper to be sent— Gardiner sat up with him, there was no immediate change till 1/2 an Hour before he died— The 2. is, does the Paper stand in a light to be established?
The Law of England admits unexecuted Papers, the presumption is

indied only in favor of those that are executed; Unexecuted Papers are recalled or repeald according to the Circumstances of them, they are never pronounced upon while the Act of God alone has prevented their being carried into Execution; where the presumption is, the Testator intended it. The Case quoted by Dr Calvert is entirely in point, much stronger than the present Case. A man sent for, & who gave verbal directions which were not wrote down in his presence, could not be read, he drew the Will from recollection, the Will was brought & part wrote after he died. The Delegates did not pronounce for that Party, but so far as it went declared it was a written & not a nuncupative Will, tho it was not written in the presence of, or ever read over to, the Testator, the Ct declared for the Paper, because the Act of God prevented the Execution; Mr Applins account is fair, the Instructions he verily believes he read to the Deed, because there was a real & Copyhold Estate as well as personals. Bignell swears positively they were read over to the Deed. The next Qu is wh: the Paper itself is liable to any Objection, so as to distinguish it from others. It is contended it can't be explained, But the Case of Watkinson & Bayley, wch began in the Consistory of Chester & is still stronger — Peter Bayley died 6 Nov: 1755. he sent for 4 parish Clk. before his death to make his Will, who took his Instructions, read them to y Decd: who approved them, but died before the Will was made. It contained Devises of landed Estates, Bequests to different Persons. & Bayley & H. W. were appointed Exors, Resid: Legi from Chester it was appealed to York, where Watkinson was admitted to plead parole Evidence, & the Writer to explain that Henry Watkinson was the person meant by H. W. & Sentence passed in favor of the Will in 3 Cts. The present Case is not so uncertain: Minutes are always taken shortly by an Att: if taken at length it wd be a compleat Will: Ed Griffin is very particularly described in the Beginning of y Will The Nephew, the Place, & the Father of the Person are first named. As to the personals, it is said, Rd can mean only the Rd Griffin before named, & that is he is, is explained, by the reference of the word said. He must have had Admon with the Will annexd if there had been no Exor. It is as plain from the Paper, that he is the Exor. Mr Applin is explicit enough as to the Appointment in the Schedule; & from the Evidence I am clear, he wd have executed it if he had survived, & that he was prevented by the Act of God only. The Ct wd be cautious if any thing appeard to shew the Intention of the Testator was not permanent. If the Paper had been brought the next morning & not executed, there wd have been grounds for doubting the permanency, but no such circumstance appears, where the Act of God only, intervenes to prevent the Execution, there is no Instance, where such Defect of Execution has defeated the Intention of the Testator in the Instructions, therefore I revoke the Admon, & decree the Probate, as prayd, without Costs.

went from thence to York, so to the Delegates

No 11 Woodward v Sanders

altham .. Dr Harris .... Dr Wynne Bishop.

Dr Wynne) Anne Ward, the party decd: died a widow, (leaving many Sanders, widow, her Daughter, only Child, & several Grand Children) 20 Feb. 1765.. 16 Feb: a Will was obtained from her in favor of Mr Woodward, an entire Stranger in Blood, who is therein appointed sole Exor & resid: Legatee: the Will has been propounded in a common Condidit, & Commission granted for examn of Witnesses at Worcester, wch Bishop alledges is not duly executed, because there are 4 subscribing Witnesses & that Altham's party has not examined Rich: Cointe, one of them without assigning a reason for such omission, on y return of the Certificate, & has examined many Hales, who is no subscribing Witness, Altham says Rd Cointe was not produced, we say he is, by y Common Condidit, that Bishop is entitled to examine him on Interrog: — It may be said, the ply propounding, may produce whom he pleases

subscribing Wit not examind. if Deft may examine him on Interrogs ....

But this will not avail, when a Deed is subscribed, because it is not the party producing, but he who made the paper, any party interested & controverting it may insist on the Evidence of all the subscribing parties. At Common Law, I am informed, if there are 10 Witnesses to a Bond, such Bond can't be put in Suit as to the Penalty, unless all the Witnesses are produced & examined, or a reason assigned why they are not — Dr Harris) This is a new case, no Pty before, has pointed out to his Opponent what Witnesses he shall examine, other Witnesses, besides the subscribing are often examined; it is too early to say we have not produced sufficient Evidence: suppose the Witness was tampered with it wd be hard on us to be obliged to produce him — They may produce & examine him in chief, wch is better than on Interrog: The Case at common Law is not ascertained, & may not be true — I hope you will not oblige us to produce this Witness, to examine the other three — Dr Hay. Judge) Every Party may produce whom he pleases, & the other party ought not to direct him, Different in the case of Instrumentary Witnesses, of great consequence; wh: the Opponent may examine Witnesses on Interrog: if they are not produced & examined by the other Pty. The Case is entirely new. The Plt will not produce all Witnesses, saying the Deft may plead, Deft declines pleading, but wd discover the Truth by Interrog: I wish to know how the practice stands, wh: a Defendant may examine all Witnesses on Interrog: whom the Plt will not produce: Dyndal, Kings Proctor said) There are Instances, where a Witness has been produced & not examined by the Plt: on wch the Deft has prayd leave to examine such Witness on Interrog: & been allowed so to do. There is no case, wherein a Party has been obliged to produce a Witness, or wherein, if not produced, he has examined that Witness upon Interrog: —

A Party has a Term what Witnesses he shall establish his Case & on what Witnesses they shall examine

alder. in case of subscribing Witnesses

Instrumentary Witnesses. ...

Sentence deferd

Judge. Dr Hay

Every party may call what Witnesses he pleases: the other shd not tell him, who he is to produce; but tho this is generally true, yet the reasoning may be different as to instrumentary Witnesses, who appear to have attested: the Questions now are wh: the party producing the Paper, shall not produce all the Witnesses appearing on the face of it, & wh: the other Party, upon his not producing them, may not examine them on Interrog: in general the subscribg Witnesses are all produced, here one is omitted: the Plt will not produce as Witness, saying that the Deft may plead & produce him himself in Chief: this the Deft declines, but wd discover the Truth from Interrog: It is a point of great consequence, the Case is new, & I wish to know what has been the Practice: If it agreable to Practice not to produce the Witnesses subscribing, & as such involuntary, & may not the Opposer of a Will examine him upon Interrog: tho not produced by the Party propounding it: I believe at Common Law, the subscribing Witnesses to an Instrument must be produced, if the Factum is disputed: If the same Evidence can be obtained by examineing the Witness upon Interrog: I do not think it reasonable to burthen the party proponent with the superfluous expence of producing him; I wd not debar the Opposer of y benefit of examining a Common Witness, nor is it reasonable to oblige the Propounder to produce a Witness, who perhaps has been tampered with I see Inconveniences both ways, so shall take time to the Bye Day.

Sentence deferd to the Bye Day....

See Sentence Fol. 24
See Fol. 112. On admission of an Allon

Mic: T. 3 Geo: 1764
Consistory of London

No 12

Schaw Guardian of Schaw v. Schaw al. Page

Stevens — Dr Collyer & Wynn — Dr Smallbroke & Harris — Collins

Dr Smallbroke.... I am Council for Mr Shaw, who has been cited into this Ct by the Father as Guardian to his Son, in a Cause of nullity of marriage, under 26 Geo. 2 by reason of minority, & being married without his the fathers Consent: Collins appears for Mrs Schaw under Protest, "that the Citation issued without Mr Schaw junior's Consent." Tho, the father in the present case brings the Suite, as the natural Guardian of his Son, & in Ld Courtneys case it was brought by Ld Aylesford, as the Testamentary Guardian, I shall rest the objections upon other reasoning, exclusive too of the Objections stated in the Proctor's Act: after the Point has been so fully argued before you in Ld Courtneys case, I do not think it decent to argue it again on the same grounds, but shall submit to your Judgement if there is any difference. Ld Ct Case & the present, & shall rest any distinction possible to be made, with the Ct. The Annulling a marriage where the parties have cohabited, is a very serious Point; even the bringing the Suite for that purpose is a Slur upon both parties concerned, & is always attended with so many disagreable circumstances, that the Ct will not suffer Citations to issue without proper grounds. I hope you will not think them sufficient in the present case. One part of the Proceedings is gone into dissuser, wch had been much better preserved, that is, a Petition of the Party praying a Citation, stating the nature of y Suite & the grounds of bringing it; the Ct had hereby an opportunity of forming a Judgement, as to the propriety & foundation of it, & granting or refuseing such Citation; that being disused, nothing remains, but to stop the Suite at the return of the Citation, a Reparation very inadequate to the Injury: The Ct will judge wh it shd not stop, upon the face of it: The Proctor has stated in his Act, that his Client was married by Licence, on Affidt of his being of full age; but the Father only avers, that his Son is under age, therefore from their own shewing there is a defect, viz. only the averment agt y Affidavit: I will allow that in common Cases, the Father is more entitled than the Son, but not in Judicial Proceedings, & when there is only an averment agt an Affidt he might have stood upon an equal footing with his Son, but as he does not, the Ct will not prefer the Fathers bare Assertion to his Sons Oath

Dr Harris..... I apprehend a Testamentary Guardian, is of a higher nature than a natural Guardian, by the Statute Car: 2. Upon this Ld Aylesford founded his right to institute the Suite in Ld Cs Case: they can't shew a Precedent where a Suite has been brought by a natural Guardian, assigned by the Ct, at the Election of the Minor. I do not say, a minor can chuse without the Approbation of the Ct; or the Ct appoint agt the Consent of the Minor. By the Stat: the Ct is discretionary —

By our Act we say Mr Schaw was a major: a major can't bring a Suite by his Guardian; & tho, they might prove hereafter, that he was a minor, yet there ought to be an Affidt previous to the Suite — whoever brings a Cause of nullity, must confess the marriage, else a Cause of Jactitation is the proper Suite. In Trent & Wilden the Woman did not swear falsely, the Man took out the Licence — The Minor is obliged to give his Answers, as well as the Guardian, you cd not allow him to prove himself perjured —

Dr Collyer..... This Suite is brought by the Guardian, to answer in a Cause of nullity, & I hope you will think it well instituted: The Gentlemen chuse to wave the Protest, they set forth the Courtship, Consent of the Woman, Licence, Consummation, & Cohabitation: they do not dispute the Jurisdiction: The Youth was inveigled to take a solemn Oath before a Surrogate; the Protest says, the Citation issued falsely before a Surrogate; the Protest says, the Citation issued falsely without the Consent of the Minor: can it be supposed that a Woman who had art enough to induce Mr Schaw to take a false Oath, wd not prevent the Citon issueing with his Consent? but the Consent of the Minor is immaterial: In Rudner & Jordan it was determined, that, the Father has a natural right: the Intent of the Statute, was to prevent the mixture of Noble & Plebeian blood, wch must be absolutely defeated, if the Minor's Consent was necessary — Tho. this may be the first Instance of a Cause of Nullity, I do not know, but it is better brought than indirectly by a Jactitation, for if she has never jactitated, the Cause drops: As to the fathers right to bring a Suite, in a Cause of Jactitation, it has been determined on solemn Argument, by Sir Geo Lee in Butler v Dolben, that a Father, as the natural Guardian of his Child, was interested to institute such a Suite in his Child's name, & whether it be, a Cause of Nullity or Jactitation, the reason & manner of his being interested, is the same —

Dr Wynn..... I do not know that a Person is obliged to bring Affidavits at the Institution of a Cause, afterwards indeed they are, in the Proof, because no one can be a Witness in his own Cause: It is said, there is no Instance of a Suite of Nullity being brought by a natural Guardian, perhaps not but it wd be very extraordinary, if a Father cd give a power by will wch he had not himself; & tho Mr Schaw alledged himself to be a major, in proper time, we shall produce better Evidence than Affidavits, viz. the Parish Registers, to prove he is a Minor: In respect to the Sort of Suite to be instituted, the very small number of Suites, since the Statute was made, whereon this is founded wd not be sufficient to establish a matter of Practice, wch being open, we were at Liberty to chuse, wh we proceed by a Suite of Nullity or Jactitation: the Method we have taken is surely the most proper, both as it is conformable to the Style of the Act (null & void) & it is more direct: for in Jactitation, the Ct in fact gives no Sentence of Nullity; it never regularly comes in question, so that it only declares it by Implication, by ordering the Party to jactitate no more: & tho in Ld Courtneys Case, the Suite of Jactitation was preferred, no Inference can from thence be drawn, that it was either the best or the most proper: It might be a Question wh Marriages in Scotland are valid or not, therefore it cd not be brought in this manner: upon the whole, Sir, I hope, you will be of opinion, that there is not that weight in the Objections, as that Mrs Schaw shd not appear absolutely —

Judge. The Question is, wh Mrs Schaw shd be assigned to appear absolutely?

Dr Bettesworth Besides the Protest, that the Citation issued without the Consent of the minor (wch Jam of opinion dont affect it) there have been 3 principal Objections made by the Council 1. That the Suite was not brought by a proper Person: 2. That it was not brought on proper Grounds. 3 That it shd have been a Suite of a different nature: — I cannot think the first well founded, for the Father has the greatest Interest in his Sons marriage, more than any testamentary Guardian, or ad Litem, can have, therefore he must be a proper person to institute the Suite: & the distinction between a testamentary & natural Guardian, cannot be admitted, for it wd be extraordinary Doctrine, that the Delegator shd have less power than the Delegate — As to the 2d Obj: that there are not sufficient Grounds for the Citation, for want of the Father's Affidt that his Son is a Minor; there is, in my opinion, no necessity for one, to enable the Father to take out the Citation; that must remain for the

Merits— As to the 2d. relative to the nature of the Suite, I think the Party may proceed either way: by Suite of Jactitation or Nullity: the Determination is in effect the same. in both Cases; in the former, the Eventually & by Implication declares a nullity, yet the reason of that Sentence does not appear; the Cause of it is not declared. it might be either Consanguinity or Frigidity: I rather think this method of proceeding in the nullity more eligible, that with is pointed out by the Act of Parl: with enacts a Penalty, of with the Sentence of this is declaratory, I therefore overrule Mrs Page's protest, & order her to appear absolutely—

Delegates Feb. 19. 1765

1713 Anne Cs. Anglesey. v. Juliana Cs. Anglesey.

Bishop. Dr Collyer Dr Clarke

Assigned for Serjt's Inn

Dr Collyer..... Jam Council for Anne dowager Lady Anglesey, Widow of Richd Earl of Anglesey, agt Juliana stileing herself Lady Anglesey Widow of the said decd Richd E. of A. The Appeal is from the Prerogative Ct of Dublin, in a cause originally instituted upon the Grant of Probate or Admon to the late Richd E. of A. between Juliana Donavan, styleing herself Widow & Extx & my Client the real Widow — In April 1759. the Decd made a Will, appointg Juliana his sole Extx by the description of Cs of A: in Feb: 1761. E. Richd died: On his death, Caveats being entred on behalf of my Client & her 3 Daughters, Dorothy Dubois, Caroline White, & Elizth Hide, the Caveats were warned by Juliana, & Citation agt Cs Anne & her daughters, with Intimation to shew cause, why Probate & Admon shd not be granted to Juliana as Widow & Extx: the respective Proctors were assigned to alledge their Clients Interests: Juliana's Proctor lodged the Will in the Registry, & gave an Allon, pleading the Execution Sanity &c An Answer was given by Anne's Proctor, & an Allon, also of 5 Articles, pleading that the Decd had Goods in diver Dioceses, & was therefore subject to the Jurisdiction, & propounded her Interest: Juliana's Proctor exhibited Exceptions in writing" that his party was not obliged to join Issue with Anne" "the pretended Widow, for that she never was married or contracted" "to the Decd: therefore has no right to oppose the Will." The time for Answers was continued 2 Court days, when Anne's Proctor gave an Allon pleading Courtship, Cohabitation, & Acknowledgement of her & the Children: that Anne obtained a Sentence for Separation by reason of Adultery: that the Decd was condemned in Costs of Suite & for nonpayment was excommunicated; that he died excommunicate; & that Persons excommunicate are intestable, therefore the Will null & void: Juliana gave a peremptory Plea, That the Decd was previously married to another Woman, that there was Consummation, Cohabitation, & Reputation. that she died intestate in 1741. & that Ld A. obtained Admon to her as Husb: that therefore Anne's marriage was void, being pleaded to have been in 1727; whereas she covenanted in an Instrument dated 22 Decr 1726 never to trouble him: Juliana joined issue on the point of marriage: an Allon was offerd by Anne, pleading the Deed of Settlement, to shew she was his Wife; they pleaded that Ld & the other Woman in 1729 put in an Answer in Chancery upon their Honor: the Judge allowing the Exception, rejected this Allon pleading a Deed as a circumstance only to shew that Earl Richd acknowledged Ly Anne & her Children as his lawfull Wife & Issue: hereupon it was appealed, & a Petn being presented to Ld Chancellor, a Caveat was entred by Juliana & Commission prayd to Ireland: the Ld Chancellor appointed to hear all parties, & the Qu: was, wh: the Commission shd be granted

here, or in Ireland; his Dr said it was an affair of consequence an Earldom & great Estate was in dispute, therefore he wd not trust it out of the Kingdom; he was very explicit; said the Judge in Ireland had neither Law nor Equity to support him, & wondered what pretence he cd have for rejecting the Allon, for that the Copy authenticated was as good as the Original.....

Dr Clarke... Jam Council for Juliana Cs of Anglesey, agt Anne Simpson the pretended Widow of Richd E. of A. & her 3 Daughters. the Dr has stated the proceedings in the Original Cause so fully, that I shall trouble the Ct long: the Admission of the Allon now in question, consisted of 3 Articles, pleading in behalf of Anne, 1 that the decd intending to provide for her as his Wife, did charge his Lands with 2000£ pln: as a Jointure, & with 10000 - 8000. & 7000, for his Daughters according to their Ldships: 2 That the Daughters are therefore parties. 3 pleaded that a Copy of the Deed was thereunto annexd: You will observe, It was a Copy authenticated only by one Witness, & the Exceptions made by my Client were, that it is obscure, & such as she is not obliged to answer: that the Original Deed is not annexed, that the Copy is insufficient. The Qu: now is only wh: the Judge did right in rejecting this Allegation, with nothing but the Copy of the Deed pleaded & annexd.

Assigned to Serjeants Inn. by Comrs Dr Bucanay & Harris Meachan

Prerogative Ct

1714 Foster v Wright See Fol. 86

Term. Trin: 2 Sess: 1765

On Admission of Graphic exceptive Allon

Bishop Drs Marriott: Wynne Drs Collyer. Harris Major

Dr Collyer... Thos Burrell Esq of Ryall in Rutlandshire, is the Decd he made Mrs Foster Resid: 3 Leg: who has propounded a Will & Codicil dated 17 Feb: 1743 & is opposed by my Client Mrs Wright, as 2d Cousin to the decd they have examined their Witnesses & Publication has passed & we are now before you with an exceptive Allegation to the two Witnesses John Gann & J. Skief: as to Gann, we plead his swearing that the name subscribed to the Will & Codicil, was his Fathers hand writing, whereas they are dated a year & half after his Fathers Death. Our Exception to Skief is, that he has sworn to the Capacity of the Decd after having given a declaration under his hand, in the presence of 2 Witnesses, that he was not capable. This Allon is exceptive to these 2 Witnesses; the one deposeing to the Sanity of the Decd the other to the hand writing of a subscribing Witness: The matter pleaded is so very essential to the Cause, that I hope, Sir, you will be of opinion, this Allon is proper to be admitted.

Dr Marriott: K's advocate Jam Council for Mrs Foster: The principal Objection I have to make, to the Admission of this Allegation, is that it is quite unnecessary to give an exceptive Plea: for unless any Exceptions can be brought to the Competency of Witnesses, these arising from little variations are proper for the hearing, upon the merits. The Station of the Witness is to be considered, he was only a Farmer; This is only a Declaration opposed to a Deposition upon Oath. It was a very singular Transaction: the Attorney goes to Mr Skief, & over a Bottle contrives to turn the Discourse upon Mr Burrell's Sanity, & gets him to sign a Paper, that the Decd was insane: but 16 days after he deposes to his Sanity; when he was sober, & had time to recollect himself, he deposes contrary to that extorted Declaration: the Nature of the Transaction proves he was drawn

let them make the most of it, there can be no pretence to say this Witness is perjured, for this was, from their own account no Declaration upon Oath; it was only an extrajudicial Examination by Persons, who had no right to take it, & cd have no good view in doing it: If this Allon is to be admitted, there will be no end of Pleas; Delay & Expence must necessarily arise; for we may, nay must give a corroborating Allegation, to establish the Credit of these 2 Witnesses. I hope therefore &c

Dr Wynne. This is an Allon to affect the Characters of the Witnesses out of their Depons: that Jn Gann Senr died in April 1743. being said to have subscribed a Will of the 17th Feb: 1744/5 & that they Son says he believes the said name, to be his Father's Hand writing: What effect can be obtained out of an Allon, to establish a Fact, such is in the Depon of the Son himself, who says his Father died in April 1743. there is no need of an Allon — The Article as to Chief pleads an extraordinary Transaction, of Mr John Wyche: the writing down what past over a Bottle, taking care to have the Paper witnessed, obtained too under his hand under a forced Consent; are very unfavorable Circumstances: Is it to be supposed that a man who was sober, cd possibly make such a declaration, & then 16 days after make a deposition directly contrary to that Declaration? But however I beg leave, to say, that in point of Law, an extrajudicial Declaration cannot defeat a solemn Depon: In Sir Wm Wolsley's case before Sir Geo Lee, no regard was paid to an Affidt contrary to the Regr for Witnesses are not suffered to averr agt their own Act —

Dr Collyer... We have given this Allon to defeat the Credibility of the Witnesses, not for delay, as the King's Advocate suggested: the Declaration has the appearance of being solemnly & deliberately made: there are 2 Witnesses to it: & that one of them is the Attorney who drew it, can be no Objection: it does not appear that Chief was drunk, or that he was tampered with; the Declaration is very material to the Competency: In the Cases of Sir Wm Wolsley & Tuit v Tuit the Exception was, that a man shd not bear witness to his own Turpitude

Dr Harris... What we have pleaded in this Allegation, are facts necessary to come before the Ct by Plea, & much more proper in this way, than at the hearing, on the merits; As to the Argument of the Improbability of a Persons making a Declaration so contrary to a subsequent Depon, the presumptions wd rather be, that the latter was made on being tampered with; for if he was drunk, wch nowhere appears, 16 days were more than sufficient to grow sober, but he never come in all that time contradicted the Declaration —

Judge... } Dr Hay... } The Allon now before me, is an exceptive Allon; the matter of it might not have come to Mrs Wright's knowledge before; but even had it been known to her, it was proper to plead as a Fact, that the Father of Gann died in 1743. It wd be an Observation out of the Depon, upon the Merits: The Proctor does his duty in giving an exceptive Allon, not trusting to his Evidence only, but to make out this fact, wch may very materially affect the Validity of the Will: for if Gann the father's Subscription, comes out to be to a Will & Codicil, dated after his death, he cd not possibly be a subscribing Witness, & his Hand must have been forged — The Objection to the Article relating to Chief was, that a Witness shall not contradict his own Act; that it shall speak for itself: but if he speaks to a Fact, verbal Declarations are to be received, to destroy his Competency: he had sworn upon the Interrog: that he never had declared the Decd was incapable: then it becomes very proper to plead this Declaration to affect the Credit of his Oath: from the very nature of exceptive Allons, the present Allon cd not have been given sooner, it cd not be offerd till after Publication; cd not except to the Depons of Witnesses, till known, & the 4 had deposed, therefore it dont seem to be offered with a view to create unnecessary delay or Expence; & the matter being entirely relevant, I am of opinion to admit this exceptive Allon as it now stands —

Arches — No 15 — Bate v Taylor.
Bishop. — Dr Clarke — Drs Wynn. Burnell — Alexander.

Dr Clarke... This was a cause of Correction in the first Instance, promoted in the Consistory of Worcester, agt the Revd Edw: Taylor Curate of the Chapel of St Oswald, by the Revd Mr Bate Minister of the Pish of Claines, who exhibited Articles agt him, for exercising his Ministerial Functions to his Parishioners of Claines, belonging to the Tything of Whistons. Mr Taylor gave an Allon, the Cause proceeded, & in May 1764. the Judge gave Sentence for Mr Taylor with Costs: my Client has appealed, & we are now before you with an Allon contradicting the Plea given in & admitted below, on behalf of Mr Taylor wherein he alledged his nomination, to the perpetual Curacy of the Chapel of St Oswalds Hospital, & that it is a free extraparochial Chapel: we say it is not extraparochial except by sufferance; they alledge that the Tything of W. belongs to the Chaplainship of St O. We contradict this, & say, that the Tything of W. belongs to the Church & parish of C. & have pleaded that the Lord of the Manor of C. holds his Ct within the Tything of W. & that W. must be part of the Pish of C. that no Marriages have ever been solemnized at St Os Chapel except by Licence —

Dr Wynn... Jam Council for Mr Edw: Taylor, who has been cited & articled agt at Worcester, for performing divine Service, to the Pishrs of Whystones residing in Claines: That he was Minister or perpetual Curate only of a Chapel belonging to the Hospital of St Oswalds; that notwithstanding, he did baptize several Children there, & bury, & church Persons, at a private House in the Pish of C. that he ought therefore to be canonically punished &c. October 1760 Mr Taylors Allon was admitted, wherein he set forth, that he was nominated by Dr Waugh Master of St Os Hospital, & Chaplain to it; that he was licenced by the Bp, to perform divine Service, & exercise all ministerial functions in the Chapel of St O. That he has accordingly officiated: That St O. is free & extraparochial, not subject to C. That the Pishrs of the Tything of W. neither serve Pish Offices, nor have Seats in the Church of C. That the Duties have belonged from Time immemorial to St Os Chapel: he annext several Exhibits, & Witnesses were examined, Publication passed, & the cause was heard on 10th May 1764. when the Judge, forasmuch as it appeared to him, that the Suit was vexatious & not well founded, pronounced that Mr T. shd be dismissed, & condemned B. in Costs: Bishop gave a Libel for B. in Hil Term, & Sp. Trim: J. he gave an Allon, with wch we are now before you: Be pleased, Sir to observe, that this is chiefly, in Answer to an Allon given by him in the Suit below, so long ago as 1760, 4 Yrs before the Suit came below, shd be proper there; & if Appeal will not admit an Allon if it is out of time, & with reason, for it wd cause infinite delays; the longest purse wd carry it, the Grievance wd be every

The Articles state

Trin: Term. 4 Geo:
2 Dr Clerke by Proxy against Bate. Suit to examine Witnesses upon the Allon. Pubn & Sentence pd. Appeal. Sentence confirmed. Appeal

great: Cts of Appeal, wch are intended to remedy Evils, wd then be productive of much greater: Parties wd be vexed, & forced into compromises, to the manifest perversion of Justice; this Case carries with it, the most evident mark of intended delay, for Bate must have seen it was necessary, to plead, in contradiction to the Allon in the Ct below, & why he did not, I cannot conceive; there is another very extraordinary Circumstance, he now undertakes to prove a fact, & plead a direct contradiction to what he has sworn in his personal Answers to the Allon; for in the plea now offered, he alledges, "That the Inhabts of the Tything of W. have served, & do serve, & are liable to serve Parish Offices & Duties for the said pish of C. & have been, are charged, with Church & other parochial Rates, Taxes, with the Parish of C." whereas in his Answer he says "That he believes the Inhabts of the Tything of W. were never charged with any parochial Rates, or Taxes in the pish of C." If this is suffered; if a Person may ever agt his own Oath, Justice wd be defeated, & very dangerous Consequences will ensue; there is another Objection; viz. the Intent is, to prove that he has performed divine Service in his own Chapel, to the pishrs of another pish, for he dont deny St Os to be a place consecrated for divine Service, & it is not pretended, that he ever performed Service in the pish Church of C. it is merely the Parish, not the Persons who are included in the Canon Law, he wd not therefore be punishable if the whole is proved: Besides, the Doctrine that a Clergyman is not to bury a Person, who is not one of his own Parishioners, wd amount to an Interdict for half the Kingdom: he is subject to no Correction, they have mistaken their way; for by Canon, the Churchwardens have a right, nay are enjoined to present those who do not come to the pish Church, & the Minister can libel for his Dues: the Articles are liable to this Objection, if no other, that the Allon is impertinent; for by what Law can Bate prevent Taylor, from administring the Sacraments, or exercising other ministerial Functions in St Os? supd he may admit the Inhabts of another parish to hear the word of God there, without being liable to Censure, tho. the pishrs themselves may be presented by Canon XC for not resorting to their own pish Church as they are enjoined to do under pain of the Censures ecclesiastical by 5 & 6 Edw: 6 & by 1 Eliz: c2. wch inflict a Fine of 12d for every absence: nor does it appear that he ever did any thing out of his own pish; & because impertinent matter has been pleaded on one side, you wd not surely allow more on the other: I hope therefore for these reasons, y one will be pleased to reject the Allon.

Dr Burnell... after the Question has been so fully spoken to by Dr Wynn, I intend to take up very little of the time of the Court: I always understood that in Appeals from definitive Sentences, the Parties might offer new matter, but it must be such as they had no opportunity of alledging in the Ct below: they are not allowed to harrass the opponent: no Cause is assigned, why this contradictory Allon, was not given in the Ct below, I must therefore presume, they have no reason to offer: Besides this Allon is directly contrary to what B. has deposed in his Answers, wch to me appears an insurmountable Objection. It is highly absurd to institute a Suit of Correction agt a Clergyman for doing his Duty in his own free Chapel: there seems no ground for Complaint agt Mr Taylor, & the Plea now offered being, I humbly apprehend, out of Time, will I hope, be rejected.

Dr Clarke... as to the Objection wch has been made, of its being out of Time, I agree that the matter of this Allon wd have been well pleaded, in the Ct below, it wd very probably have given a different Issue to the Cause: As to the reason why it was not pleaded, there is none, but that the matter was lately come to his Knowledge: Causes open upon Appeal, in order to let Parties into new matter, to instruct the Cause further, it is one of the principal uses of an Appeal: for if you did not receive fresh matter, a Slip in the first Instance, wd be fatal to a Party, he wd then have no way to cure the defect, but by instituting the Cause de novo, it is rather to be done by Appeal, wch is more a Cause de novo: As to the difference between the Allon & his former Answer, he only answered to his Belief, he might know more afterwards; In Scott & Roberts. 2 Hitchcocks a special Plea of Sanity was admitted, tho. it might have been given in the Ct below, & tho. Sanity was pleaded of course in the common Condidit...

Dr Wynn... The special Plea in that Case was only of the Capacity of the Dec: before & after the Execution, not of it, at the time of the Execution, wch is all that is pleaded, in a Common Condidit, therefore the Case is not similar...

Judge... Dr Hay... The Question now before me is, whether the party agent, has I suffered the Def: to examine his Witnesses upon his Allon & Publication to pass in the Inferior Ct is at Liberty to give a contradictory Plea in a Court of Appeal? An Appeal opens the Cause, it is true, but not so as to let parties in to plead what has been pleaded before, or contrary to it: you may do every thing, you cd have done, in time in the first Instance; Dicet non Allegata, allegare, non probata, probare, generally. Mr T. had pleaded that the Tything of W. is not in the pish of C. the first Article of the present Allon being to contradict this is in contradiction to what the Witnesses have already been examd to. Qu: then cd Mr Bate have given a Plea of this kind in the Ct below, in this State of the Cause? where the Parties have examined Witnesses, where Publication has passed, & the Depons have been seen? the Rule of non allegata, allegare, & non probata, probare, will not hold, this Article therefore must be rejected: the other Articles plead new matter, that B. has received the Easter Offerings, & the Impropriator the Tythes in the Tything of W. B. promotes a Cause of Correction agt T. for officiating viz. to the Inhabts of W. The Qu: will be, wh: the place where he performed parochial Duty, is subject only to the Minister of C. for the Tything of W. may be in the pish of C. without T. being affected by it — It is not necessary to give a reason, why the matter of this Allon was not pleaded before; B. might think the Cause not sufficiently instructed, so may give it now — I wish the Promoter wd consider how it can avail him; we cannot examine the Bounds of the Parish here, & even tho. the Cts shd be of Opinion that W. is in the pish of C. yet if Mr Bate does not shew that Mr Taylor did Duty in the pish of C. he will fail in his Suit; for T. by doing Duty in his own Chapel will be subject to no ecclesiastical Censures. However rejecting the first Article, I admit the rest.

Ought. Tit: 318. In Causa Appellationis a Sententia Definitiva, licet tam Appellanti quam parti appellatæ non allegata (coram Judice à quo) allegari non probata, probare, dummodo non obstet publicatio Testium productorum in prima Instantia —

Bye Day July 4th.

Nº 10

Allham — Woodward: v Saunders — Petition

Dr Harris — Dr Wynn — Bishop.

In this Case a Will has been propounded, a Commission prayd, decreed, to wch the following Objections were taken: That there appeared to be 4 subscribing Witnesses, & only 3 examined: that one of them was not produced, without any reason assigned, & that one who was not a subscribing Witness had been examined, upon this last Objection no stress can be laid; the Commission is general, the Party is not restrained to the Examination of the subscribing Witnesses, he may examine such (as many as he thinks fit. The Qu: is singly wh: the subscribing Witnesses shd not have been produced by the Party propounding the Will? It has been insisted upon, that he shd produce all the subscribing Witnesses, because they are instrumentary, referred to by the Testator himself: To be sure he has referred to them; but the Case was new, no Instances have been quoted, I can find none in the Books, it is therefore res integra. — I think the Party propounding is not compellable to produce all the subscribing Witnesses nor more than are sufficient; but he must bring as many as the Law requires for that act: The Law as to personæ Testis, requires 2 Witnesses, he need not therefore produce more than two, he may omit those he dont chuse to examine, not only because he may suspect them to have been tampered with, but on account of a superfluous number of Witnesses occasioning Delay & Expence. It has been said, that the Opponent has a right to avail himself of all the Evidence appearing on the Will, that he has as much Interest as the Propounder (so has a right to hear all. But I think the party propounding is not obliged to produce more Witnesses than are necessary for his purpose, the Testator might have had 20 subscribing Witnesses. There is another Objection to obliging him to produce them all, that the Person bringing them, makes them his own Witnesses, & cannot afterwards except to them, if any of them shd have been tampered with, it wd be very hard that the party propounding shd be forced to produce them: Besides let the Witness be ever so unexceptionable, the Producent wd be liable to the Costs: so that there are 2 Objections to this Method. 1. that it wd be unreasonable to oblige a Party to produce a Witness who may be agt him, (cannot be serviceable, the others being sufficient: 2. that the party wd thereby be subject to the Expence. But I think there can be no Objection to the following Method, the Term probatory not being expired, tho' he has not yet been produced, he may be, & if he is not, when the Cause is called on, the Opponent may pray a Monition, suggesting that this subscribing Witness has not been examined by the Party propounding the Will, (praying him to be brought for him to examine upon Interrog: concerning the Will, but then he must be produced at the Expence of the Party praying the Monition. If such Monition was to be prayd now, I wd direct it, upon the party proponent declaring, he will not produce him. NB Mr Allham declared he wd not produce him & monition was decreed at the petition of Bishop.

Petition: It is a pity proponding a Will to prod: all ye subscribing Witnesses

Dr Hay Judge on Deliberation.

See the Case fol. 14. 16. — 112. on admission of Allhams Allon — also 190. 195.

Trin: Term A Sess.

Delegates. Dr Marriott Meacham. Dr Wynne

Nº 17

Jones & Scroop v Craven.

Tyndal. — Dr Collyer. Harris — Dr Wynne — Stevens.

June 28.

Jam Council for Mr Wm Craven B of all Souls Coll: Oxon: The Cause began in the Court of the Vice Chancellor of Oxon by the Proctors of the University promoting the Office of the Judge for menacing & impedeing ye Officers of the University contrary to the Statutes: they gave in articles objecting that Wm Craven, with several others on the 5th & 6th of March 1763 was found, by the Proctors, drinking & rioting at a Coffee house; that they were admonished to depart to their several Colleges; that instead of obeying the admonition, they all went together into All Souls College; that Mr Craven did afford them Shelter in his Chambers (refused to admit the Proctors, or send away those belonging to other Colleges, (upon the Proctors going away, he opened ye window (putting out his hand in a menaceing manner, called out "No body shall come under my Window. 2 May 1763 the Judge decreed for Mr Cravens Answers, who then alledging, that he intended to protest agt ye Jurisdiction, was assigned to exhibit his Protest the next Ct. day: The Proctor rose thus "Mr V. Chanc: I persist in protesting saving all due reverence, that I am not subject to your Authority for any thing, within the Walls of All Souls College" Then under protestation he gave his answers, admitting the Facts of the Statutes of the University being as stated, & that of his being at ye Coffee house, that he went quietly home, but denied every thing relative to his menaceing or impedeing the Proctors, except that he desired they wd not come into his Chamber in ye College. The Vice Chanc: took time to consider, on 17th May 1763 the V. heard Council "Wh: ye University have a right to take Cognizance of Offences committed within the Colleges agt the Statutes, & enter into the private Colleges for the Delinquents; or wh: they are distinct Communities, & the Persons being within the Walls are subject, are subject only to the Warden & Fellows of All Souls) resolved, that the Proctors have a right to visit all Colleges, (that there is no particular Exemption for All Souls, therefore overruled the Protest: from this determination, Mr Craven appealed to the House of Congregation of Doctors & Masters: These Delegates took Cognizance of the point, (decreed thus" We Delegates do confirm the Interlocutory Decree of the Vice Chancellor, remit the Causes: from this Sentence Mr Craven appealed to the venerable House of Convocation, who on ye 23d of Decr 1763, reversed the Sentence with Costs, declareing it to be illegal, unconstitutional & (null & void: from this Decree of Convocation, Messrs Jones & Scrope appealed to the King in Chancery: An appearance has been given for Mr Craven, who is now before you with an allon pleading that All Souls Coll: is a Body corporate, that it is their freehold & Domicile, that all the Colleges are exempt from the Entry of the University Officers: that it was erected a Body Corporate by Letters Patent 16 (20 H6. (that for these Reasons, the Members of All Souls are not subject to the V. Chr for Offences committed within the College Walls, but are governed by their own Statutes, Warden (& Fellows.

Dr Collyer. One of my Objections to this Allon, is, that it contains ye very same matter, as was comprized in his Answers, given in before the V. Chr (it seems to go, on the maxim, of every ones House being his Castle; this is the Common Law Rule & looks towards a Prohibn: It was omitted, I dare say, undesignedly, by the Dr in ye opening, that we objected upon the Appeal to 3 of the Delegates of Convocation as being Fellows of the College to wch ye Delinquent belonged:

& that our Objection was overruled: there, what is the nature of the Allon? it is to plead what we have allowed, the College being a Body Corporate we avid this, it is true that the Parties have a right to plead their own way, yet the matter pleaded must be relevant: it is saying nothing: Stays that All Souls College was All Souls College, founded in such a Reign: they might as well say Mr Cravens name is Cr. then they allege that it is not subject to the Laws in the University now this is the very thing in question, wh? it is or not? did ever any Person give in Plea the point in Issue, the very merits? at this rate, the Cause might never have an End, we might give an Allon to plead they are subject: this is to be proved by the Statutes, & is improper in an Allon: Here is no fact pleaded, the matter is irrelevant, it is calculated only to protract a Cause, already shamefully delayed.

Dr Harris.... I believe the Gentlemen are not really serious, in expecting this Allon to be admitted, they will however have gained their point, such is delay: the Contents of Mr Cravens Protest are to the purpose, but he ought to have protested in Acts of Ct & not set forth the matter in an Allon: they have stated that all the Colleges are exempt: they have certainly no Business to consider the Rules as to other Colleges: If this is a Custom in the University (wch it is not) it is a bad Custom & such as you will not allow: There is a Statute entitled De nocturna vagatione reprimenda agt wch these Gentlemen have offended: that Statute directs how the Delinquents shall be punished. No Custom can be suffered to destroy the Discipline of the University, as this undoubtedly wd, if it existed; if any Colleges cd protect Members of the University, the Delinquents need only shelter themselves within the Walls of that College, & so escape with Impunity: if All Souls was to be an Asylum for Mr Craven, what pretence cd there be, for the Colleges to protect those belonging to other Colleges? will it be said the Offence did not deserve punishment, I believe it will be allowed to be contrary to the regularity & Order required in a Seminary of Learning, & it does not appear that Mr Craven was punished in College, wch shews more the propriety of the Proctors taking Cognizance of it: the University is a Body corporate consisting of all the other Colleges, wch are, as Members subordinate to the Head; the Statute above mentioned, allows of no exception, no privilege or exemption for any College or person; it is therefore not only contrary to right reason, but to express Law, that any such Privilege shd exist. It has been pleaded as a Custom, but very improperly; they cannot examine Witnesses to the fact of a Custom, they shd exhibit the Statutes of the College, to shew such an Exemption, no such right appearing in those of the University, & if the present plea was to be introductory thereof, the matter of the Protest shd have been stated in Acts of Court.

Dr Wynn..... The Dr has introduced the Objection to this Allon, as if we had no other view in offering it, than Delay, we were ourselves indifferent to the sale of it: but I hope you will consider it as we mean it, serviceable & necessary in the Cause; if there has been any improper delay it has been the fault of the other Parties; they appealed, we only follow them; they have the purse of the University to support them, we are at our own Expence: they suppose the private Colleges to be like nests of Hornets, no discipline, no Officers in them; if this was so, it wd indeed be a very extraordinary Case, if this wd be such an Allon, as none cd support. The University consists of a number of

University; each has Laws, a Master, Fellows, & Officers of its own: who have authority to enquire into the Conduct of its Members: & punish Delinquents: & why the V. Ch? shd interfere, I cannot conceive In the protest Mr Craven has stated, that being a Member of All Souls, he is exempt from the Visitation of the University Officers: & surely I have as good a right to say he was exempt as they have truly he was not: This Allon is diff? from the Answers, for in them, he, as to many facts articled agt him, asserts his Innocence; something has dropt in the Argument, as if there had been an Irregularity in the Proceedings; there is no mention made of it in the Appeal, & I must take the Liberty of setting the matter right it is a mistake; 2 of the Delegates were not of All Souls College, nor are they special Delegates appointed for this Purpose, but are chosen by the Proctors on their first entering on their Office; they are stated fixed Judges for the Year, so that it wd be no Objection, even if there had happened to be 3 out of All Souls, whereas there was but one out of that College, & one belonging to each College, wherein the others of the Company belonged; the Mistake then seems to have arisen from thence, & from not rightly understanding, how the House of Convocation is constituted. As to the Allons pleading the merits, I know no other use of an Allon: as a man pleads who propounds a Will: by our manner of pleading we plainly refer to the Statutes, we may hereafter introduce them: the Case is different from private Instruments, wch must be annexed to the Allon: these are young men, have not an Opportunity of producing the Statutes, they are too voluminous to Copy. As to the other Question, whether we can prove the fact of Custom so as to establish our Plea; I see no impropriety in our examining Witnesses; if we cd be benefited by it, we surely might examine them: suppose Persons were to Depose, that it is the prevailing opinion, that it is not usual for the University Officers to visit private Colleges; we claim no peculiar privilege above the other Colleges, so it is proper to say, that all the other Colleges are exempt; we may over, we may use what we please. From the Abstracts of the University Statutes Si Quis &c. &c. Si stat hujusmodi Coll: &c. produced by them, there are limitations, Conditions wch shew, they are far from vesting a supreme visitatorial power in the University; those very limitations &c. clearly exempt us, & put us out of the reach of the Statutes, the University cannot punish unless Justice has been denied, or there is no Law to punish within the College; it does not appear, that a Complaint was ever made, & there must be a Law in the College to punish because, they were actually punished — All the Statutes of Oxford are not equal, some are by Act of Parl?: others are not; but what use we can make of what we have pleaded, will be seen when the Merits come on —

Judges. the King's Advocate Dr Harris & Dr Marriot deliver the sentence.... The Rules for Allons are different in Cts of Appeal, from what they are in Cts of the first Instance: there is such room for Subterfuge in the Case of Appeals, that they are more strictly required to be relevant: As to the present Allon, it is only general, nothing special, there is no more than has been already pleaded, I do not see any new matter introduced: the general matter of All Souls being a Body Corporate, was properly admitted in the first Instance, & it was unnecessary to plead it again: they shd have pleaded that by the Statutes of All Souls, he was not subject to the Authority of the Vice Chan:

Commissary of Surry

&c. The Words Freehold &c look towards a Prohibition; on the whole, we reject the Allon, saving a right to both Parties to bring in Exhibits any time before this hearing on the Merits.

No 18

Jones. v. Day.

Fountain — Dr Burrell — Bishop

July 1. 1765.

For Adultery clearly proved — Mr Suspended

Dr Burrell.... The Articles brought by Mr Jones agt Mr Day, are as follow: That he, being a Minister in holy Orders of St Saviours Church in Southwark had been guilty of several enormities, wch ought to be canonically punished: that in March, April &c 1763, he kept Company with a Woman call'd J. Barrington in Bow Street Covent Garden, tho, he himself was a married man. That J Barrington lodged sometime at Mr Sharps at Chelsea, that he paid 9 shillings a week for the lodging, & they went by the names of Gould, repeated Acts of Adultery are laid, especially, that on 11th April 1763 in the morn: Mrs Sharp carried them up some Brandy & Water, saw them in Bed together by the name of Gould, that Mrs Sharp happened to hire a Servant who knew him, & acquainted her Mistress that his name was not Gould but Day, that he was a married man & had Children by his Wife; that finding himself discovered, he quitted those Lodgings with her, sent one Mr Leech to pay for them, & to prevail on Mr & Mrs Sharp to keep their whole Affair secret; they plead the Identity, there being seen naked in Bed; that on the 12th &c. &c he was very drunk, insomuch, that he could not walk, even at Noon, that he was very abusive & passionate, drew a knife; that in those Fears he cursed & swore; on 15th of April having made an Appointment with that Mistress when the Corpse was brought to be buried, he said Damn the Burial &c &c. that his Behavior had so scandalized the parish, that several Persons upon that Account, no other, absented themselves from Church, his Misbehavior at y Administration of the Sacrament was also pleaded. The several Charges are fully proved by Mary Rhodes, Mary Fawcett, Eliz: Wm Sharp — Leech, and no Defence is made by Mr Day. I therefore move that you will be pleased to punish him Canonically, & condemn him in Costs.

Judge.... }
Dr Harris... } In all these Accusations, when the Evidence has been read, the Canons say, the Minister shall not be deprived, till the Case is laid before the Bp, who has accordingly been acquainted with it, & has left it to me, either to suspend or deprive: He rather inclined to the latter; but in hopes that Mr Day will not abuse the Indulgence, I shall content myself with the former: Accordingly he is suspended for 3 years, from the Office & Profits of Minister of the Parish of St Saviours, & at the expiration of that Period, he is to bring a Certificate of his good behavior, during those three years, else the Suspension is to continue notwithstand: the Time being expired: He is also suspended from y exercise of any Ministerial function within the Diocese of Winchester. The Bishop has nominated y Rev: Mr Sambrooke Russell to officiate, & receive all y profits during y Suspension, Mr Day being suspended from the Duty as well as the Profits. I condemn Mr Day in Costs, taxed at 40£. The Certificate of his good behavior is to be under y Hands of three neighbouring Clergymen, & this Certificate is to be exhibited to them before y Suspension is taken off: else if y Certificate is not satisfactory, y Suspension is to continue after y expiration of y three years. Publication of y Suspension is to be certified to the Judge the first Court day after y Suspension, to commence from the Time of Publication.

Dilapidation

Arches July. 2.

On Admission of the Libel

See Fol. 89

No 19

Markham v Beadon & Kirke

Altham — Dr Harris, Wynn — Dr Marriott, Calvert — Gostling.

Dr Harris... This is a Libel in a Suit for Dilapidations brought by Dr Markham Dean of Rochester agt Mr Beadon & Mrs Kirke Exrs of Dr Newcome y late Dean of Rochester. After the usual introductory matter, that the premises were very much out of repair, that they had been surveyed & Estimates signed by the several Surveyors. We have annexed Schedules of these Estimates. That by Hardy, who is dead, makes the repairs amount to 1566£. & that by Wright to 1200£. We charge in this Libel that Mr Beadon has refused to pay, as decard by his own Surveyors Estimate.

Dr Marriott... I am Counsel for Mr Beadon & Mrs Kirke, & do not object to y Form of the Libel, but to y whole Estimates. The Surveyor takes in several Articles never allowed in Chancery: Painting & White-washing are not Dilapidations, the whole seems to be estimated for rebuilding y greater part of y Deanery House, & surely Sir, you will not direct it to be rebuilt: They are in the nature of Tenants for Life, of whom no more is required by Law than Wind & Water tight.

Dr Calvert... We humbly submit to you Sir that this is not to be received, as it is now offered consisting of 17 Articles, several of wch are unnecessary, & it always is usual, for what does not relate to the point to be struck out: the Article pleading y value of y Deanery does not administer to the Question whatever it is, the Successor is equally obliged to repair, & has a right to call upon y Exrs of his Predecessor for Dilapidations, so that this Article not instructing y Cause ought to be struck out. If is pleaded, there is a mansion house belong: to y Deanery, & y Dr sometimes usually resided there; this Article is also very immaterial, for wch he did reside there, or no, his Exors are equally liable to y Suite of his Successor for Dilapidations. Another Article is, that Dr H is now Dean of R. this is unnecessary, we allow his Interest as such, by appearing to y Citation. The next Article is of a similar Nature, y Exrs liable to y same Objection: it states y Appointment in Dr Newcome's Will of Mrs Rich: Beadon, Mrs Mary Kirke to be his Exrs: this we have allowed, we have been cited as such. The Demand laid in the Libel ought to be precise: they shd have exhibited an Estimate for a Sum fixed: whereas he has given 3 Estimates, so that we cannot know what Tender to make: nothing appears to guide us the manner of pleading is what I object to; for in pleading Hardy & Harrison's Estimates, they plead a Contradiction: the Sums are different, & both be true: Wright is alledged to be the true Estimater, this differ from the other two, they are exhibited also, & cannot be all true: might perhaps have been pleaded differently, but as it is, y manner seems to induce an Objection to y prayer of y Libel, wch shd be reformed as indefinite. In Hayter v Sherlock & Gooch the Libel was reformed, y prayer was, that y party shd be compelled to pay y Sum in y Schedules annexed; here are 3 Schedules, so no certainty what is the Sum to decree: I shd humbly apprehend, this is y proper time to object to Items in y Estimates, wch are not Dilapidations: y Representatives of an Incumbent is liable only to y Repairs necessary; they are obliged to uphold decently to exist; but surely Sir, you will never allow an Article to stand, for contracting y Chimneys in order to make them modern: nor for laying down Portland Slabs; I believe y tiny Imitation of a Bp, he never admonished a Dean to modernize y Deanery House: nothing wch did not exist in y Predecessors times can be considered as a Dilapidation: the making 2 Windows instead of one, cannot be looked upon as necessary: no more than as obliged to make new Cisterns where there never were any before, they need not ornament, there is no necessity for painting, inside & outside. If no where appears when Dr Newcome died, yet this an Incumbents death: whereas if y Estimate is taken considerably after many fresh Dilapidations may have happened; those sort of Houses are generally old, a month or two may make a very material difference in Hayter & Gooch Dr Bilke's work ordered y time of Bp Sherlocks death to be specified, to see what Estimate was taken soon or long after.

Dr Harris. ... It was very material to show that ye Building is in so ruinous a condition, as to want rebuilding; it shews how greatly neglected every thing has been, & if any parts are in that State, they must be rebuilt: there is a wide difference between Incumbents & mere Tenants for life in the case of the latter, the next in Reversion, can come in to view, & have an Action of waste whilst the Tenant for life is living: the Successor to an Incumbent in possession, is incertain, acquires no right in his life time, nor was a person ever ascertain of succeeding to ye eccles: promotion, ed he claim a right of entry or sue. ye Incumbent: if ye Deanery House was dilapidated in ye time of ye late Dean Predecessor ye Dean had his Remedy agt his Exors; if he had not a proper sum from them, he might have had, it was his own neglect, his own fault; & his Exors must make it good to ye present Dean. The Objections made: ye some Item in ye Estimates are not Dilapidations, is too early: but however, those pitched upon, may fall under that denomination: for as to contracting ye Chimney. ye presumption will be, ye it is to be done for ye sake of strengthening ye House: there may be no Cisterns now but ye presumption is, ye they are worn out; ye Question is not, how Tenants for life are to repair: Eccles: Houses are to be repaired by a different Rule: they are to be in such repair ye ye Successor can come in directly: therefore painting & White washing are fit & necessary: from our shewing ye time that Dr N. enjoyd ye Deanery, near 20 years, it is to be presumed ye ye Dilapidations arose in his time. It is not so immaterial as ye Dr wd make it to plead his residing; for one who resides & lets ye House decay is ye more culpable: It is true indeed, we have not expresly pleaded when Dr N. died: but he must have died about ye time ye Dr Markham acquiesced to ye his Succession we have pleaded: it is ascertained within a week: the time when ye Will was proved fixes that of ye Death precisely enough: in ye 14th Article we claim £200 accord: to Wrights Estimate: so they cd be at no loss for a specific Sum to guide them in making a Tender.

Dr Wynn ... Ied not understand the Kings Advocate, except ye Argument was, ye ye Deanery House is too ruinous to be repaired, and rebuilding: but if it does, ye neglect of ye late Predecessor must have been ye occasion of it, his Exors must bear ye Burthen of ye Dilapidations arising from that neglect, whether it be re-building or repairing: I do not know ye Law of Chancery, or of Tenants for Life; but by ye Eccles: Law, in whosesoever's time they arose, the Exors of ye Person late in possession are to be charged with ye Repairs, for it is no excuse to say the late Incumbent found ye House dilapidated, because it was his duty to ye Church, as well as himself, to see for what this Predecessor ought to have done: he ought on coming to ye Preferment to get ye Dilapidations immediately ascertained if he omitted it, he acted very unjustly: in his life time he was liable to a monition for Repairs; Estimates are always taken to found a demand, & serve as a guide in ye Tender: It is certified jointly & severally, that ye Repairs will amount to £200, we are so far from being absolutely bound, ye if more can be proved due, more may be demanded

several of ye Articles are necessary to make it intelligible & to form a Connexion: It was very essential to plead ye Value of ye Benefice, ye number of years Dr N. had it, for suppose a Party comes to a Benefice greatly dilapidated, this Predecessor std be insolvent, ye Sute agt his Exors ed only be in proportion to ye value of ye Benefice, ye number of years their Testator enjoyd it: setting them ye value of ye Deanery only at £800 p An: & they ed short of its real value, if he enjoyd it for 20 years he must have received 16000 at: nothing has been laid out upon ye House, £200 cannot be disproportionate to so large a Sum. The Situation of ye Windows, shew, ye ye proposed Alteration is intended to add to the Strength of ye House; ye Walls were cracked so as to render it necessary not merely for conveniency or fashion, tho both may be ye Consequence a Party wall in ye Stable is necessary to support ye Roof, as appears from ye very form it is pleaded in, where it is said to be crippled. there has not been ye least painting or white washing all Dr N's time: ye former is absolutely wanted for upholding ye Glass wch is falling out, by reason of ye Irones wch are rotting the other is highly fit, proper for ye Dignity & Income of ye Incumbent; all was allowd in ye late case of Hayter & Gooch.

Judge Dr Hay's ... In a cause of Dilapidations, ye Rule is not ye same as in ye Case of a Tenant for life, Wind & Water tight is not sufficient things must be suitable to ye Dignity & Station of ye Person to succeed & the Deceased's own the same is not required for a Rector, as for a Bp or a Dean, it is therefore necessary to set forth ye Value of the Preferment &c. if Dr Newcome has enjoyd ye Deanery for 20 years, has left ye Mansion in a very ruinous condition, it is very fit his Exors shd repair; however, tho, it is to be neat & decent yet they are not to be charged for all ye Conveniencys his Successor may think wanting: the time of Dr N's death wd be necessary to be pleaded, unless it was sufficiently specified by ye other Articles, for ye Exors are not liable for Dilapidations subsequent to ye Death of ye late possessor, but if ye thought it clear enough about what time he died from ye other Articles, there wd not need a particular one for this purpose, I wd not delay ye examn of ye Witnesses during ye vacation. The Articles of his residing, & ye value of ye Deanery are admissible, as being introductory, stating ye facts: the material Articles are those stating the Estimates, on wch I have made this remark, that Harrison's for rebuilding ye whole is less than one of ye others for repairing: but if the House falls down, the Exor must rebuild: The Objections to some of ye Articles in the Estimate, not being Dilapidations, come too early: some perhaps may be not such, but they are proper for ye merits but will not go to ye rejection of ye Libel. the Method is, to state ye Estimates, wch taken by Agreement or otherwise, ye Ct will consider, what Articles are, & what are not Dilapidations, Estimates are very necessary for one party to make a certain demand, & ye other a Tender, the Demand is certain enough in ye 14th Article, wherein it is pleaded, they have refused to pay according to ye Estimates made by Steph: Wright it is ye same as if it had been explained in ye prayer: it is sufficient ground for ye prayer: the only Qu: is wh: ye Libel with Estimates annexed are admissible: by admitting them, it does not conclude, that all ye Articles in ye Estimates are Dilapidations: that will be a future consideration; therefore I admit ye Libel, upon inserting only the Day of Dr Newcome's Death.

Arches

N°23 Johnson v Champion, Wright & Johnson. July 2.

Goodwin — Dr Collyer — Dr Wynne — Gostling

Dr Wynne ... I am Counsel for Mrs James Johnson one of the Extrs in y^e Will of Mr Johnson. Citation has issued & been returned Sol. Trin: 5 Agt y^e Extrs of Chesthunt in Hertfordshire, who gave y^e Interest of his Fortune to his Wife for her life, & on her death, a Legacy of 50£ to Mr Johnson: the Will was proved 1759 — 1762 Mr Johnson the Legatee became insolvent & agreed with his Creditors to appoint Trustees, this Extr being one, to whom he assigned over all y^e Effects he was interested in, possessed of, or entitled to, for the benefit of his Creditors, in consideration of wch Assignment he was to enjoy the same Liberty of Person, as if a Commission of Bankruptcy had issued agt him: the view in taking out such Commission, was to save expence —
1763. this insolvent Legatee has cited y^e Extr to pay the Legacy, who appears under protest — says the Assts will shew, that on y^e death of y^e Widow in 1763, he paid this Legacy of 50£ to himself & Co-Trustees, & swears it was rateably distributed amongst y^e Creditors: that only 19£ remains in their hands — the is still indebted 800£, that they have paid about 12 shillings in the Pound: that he is not liable to pay the Legacy over again — The Qu^e then is, wh^r Mr Johnson was intitled to, or entitled to this Legacy, on the Day the Assignment was made: This Legacy was given to him on y^e death of y^e Widow, but it was vested in him upon y^e death of y^r Testator, it was y^e payment only wch was postponed: there is nothing plainer, nothing better established in Law, than that a Man is entitled to what is Debitum in præsenti, solvendum in futuro: if a Commission of Bankruptcy had issued, this was liable to be sold, it was valuable, the Commiss^rs wd have been entitled, & this Assignment is y^e same as to its Effect, as a Commission of Bankruptcy wd have been: By being once vested in him, he might have devised it by will, & therefore no doubt but it was transferable, with Regard to this Effect: he now acknowledges having received all the benefit y^e Law wd give him, & all he proposed to himself from y^e Assignment, he does not deny its being paid over to y^e Trustees, fairly distributed: in what light then must he appear, as per such an Assignment, wherein he covenanted to assist in y^e recovery of all Debts &c without any Objections to y^e proceedings of y^e Assignees, Creditors who have suffered so considerably by it, now to become & pray to be paid over again, & that has been fairly distributed as well as fairly paid: there don't seem at least pretence for his Claim, & the only Objection is that he has paid y^e Legacy to himself: it so happened, but there is no sort of colour to charge him with unfairness, for he was Extr with 2 Women: he was of fittest person to act, he was a principal Creditor: there cd be none therefore more proper for an Assignee; nothing surely can be so unreasonable as his demand; so I hope, Sir, you will allow Mr Gostling's Protest & dismiss my Client —

Dr Collyer ..... Mr Gostling has appeared under Protest, the Qu^e is, wh^r he must appear absolutely? Protests of 2 Sorts shall not be obliged to appear absolutely, or special, as to the general, as to the Jurisdiction of the Ct, or special, as to the Cause itself; & the Query will be, whether the matters alledged are sufficient for him not to appear absolutely? In a special Protest a Person may object to his Appearance, by reason of the Excommunication, Outlawry, or Release of the Party citing in the Cause of Legacy, because they wd appear from the acts of the Ct or upon Record: but when a special matter is alledged, he must appear absolutely, & give an Allegation, with the Deed annexed, when it is of a private nature as an Assignment is: He confesses a Legacy to have been left, only says it was assigned over for payment of Debts: this is a private Transaction, entirely of a private nature & there is no deed exhibited, it is mere Suggestion, & no Protest can be founded without any Evidence: upon the face of the Assignment, they pretend, it appears to have been made to a Trustee, on 18th June 1762. & the Man did not become intitled by the Extr, on 18th June 1762. & the Man did not become intitled by the Widows death till 1763 — This Legacy then, was not, cd not be comprized in the Assignment, he had it not at the time when the Assignment was made: he cd not know whether it wd arise or not — he might not outlive the Widow — perhaps it might have been liable to a Statute of Bankruptcy — but besides the Assignments being very different from a Commission of Bankruptcy, this was such an Interest as the Commiss^rs cd not have disposed of at that time; it was a contingent Interest, & selling it cd have been a Fraud to his Admr, or a detriment to him, because his Debts might have been paid perhaps, & the Commission superseded before the Legacy was to come into possession — Shall the Extr, on the Plea of his being an Assignee, take possession, & do what he will? he has paid it, how? to himself truly, who cd never sue for it, since the Legatee himself, & not the Trustee, must be the Person to claim it — The first Question is, wh^r Gostling will appear absolutely, give an Allegation, & exhibit the Indenture? It will be a future Consideration wh^r the Legacy was so vested at the time of the Assignment, as to be conveyed by it.

Dr Hay Judge

The Legatee sues for a Legacy, the Extr protests (using the words improperly) for the Reasons in the Act, whereas the Proctor shd rather have appeared absolutely, might have alledged payment, & prayed the Answer of the Party — If the Legatee had any right under the Will it was in 1759, not material wh^r the Interest was contingent or present, it was vested in 1762, but not to be received till the death of the Widow. In 1762. he assigns over all his Effects, & it happened that the Extr was one of the Assignees — Goodwin does not deny the facts of the Assignment, or the Assignees being paid the Money by himself, as Extr, for the benefit of the Creditors or their receiving it rateably; but only says, that Mr Johnson was not entitled to this Legacy in 1762, so that the Assignment cd not extend to this. The Reality of the Existence of such an Assignment not being disputed, there was no necessity for it to be exhibited, & the Qu^e now is merely on a point of Law, viz. wh^r the Legatee was or was not entitled to this Legacy in 1762 when the Assignment was made? I am of opinion it was clearly vested; he acquired the right on the death of the Testator in 1759 prior to the date of the Assignment, tho' the payment was deferred till the Widows Death, wch happened subsequently —

Debitum in præsenti, solvendum in futuro

Gostling said it was to save Expence ....

This Protest is in the nature of an Allegation, the Facts, the point of Law, the whole is now before me, & I can not think the Legatee is entitled to his Legacy, it having been assigned over, paid, & distributed, for the Purpose of the Assignment

Arches July — No 21

Gunner and Hazeler agt Pays.

Gostling — Dr Harris, Calvert — Dr Wynne, Bever — Skeens.

Liv: Wh: Ch: Wns ed make a rate contrary to ye order of Vestry

Dr Harris — I am Council for Mess.rs Gunner & Hazler Churchwardens of the pish of Walton, who have instituted a Suit agt Mr Pays, for not paying to the Repairs of the Church, according to an Order of Vestry, directing a rate to be made to raise 150£ to repay Mr Smith &c the Assessment to be laid for the Church Rate according to the last Poors Rate: but that Rate being set aside by Appeal to the Quarter Sessions, the Ch: Wns made another Church Rate, on pretence that it was different from that directed by the Vestry. Mr Pays refused to pay, whereupon he was cited into the Consistory of Winchester, & we gave an Allon pleading the Equality of the Rate directed by the Vestry: that the Householders were more numerous than the Landholders; that the House-holders were rated at double what they would be, if Landholders: that on account of this Inequality in the Poors Rate, it was set aside by the Justices, & moreover contradicts the Plea given by Pays, that some were under rated, & others over rated, in the Assessment made by them: this Allon was rejected in the Ct below, from wch we have appealed

Dr Wynne — I am Council for Mr Pays cited originally into this Ct of Winchester, in a Cause of Subtraction of Church rate: the Church of Walton being out of repair, there was an Order of Vestry for the Ch: Wns to borrow money: Mr Smith lent it, & the Vestry directed them to make an Assessment of 2.6 in the pound, so that the same be made & figured as the last Poors Rate was, & otherwise, according to the ancient Custom of the Parish: Mr J. Gunner was present, when the Order was made, & signed it; the others were absent: 5 April 1759 Notice was given for a meeting on the 6th to sign the Church Rate: the 2 Ch: Wns, Constable, Overseers, & the other Parish.rs met accordingly, to the Number of 82: Gunner & Hazler then produced a rate, drawn up differently from the Order of Vestry for it to be accord.d to the last poors rate. It differed a Shilling in the Pound; & all the Parish.rs present, except 11 declared agt it. Temple the other Ch: Wn produced such a Church rate as had been directed, wch he, the Constable, Overseers, & 65 Psh.rs signed. That produced by Gunner & Hazler was signed by themselves, & 11 Parish.rs only: at the same time the the Vestry made an Order for it to be entred

That on 5 March 1759 it was agreed, the Ch: Wns shd make a Rate according to the last Poors Rate; that upon the meeting of the Vestry to sign the Book, Gunner & Hazler produced a Church Rate that was very unequal & Hazler produced one agreable to the Order. That Temple produced one agreable to the Order. That Gunner & Hazler refused to sign it; that they (the Majority) allowd Temples, & directed the Rate to be levied according to the Book in his hand, at the same time disapproving of that made by Gunner & Hazler: notwithstanding this Order, Gott. have libelled agt Pays: 10 October 1760 they gave additional Articles.

Allow.d they were heard on the Admission rejected; they appeald on 28 Nov.r & were assigned to Libell: in April 1761 appeald on 28 Nov.r & were assigned to Libell: in April 1761 the cause was dismissed. M.r T. 1762. Nov. 22. they began again at Winchester, the Deft.s Proctor gave an Allon, wch, with y.r Exhibits was admitted. 1 July 1763 Publication was decreed at y.r Petn of both Parties. 29 July the Pltfs gave an Allon, declaring they had not seen the Depons the Judge took time to deliberate, rejected the Allon, the Admission of wch is now the point before you. The Allon, the Admission of wch is now the point before you. The Allon, the Admission was given after Publication, decreed at Objections, are, that it was given after Publication, decreed at the petn of both Proctors, & the Depons are transmitted open, they may have been seen, tho it is otherwise asserted; they cd separate, avoid being seen. This Cause was begun in the most arbitrary obstinate manner by the Parish Officers before the Rate was agreed to, the Proportion was settled by the Vestry, who at the next meeting provided agt that, wch had been produced by these Officers: the whole Allon is inadmissible except one Article, insisting on the right & Authority they had to lay it as they thought proper, this is contrary to what they had pleaded before" That the Vestry had settled the Church rate to be raised accord.g to the Poors Rate, wch was "very unequal rate." In that plea they do not dispute the right of the Vestry. I know but of one Instance where a Ch: Wn may make a rate, wch is to reimburse himself on the refusal of the Psh.rs to rate themselves: else he is only to collect the rate when made; he may object to it as a Psh.r if he thinks himself overrated. The Poors rate had been quashed by the Justices, was no justification to them to make a Church Rate, different from that ordered by the Vestry; the Poors Rate was only to serve for a Guide in making the Assessment, & the fate of one, cd not determine the other: the Parties aggrieved by the 2 Rates, have 2 diff.t Remedies: the Church rate, if unequal, cd have been quash.d by the Ordinary, the Poors rate by the Appeal: this Assessment made contrary to the Order of Vestry is illegal, wch my Client & every other Psh.r has a right to object to: the litigious manner in wch these Ch: Wns have proceeded, is worthy notice. I hope therefore, Sir, you will not only reject the Allon but condemn them in Costs.

Dr Bever — The Ch: Wns have mistaken their own power; Parishes have their Vestrys to determine upon the Business, they are little Republicks: the Ch: Wns are the Officers to execute the Resolutions, & whilst they act within Legal Bounds, they will be protected. Every thing is voted in Vestry; the Majority conclude, & it is a method wch is in general beneficial; & the Confusion cd be endless if a Minority, a factious few cd counteract the Resolutions of the Majority. The Ch: Wns are ministerial, have no more right to alter an Order of Vestry, than a Judge had to alter an Act of Parl.t or falsify a Record: to say this Plea is to introduce new matter, is putting it upon quite a wrong footing, for from their own shewing they disobey'd the Orders of Vestry, & Publication has past they are now too late

Dr Harris — It is not to be supposed the Proctor saw the Depons, he said he had not seen them, & it is to be taken so till the Contrary appears, & then all the Articles contradictory to their Plea are to be admitted; Mr Pays has joined Issue, he does not deny our right, he has only said, such & such Persons

are underrated, & the over rated: New matter, if relevant may be pleaded: the Contest is not between these parties merely it is intended to try a right, & the Qu: is whr the Householders or Landholders shall prevail; the Ct shd lay down Rules: shall the Householders be raised only at 1/4 & the Landholders at 1/2 of the Rent? we plead that what the Vestry ordred was illegal, because the Poors Rate was quashed: the Article exhibiting the Poor's Rate is relevant to shew that they ed not comply with the Order of Vestry —

Dr Calvert — The Proceedings of the Ch: Wns have been called arbitrary, this Charge is more applicable to the Pshr who controuled the Vestry: for what ed be more arbitrary than for the Householders to rate themselves, at only 1/2 as much as they rated the Landholders: The reason why new matter may not be given after Publication (as said Downby Clerk) is, that Parties from knowing what has been deposed, may not have an opportunity to suborn Witnesses, when they see where the cause pinches: our declaring that we have not seen the Depons, takes off this Objection to our offering new matter: the presumption that we had seen them is removed, by our positive Assertion that we have not so that we are equally at Liberty, to offer a fresh Plea as if Publication had not past — It has been said, the 6th Article contradicts the 5th, it does not it is only making out our Case: we endeavour to shew, we shd not have been authorized to collect the rate, ordred by the Vestry: it was material for us to alledge the Poors Rate being unequal; & that rate being rejected by the Justices, notwithstanding the Order of Vestry to make the Church rate according to that Poor Rate we were thereby justifyd in disobeying the Order of Vestry

Judge
Dr Hay — Churchwardens have certainly a right to sue Pshrs for Rates legally due; but they have not of themselves any right to tax the Parish — The Law requires a Vestry first to be called on legal notice: if the Pshrs attend, the majority of them binds the whole Pish: if the Pshrs do not attend, then the Ch: Wns may make a rate, wch will be conclusive; but the Equality & legality of the Rate may either way come before the Ct: the Ch: Wns are however bound by the Vestry, & great Confusion wd insue, if the Vestry ordred one Rate, & the Ch: Wns took upon them to make another — The Order of Vestry binds the Pish & the Ch: Wns, but yet Individuals are not precluded from complaining of the Rate made, if they think themselves aggrieved: but then the Ch: Wns take upon them to make a Rate contrary to the Resolutions & Order of the Vestry; if this was to be suffered, the Vestry meeting wd be useless; this cannot be legal Vestry proper; if they dis approved, they might have objected in Vestry; but the Order being made by the Majority the Ch: Wns are only Ministerial, & the Pshrs may com-

Because the Quarter Sessions had set aside that Poors Rate —

plain if they are unequally taxed — These Ch: Wns appear the Sense of the whole Pish except 11 Persons, & come with an Allon pleading, that, as they ed not collect the Rate planned upon the Poors Rate, on account of the Inequality they were at Liberty to make a rate themselves. that they were at Liberty to make a rate themselves. that in pushing the Rate whereon this Church rate was planned, as unequal, is a Presumption, that the Church Rate too, was unequal, is a Presumption, that the Church Rate too, was unequal but this Ct is not concluded by the Act of the Justices; any Landholder might have contested the Rate made in conse-quence of the Order of Vestry; but it was the Duty of the Ch: Wns hereby; they were to collect it, & not to take upon them to make a different Rate: it appearing then to them that this Rate was made in opposition to the Order of Vestry, I cannot go into the Equality & Justness of it, without allowing the Ch: Wns right to tax the Pish of their own authority, wch if laid as a Custom in the Pish, is such a Custom, as can never be defended, nor can the Rate be supported on that Footing — If the Rate directed by the Vestry is unequal, the Ch: Wns or any other of the Pshrs may by Complaint set it aside — I reject the Allon, because the Ch: Wns were not at Liberty to act contrary to the Order of Vestry, & I decree Costs to be Paid; for the Costs cannot be given agt a public Officer yet Gunner & Hagler not being at present Churchwardens, shall: acted improperly as I think to be condemned in Costs —

Prerogative — No 22 — Whittington & Francis — July 14

Altham — Dr Wynne — Dr Harris — Fuller.

Dr Harris — Mary Randall is the decd, she left a Will dated 14 Oct: 1762 & therein appointed my Client Mr Geo. Francis sole Exor, but made no disposition of the Residue Mr Richd Whittington Cousen German once removed, has cited him to give an Inventory & Account: There are two Persons of the name of Geo Francis, one of them, the Exor, the other his Nephew The Qu: is wh: the Legatee in the Will, is the Exor or his Nephew? the deed had lived 25 years with the Exor, had always expressd a very high regard for him, & had frequently declared she shd never have it in her power to make him amends, for the trouble she had given him, in the management of her Affairs, had paid & received all moneys upon her account; it appears too, she had a great regard for his Nephew; we say, that Geo Francis the Exor has no Legacy under the Will & is entitled to the Residue, therefore Fuller has appeared under protest; for if G. F. the Exor has the Legacy, he is under no necessity to give an Account to a person who has no Benefit or Interest under the Will Sole Exor: I. Fuller brought in the Commission with his Affidavits, wherein it is deposed, that the deed declared there was no body she ed confide in like Mr Geo. Francis the Exor, & that they cant believe the Legacy of £20 was meant for him, being by no means a Satisfaction for the Trouble & Expence he had been at, in the management of her Affairs: that they knew Geo. Francis Junr & the deed were intimately acquainted, that he lived with her for 12 months before her Death used frequently to go on Messages for her

altham has also brought in a Commission, Affid:ts in wch the Witnesses swear, they beleive that Mary Randall by her Bequest to Mr Geo Francis, meant the Exor an eminent Butcher at West Grinstead, & not Geo Francis his Nephew an Infant & who was not used to be called Mr There were 2 Geo Francis's, & this Affidt: dont shew that G. F. junr was an improper person to be called Mr, for if the reason had been the Witnesses own, he wd have said because he was very young or quite a Boy, whereas the saying, because he was an Infant, shews that an Attorney drew the Affidavit: the words & reason are his: In our Law, we call them Minors after Seven years of Age. Our Witnesses say the decd had a great regard, for this Nephew of Mr G. F. the Exor, wch makes the presumption very strong, that he was the Person intended to be benefitted by the Legacy of £20, & her Declarations of her great obligations to the Exor, & fears of not being able to make him amends, make it very improbable that she shd intend him so small a Legacy, but highly probable she intended him for her universal Heir — But even if the Exor is the Mr G. F. meant for the Legatee, there have been Cases where Exors have had a specific Legacy & yet the Residue has been decreed to them: the Case of Newstead & Johnson 1740. Blinkhorn & Feast 1750. & a Case in 2 P. Williams 340 where a Person had a House left to him, & yet the Ct decreed him ye Residue as Exor: If the Bequest of a Legacy to the Exor, excludes him from the Residue, the Gift of a Legacy wd also exclude a next of Kin; the same reasoning wd hold in both; viz: that where the Testator had given a part, he never cd intend the whole: yet there is a judicial Determination of next of Kin, Specific Legatees, havg: the residue decreed to them: so that I hope my Client will be thought by the Ct entitled to the Residue, even tho, you shd be of opinion, that he is a specific Legatee in the Will

Dr Wynne ... I am Council for Mr Whittington Couzen German Couzen German once removed to the decd, Mrs Mary Randall, who having appointed Mr Geo Francis her Exor he has been cited at the Instance of my Client to an Inventory & Account: there is an Appearance under protest Mr Whittingtons Interest is confessed, wch is sufficient for the present purpose; the reason of the Protest, is not now that Mr W. has no Right, as next of Kin, but that the Exor is not obliged to give an Inventory & Acct being entitled as Exor to the undisposed Residue: the Cases quoted, of specific Legatees havg: the residue decreed to them as Exors, are Determinations in another Ct, & take their rise from that of Foster & Mount in the time of Ld. C. J. Jeffries where Legacies were given to the next of Kin; but in this Will there is nothing given to us as next of Kin, so it is different to the Case alluded to by Dr Harris: the Qu: now is, whr there is a probability of Interest, viz in Distribution (an ostensible reason not being deemed sufficient) to found us in calling upon the Exor. We certainly have a right to do it; as Exor he takes Probate under the Condition of giving an Inventory & Account; & it appears neither from ye Will (but the reverse) nor from the Evidence, that he is at all entitled to the Residue: there is not one Witness who says a Word of the Decd havg: ever declared her Intention of giving the Residue to him, she might not be acquainted with the Law, she might intend him the Residue & think, the making him Exor, was giving it him, but her Intention must follow the Law: there being no declared Intention it must be collected from the Will alone, from wch you cannot form a persuasion, that the Legacy of £20. was intended for Geo Francis ye younger one of his Age wd never have been called Mr & the Witnesses swear he did not use to be so; if therefore G. F. junr is not the Legatee, Mr G. F. the Exor must be, as such, not a nude Exor, & not entitled to the undisposed Residue, but must give an Inventory & Account . . .

Judge Dr Hay ... The Testatrix gives a Legacy of £20. to a Mr Geo, Francis, the next of Kin cites the Exor to Inventory & account, who alledges in Bar, that he has the Residue; the Qu: is wh: the Exor, is a nude Exor, or not, this depends upon Law & Fact: the Exor is to prove he is not a specific Legatee: it appears on Affidt: that there were two of that name: the Witnesses swear they verily beleive from her Declarations, as to Mr Geo Francis the Exor, that she intended him to have the Residue; but allowing this Evidence its whole force, that dont make it certain the Exor was not the person intended for the Legatee, & there are two Witnesses who swear the contrary: he must make it clear, that he was not the person to whom the Legacy was left: It is the duty of an Exor to give Inventory at the Suit of any Person havg: an Interest, however slight; it used to be done at the time of taking Probate: if it is doubtful whr the next of Kin has any Distribution, the Exor must give Inventory, because he is obliged to do it without being cited, & the Ct can direct one, & it is always done in the Country, therefore I overrule the Protest. This Ct is not authorized to pronounce the Exor a Trustee for the next of Kin, (the Ct of Chancery can) & direct him to distribute accordingly, tho, it virtually may by pronouncing, Mr Geo Francis the Legatee, to mean Geo Francis the Exor . . . .

Exor obliged to give Inventory without being cited

Prerogate — No 29 Talbot v. Ryan. — July. 4

Bargrave — Dr Collyer — Dr Bever — Holman

As to Validity of a Will

Dr Collyer ... Wm Ryan is the Party decd; he left a Will, wherein he appd: Edwd: Talbot sole Exor, & gave his Sisters £20 apiece: Cath: Ryan (now Stewart) took Admon as to an Intestate, wch has been called in at the Suit of the Exor. It appears that 2 Witnesses subscribed the Will; one is dead, the other swears to the Sanity & to the Subscription of the Decd, & to its being subscribed by the other Witness in his presence: there has been 1 Witness exam: to ye Handwriting of the Dead Witness. The Query

Judge — is, whether the Will is valid or not?

Dr Hay — I think this so clear a Case, that I will not trouble the Council. The Will is indisputably valid; there is 1 Witness to the Execution: it is always usual to establish a Will upon the Evidence of the Character of a Deed Witness a direction to sign the Name of a Testator will be as signing by the Testator, but it is not allowable to be proved by the Testimony of that single Witness, however one Witness is sufficient in the present Case to prove the Handwriting of the Deed Witness, on account of the other concurring proofs: I am of opinion to pronounce for the Validity of this Will —

Prerogative — See Jul. 10

Neale v Neale & Piper — No 2A

Cumberlege — Dr Wynne — Dr Harris — Greene

July 4th. This Admon shall be excommunicate for not giving further Security

Dr Harris — Mrs Piper the Admin[x] was cited by the Curator of Minors, their Grandfather to give an Inventory & Account of the Estate of Mr Neale her first Husband; it thereby appeared to be more considerable than was at first imagined; the Ct then directed the Securities to justify — On their refusal, you said, you could not revoke the Admon, but ordered the Admin[x] to give further Security, on pain of Excommunication; the Ex[n] therefore now is, she[r] the Excommunication is to go under Seal, by reason of her not getting such Security; & there is the Affid[t] of a Person who heard 4 People refuse; having done therefore all in her power to comply with the Order of Court, I hope you will be of Opinion, not to let the Excommunication go under Seal —

Dr Wynne — Our Application is on behalf of 6 Children Minors: the Mother takes Admon, brings 2 Persons as Security; she ought to have known whether they were responsible Ones to justify: however she soon marries again without taking any Care to secure the Money for the Minors; the Children are innocent & it wd be extremely hard they shd suffer thro' her neglect — the Husb[d] & Wife swear they have applyd to sev[l] Persons who have refused to be Security, but none are named, if any had, it wd be more credible, whereas by specifying none, she puts it out of the power of the other party to contradict it: there is indeed a reason pretended, because Neale is concerned: but that can have very little Weight as no Act can be done without the Admon: if the Excommunication was to stop, there appears great probability that it wd not be attended with Imprisonment, for when past, she wd in all likelihood find Security —

Judge — Dr Hay — If the Widow has used her Endeavours to comply with the Order of the Ct, has shewn it to their Satisfaction, she is in time to prevent the Excommunication going under Seal — She took Admon, there was no Objection on her not being able to find sufficient Security at the time the Admon was granted: she married again, the Guardian then applied to have all the possible care taken of the Estate, that the Security shd justify; they have refused to justify; they prayd to have the Admon revoked; but the Court said there was a great difference between revoking an Admon once well granted & making an Election whilst it was open, as to granting it to the Guardian or Widow? I doubt wh[r] the Ct cd go farther than obliging the Party to give the Security; but tho' the Ct cd not revoke the Admon, it directed the Widow to give Security, on pain of Excommunication; the better Husband I swear to have applied to all her Neighbours & Acquaintance; the other Witness swears to hearing four Persons refuse to be Security; then the Return is, that she cannot comply with the Order; I cd enforce my own Decrees but the Ct cd not be cruel; Lex non cogit ad Impossibilia; I don't see why the Guardian does not sue for Distribution, for then he might come at the Securities; The Husband of the Widow has given Bond since the Excommunication issued, all that can be done, has been done to secure the Minors Interests, & I think in this Case, sufficient Reason has been shewn, to induce the Ct not to proceed; I therefore dismiss the Widow, but grant a Decree, as is now prayd by Mr Cumberlege to exhibit an Inventory & see Portions allotted — — — — —

Delegates — July 5 — On Admon of an Allegation of Bottomry Bond

No 25 — Merry v Jamison & Co[o]

Gostlin — Dr Wynne — Dr Clarke

Dr Clarke — This is an Appeal from the high Ct of Admiralty: the Ship Ld Anson whereof Mr Merry is the Owner, in April, May, & June 1763. lay at in Virginia & the Ship wanting repairs, the Captain applyd to my Clients Jamison & Co. for £1000 to be employd in refitting, victualling, & lading this Ship for the Port of London: to secure the Repayment the Masters gave my Clients a Bond of Bottomry & Bills of Exchange, on Mr Merry the Owner, with Bond as well as the Bills he refused to pay: the Ship arrived in Aug[t] 1762. had made considerable Freight. 17 Sep[r] 1763 Action was entred, & a Warrant issued to arrest the Ship; her Tackle &c in whosesoever hands they shd be, to answer to my Client. Bail was entred, & a Libel has been given consisting of 9 Articles, setting forth that sometime in 1761 or 62. the Ship Ld Anson was freighted on a Voyage to Quebec; that she was about 400 Tons burthen, that Mr Woolcomb was sole Commander; that the Ship lying in Hampton River, the Master had no fixd Credit there Messrs Jamison & Co. supplied the Capt. with money to the amount of £1000 to refit, victual & lade her, else she cd not have proceeded safely to London; that for Security the Capt: made over the Ship, Tackle &c and gave a Bottomry Bond; the Identity of the Persons is pleaded & the Bill of Sale: that in Aug: 1763. she made Freight to the amount of £1500. that Mr Merry had been frequently applied to for the payment but had as often refused; & the Motion was that he might be compelled to payment by Sentence of the Ct. this Libel the Judge below admitted, from wch Admission Gostling has appealed —

Dr Wynne — I am Council for Mr Merry: 17 Sep[r] 1763 Action was entred in £2000 8ber 1763. he bailed the Ship &c. 14 Nov[r] 63. the Judge of the Adm[y] admitted the Libel, & right to 22 Nov[r] when Mr Jamison prayd to be heard on his Petition "That this was a grievance & cd not be appealed" The Answer is it wd be an irreperable damage. for we plead they did not take such previous steps, as ought to be, & always are taken abroad, to empower a Capt: to pledge the Owners, or Artificers under their Hands, that the Ship cd not proceed further return, till those repairs were done, for wch the money is

Assigned for Sept 7 Jan

said to have been borrowed, & that the Judge unduly admitted the Libel, tho, the Hypothecation was not made with the Consent of the Officers, Mariners, without wch no master or Captain has power to execute an Hypothecation Bond...

Sur Feb. 18.

July 5

Commissary of Surry

Dr Collyer

No 26 Hewet v Kidgell
Stevens. Dr Wynn Dr Harris Fountain.

This Suit is brought agt the Revd Mr Kidgell for non Residence by Mr Hewet, who has cited Mr Kidgel, for 6 Months, to be computed from the time of Service (from 2 months to 2 months) to reside, otherwise, the said 6 Months being elapsed, to shew cause why he shd not be deprived of the Rectory of Horne in Surry. The Monition was returned 22d May 1765: Fountain to day. The Monition was returned 22d May 1765: Fountain to save the Contempt appeared for Kidgell; the Citation to appear, wch was not, to appear personally, & we produce an Affidt of Kerchman that a Proxy is gone over to Dunkirk to be executed by Kidgell who is there: it is daily expected, Fountain has prayd time to exhibit this Proxy, & it now comes on, at his Petition — Please to observe, Sir, that this is a Presentment agt Kidgell for Non Residence; I wish he may not repent, the Sequestrator now appears; it is an indirect method of attacking the authority of the Act of B.R. The Sequestrator has an Interest Mr Clarke now appears for him; the Sequestrator is the person who shd be punished; for Mr Kidgell is now under an actual deprivation; the Sequestrator has all; he does not pray to officiate, to take it away from the Sequestrator; the Business is taken out of Kidgells hands; if there is any neglect in the Person appointed by the Sequestrator to officiate, the neglect falls on the Sequestrator; tis by virtue of his officiating that he is punishable for Non Residence: the Presentment alledges that no Curate has been appointed since May 5th 1764. Supposing the Fact true, Kidgell is not in fault, he cannot appoint a Curate, the Sequestrator must do it, he is to pay him: Kidgell has nothing to do in the parish: would you then article agt him for not doing, what he must not do; if you proceed the Kings Bench will have made an negatory Writ: the Rights of the Sequestrator are a material Consideration & will be a Point to be made hereafter, the Business now, is merely that Fountain has not a Proxy from Kidgell, who has Friends that wd direct him to appear to save the Contempt; but a Proxy being now necessary he cannot proceed, till he receives one; we have an Affidt that he expects this Authority & we pray time to exhibit this Proxy; surely, Sir nothing can be more reasonable than such a Petition; the Defendt is abroad & ought to have an Opportunity of defending himself: there arises an Objection from the manner in wch this Suit was begun; here is a Presentment, no Articles; that will come before the Court hereafter; but it is always usual that wherever there is a deprivation there shd be Articles —

Dr Wynne — I cant tell how many points the Dr may have to make, but this Cause has begun in a very regular manner: Causes of this kind are not very frequent: I hope many occasions are not given for Suits of this nature: the Cause was begun by Presentment of Churchwardens in Nov: 1764. there needs no other Evidence, the Citation has issued upon it; he has had 3 Terms assigned him, the 6 Months are expired: he is already ipso facto deprived, & wants only a declaratory Sentence; the Dr Argument, that the Act of B.R. is in proper Ordinary is an extraordinary Position; for if this Doctrine, that a Clergyman cannot be deprived, because a Sequestrator wd

suffer; was once to be allowed to prevail, I dont know how a Minister cd be punished; if to his other great enormities he cd add Debt; or by Collusion he might easily contrive to get the Benefice sequestred: true, the Ct of C.R. will give a Creditor all the Benefit he can receive, but he can have no more rights than the Minister himself cd have, when the Creditor trusted him they knew the Conditions, they knew the risque they ran; a Man may forfeit even a Freehold. The power of Deprivation is in the Ordinary: In Ch. Parkers time a Clergyman was deprived for non-residence; the Proceedings were the same as in the present Case, & the Form of the Citation, monition &c is taken from his Register mutatis, mutandis. The time is long since expired: it expired in may: Stevens objected to Fountains appearance, the Ct nevertheless indulged a month beyond the time to exhibit y^e Proxy &c: if the very Position does not shew, he has no right to make it. He is a good Proctor, but no Pch Priest; I do not say possible Cases may not be devised, why a Party may not be compelled to reside, but then he must shew reasons for his being excused Residence, & there must be a legal Authority to oblige him to reside, & that Authority is the Ordinary: the pretence now for this Petition is, that he has heard nothing of the matter; it is a very lame Acct given by Hirelander; he has some notion of Ridgell being at Dunkirk, the Affid^t is dated June 21 in talking of a Person's being at Dunkirk as a reason for not being able to procure a Proxy all this time; you can as easily have an Answer in a fortnight from Dunkirk, as from York in due Course of the Post, there has already been ample time given, if he cd not come within 6 months, cd he not by the Cause before the Ct cd he not assign a reason for his not coming; it wd have been very proper, if the Ct had judged it sufficient, it wd have cancelled the Sequestration; that seems not now a point open for the Consideration of the Ct: there is a Terminus juris, you have declared in penam; a Proctor now appears y^e the Term being expired, by praying time because he has no Proxy, he acknowledges in fact, that he has no Authority to appear to make such Prayer, & dont know where to have one. The Residence is what is expected from the Minister himself, & it is no Satisfaction to the Pch^rs that a Stipendiary does the Duty, I hope therefore Sir, that rejecting this Petition you will proceed to Sentence.

Judge — If Deprivation shd be necessary, the Bp. must hear & determine in person, Certifying is not the Practice now, the Bishop himself must attend: the Papers were not left in Time, & there is also another reason why the Bp cd not have determined, wch is because Mr Clarke now appears for the Sequestrator. The cause cd not be then forwarded, wch Ingredience or reject the Petition, the whole stands now, as it did 6 months ago, & must remain as it is, whatever I determine now might delay, cant forward, whatever new matter & Papers are to be introduced must be delivered into the Registry a week before.

July 30

Prerogative Ct — No 27 — Orts v Rowland

Collins — Dr Calvert — Dr Collier — Grene

Dr Calvert — I am Counsel for Mrs Anna Maria Orts grandniece & only next of kin of Margaret Nicholson, who died intestate Feb^y 1762. leaving Anne Nicholson his Widow. March 1763 Admon was granted to Anne Nicholson the Widow. March 1763 Admon was granted to Anne Nicholson the Widow. soon she died had made a Will & appointed for her Exec^x Mary Rowland the other Party in this Cause: Caveat was entred in the Admon de Bonis of Margaret Nicholson. Mr Grene denied the Interest of my Client; an Action was given on our part & admitted, & the Interest was confessed modo & forma; I must trouble you with reading the Act of Ct & we must have Costs. The Statute directs Admon to be granted on an Intestacy, to the Widow or next of kin; here the Election has been made. The Statute gives a positive Interest to the next of kin, where there is no Widow. They plead that Mrs Orts has assigned over all her Interest in the Goods of Mr Nicholson to one Mr Campbell: she might make over all her part in distribution, but cd not give away her right to the Admon; she still remains next of kin to Mr Nicholson, & the Direction of the Statute, is to grant the Admon to the next of kin; the Ct only considers the Cases out of the Statute & the Point was so solemnly argued & determined in the recent Case of Jacobson & Walton that I think it quite unnecessary to give the Ct any further trouble.

Dr Collyer — I apprehend this Case to be out of the Statute, for the reason of the Alternative left by the Statute is, because of the Interest they both have under the Intestacy: We have shewn Mrs Orts has no Interest; she has hereby put it out of her own power to claim the Admon; the Majority of Interest founded the Determination in the Case of Clarke & Biddlecombe. Geo. Clark died intestate leaving a Widow, a Sister, & several Nephews: the Widow took Admon, the Sister died, & then the Widow, leaving Goods of her Husb^d unadministred; she made a Will & appointed Mrs Eliz^h Biddlecombe, her Husbands Sister's Daughter, her Exec^x Edw: Clarke a Nephew of the first died entred a Caveat agt the grant of Admon de Bonis non, of Geo Clarke, in opposition to the Exec^x of the Widow; but the Ct deemed the Admon to Mrs Biddecombe, in preference of the Nephew on account of the Majority of Interest. That Case was considered out of the Statute: Ours seems to be so too, being left to the direction of the Ct, I hope you will decree the Admon to my Client upon the same ground of Interest, & Mr Campbell the person interested consenting to Mrs Rowlands administring.

Judge — If it was discretionary in me to whom I shd grant the Admon if the Interest was to be the Rule to direct; & upon Mr Campbells consenting to it's being granted to Mrs Rowland, I might perhaps have inclined to grant it to her. But the Q^n is first wh^r this Case is within the Statute, & as I apprehend it is, I am bound absolutely: Admon de Bonis being under the same Rule as primary Admons. Whatever Mrs Orts made over, however she has divested herself of her Interest, she cd not grant away her right to the Admon, because the Statute considers who shall be the Representative, not the Interest. when y^e dispute lies between persons in equal degree, y^e Ct has an Election, & the majority of Interests is considered: it is so in Wills when they stand upon an equal footing; but in the present Case, I dm not

at Liberty to chuse. Mr Campbell must have his Remedy agt Mrs Orts as Admix she is only Trusted for him; for I must deny the Admon to her, as next of kin with Costs to the Time of pronouncing for her Interest

Appealed

Prerogative

No 28 Winchester Langdale & Wood v Gough als Strode — July 30

Bog — Dr Wynne — Dr Harris — Major

Dr Harris

Mrs Eliz: Gough died, leaving a Will, dated Jan: 18. 1760, & another June 6th. 1762. in one Allon we particularly set forth how Mrs Lucy Naomy Gough, the Daughter of ye deced is entitled to the Fortune, viz. by ye Will of Mr Ferdinando John Paris: the Will of 1760 has been propounded on the part of Mrs Strode, & this Allon is Subsidiary: we formerly pleaded that Mrs Paris recommended Miss L. N. Gough to her Husband, to be provided for by him: that after his Wives death, for the better care he took her, her mother home to his House, adopted her as his Child, & declared he wd leave her his Fortune; & that he made this declaration, even after her Marriage with Strode, but added, he must now give it under some private Trust: that she then recommended her mother to be her Trustee, & that she accepted of the Trust accordingly. That Mr Paris's Will was dated Jan: 7. 1716, that a Letter of the same date was found, together with the Probate in Mrs Goughs Custody: that the Persons setting up the Will of 1762 are Strangers, that the Contents of the Papers were never read to the Deced. In this present Allon, we plead & Exhibits, Notes, & Messages, we annexed to Interrog: necessary to the Allon, that they might not plead them. pleads that Legacy given to Miss Lyre, whom they called Insolent &c. Mrs. she will find she must be slave to him & his Insolent Daughter, & the dirty Slut he keeps" That Miss Lyre is ye Daughter of Francis Lyre Esq, the Person they wd intend by him, & she is meant by his Insolent Daughter. Mr Innes Clerk to ye said Mr Lyre Solicitor is a Witness

This Day (20th Sept: 1762) due to my child Ten Gns: Voyage in Crown Pieces

Dr Wynne

Sam Council for the Exors named in the Will of 1762, who are also Trustees under it for Miss. Lucy Naomy Strode, to whom the fortune is left for her life, & to her Heirs of her body, & for want of Issue to these Trustees themselves; the Dates of the Steps wch have been taken in this Cause, will sufficiently shew how unwarrantably it has been delayd. Mrs Eliz. Gough died Jan: 23. 1763. On 2d Sess. Hil. T. (29 Jan) 1763. Bog prayd Probate. On the Bye Day. Mrs L. N. Gough opposed: the Will was propounded in an Allon, Witnesses were examined, & 1 Sess: Trin. T. Publication was decreed on the Petition of Bog: they suspected they wd plead a former Will, & Republication, & Admon was granted to Jos Robinson, the Nominee of Mrs L. N. Gough. als Strode; their Allon was admitted in Mic: T. 1763, to wch this is supplementary, & only 3 Witnesses have been examined. Major declared he shd give an Allon 1 Sess: Trin. T. last. we have waited for it almost 2 Months; it now consists only of 3 Articles immaterial & irrelevant, with a long list of Notes, Papers, whose contents are not by any means expressions of tenderness from Mr Paris to Mrs Strode. Custody & Imposition have been alledged; nothing can appear from these Notes to instruct these Articles, but supposing they could, that you cd even examine wh: Trust, or not (as you cannot), yet general Hints only wd be no sort of proof of leaving a Trust in her favour. the Ct will not admit such quantities of Papers, that do not make to the Issue: & serve only to

Dr

continue an affected delay: they are out of time; if proper shd have been annexed to the Allon, but must appear in a very different Light after 2 Years.

Judge Dr Hay

If they had been offered with the Allon originally pleading the Affection, Exhibits are to attend it. The Identity of the Papers is confessed, Witnesses need not be examined to them: the rest is observation, let them come in time

July 30. a. Wh: certain Papers are to be taken as part of y Will

Prerogative

No 29 Dovee in the Goods of Anne Box deced

Clarke — Dr Wynne.

Dr Wynne

This is an Application for the opinion of the Ct, from a Person who has administred as Exec: in a Will of Mrs Anne Box deced, dated 11th Jan: 1761 has since found 2 Papers of a Testamentary nature, & is desirous of knowing whether she must take Probate of them. In the Will of Jan: she made a disposition of her Estates, in trust, with a Clause, "that there shd be paid out of the Profits, such Sum or Sums as she shd direct, by Note or Notes under her hand" She by a Paper gave several Legacies, wch she directed her Exec: to pay. The Will & Paper were proved March 28. 1763. The Papers subsequently found, were 2 Letters addressed to Mrs Betty Foreman, In the one dated Sep: 29. 1762. are these Words "Remember if I shd not live to go to Feversham to give my Keys to Jane Smith, you will find a Will, but it is not to my mind, & I am too unhappy to make another" She also gives Mrs Foreman a Legacy of £50, mentioning the doing several Acts for her, wch were then imperfect & many other things. the other is of the same date & nearly of the same purport, & contains moreover the Words "I desire Anne Dovee to give all to my Brothers & Sisters" The Controversy mentioned in the Letter was determined in her Life time. The person addressed, was Betty Foreman her Servant, who had left her long before her death. the Account mentioned, was settled before she had another person who managed her Affairs, & not ye person taken notice of as Manager in that Letter. the Q: is wh: these Papers are to be taken as Part of the Will

Judge Dr Hay

The Question may depend upon Circumstances: but upon ye face of these Papers, Mr Dovee need not take Probate of them, unless she pleases: they are not addressed to the Exec: & Exors are not obliged to take notice of Papers not relating to the Will, wch these seem not to do. If the persons interested set them up, Citation and Issue at their Instance

Nov: 23 1765

Mich: Term 3d Sess:

No 30 Holmes v Fleet

Prerogative — Goslin — Dr Collyer — Dr Wynne — Holman

Dr Collyer

Caveat being entred by Mrs Fleet Daughter of the deced, was warned by Frances Holmes the Husband, it is said he barred himself by a Settlement before Marriage. The Husband in that Case, has a right to every thing, not covered by the Deed. Goslin prayd Admon to Frances Holmes. Holman alledged that previous to ye Marriage he had agreed, that whatever Goods &c she then possessed shd be vested in Trustees to be to her Sole Use, & disposed of by her as if sole. the Deed is in 1744 & conveys, Leases, Messuages, India Bonds, Debts, Plate, & all other Goods & Effects whatsoever in Trust for her the said Sarah Kingston, that Glanville, Robert & ye Survivor shd suffer her to receive the Interest, if she shd survive her Husband: her discharge to be sufficient notwithstanding the Coverture, her Goods &c not to be liable to his Debts, shd they shd permit her to let, sell, mortgage such Tenements Hereditaments

Dr Wynne

Judge
Dr Hay

Mr. L. 3d Sep.
Commissary of Surry

Dr Collyer
The Person who
moves the Act begins

Dr

Mo 31 Hewet. v Kidgell ——— Sequestrator
Stevens Dr Wynne Dr Collyer. Fountain Greene.

Gro: 26
On Adm
of Effects
Petition
for articles
& Charge being
by presentment

Dr Wynne

Sequestrator cant
sue in Exch. for Tythes
without the Bp being
made Party to the Bill

Mr Stat. 13 Eliz: c 20.
See Clauses to
confine no longer
than Residence
of the Depr.

See Fol. 13

He also a Liberty to purchase, & that, to be at her own disposal, as if she had remained sole— Gostling says he has nowhere barred himself of his right to administer. She died intestate. 1764— If every thing was not tied up, what ever was not covered, wd have been divided with his Children— Suppose she had a legacy left her, wd that have been covered? we do not desire what is Scheduled, we admit we are barred of that; who is so proper to have the Admon as her Husband— the Law has cast it on him

Sarah Holmes is the deed, the private History &c are not proper for me to enter into, but the Man shd be bound by his own solemn Act. The Qu: is, wh on these Articles it appears that the Deed is restrained to particular Effects? All he comprehends all she was worth; there is a very minute particular in the Schedule; she meant to include every thing; there is no reason to say it is restrained— If she has acquired afterwards, because it adds, also Lands &c, wch she may after her marriage purchase; wch seem to comprehend all she cd possibly acquire; unless he shd deserve by his Behavior, that she shd make a Will in his favor; she has made no Will— Here is a vested Interest— Shall a possibility be presumed for an Admon to be granted away to the Husband, unless you are bound by Law; Tho the Law has directed it, yet it is with an Allowance to this Ct to judge where the presumption is taken off, of his being the most interested Person

It is certain, in Law the Husband is entitled to y^e^ general Admon but he can give a Power to the Wife to dispose of her Estate by Will— If she makes no Will, if he says her Goods shall go to the next of Kin, he bars himself— If he has given away his right he wd not be entitled, to y^e^ Admon, had: no Interest. The Qu: is, what this Person has allowed his Wife by y^e^ deed? The Deed confines it to all the Goods of the said Sarah Kingston The Deed confines it to all the Goods of the said Sarah Kingston If the Deed had stopp'd at the Words "Should purchase or acquire after the Marriage, with the Proceeds of the 3d Trust Estate, it wd have been otherwise; but in the present Case I am of opinion Mrs Hewet is entitled to admon of y^e^ Effects mentioned in the Deed, & all acquired, since her marriage, with the Proceeds— If there are any other Effects, the Husb^d^ wd be entitled to y^e^ Admon thereof—

I am Council for Mr Jacob Kirkman, a Creditor of Kidgell Rector of Horne in Surry, in £180. for this debt, he sued Kid in B.R. & recovered Debt & Costs making together £483. after Judgement a Fieri facias issued to levy this Debt on Kids Effects to the Sheriff of Surry, who returned no Lay Fee, but that he was Clericus Beneficiatus, as Rector of Horne, but in Surry: the B.R. made out a Writ of Sequestration directed to the Bp of Winchester, to aid the Judgement of B.R. who in Obedience thereto granted a Sequestration & appointed Kirkman to receive the Profits & take care of the Cure, & to account for the Profits if demanded, till the Debt was paid & y^e^ Sequestration relaxed— Suit has been commenced by Hewet, by Presentment to deprive Kidgell for Non Residence: Stevens for Hewit alledged that Kirkman had no Interest to entitle him to intervene in this Cause; as a bare Sequestrator perhaps he has no right, but when coupled with an Int: under the Authority of B.R. it is different: we therefore pray the Sequestration will not proceed to a Deprivation till our Sequestration is relaxed, the Debt & Costs satisfied, otherwise the Sentence

of B.R. Writ will be nugatory— The Rev^d^ Edw. Jackson is appointed with the Priority (Approbation of the Bp, as Act plurimum) the Duties are well & duly performed, & the Sequestration is not yet relaxed— The Writ of Sequestration is exhibited— it directs the Bp of Winchester to issue the Seq^t^ levy 480 Debt, also 63 Shillings Costs & damages (as the Indorsement on the Original Writ, is levy £52. 10.) The Bp returns that he has sequestred the profits &c Dr Wynne I am Council for Mr Hewit a pet^r^ of Horne; the Proceedings commenced by the Presentment of the Ch: Wdns of Horne at the Visitation agt y^e^ Rev^d^ Kidgell M^r^ for non Residence & deserting y^e^ Duty from March 20th to May 1764— Stevens alledged, the Sequestrator had no right to appear in the Cause; that the Suit was promoted only agt Kidgell for Contempt & Non Residence— Hewit prayed a Monition out of Ct, directed into 3 portions, as a peremptory Citation to come & do his Duty, or shew Cause why he shd not be proceeded agt for Deprivation; no Appearance was given till 3d Sess. Trin: T. in July Fountain has now an Authority from Kidgell to appear; the first point therefore is wh: Kirkman has a right to appear as a Party in this Cause— Fountain alledges Hewit to be a voluntary Promoter, that this is a Plenary Cause, shd proceed by proving y^e^ prayed Articles— This is improperly styled a Suit, because no Citation is taken out; only a Monition to do a certain thing; if he had come to reside, there wd have been no Punishment, no Retrospect, an End of the Proceeding; It is in the Nature of a duplex Querela, How therefore can any Person, but the Minister be a Party— A Sequestrator cant sue for Tythes in the Exchequer; but the Bp must be named along with him in the Bill— indeed in y^e^ Spi: Ct he is aided, that Judge knows him, but the Common Law does not; he is there considered as a mere Bailiff appointed for a particular purpose Kirkman has been in possession of y^e^ Sequestration from June 1764 to levy £52. 10 pursuant to y^e^ Indorsement, therefore y^e^ purpose of the Writ is probably answered; on wch account I hope y^e^ Ct will think he has no Interest, & is not entitled to intervene: especially when you consider it is no Suit, & that the Proceedings are with another view: But if you indulge the Sequestrator, it is to stop the Proceedings, till the Sequestration is relaxed: Can there be a pretence, that the Sequestrator shd retain his right longer than his Principal: Kidgel had a Freehold, but defeasible, subject to be called upon, for the performance of his Duties, for omitting wch he may be deprived: Will the Doctor contend that a Benefice is different from an Annuity, he is put in only to y^e^ performance of certain Duties: Can his running into Debt, & then, change the nature of the Case? If that avails, & a Sequestration wd stop y^e^ Proceedings in case of Non Residence, it wd stop them in case of Homicide, Adultery, or any other Crime, provided he added Insolveney, or running in Debt, to his other Enormities; he might also collusively confess Judgement to a Friend, & set the Law at Defiance— It is said, Indeed, if you dont stop Proceedings, the Sequestrator may lose his Debt & true: by a parity of reasoning a Bond Creditor, who wd lose his mortgage Debt by a superior Title, might justify agt such Title: People are liable to such Lapses, they know what sort of man they trust, the Inconvenience is less, that Individuals shd suffer, than that a bad Man shd escape Punishment. Stat 13 Eliz: c 20. Sec. 7 No Lease is to endure longer than y^e^ residence of the Depr; who is not to be absent more than 30 days. See what the Makers of this Law thought of y^e^ Consequence of a Parsons Residence: they lay hold of this Method of punishing: How came the Monition ever to issue? it was then thought no Bar

that the Benefice was sequestred; you granted the Remedy that all the pish^rs are entitled to - The Dr said he cd not come & do the Duty: Kidgell shd have shewn this: But this Objection is not founded: a minister of a Sequestred Parish, can & ought to do his Duty, as before. y^e Sequ^r wch says If Occasion requires, to get the Benefice served by a proper Person: The Church is to be supplied; the Minister is as capable as before: It is impossible the Ordinary can approve of any other, whilst the Minister is on the Spot & ready to do the Duty. On these Considerations, I submit, that Kirkman cant intervene, because there is no Suit; & that he can claim no Interest except in right of Kidgell - The last Consideration, is Fountains Petⁿ, who alledges the Suit to be a cause of Correction voluntarily promoted agt Mr Kidgell, & that Kirkman has given a Bond of 80£ to prosecute, it is a plea any cause shd be proceeded in by Articles & examⁿ of Witnesses, that Presentment is not sufficient Evidence to deprive on - This Petition is new & extraordinary: the Def^t appears, without alledging any Nullity, directs the Promoter how to proceed: If he alledged any Irregularity he shd appear under Protest; I beg leave to insist there is no Cause; no Citation, & that Kidgell is not before the Ct in this respect - This is no Cause of Correction, as they apeal, what is it to correct - we dont say a word about his Manners &c. we only say, he has not resided, & implore the Aid of the Ct to admonish him to come & reside, or shew Cause why he shd not be deprived - We might proceed by Articles, but have not any Vindictive Sentiments, no Retrospect: there is no Color to examine Witnesses, the Judge can do without, he may proceed on the slightest grounds, because the Party need only certify his Residence, if the Judge proceeds afterwards, it is at his own peril - The 2d Presentment in may. 6 months after y^e first, clearly shews he did not reside - Articles wd be a clear Nullity, as there has been no Citation, I hope, as the Effect of your Monition has not been answered, you will enforce it, & proceed to Deprivation, wch must be done by y^e Bp. himself - This No-Cause, No-Suit is brought by Mr Hewit for non Residence - I insist Non Residence is no Cause of deprivation & that there is no Law to justify it - half the Clergy in Engl^d wd be deprivable - If a man voluntarily flys from y^e Living & deserts his parish, he may be admonished to reside, & on omitting so to do, may be deprived; but it must be a voluntary Desertion - I must trouble you with y^e presentment wch is audaciously fraudulent; it is first made to y^e Archdeacon, & states that Kidgell has not personally resided, or himself done the Duty, had not appointed a Curate. What cd possibly the Archdeacon, not to enquire wh^r the Cure was served: the Sequestrators would not have Kidgel, but y^e Service was regularly supplied - K. is now under a temporary Deprivation If he was to attempt to do Service under the Sequestration he wd be a Disturber, liable to prosecution as such in y^e Sp^l Ct & at Common Law - A 2d Presentment is made to the Bp, he asked no Questions, tho he had issued the Sequestration) wh^r the Parish was not Served - The Presentments appear Colorable the Monition takes it for granted: what Business has Kidgel there, to see another person receive the Profits & do y^e Duty: he has Enemies, because he opposed Blasphemy - Only to take away all a man has in y^e world, I dont know else what can be called a Cause of Correction: Debitum Justitiæ to give Articles that we may plead & shew Causes - He is a

Dr Collyer

Sequestrator coupled with an Interest; not a mere Sequestrator: He does the duty of one, as Bailif he is accountable to y^e Ordinary: we pray to be dismissed -

N3 Dr Wynne offered to reply wch Dr Collyer objected to as unusual but Dr Harris said In all motions where a Reply was desired it was allowed

Dr Wynne... The Dr takes for granted that our proceedure is new; It follows that if our Way is right, there is no color for Articles, It is no criminal prosecution - It is y^e Ministers Duty to reside after Sequestration as well as before; If he chose to reside, do his Duty, the Sequestrator cd have no right to intermeddle with the Cure: if he suggested to y^e Ordinary, a Desire to do the Duty cd appoint him, & order the Sequestrator Curate to cease officiating. There is the Deprivation of Mr Morrison, Rector of Henley on Thames in Gibsons Appendix, he is acquainted with the whole in this Way, to call for Articles or Evidence is totally unnecessary agt the nature of the Thing -

Morrison Deprivation in Gibsons Appendix...

Judge } The 2 Qu^ns before the Ct are 1 Wh^r the Sequestrator may intervene
Dr Harris } 2. Wh^r Fountain is entitled to Articles

As to the first, the Sequestrator has in one Sense an Interest, (he may lose his Debt) but not such an Interest as will qualify him to intervene in a Cause of Non Residence between y^e Bp & his Clergy - All Respect will be paid to the Kings Writ, it cd only be conditional, so long as this Rector shd continue Incumbent.

As to the Second, I think not entirely with Dr Wynne - This is a Cause he is cited to appear, he has appeared, & prays to have the Charge. There is no Process, where Parties are obliged to defend themselves, before Articles have been exhibited - Where Articles have not been given in agt Clerks, they have been ordered on Appeal - I am inclined to think Articles ought to be given by Mr Stevens, the whole Monition is in y^e nature of a Citation - I assign Stevens to give Articles by next Ct. & think Kirkman has no Interest to appear in this Cause, & reject Greens Allon.

Correction for

Greene appealed. Prerogative Ct. Sept. Mich. Ter.

To prove the Allon.

N°32 Lovegrove v Lycett

Altham. — Dr Clarke, Calvert — Dr Harris, Wynn — Jeanes

Dr Harris... The Allon states that L 25 Sept^r 1763 caused Bid Hestones to be brought to the Bare Ground, & that he gave him strong Liquors so as to cause a Delirium, wch continued till his Death: that he cd not be taken out of Bed nor bear y^e least Noise; that the Bells of the Pish did not ring on that account - that L brought him a Will dated Sept^r 13th sometime in Oct^r to execute this, he was totally incapable

Dr Calvert read y^e 10th Article of y^e first Allon^t that between y^e 20th & 30th of Sept^r the Deed seemed pleased to see y^e Sd Lycett, behaved in a friendly manner to him, in y^e presence of Lovegrove, & wished him a good Journey

2^d Art: of the 2d Allon. 1^h June 1765

That Lycett on y^e 12th Ober 63. went to Bid Hestones, found him in Bed, delirious, & returned with his 2 Friends, as he was not conversable

10 & 11th Articles Mr Lycett about 15th of October, wrote to Dr Battie at Marlow, desiring him to visit the Deed, that he went on 17th & again on 24th of October & found him worse

Dr Clarke... Having stated the Case, said, I will suppose they had forgot these facts they are of such a nature as not to affect the Cause they cant prove Mr Lovegroves Intention as an Apothecary, the bad Intention cant be proved, It is an Articles calculated only to defeat

on his Character - it defeats the purpose on wch it was pleaded
I wd take him at the time he was drunk not to do an
Act in Sobor, in order to be practiced on - If they can prove
the 2d Art: let them state a fact, that it was executed they
have in the first Art: pleaded Contradictions to the other
Allons -

Dr Calvert — You said, Sir, if the Counsel cd pick out any thing relevant
it might be received - I dont know that any Practice settles
the Number of Allons, but I may say the Ct will set Bounds
if Parties drop in Allons continually, the Dr alledged an
Excuse for it - there shd have been an Affid: the Assertions
of Counsel however respectable are not Evidence; he must
have known of it & suppressed them - Tho' this Act is not a
direct Repetition, yet it is so in Substance - In one Article
it is pleaded that Mr Lyet found the Deed delirious in October
then they say he was made delirious in Sept: & continued so
to his Death, then he was certainly so in October - he died in
Feb. 64, so that accord: to their Acct he continued intoxicated
for 6 months - It was very natural to prevent y Bellowings
without any bad design - when they before pleaded that he might
recover if properly taken care of, there was not a word
said, of the Cause of his Disorder - The 2d Article only
says "in order to sign" they shd have alledged that it was
signed, the Charge being little less than a Charge of Murder
the Client himself brings it; the Counsel do not sign it - It
has never been approved or read by them, they have not
testify'd it under their Hands

Dr Harris — We allow this was known before; the Party is ready to
make an Affid: it has slipt his memory - We rely on our
other Allon - it induces a presumption that the Will was
not executed on the 13th, & moreover Biddlestone declared
on 19th Sept: that Lyet was his Exor; he wd have been
a deceitfull man - We have pleaded he was in a delirium
on Sept: 19th. there were Intervals between. take the whole
Allon; if she was executed on Sept: 13th, wd it have been
tendered again in October; we thereby take upon us to shew
it was executed in Oct: - Before Publication, any relevant
Allon may be admitted

Dr Wynne — Criminal Matter being charged in this Allon, is the reason
of its not being signed by Counsel; the Ct has allowed such
Facts are proper, by admitting the other Allons - 3 Pleas
have been given: there has been no longer time taken up
in this, than in all Causes of Consequence; we have been
employd in examining Witnesses - We say the Wine was not
administred as a Cordial, but to such a Degree as to intoxi-
cate; this is a Charge agt Mr Lovegrove: we say y Testator
was so ill he ought to have been in Bed, had: a total constant
Delirium - The Bells being stopt ringing, fixes the time of the
Witness.

Judge. — It is admitted the Party has already pleaded twice; the
Dr Hay. — other was a common Condidit only, in order to revoke a Will
appearing subsequent - I know no fixed Rule for the num-
ber of Allons; they depend on Circumstances; I will never
reject an Allon, because it contains hard matter agt
an Opponent; It is the Duty of the Ct to receive it: I think
I shd reject this, not out of Tenderness, but because the Party
has given no Satisfaction, that these Facts cd not be offered before
he has given no Affid: that he declares he is ready to give one -
It is always a Rule to reject an admissible Plea if not offered
in time; otherwise there wd be no end of the Delay: In the former
Plea, the Deed was said to be incapable & delirious, why did not
these facts come out on the first Plea; that Omission will found
me in rejecting this - In the first Plea a special delirium was
alledged if the Witnesses cant be examined on the points now
stated, this Allon must be rejected as contradictory. The Rule is,
you cant contradict the matters given in before - They have
virtually pleaded that it was not executed on the 13th of Sept
but have alledged it to be between the 25th & 30th - See the
Allon is artfully drawn, as if it neither contradicted nor
repeated, I think it does both, & reject the Plea -

Prerogative
Jdt

No 33 Pepper, Markham & Markham v Markham

Fuller — Dr Wynne — Dr Clarke — Altham

Dr Wynne — I am Counsel for Anne Pepper, Wm Jn Markham Nephews, Neice of Thos Markham dec'd; he left a Will dated March 1744/5 wholly written by himself, attested by 3 Witnesses, therein named no Exor, but appointed his Wife (Mary Markham) Universal Legatee. 19 Sep: 1755 Admon with the Will annexed was granted to Mary Markham - In March 1765 a decree was taken out agt Mary Markham (to bring in y Will & prove it in solemn form) by Anne Pepper, Wm & Jn Markham Nephews & Nieces of Thos Markham Esq. Altham for M.M. propounds the Will. 5 Witnesses are examined -

Sarah Nunn, formerly Harrison, a Subscribing Witness, says she well knew Thos Markham 8 years; did not see him for near years before his death; that he & his Wife visited her Father & Mother - That whilst the Deed lodged at about the year 1744, as she best remembers, she was called into a Room in her Fathers House, where her Father, Mother were, that she saw a Paper lying on the Dresser, to which her Fr & Mr were Witnesses; that She set her name to it at their request, but knew not what the Paper was; but on looking on the Attestation to the Will, says, the Handwriting is her Fr's & Mr's & the name Sarah Harrison was her name; can't say wh: this was the paper: Has seen her Fr & Mr write several times & knows their Handwriting very well, that her Fr & Mr were people of Credit - To the C. Interrog: she says, she was not present when the Will was executed by the Deed, nor knows where it was executed by him - To 9th Interrog: Confesses on being asked, wh: she had signed the Will of Thos Markham, she offered to take her Oath, she never had sign'd a Will for Capt: Markham

33 . . . a Witness to the Testator's Handwriting was objected to, on acct of this Depon being improperly taken

Q: Wh: a Witness examined on an Allon, can be read to an executed Will, as to Handwriting?

I insist there is a mode of pleading in this Ct: viz that it is his Handwriting & known to be so: if they intended to examine to the Handwriting, the Parties wd be apprized what Witnesses wd be used, they wd suppose it a Subscribing Witness, or one who saw him write the Will: I object to it as extra articulum. It is not sufficient to say it is Deed & Writing, but that the Witness saw him write it -

Dr Clarke — The Article states "That the Deed did with his own Hand make & Write the Will now propounded; A Person acquainted with the Hand writing, tho, not present, may prove it — The Objection that S.K. declared to the two Ministrants, she did know she attested a Will is of no Consequence; She now says, she recollects, she signed a Paper she can explain it — if she had died, the Objection to be sure wd not have been removed

Dr Wynne — The general Objection to me, is, our having lain by so long; It happens there is a circumstance in their Evidence wch accounts for the Delay; On seeing an executed Will, they had no reason to suspect, & therefore acquiesced — Within a Year after, there might be grounds to suspect all was not right, in wch Case it was natural to ask if Witness if she had attested such Will; & when ill, was more likely to tell the Truth — The Witness subsequent to the taking out y^e Citation; there have been many Cases where the Exors wd be glad all the Witnesses were dead; because Dead men tell no Tales; the Signature is the same wh: the Testator is same or not

This is called an unsolemn Will, the Handwriting is the point in Question; I deny the Doctrine laid down, It is not the What is disposed of, that the Law regards, but the Form & Manner of the Disposition: If the Testator designed an executed Will, the y^e . . . . on Subscription, Attestation — This is represented only as an accessory Witness to the others; In the Interrog: she says, her Father said, Girl you must sign this Paper; the Witness does not say a word to the Sanity, Recognition, the Deed may have been asleep, nothing appears from this Witness; Her Depon takes away the presumptions, wch wd have arisen from y^e other Witness if not ousted by positive Evidence — the whole will rests on the depon of a single Witness to the Hand writing of the Deed — Goldney stumbles at the Outset, says he knew him till 17[illegible] the he died in 1755

Judge / Dr Hay — This Will is dated [illegible] years ago, the Widow took Admon in 1755, enjoyd it undisturbed till 1765. when it was called in at the Instance of the next of kin, who have a right so to do at any time, the Reason of their deferring it so long dont appear The Law is wh: there is legal Evidence to continue the Admon? It was a right Observation, that the Law requires no more Evidence than of the death of 2 of the Witnesses is not controverted, y^e other is examined — The 3d Witness, admits an improper Execution of the Will wch had been just signed, but not in her presence, that she was bid by her Father, not by the Deed swears positively to her signing, also to her Father, Mother signing: So that she ascertains Time, Place, & Persons: She allows she made the Declaration wch occasioned this Cause, it stands on her Evidence, the 2 Ministrants came to her when ill in Bed, very proper, she was then most likely to tell the Truth; taken all together, she says after this putting her on her Recollection, she remembers the Fact what other Account can she give — The Law requires, if a Will is executed, the Examon of the Witnesses; if dead, y^e Hand writing & Character — Bromfield the Clergyman proves the Hand writing; Harrison swears to her Father's Writing; besides a Supplementary Circumstance, tho, insufficient in itself, deed ed not be asleep, when he wrote the Will in favor of his Widow The Character, Handwriting of y^e Witnesses dead is proved, y^e Fact by 1 Witness — Upon the whole, I decree Admon with y^e Will annexed, to the Widow.

Dec. 11. 1765

I think a Release is as strong to an Inventory as a Decree.

Prerogative / Bp & Day

N°38 Element ol. Hedge, agt Hedge / Alexander / Dr Harris / Dr Wynne / Addersley

Dr Bynne — Eliz Allen of. Hedge died without Children, leaving Dan^l Rupel Hedges her Brothers, & Wilhelmina Element her Sister; to y^e Geo: Baker her Nephews, entitled in Distribution — Soon after her death, Admon was granted to Daniel Hedge, my Client, & on y^e issued by Eliz. Element & Rupell Hedge to see Distribution: Rupel Hedge appears to be named in the Citation without his leave — Daniel Hedge appears under Protest, & alledges a general Release from all those Parties, & that he had already distributed — Element has made an Affid^t that the Release was unduly or forceably obtained, & suggests, there was a debt of £200 owing to the Deed, wch did not appear to be accounted for — Dan^l Hedge makes an Affid^t stating that he has paid her more than her Share, wd amount to — She alledges, he extorted the Release by threatening, if she refused to sign it she shd be a Sufferer, & by promising to pay her a Share of the S^th Sea Stock & the 100£ owing by a Person unknown to her, & Richmond, He says, he had lent her Money, & therefore retained y^e money arising from the Sale of the S^th Sea Stock

There is no Proxy given by Mr Rupel Hedge appointing any one to cite for him — If D. H. has distributed, you will not decree an Inventory; there is a general Release, tho' it is pretended to be only for particular parts, if that was the Case he wd be entitled to a further Distribution, therefore to an Inventory, but you will observe the Words are large: the Ct will pay no Attention to what is set forth in the Affid^t She must apply elsewhere to invalidate the Release, the Ct will take it for granted; if it stood on Affid^t Mr Hedge gives a full account of the whole matter, he has a right to retain for his own Debt, standing on equal footing —

Dr Harris — we dont say Mr H. was a party in the Cause so as to have a Proctor, but you deny the Citation; I remember it was said by the Ct, that the Ct was not generally wh: the Release was valid or not; but wh: it shd be a Bar. Mr H's own Affid^t shews it was a particular, not a general Release — If she cant dispute her distributive Share here, she can no where — I hope you will order an Inventory & Account; it is due of common right, an Inventory in 6 Months. an Acc^t in 12 Mo^s the Release is not a General one, nor does he contradict my Clients Affid^t wh: he has paid her her Share will appear by the Inventory. It is not material wh: one or both cited; he pleads a general Release, that she had received her distributive Share, & that he was not obliged to give an Inventory & Account: that it stood merely on a Release from all the Parties; tho' there shd be a Fraud on the Release, they must resort to another Ct before they cd be entitled here: But in this Case y^e Release is exhibited & Affid^t it shd be general; but Mr Hedge gives an

Judge / Dr Hay

affid.t that on executing the Release, it was agreed between them, that £100 shd remain to reimburse him his Expences as Admor: he has effectually on his Oath declared, there remains a Surplus to be distributed: the Setting off, is a future Question, the Inventory is the present: the Release is not for every part, if he admits there was any thing left wch shd be distributed hereafter, as he does in this affid.t he must give an Inventory, so I must decree one; a Release & Receipt may be a Bar

Prerogative

Bye Day
Qu.n Whether Creditor Entitled to an Inventory?

No 35 Molyneux agt Maye
Gostlin — Dr Wynne — Dr Calvert — Bishop — peton

Dr Calvert — Robert Barber is the Deed, he made a Will & appointed Michael Maye Exor. 17 August a Citation was taken out by Sarah Molyneux Admin.x of Mary Barber a Creditrix of the deed, who appears by the Books of Mary Barber indebted to her £559. 5. 4½ with Int: due thereon — It is objected that they have not specified y.e particular Sort of Debt, but only that it remains on the Books, you will observe, Sir; we have had possession of the Probate 4 Years — The Ex.x will expect to be informed how this Debt was contracted

Dr Wynne — The Plt is Admin.x to the Deed Mary Barber; she swears as such as fully as she can, must be supposed to know no more; It is, or may be a Book Debt — The Question is Wh.t this is such a Debt as can entitle the Creditrix to an Inventory? The Person does not say the Deed was not indebted, as to her being possess'd of the Probate 4 Years, immaterial, as she might not have been informed of the Debt till lately

Judge
Dr Hay — To entitle her to an Inventory she must make an affid.t of her Debt; she is not herself the Creditor, but the Admin.x of the Creditor; she swears positively to a Debt appearing on the Books; perhaps she may never be able to set forth what Debt it is; so the Oath of an Assignee of a Bankrupt will be sufficient — She has gone further than she need have done she swears positively, not to her Belief: the affid.t is full, the Creditor may say how the Debt particularly arises, the Appearance of a Debt, in the Case of y.e Representative of a Creditor, is sufficient to entitle him to an Inventory

To entitle her to an Inventory she must make an affid.t of the Debt

Prerogative

See Fol: 19 92.

For Sentence 2. Janry

No 36 Foster agt Wright
Bishop — Dr Marriot Wynne. Burrell — Dr Collyer. Harris. Calvert. Maye

Dr Marriot — Thos Burrell Esq.r is the Deed — he was born March 1717. & died 16th Dec.r 1763, being about 46 years old at his Death; he made his Will dated 16 Aug.t 1741, & thereby appointed Carrier Thompson, Thos Trollop his Exors, & Jane Foster, Mary Hooke Wife of Jn.o Hooke & Judith Green, now Judith Porbington, Anne Green after Dr Dawkins Wife of Francis Dawkins, Wm Foster, Humphry Hyde, Thos Hyde Resid.y Legatees — Carryer Thompson & Thos Trollop y.e Exors, Ann Green after Dr Dawkins, Wm Foster, Humphry & Thos Hyde Resid.y Legatees died on the Testators Life time, & Jane Foster, Mary Wife of Jn.o Hooke & Judith Wife of Jn.o Porbington are the Surviving Resid.y Legatees & the Parties promoting this Cause — The Deed also made 3 Codicils. 1st Codicil dated 26 Aug.t 1741 (B)
2d Codicil 12th Feb.y 1744/5 (C)
3d Do 17th Feb.y 1746 (D)
The Deed has given the Bulk of his Estate amongst all his Relations except Mary Wright a first Cousin (who brings this Suit) the reason she was left out appears in some measure appears in some measure from an Answer of one of her own

Gives additional Legacy to Hyde's Legacy to Owen.
Wm Barber y.e younger added as a Trustee to preserve contingent Remainders — Burrell y.e Uncle's Name omitted, my Infant after his mean Burrell

Witnesses, viz. Anne Moor, to an Interrogatory on the part of Foster, framed to shew that Mary Wright's Father owed y.e Deed 900£, & had tricked him out of it —
The above Will & Codicils have been opposed by the said Mary Wright, & propounded by Bishop on the behalf of the Surviving Residuary Legatees, thereon 8 Witnesses have been examined — Major for Mary Wright gave an Allon pleading Insanity & examined 48 Witnesses thereon, In reply to wch Bishop gave another Allon, & examined 29 Witnesses thereon
18 Feb.y 1763. Publication was Decreed, & the Cause assigned for Sentence on the first Assignation the Bye day, & continued to the 6th of June 1763, when Mary Wright Spinster appeared personally & gave an exceptive Allon to two of Bp.s Client's Witnesses, viz. John Skeath & Jn Gann N.o 1. "Jn Skeath who was exam.d on the 1st Int. hath said, that he hath not thought from his first Condicidit hath said, that he hath not thought from his first Knowledge of the said deed, that the Testr wanted natural Sense, nor Knowledge of the said deed, that the Testr wanted natural Sense, nor however declared as much, or to that, or the like Effect — however declared as much, or to that, or the like Effect — how-ever this exceptive Allon they have pleaded a Paper Writing subscribed by y.e said Jn Skeath marked B wherein he says "the thinks y.e decd was not in a capacity for making a Will, or of Understanding enough to dispose of his Affairs, that he always thought y.e decd was always wanting natural Sense"
The Exception to Jn Gann was, that on his Examn on the Condicidit he swears that he believes the Subscription Jn Gann to y.e Codicil, marked C. dated Feb.y 12th. 1744/5 to be his Father's Hand writing, whereas he goes on & says after, that his Father died April 19th. 1743. wch is one year & 9 months before the Codicil was made, so that it could not be his Father's Subscription — The Cause now stands for Hearing on the Evidence, upon the Question of Sanity, at the particular Period when the Will & Codicils were executed —

Dr Collyer — In this Case, there are no nearer Relations than Cousin Germans; Mrs Portington is a Stranger in Blood, the Will is very intricate & full of Law Terms, Wes, Trusts, Limitations, wch require very uncommon Understanding the Dr has inferred he was sane, till the Commission deemed him a Lunatic, but it is not in y.e Commiss.rs found, that he was insane only then — The Ex.x did be satisfied as to the Instructions. The Writer does not say the deed sent for him — he says when he came Mr Burrell took these Instructions out of his Pocket — Mr Foster y.e Writer of the Will says he explained the Instructions, what! a Man's own Instructions! he tells you the deed was of sound mind & Memory; Upon the Interrog.y says that the deed on y.e 26th of Aug.t was very capable of making a Will wch required common thought, but being a weak man, cd not take upon him to sweak he cd do every thing wch required great deliberation.
Rd Rubens, was Foskes Clerk, he says, he never knew y.e deed was sent for to attest the Execution, that he did so, believes him to be capable of understanding, at that time y.e Expressions used in the Will, in their Extent, as the difference of Joint-Tenants & Tenants in Common
The other subscribing Witness was Skeath to whose Evidence we have given an exceptive Allon, because on y.e 10th of Sept.r he signed a Declaration, that he knew the deed to be subject to Fits, & that when he Jn Skeath, was called to witness a Codicil of y.e deed, he did not think him very fit to do such an Act
In Gann Witness to the 2d Codicil, when exam.d to y.e Handwriting is positive it was his fathers writing, but thought it

holder— Jn Gann believes his Father died a Year before
The Qu: is ad[m] the deed had an Understanding adequate to
this Will. Who hired do all common acts? Shew as high Sheriff
Churwarden, or a Common Councilman if prompted; It will
appear he was in those Understandings, under ye direction of his
Servant Owen, who told him what to do, whom to drink
to— We have examined Millwers, Manhuamakers & various
people at Stamford to the general Opinion of the deed; they
are very good Witnesses to Common Fame, tho they never
saw him or spoke to him— The Evidence being read, a doubt
Qu: wh[t] Certain Letters & Books of accounts, generally pleaded
in an Allon admitted on the behalf of Mr Foster, ought to be read
on the Merits without being specially pleaded, where they are made
part of the Depon[t] If they can.
2 Qu: wh[t] they ought to be read being only proved by one Witness supported
by Circumstances & wh[t] that is sufficient to identify them?
3 Qu: wh[t] Monition shall issue agt Mr Foster to bring in y[e] Instruc-
tions said to be given by the Deceased?
Judge D[r] Hay. I have often seen in Causes spoken Proctors want y[e] Instructions
before the Ct: the Examiner directed to tell the Witness to leave
them, if he refused the Examiner would have wrote his
Refusal down, in wch case Monition might have issued for bring-
them in— Mr Major, seeing the Examiner had omitted it, might after
Publication have moved the Ct to order them to be brought in before
the Conclusion, but Mr Major took no Exception thereto—
If the Exhibits pleaded were not brought in, he might have
given an exceptive Allon, after Publication, but cannot
before— When a Party pleads any Paper he shd annex it
to his Depon— 2 Witnesses, viz. Mr Forster, Jn Jarvis: one
brings in Accounts, the other Letters & Receipts— A doubt
arose, with respect to the Sufficiency of the Oath of one
Witness One Witness is sufficient for an incidental
point in a Cause, he'd seen the Deed write, & referring
to these Papers, wch is a part of their Depon[t], they say he
did write, here are some papers wrote by him, can the
Ct shut its Eyes agt them, because it might have been
pleaded on the other Side; Can it hear the Cause without examin
the Deeds own Acts, only because the Proctor mistook, & did
not call for them on the Allon? shall a Mistake of that
kind reject the Evidence, it must be read as part of the
Depon[t]. The Case of Walton & Ryder before Sir Geo. Lee
Feb. 2. 1752. in the Arches— It was a Cause of Jactitation
Ryder justified a marriage in 1742 Their was weak
Proof of a Fleet Marriage in 1727, only the Evidence of the
Parson who married them— a Witness for Ryder brought a
Letter under Walton's Hand wrote to Ryder, but not pleaded
in the Cause— It was not objected to, & we insisted only for
of the Letter, on this Letter the Judgement was grounded
& the former Marriag decreed for— The present Case is diff[t]
a Witness may bring in Papers at his Examon, an-
nex them to his Depon, & the Ct must take notice of
it, the Party may not know of an Exhibit a Witness has
who brings it in— On the other hand, it wd be hard to say
this Evidence shall stand uncontradicted, without giving
the Opponent an Opportunity to dispute it; there is a
Medium; I must therefore rescind the Conclusion of the
Cause (wch is often done) to introduce Exhibits, tho it is
dangerous where you examine to what has appeared in
the Cause, yet in the present Case, there is no reason to ap-
prehend Perjury) permitting Mayor to examine Foster &
Jarvis touching the Exhibits introduced by them, but

generally on the Interrogatories; It is to cure the defect: I ought
to have the whole Evidence before me; what might have
been done before the Conclusion of the Cause, may be done
now; I don't mean to confine Mayor to any part of the
Books, & allow him, if advised, an exceptive Plea to
what those Witnesses have said touching those Exhibits
under these Limitations & Restrictions. There is no more
danger now, than if timeously applied for— It is Justice
it instructs the Cause; I wonder more Attention has not
been paid to it— The Instructions for the Will, Codicils
ought to be brought in, I therefore grant a Monition
agt Mr Foster, unless he brings them in voluntarily—
No Ct shd hear the Cause without this Light, particu-
larly as there are said to be Alterations in his hand
writing—
A Witness deposing extra Articulum shd be read to shew the
Depon[t] cannot be received—
Steven Registrar motions have been made for examineing Parties to Interrog[s]
concerning the Destruction of Testamentary Papers—

Arches. Bye Day M. T. Dec: 9. 1765

Lus on y[e] Grant of the new Commission of Inspection of y[e] Deanery [illegible] Rochester by Clergymen—

№ 27 **Markham v Beadon & Kirk.**

Altham **D[rs] Harris, Wynn D[r] Marriot, Calvert. Gosling**

D[r] Marriot opened & then Dr Calvert read the Act.
Altham prays a Commission to be directed to 3 Commissioners named
by the Ct, annexing them to the present Estimates: Gosling opposed the
annexing the Estimates, as containing many Articles, not Dilapidations
but prays the Commission to be directed to three Prebends of Rochester
Mr Beadons affidavit was to the following Purport, That the Lock &c were y[e] Deans
" own property, not belonging to the Deanery House— That y[e] rebuilding
" is unnecessary— That annexing the Estimates already taken wd mislead
the Commissioners
NB The Party moving is to support the motion the Opponents
to reply—
D[r] Marriot Reasons as the Deanery House is pretended to be, D[r] Markham has
resided there all the Summer— The Estimate brought in, is only to found
the Prayer— the Prebends know the Condition of the Premises
D[r] Calvert D[r] Newcombe the late Dean of Rochester, at his Decease left y[e] Deanery
House something out of Repair— Dr Markham had a right to call on
the Exors— It has been the Plan on one side to give a Libel, annex
an Estimate, on the other Side, to give an Allon with another
Estimate, in order to found an Application to the Ct for Commissioners
But it is negatory for us to give an Estimate, as no Judgement
to be founded on it— Clergymen are most conversant in these
Affairs; mere Workmen are not Judges of Dilapidations; they
know what the Repairs will come to, when the Commiss[rs] have
instructed them, what are Dilapidations; This is a Question of
Law as well as fact
1328 Mepham Constit— Nullatenus
Register of Abp Reynolds, Commission to y[e] Canons of Litchfield &
Hereford
In the Case of altering Palaces or Parsonage Houses, Commission to
Clergymen— D[r] Calvert instanced the Faculty to the present Bp
of London to alter his Palace— founded in Law, Precedents
grounded thereon— provided Clergymen are chosen we shd not
object to the nomination of the Court— Our Objection to the
Estimate is, that it might bias the Surveyors— Gayler, Cook
Both Sides had pleaded an Estimate, therefore the Ct annexed the
said Estimate to the Commission; there is a Claim only on one
Side, there it was to liquidate the 2 Estimates—
D[r] Harris 2 Schedules are annexed, Mr Vardys on the part of D[r] Markham
is £1380— Wrights £1200. Vardy dying, we gave another Estimate

of Mr Harrison amounting to £1300 - In Clarke's Praxis no mention is made of Clergymen - the Parties are both to give their Pleas, & annex the Claims to them - the Practice of Clergymen is antiquated - Linwood lived Temp. Hen: 8. the Clergy had great sway then, they were versatilis Ingenij, presided in Chancery &c. were as well versed in Civil, as Spiritual affairs - I believe they wd not take it amiss, if they heard me say, they now understand nothing but Divinity: Does the Ct want middle men, will it tend to dispatch: Comrs to be sworn by you - In Hayter & Goode 3 Persons were appointed faithfully & accord? to their best Skill, to make an Estimate of the Repairs wanting at Fulham, & a Return of what is necessary, to render the Palace substantial, fit for the Reception & Habitation of a Bp, directed the Libel, Allon, & Schedule to be annexed - It wd be absurd to argue from their not having given an Allon, their own Laches, Stubbornness, our Activity: you have an Allon, I have none, say they, therefore don't use yours -

Dr Wynne. The Date of the last Instrument is near 400 years ago - founded on a mistake; they were mere extrajudicial Proceedings; I don't say the Workmen must go Article by Article, according to the Schedule - If they did not chuse to give an Allon they must take the Consequence: the reason will appear from the Libel, directing a Commission to Clergymen, is making them Judges of what they don't Understand -

Judge. Dr Hay. In this Case Dr Markham sues the Exors of Dr Newcomb, who don't deny that some Dilapidations are due, if they did Dr M. has a right to shew what he ought to be paid for - This melancholy tore: how much reason there is to complain of Dignitaries leaving their Houses dilapidated, for want of Care during the Incumbency, throughout the Kingdom - the Law provides for the Support, & sets apart a Portion during the Incumbency - Dr M. did his Duty: Dilapidations must be taken at the time of y^e Vacancy; Libel was admitted in Trin: Term last. Dr N. died in Jan^y preceding; several Schedules were annexed to the Libel, Wright has not signed the Estimate, the Sum deducted is by him. Harrison makes the Sum nearly the same, with Wright's Objection was taken to the Schedules; the Ct said it was too early to object to y^e Art. of the Libel, & admitted y^e Schedules not being on Oath - the present prayer is to render the Admission of the Libel & Schedules of no effect by naming Clergymen in the Commission - They are properly called mid Ile men - I am to determine what are de on the final Hearing, on the return of the Commissioners these Schedules being properly received, if improper they the have appealed - What Mr Beadon says in his affid^t will come before me on the Return, in considering y^e dilapidations; if the old Floors can't be well repaired, new Floors must be laid down; the Deanery H. accord^g to y^e general Doctrine ought to be fit for the Reception of y^e next Incumbent - I cannot receive the Objection on Mr Beadons affid^t or his Proctors act - The Practice is never to chuse Clergymen - Ward & Somers in the Arches. June 26. 1741

a case founded on Mepham's Constitutions - Dr Ward Rector of Biddington in Kent gave a Libel with a Schedule & Estimate, Somers did the same; the Ct named Commissioners, referred the Schedules to them; they reported according to the Estimate of Dr Ward - No Witnesses were examined on either side, but the Ct determined on y^e Commiss^rs Report & gave Ward £46 Costs - I rather think with Dr Lyon that if Clergymen were named, I must judge on their Opinion which will create Delay & answer no purpose - Mr Beadon has given no Estimate, wch he might have given, had it annexed as well as Dr Markham - I must refer to the Schedules admitted, as a Guide to those who must make a return to me. - Mr Beadon may then object - He has offered no Tender - Gostling Peton was rejected, who then asserted he gave an Allon.

Thursday Dec: 12

Consistory of London. By Day

N°38 Ward. v Hennell

Jenner Dr Harris — Dr Marriot. Wynne. Burrell. Tyndal.

. . . . Hennell Clerk of the Incidents in the Excise Office was chosen Churwarden of the Parish of for the year . Hennell refused to take upon him that Office, upon wch Suit was brought agt him by Ward to compell him to serve; Tyndal appeared for Hennell, alledged him to be Clerk of the Incidents in the Excise Office, & exempt from serving all pish Offices by virtue of the Kings Patent to the Comrs of Excise -

Dr Wynne. Vaupe & Lindsey. Lindsey being sued for not taking upon him a pish Office (wch: Wd) alled ged himself an Officer with Fee, & excused by the Proclamation 1 Geo. 3^d from serving on Jury, & Watch & Ward - It never came to a Sentence, the Opponents giving up the Point - NB Lindsey was Watch maker to the King, he exhibited a Warrant from the Chamberlains Office for a Salary -

Dr Burrell He is exempted by Common Law, under the following Words all in his Majestys Ordinary Services. See Prideaux of Ch: Wns fol. 1 Vide Degge fol: 182. Lyndwood Cap. de Clericis non residentibus vitp. prædicta, fol: 132. the Gl^t

Judge. Dr Burrell's wish The present Question before me, is not wh^r Lindsey is eligible but wh^r compellable to serve the Office of Churchwarden? he pleads in Bar a Privilege, & exhibits a Patent, whereby the Commiss^rs &c are exempted. There is no doubt that y^e Crown has a power so to do - the next Qu: Is the Clerk of the Incidents understood, under the Words, Officers or Agents? I think he is - The Certificate does not give me full Satisfaction, as it don't state that Hennell was Clerk of the Incidents at the time he was elected? It is said, he is so. 16 Dec: 1762. I think if he was Clk of y^e Incidents, at y^e time of his Election he ought to be dismissed; but of that I shd be satisfied - NB Mr Poole, who attended for Mr Baxter, y^e Sollicitor of the Excise, was allowed to swear in Ct (tho: irregularly in my opinion) that Hennell was at y^e time of y^e Election Clerk of the Incidents, & he was dismissed accordingly -

with the Patent

clause in the Patent dated 10 Feb. 1763 to the present Commissioners - "That you may be enabled the better to attend the Execution of "this Commission, our Will is that our Commissioners Sub Collectors "Deputys Officers, or Agents shall not be compelled to serve as "Mayors, Sheriffs at any Assizes or Sessions for any Jury or bear any other "Publick Offices or Employments -

Persons exempt by Law

1 Peers by reason of Dignity - 2. Clergymen by Statt Orders - 3. Statt Men all in his Majs Ordinary Services by Privileges - 4. Lawyers, Attorneys, Clks of Chancery, B. R. Com. Pl. & Exch^r by reason of their Attendance 2 Rol. Ab. 5. Physicians, Surgeons by 5 H8. c 6. 32 H8. c 40 7. Sportsmen carrys by 6 & 7 W^m 3 c 4 - 1 Anne St 1. c 18. 5 Geo. c 14 - 8 Dissenting Preachers, Teachers if qualified according to Statt by 1 W^m & M. c 18 -

Attorneys exempt E. 14 b. Watsons Case B.R. Trin. 15 G. 2 Rol. ab. 272. Barkers Case M. 21 Jac. Stampes Case 1 Rol. 368 -

Prerogative....
Hil T. Sess.

No 39 Price agt Price Burnell & Harrison

Q. Whi. Admon de Bonis

Dr Collyer . . . . . Drs Calvert & Wynne

Dr Calvert.

Wm Price is the Decd. By a Will & Codicil dated 16 July. 1761. he appointed Wisker & Peter Theobald Esq[rs] his Extors, & resid[y] Legatees in trust for Wm & Jn Price, minors, to be paid at their respective Ages of 24. if either dies, the other is to take by Survivorship; if both die. The Residue is devised to Wm Price Decorn, a Nephew of the Decd. In March 1762 Theobald renounced & Probate was granted to Wisker, who dyeing in 1762. Theobald renounced again, when a Decree issued to shew Cause why Admon with the Will & Codicil annexd should not be granted to Jane Price the mother of John who had elected her, his Guardian -

The Question now before the Ct, is, to wch Guardian Admon de Bonis shall be granted, & the Statute leaves it to the discretion of the Ct & a small Legacy will create no preference, when a moiety of the Residue amounts to £7500. Eldership creates no right; the Ct will determine whose Hands are properest for the Admon, & take the Characters of the Parties into Consideration - Wm Price's bad behavior appears from the Affid[ts]. It continued till he ran away; he appeard before a Surrogate & took a false Oath, wch is a sufficient Objection to his Nominee - It may be said, what is this to Mr Higgins surely, it must reflect upon him to be chosen by such a man, as in the Case of a Prodigal, but it is brought home to Mr Higgins, by his supplying him with Money for his evil Courses - The Minor swore to the License 22 May, chose Higgins his Guardian 24th. The Manor in wch Higgins obtained this Influence over the Minor to be his Guardian, must make him stand in an unfavorable Light before the Ct - besides, as a Creditor to the Estate he is very improper, but as a Debtor to an Estate is always considered unfit to get in his own debt; he is asserted to be so by Mess[rs] Lee & Harrison, who say he promised to pay, but afterwards set up an Account, wch they & the Mother believe to be false; when asked by Lee for the money, he only desired time; if he had been a Creditor, he wd have mentioned it. The Partnership ended in June, the Accounts of course were balanced would he have paid Bonds, if the Estate had been indebted to him. It is inconsistent for him to say he is ready to settle the Acc[t] & then pray to be appointed the Person to settle it - It is a Circumstance in Harrisons favor, tho, not conclusive, that he is appointed Receiver by the Ct of Chancery; if Mr Higgins was named Admor it wd create confusion in the Accounts

Dr Wynne....

The Extors of the Extor, desired the Mother might be the Person to administer, who is as proper, as an ignorant & indigent Person cd be; they never intended to put the whole into her Hands, therefore by the advice of the Attorney, threw the fortune into Chancery by an amicable Bill - Notwithstanding her very strong Affid[t] she soon comes, & unsays all she had before said - the Ct need seek for no other reason, why Whiskers Extors, were desirous of taking it out of the Mothers Hands - Tho, an election of a Guardian by the Minor, is an Inducement, yet the Ct never reckons itself ministerial, but if it appears the Minor has made an improper Choice the Ct will set aside the Election; - a Legacy is given in the Will, by the Description of Wm Higgin his late Clerk - All these Objections lie agt Wm Higgin - It is proved by affid[ts] that Wm Price is extremely profligate, & that Higgins contrary to his own Affid[t] has used many undue means, to get himself appointed Guardian to him - the Mother justly observes on Lending the Minor Money during his Apprenticeship, Lee & Blackwell prove it - he is indebted to the Estate but never mentions such debt; he apologized for not paying, but said he would; when he cd not shave off the Accounts, set up the Claim of an open Acc[t] Is it not absurd, to suppose him scrapeing up money for years, to pay it gradually, without saying he Decd was indebted to him, if he was; Even if he was a Creditor, he wd be very improper to audit his own Accounts, therefore under the present Circumstances most improper; it is scarce possible to devise more Objections -

how in what light does Mr Harrison appear? he has full as good a right as Higgins by the Appointment of the other Minor, he even seems pointed out by the Testator - the act of the Ct of Chancery is a further motive for this Ct to aid & carrying that Decree into Execution - If Higgins is the Admor, he may receive the Rents, but Harrison will say, I cant admit such Receipt, being named Receiver by Chancery, these & the other Circumstances consid: cited will induce this Ct, I hope, to grant Admon to my Client Mr Harrison

Dr Collyer....

The Sentence of this Ct was, that Burnell & Harrison had no Interest, there being an Extor living, who might resume; from this Sentence, Grene appeald But Burnell & Harrison being since advised to drop it, the Inhibition from the Delegates has been relaxd & the Cause remitted, upon wch the Ct decreed to proceed upon former Acts; during the Delay Harrison gets himself appointed Receiver by the Ct of Chancery, & comes, as if in another Shape; Grene exhibits a special Proxy, with Office Copies of 2 Orders of Chancery annexd under the hand of Jn Price the Minor, whereby he retracted his former election of his Mother as Guardian, elects Daniel Harrison, already appointed by Chancery, to be his Guardian for the purpose of taking Admon & Grene also exhibited a special Proxy under the hand & Seal of sd D. Harrison whereby he accepts sd Guardianship, wch he prays to be admitted & sd Dl. to be appointed Guardian to said Minor & Admon to be granted him as such - In Answer to this, we set forth that Wm Price is 19. that he chose Mr Higgin, who is a proper Person - that Jane Price the Mother renounced in his favor, that he is recommended by Mr Theobald himself, & we deny his being a debtor to the Estate, as alledged by Grene

Jane Price. Depon

Wm Price the Testator died in March 1762 - there appeard 2 promissory Notes for £268 to Higgins - Wm Price the Minor ran away from his Master Reeves, a Coachmaker in the Borough, & at the Instigation of Wm Higgens refused to appoint his Mother his Guardian, for wch Mr Harrison reproved him - Higgins often importuned this Depon[t] to consent to his having the Admon, offered to take her a House - that Lee & Harrison never offered her any thing to consent - that Wm Price led a profligate loose life, that Higgins encouraged him therein, by advanceing him Money, tho, an Apprentice, & has talked with Reeves about buying out the time; asked leave for Wm Price to go to Drs Commons, (who never returned) tried to draw him in to marry Eliz: Nelson, a Woman of bad Character - that Wm Price went before Dr Calvert to swear to a License, but was rejected, Dr C. recollecting he had appeard before him, a few days prior thereto, to chuse a Guardian as a Minor - She believes Higgins a very improper person to administer, that he wd embezzle the Effects, or suffer them to be embezzled - that he unduly & falsely sets up a Claim to Goods as a pretended Partner - There was an Affid[t] to lead the License, wherein Wm must swear himself of Age -

Christopher Reeves Depon

Was asked by Higgins to permit Wm Price, to go to Drs Commons, that he gave him leave - he had a letter from Higgins, wherein he speaks of Wm Price's bad Behavior, says "Get the Business compleated, he will make you amends"

Blackwell's Depon

That Wm Higgins advised Wm Price to refuse appointing his mother his Guardian & intimated, the Minor was indebted to him, & must do, as he wd have him -

17 July 1765. Dan[l] Harrison was appointed Guardian & Receiver by the Master of the Rolls, & then Jn Price revoked his Appointment of his Mother & chose Dan[l] Harrison his Guardian -

Dr Collyer....

The Reason why this Cause was appealed, is plain, a delay was necessary, the purpose now appears; to ask in another Character - Mr Harrisons is a negative Character, he only solicits, has not been appointed Guardian by the Ct - The elder Brother is entitled to a moiety, he has the Lease & sev[l] other Bequests; is at the Age of Puberty being 18 - the Civil Law is the Rule of this Ct, unless there is very good Reason, the Ct cant refuse the Election of the Minor. Mon Lanus & LA. Curator non datur invito sed petenti. a Tutore detur, non confirmetur, nisi petenti - he may give a Tutor for his Education - Mr Theobald the Surviving Extor, says, he has known Wm Higgin for many years, that he is a proper person, he might resume his Function, his Recommendation will have due Weight - Mr Harrisons Character is unsupported - it is clear Higgins was in partnership with the Decd - It is suggested he was indebted to the Estate; the Persons who depose to that fact, render the truth suspected, the Mother & Lee - nothing uncommon for a Person to be owed money & yet borrow - Mr Harrison took the Management & proved a

Debtor to the Estate. Higgins stands on the Evidence of Jane Price who in her affid[t] charges him very grossly

Dr Harris ——— The first Step is wh[r] Mr Harrison is a proper Person to be Guardian; he has appeared as a temerary Admor, punishable here at Common Law; even if Mr Higgins did advise the Minor as to his mother, he did right. We know a great deal is allowd to Admors by the Ct of Chancery. Perhaps they Mr Lee & Harris on did not use the Words "tear her to pieces, if she did not go on with the Suit" but words tantamount. — A Rake may not want Understanding: the Boy did refuse to chuse his mother Guardian; Harrison in a great passion, like a disappointed Man, kicked & abused the Boy, tock he dont contradict, but dont recollect; wh[r] Higgins is a Creditor or Debtor in £300, the Ct will inquire into the Relation this Sum bears to £1500. — Mr Harrison was a Taylor, left off, did not manage his own affairs, is he fit to manage others, an Estate of £1500 Mr Higgins is a man of Business, so most proper, he was a Servant of & under Obligations to the Decd, wch he wd repay by taking care of the Grandchild —

Judge ——— }
Dr Hay ——— } when the Parties came before this Ct, the Lu[r] was, who was entitled to Admon de Bonis of the Exors of Francis Whiskin thonly acting Exor, insisted, as such, they had a Right to the de Bonis, Th was a precious Point, the Ct was of Opinion they had not that right, because Theobald could retract — appears for Harrison as Guardian appointed by the Ct of Chancery, & prays to be appointed Gn by this Ct; to have the Admon; he is opposed by Higgins appointed in the Ordinary Course, the Lu[r] therefore hou'ds, to wch nominee? when this Case came formerly before the Ct, the Appeal was immediately interposed, on the Opinion being declared; but it did not follow I shd grant it, to Mr Higgins, for there appeared such behavior in the mother, that I shd not have been satisfied to grant it to Higgins; for the mother had sworn him an unfit Person, retracted — This Ct is the Guardian of Minors; but I shall consider it as my Duty to enquire into the Circumstances; If there had been no Appeal, I shd have ordered the Minors into Ct, to enquire into the motives; that is over; Lu therefore how shall I grant? I cant think the Character of the Minor sufficient to determine on the Nominee; one of good Character may appoint a bad Nominee, & vice versa; I will determine on the Character of the Nominees; the small difference of Interest has no weight — no Affid[t] to shew Mr Harrison is an improper Person — I dont think there is any thing appears to ground any Opinion on what appears as to Character; the Surrogates Appointment only allows you to come before the Ct; if a proper Person — a person indebted is therefore improper; a good Objection; as good too, if he has a Demand upon the Estate; a considerable one of £300 — Then does appear an Objection on the face of y[e] Proceedings. It is only by Contumacy; ought not Mr Higgins to have appeared in Chancery, if Harrison was improper; he did nothing to obstruct the Decree; tho Mr Harrison is Guardian in Chancery, I insist, he must not come into this Ct & claim here as such under the Chancery Appointment, he must account to the Admor; this Jurisdiction is totally independent of Chancery; but that Appointment shd not be esteemd an Objection, it is rather a Recommendation; if a proper Person, rather in his favor; but the Preference, from what Dr Wynne said, is grounded on the Will of the first Testator; tho, not claimable by Law yet founded on Reason & Principle, whereon the Ct determines, tho not as Exor of Exor, if elected, proper, it is an Addition, Circumstance, with the Appointment in Chancery, without Opposition; for these Reasons, I decree the Admon to Daniel Harrison —

on Admission of the Articles.

Arches. 3d Sess. Mid. Term. ——— The Office of the Judge promoted agt Greenway Registrar to the Archdeacon of Berks — Holman
Fountain — Dr Harris & Wynn — Dr Collyer.

Dr Harris ——— This is a Cause of Office promoted by Dr Bever, officiating Surrogate of Dr Spry Official of the Archdeaconry of Berks, now beyond Seas, agt John Greenway a Parishioner of St Peter in the Bailey, in the City & Diocese of Oxford, & Principal Registrar of the Archdeaconry Ct of Berks, to answer to certain Articles concerning his Souls health, Correction of his manners & Excesses, but more especially for his refusal, or at least neglecting to perform the Duty of his Office of Registrar —

Doubt of Jurisdiction

as Doubts might have arisen of the Domicil of the said J.G. in Dioces of Oxford, wh[r] he was subject to the Jurisdiction of the Consistorial & Episcopal Ct of Oxford, by reason of his Residence in the S[d] Dioces, or wh[r] he was subject to the Jurisdiction of the Consistory of Salisbury by reason of its Concurrency with the Archidiaconal Ct of Berks or wh[r] he was subject to the Jurisdiction of the Archidiaconal Ct of Berks only by reason of his being principal Registrar thereof; or wh[r] he was subject to the Archidiaconal Ct of Oxford, by reason of its Concurrency in point of Jurisdiction with the Consistorial & Episcopal Ct of Oxford —

Letters of Request to the Dean of the Arches.

Dr Taylor Chancellor of Salisbury } Dr Dodwell Archdeacon of Berks } Dr Burton Chancellor of Oxford } Dr Bever Official of Oxford } have granted Letters of Regulst at the desire of Dr Bever to commence such Suite in this Court, & Dr Bever as Official of Berks hath also signed the same.

23 Oct: 1765. The Letters of Request were presented & accepted, & Citation was decreed & issued agt Jn Green way —

1 Sess. Mich: Term. A decree with Certificate & Affidavit of personal Service was returned, & Certificate continued to next Ct. in pain of I.G. called &c.

2d Sess. Certificate continued

3d Sess. the same — No Appearance being given for J.G. he was thrice called &. not appearing, he was decreed excommunicate, & a Schedule ponnected, read, signed, & the Judge at Fountains peton, decreed sd J.G. to be cited to appear singulis Sessionibus to see Proceedings, with Intimation &c.

1765. Nov: 24. J.G. was publickly denounced excommunicate in St Peters Church in the Bailey, in the City of Oxford —

4th Sess. (2 Dec[r] 1765) Decree to see Proceedings, with Certificate & Affid[t] of personal Service on J.G. was returned & Certif: continued to the Bye Day —

Fountain on behalf of the Promoter will gives in Articles agt J.G. in pain &c.

Dr Collyer ... Objected to the Admission of the Articles

One of the Charges, is, that the Registrar keeps the Seal of Office & wont part with it, so that the Officiating Surrogate cant come at it; if so, how came the Requisition hither? how is it authenticated? I know not, if it dont come from the Officiating Surrogate to the Chancellor of Salisbury & from him to you; it is an Error in the first Outset, wch cant be cured by a subsequent Transaction. If it dont appear that the Registrar is possess of the Seal, now, & refuses to deliver it, the Charge is nugatory. The Official & Registrar live both out of the Jurisdiction, the Transaction is out of the Jurisdiction, the Dr is domiciled at Oxford; I wd admit an Article, charging that he has made no Deputy — This is a Cause of Correction, therefore stricti Juris — They shd lay he is a Registrar by Patent — has a right to appoint a Deputy; — They lay the 134th Canon, when they compare it with the Article, might as well have laid the Lords Prayer & 10 Commandments; the Canon supposes the Registrar shall be in the execution of his Office; he cd not execute it in Yorkshire, the Neglect must arise within the Registry &c. y[e] Jurisdiction the Charge of not appointing a Deputy is proper — In the Article wch speaks of Mr Jt Monell, they dont say the Fees of Office were tendred, when the Application, for a Faculty, was made, nor where made; if such Application for a Probate was made in Oxford, it was irregular, the Reg[r] not being bound out of the Jurisdiction; it shd have been laid in Berks —

a Cause of Correction call'd stricti Juris.

5 Art: it is laid that Application was made by Edw.d Towsey to issue a Process agt Mrs. . . . . at Wantage in Berks; Wantage within the Juris diction of the Archdeacon of Berks, it may be in the Diocess of Sarum, shd be laid definitely: the Fees of Office were tended, otherwise wd be liable to the same Objection, as above mentiond—

6th. Art: was directed by . . . . . & Susannah Bradford to issue a Citation in a Cause of Defamation; where did they go to him; was he within, or were they, of, the Juris diction?

7th. The Application of Mary Simmonds to issue a Citation, is liable to the same Objection—

8th. pleads D.r Spry's Appointment of D.r Bever to be his Surrogate. The Instructions shd have been exhibited, the Patent pleaded, tho it need not absolutely be annexd. The Objection is, the Instrument is neither pleaded nor annexd, nor the Time of such Appointment specified — It is not said how long, where, or how the Seal was delivered to the Registrar? It might have been given by D.r Spry, with positive Orders not to part with it; it shd be stated, that he has refused, being required by his Principal, to deliver it —

D.r Harris . . . . . We took all possible Precautions, got it thro, 4 Cts; the D.r says how c.d Letters of Request come from the Official of Berks, if he had the Seal, why, all Letters of Request, pass under the Hand, sometimes under the Seal, but usually under the small Seal of the Judge, he can use none but what he has; this is a sufficient Answer — Where c.d the Office be kept, but where the man lives, he had no Deputy, so People were forced to apply to him himself wheresoever — The Reg.r living out of the Diocess is a Laches — none must take Advantage of their own Laches — the Presumption is that Berkshire is in the Juris diction of the Archdeacon, if it is not, they must shew the contrary — The 8th & 9th Art.s consist of 2 Faults for not issueing the Faculty & keeping the Instrument; we have laid particulars, it is always usual to give a general Article, that the Witnesses may depose to more particulars when examined; a late Judge thought it the best way, because the Witnesses are not led; slandering the Judge is an Offence within the Canon —

D.r Wynne — The general practice being to appoint a Registrar by Patent & he thereby having of course a power to appoint a Deputy, I hope the laying him to be a principal Registrar, will be thought definite enough — In answer to the Objection of the Juris diction, we have laid he neither executed by himself nor Deputy — I know no Law wch obliges a Reg.r to reside within the Juris diction; he is prima facie bound to grant the Citations &c but if he can exculpate himself so, he may, we plead a real Scandal on the Judge & Court on

D.r Hay. Judge — I take it for granted the Letters of Request are in the usual way, that is, under the Hand & private Seal of the Judge requesting; shd it be otherwise, there is a reason for the variation, because the Seal is charged to be withheld & the Def.t is charged with improper Behavior in not issuing Citations &c — Causes of Correction are different from Civil Causes, in abrimindl Cause you shd not be general but Specific, clear & explicit, that the Party charged may be able to defend himself; if you leave it to the Witnesses & speak to Times & Places, with wch he is not acquainted, he cant exculpate himself, or prove an alibi — The Articles in general are properly laid; for the Objection of his being applied to out of the Juris diction, the Answer is that it was for purposes within the Juris diction, they have said neither by himself nor Deputy, if he had power to appoint a Deputy, he might have done it by himself — The 12th Art: contains a general Charge of his refusing Probates for 12 - 6 - or 3 months — Specify Times, Places, & Person, that he may have an Opportunity to defend himself — Saying the Places were in Berkshire, implies it will be within the Archdeacons Juris diction, if they are not, it will be matter of defence for him to shew, as it will also that D.r Spry ordered him not to deliver the Seal; Upon the whole, the 12th being reformed, I think the rest may be received —

Appeal from Worcester from a Grievance.

Arches — Nº A1 — Cole by his Guardian agt Surman

Bishop — D.r Marriot — D.r Wynne — Alexander . . .

D.r Marriott Kings Advocate. — Mary Rea, is the dec.d devised a Specific Legacy to Ch.r Cole, who cited Surman the Exor to an Inventory & account; Surman gave an Allon pleading payment to the Minor himself, wch the Judge admitted & from that we have appealed

D.r Wynne . . — read the Allon, wch pleads that on May 10th. 1762. Cole the Minor received a Flock of Sheep, in the Presence of 2 Witnesses, when he declared he received them in full of his Legacy —

D.r Marriott — This Allon is a peremptory Plea in Bar of the whole Suit: by my client; our Citation was for an Inventory & Account, due of right — Payment shd be made in Ct if the Minor is not benefited; Ch.r Cole on the 10th of May 1762. aged 16, received the Legacy left by Mary Rea the Testatrix, who left half a Flock of Sheep & Lambs, all Furnitures, Brass, Pewter, Bedding & all kind thereof —

D.r Wynne . . . — This comes by Appeal from Worcester; It is a Business of exhibiting an Inventory & Account, brought by Ch.r Cole a Minor, acting by Henry Cole his Guardian, in a Cause of Substraction of Legacy,

Holyoak . . . . — The Proctor for the Exor appeared under Protest & gave in an Allon, & the Minors Proctor prayd the Allon to be rejected, on the Plea that a Payment to a Minor, is no payment unless so directed by the Will — The Allon is no more than an extended Protest, I hope you will be of Opinion the Judge did right not to preclude the Party from pleading what he can aid the Cause. The Ct wd reject what is impertinent, but it cannot be said, that this is so, to say that the Legacy is paid — The Objection that the Minors Receipt is no payment is too early, tho, If I misapprehend not, an Exor may bona fide pay the Legacy into the hand of the Minor, & so doing, is excused notwithstanding the Quotation from the Roman Law, or argueing from Analogy of Debt or a Loan, because he complys with the Will of the Testator. The Case of a Feme Covert quoted by the Dr out of Vernon, is not in point; she & her Husband are one; the Receipt given by her cant bind the Husband; what I insist on is, that the Objection is too early, if not, that the Payment to a Minor is good — Wentworth in his Office of an Executor, P.219. (wrote by Judge Doddridge) says, "What if Payment be made to an Infant"

This is the Law of England; the Reason is, the Exor performing the Will of the Testator bona fide, is not bound to secure it; if he acted improperly, took any thing from the Minor, or any Collateral Security, it wd be otherwise —

D.r Marriot . . — That is only the Opinion of a single Judge & no Case determined on it —

D.r Hay — ? Judge . . . . } — The Exors appeared & alledged the Minor aged 16 received the Legacy, & declared he had received it in the presence of Witnesses. It is not set forth how he received it, therefore it is to be taken on the Allon, he received it properly, i.e. by his Guardian; the Allon is to be rec.d for it states a Fact; what Sort of a Receipt or what may be the Operation in Law, is for the Merits, hereafter, but the Judge did right to admit the Allon (No Costs were given against the Minor it not being usual) I admit the Allon & pronounce agt the Appeal —

Prerogative
H. T. 3 Jes. Feb. 6

Dr Wynne
Shakeing the Case

No 42.

Otway Guardian of Otway als Savory, agt Otway

H Stevens Junr — Drd Wynn & Bever — Dr Harris & Calvert — Adderley

A Petition on grant of Admon with Will annexd during ye minority of a Bastard.

Mrs Grace Otway Spinster, the Decd, made her Will April 2d. 1763. all of her own hand writing, named no Extor, but hath appointed therein, her daughter Susanna Otway als Savory Resid: Leg: & in case of her death, substituted her Cozen Frances Otway Esq Resid: Leg: she has also by sd Will, in Case of her Daughters death, given & bequeathd her Forhune, Legacies excepted to sd F.O. to be divided amongst his Children, as he thinks proper.

June 21. Testatrix died on a Visit at Mr Coulthards of the small Pox at Hendon

June 22. Miss Caroline Otway & Mrs Frances Otway, went together to the Deeds House at Acton to search for a Will, & there found, locked up in a Chest of Drawers Belonging to Decd, the sd Will, wch being read by F.O. he offered the same to Miss C.O. who then declined taking it, & F.O. took sd Will into his Custody, but some few days after, C.O. telling him Col. Wynyard desired to see sd Originals Will, he deliv: the same to her, but afterwards asking her for it again she re-fused to deliver it back to him

July 29. F.O. thinking the Infant Child & himself & Family greatly interested under sd Will, applyd to this Ct, & on exhibiting an Affid: of sd Facts, a Copy of sd Will, was assigned Curator or Guardian to sd S.O. als S. the Infant, to all Effects in Law, & especially to the effect of taking Admon, with sd Will annexd, for the Use & benefit of sd Infant, & until she shd be 21; & also to the effect of commencing & prosecuteing this Suit, & citing sd C.O. Possessor of sd Will, to bring into & leave the Same in the Registry of this Ct, at his promotion, as Guardian Lawfully assigned to sd Infant. F.O. accep-ted such Guardianship, & caused the Original Citation in this Cause to be taken out agt C.O. for the afd Purposes.

Sep. 3. The Citation was returnd

Oct. 4. Adderley appeard for C.O. & was assigned to bring in the Will next Ct.

1 Sess. M.T. Adderley brought in sd original Will; H Stevens jun^r prayd Admon with sd Will annexd to be granted to F.O. as Gn Lawfully assigned &c. Adderley alledged C.O. to be Sister of the decd, & prayd the Assignment of F.O. as Gn &c to be reversed, & that his client as the more fit Person may be assigned her Gn & Admon with the Will annexd decreed to her for the Benefit of ye Minor: the Judge assigned to be heard on Grant of the Admon with the Will annexd, the 3d Session. This Assignation was continued to the 4th Sess. & Bye. Day, when Adderley brought in an Affidavit of C.O. & Stevens brt in an Affidt of Jas Coulthard, & Assignation was continued to 1 Sess. Hil. T. & if any further Affidts were given Copies were to be delivered a Week before

1 Sess. Hil. T. Adderley brt in a further Affidt of C.O. now C. Douglas Since the Suit commenced married to Jn. St Leger Douglas Esq & the Assignation was continued to the 2d Session. The Cause come on to be heard now on these Affidavits; It is to be observed, that, as the Infant is a natural Child, she has strictly no Relation that can claim any preferable right to the Guardianship as such, but F.O. has on the Face of the Will an Interest in ye Decds Estate, so as to induce him to take all due care thereof for the Benefit of the Infant, in case of her death, for his own Children; but Adderley has in his Act expressly denied, F.O. or his Children to have any contingent Interest under the Will, — This is not now a Deft to be determined by this Ct. It is plain on the Face of the Will, the Testatrix meant them that Benefit, but even supposing the Bequest over to F.Os Children, be in point of Law, accord: to the Rules of Equity not good, yet that gives no right or Int: to Mrs Douglas; the Right wd devolve to the Crown & not to her. The Objection agt Mrs D. being Gn to the Infant is very strong; because hers & the Infants Interests under Capt: Cottons Will & her Gr: father & Mrs Os her mother greatly clash, as clearly appears from Mr Coulthard the Sollicitors Observation

We move the Admon with sd Will annexd of Mrs Grace O. may be granted to sd F.O. as Gn Lawfully assigned to sd Infant, for her Use & benefit until she shall attain 21.....

Dr Wynne

The Qu: now is who shall be Guardian? for the Admon follows. This being a natural Child, has no Relation; it is discretionary in your ye you will be guided by the Benefit of the Infant, but in this, as in all other Cases, also, by the Will of the decd; if she had expressly granted the Guardianship, there wd be no doubt. Another Consideration is, if the Party has an Interest in the Estate, not interfering with that of the Minor: Mr O. is related to the Family, he was much trusted by the mother; he has already by your Surrogate been appointed, but of your own, subject to your Review; he did not obtain it improperly; he waited a Month; he was much in Mrs Maria Otways Confidence, more in Mrs Gr. as appears by her Will. They deny his being substituted resid: Leg: in answer to wch, I need only refer to the Will; all my Fortune &c nothing can be more general; wh: a regular, vulgar, or pupillary Substitution, or not, is not now the Inquiry, nor wd this be the Place. She had not once her Sister in Contemplation, never mentions her; this is the Situation of my Client; now in favor of Mrs Douglas, that she paid a Month or two nursing, & saying, She took upon herself to be Gn unassigned; surely the Appointment of your Surrogate is as good, as her own Appointment, Possession is as strong at least for us. She has no Claim as relation, for she can be none to the Infant; if she has any, it must be only from the natural presumption of Affection from ye relationship to the Infants mother, this is ousted by the contrary proof from the Will. Whatever right to the Lands & Tenements Mrd may have, it can have no effect on the Admon with the Will annexd; there are, not only no Pretensions, but many Objections, if it was only her being a Feme Covert, even her being a Woman is some a very small portion of her mothers fortune was given to Mrs G.O. in proportion to the other; there are in the Will a number of Limitations &c not easily understood; besides the Deed declard she had no hope of obtaining Justice from her Sister, & had even directed her Solicitor to bring a Bill in Chancery, who then must bring this Suit, will she, agt herself? the Admor wd be the properer Person; perhaps a Sort of prochein Amy might be appointed by the Ct of Chancery, but it wd be better brought by an Admor. There are many Doubts upon the right of Mrs Maria Otway under ye limitation of Relations; Besides the Papers, the Titles are all in Mrs Ds Hands.

Dr Bever.

I hope you will not think it quite foreign, to say a few words on the nature of Admons in general; the only Case of granting one with the Will annexd, mentioned in the Statute, is when the Extor refuse; this not unlikely the Testator shd think, that by granting the Residue to a Person she gave the Exorships. Qu: wh: Mr O. is not the properest Person, Mrs D. the most improper? The Deed may have mistaken the decd, wh: a right Substitution or not, but you may by granting it agt Mr O. you in a manner anticipate the Judgment of the Ct of Chancery; Mr O. has a reversionary Int: it is for his Benefit to take care of it, he takes care of his own. Mrs D. by being Ex: to her mothers Will, it is a doubt wh? she had a right to some part of what is bequeathed; the Effects on her death wd go into hands, who have no sort of claim, or Interest; the Principle of this Admon wd be different from that whereon the Statute proceeds, her meddling therefore is improper.

Dr Harris...

When there is a Will & Resid: Leg: in contradiction to the Statute giving the Admon to the next of Kin, the Resid: Leg: has it, or his Guardian; according to the Statute, this is an Intestacy; Let the Creditor be ever so considerable, yet, tho, the next of Kin can have nothing, he must have the Admon. She is the natural Aunt, the Sory is the same. Ld Coke says, no Person shd have the Guardianship, who can possibly inherit the Estate; If she has an Interest, his being the next of Kin, is an Objection; if he has none, he has no Claim, for then the degree wd give it to the natural Aunt. Mr Yorke & Mr Wilbraham say that F.O. has no Int: whatever, except the Child had died before the Mother.

NB... The Queries put to ye afd Counsel & their Answers were as follows,

Mr Yorke 1. The Testamentary Paper is not expres; the Decd intended to give the whole to her daughter &c if she had died in the Testators life time to F.O. to be divided amongst his Children in such Proportions as he shd think

proper; as the Event has happened, I think the Children of J. O. can have no Share—

Mr Wilbraham... A. I think the absolute Int.t past to her Daughter

Her death is not a Contingency, but the common fate of all mankind; a Legacy to a Child shd have a liberal Construction in its favor—

If Mr. O. behaves ever so ill in the management of the Estate, he cannot be called to account by Chancery, because the Chancellor cd say, what Interest he has an ostensible one— The deed has not expressly shewn an affection for her Sister, but she has omitted disposing of an Estate wch she might have given away from her, & that she cod else have; there might be an Admon Pendente Lite, if there was a Suit in Chancery; the Guardian ought not to be interested, the Ct might grant the Admon to a third Person; this Ct, is an English Ct, will follow the Law of England laid down in that Case—

Dr Calvert.... The Q. is who shall have the Admon for the Benefit of the Minor; not who has the Interest? The words shd have been at my Daughters death, in order to give J. O. a contingent Interest; cd not mean to give it absolutely to J. O. whether her Daughter had Children or not— A Man is supposed to manage the affairs best, this out of the reason, this is money, not like Land; a Woman is now the properest; the Infant, is a Girl to be educated; Mrs D. has shewn an uncommon affection, there can be no account remaining between the Deed & Mrs D. mere Suggestion of Doubt is not sufficient

Dr Wynne..... In the pupillary Substitution, according to the Roman Law, there is a Term fixd

Dr Hay, Judge..... This Case is very special; Mrs Grace Otway dies leaving a natural Child towhom she bequeathes her fortune, & in case of her death, to Mrs Frances Otway to be divided amongst his Children, as he shall approve— The Operation of this Will this Ct can not determine; the Qu now before me respects the Admon; I must decide who is the properest person to be entrusted with the Guardianship of the Infant to manage her Effects till she is 21; being an illegitimate female Child she has no Relation who can claim, the Ct must therefore exercise its discretion, guided by Circumstances— The Distinction between natural & legal Relations— In the Order of Nature the Sister is the natural, tho, not the legal Relation— J. O. has no claim either under the Will as Guardian or 1st Cozen; he appears by the Will to be the Substituted Resid: Leg: this is the strongest Objection to his hav: the Gap or Admon, as he cod have an Interest in the death of the Child towhom he is Gn; the Gentlemen arguing thus have mistaken their way; he shd not have the Gnship because he has the substituted Int.t It has been said he was not so, according to 2 respectable Opinions; but if the Child died Mr O. wd apply for a Judgement— It appears he is the Person the Deed intended to benefit; I shd think, he wd have a Claim to go to y.e Crown & say, I have such an intended Interest by the Will, am I not to be preferrd? the Crown cd dispose at pleasure; as he has a right to apply to the Crown (tis a kind of Interest on the death of the Child) Care shd be taken by the Ct that no person having an immediate or reversionary, certain, or contingent Interest, in the death of the Child, (where there are no legal Relations for where there are any the Law will take care) shd be nominated Guardian, as it might then be in his power to defeat the Childs Interest— He can't take it as a substituted Legatee; Mr O. is the Cozen, Mrs D. Sister to the deed, if she had no Interest, I shd not doubt giving it to her, but Mr O. has made it appear, that the deed thought, she had

Otway v. Douglas
Bye Day Feb: 28.... The Judge decreed y.e Admon to Mr Coulthurst y.e Sol.r y.e Attorn: (because he appeard to be in y.e Confidence of y.e Dead, he, his Wife were Legatees in y.e Will) for the Benefit of the Minor, there being no Objection to his Character, & the Securities were ordrd to justify—

a Claim upon her Sister in wch the child may be interested; Mr Coulthard in his Affid.t swears she ordred him to file a Bill in Chancery agt her Sister to shew the Deeds— If there is a possible Interest in her Sister to shew the Deeds— If there is a possible Interest in Mrs D. as natural Aunt, in the Effects, either certain or consequential, I think, I ought not to grant the Guardianship to a person in any possible way interested— Suppose Mr O. had only come as a Friend & objected to Mrs D. I shd have heard him, & thought it on their Evidence improper to grant it to the natural Aunt— I cd wish some totally indifferent Person cd be chosen to be Gn to the Child by agreement; if the Parties dont agree, my direction will be that each name one, & I will determine to wch it shall be granted, it will be my duty to use my discretion, so, that no one who has a Benefit in the Effects shall be named— I repeat it, neither have any right in the Eye of the Law, both being Strangers; I see Objections to both, I wish an Indifferent Person might have the Guardianship & Admon: I decree the Parties to name within a week & to be heard on the Grant by the Bye Day—

On Admission of an Allegation

Consistory of London
Hil. Term: 3d Sess:

N.C.A.S

Balderston agt Balderston.

Fuller — Dr Collyer & Calvert — Dr Harris & Wynn — Bargrave —

Dr Calvert read.....

1st Art. pleads the marriage & 4 Children by such marriage & that Mr
2d... B. was bred an Attorney, but not meeting with the Success he expected at Canterbury, he removed to London with his Wife—
3d... He is removing, behaving affectionately, & that he sent up her Clothes.
4th.... He expected her for 4 months in vain, wrote to her, & received an answer, that her Brother the Rev.d Jam.s Tremoulet, wd never do any thing for her & her Children if she went with her Husband & she had refused at the Instance of her Brother—
5th... finding all Intercourse stopped thro his Means

Dr Harris for Mrs Balderston

Mrs Balderston has sued her Husband not for one Act but a Series of Adultery, that he ran away & left her destitute— They were loath to give an Issue, when desired to be heard on their Petition, brought in none, but instead thereof gave this Allegation; I cd wish Dr Collyer had not signed this Allegat.n; the Intent is to shew there was a Reconciliation subsequent to the Facts & that the Suit was commenced without her Consent or Knowledge.
5th Art: contains Mr Bs History & Mrs Bs Consent to go with him, but that she was withheld by her Brother; no date is mentioned, when he went up to Town, she sent her Cloaths, Letters are mentioned, without the Dates, nor are they Exhibited— Mr Tremoults persuasion is nothing; his Sister is a free Agent, there is no restraint on her Person; Every Mind is actuated by some means or other; the Dates of the Letters must be pleaded; if they are not subsequent to 1762 & the Citation, they are absolutely nothing to the purpose— In Art: 6 & 7 Times are specified; if she was so willing, why did he write to her on his coming to Canterbury; It is said, she ran away, wch is very natural after his Usage; the Suggestion that this Suit is brought without her Consent; a Proxy is signed by her & 2 Witnesses wch was exhibited in April 1765 when the Citation issued,
8 & 10 Arts: say he took Mr Reynolds to persuade Mrs B to be reconciled, this contradicts what is said of her readiness to live with him; she falls into a Fit, the Apothecary & Son come & are happy to think there is a prospect of Reconciliation; his thoughts wh.r true or not, are not set to be pleaded here; her desiring him to stay a few days, implies she wanted to gain time, was afraid of him; if she was so willing, she might have gone with him... The Transaction of Mr B. being committed to Prison for his Behavior to Mrs Bowes, Mr Tremoults Sister, you have nothing to do with Mrs B. has Friends who protect her, as they ought, there is not one Article with tends to shew force.

Dr Wynne... I am likewise Counsel for Mrs B who charges Mr B. with marrying her in Jan.y 1753, & deserting her in Feb.y 1759, & with a general Scene of Adultery prior & subsequent to the last Period; to excuse only 2 Causes can be assigned,
1st. Shewing what we plead did not happen, or
2dly. That the Suit was not voluntarily instituted by her, because she cd not suffer a Suit to be brought but by the Consent of the Pl.t this he does plead, not in Contradiction; but the Proxy under her hand & Seal refutes that Plea, he must therefore shew she desires to be reconciled— He might have instituted a Cause of Restitution, she then might have

Pleaded Adultery in bar, but she has begun — To plead Letters without exhibiting them, or endeavouring to prove they are not in being; can the Ct interpose & oblige the Brother to consent?

Dr Collyer... The Qu: is, whether the Facts pleaded are relevant to exempt the Suit; we lay the Elopement, that she seperated from us, it is necessary to lay all the circumstances; she refused, on being required to follow his Condition; Qu: wh: a woman after has eloped can substitute a Suit of this kind? I remember in the case of the Duke of Beaufort this was made a point, & it was insisted that after the Articles are signed, the Man quits all his right, but the Ct was of opinion, she was always under him. She shd have had recourse to God by Prayers & Tears to turn his heart — It is malum prohibitum, not per se, to have a Wife & Concubine; tho. contrary to Law, it is no false Logic to say a man may have 2 Wives; If he did commit Acts of Adultery during the Cohabitation, our proving they parted Friends after, is a proof of Reconciliation; it is very material to lay, it is not her Suit; that she was under the Custody of her Brother; she was willing enough, when her Brother was absent — It is proper to lay the Letter; we can be relieved by her Answers, & in this case she must answer; he might move for a Sequestration, else a woman might go away with a Paramour; I think you shd examine the woman, wh: willing, a reasonable peremptory Objection; we have moved for an Information for a Conspiracy, agt all these Persons so this is not for Delay; we say she went to France to avoid seeing the Husband & took the Children; he tells you why he cod not go directly to the House; I think they call her a meek spirited Woman, & subject to Fits —

Dr Calvert.... This is a Case of Adultery brought by Mrs B. agt her Husd who is justified in delay to get Matter in Bar; the Matter of the Petition is extended into a Libel Allon; We dont say the Suit was instituted in another name, but that the Proxy was given under an undue Influence; we are reduced to this Plea, because we cant sue for the Restitution of Conjugal Rites, are under bad Circumstances, cant assert this Right so well, as when in better Circumstances, the Conjugal Commerce is always presumed; the Imprisonment is conducive to shew the Influence of the Brother.

Dr Bettesworth Judge. This is a very long Allon, & the Qu: is, wh: it is admissible, the Facts material for the Service of the Person; I never saw an Allon with more Words & fewer Facts; there is a Suit for Adultery, a Libel given &c. This Allon is not in the usual Manner, but to shew that he did not run away, but that she eloped; it is brought with a view, that the Wife may not obtain Sentence — To shew it comes with the Consent of the Wife, a Proxy is given; tho, I cod wish the Allon had been drawn differently, yet I think it may be received; the 1st Art: must be reformed, the Letters sent to him exhibited; 1 word in the 18th Art: struck out, the Exorbitancy of the Bail struck out, the rest admitted....

Feb. 3. 1766

Prerogative
A. Sess: Feb: 18. 1766.

No 12
Lovegrove v Lycett
altham — Dr Clarke, Calvert — Dr Harris, Wynn — Jennour
on Admission of Lovegroves Allon

Dr Clarke.... Our Allon is to repel their charge
1st Art: pleads that the Deed before 13th of Sept: did express a dislike to the said Jn Lycett & declared, he cod make another Will & Extr, for that he had harboured a Snake in his Bosom, & was then in his perfect Senses
2d Art: he declared he had made another Will, to his friend & Servants & appointed H. Lovegrove sole Extr & Residuary
3d Art: That H. Apothecary is a Person of good Credit & so reputed —
Dr Calvert read the Allon —

Dr Harris.... We pleaded matter in our Allon touch this is a Contradiction; we then gave another Allon with a variety of Facts, wch was rejected because no other was given on the other part; now they have given another; the matter of this Allon no doubt is proper, but out of time; they contradict our first Allon given in above a year ago, wch they might then — have contradicted; Our Allon was rejected not to protract the Cause & not because irrelevant — if we were in fault they are more so, as so much later than us

Dr Wynne... The matter of this Allon is undoubtedly proper but out of time, it is impossible to lay down an exact time; for parties to give Allons but reasons may be assigned for their pleading these delarations, I hope you will not suffer the Cause to be protracted

Dr Hay. Judge... The Allon of Mr Lycett, was not rejected merely because out of Time, but because the Facts appeared examinable upon the former Plea, Mr Lycett had given a special Plea before; he might have appealed; I am certain that it was properly rejected; the Objection taken is that it is out of Time; it is rather late, but the Cause is open; Mr Lovegrove may plead, he gave only a Common Condedit, the Facts are relevant

Prerogative
4 Sess:

Thorpe & Robinson Attorneys of Killian v Middleton
Fuller — Dr Harris — Dr Wynne — Jenner
VOAS
on admission of Fullers Allon

Dr Harris... Edward Green is the Deed, at Antigua his Will was proved; Martha Middleton his Sister obtained Admon here by swearing to an Intestacy; The Allon pleads the Will, that it was proved in the Gov: Ct that the Copy agrees with the Original Will wch is attested by 3 Witnesses

Dr Wynne... Edw: Green died some time since, Admon was granted to Martha Middleton, upon whom you will observe, there is no reflection. 69
she took Admon in 1765 was cited to shew Cause why it shd not be revoked Admon with Will annexed to . . . . . Attorneys
of the surviving Exors; Sam: Short, Geo. Wm Freeman, Wm Atkinson are Witnesses in the 3d Art: they plead the subscription & Handwriting of the Deed; unless they plead the Witnesses to be dead, they cannot plead & examine to the hand writing of the Deed
the 4th. plead that Sam: Short is dead & in the next his hand writing; they shd specify where the Deed did abroad, when, & where the Witness died, & in what condition of life he was; it may be difficult to find his Character, residence
6th Art: That Wm Freeman since the date execution of the Will, has left Antigua, that his nearest Relations & Acquaintance cant tell what is become of him; they shd say that the Exor & the Attorney of the Exor have enquired; they shd advertize & take other Methods, this is too loose & general; they take no notice of the 3d Witness —

Dr Harris... This Man died in England, she took Admon here; this is the Case of a Person, similar to a Seaman, leading an itinerant Life; if we had not pleaded the hand writing of the Testator, we shd have failed in proof a Cautious Proctor wd do this, tho. the Witnesses were ever so numerous — they shd plead agt the Mans Character, his Condition, we say he is dead; to be there he was alive when he signed; if they can, it is for them to prove, he is not dead, we plead the hand writing because the Man cant be found; the Exors say his Friends enquired they cd not enquire except they knew where —

Dr Hay Judge... The Allon pleads a Copy of a Will, & such Copy proved at Antigua may be offered; when they plead one of the Witnesses to be dead, it is not necessary to lay where & when he died, the Exor may not know, they can only plead the Inquiry; pleading Hand writing is always supplatory & may be pleaded at any time; altering the 6th Art: & inserting some words to shew the Exors have enquired & dont know the 3d Witness to be living I admit the Allon . . . . . admitted

Consistory of London
4 Sess: Hil: T. 29 Feb. 1766

No 13
Carpenter & Deuxell agt the Vicar & Parishioners of St Leonards Shoreditch
Cumberlege — Dr Wynne — Drs Harris & Calvert — Jenner
on a faculty for adding Bells on Wilsons Protest Decree for voluntary & condemned Cost

Dr Harris..... a Citation issued agt Mr Wm Wilson, with Intimation at the Suit of . . . . Mr Wilson appears under Protest & objects that the Recital is for alterations; that neither the Act nor Intimation mention the Chimes being ordred by the Vestry

with the Ministers Consent; that there is a variation between the Act & Intimation; — There is always an Act of Ct leading a Monition with Intimation; the 4th Obj: is, that there is alledged in the Intimation what is not in the Act of Ct; the Grounds therefore are irregular & false. — The Order is, that a Church Rate be made for the Reparations of the Roof & of the Church, of 6pence in the Pound.

Dawson bequeathed 100£ for a Set of Chimes of Bells, to play the old Windsor Tune

It dont appear the Chimes were purchased with the Consent of the Minister & Vestry — There shd have been an Order of Vestry to lead the Application for a Faculty

Dr Calvert.... It is alledged by Cumberlege, that the Ministers presence is not by Law necessary, but that the Majority of y^e Parishioners in Vestry bind the rest; that the Parishrs & Vicar approved of setting up the Chimes, by subscribing £40 for y^e deficiency & agreed to accept of Mr Dawson's donation, for that purpose left to the Senior Churchwarden; that Jenner has not alledged any thing proper for a Protest, & that Mr Wilson shd have appeared by his Proctor on the Return of the Citation, & have given an Allon pleading these Matters — Jenner insists, that tho, a Majority might conclude, yet the Parish had no right to set up Chimes without y^e Consent of the Ordinary, it could not be legally done without a Faculty — he submits, no new Matter or Exhibits can be now brought in by Cumberlege, nor is it necessary to object to the Jurisdiction — That his Party being a Pshr is by the Citation called into Judgement, & is not a voluntary Party; that these Repairs are not necessary — The Order of Vestry, is, for repairing the Roof of the Church, & doing other necessary Repairs, surveyed by the City Surveyor Mr Dance —

Dr Harris ..... The Objection is to the Intimation, wch if wrong, all the rest falls of course; viz, there is no Vestry Act, wherein there is any Agreement for Chimes — If a Citation cannot be altered an Intimation, wch is one, cannot be mended, so this matter cannot be admitted —

Dr Wynn ..... The Objection taken by Dr Harris, is,
We do not desire to mend the Intimation, but to contradict what they state in their Act, viz. That there was no Order &
We want to shew there was the Consent of the Parishioners wch is proved by the Subscription —
Dr Bettesworth Judge allowed an affidt of the Vestry Clerk to be read to ascertain the Order of Vestry — That Mr Dawson's was agreed to in Vestry — The Subscription Paper cited by the Vestry Clerk's Affidavit, "That we the Subscribers agree to make good the Deficiency towards making up the necessary Bells &c. 9th of July 1765"

Dr Harris ..... There are 2 Sorts of Prokstn; one to the Jurisdiction, the other to the Suit; this is to the Proceedings; he may protest because he is cited, & all Persons who are cited may object to the Proceedings, as well as to the Judge; Ours is to the Intimation, Mr Wilson does not mean to proceed vexatiously, but says the Vestry was obtained unduly & clandestinely; the Intimation shd be new, then the Churchwns may cool in their fondness for Chimes — The Intimation is constantly built upon the Evidence brought before the Judge for the Reading it; Every Alteration made in the Church, requires the Vicars Consent; it is the House of God; & God's Vicegerent; they might repair the Walls all round without the Consent of the Vicar or Ordinary, wch go together; they bring no Evidence of the Vicars subsequent Consent — No Act of Vestry leading the Ct. Act, & the Intimation; every thing in the Intimation

is copied in the Sentence — the Record wd be false; it recites that in the Vestry it was agreed, there shd be an application for a Faculty, nay they do the thing before application —

Dr Calvert.... The design of the Intimation, was, to lead the grant of a faculty — The design of the Pshrs that the Chimes &c were improper & the Opinion of the Pshrs, resolved that Mr Wilson, as Overseer, was the fittest expence, resolved that Mr Wilson, as Overseer, was the properest to appear in Judgement — 2 Sorts of Protest — he does not object to his being improperly before the Ct, as not domiciled, but object to his being improperly before the Ct, as not domiciled, but any thing in Bar may be made matter of Protest; our Prayer is that the Intimation may be dismissed; the Law says, no Alteration shall be made in the Church without the Vicar; he has a freehold in the Church, the Ct never orders any thing in the Church without his Consent; as in the Case of a Monument a Certificate thereof is given in; the not obtaining his Consent is a fatal Error; you want to confirm what they have done, without your Consent, that of the Minister or Pshrs all shd appear on the face of the Intimation else the Error wd be fatal; It is in the Act alledged, to be sped before you, but it was sped before Dr Macham — all Errors are by Mistake — The Vestry Act does not say a word of suspending the Chimes, till a Faculty obtained; if you think the Objection well founded to the Intimation, you will I hope dismiss my Client that we may have an Opportunity to take the Sense of the Parish

Dr Wynn.... This Person is cited only in general with the rest of the Pshrs he comes voluntarily, not being particularly cited, & comes in without any purpose — There are some general Objections offered, viz, that the Proceedings do not appear to have the Consent of the Vicar, & it is insisted on, that all Repairs & Alterations in the Church require your Consent: as to Repairs it is impossible, whatever may be in Alterations, the Dr quoted no Law — from the Estimate the Repairs appear quite necessary, & merely such wch the Churchwns cd do, without consulting any one Person in the Parish; they are elected for that Purpose; the Parishrs Consent devolves on them by the Election — The Parish must consent because they are to contribute, the Ordinarys Licence is proper, because he is the Judge; as to Monuments they being held Freehold, & as to other Cases, the Ministers Consent may be requisite; In Edmonton & Staines the Vicar was held to be only as one of the Parishrs — If the Consent of the Parish was to lead the Intimation, to what purpose is it issued? it is only to know wh: they will consent or not; ex abundanti cautela they may exhibit their Consent, previous thereto; Another Objn relied on, more than I shd imagine, is, the Variation between you & your Surrogate; your Surrogate did it in a regular manner; the Ct will not record such a Mistake; such an Alteration may be allowed us — I will instance the Case of a Sentence in the Prerog: Ct. before Sir Geo, Lee, It was Aylesbury in Bucks — the Name of the Judge was at the head of the Process & it was subscribed by y^e Surrogate,
There might be an Order of Vestry, & a verbal Direction given by the Parishrs to the Churchwns to apply; tho, repairs may be made without a Licence, yet it is generally proper, where material —
That a Faculty shd be applied for; respecting the Alterations,
The Vestry only agree to make a Rate for the Chimes, not that they shd be done, before the Faculty was obtained — From what appears, the Orders of Vestry are quite fair; the Vicar is particularly named in the Intimation, he made no Objection & Mr Wilson has no reason to make any —

Dr Bettesworth Judge..... In this Case Intimation was taken out agt the Vicar &c to shew cause why a faculty shd not be granted for some Alterations? to this Mr Wilson a Parishioner & Overseer appears under Protest, not to y^e Jurisdiction, but to an Error in the Proceedings, because y^e Vicar did not consent & y^e Intimation states it to be before y^e Judge & not before his Surrogate as it really was — I know no Law wch requires the Ministers express

Consent, he only must not dissent; he did not object at the Vestry, but ever was a voluntary Subscriber, & as to the other Objection, on the Authority of the Case in the Prerogative, I sho think it not at all material, nor is it essentially necessary to be rectified, the Act of the Surrogate is the Act of the Judge; The Qu: is wh: the Intimation is erroneous, not wh: the alterations are necessary? I am of Opinion to overrule Mr Wilsons Protest as frivolous, & condemn him in L: & S: Costs.

Delegates. Serj: Inn. Dec: 9. 1768. .....

No 17

Archer & Wakelin agt Whytall & others.

On admission of 4 Allon. of one of 4 next of Kin

Dr Harris, Wynn Attorney Gineral. — Dr Bever ... Dr Collier, Calvert & Sir Fletcher Norton — Burrell Mr Perryn. — Sollic: Gen. Mrs: Madox. Durning

admitted

Sir Fletcher Norton

It is absurd & ridiculous, that the Paper brought in from the Ct of Chancery shd be signed by one of the Six Clerks; but where did the Paper come from? Mr Hood was Solicitor for Mr Whytall; Suppose a base not foreign from Truth; I use it only to shew how dangerous; Suppose Mr Hood had been Mr Whytalls Attorney, got Possession of his Papers, amongst the rest of the Mans Proceedings let me suppose after he had thus obtained Mr Whytalls Secrets, if he has, is an Attorney in the Ct, this will be a foundation for striking him off the Roll: wd your Lopps receive a Paper to introduced, the Grounds of wch are false - It is not alledged to be the writing of the Testator, or that it came from him, so as to fall under the Description of Scripts wrote by him - The Allon states the Paper to be wrote by Mr Whytall - Confederacy is charged wch confutes itself - the Contest is between different Claimants of Opposite Interests.

Ct. was adjourned Dec: 18. 1768. ...

Mr Perrin .....

Seriatim. It is falsely alledged to be proved; these Minutes were delivered to Mr Smart, when he drew the Will - The Bill in Chancery was amended & Mr Hood made a Party on 4 20th of June 1764 Mr Hood put in his Answer, wherein he confessd he had Minutes Barker one of 4 Co Clerks has no power to collate &c delayed

Sollicitor Gen: ... Mr De Grey ... solate,

It is the Misfortune of Mr Thos: Johnson Mrs Eliz: Marshals Exor, to be they got Sentence pronounced agt her, 2 years after her death they might have come in as original Parties; they have been opposed in their Intervention - I beg leave to state the real question it is of short discussion, & rather that I may be precise, than out of doubt of your Lopps memory - The Deed died in 1759 leaving 2 Wills, both benefitting Strangers; they were propounded in the Eccles: Ct - Fraud, undue Influence, & that practice was alternately charged, one Side must be guilty - Eliz: Marshal was cited but died before the Examon of Witnesses; Publication passed in 1761, they proceeded to Sentence 1762 as if she was living, & pronounced her Contumacious for not appearing 2 or 3 years after she was dead - they cd not proceed to the Execution of the Sentence - the Personal Representatives are admitted as original Parties to intervene, alledge what they might in the Ct below; if the next of Kin can make out the Malpractice as to the Will of ..... What is to prove Fraud? is there any Line, any defined Rule? consider what it is to confine Parties in one of the most vague Propositions as to private Property - In Bills in Chancery, any thing improper or scandalous is expunged; but if it is proved, it must be relevant, however abusive - The same as to Answers in Issues directed by Chancery - the reason is stronger here - there may be Surprize in Issues - In all Cases you point out to Parties what you mean to examine upon - great Inconvenience may ensue from shutting out light; none in admitting it - If some Articles are rather verging towards impertinence, it cannot yet be certain, these are not Accusations, the Proofs are by the Answers upon Oath; he has a right to Witnesses to what they can prove, he may produce what Instruments he can - there is no

Objection to the Examon of Mr Whytall - that may prove some Articles, the Deed was either incapable of giving Minutes, or of writing them, can any thing be more likely than an artfull man who knew something of a Testators Affairs, if he cd collect any notion of Bounties to Hospitals &c. not perfect, uniform, but irregular thinks; tho, a Will may be made at several Times, it must be a consistent uniform Intention - are they material? is it not a strong Circumstance of Fraud, if Whytall has taken down several hints of different Tenors - These are Instructions; they are in Mr Whytalls Hand: what mean C.D.W. would the Testator give such a direction to leave him nothing (Letter B) He is charged with Collusion with Mrs Archer; she is to have the Residue - They object to the Copies out of Chancery; the Original will be applied for at the hearing of the Cause - They are said to be unfairly got; what, are they unfairly lodged in the Ct of Chancery? Admit it be presumed they did impute Fraud on the Exchequer; punish the Delinquents; but it has nothing to do with Mr Johnson: out of Evil comes Good; it is essential to those concerned for Mr Biddlestone - If there shd be Instructions in concert with Mrs Thexton, we can't now say, they are incapable of Proof - Suppressing the Exhibits: it is not an Indictment for Perjury, but it imports the next of Kin to know why Mr Whytall said he had no testamentary Paper, when he had these; perhaps Mr Whytall might think so - as to the Articles of the Deeds declaring his dislike to the Brother, if on the other hand they can produce Declarations that he had forgiven him - Bond - It is a Circumstance confirming the Collusion between Thexton & Whytall, wrote, witnessed &c The 12th. has something to do with Collusion & undue Influence practiced on the Testator - the 13th. is to shew it cd not be written by Bowman, because he is ignorant of the Language

Judges. Wilmot Gould Perrot Dr Marriot Macham

Dr Burrell .....

The Judges agreed to admit the Allegation without hearing the rest of the Council for Mr Johnson & the other next of Kin.

Delegates Feb 10. 1766

No 18

Sollicitor Gen: Jones & Scroop agt Craven Dr Blackstone
Tyndal Dr Calvert Harris Dr Wynne Mr Lepham Stevens ...

Dr Wynne ...

This is an Appeal from Oxford - It does not appear any original Citation issued - Decreed for personal Answers - articled, that the Proctor apprehending himself in danger, ran down St Mary Lane - Mr Craven appears under Protest to the Jurisdiction, says he is not subject thereto within the Walls of All Souls College, he exhibited his Answers saving his Protest & admits the first 3 Articles - The Answers probably wd have been received in the Vice Chancellor of Oxford's Court, they not proceeding as we do in the regular Ecclesiastical Ct - he denied his doing it in defiance, but thought the Proctor exceeded his Power, & therefore did not impede him in the legal Execution of his Office -

23 Dec: 1763. The Drs Butler, Harrison, Vivian, Bever & Bourn reverse the Decree of the Congregation

E.D. 1764. Tyndall returned the Citation, Inhibition & Monition - They are now confined to the Prosecution of the Appeal wch is the Decree

Dr Harris .....

The Qu: is, wh: the Judges recused, have a right to give any Sentence; & then wh: that Sentence is a just one. (here he related the Case) The Vice Chancellor declared the Proctors have a right to pursue Delinquents into any College - 2 of the Delegates of Congregation dissented from the Confirmation of the Vice Ch: Sentence - The Proctor for the Appellant recused Dr: Butler, Bever, Bourn, & gave a recusatory Writing, objecting to their being admitted because of their great Intimacy, eating at the same Table, & partaking of the same Bounty with Mr Craven; the other Six declared they wd not judge of the Recusation of the 3 Drs &c - The recused Drs said fairly they wd nominate Arbiters for themselves, & required Messrs Jones & Scroop to appoint Arbiters on their part, & meet again the 2d of Nov: There is a difference between Arbiters & Arbitrators - Scroops Proctor named Nody Smallwall

NB The Protestor begins in the Delegates..

who appeared & accepted 9th Nov.r D.rs & q.d Recused held a Ct & declared the Recusation did not appear to them to be a legal Proceeding (as you will find the Recusation is pointed out by the Statutes) & wd defer naming Arbiters till it was proved to be the Custom & Law of the University - Jones protested - The Arbiters met & declared that on the Allon of Recusation, the 2 Dr.s were improper by reason of their Domesticity - 7th Dec.r Mr Scroop exhibited this Arbitration, requested the Vice Ch.r & 2 Proctors to nominate 3 others in lieu of those recused; 13th Dec.r they did not, so the Ct went on; 2 of the Recused met, & rejected the Recusation - No Ordinary Act can be done, unless there are 3 Judges, yet 2 of these took upon them to do a Judicial Act, i.e. sat aside the Recusation; from this Mess.rs Scroop & Jones protested & offered to proceed on the Merits

22 Dec.r The 3 recused & 2 others said Mr Craven had a right to appeal, the other 3 withdrew & dissented

24 Dec: The Unrecused Dr.s Kelly & Newcome, Mess.rs Allen & Stinecome decreed Mr Craven to be a Person inhibited from Appeal, as unworthy, being accused of breaking the Peace & dismiss'd the Appeal

28th Dec.r the Recused & 2 others made a contrary Decree from wch we appeal, as also from all other Nullitys & Grievances to be collected from the Acts of the several Judges - The 1st Qu: therefore is wh: the Judges recused are Competent, 2° wh: the Decree is right.r We shall after the first, beg the Opinion of the Ct, &c.

Dr Blackstone.. The Charters are necessary; the Rule of the Civil & Canon Law to recuse Judges - they must shew that such prevails in the Vice Chancellor's Ct unless it is the Usage of the Academical Cts, they are bound by Charters & Customs, the Charters & Statute shd be exhibited, we are not prepared on this Point

Dr Wynn.... In the appeal there is not a Syllable more than the formal Words; I put it to the Gentlemen, wh.r any Person reading the Libel wd find out a Word of these matters; why did they not appeal, if the delegates would proceed notwithstanding the Recusancy; they cd not go on through out protesting

Soll.r Gen.l..... The Gentlemen cant be Strangers, tho, they are not so well informd, as they wd otherwise have been - No Surprize appears on the Books of Proceedings transmitted -

Judges..... The Words null & void includes a great deal

Dr Wynn.... The Recused not appointing Arbiters was an Appealable Act, the Proctors by not appealing acquiesced -

Sollic.r Gen.l.. By refusing to appoint Arbiters, he confesses the Recusancy.
13 Eliz: restored those Charters, Ld Coke declareing them void as to common & Civil Law

Judges..... Supposeing the Time for making the Stand was on the Grievance but if all is included in the Mode of Proceeding - If a Writ of Error on a Judgement, it says only null, yet you may shew it was wrong; if so we may go on to the Question of Recusation: The Appellts undertake now, to shew it to be according to the practice of y.e Civil Law - The Assertion is not a Specification of any particular Grievance, it is general, & involves the Idea of Nullity
Barrt Adams
Justice Yates
Dr.s Marriot
Macham
If the Respondents have neglected any Documents, they must bear the Inconveniences
Stat: of all Souls, to punish
De domibus Oppidanorum non frequentandis
De manutenentibus Oppugnatoribus &c Etiamsi intra Collegium quod cunque

Delegates
Feb: 13 1766....
Dr Blackston

Mr Craven on the first Admonition departed; some time after, some of the Company came into his Chamber & staid some time; he did not suffer the Proctor to enter his Chamber, not in defiance of y.e Procuratorial Authority but believing he had exceeded his Power: he did not think his Refusal to surrender his Company, was impedeing

The Proctor in the Execution of his Office - If any Offence is committed in the University or in a private College it is said to be equally amenable to the Vice Chanc.r By the Statute, being at a Public House a one hour, makes the Delinquent liable to one Penalty, being there at another Hour, a higher Penalty is incurred - neither the Proctor's Accusation, nor Mr Cravens Defence, is to be taken for Truth - The Plea on one Side, is that the Offence was committed in the University at large; the Cause of the Protest is the Claim of Authority by the Proctor, not in the V. Ch.r Ct - The Proctor introduced another Matter arising from Mr Cravens Answers only - wh.r the Proctor has a power by the Statute to enter private Colleges - separates the 2d Qu.r - no Instance of Recusation being made - All Souls & St Johns have most Doctors, compose the Delegates - Maranta Speculum - Dr Wood says the Vice Chan.r cannot be recused, as who shd imprison them? who ed be put in his Place, if Mr Craven had refused - Both the ..... & Assessors, are appointed by him, it wod be trifling, must a new one be made, the same Rule must run thro, the whole - The Statute Sequempiam recusaverit 1636 - no Corporation can make a Bye Law not warranted by Custom: if an explicit Statute is not binding, much less would one be that is Hypothetical - These Statutes were framed by Sir Henry Martin, Judge of y.e Prerogative, being sent to him by Abp Laud - If the Recusancy be admissible & the arbiters ed proceed exparte, the Domesticity is not one of 40 Causes mentioned by Maranta: this is not proved - Dr.s of Divinity & A.B. have not much familiarity, especially at All Souls

Qu: That the V. Ch.r has power over Causes arising in private Colleges
Admit, but deny that Proctors are authorized to exercise it -
Colleges, as Corporate Bodies are distinct from the University, wch existed before the Colleges - They have no Jurisdiction in Domestic interior Faults, but in enormous ones, as Felony &c. on Roses of hard are amenable in the V. Ch.r Ct - Colleges are like private Houses, the Warden is the Head of the Family - The Statutes are only mere Bye Laws, if contrary to Law, they are void: Shall a Proctor search private Chambers to find Delinquents - General Warrants, Excise Laws, are inconsiderable Instances of Tyranny, if compared with the power claimed by the Proctors, they ed pursue a Delinquent into a private House, tho, contrary to the Law of England - This Statute is only conditional, it is an Infringement on publick, private Right -

Dr Wynn.... The Objection taken in Limine was by a Recusation; the 1st Qu: is wh.r this has taken away the Jurisdiction - 2dly. wh.r this practice is allowd & admitted - 3dly. wh.r the mode & Form alledged by the Proctors ought to be received?
As to the Law in Gails Observationes Practicæ. Lib.s. 33. There appears a Recusation allowd by the Civil & Canon Law -
In the Civil, an ordinary Judge cannot be recused
By the Canon, an Ordinary, even a delegate Judge can
A Libel administred or else a general Allon of Recusation is offer'd without expressing &c
only an Oath of Calumny at first is ... expressing the Cause
Arbiters are appointed - According to Castrensis, & Alciatus the Arbiters are to take Cognizance of the principal Cause - Oughton 277. says the Causes are to be set forth - A Recusation in the Civil Law is very different from what is contended for - A Bishop sued for dilapidations before his Chancellor, yet there was no Recusation thought of - The Practice of Recusation is now unknown in the Cts of Arches, Admiralty & Prerogative - Does such a Practice prevail in the Chancellor of Oxford Ct? is it adapted to their Proceedings - It is not a Delegation for a particular purpose, it is an ordinary Ct, therefore it had not the Character stamp'd on it by the Canon Law Rules, they are appointed for the year at a stated Time - The Compiler of the Statute had in Contemplation that there was such a Practice mentioned in the Books - I must observe that the Gentlemen who stated this Objection were themselves ignorant of such Contemplation, & Practice. It never was Law, that it shd be referred to the unrecused Judges to determine by themselves, where did the Gentlemen find that? no arbiters were named on one Side the others name Arbiters - The Recusatory Allon. 5.t Ct Day - 2 Bilson said he had now ..... 3d then another ..... they proceeded to proof, but non constat what the Proofs were - They recused the Judges, the Arbiters carried their Judgement to the V. Ch.r & Proctors,

A The Delegates must be composd of resident D.rs of Law - .....
B The Statute says the guilty party is to appear on his knees ask pardon & be imprisoned - .....

who refused to conform it; then they said, they wd Submit to the
recused Judges: then comes the Protest to the Jurisdiction, that
it was unappealable, tho, he wd have submitted. There was no
foundation for the Recusation — Every College has Professions, Laws
& Officers of its own; the System of Corporate Bodies may be com-
=pared to Political Bodies for the Purpose of Power & Sovereignty
reserving their own Independency, except for the purpose of the
Alliance — It was a Seminary of Learning, long before y^e founda-
=tion of Colleges, to wch Persons resorted for publick Lectures, were
lodged in private Houses, therefore at large, they were subject to y^e
particular Officers — Individuals fixt their Residence, where there
were these Studies, it was found more convenient to assemble
Different Persons within the Walls of one House — As to this respect
the Statutes of the University were narrowed, but in other respects
remained the same — Imperium in Imperio is always exception-
=able a Party might be harrassed twice for the same Offence —
the Private Colleges have always been jealous of their own
Rights — They have Statutes ordaining all differences to be adjusted
by the Local Jurisdiction; even Bp Laud receded from visiting
because each College had Statutes. he did not mean to visit only
as Metropolitan. The Statute respects only the Regulation of domestic
discipline, It is tender of private Immunities, far from so
illiberal a thought, as to involve the University in continual
disputes with private Colleges for the privilege of punishing.
If your Lops shd think the Colleges have the same privilege
as private Houses, i.e. not to be entred, except for some extra-
=ordinary Case — The Greatest Power makes Apologies for pur-
=suing Offenders into the Territory of the weaker, because what is
an Act of Justice in the one, is an Intrusion in the other Case: The V.Ch^r
decree is very general, not restricted, what better right has he to
order the Outer Gate to be opened, than the Inner. There is a
distinction between Colleges & Appidans by the Statute, it is given
not only in the latter Case to the V.Ch^r & Proctors, but to the Masters
&c to enter — a Penalty is given for not opening their Doors at
once, when demanded, but not a word is mentioned of private
Colleges. It is omitted in the Statute, a Gownsman being in a College.
It is notorious, there is no College, wch has not Statutes to punish
all sorts of Offences; the Notoriety is enough, if no Statute had
been produced —

Delegates.
Sat: July 22^d 1766.

Sollicitor Gen^l.

It is necessary to recall the attention of the Ct (diverted by
such various points) by stating the case. The Charge was
"That Mr Craven affording Shelter in his College to the others,
menaced the Proctor in the Streets" Mr Craven in his answer
insists on three things, 1^st by his Protest, that he is not subject to the V.Ch^r Jurisdic-
=tion for any thing done within the College — 2dly That the
Proctor had no Authority to enter his private Chamber — 3dly he
denies the facts charged — The 2 first are parts of Academical
Law, the other is a direct Answer — The 2 last points are not in
Consideration, the 1^st is the Protest; viz^t "Though I had committed
any Offence I am not subject to the V.Ch^r" this the only point
in Issue below — I speak to the Declinatory P^t viz^t The V.Ch^r
recites that from the Pleadings there had been a Proposition
started, "That Proctors cant pursue" &c That an Offence within
a College is cognizable by the V.Ch^r so determining agt y^e form
of the Protest. The Delegates of Congregation (6 present, 5 absent)
confirmed y^e above determination, but not unanimously, the
two of All Souls dissenting, from thence, it was appealed to the
Convocation — That Ct consisted of 9. 4 did not act & understood
it & declared it null, but did not reverse the Decree of the

V.Ch^r & Congregation as contrary to the Statutes; from that decree
the present Appeal is brought, insisting that it cannot be supported,
that Offences committed in a private College is cognizable by the V.Ch^r
It is for the Credit of the Advocates, the Convocation; can Gentlemen who
are conversant in reasoning, determine contrary to the Principles
& Premises? Can such a Conclusion be drawn by any Logician, "that
"because the Proctor ed not pursue, yet the V.Ch^r might have a right
"to determine Offences — This is not maintainable for 3 Reasons. They
had no Authority to determine at all, but if they had, they determined
a Point not judicially before them; & if it was before them, they
determined wrong — . . . . . The University received Charters
from the Crown with large Powers — the 13 Eliz: confirmed & made effectual
whatever was wanting in the Powers under the Crown Charters. ^ They erected Ctss appointed Officers; it is no wonder, where the Civil
Law prevails & the Common Law is not understood, they shd adopt the
Proceedings of the Civil Law, not of the Common Law. The Kings Charters
cannot direct a Ct to proceed by the Civil Canon Law, it is the Statute
wch makes their Proceedings legal — In Cases of meum & tuum
they proceed by the common Law, in others by the Civil, not the Canon
wch is unknown there — their forms of Proceeding are according to
the Civil Law; the Chan^r & V.Ch^r has an Assessor of the degrees of LL B or
D.C.L. The Offences are not such by the Common Law — Hales Hist^y of the
Common Law — 32 — They are not Ecclesiastical but Temporal. 8 H. 4 &
H. 8. Littletons Rep: 9 & 10 — Manners & Penn Ld Raymond 134
Proceedings according to the Civil Law; it is true the B.R. wd not take
notice they proceeded by the Civil Law Rules, unless returned so by the
V.Ch^r Usage is to be observed there — It happens that some Judges are
exceptionable, Interest includes all — as to the K. . . . executive
Powers, Prerogative is very different from Judges appointed by the
Subject . . . . . happened in Chancery
in Ld Talbot or Ld Cowpers time, it was to the Mr of the Rolls, not the
Chancellor) who gave Sentence agt the Chan^r with Costs & he submitted
It is a Principle of Justice — But say the Gentlemen not applicable
here, because the Act of Parl^t directs they shall proceed by Usage — they mean
as to the form & original Institution, because no Instance on the Rolls,
the method once adopted, to proceed by the Civil Law, you must
pursue it accordingly — The Statute of the University directs the
Proctors &c on the Recusation, shall appoint others; This not inserted,
occasionally, but expressly, this must refer to the Civil Law — Dr Wynne
has produced the Different Methods between the Civil & Canon Law,
nor has any Civilian differd, only Covarruvias a Spaniard Loughton
say, Ecclesiastico to Civili . . . . thus Countries adopted the Canon Law
more or less — The Common Law is as near to the Civil, as the Canon
Law is — the Authorities all agree that by the Civil Law, these particu-
=lar Articles take place in all Recusations, it is not necessary to
specify at the time; It is not clear in all the Cases, wh^r the arbitors
took the Point ^ original in Issue under Consideration, if they determined agt the
Recusation, the other Ct proceeded, (suspended at least, if not with-
=drew the Cause out of the Ct — the Recused undertook to name
their Arbiters next Ct, but did not, the remainder declined, the
recused Judges did not sit
An Officious intruding Judge does not lighten the Suspicion of
some improper Bias
This similar to the Challenge of a Jury. The Attorneys are Triers when
is challenged, otherwise the Sworn Jurors are Triers — In the whole the whole away
17 Judges concerned, 2 or 3 of All Souls; the Q^n was with respect
to the Jurisdiction of the V.Ch^r only, but he determined one point
more; not in Judgement, not contested; there is never an Appeal
upon an extrajudicial point the Judgement stood go at large, it is not
even an Authority in the Books; for if a Proctor had pursued
a Collegian the next day, he might have contested the Right, he was
not concluded by the V.Ch^r nor subject to the Examen
Suppose a Constable hears of an Offence, or sees a Fray tries to take
the Parties in his own District, he may pursue them into another
County — The Statutes are anxious to give the largest Powers to the

^ the first defect in those Charters was their creating Ch^y appointing Officers for those Cts, wch can be done only by Act of Parl^t...

to preserve & discipline of ^ University they recused &c

Officers of the University in Domibus Oppidanorum, in plateis,
It is admitted, if an Offence is committed within the District of
the University, the Offender is amenable to the V. Ch[r] you cod
not confine the Power to apprehending & prosecuting—
The University does not consist of Streets, Houses, but of
Scholars, Officers, Members; it is not the Colleges wch consti-
-tute the University, but the whole,
There is the same right to enter a College as a House from
the Words, reason of the Statute— the University Jurisdiction &
that of the College flow from different Sources; the one, from
the Crown, the other from the Individual, they may coincide
to reform Manners & presewe Discipline; it is not the Habit
& Matriculation, but the Living in the Precinct; what a
System of Policy is laid down? (a name of Discipline, Education
wod be an Asylum of Defiance, like White Friars— No Instance
of any abuse of the Authority, yet you are desired to let
loose the Flood Gates of Irregularity; Should the Proctors
have asked leave, the Heads of Colleges also applied; Decency
alone would be the best grounds to found the Authority of the
University; the Heads of Colleges have no power to take
Cognizance of the Delinquents of other Colleges, but they call
in the Aid of the University—

Dr Harris

I am Council for the University as well as for Mr Scroop;
Mr Craven first appeared absolutely on the 3d of May— there can
be no Protest to the Jurisdiction after Issue joined; before I
enter on the Recusaney, I must remove the Objection, that
the Ordinary Judges cannot be recused, but an Apesson;
Mr Blackstones Arg[t] that the Civil Law is not the Rule of
the University Ct but it is made up of the Proceedings of both
Civil & Canon Law cannot well Hold
Sr Tho[s] Shirley, 14 R 2. & 18— In Fitzherberts Nat: Brev: Sus
Fit: de Excommunicato capiendo &c. from hence I collect
it is an Ecclesiastical Ct too— Stat[t] to substitute to a
Recusaney— From Dr Aylif that he was expelld, but y[e] reason
was, for writing agt the Statutes of the University. It was
not malum in se— Aylifs ancient & present State of the
University— Dr Wood wod not be recused, he was Apesson, & the
allon given by the Recusant, he proceeded but the Convoca-
-tion annulled the Proceedings, & the Delegates confirmd that
Sentence, declaring the V. Ch[r] & Apesson cod be recused for
just reasons— It is a Solecism to say a delegate can be an
ordinary Judge, & the Commentators on the Code says he may
be— Recusation ties up the Hands of the Judge; he must
wait to have the reasons given; whatever he does, is
null, tho, else the Act wod be valid— Gail 1 B. 31 Obs:—
the Libel of Recusation was given to the Arbiters; they cod
not hear the reasons; from their own mouths. the
recused Judges confess the reason of Recusaney by agreeing
to appoint Arbiters, as being of All Souls— If the recusation
is proper we have a Sentence in our favor, for Mr Scroop
protested that Mr Craven had no right to appeal— Quod in
notoriis non appellandum est is the ancient Decret:
Gregor: Lib: 9. The Petition of the V. Ch[r] of Oxford in 1631 to
the King, that the Peace had been disturbed by Tho[s] Ford,
being forced to give a Copy of his Sermon &c by the Statute
he cod not appeal; this shews there was a Statute of this kind
before Bp Lauds time; If an All Souls man on a question of
privilege of All Souls was to offer to be a Witness, he wod be
refused by the Ct; a fortiori more objectionable as a Judge, but
The Proctor is bound by Oath to go in quest of Delinquents;
what Exemptions, Charter, or Custom has All Souls? at last
comes a single Statute containing no more than those of all
other Colleges— on insulting the Proctor in ..... vel extra-

those Gentlemen seem to have had the rage of Judging very strong—

what means extra? ... Hawk. Pl. Cr. If a debtor escapes into a House, the
officer may demand Entrance, if refused, may break it open, but not
finding his Prisoner, he acts at his peril— The Delinquent is to be
imprisond, who is to find him? the Proctor, he must search after him
This not a Case of meum or tuum, it is of a lighter nature; a Sanctuary
cannot be a Plea to annoy another from; wch Mr Craven is accused of—
I hope when you give Sentence, you will fix a Stigma on Gentlemen
who force themselves into Judgement—

Dr Calvert...

Our first Objection, "that it is anullity on account of the Recusaney by
the Statute of the University & the Civil & Canon Law" the Gent[n] were
aware of, denied the University to be governd by the Canon Civil Law—
no Authority was cited to prove this; when the Charters were granted
they might elect what Law they wod proceed on — at the Head of Dr Woods
Book is a Letter the Civil Law wch you are so fond of
the Canon Law is partly adopted: no Ct is purely Civil or Roman Law,
the Canon Law Cts proceed by the Civil Law in many Cases, it is mixd
according to Circumstances & Things; there is no Trace of the Common
Law; In the proceedings by the Canon Law, there is an Appeal from
every Step; by the Civil Law only from a definitive Sentence
.....on our favor, that if the Common Law prevails there is no
Recusation — an injudicious acc[t] of the Statute .....
but I believe it does not appear to be an injudicious Interpretation of
Recusaney, it is stronger than if Categorical, it is but hypothetical,
supposes it to have been what has before happend & so adopted— It is
provided by the Statute, that if a deficiency of the Degrees appointed
the V. Ch[r] & Proctors may elect from other Degrees— If there was no Doctrine
of Recusaney, suppose the Proctors themselves were of the Convocation
wod it not be absurd that they must judge in their own Cause; there
might be Instances of Judges recused, but none of Judges who ever
intruded themselves after— 12 years ago a Judge was recused— In the

Dr Edmunds was of Cambridge

MSS. of Dr Edmunds, in a Case of Recusation, another Delegate was ap-
-pointed by 3 Delegates nominated by the Vice Chanc[r] & Apesson;
the 2 Universitys are similar in many Instances; the University
Ct is sine figura Judicij, & their Proceedings are not to be considerd
strictly, as they wod be in other Cts— The Oath of Calumny is estab-
-lished as sufficient by the Civil Law; & here the Libel of Recusa-
-tion was regularly given in — In all regular formal Cts there is
a day given to the Party; but the V. Ch[r] gave Sentence, ordred
Execution the same Day; It was a Contumacy established & well known
in Lumonary Cts the notoriety serves for Proof; the Arbiters determine
on the proofs, but it is not returnd in the Process, from whence the
Gentlemen infer, there was none; the reasons they proceeded on are
immaterial, you do not sit to determine the Sentence of the Arbiters.
Sine figura Judicij— the Reason was such a Blot as cod not be got
over, wh[r] the Arbiters had determined or not— Maranta, "Judex
"potest recusari, & interea suspenditur Sententia Pt. 6. N. 24. the two
recused Judges themselves pronounced, they were not well recused
for themselves & for their absent Brother; (Dr Bever) I hope then
we shall never be sent back again— Neither by Civil, Canon, or
Common Law, shd a Judge be so in his own Cause— the Declaration of the
V. Ch[r] is taken for part of the Sentence mistakenly; Privilege is always
stricti Juris, they are to shew it; the Comparison of private Houses is agt
them, for by the Statute the Houses of the Oppidants may even be search[d]
we dont pretend to that— From the manner in wch the Origin of the
University has been deduced by Dr Blackston, it follows that the
University being founded previously, the Colleges as subsequent in point
of time were subservient; therefore any such Immunity claimed by
them, wod not be received agt that of the University established: the Arg[t]
holds as to any 2 Colleges, but not as to the University, the Fellows are of
Colleges have Distinct Officers, take no Oath, as they do to y[e] University
If the Head of a College is applied to, & he shd refuse the Power would be
baffled: absurdity might make him refuse, he has a right— If we asserted
the Domestic Government, wh[r] the Youth shd attend Chapel Lectures, the
Doctrine might hold, but in publick Offences it is different; Suppose
Persons go to a diff[t] College from their own, & commit an Offence, how

ed they be amenable. a fortiori the Master of the College. cant if the Proctor cannot. The Stat: of the University direct how the Delinquent can be punish'd for an Offence committed agt the Discipline of the University; & the Stat: of All Souls punish in the same manner. It did not order the Delinquent on his knees in the Congregation House, nor fine him 40 s to the University, much less incarcerate him. It is the University Prison he is to be committed to, the Gaoler did not receive him but by virtue of that Sentence; If there is power to incarcerate the Right to follow, is a natural Consequence; the matter is too serious for a slight determination. A spirit of resisting Discipline is popular & receives abettors enough. a dean or Master may not always be found.

Dr Blackstone.... I am in no pain for the discipline, cannot perceive it in danger, tho the Doctrine laid down, shd not prevail, It has subsisted a Century without any such attempt. The Gent.n argued as supposing the Allegation proved, tho, it is only an accusation. the Presumption is in favor of the answers on Oath. There is no doubt that any Offence committed in the University falls under the Cognizance of the University. they shd have reversed only part of the V. Ch.rs Sentence, viz. the Pursuit. The old Statute is not produced tho. mentioned in Chancellor Laud's Body of Statutes compiled by the Delegates, confirmed by the King. You can't take judicial Notice of the Proceedings by the Civil Law unless proved. The University may be governed by local Usages; Common Canon & Civil Law Precedents shd be shewn; the presumption is strong that the Doctrine of Recusation is not Academical Law. The Civil & Canon Law is nowhere purely received, in France nor Holland; Dr Aylifs Book is of no Authority; he was expelled for a Contempt sued by Dr Gardiner of All Souls, for reflecting on & scandalizing him in it. The Gentlemen might have found this on the Record, if there were such a Case at Oxford; the Register of the Delegates has been searched without effect. Dr Calverts quotation from Dr Eden may be Law at Cambridge, but an Usage at Oxford will not follow from thence. the Dr was mistaken in the other Case, an Argument cant be drawn, as it is not a Legal Determination. There is one of a Physician Def.t at Christ-Church. The present Proctors employ'd a military Judicial Office. one of the Proctors objected, but it was overruled as to the Recusation. Recusation might hold in every Instance equally; such a Doctrine is not to be received. I am sorry to hear any, sitting under the Commission cd be recused. a Delegated Judge shd mean a deputed one vice alterius; but these Delegates are selected at the Commencement of the Year, for the whole year. they are as much Ordinary Judges as the V. Ch.r for a Year. It is said the Option by Charter once determined can't be altered or wavering. Shall a Cause be hung up, because in case of the Recusation, (it is admitted) no Practice is settled; wch shews it never happened. What sort of Arbiters were these? Ex parte Arbiters never before undertook to decide; they were as officious as the Judges recused. Notwithstand.g the Rigour of the Proceedings agt the 3 Preachers in Laud's time, there was no reason to recuse the Delegates, who were the Principals of Maudlen, & Exeter. These Delegates were specially named, wch shews there was no Statute then existing. yet notwithstanding all the Noise, not a word is said of the Recusation, The V. Ch.rs Decree says pursue Delinquents; the Proctors are not parallell to Constables; it is a non sequitur. the Law of the University, is, that it shall recede to the College Statutes. The Senior, is Dean by the Constitution; he may be delated before the V. Ch.r for any Offence known to the Proctors. If your Dpts shd decide on this point, it must be extrajudicially, as Mr Sollic.r Gen.l desired, so that I argue it extrajudicially. The words of the Sentence comprehend all

James, pursuit is various, Delinquent Government includes all; into any Colleges, includes every College, & every part of it; these are general Terms. a Head of a House visiting another, is to be brought on his Knees; the Proctor can demand Extraction &c, strange Consequences. all Heads of Houses will be as carefull as any casual Magistrate. The Head of a House can turn the Stranger out, & send for a Proctor to take him; what past in Lauds Chancellorships, shews the Sense of the University at that time; Dr Frewen the V. Ch.r was wrote to by the Bp in 1639, to destroy Good Fellowship he excused himself by saying, they were out of the reach of the University Officers. Dr Aylif was served with the Citation in his own College Stall & therefore refused to obey, & Sentence went by Contumacy.

Dr Wynne..... I beg a few words to the present Objection of the Recusation; different Law is urged, as well as different Argument. a Delegated Judge is for a particular Cause, but an Ordinary Judge for a particular purpose in all Causes. Gail 13 N. Tit. de Recusatione Judicis. as to recusatory Libels Mr Sollr Genl says, they follow the Civil Law; the Proceedings have not shewn it; they have adhered neither to Canon or Civil Law; 13 by 4 Civil Law the Arbiters must determine on the principal Cause; they dont appear to have appointed Arbiters in the Case of Dr Eden, but another Delegate was appointed; they were really Delegates so might legally be recused; if the University had on their Records any such Practice I did not contend wh.r they shd proceed wholly by the Civil or Canon Law or Usage; the Custom is not known to the Judges or the Society, before you admit it there must be a way pointed out. The moment Judges were named.. the Proctors swore them into their Office; this Practice tho. antiquated is attempted to be set up; it is not a preamble but a part of the Decree; as good an Objection as can be to a Judges Decree, is, that it is incongruous & does not adhere to the Point. Mr Craven gave his Protest & his Answers under it; no doubt the V. Ch.r grounded himself on the Answers, it did not come out else; your Dpts may confirm part & reverse part; the Statute wch says alibi, means only in the University, it cannot apply to the Colleges themselves: the V. Ch.r had not enormous Crimes, like Felony &c. in contemplation: the Gent.n of the Colleges wd be attentive to discipline tho, the Relaxation of it, has been so tragically set forth. the Inference from the Statute of incarcerating &c is drawn, that the College cant punish in the same manner; no such thing is said to be necessary here the Note Writer left the Ct.

Mr Popham..... We contend the Cts of the University are not civil, common law Jurisdictions; it is incumbent on them to shew, it is so governed; the King cant grant Authority to hold plea, contrary to the Law of the Land. Stalles Pl: Cor: in 8vo. The Recusation is unknown in our Law; analogous to a Juror; what Oughton says does not much differ; it must fall under some of the general descriptions; how will the Law draw the line of Inbimacy to settle Competency. the Direction is given to the Sheriff to summon the Neighbours on a Jury because they are supposed to be best acquainted with y.e Persons & matter in Issue. Mr Soroop submitted, & then protested agt Mr Cravens right of Appeal, because he was accused de gravibus criminibus; the Proctor has submitted to 2 Jurisdictions; a Person may be struck out of the University Book & yet remain a Member of a College; the Statutes neither directly nor indirectly give a power to enter private Colleges; I shd be sorry to have it insinuated that it wd relax the Discipline; it is such a Disrespect to the Heads &c as no one can entertain: It is not to be considered as an University Cause; it is too disrespectfull to think they wd thus suffer it to be carried on at a private Expence.

N.B. This shd have been inserted after Dr Wynns Speech Feb.13.....

Consistory of London
4th Sess. of Hil. T. Feb: 21

No 49

Knipe ol: Spier. agt Spier

Grene ——— Dr Bever ——— Dr Wynn ——— Bogg ——— on Boggs Petition.

Dr Wynn ——— opened his Case, it being Boggs Act—

Dr Bever ——— This is a Cause of Substraction of Legacy promoted by Dorothy Knipe ol: Spier as Daughter & Legatee named in the Will of Richd Spier deed, agt James Spier Son. & sole Exor in Sd Will, wherein Deed gives all his personal Estate to his Sd Son, subject to pay 10£ a year to Sd D.S. for 10 years, if she & Sd James shall so long live &c for securing the payment of the same directs Sd James do within one month [erased: execute a Bond] next after his, Decds death, execute a Bond to such person as Dorothy shall appoint, conditiond for payment of Sd Annuity, the first payment to commence from next Quarter Day after Decds death, & if Sd James shall refuse, shall not nor will upon the reasonable request of Sd D.S. execute such Bond, gives to Sd D.S. 100 to be paid out of his personal Estate, within 12 Months after his Decease — Decd died 8th of May 1764, & J.S. not having executed a Bond, as directed, but having refused to execute it when applied to by Sd D.K. ol.S. this Suit was instituted & Libel for Sd 100 as due & payable, by reason of the Non Execution of a Bond as directed by Sd Will — Negative Issue has been given to Sd Libel & an Office Copy of Sd Will exhibited in proof, the Subscription thereto & Identity of the Parties names confessed—

30 Sept: M.T. Bogg as Proctor for J.S. made the following Tender in writing; viz That he tendered the Legacy according to the Tenor of Decds Will, & alledged his Party, is ready, now, to pay the Annuity of 10 with Arrears & Interest from the time they became due, & prayd his Party to be dismissed — Said Tender was immediately refused by D.K.'s Proctor, who would have called on the Cause for hearing, but Bogg prayd to be heard on this petition, wch was assigned, & appears a Repetition of Sd Tender, & an Offer that his Party is ready to appear personally & be admonished to pay Sd Annuity — This Submitted, Wht under these Circumstances the Bequest of Sd Annuity is ceased & the Legacy of 100 become due & payable — Grene alledges the Tender to be not made, till after the Time the penalty was incurred pursuant to the Will —

Dr Wynn ——— I am Counsel for the Son of the Decd — a Person to entitle herself to the Penalty, must shew he has not complied with the Directions of the Testator; it is very likely to be altercation between the Exor & Legatee wht she Shd receive the Annuity or the Legacy of 100 — She Shd shew it to be the fault of the Exor, that she has made such reasonable request — They have introduced 2 Affids of Relations of the Party — Witt says he saw the Party in the Kitchen after the Exor a Paper wch he apprehended to be a Bond; that the Exor said, would give her only what the Law wd give; where is the Bond? the Drawer of the Bond cd prove something — The other Witn: says something more, but is not likely to be more correct; thd, suppose the fact proved there is no proof of the ——— he might refuse to execute an unreasonable Bond, conditiond perhaps for 20 p Ann:

Dr Bever ——— The Tender was necessary to be made to Mrs Spier herself, for in all Legacys the Party interested is to look to doing the proper Acts — It is the Duty of Exors to give notice to the Legatees under the Will; how can they know, she came in time, the Legacy was not due when she offered the Bond — Herne & Shelbrook Winch: Rep: 69 "A Testator possessed of an Estate in fee, made Lease, & devised the Reversion to J.S. gave the Exors the Lease for Life, conditioning to give Bond for the payment of 20 p Ann: to J.S. No Bond being given, the Possession was decreed to the Reversionary Legatee — The Condition becomes absolute ...

Dr Wynn ——— There does not appear in that Case an Alternative, as there is here; another difference is, the Testator says upon a reasonable demand made; in this Case the Testator has thrown the Demand on the Legatee

Judge Dr Betteworth for Dr Clarke ——— In this Case Sd Spier gives the Plt a Legacy of 10£ a year, on failure of payment thereof by the Exor on demand made by the Legatee, give her a Legacy of 100£, wch is rather more beneficial than the Annuity The Exor has now made a Tender of 100£ to Annuity with Int: but I dont find that he now offers to give Bond; there are 2 Affidavits

that a Bond was tendered — I think the Son has not complied with the Condition, that the Tender was not well made, therefore I decree him to have forfeited the Penalty, i.e. the Legacy of 100 —
Grene prayd all Facts to be propounded by the first day of next Term —

For fuller Answers

Consistory of London
4 Sess. H.T. Feb. 21 ...

No 50

Earle agt Earle

Dr Wynne ——— Dr Collier & Harris

Dr Collier ——— an Allon of Faculties has been admitted & Mr Earles Answers prayd; we say his Answers are evasive — we say he has an Estate of 500 p Ann: he answers 132 subject to a mortgage of 3500£ that he has only the Reversion of 20 a year — we object that the Money pretended to be owing, exceeds the value of the Estates; here is 132 in Land subject to such a Sum, It shd be specified, who, & what Sums, else we are cut off from our Proof —

Dr Harris ——— he Shd give a fuller Answer, to the Estate of Leigh, he says it is so small a Sum as 20 p Ann. we say 12 — to 4th Artic: We say that Wm Earle is possessd of a Share in Covt Garden Playhouse wch brings in 20 p Ann, & we object that he has not answerd precisely enough, for it stands in the Alternative he Shd say wht he has any Share, or wht it is worth somuch

In ... Artic we say he has purchased some additional Freeholds; How does he answer? he owns he has a House, but does not answer to the additional Purchase, he Shd speak precisely to the Quantity of the Estate — We say, that he has received 11500 Fortune; She tells us a long Story of his expending the money; we want a definite Answer to adjust the Quantity of Alimony, he talks of Elopement; that is a Suggestion of his own, it is not in Cause what she carried away is nothing to the purpose; the Quæ is, what is her worth? how can you judge what the Mans Estate is from such vague Answers; let him state precisely wht the Estate is in his own hands or not; he says it is mortgaged for 300 or 400£, very extraordinary in so small a Sum — Her carrying away the Plate is extra — We say there are Things to the Amount of a large Sum in Town & Country The answers only to the one — He is a rich Man to call 800 a Trifle.

Dr Wynn ——— It is no matter wht by purchase or Descent; he admits he has a House &c he specifies the Particulars of the Fortune received with his Wife; he is ready to answer to the Allon of Faculties, what Deductions are made from what he received from his Wife — He answers in such a manner that it dont signify how many Houses he had, he answers as to the Sum 800£

Fuller Answers decreed ...

Dr Betteworth Judge ——— I decree for fuller Answers

Arches, Bye Day
Sat. 7 Feb. 22 ...

No 51

Griffin agt Rice

Addderley ——— Dr Harris ——— Dr Marriot ——— Bishop ...

2: are the Proceedings to be quashed the Minor not appearing by his Guardian? ...

Dr Marriot ——— I am Council for Waller Rice, an Infant who has taken Probate as Exor of Rice Griffin, who was Exor & Resid: Legr of Abel Griffin — The Suit began on the part of Mathew Griffin Brother to Abel: the Judge decreed Admon de Bonis non of Abel in panam, taking no notice of the Caveat entered by Waller Rice — there are 2 Caveats before the Ct

Dr Harris ——— Sam: Every was not appointed Guardian to Waller Rice, & Rice Griffin had no right to appoint a Guardian to his Nephew — Our Objection is, the Judge, pronouncing for the Minors Interest without any Certainty of his appearing lawfully by his Guardian — The Minor has not appeard properly before the Inferior Ct or here; nor Constat that he was Exor or that he appeard lawfully; if the Admon was improperly granted to my Client, he was not to be devested of it improperly

Dr Marriot ——— The Exor of an Exor has Priority legally vested with an Interest; the Judge satisfied of this, calls in the Admon, declares it void, but does not say to whom he will grant it — he does not determine, but it is sufficient for revoking it, to shew upon the face of the Plea, that there is an Exor of an Exor who has continued the Priority to the first Testator

Dr Harris ——— Our Grievance is this; we deny Waller to be Exor, & the Judge calls in the Admon without putting the Minor upon the Proof of his Int: the Cause is Welch — all our Proctor desired was to be satisfied — Nor did he appear properly — A Testamentary Guardian can be appointed only by the Father — Nothing appeared to the Judge but a Bit of Paper called a Citation, wherein he stiles himself Exor of an Exor

Dr Hay Judge ——— It is certainly true, that the Exor of an Exor is the Exor of the first Testator, insomuch that he need not take Admon de Bonis, he may act under the original Probate — to be sure here is an Irregularity in the Proceedings — Abel Griffin dies, appoints Rice Griffin Exor & Resid: Legatee

Rice Griffin dies, names Trustee & Sam[l] Evans Gr- the former is before the S[t], the other is not- Caveat is entred by Sam[l] Evans not warned as here, but in effect by a Citation taken out & returned, but not continued, as it is here- The Judge gave Sentence the same day (without waiting the whole time allowd) notwithstanding a Caveat entred by Rice Griffin- the Judge gave the Admon to Mr Gr: thus it stood till May when Citation issued at the Instance of Waller Rice- the Judge revokes the Admon granted to Mr Gr: assigns to be heard on the Grant on a future Day; the Judge had sufficient Allons before him to determine, but the Minor by himself cd not have had Admon, because he cd not have given Bond- To be sure regularly Waller Rice shd have appointed his Gr: if Objection wd have been at an end- from the Will, as being Trustee, Sam[l] Evans was to take Care of the Minors Interest; for Mr Gr: had none under the Will- If the Admon granted to Mr Gr: is revoked, then is no need of another, the Trustee takes care, the just thing is done, I will not keep Parties on Niceties, what wd be the Case if I sent it back, the Minor wd put an end to the Suit by nameing Mr Evans his Guardian; I pronounce agt the Appeal, but give no Costs-

Prerogative
Bye Day. Feb: 25.

N°52. Forrest agt Wilson

Bishop — Dr Harris — Dr Wynn. — Bogg..

On Admission of Bogg's Allon

Dr Wynn . . . James Wilson died intestate, leaving Tho[s] Wilson one of the Parties in this Cause & his Brothers & Sisters, his lawfull Cozen Germans & the only Persons entitled to distribution

Aug[t] 1763 Admon was granted to J. W. 1764 Citation issued at the Sute of Eliz: Forest, as Sister of the Decd to bring in the Admon- 21 Jan[y] 1765 Bishops Allon was admitted. 2 Sep: Hel. J. Bogg a pretended he gave an Allon, the Admission whereof is the Point now to be debated

1st Art: pleads that J. W. died in July 1763 leaving only these Cozen Germans

2d Art: whereas it is pleaded in Bishops Allon that J. W. the Decd was from a different Stock, this we deny & plead otherwise

3d Art: pleads the Register of Baptism at Leith 1709

4th Art. The Decd was Son of Wm Wilson (by Eliz[th] his Wife) 2nd Groom of the C. of Northumberland, who was the only Son of Tho[s] Wilson Mariner, (by Janet Dagrom his Wife) at Leith near Edenburgh, who died before 1709, acknowledg the Deed- 3d That Register- 4th. That the Conversation of Eliz[th] the pretended Mother that she had no Children, is falsely alledged

Wm Wilson pretended Groom to Duke Hamilton had 6 Sons & 3 Daughters & married a different Person from what is pleaded

Dr Harris . . . . he shd goup & shew who was the Father of Tho[s]: the 4th Art: is improper, for it does not signify with Eliz: if J. has Sisters or not, it wd only diminish her Share in the Distribution, her Degree is just the same with respect to them- She might allow Mr J. W. to be Cos[n] German; It is said a Gentleman pretended to have an Authority from C: J. to offer J. W. 500- This is not charging an express power, it shews only a desire to avoid Law; they shew only the Birth & Death of Jn, they shd have made out the Chain-

Dr Wynn . . . . You will please to observe, Sir, that we are in possession of an Admon- It is necessary to contradict her being the only next of Kin-

Judge. Dr Hay . . . This is a Case of Interest; the Qu: is, wh[r] the Admon granted to J. W. shall be revoked, & wh: E. F. is the Sister or not, she gave an Allon, pleading that John her father was Son of Wm & Eliz: Goddard; nothing very strong, as the Dr says, but it is admitted; the Cozen German comes not to set up his own right but to controvert hers; for as Admor, he had a right

to deny hers; as to the Allon, every part wch tends to shew, that Eliz[th] is not interested, is proper- She is in possession of an Admon therefore his Interest is as it were proved, it is not necessary for an Admor to prove his Int[t] in a particular way- it is very material to say that Eliz. F. has other Brothers & Sisters, She having all, She has confessd him to be a Cozen German & did not then mention her being Sister- Tho this Allon is not very strong, yet as it is in answer to a weak one, I admit the whole Allon- admitted

On Jenners Petition to rescind & Conclusion . . . . .

Prerogative
Bye Day. Feb. 25

N°53 Morris agt West falsely calling herself Williams

Longdon — Dr Calvert. — Dr Wynne — Jenner

Dr Calvert . . . . In the Case of Foster & Wright the Conclusion was rescinded to let in Exhibits, wch are different from new matter.

Dr Wynn . . . The Qu: is wh[r] certain Letters shall be introduced, after the Cause is concluded, wrote by Mrs West to the Decds Brother, wch Jenner alledges were sent to Faulkner to draw an Allon from, wch he omitted to do? I hope you will not rescind the Conclusion on acc[t] of the Proctors Blunder, as the Party intrusting such Proctor, must abide by his Proceedings, & as there is an Opportunity of rectifying the errors so committed, in the Superior Ct where lyes an Appeal, it is allowd, non allegata, allegare, & non probata, probare-

Dr Ray Judge . . . . In Williams is the Decd, Many Wms, as his Widow had possession of the Admon, from May 1763 to May 1764- The Qu: is with respect to Mrs West's Interest; Faulkner appeard for the Widow, called on the Cause regularly; I am sorry to find he behaved so unprofessionally in the Conduct of the Cause, his Behavior to his Client- the Letters if brought in time, contain some things wch might be material, but if they were ever so material, I shd not think it right to open the Cause, in order to introduce matter, wch may be received in the Superior Ct; the Case of Foster & Wright is very diff: there Letters & Books of Accounts had been pleaded & made part of the Depos, but were not annexed to the Allon; the Ct rescinded the Cause for the purpose of introducing the old Exhibits, to wch it was confined & not allowd to introduce any new Exhibits- A Party is bound by his Proctor, he has his Action agt him, but I cannot rescind the Conclusion, on the face of the Letters, they do not carry that Evidence of the Marriage wch the Act asserts, tho, if offerd in time, might have induced presumptive Reasons- Foster & Wright, shd never be made a Precedent, it is a single Case standing on a particular Circumstance peculiar to itself- Upon the whole, I reject Jenners Prayer . . . . . rejected . . . . .

Prerogative
Bye Day. Feb: 25.

N°54 Senior . . . . agt Senior in y[e] Goods of Rachael Senior decd.

Greene — Dr Wynne. — Dr Calvert — H: Stevens Jun

On Grant of y[e] Admon.

Q: Wh: a single Admon to y[e] Sister or a joint Admon to y[e] half Blood with a Majority of Interest?

Dr Calvert . . . . Mr Greene alledges that Abraham is an indigent Person, that he was in such low Circumstances, as to apply to Nassau Tho[s] Senior to borrow 100; Stevens confesses the fact, but says, his Party was cast away in y[e] Winchelsea in y[e] Number M. of W & that he was reduced to such a low Situation, that he offerd his Brother Nassau Security on his half Pay- that Nassau went down & took possession of the Decds Effects, without giving him any notice thereof & that Nassau is only of the half Blood

Dr Wynn . . . . . Rachel Senior Spinster died intestate, without Parent leaving ~~Issue~~ Abr[m] her eldest Brother & Henrietta Eliz[th] Jemima Senior Spinster her Sister both by the whole Blood & Nassau Tho[s] Senior Esq[r] & Ascanius Wm Senior her Brothers by the half Blood, the only Persons interested in distribution; Immediately after her death Application was made for a Commission to swear N. F. S. & take his Bond as Admor, but a Caveat being entred for A. S. was warned by Ink: of A. S. stated as eldest Brother of y[e] whole Blood & next of Kin to Decd Stevens prays Admon to A. S. Greene that N. F. S. may be joined with him, as equally entitled, he alledges A. S.'s Poverty & Application to borrow 100, Stevens alledgd that A. S. was shipwrecked in y[e] Number M. of W. was after wards transferd to the Ship Mary where he continued till the End of y[e] War, when he applyd to N. F. S. to lend him 100 but was refusd: A. S. offers any Security for y[e] due performance of y[e] Admon

says if N.J.S. was joined with him, it wd add greatly to his distress – N.J.S. swears Ab.S. was in such distress a little time since as to be in danger of being arrested, that if Ab.S. has the Admon he fears he shall find great difficulty in obtaining his Share; That Ascanius S. in the last Indies appointed him, his Attorney. a Proxy is given for N.S. praying Admon may be granted to Ab.S & N.J.S. jointly –

Dr Calvert... If it appeard a Person was of bad Character & low Circumstances it wd be an Objection; but Ab.S. lost his Fortune by Shipwreck, & his Behavior was so good, that he was appointed to another Ship directly – The Point is, that N.J.S. prays a Joint, we a simple Admon a Joint Admon is never granted where all the Parties dont join in the Prayer; it is not likely they shd draw together. N.J.S. refused to lend Ab.S. 100 in his distress; besides there is a Suit depending between Mrs Hutton the Mother of Ab.S. my Client & N.S. they produce a Proxy of Consent of Mrs H. & J.S. it is only to join Ab.S & N.S. in the Admon, not to give N.S. a preference, this Conduct on y^e death of his Sister is an Objection, viz. he sent a Lawyer to take possession seized the House, & gave directions to admit no Person whatever. my Client is in equal Degree, & being the Elder of the whole Blood is entitled to a preference, We own he was in low Circumstances in 1764, but say he now lives in a House of 20 p^d Ann, & therefore cant be said to be poor

Dr Wynn..... The reason assigned for Preference is that Ab.S. is of the whole Blood & y^e Elder; Eldership gives no preference, in y^e grant of an Admon however has any weight, (where the Parties are especially founded in their Pretensions) the Ct considers only the Interest, & who will administer best for the Parties interested; this Brother of the half Blood, has a Proxy from the Sister of the whole Blood to oppose the Grant of a sole Admon to Ab.S. 3/4 of the Interest are for a joint Admon; if the Evidence went no farther, each had an equal Interest, my Client wd be entitled – Another Obj^n is the Poverty of Ab.S. his holding a House of 20 p^d Ann, is no Evidence of his Substance; the Ct will never put the Parties to such Trouble, to come upon the Securitys, wch may possibly be the case if Admon is granted to Ab.S. when there is a responsible Person willing to undertake it – The Obj^n to N.S. Conduct at his Sisters death, is mere Suggestion; there is no Colour to say, there was more than proper precaution taken to secure the Effects – I hope as my Client is in good Circumstances & has a Majority of Int^t you will either grant y^e Admon to him singly, or a Joint Admon to him & Ab^m Senior jointly . . .

Dr Hay Judge.... The Qu: is on the Grant of an Admon bet: the half & whole Blood; the Rule is to prefer the whole Blood; for by the Rules of the Civil Law, the whole Blood is held to be nearer of Kin, tho not by the Common Law; but I have known Instances, where it has been granted to the half, in preference of the whole Blood In this Case N.S. does not pray it singly; but the Ct seldom gives a Joint Admon unless both Parties apply, from y^e Inconvenience of their drawing different ways; here there are 3 Interests before the Ct equally entitled. viz. N.S. for himself, as the Attorney of Ascanius his Brother & had the Proxy of N.J.S. the difficulty with the Ct therefore (for it desires to put y^e Admon in the best hands) is wh^r it shall be granted singly to Ab.S. in opposition to the prayer of the 3 other Parties interested in distribution? See no Inconvenience likely to arise to y^e Suit in Chancery by a joint Admon to Ab. & N.S. where it is pray'd by a Majority of Int^t in distribution, & rather think a joint Admon preferable; shd never grant y^e Admon to N.S. singly, as it wd be an Imputation on Abraham Senior

A Joint Admon decreed.

Parties

Defamation

Consistory of Lond: Friday Feb 26.. 1768

Rippon . . . v. . . Turner
Goodwin . . . Dr Calvert — Dr Harris, Wynn, Greene

Dr Calvert... This is a Cause of Defamation brought by Jane Rippon agt Mrs Henrietta Turner, Wife of Richd Turner Esq –
Thos Powell deposes, that he & Mrs Turner being in a Parlour adjoining heard Mrs Turner say to the Plt "you are with Child" you use me ill replied the Maid, I am not – Eliz.th Welsey says about 2 Months ago, she was in the Passage & heard the said Conversation –

Dr Harris.. The Libel pleads the Character, the Words charged are, "you are with Child;" & "you are a Whore;" the Witnesses depose only to Mrs Turner saying, "you are with Child, one may see it;" the Qu: therefore is, wh.r the Words spoken are defamatory, if they are, wh.r they were spoken with an Intention to defame? Thos Powell to Interrog.s answers, that the Minister did not say you are a Whore

Dr Calvert.. We have proved the Defamation, tho, not in the express words laid; I believe you are with Child; In these Cases I know there shd be an exact Conformity in the Witnesses; there is in the present Case; Powell was turned out of the family on Suspicion of being married to her; another Witness says he was then courting her in the Way of Marriage; As to the Intention of defaming, that appears from the manner in wch the Woman took it & the Circumstances prove it; the Mistress taxed her resentfully With whoredom, before Powell, who was then addressing her by way of Marriage wch is the greatest she cd do –

Dr Harris.. This is a Suit brought by a Servant agt her Mistress, wch is very new & unfavorable; when I looked into the Libel I saw the word Whore; this very indecent word was spoke in a Bedchamber or a Parlour by the Mr Mistress to the Servant (for the Witnesses differ as to the Place) could that be to defame? they dont say the Original of the Quarrell; the only words you can regard, are these, "you are with Child" It is said a Person may be called Whore by Implication, I allow it, but the Implication must be necessary, wch it is not in the present Case; as if I said to a Woman "you have a Bastard" implies Whoredom, as she must have committed Fornication or Adultery; but in saying, "you are with child, no such Implication follows; she might be married, & the Implication is that she was; I remember the Case of Man & Gould Mrs Gould was Housekeeper to a Family of great Rank, with a Power of hiring & discharging the Servants found fault with a Maid Servant for being too great with one of the Men & said you are considered as the Whore of that Man, Suit was brought agt Mrs Gould & 2 Witn.s swore to the fact, the Plt said, as the words were spoke in a Private Place, by the Representative of the Mistress it cd not be conceived they were with an Intention to defame, that the Character of the Plt wd be concerned, if the Mistress was to be condemned for a hasty word, that the Presumption was so strong agt the defamatory Intention, tho, the word spoken was Whore, that 5£ Costs were given agt the Plt nomine Expensarum on account of the Indecency of bringing such a Suite; I hope you will also discountenance them & give us exemplary Costs

Dr Wynn.... I submit, there is a defect of Proof in the 2 necessary Points, viz the Speaking the defamatory Words, or doing it animo defamandi; from attending to the Words of the Interrog.s & Answers, you will see Mrs T. herself suspected a Marriage between the Plt & Powell, & did he not declare he cd take any Liberties with her & is now married to or courts her? to the latter he answers negatively, but to the first part, so, as to confirm Mrs T. spoke the Words from a Suspicion of the Marriage – The Words must be proved to be spoken with Malice or Passion; if such Suits were countenanced, this Ct wd become a Court of Inquisition; nothing cd pass unnoticed in a private family; a contrivance at any distance of time after the words were spoken, wd operate; It exciting resentment in the Plt, is no proof of the Injury; if loss of Character ensued, it was from her own ill Conduct; there is reason to believe, the whole is a Trap laid; Welsey is in the Passage, the other Servant Powell in the Room; the Plt comes in & begins the discourse by saying to her Mistress, you use me ill, in saying I am with child; Mrs T. answers, I do not, you are with child –

Dr Calvert. The Maid could not begin the Conversation as Dr Wynn stated it, because it is a Reply – The case of Man & Gould does not apply, because Dr Harris observes, the Words were spoken merely to correct her Conduct, indecent Passion produces Defamation; it arises from one Party asserting, another

denying, why shd she upbraid her with being with child, if she thought her married?

Dr Betteworth. J.. This is a very extraordinary cause, it is certain no Master or Mistress has a right to defame a Servant, their Characters are as essential, or of more consequence to them, than their Superiors here the Libel charges the Words whose to have been spoken with the Witnesses dont prove; it is Observd, whose may be by Implication, but saying a Person is with Child, dont warrant such Implication; besides, this is spoke in a private Room, by the Mistress to the Servant, not with an Intention to defame but perhaps by way of Reason assigned for discharging her, Upon the whole, I think the Sute frivolous, I dismiss the Party Sued, condemn the Plt in 52 Costs in order to discourage such Suites..

Consistory of London Feb: 76

No 56 Balderston agt Balderston

On Admission of additional Articles.

Fuller — Dr Harris & Wynn — Dr Collier & Calvert — Bargrave —

Dr Harris .... I object to the Letters offerd by Mr Balderston, because they dont prove Reconciliation after the Facts of Adultery charged agt him. If he can shew that Mr Fremoult confined his Wife, or laid any restraint on her Will, let him do it; Mr F. a Worded her the Protection of a Brother. If Mr B. can prove he laid with his Wife in 1763, it will be material, the Sute being brought in 1762; but did not he use force, was he naked with her on the same Bed, more shd be said; Consent, Carnal Knowledge, because on the same Bed, is a weak Implication, a man may commit a Rape on his own Wife

Dr Wynn ... The Date of the Letters are in April 1765, the Facts are laid in 1762; it is not suggested she knew them before, he cohabited with Mrs Smith from 1759 to 1762

Dr Collier... The Charge is for Adultery at Canterbury in 1759 these Letters exculpate him; they are during his Absence; here are 3 Letters it appears, the others were intercepted; if any Affidavit to lead the Monition, it might issue agt Mr Fremoult to produce the intercepted Letters; we urge the Custody; they must prove there has been no Reconciliation, & that the Sute is voluntarily instituted.

Dr Betteworth. J.. The Judge would not give Dr Calvert the trouble of Speaking. There is something particular in this Case; the Cause begins in 1765. the facts are stated to be committed in 1758 & 1759 & 1762. It requires some Explanation, the Husband endeavours to prove it is not her Act, that if it was, there has been a Reconciliation, whatever then, the Husband thinks material for his defence shd be admitted; I admit the Allon, with the Letters, as proper to be received to proof; as unless there is some very particular Cause shewn, the Husband must pay all the Expence ....

Prerogative Ct. Sat: March. s. 1766

No 57 Foster ..... agt ..... Wright

Lu: As to the Testators Sanity & Capacity ....

See Fol: 19. C56.

Bishop — Dr Marriott Wynn & Bicknell — Dr Collier, Harris, Calvert — Mayor.

Dr Marriott... This Question respects the Sanity of Mr Bicknell at the time of making his Will, Codicil dated 26 Augt 1741, his 2d Codicil 12 Feb: 1744/5 & his 3d Codicil 17 Feb: 1746. Mr B. died 16 Decr 1763 he was found to be a Lunatic, by virtue of a Commission out of Chancery 1761 & for 3 years before, wch fixes the time about 1758, so that from the time of his last testamentary Act to his Insanity, are 12 Years; the Evidence therefore may be true in part, yet not sufficient to establish the Insanity. the Sute is brought by Mrs Wright, who is disappointed in her expected Share; but every one is presumed sane till the contrary is proved; we produce an Act with none but a sane person cd do; if upon the face of it, the Limitations are so rational as you can suppose them made by no other.

The next Presumption is, where the Codicils are wrote, by the Testator, It results from Comparison, his signing each Sheet, the Act itself is Witness — The last is the Character of the

Subscribing Witnesses — this depends on their Situation & Character in Life; when indigent, open to Temptation, they are entitled to a less Degree of Credit than Persons in higher Life; our Witnesses are Persons of the first Character & Station; a Baronet, Tenants &c who are to be credited in preference to the miserable Witnesses produced by our Opponents, viz: Persons out of Hospitals, illiterate, & those who cant write — The 2d Point of Credibility, depends on the Capacity to judge of the Act done; unfortunate Appearance and prejudice persons of better Judgement, Understanding, great Impediment in his Speech Epileptic fits from the Effects they have upon the Muscles of the Countenance} gives a Cast of Stupidity. ..... of Persons who know very little or whose Vicinity, Domesticity must make them competent Judges wh: a Person is capable of a rational Act — you will determine wh: the Evidence is conclusive or not — Mrr Wrights best Evidence form their Judgement from the Appearance merely — I will narrow the Point, was he sane, rational when he exd and several Testamentary Papers, for if he can prove he was in a rational condition, previous to that time, the presumption will be, that he was so, at the very instant of Execution; any subsequent Insanity cannot defeat the Act — Instrumental Evidence, subsidiary, by Witnesses who speak to the several different Periods .... comes the Evidence to the execution — we have exhibited Instruments annexd to the depons of 2 of our Witnesses, the Drawer of the Codicils, & Letters between the Testator, Mr Sam: Foster, corroborated by his Evidence; he mentions the Correspondence beginning 1727 relative to a Mortgage; they are sensible, rational, & proper attention to his property; he observes on the nature of the Estate, being in an open or enclosed Country, altering the Value of the Security; there is a letter dated 17 March 1741, very near the time of making his Will, relative to it — The next to be noted, is the Book of Accounts, in wch there are several Payments of monies on account, to the Person supposed to have an Influence over the Deed; particularly one Payt of Wages agreeing with a Receipt given by Owen, the other Articles are strongly in our favor; the last Article of the Day Memrs Book annexd to Harris's depon is 23 June 1747 — there is another Book, wherein the Dead has entered in his own Hand, many Memrs of Receipts for Rent fr: March 1741 to 1748 — They are mere Memrs we dont go into the exact formality. It is a regular Acct of Rents &c better framed than usual amongst Country Gentn. Harris is a principal Tenant — Pierson says in 1748 he pd Deed, & had Receipts in his own hand; the Deed or Bundle does we have the Barn pulled, as the best method of proceeding — Mary Hunt a Servt of Deed says it was his constant Rule to enter his Acct every monday Morn: — Deed issued large Sums to Owen on Account; receives the Money of Owen wch he had lent for him as Churchwarden — pays almost all Workmen himself — Thos Hunt a Tenant has had Receipts from Deed in his own hand — You see Sir, that was the general practice of the Deed — he was not under the absolute authority of Owen, it is no wonder if an old family Servant, who had been long useful to a sickly Master, shd take upon him a little, but this Impertinence cannot be construed into Influence; he was only too familiar — With respect to H. Clos Bect it being shewn to Wm Clos he says he thinks it better than his Brors Henry wrote, but does not say it was not his writing, if it had not been, he cd have said so, the presumption therefore is, it was wrote by H.C — 1 Witn supported by Circumstances is sufficient to establish an Exhibit; a Witn is not credible where he speaks agt his own Act, wit Hudsons Case in Skinner 79, this shews what Clos deserves, he is a very mean person has a large family without any thing to maintain them, swears roundly, his behavior is very extraordinary — The Deed provides for all his Friends & Relations, the limitations are not unusual, & very sensible — he said he cd take care his Uncle Redmond shd not spend his Estate as he had extravagantly done his own — he made his

Father's Will the model - from Foster & Howgraves Evidence Mrs Wrights name was omitted on acct of an old Quarrell, her father having been indebted to Decd father & pleaded the Statute of Lim.ns in bar of Pdyment - Sheath is dead, his Subscript.n is proved, Sheath jun.r & Gaun are the othe 2 Witn.s to the 2d Cod.: before the hearing on the Merits they are objected to, what is strange Gaun does not know his own writing he says it is like his fathers, but thinks it rather better, he gives an honest plain Country account of it; the Presumption is that it is his own; have they produced a single Exhibit to combat its being so, you wd aid a forgetfullness of his Character is unimpeached Mrs Wrights Sollr gets Sheath into Company over a Bottle, perswades him to sign a Declaration, wch when Sober, he afterwards contradicts on his Examon - the Declaration was extrajudicial, our Exhibits stand on better legs, from their not having contradicted us tho, they had an extraord.y opportunity to afford them an Opportunity - The Papers are better supported than many are, cant be overthrown by Minutia In Hudsons Case 1 Witn.s deposed to Instructions, another to overhearing Circumstances; In all Frauds some little Blunder discovers the whole - Mr Wych says, he has heard the Deed was made Exor, but from Incapacity did not prove, the presumption is that he did; the Father's making him Exor is a sign, he thought him sane - One Silly Woman grounds her Belief of his Insanity on his playing with her, when a Child, in a foolhardy manner It is said his Understanding was on the Decline; no wonder from such fits - He was Sheriff & Ch: Wn, if he was so imbecil of mind & body, he wd have been excused thro, friends; his Apothecary & Servant attended him - Judge Page, an ill natured Man, made an ill natured remark, this is no proof of Idiocy - He pays over the parish money, accounts with Owen; is not quite unsociable, kept Hounds, & generally an open Table, the Consequence of it - Sir Tho.s Frollop speaks in direct Terms, to support the Sanity of the Deed - The Legacy to Owen is not unreasonable by a Person who had no Children - Several speak to his superseding Owens Orders, instead of letting the Apothecary load him with Drugs, he gave him a piece of Gold, & reprimanded Owen for not treating him as a Gentleman; he raises Servants Wages, chuses Liveries &c contrary to Owens Inclination; I don't say he was a man of Taste, but he shewd his Judgement superior to his Carpenters in Mechanics - He paid Mr Foster £220 for Digby; you see he was capable of being an Agent, & not once, but several times, also capable of counting money, no small Sum £2000 - No Minister for his own honor wd administer the Sacram.t to an Idiot - it is said he put on his hat at Church, he was liable to take Cold after the violent efforts of his Fits - his Music Master testify he had a competent Skill in Music - he saw all his Servants in Bed before him & gave proper Orders as a Paterfamilias - he sat as Judge in his own house upon a pre-contract of Marriage, & wd not suffer the Parties to go to Church, till the affair was settled, wch he did wisely & judiciously Familiarity naturally arises in the Country between Masters Servants - After Fits all Ideas of Interval are lost - this is the gen.l State of our Case - Mr Sam.l Foster the Drawer of y.e Will has exhib.d the Instructions wch agree with y.e Will it self in all y.e Bequests - In the Mem.m Book is an account of 4 Guineas paid to Mr Sam.l Foster for having drawn the Will - The Witnesses on the other Side consist of 3 Hospital Persons who cant write their names, 10 Labourers, 3 Barbers &c who from their Situation, cd know little more of y.e Deed than his Appearance there is a Milliner also, who is a little better sort of Person & will

Dr Wynn..

not take upon her to swear he was insane for all the time she knew him; all form their Opinions from the Deeds Appearance, out of 48 Witnesses, only the Schoolmasters Mr Wyche, Lyndsay the Clerk & is a pragmatical fellow & forms his Idea of the Decd Understanding from his taking little Notice of him -

The Will is dated when the Testator was about 24 - there are specific Legacies to all the Relations, except Mrs Wright, 5001 to Owen, an old Servt 400l to his Wife, & a Sum to the Poor, by the 2d Cod: a lapsed Legacy is turned over to Owen, & in the 3d Cod: y.e name of Mr Burnell the Uncle is omitted he being dead between the time of making the Will & the 3d Cod: Mrs Wright the only Relation omitted, opposes the Will - It is pleaded, the Testator was totally incapable of giving Instructions &c from his Fathers death to his own, by reason of Fits - before I go into the Evidence, I submit to you who the Law defines capable & incapable, from the Civil & Canon Law - Swinb: 177. Every one is presumed capable till the contrary is proved; if any one impugns he must prove the Impediment; it is hard to prove a person insane; it is not sufficient for the Witn.s to depose he was so unless they give a reason for their belief; the Testimony of those who depose to Sanity is preferd; If a Lunatic makes his Testament, & it is not known, wh.n it was made during the Interval &c. it is to be presumed it was - Swinb. 99. defines an Idiot to be one who cant number 20, or answer a Question so as not to know his own Int.t cant measure a yard of Cloth, or beget a Child, &c By applying the Evidence to these Rules, wch will not be contested by the Gentl.n as to Law or Reasonableness, we shall shew this Suit is ill founded; the Circumstances they depend on, are consistent, tho' they infer differently the Witnesses are produced, were acquainted with him intimately I admit he was the wisest Man, was in firm of Body; it is said he was not a bright Boy, but made his Exercises neatly, the Father's Will is an Evidence of his Opinion; the Testator was put under a Clergyman for a more liberal Education, who says, he acquired some knowledge in History & Geography, & if he wd have attended might have attaind a competent Skill therein; this is the Acct of him till he came of Age; he resided at Rythall in 1737. his Guardians allowed him a Pack of Hounds; you see this Book of Accounts, they begin as soon as he'd take the management of his Affairs, Wm Foster was the Person to be benefitted after his own Relations, he transacted his affairs; the Letters were such, as suggested themselves to him at the time; in many Instances he gave him his own directions, viz. in one Letter, I have told my Tenant I wd insist on y.e years rent &c in some things he referred to his Judgement in others, gave directions to the self; few shew so much regard to the main chance as this young man, he asks many pertinent Questions relative to a Mortgage - in another Letter to Mr Wm Foster, he desires him to enquire how the late Sir Charles Buck left his affairs, & what Fortunes his Daughters had - Persons at his Elbow, might direct him in his own affairs, but nobody cd direct his Advice in their affairs; it is not to be conceived, a Person wd write to consult an Idiot; it is clear he was not so reckoned by the Gent.n of the Neighbourhood - There are some slight errors in Mr Bs Accounts but considering the Condition of the . . . . . they may be accounted for; yet preserving the degree of capacity we contend for; it was not always the same, Nature relieved by sleep 48 Hours, else I suppose Persons so afflicted with Fits cd not be supported so many years; this may occasion the Gaps in his Accounts, it is a temporary Incapacity, perhaps assisted by his own Recollection, or by the Suggestion of the Servants, bringing him their Bills, he inserts them afterward for his Amusement - the Irregularity considering the Circumstances, is no Argument of Incapacity - the Government of his Servants is proved by many . . . indeed Owen took a good deal upon him, & was sometimes restrained; as when he had got some of the Tenants drinking in the Hall on their being noisy, the Testator said to Owen, if it was your own Beer, you wd not be so liberal of it - When Owen was going to pay This Teston y.e Gardiner, he said Decd agreed to give him 2/6

a year more, wch Owen not believing, it was sent to the Deed who confirmd the Gardiners Assertion; consider the Account of those who associated with the Deed, four Opponents have exam^d none) We, five; I will take the Liberty to name them (what they say, Mr Dove who frequently visited the Testator till within 10 or 12 years of his death, says he stood Godfather to one of his Children, behaved rationally, & gave Orders to his Servants; Dr Harrison deposes to his being sensible till within 10 years of his death, Sir Tho: Trollop till about 10 years since — Mr Maidwell being indebted to Deed on Mortgage, the first time he paid him the Interest in 1741, figured the different Coins on Paper wch Mr T3. cast up — Eliz: Howgrave who was acquainted with Deed till 1749. gives many Instances of his Understanding, as being angry with the Clergyman for not reading Prayers in y^e Afternoon his going into another Room to pray &c — They all speak to his bad Appearance, & to their judgeing him incapable on their first acquaintance, than they found him — Mr Howgrave gives an Instance of his Humanity, Discretion, Capacity; upon his representing Mr Redmond's distressed Condition, the Deed (if Howgrave is to be believd) sends him Money to buy him Cloaths, pay his Debt, but takes care he shd gamble away his fortune — 1739 he is high Sheriff; it is impossible to conceive his Relations wd not have represented it, got him excused, if incapable to serve. Henry Close, Parry indeed swear he was improper, that he did not know what to do, by reason of his Epileptic fits, that being ill one Day during y^e Assizes, unable to attend, the Judge said why do you appoint such an one Sheriff; no Inference of Incapacity can be inferd from this Speech — The cloud of Evidence brought by the Opponents looks as if they wanted to overbear us by Numbers — Dr Stukely, Dr Clarke do not remember from 1743 to 1745 one silly thing said or done by the Deed; Dr S. was old, wh^r his own Memory decayd or not, Jeant say, what Dr C. says, shews he was shy — In his Account Book the fees are set down wch he gave in Town to Sir Edw: Hulse, Dr Mead, wch shews he knew, what was going forward — As to Close, I must except him from the general Obj^n he depose severy strongly; he deposes to Deed siding among st y^e Corn, names Thompson as present, who flatly contradicts him — Mary Hunt speaks to a fact, wch this Man must know, i.e. Langtons Marriage; if she speaks truth, this Man must be perjured, for he swears, the Deed cd not answer a Question or do any rational Act, all the while he knew him — The Ct will pay attention to a particular part of this depon, distinguishing him from the other Witnesses; In an Interrog: 9 he denies giving a Receipt to Deed, in the next, he goes thro, denies his own hand writing, the reason given is, he cd not write so well, if any Body had wrote it his mark wd have appeard — Thus stands y^e Evidence; We depose to his Capacity, previous, long subsequent to y^e Date of the 3 Papers; we have laid a foundation of general Capacity to introduce the Execution of the Papers themselves, there is room to let in proof relative thereto; I will mention the internal Evidence of the Papers themselves; nothing so proper as to dispose of his Estate, as he has; miss Wright so proper as to dispose of his Estate, as he has; miss Wright Father refused to pay a Debt of 800^l pleaded in Bar the Statute of Limitations, at wch the Deed was angry; Mr Foster took the Instructions, the Deed made his fathers Will his model, he said he wd leave his mothers Relations nothing, miss Wright was so; This a Subsidiary proof of his Capacity; it wd not have been probable Story, if he had given particular Directions for each Legacy — It is not the Behavior of a quick Man; he produced

the Will, Mr F took a good deal of time to explain to him the Law Terms &c — It will be said indeed that the Instructions are not in his own hand writing; it is not to be insisted that it shd be the entire motion of his own mind, but if another writes & brings them it is sufficient, as in Coombes Case

Penny v. June 17. 1754

Wise Johnson Before Sir Geo: Lee, Johnson made his Will 2 May 1753. Wife £100 & Link of wood to his Father & Mother for their Lives, then to his Sisters Children, in default thereof to his next of kin, appt Wise his Uncle & Harrison & Brown (who owed him 800^l) Exors and them Legacies of 20^l each, by a Codicil he added his Father Wm Johnson to y^e other Exors &c

It is objected the Instructions for the 3d Codicil did not originally proceed from the Deed; but there is a Constat of his Intention at the time of the Execution, the Obj^n is negatory if the Deed was acquainted with the Substance — As to Skeath, the obtaining the Declaration is a presumption agt them, if he had or that been . . . . . it wd have rejected it. to Hudsons Case, the Ct wd have taken it so, rejected the Plea with Resentment; what Persons who had obtaind a Will improperly wd have got a Deed to make a Codicil of the same Date, only to give 4 Rings? this shews it to be of his own motion — Jn Skeath Jun^r believes his father witnessd the Codicil, because he was of a good Character, wd not sign any thing improperly, he does not say he did not sign, or that he thinks he saw any Act of Insanity; he speaks dubiously & unaccountably from his deposing to the Will & 3^d Cod: of 1746 as if he had quarrelled with Owen; he deposes vaguely to the Cod: of 1743 — he can speak to the Testators Sanity at 1746 — it is a misfortune to have such a Witness as Gann, but it cannot prove agt the Sanity of y^e Deed at the time; it cannot prove for the Will, but we rely on the . . . . . As Foster says he did not receive the Instructions from the Deed himself, the Ct shd be satisfied; he took a great deal of Pains to explain the Terms to the Testator, wh^r he understood them exactly, is not material; what I beg leave to insist on, is, that we have made out by Witnesses, the Deed had a Capacity, the Person concernd was an impartial Person took a great deal of Pains —

D^r Burrell . . . The Objections taken to the Validity of this Will, Codicils, are, a general Incapacity in the Deed, his Insanity at the Times they were made, & Defect of proof with respect to the Instructions, that Deed was in the Custody, Controul of Edw: Owen therefore liable to have a will imposed on him; that he never concernd himself in the management, admon of his Affairs; an Exceptive Allow was likewise given to the Characters of Jn Skeath jun^r & Jn Gann, 2 of the Witnesses to the 2d Codicil; these are the Points we are to controvert these are the Difficulties we are to remove; but before I enter upon the discussion of them, I will beg leave to state to the Ct the Variations between the Codicils, the Will, wch are in themselves so trifling, uninteresting to the Parties principally concernd in the Testators Bounty, that it is very improbable they should flow from any other Source, than the Inclination of y^e Deed himself — The Will is made entirely in favor of Relations, except a few Legacies to Servants, 100^l to each of the Exors, 5^l to the Poor of these Parishes in wch Deeds Estates lay, Rings to Exors Acquaintance, Scarfs & Gloves to the Tenants, their Wives — The first Cod: bearing even date with the Will, is calculated merely to supply certain omissions in the Will, of Rings to a few friends — the 2d Cod: gives 100^l to Edw: Owen wch Sum was by the Will given to Tho^s Hyde, lapsed by his death — The 3d Cod: revokes the Devise of Lands &c in Lincolnsh: Bucklandsh: (wch were by the Will given to the Deeds Uncle Redman B, & his Issue, in default thereof to his Uncle Wm B, & his Issue, in default thereof) to Wm Foster his Heirs, & Assigns for ever, & to Miss Hydes) adds Brownlow Toller & Wm Barker Jun^r to his two

*) B had intreated y^e Maid of y^e H. to take they of a Bureau out of Wises Pocket (then in my House with Deed) when he was in Bed, that he might come at y^e Will — The Judge said if Single Sum was on y^e Sachim of y^e God: that it appd from Deed but S. who sent y^e Paper in a Letter without first consulting Deed thereon, but no Party prakended Deed was not perfectly in his Senses, Wise died before any Step in Chancery were taken, but Deed would have executed it then, was dissuaded by him, executed it on y^e 15th the again dissuaded by him, the inserting a Legacy to Dorrell (of 50^l) is y^e strongest

former Trustees, leaves out his Uncle Wm Bs name, he hav. died 27 April 1742, & on failure of Bedmans Issue bequeaths ½ his Estate to Wm Foster & his Heirs, & if he died in the Testators life time, to his eldest Son Thō; & if he died in the Testators life time, to the Heirs of his Body, & in default thereof, to Wm younger Brother of sd Thō: his Heirs & Assigns forever; the other ½ is given to the 2 Daughters of the Revd Thō: Hyde whose names are specified to be Philippa & Anne — The Instructions for the Will & first & 2d Codicil are fully proved by Mr Sam: Foster, who says he went about 25th Augt 1741 to Deeds House at Rythall, in pursuance of a Message he had before received from him; when he got there Deed told him he had sent for him to make his Will, & desired he wd prepare one accordingly, but it being near Dinner-time, Deed & Music Master with him, no more was said then; but about an Hour after Dinner, Deed resumed the Conversation, & as there were sevl persons present, & desired some private Conversation with the Deed, who then withdrew with Dept into another Room; that when they were alone, Deed pulled out of his pocket, & gave Dept Instructions for his Will, not wrote in his own hand; Dept read them, & on talking with Deed, made some little additions & alterations thereto, with his Approbation; who said he proposd making his Will, as near as he cd, to his Fathers Will, by chiefly giving all what he had, to his Fathers Relations, & not to his Mother & for the latter had not used him, or his father well. Dept desired to see his Fathers Will, the Probate of which was shewn to him, believd little or nothing was therein given to Deeds Mothers Relations: He goes on & says, he spent some time in altering, explaining, & considering with Deed, sd Instructions, wch he appeard then to understand; that he thereupon, from sd Instructions, made a draft of sd Will, wch when finishd, he read all over to Deed, who approved thereof, & desired him to make 2 Copies, that there might be a Duplicate of the Original Will; that he did not finish them till the next Evening, being 26 Augt 4th day of the Date of the Will, & when wrote, compared carefully, sd Will or Duplicate, with sd Draft, & found it to agree therewith, & then compared the Will or Duplicate with the other Draft, & found that also to agree, & then read over sd Will or Duplicate to Deed, who approvd thereof, & executed the same in the Presence of him, Foster, Bd Rubins & In Skeath — Who confirm his Evidence, with respect to ye Execution of the said Will —

Mr Foster depones to his receiving Verbal Instructions, from Deed, for Cod: B. wch he drew immediately, read over to Deed, who approved, & executed the same, that Evening; & he attested it —

As to Cod: C. there do not appear any Instructions, but Mr Foster swears, he believes the Body thereof & Subscription to be the Hand writing of the Deed; & Thō Hunt confirms him, with respect to the Subscription — Foster & Hunt both say, they are well acquainted with the Deeds handwriting — It is attested by 3 Witnesses, Jn Skeath who is dead, In Skeath Junr & In Gann, whose Testimonys are excepted agt: before I therefore proceed to the 3d Cod: I will state, if possible obviate, the Objections taken agt them — & first with regard to Skeath, whose Character is attacked, on account of a Declaration said to be signd by him 10 Sep: 1764, (wherein he says he thinks the Deed never had Capacity) in the Presence of Wyche & Randall who attested the same — It is necessary for me to enquire, a little, into this Transaction, & I must observe to the Ct, that the name of Wyche, is sufficient to found a Suspicion of unfair Practices, he is himself a Witness exam: on the part of Mrs Wright, & his Son is her Solicitor in the Cause; & what further confirms me in that Idea is, that Skeath came voluntarily, to be exam: within a month after the Date of this Declaration, & to the 6th Interrog: answers, "that Deed was a man of strong natural parts & quick Apprehension, till 4 or 5 Yrs before his death" & to 13th Interrog: "he has not always thought Deed wanted natural Sense, nor ever declared as much or to the like effect" —

under these Circumstances, perhaps I shd be justified in forming any supposition, but I will, out of Candour to Wyche & Randall, suppose they took advantage of Skeath over a Bottle, when he was heated with Liquor, & persuaded him to sign a Paper, to the Contents of wch he was an utter Stranger, as his subsequent Behaviour sufficiently testifys; I say, I have supposd this out of Candour, lest I shd be obliged to have recourse to a harsher Conjecture, that of accusing the Witnesses to the Declaration, of fabricating the Paper themselves; I shd humbly hope my Sentiments wd meet with the Approbation of the Ct; but I will go a step further, & insist, that if Skeath had confirmd the Declaration, alledged to be signd by him, it wd not have availed, to affect his attestation; for I apprehend it to be clear Law, that Witnesses contradicting their own Act & Deed, are in that respect not to be credited, tho, they are in all other Points, where they stand uncontradicted. It was so laid down in Brown & Ellis by Sir Geo. Lee, who cited the Case of Collins & Chapman at the Delegates, where a Witness had discovered that he was induced to forge a Will, his Evidence was received, where supported by other Circumstances; the same was ruled Law in Hudsons Case, where 2 Witns swore ye Testator did not publish it as his last Will, but that another guided his hand, & that ye Testator, had made his mark, but said nothing, nor was capable; & com: it was proved the Testator had made 2 former Wills & in them had disposed his Land in ye like manner, & that he died of a Consumption, & was sensible to the last; hereupon it appeard the Witnesses had been dealt with, & the Council on the other side urged, that if the Witnesses were not to be believed, there wd not be 3 Witns to the Will, & so no good Will within the Statute, to wch Ld C.J. Pemberton said, if there were 3 Witns to a Will, & one, was a Thief or Person not credible, yet the Words of the Statute being satisfied, & he had collateral proof to fortify the Will, he wd direct a Jury to find it a good Will, & he committed the Witnesses, & took Security of the Plt to prosecute them for Perjury — The Reason of the Law & Equity adopting these Sentiments, are evident & plain, for if Witnesses were suffered to contradict their own Act & Deed; it wd at any time, be in the power, of a corrupt & perjurd Witness, to destroy the Will of the Ablest Lawyer, or defeat the Act of the wisest man in England —

Skinner 79 ... 2 2 Burn. 253 ...

The Objection to Gann is, his swearing to his fathers handwriting, as a Witness to Cod: C. in Feb. 1744/5 yet says, his father died in April 1743 — This strange contradiction, will, I readily admit, destroy the validity of his Evidence; but it is so palpable, as must certainly proceed rather from Error, than any Intention to mislead the Ct; as will more clearly appear, when you observe the extreme ignorance & illiteratness of the Witness & the manner of his deposing; as follows, "he believes it to be his Fathers hand writing, but it is not wrote so bold as his father usually wrote," the Truth of the affair is, he was told he was to be exam: to his Fathers hand writing, was shewn this Attestation, found a great Similarity, therein, to his fathers hand, & therefore ignorantly concluded, it to be so, tho, in fact it was his own; but he was not the only Person deceived by the Similitude, for Thō: Hunt to Cod Art: swears he was acquainted with the hand writing of J. Gann Deed, & that he believd it was his Attestation to Cod: C — So much I thought necessary for me to say, in order to vindicate an honest but ignorant Husbandman, from the Suspicion he might possibly be open to, for having endeavoured to impose on the Ct. I did not mean it with any expectation of validating his Testimony, nor indeed have we Occasion for the Assistance of any Witnesses at all, to establish the Codicil in Ch

the Hand writing of the Testator being sufficiently proved-
For 2d C.B. Gilbert in his Rep: fol: 260. says" If a Will be made of Goods (written in the Partys own hand, without any Witness at all, it is allowed to be good, (the Statute doth not require any Witness, to Chattels only-
Swinb: fol. 253." If it is certain the Testament is written with the Testators own hand or Subscribed by him, the Testimony of Witnesses is not necessary
Comyns 452 . . . It was so held in Wright & Walthoe 1710 Worlick (Pollett 1711-
See 2 Burn 883 . . . Brown (Heath 1721 Loveday (Claridge 1730 Lemberry v Hyde (Mason 1738- If this Doctrine holds with respect to a Will for the Disposal of a great Personal Estate, a fortiori, it must operate with regard to a Codicil by wch trifling Legacies are bequeathed- Having solved the Difficulties under wch the 2d Codicil labourd, I proceed to Cons'd the Instructions for wch Mr Sam'l Foster says he received in writing from Mr Wm Foster of Bourn a near Relation of y'e Deed, principally concerned for him in his Affairs, that he made a draft from ye Instructions, from wch Draft Cod: D. was copied; that about 17th Feb. 1746, he by Deeds Appointment Direction met him at Mr Greens, when it was read over to, approved (executed by Deed, in y'e presence of Dep't Rob't Chamberlain (Frances Crowson since Deed- In this Acc't he is confirmed by Chamberlain (Crowsons Attestation is sworn to by Paul Lowth (Paul Lowth Jun'r Father, Brother in law to Crowson- Mr Foster says he has searched carefully, for but cannot find the 2d Instructions at his House; Upon these Foundations rest the Will, 3 Codicils, wch I flatter myself will be thought sufficient, by the Ct, to establish them as to the Instructions (Execution of so, the next Point for your Consideration, will be this, wh'r they are liable to be set aside, on account of any defects in the Testator, either with respect to his generall Incapacity, or his particular insanity at the times they are dated; (here it will be proper forme, to enquire minutely, into the State of the Evidence on both Sides, that by a Candid (impartial review, the Ct may be the better enabled to form its Judgement with Precision; In a word, thus it stands; 25 Witnesses depose to the Testators Sanity (Capacity at different Periods of his life, viz. from his Infancy (till within 6 years of his death. All these Witnesses stand unimpeached in their Characters; they consist chiefly of Persons, intimately connected with the Deed; who were frequently in his Company (used to his Conversation; several are Men of Fashion in the Neighbourhood, & reputable Clergymen, who are uncontradicted in the particular Facts they speak to- On the other Side 48 Witnesses are examined to his general Incapacity; of these, 21. were never in Company with or spoke to the Deed; 3 form no Opinion of Deed- 6 cant speak to his Capacity, 8 cant speak to it from 1740 to 1746- 5 speaks from Report (5 form their Judgements from the Length of y'e Will, Deeds Appearance, Manner of Speech; So that there then remain only 4, of this Regiment of Evidence, who depose to the Point; the first of these, Henry Clos, (if there was no other Objection) is most unfortunately contradicted in every Assertion he advances, by sev'l Persons; wch must necessarily overturn (destroy his Evidence; but when the Badness of his Character (the Disavowale of his Receipt to Deed, for Wages, is thrown into the Scale, the Ct cannot hesitate a Moment wh'r it shd be rejected with Contempt.

Dr Stukeleys Evidence is given in a very loose & unguarded manner; how able he is to speak positively on this Head, will appear, from his Answer to first Interrog: where he acknowledges, he never asked the Deed any Question; The Observations of Mr Wyche, were made during the minority, of the Deed, & therefore cannot affect him with respect to the validity of the Will (Codicils; besides, this Witness owns, he forms his Opinion chiefly from Report- the last Witness, J. Bigadike, Swears positively to Deeds Incapacity from 1738 to 1746, but assigns no reason for framing this Opinion: when therefore you consider how strongly Deeds Capacity (Sanity is supported by our Witnesses, (how flatly they contradict her Depos'n, I hope you will think the weight of Evidence is greatly in favor of my Partys- As to Custody & Imposition, it is denied by 15 unexceptionable Witnesses, well acquainted & conversant with the Deed- (con: 12 Witnesses assert it, 4 of whom never spoke to Deed, 4 cant depose from 1738 to 1746, 2 judge from Report, Wyche contradicts himself in answer to 6th Interrog: 6 Henry Clos's Evidence will not stand the Test of Examination; as several of the Opponents Witnesses, have judged hastily of Deeds Capacity, from his Appearance (manner of Speaking; we have shewn that no Inference can be drawn from it- 11 W's uncontradicted by Mr Wright's, swear positively to his having an Impediment in his Speech, wch to Persons unacquainted with Deed, might give an unfavorable Idea of his Understanding- Dr Clarke (Mark Addy confirm this Account- the reason of Deeds omitting Miss Wright in his Will is accounted for (by) on Acc't of her Fathers pleading the Statute, in Bar of Payment of a Debt to old Mr B. Anne Moore (Wm Close acknowledges they have been told the same Story- 7 Wit'ss depose that Deed managed his Affairs from March 1738 (when he came of Age) to 1750. (inform you of various Transactions, in Business, they had with Deed- 5 Witnesses deny he managed his own affairs, but 3 of these viz. Tyler, Sherman, (Pinkham are favorable to us; Close is immaterial, (the Credit wch is due to Clos's Evidence, the Ct is a competent Judge of
To corroborate, confirm the Assertions brought by us, you have different Circumstances, wch put the whole beyond a doubt, in 1739 the Testator was nominated High Sheriff of Lincolnshire, (served that Office, in a becoming manner; he acted as Churchwarden for 4 or 5 years successively; he wrote Letters to different Persons, on Business, with a degree of Caution (Skill, not very common to Country Gentlemen; those Letters are before the Ct; as also his Account Book, wherein he noted his current Expences; & another, wherein you find entred, the different Accounts of his Tenants, in Dowsby Estate, with very particular Accuracy; These Concurrent Circumstances, with the Depos'ns of so many Persons of rank in their County, in our favor, added to the internal Evidence of the Will itself with the 3 Codicils, will I doubt not, be sufficient to entitle us to your Sentence confirming the validity of the Paper in Question- But lest any doubt shd arise, as to the particular degree of Capacity necessary, when a Man makes his Will I will beg the Indulgence of the Ct, to state what is delivered on this Subject by the best Writers on this Subject,

Swinb: Pt. 2. Sect. 8. fol. 79. 3 If one that is Lunatic, but not continually, make his Testament, it is not known wh't it was made, whilst of sound Mind, (may or no; then if the Testament be so conceived, as thereby no Arg't of Frenzy or Folly can be gathered, it is to be presumed, the same was made during y'e time of clear & calm Intermissions

Godolph: Orphanicg. Pt. 1. c. 8. fol. 11: 12. Lunatics if they have lucida Intervalla, may make their Testaments during the time of such freedom from the Lunacy; but if it is not certainly known wh't the Testament was made in or out of his fits of Lunacy, if no Arg't of Folly or Frenzy can be collected by the Testament, it shall be presumed to be made during the Intermissions, so adjudged to be good, tho it can not be proved that the Testator used to have any clear, calm Intermissions, provided the same Testament be wisely (orderly made- In contrary Depons those Witnesses are to be preferr'd wch depose that the Testator was of sound Memory

Vinnius in Justin. Lib. 2. Tit. 12. §1. . . . . Si proferatur Testamentum conditum à furioso, quem certum est habuisse id ita ordinandi furiis, ut quivis Paterfamilias sanæ mentis, sic credendum intervalli tempore factum; Palam enim est, unum tantum tempus inspici Testamenti facti, ac sufficere eo tempore Testatorem habuisse Testamenti factionem, cui tempore mortis non habuerit-

Lib. 7. c. 8. ..... Upon the same Principle was founded, the Determination of the Centumviri reported by Val: Maximus where he speaks de Iudicani Hominis certa de nota Insania Testamento. quod a Centumviris confirmatum ait magis quid Scriptum ipse in Tabulis quam quis Scripsisset considerandum exis=timantibus

Ld Coke part 4. Beverleys Case ..... If a man who is of good & perfect memory makes his Will & afterwards by the Vizitation of God becomes of unsound me=mory, this shall not be a Revocation

upon the whole, the Proof offerd by our Opponents (if it can deserve that name) has been chiefly, Probabilities, Cir=cumstances, Conjectures, & Suppositions; whereas we have encountered & disproved even them, by far greater Probabilities, much stronger Circumstances & also by such Evidence as will, I hope be deemed convincing & decisive by the Court—

Dr Collyer ..... The Circumstances & Evidence in this Cause need any to elu=cidate it lies in a narrow Compass, the Qu: is wh? the Deed had a Capacity equal to the Will now before you? Dr Wynne has laid down the Doctrine of Lunacy out of Swinburn; if he had said, the Testator must have a Capacity adequate to the Act, he wd have spoke to the Point; they have quoted Cases to shew Recognition makes a Will good; for If I draw a Will & the Person for whom it is intended adopts it, it is good, that is the Syllogism to which our Argument is to be reduced; but the Will & Cod: now before you are the works of a Person who must have a legal Head & quick Recollection, it contains 50 Legacies, & various limitations; I shall first beg leave to consider y^e internal Evidence, it is a Will disposing of Freehold & Copyhold Lands, to establish wch there is the positive, resulting, internal, & the Collateral Evidence — Is it not very extraord: that not a single word is dropt amongst his numerous acquaintance, that he had made a Will; Mr Fosters Clerk knows nothing but the Execution, & nothing of his Capacity, except from his doing an Act wch Wise Men always do — they want to restore y^e Credit of Stealth, why? the Ct admitted our Allow, the Answer confesses & the End is that the Man is no good Witness; If then stands on y^e Evidence of Foster, Rubins, how what Account does Foster give? He sits down to draw a Will, make very material Alterations, & the Instructions are not in the hand writing of y^e Deed; the man himself cd have made the Alterations with his own hand if capable of receiving Is Directions & Explanations; it is very odd to explain a Mans own Act to himself; the Estate is altered, all the Limitations in the Instructions were Mr I's own — he says Deed had Capacity to do what required common Thought & Judgement; is this a Common Will? it requires a legal head Is Evidence is evasive; he shd have said Deed was capable of making such a Will, he owns, he was rather a weak man, but say the Gent: this refers to his Body; how can that be when they are speaking of his Mind? I dont think Owens Legacy improper, he desired it, but in order to preserve such a Legacy, he was to preserve an Appearance of Sanity & Regularity, it is very likely Owen, when his Master came home, examind what he had spent & made him then set it down — There is no Evidence that Mr Wm B. was dead at that time, but it is material, because in Cod: D. Wm Foster himself is benefitted & Wm B. struck out, one additional Trustee is named; here is a Codicil produced by those who are benefitted — their Evidence answers my purpose; Sir T. Trollop says, he doubts wh: Deed was able to converse sensibly for half an hour together;

I wd not say he was an Idiot & unable to tell his Name — We intend to produce Person to prove what was the General Opinion in y^e neigh=bourhood of his Capacity, immaterial if we had produced Beggars, we did not after them as his Acquaintance; We will set Close agt Hunt; Conexions are necessary on both Sides — Hounds do produce Company, but such Company as does not require any great Capacity — He under=stood no more of Law Terms, than he did of Greek; any Child might know the Lines upon the Globe; but it seems the Account Book is the Clincher; I must read 2 Letters in the Case of Timmey v Jennings & Woods at the Delegates — as follows, "Rev^d Sir, I wrote to Mr Gay to come out to witness my Will Henry Roberts — Mr Gay, enclosed I send you my Will, pray let me know whether it is according to Law or not: I am to have an Estate come home, & have none nearer than my Sister — These Letters were all wrote with his own hand; afterwards upon an Inquisition taken at Exeter he separated Gold from Silver, & in the Kings Bench, objecting to a Witness, he stood up, & said, she is perjurd: That Mans Appearance was the same as this, there was memory & ..... but upon Person deposing to his being unequal to such a Will, the Delegates declard agt it; Let the Letters be ever so much his Hand writing, they must be by Dictation; if his Character was that of a Lunatic, & at last a Commission issued agt him, the resulting Evidence labourd by the Gentlemen concludes agt them — I knew a Boy who cd copy, but cd not read; from the Irregularity, they are not the Mans own; I dont put it upon his Capacity at Large, but with respect to the Act in Issue; I allow the Codicil to be written with his own hand —

to benefit

Dr Harris ..... There appears no previous Declaration, of the Testator intending the numerous Legacies mentiond in his Will; nor any subsequent Declaration that he had done so; I dont insist the man had no Capacity at all, he might apply to the Study of the Globes, & play at Cards with his Neighbours, who were glad to see him, I sup=pose because he lost his money; I cant agree with the Witnesses who depose to his had a strong Capacity; Ser T. Trollop says he cd not hold a Conversation for half an Hour — Mat: Bingham their own Witness says he came into Church with his Hat on; the Inference is, that it was improper to administer the Sacrament to one who knew not what he did; Judge Page did not object to him on account of his Fits, but his Defect of Understanding, you are told he spoke drank to nobody at the Assizes; what sort of Letters cd such a man write — Mr Sam^l Foster was indigent — not true from whence I presume he was not above Temptation to do an irregular thing; The Deed was an Automaton, he cd move but must have something to set him a going; Dr Mariot calls the Acc^t Book, a Waste Book; why have we not the Posting Book, it is not cast up; why have we not the Acc^t Book of the other Estates, he had more than Dowsby — Thatcher says he never did Business for the Deed but once, yet there are two Entries of Moneys pd him for Business done for the Deed; If I may risque a Thought it is this, that the Acc^ts were wrote by Owen & Gibbon Deed to copy for his Amusement; if they are not real Accounts, they are nothing — Stopher Thompson gives the whole Transaction, Deed had Gentlemen Overseers, who settled the Acc^ts of his Estate, Owen was his house Steward & cd not attend to the Estate likewise; The fondness of the Father proves nothing, he might think the Son wd recover, all Fathers think well of their Children — As to general Capacity, one Witness says, Owen used to give him a particular Look; he went backwards & for=ward whilst the Will was making, & probably did not then drop that Look; it is said he jogged him, lest he shd eat too much, what Gentleman

wd suffer such Liberties? how can you reconcile Sir T. Js
Depon that he cd not converse sensibly for ½ an Hour, yet cd
make such a Will - Wyche says he cd play at Cards, but not
make such a Will; How came he to sign these Papers, was
it a sudden thought; It is odd the Instructions shd not be
in the hand writing of this ready Penman? does nobody know
who wrote it? it appears Mrs T. was sent for, was told it
was to make a Will, but the Music Master being present, they
defer it till after dinner - when the first motion comes from
S.T. to retire into a private Room; he must know his Capacity
& shd have desired Assistance; then says Foster the Deed took
out the Instructions, (not a word is mentiond of Law Terms)
they containd the names of a number of Persons, whom
it is impossible he cd remember so as to write down; I
will compare the Will & Instructions with the alterations,
what are they? Sam: T. introduces Wm T. who is thought
to have too beneficial an Interest, therefore the Heirs of
the Body of Redmond & Wm are inserted, this is done by
a line drawn over the regular lines of the Instructions
from wch the Will varies very much; they looked on the
Deed like an Image of Wax - In his Instructions, he said
Lozens, yet did not specify them, tho, he cd remember 60
Legatees - Tho, all these pains are taken to explain, yet they
extend only to the Instructions; what not know wh: the
Draft was read over? if it was not, he never heard the
technical Terms, they cd not be explaind to him: the whole
was done in the Afternoon; it is very odd that Foster's Clerk
was not employd to copy - As to the 3d Cod: the Instruction
came from the Person who was to be benefitted, consequently
are not to be credited; he therein confirms all the Legacies in
his Will & first Cod: but takes no notice of the 2d Cod: from whence
I presume he knew nothing of it - Butler & Parminter the
reasons are in general good agt a Persons contradicting his own
act, but if a Person is in low life & illiterate, he is allowd to de-
pose agt his own Act, if fee is suppriz'd into the Execution,
Skeath must be totally rejected, or we may use him: Sam: T.
is the only Witness to the Instructions, he is indigent, his
Character is at Stake, he struggles between Vertue & falsehood;
he must mean, the Deed was capable of doing Things wch re-
quired common Thought, but not any such those wch deman-
ded Serious Reflection; Chamberlain never saw Deed before,
I must leave S. Js Credit with you; the Instructions are
not written by Deed, the came from him, yet wanted Expla-
nation, this is very new to me, they cd not be made as they
ought with proper Deliberation -

Dr Calvert. ..... I must trouble you with a short word on the same Side;
this Will & Codicils are set up by the Resid: Legr: the most
material Objection to wch is the Capacity of the Deed, wch
when doubted, I must insist, is to be determined from the Act
itself; every Case must stand on its own bottom, & is not to be defeated
48 Witn: are produced to shew, he was not esteemd to have such
a general Capacity, as the Gentlemen wd contend for; from as
Series of Actions such a Judgement is to be formed; they all knew
him from his Infancy; when they say, they judge from the
Appearance, they dont mean from seeing him once, but from the
general Appearance he made in the Neighbourhood; the Reputa-
tion was confirmed, by what was said when he made his Will
they wd not believe it, because he was incapable; what Im-
pression did the Report make on those who believed a Will
was made; they said, Owen made it; This admitted his Capacity
& Memory, was impaired by Epileptic Fits; the difference then between

us, is, when the Incapacity commenced; the Witnesses date it at different
times from 43 to 47 - Wright says, Deeds Capacity failed in 41. he taught
him Musick from 36 to 41, & believd he cd make a Will till the latter end
of his first attendance; many of our Witnesses, believe him incapable from
their first acquaintance; we must take such Witn: as the Occasion allows
to prove a fact; Poor & Honest, is a maxim - a Person of best Capacity
may forget the names of Persons, but not repeatedly forget the name of the
same Person; want of memory, so grossly, is want of Sense - I never
knew the Squire of a Parish had a Liberty to transgress Decency, in coming
to Church with his Hat on, all People are on a footing there; a Child behaves
well sometimes - Sitting like a Post at the Assizes, is an improper Be-
haviour; if he had behaved like a Sheriff, they might have produced Witn:
to specify some particular Acts done there by him; Everybody knows how
Sheriffs are appointed, the Clerk of the Peace returns the names of those
who are proper to serve, & if no Objection is made, the Appointment stands
of course, if objected to before the K: Council, they are withdrawn sometimes
he is appointed Ch: Wn too, being considerd as a Man of Fortune; Owen
executes the Office; there is no great Capacity required to have y Windows
mended; Wright deposes to his becoming a Proficient in Musick after the
time he is said to be incapable - It is said he vizited, behaved, & was receivd
properly; this is no Arg: of Capacity, if he was only received as a Person of
Fortune - It is deposed Mrs Toller used to ask Owen what she shd help
the Deed to; wd such Behavior be used towards a Person, in his right Senses -
Sy: Toller did not stay with him after dinner, but went out & took his
Walk as if nobody was there - Wes say he was in the Custody of Owen, &
liable to be imposed on, if so, he was consequently by any one, introduced
by Owen whose Behavior does not appear to be only the familiarity of
a Servant, viz taking his Apples & money away - The Items in the Day
Books appear incoherent Sums plaied without Order or Design, the
Dates are confused, Payments mixd with Receipts; This said the Day Book
dont appear so; We dont say the Sums are fictitious, but that Owen gave
him the Dates &c to copy, wherefore they will correspond with the Entries -
Unless the Deed appears to have had an Intention to dispose of his Effects
in this Manner, it cannot avail; the first thing to enquire, is wh: Deed
made any Declaration with respect to his intended Disposition; it is said, he
was overheard to say, he wd take care of the Poor, but that cd not apply to the
Will, he having given only 35£ to 7 Parishes; If Instructions come from
the Deed himself, they prove his Intention, I will not contend they shd be
in his own handwriting; Dr Wynn said, the Instructions were peculiarly
adapted to his Capacity, I agree they were, for a Will to be imposed on
him, for they were ready drawn; he brought them, clearly not understanding
what they were, because the Contents were to be explaind; the Explanation
applies to the Instructions: a Person need not understand all y Technical
Terms, but there are none in the Instructions, so none to be explained,
a moderate Capacity was sufficient to understand them; Dr E. did
not chuse to proceed before Dr Green, the Motion came from him
to retire; Mrs Wrights Relationship dont appear, so no Arg: is to be
drawn from thence; T. inserted the Trustees without any directions
as far as appears to the Ct. he did not go home to draw the Will
& bring it next Day, but stayd at Ryal, so secretly was this affair
transacted, that Rubins Js Clerk, tho, in the House, was not employd to
copy it, & knew nothing of the Instructions; does not this afford
reasonable grounds of Suspicion; the Execution was short, merely
mechanical, nothing paid to shew Deed knew what he did at the
time - As to the Cod: what was truly laid down by Dr Burrell in
relation to the Support of Testamentary Papers without Witnesses, will
not hold as to executed Papers, propounded as such; Owen sent for
Skeath to attest this Paper in his own favor; It appears to have
been wrote from a Copy, & possibly the Deed might have received the Ins-
tructions from Owen himself; the reason for the 3d Cod: (viz y Uncles
death) does not appear, if true, no reason for the Alteration, the Legacy
wd have lapsed, as those of several other Legatees, on wch account no

alteration had been made; in this Codicil he has secured the Legacy still stronger; mr Wm T. knew this, there is a Clause whereby he confirms all the Bequests before made; if the Deed had it explaind, he cod have known the Codicil of 1748 made an alteration - There is not sufficient Evidence to prove the Testamentary Papers, if there was no doubt of Capacity; They say there was no Room for Suspicion, for nobody had an Interest to impose the Will, I cant point it out, but Owen has £400, mr Wm Foster £400 besides the Reversion of a moiety of the Estate; the Lt will have a clear proof that they did not influence, I think had: shewn he was out of his Senses when he died, if I can shew he was sometimes out of his mind, the onus probandi lies on them; we have given Instances of Furor, they must give proofs of this Sanity at the time of making the Will -

Dr Marriot..... The Deed was obliged to Owen for checking his voracious appetite, wch frequently brings on Epilepsys, especially when the Party is subject to them, the Behavior of mr & mrs Tollard seems to be a proof of their austicity - mr Ross was led in his Opinion by the difficulty the Deed must have to understand Law Terms -

Dr Wynn..... The Gentleman who spoke first thought we took a great deal of unnecessary pains, the Dr who followd, seemd to admit the Deed might be a person of ordinary Understanding but said, we shd prove he had a capacity to make a Will of this kind - the Authorities I quoted were to shew that a very low Understanding wd be sufficient to make a Will; if the other Doctrine obtained nobody cd dispose of their property, a legal knowledge is not required; It is said there are Erasures in the Instructions, they were probably read; it seems he has struck out some words to insert legal ones, but they are conformable to the Instructions, there is no material difference between the Will & Instructions; the dimensions are in fact the same; it is observed as remarkable that there is no Declaration on the Part of the Deed; surely the Guide he gave Foster of his Father's Will, mentiond by him has been forgot, as also the Expression overheard by the Maid Servant that he wd remember the Poor; the probable reason why it did not appear, is, that he had considered every Relation so that we cd not produce them as Witnesses - mr Foster is called a needy Person, it does not appear wh? he wanted to borrow money for himself or others -

Dr Hay Judge..... The Dut? before me is, concerning the validity of the Will & 3 Codicils of Thos Bussell Esq? Deed? the actual mechanical Execution of the Will & 2d & 3d Codicils are proved by S. Foster who is confirmd by Rubins with respect to the Will; the 2d Codicil is proved rather by the handwriting of the Deed (as Foster & Hunt depose) than by the Witnesses, for Gann appears to have been mistaken; I do not enquire about Heath, for I shall lay no Stress on him, the Execution of the 3d Codicil is proved by 3 Witnesses; the principal Dut? then to determine is the Capacity of the Deed, in wch I have great difficulty; it is agreed, he was a Lunatic many years prior to his death, 3 yrs before that period, he is found so by Inquisition; the Witnesses speak to a much longer Incapacity, some of them say 10 or 12 yrs before his death; the Question is, wh? he had a legal testamentary Capacity, when he executed his Will & Codicils, many Wt speak of him as totally incapable & under the management & Custody of Owen, they depose to diffr times; Dr Clerk says he never had

any Capacity to act in the most common occurrences of life, & answer? Questions properly, or write down Legacies; if he had no greater Capacity than Dr Clerk describes him to have, he certainly cd not have made the Will &c - The Witnesses for the Will, admit he was not a man of strong Understanding, but was rather weak & deficient in his Intellects; Ser? Trollop answers in that manner, that he was rather a weak man, & he doubts if he was able to reason by way of Argument - Elig? Kowgrave thinks he cd not draw a Will, but if it was ready made, he might understand it, Mr Wilm? says he was of himself able to draw a Will; Under these Circumstances, it comes to a Question of Law, what degree of Capacity is requisite to entitle a man to make a Will? this Qu? is difficult to determine - if in general, he knows what he is about, a knowledge of the Law is not required; if he knows there is such a Disposition as is read to him, it is not necessary he shd draw the Will, or give the Instructions; if another Person makes a disposition & the Testator knows the Tenor, Extent & Effects of the Proposition, ratifies it, it is good - This is a Will to benefit Relations & Heirs at Law in a certain way, drawn by mr Foster in legal Terms, I wanted the Instructions to see wh? they were better adapted to a plain Understanding than the Will is; many Interlineations appear in the Instructions, & additions in Ts hand writing, some lines are drawn through with a Pen, by whom, is uncertain - mr T deposes the Deed said on his coming to Ryal, he had sent for him to make his Will, but it being near dinner Time, no more was then said; that after dinner he started the Subject of the Will again, wch T. is to be credited, he gives a strong Instance of the Testator knowing what he was about by his Directions to T. to make his Will conformable to his Father's Will; many Things descriptive of & identifying Persons, are inserted in Ts Hand, but they are immaterial - T adds, that soon after the Execution of the Will, the Deed gave verbal directions for a Codi: this is very material; it is improbable that Owen, or any one who is said to have him in Custody, wd have made that Codicil merely to dispose of a few Rings; the reasonableness of a Will is no conclusive Proof of Capacity in a Testator; a capable Man may make an absurd Disposition; an incapable Man can make no disposition at all. There is a Circumstance wch might have come into Consideration, it was left to Interrog? miss Wright shd have been exam? touching the Debt her Father had declared to pay - I suppose the Deed upon conversing with T. told him, who he wd have benefitted, for the Names of the Resid? Legt are in Ts hand writing - Propriety has this Operation, it will go so far as to determine in favor of that Evidence wch supports, in preference of that wch opposes the Will - This is a very doubtfull Case; Drs Stukely & Clark speak strongly to the Testators Insanity & Incapacity to make a Will from his outside Frame; others form their Opinions from his appearance & other Causes; the Resid? Legt admit his appearance was inferior to his Capacity; I must take it upon the whole with mr Ts Answer to the Interrogatory, that he had a capacity to do what a common Capacity could do - The facts being so I must look into y? Circumstances & give my Judgement in this very difficult Case from Inference There is one Witness who goes far to satisfy my Mind of the Deeds Capacity to do a Testamentary Act, that is Mr Kowgrave whose Evidence stands unimpeachd; he says, that a little before the Deed made his Will, Green applied to him to speak to Deed in behalf of Redman - B. he did so, & the answer of the Deed is sufficient to prove his discretion for a Testamentary Act, & that he was not such an Idiot as several of the Witnesses fancied him - He sends £120 to pay his Debts & cloath him; Some Stress too, in this doubtfull Case, is to be laid on the Fathers Will & comparing it with Deeds Will - The Father died 1733, if he had thought his Son an Idiot, he cod have appointed some Trustee for him - I lay no great Stress on his being Sheriff or Ch: Wn; improper Persons are often chosen; I see no appearance of blandestinity or Imposition, wch must have come

out, if there had been any; It is an Argument in favor of Capacity that the Transaction was so Secret – Owen was his Attendant, was necessary, by reason of his Illness, there do not appear any attempts to impose on Dead, or improper Behavior in Owen; What Chapman says is very material, that when he was making his Will, she heard him say "I'll take care of the Poor;" it was then notorious he was about his Will, & there is no room to suspect fraud; I think the written Evidence ought to have its weight with me, tho, it is irregular, yet it shews, he did attend to his affairs, immaterial whether with so much exactness as many other Persons – The 3 Trustees named by his father, will took care of every thing till he came of Age, then he enters upon the Administration, keeps his Accounts, receives & pays, gives Receipts, writes Letters from 37 to 41 I lay a stress on these Letters, tho, some of them are trifling, I see no reason to suppose, they were written from Copies, Am I to presume that any Body did give him Copies, especially when Mrs Wright has not interrogated Foster or Jarvis In Tinneys Case it appeard he had given Roberts Copies wch he wrote fair as his Will; If in the present, as in that Case, these were shewn to be mechanical Acts, it wd support the Evidence who speak to Incapacity; I found my Judgement on the Acts in the Cause, on the written Evidence, wch supports the Witns who speak to Capacity, tho, it is weak; Evidence of Opinion on either Side is not relied on, because Witnesses may be mistaken; this Poor Man was weak from nature, but not so as to incapacitate him from making a Will; I cannot say this Man was incapable, foundding my Judgement upon the Opinions of Persons, contrary to the positive Evidence of Howgrave, Trollop, Foster, whose Characters stand unimpeachd – Upon the whole I think him capable, & pronounce my Judgement in favor of the Will, Codicils propounded, & yet I think it as doubtfull a Case as ever I remember – no Costs.

N.B. Appealed & afterwards compromised . . . . . .

Arches April 22. — Easter Term 2d Session

N°58 Dr Markham v Beadon & Kirk

Altham — Dr Harris, Wynn. — Dr Marriot, Calvert — Gostling

Dr Marriot . . . . . In this Case a Suit for Dilapidations has been brought by Dr M. Successor to Dr N. in the Deanery of Rochester, agt his Exors Estimates of the Repairs, wch the Deanery House stands in need of, have been given in; we thought them too high, but have made a Tender of a considerable Sum, wch Dr M. has refused to accept, & has made a Proposal – the Quin now before you, is wh a distinction ought not to be taken, between the old Deanery & the new; there are 2 Fabricks, one of wch, we say, has not been the Residence of the Dean, for time immemorial, but has been let into Tenements, & therefore ought not to be considerd, on the footing of the Deans Residence, (called the new Deanery) nor to be repaired as such – Mr Beadon has made an Affidavit, supported by the Attestation of a Person, well acquainted with the Premises & Dr M. has made Affidavit, that he has given notices, to the Tenants, to quit, there not being sufficient room in the new Deanery for him & his Family

Dr Calvert . . . . . Gostling alledges, that on the part of his Client, he has made a Tender of £883. 5. 0. for Dilapidations; that Altham for his Client refused to accept it, but offered to split the difference between that Sum, & the lowest Estimate, given in by his Surveyor, to accept of £1132. 0. 6. with Costs, Gostling alledges there is an article in the Schedules of both Dr Ms Surveyors wherein the rebuilding the old Deanery, is estimated at upwards of £600, but that the Charge of putting it into tenantable repair is in Mr Bs Surveyors Estimate rated only at 200£. that before he agrees to Althams proposal, he desires to take the Sense of the Court wh the old Deanery, is to be considered as part of the Deanery House; that he apprehends he is not liable to fit it up, as if it was for the Deans Residence – Altham alledges there is a door of Communication, between the 2 Houses, a Cellar wch is in constant use by the Resident Dean in the new Deanery, running under ones of the Parlors of the old Deanery; that there is not room enough for the Dean & his Family; that the old Deanery was let out in Tenements all the time of the late Dean, but that Dr M. immediately gave Notice to the Tenants to quit, who accordingly left their Apartments last Lady Day – Gostling further alledges, there are several Persons at Rochester, who can testify to the Old Deanery having been always let out to Tenants, but they have refused to let Mr B. have the Benefit of their Testimony therefore he prays that they may be compelled

The Affidavits of Dr Markam & Mr Beadon &c . . . . Hoskins were read.

Dr Marriot . . . . . Dr Markam has high notions, seems to expect all the Repairs shd be conformable to his Plan – when the Ct laid it down as a Rule, that if any of the Premises belonging to an Ecclesiastical House, were left so dilapidated that they cd not be repaired, they must be rebuilt by the Dilapidators Exors, the Doctrine was intended, only for the use of the Successor, fit for his Degree & Reception; if rebuilding is necessary it will not extend to the present Case; tho, incapable of Repairs for the Deans Residence, it may be repaired, so as to be very tenantable for Persons at 3£p An: rent – Dr Ms Affid: does not contradict ours, it is prior to ours, admits the Distinction, between the new Deanery & the Old – We think 200£ very sufficient for the Repairs of a House let out to poor Tenants – Dr M. may have a Task for Building, he may want to rebuild it, he may want perhaps to build an Episcopal Palace – That our Plea is well founded is clearly confirmd by the Bp of London's Conduct with respect to London House, wch being let out into Tenements, never used as an Episcopal Palace, upon very respectable Opinions, he accepted a very moderate Sum, not considering his own Degree, but that of the Persons who resided in it –

Dr Calvert . . . . I am Council on the same Side – To the Libel given in by Dr M. 2 Estimates were annexd; we have made a Tender of near 900£ wch has been refused, he offers to accept of £1132. 0. 0. with Costs – Before we can determine wh we shall agree to the Proposal, we must know how the old Deanery is to be repaired, wh suitably for the Residence of the Dean, or to be let out as Tenements; Perhaps it may be said, that we come before the Time, but we wish to shorten the Suit, the Application is not improper; you can as well determine upon the Law now, the Facts if they are sufficiently before you – Mr B. says, he has been told, of its being let out so for many years, even time immemorial, specifies 2 Persons – It shews that there was a time, when a new House was built for the Dean, the old therefore was no longer considerd as his Residence: Altham dont deny it's being so let, he allows it to have been so let all Dr N's time – I know very well, every Incumbent is bound to keep, all his Ecclesiastical Houses in proper Repair, for the Purposes he finds them put to; they shd not be worsted but it is not necessary they shd be bettered; the Case of London House is much stronger than this, for there a House was lost to the Bp – Suppose the Incumbent had died immediately after building the new Deanery House, would the Ct have suffered the Successor to have called on the Exors, for Dilapidations of the Old? Because it has not been for Time immemorial, will the Court presume there was no legal Beginning? or, that the Dean was not properly authorized to convert the Old House into Tenements upon building the new Deanery – Dr M. says the Tenants have quitted, pursuant to the Warning; but he dont even say, he intends to reside; the Purposes of this Application may be only to recover as much Money, in order to convert it to other Repairs; perhaps he may hereafter apply for a Faculty – It has been large enough for the Use of his Predecessors, if the present Deans Views happen to be more extensive, he must be at the Expence himself, the Money must come out of his own Pocket – must we fit up as he chuses? if he shd desire more Bedchambers or Parlors, must he have them at our Expence, it might suit him, but might be a

burthen to Succesor in less affluent circumstances; Hope you will think we are not improper now, for by your present Determination the Suite is at an End; if you shd doubt the fact of a Part being Lett in Tenements as we alledge, we can ascertain it by sev: Persons at Rochester; whom apprehend we may compel to be examined on Interrog: or as the Ct shall think fit, without a Plea ...

Dr Harris .... We gave a Libel for Dilapidations, with Estimates annexd; Mr Cardys amounted to £562 Harrisons to £380. 16. Gosling objected & prayd a Commission of Review by Clergymen, wch was rejected; but they had a Surveyor, whose Estimate amounts to £883. 5. 0. wch Sum has accordingly been tendered, but refused by us, who offerd to divide the difference, between their Tender & our lowest Estimate, wch being £248. 13. 6 added to their Tender, amounts to £632. 0. 6 is the Sum we have offerd to accept. Gosling says his Client is ready to pay to the full what is due but not more, than by Law he ought; The Objection made is, that both in Harrisons & Cardys Estimates there is a Charge of £60 for rebuilding the old Deanery House. They in their Estimates say, there is no Occasion to rebuild it; that by the old Windows, they are led to believe, the old Deanery, was formerly the Residence of the Deans, but that it ceased to be so when the new Deanery was built ao. 1741 & that about £20 will be sufficient to put it into repair for Tenants. This very extraordinary for any Article of an Estimate to be so expresd the Lt is wh the old Deanery is part of the Deanery House, or like a Farm for Tenants. None of their Affidavits go farther back, than 30 or 40 Years. A Predecessor letting any part of his Ecclesiastical House will not bar the Succesor from taking the whole into his possession there is a door of Communication, & the old & new Deanery, are certainly one House, nor is it denied by Mr B's Affid: that there is such Door; the New Deanery is certainly very small for the habitation of a Dean, even from Mr B's own shewing, but supposeing the House separate, it is immaterial; a Minister may have 3 or 4 small Houses; he may live sometimes in one, sometimes at another, they may be looked upon as one, he is entitled to Dilapidations for them all - the Presumption is with us, that the new Deanery is only an Addition to the Old - If is adding no new Rooms, it is only making the old ones fit for the Deans use that we ask; our Estimate at 4s 6d pr Square only, is so low, that it shews we want them only to be decent; it is the Price frequently allotted for Farm Houses.

Dr Wynne .. I am Council also for Dr Markam - One of the Council on the other Side seems aware of their being too early, & it is undoubtedly irregular; but we dont rely on that - How can the Old & New Deanery be distinct Houses? the Old is contiguous to the New; the Cellar belongs to it is constantly used; the Qu is, wh it is or is not part of y Deanery House? for that it will take a different Sum in the one case, from what it would in the other - 2ly, it is clearly, from the Communication & other Circumstances, as much the Deanery House, as the new is, yet if that was not sufficiently before you, the Principle whereon this goes is sufficiently so; viz, its being let out in Tenements in the late Dean's Time, & therefore to be repaired for Tenants, but the Distinction hereby intended to be made, between the Deans residence, letting it out to Tenants, is not well founded; this Application of the Deanery House, (wh part of the Deanery or not being immaterial) was very improper in its beginning, no length of Time can make it right; it was very indecent to apply a Building contiguous to, & Parcel of, the Deanery House in this manner: it is high time to put a Stop to this Misapplication of it, & very happily for the Honor of the Church, a Gentleman is come into it, who has such a Regard for his own Reputation, Station, Character as to have turned out the Tenants: there is no doubt but an Ecclesiastical House may be too large; the Law in such Case has chalked out the Way to reduce it: the Ordinary upon proper Application appoints a Review, & upon the Report, allows the Party to pull down, the Old, ruinous, superfluous Buildings, to rebuild others

in lieu, applying or selling the Materials: generally too, the Person applying for the Faculty, alledges he will lay out some of his own Money &c if it dont appear any thing was ever laid out on this Building - here are 4 Tenements let for 12£. It is now reduced so low, that it cant be repaired, therefore must be rebuilt: It has been suffered to run to ruin it has gradually decreased in Value; rather than repair, the Incumbent has let it for whatever he can get; it will at last let for nothing, & in the Course of a few Years, a Dean will find his Lds of a Farm of 12£ p Ann: nothing but a heap of Rubbish: this is very different from the case of London House: but supposeing that, tho, let into Tenements, it had been so bad, so ruinous, that it cd not have been repaired, why then it must have been rebuilt; if this Building was in the Repair it ought to be, as Tenements, it wd fetch double the Sum it now lets at; but it is improper; it is indecent, that just at the Deans own Door, it shd be let at all; we are to consider this Point as we wd the Relevancy of an Allon; Hope you will pronounce agt the ground of the distinction taken up, on the other Side, it will equally plead to the Suite -

Dr Hay. Judge The Exors have made a Tender wch Dr M. has not accepted, but he has, at the same time made a Proposal - The Proctor for the Exors has done very properly, in endeavouring to put an End to the dispute, by taking the Opinion of the Ct: tho it is rather early - He was in the right to apply to the Ct upon the Relevancy of Dr Ms Application for being allowd Dilapidations on the old Deanery, wh it must be rebuilt as a parcel of the Deanery House, or wh it is to be repaired on the Distinction of being let into Tenements for Tenants, not serving for the Deans Residence - I do think it a very scandalous Application of the Deanery House, to let it out to Persons of low Condition for 12£ p An. An Eccles: Ct will never approve of such a Conversion, tho of ever so long a Standing - With respect to London House, however it arose it was very improper; it never received Countenance or Support from this Ct. so far from it, that if Bp Sherlock had not acquiesced, but had applied to this Ct: to have had its Judgement wh London House shd have been let out into Tenements, the Ct I am sure wd never have approved of such Conversion, for the Bp to live where he pleases out of his Jurisdiction; however it is not so here; this is part of the House; it is not denied but that Part of the old Deanery, was made use of by y late Dean: It is admitted to be a Dilapidation; but the Qu is, wh it is to be deemed so, as a Part of the Deanery, or as a Farm let out to Tenants; I can only be of Opinion, that it is as part of the Deanery, there is not enough before me to determine more; I cant say wh so large a Sum may be paid for it as is claimed, that must be a future Consideration, if the Suite goes on; if it can be shewd that Dr M. found it so applied, that will be a reason for making the less allowance for this Dilapidation; tho I think it very indecent & improper, that there shd ever have been such an Application of this old Deanery; I am sure an Eccles: Ct will always set its face, agt such Conversion of Eccles: Buildings; It does not appear when this old Deanery became so Inhabited, if before Dr Ms time, it may be a reason to alleviate his Exors, but the case will be very different if Dr M. was the first who let it so - the old Deanery House, is part of the Deanery as to Dilapidations, the Quantum of wch must be hereafter determined; I think Mr B. shews a good disposition, by making this Tender, wch really seems to be a very handsome one, wch Dr M. wd do well to consider of, wh he shall accept, for after this, if things shd not turn out to entitle Dr M. to what he claims, he will be liable to Costs from the time the Tender was made - Letting out a Deanery House to low People, just at the Deans Door, is a Disgrace to the Church, & a great Scandal: Dr M. is therefore very praiseworthy, in restoreing it to its pristine Dignity & Lustre by turning those People out.

See Fol. 18: [illegible]

Prerogative Ct
2d Sess: E. T.....

No 59

Woodward agt Sanders

Altham — Dr Harris, Burnell — Dr Wynne — Bishop —

On admon of Woodwards Will

Dr Harris..... Mrs Anne Ward .... died 28 Feb. 1768 leaving a Will by wch she appointed John Woodward Exor, he is opposed by Mrs Sanders the Daur of the Deed, & we are now before you on the admon of an Allon

Dr Wynne..... I object only to one Article of the Allon, wch pleads a Letter wrote to Mr Hand, wch is not exhibited: now I apprehend it to be a Rule that where a Letter or the Contents thereof are pleaded it ought to be exhibited (as it may contain what may be favorable to us,) or Cause shewn why it is not.

Dr Hay Judge.. Here is a Proctor of this Ct wrote to by Mr Hand, who answers that he cannot comply with his Request, being already engaged by his Opponent — Such Letter must be in Mr Hands possession; if Parties can produce Letters pleaded they should do it — there is great use in bringing in all Instruments, it is very proper to call for them; In Foster & Wright, the Conclusion was rescinded, because the Party had no Opportunity to cross examine — the Proponent shd plead, that he had applied to the Party, that he refused to comply with his request, to transmit the letter pleaded, I admit the Allon the 12th Art. being reformed with pleads a letter wrote by Mr Bishop to Mr Hand...

No 60

Morris agt West falsely calling herself Williams

Jenner for Holman } Dr Calvert, Burnell — Dr Harris, Wynn — Longden

On Reuse of Admon

Dr Harris..... John Williams Esq died 1763 he was married in June 1742 at the Fleet to Mrs ..... West Daur of Ld Chancellor West, (immediately went to Bristol to the House of ..... Tyler where they consummated & cohabited as man & Wife for years, when they removed to Gloucester, where they lived together, 7 years, during which period they had 2 Children & from thence removed to Brook Street Hanover Square where they continued till Mr Williams death, being visited by Persons of Fashion, & reputed to be Man & Wife

Dr Calvert..... We have given no Plea, or Interrogs they have pleaded the marriage at the Fleet, reputable Cohabitation at Tyler at Bristol, removal to Gloucester, residence there 7 years, Birth of 2 Children, have exhibited the Registers of Baptisms, examined 7 Witnesses to shew the Reputation of their being married — they plead their going from Gloucester, to live in Brook Street, & continuance there under a reputable Cohabitation & owning to the Time of Mr Williams death — they plead a Pension granted to Ld Chancellor West, his Wife & Daur for their joint Lives, Mrs West the Daurs enjoyment thereof, appointing Mr Clements Agent for the Receipt of it in Dublin his Payment thereof to Mr Williams as her Husband, who in such Capacity gave regular acquittances to Mr Clements — A Passage is also pleaded in the late Judge Burnets Will, wherein he (who was her Uncle) styles her Mrs Williams

Dr Harris..... Mrs Williams possessed herself of the Admon to Mr Williams (continued) therein a whole year; here are Exhibits & Evidence wch stand uncontradicted, I suppose then, this must be a Question of Law, whether one of the Parties, being alive, the Marriage shall be pronounced for unless there is actual Proof of it; It is not necessary both the Parties shd be dead, to induce the Ct to accept of presumptive Proof in favor of Marriage Bond & Bond before Sir Geo Lee 1733. the Marriage was denied by a Son by a former Wife, it appeared the Woman had a Child by the Husb before the marriage, yet as there was a Cohabitation for 16 Years, Children Baptized, as lawfull Children, the Presumption was, they cod not have been so baptized, unless they were legitimate. Voet de ritu Nuptiarum (a) In the Civil Law in Scotland they dont require the Birth of Children

(a) Voet. Contra rumor nuptiæ secundum

But where there is Cohabitation, they decree in favor of the Marriage Conrad & Dr the Man began a Causes of Jactitation, the Woman set up a Marriage, but cd not specify it, she offered the Fleet Register in support of Proof, but the Ct wd not relieve it; She proved the Man's teaching her Prayers; Simpson Chanr of London pronounced for the Marriage, but his Sentence was reversed by Sir Geo Lee, on Appeal, by reason of the Woman's bad Character; otherwise the Marriage cod have been established tho, both the Parties were living — 2 years is a Space of Time sufficient to have 2 Children, if prove such a Cohabitation, it is enough — Mr Morris & his Wife have received a Present from Mrs Williams as Administratrix of Mr Wms

Dr Wynne..... I believe the marriage cannot be proved, merely here in this Country as in others; but it is the invariable Custom to allow it, where one of the Parties are dead; if both are living, I believe it is necessary to plead the fact of Marriage — It may happen, that a Person brought from a distance, may be married & go away directly; It is frequently out of the Power of the Parties to offer any other proof than reputable Cohabitation, having only the Evidence of such Witn as the Fleet afforded The Evidence of Persons at Gloucester is very full, Mrs W. was not a low Person, she was Judge Burnetts Niece, (visited by Persons of Fashion:) she gave her a Legacy, wch he wd not have done, if she had lived with a Man to whom she was not married; It is a very compassionate Case of a Widow & her Son; the Plt by living & conversing with her, might find out what she could & what she could not prove. It is y Doctrine, y you need not prove the fact of marriage where there is a subsequent Cohabitation with Reputation.

her son to whom she is entitled in right of her father

y Balance of an Acct to which she is entitled in right of her father

Dr Calvert..... I hope you will think there is no Imputation on Mrs Morris; when a Person discovers a Right, she is justified in reason & Equity to assert it — I believe the Doctrine contended for, will hold in general, but is not applicable to the present Case — Dr K. did not distinguish in his Quotation from Voet, how far Use alone shd operate towards establishing a Marriage — as to the Circumstances of the Cases mentioned, the Dr did not state them; one contradicts the other — the Gentlemen allow that Cohabition is not sufficient, if both Parties are living; one Party can tell where she was married as well as if both were living, where both are dead it is otherwise, nor can the Children speak to that Circumstance — The proof here is deficient, they plead the Time of the Marriage to be in June 1742, cant it be deemed sufficient to put this into an Allon, to have it admitted, yet not be obliged to prove it? There is not even the Fleet Register, wch wd have been some satisfaction to the Ct that such Marriage existed, tho it is not Evidence, why have they not examined Tyler or assigned a Cause for their Omission why have they not produced Witnesses from Bristol? they have laid a base before the Ct wch must induce a presumption of mala fides: they prove only Cohabitation at Gloucester; they cd certainly prove a Cohabitation in Brook Street, as they plead it to 1763; they cd prove the fact of the paym: of the Pension, if true — There is no Identity of the Person mentioned in Judge Burnells Will, the Deft ascertained, but the Identity was proved, it is dated in 1748 during the Cohab: at Gloucester We admit she had there the Reputation, wch might deceive Judge B. as well as the rest of the World — Mrs Morris, when she accepted the Ring, was ignorant of these Circumstances; we are by Accident precluded by the negligence of the late Proctor in the Cause from making use of those Papers wch wd have solved these difficulties this Circumstance will oust all Presumption agt us.

Faulkner died not plead exhibited under Mrs W's Hand: as he was deserted by his Client

Dr Burnell..... The present Question is, wh there is such proof offered, as to induce the Ct to pronounce in favor of the Marriage? I will readily admit if the Deft had made out all she has pleaded, there wd have been little occasion for my taking up the time of the Ct; but when a Party fails almost entirely, in ascertaining those facts she assumes the proof of, the necessary conclusion must be this, that the Assertions were groundless & false; the Gentn are well aware of this, & therefore have judiciously for their Client, insisted, that a Cohab: with reputation at any period, subsequent to the Marriage, is sufficient to authenticate it. where either of the Partys are dead, that the Ct will not expect such strong proof in a Case of Interest, as where the fact of Marriage

comes immediately in Question; I shall readily agree with them, in some of these Positions, but in others must differ very widely; I can never subscribe to that Doctrine of Cohab[t] at any period subsequent to that, on wch the Marriage is laid, being sufficient to ascertain the fact of marriage; if so absurd a Rule was once adopted, it would be impossible to invalidate any Pretence of Marriage whatever; every Intrigue, under that Predicament, wd be conjured up into baleful Matrimony, & there wd be scarce a Family in England, who would not sooner or later, have just Grounds to lament so ridiculous a Regulation; Whatever may be the Laws of Scotland, or the Customs of other Countries, is not my Province to consider, We are bound by the Laws, Customs of Great Brittain, & by those only; If the Doctrine now contended for, had prevailed in the Reign of Henry 3d, the Bishops & dignified Clergy, would not have been necessitated, to ask the Permission of the Barons, to legitimate Children born before Marriage, nor exposed themselves to the Refusal they met with; they would have clearly perceived, they had only to wait till the Death of one of the Parties, when a reputable Cohabitation at any short Period, would salve all Defects; In the present case, they have not attempted to enter into proof of the many Facts laid, except the Cohab[t] & Baptism of 2 Children at Gloucester, wch I cannot consider as any Proof at all; can it be conceived, they would be so injudicious, to blast their Reputation by declaring the Children to be Bastards? nothing is more common in Cases of Adultery, than to lay the Birth of Children in order to prove the fact charged, It was so laid in the Cases of Scott & Scott & Ware & Ware a Case of Incest – Have the Gent[n] assigned any reason, why they have not examined Tyler or produced the Fleet Register, why they omitted to examine Mr Clements or explain the Receipts given by Mr Wms for the Pension? I admit that the Ct will not demand stricter Proof than the Case will furnish but then, they shd have satisfied the Ct they have offered all the Proof they are able; Upon the whole I hope you will think they have not made out their Pleas, but have totally failed therein, & that you will pronounce agt the Int: of Mrs West revoke the Admon, grant a new Admon to my Client & condemn Mrs West in Costs – Wm Morris being one of the Securities to the admon: shews he was then a Stranger to these Particulars....

Stat: 20 Hen: 3. c 9 – By the Law of Scotland a subsequent marriage legitimates Children born before – – – – – –

Dr Harris – – – – We are not bound to offer superfluous proof; there is sufficient as we apprehend; we have pleaded & proved they lived together 8 Years – tho, one Party is living, Cohab: is sufficient, otherwise it wd be impossible to prove a Marriage; It is true, we dont bring the Cohabitation down to Mr Williams's Death; the Civil Law is not the Law of England, or adopted here; the Children have been christened as Legitimate – Cohab: with Reputation is a presumption tho, no proper foundation of pleading the fact of Marriage; the Doctrine of Cohab: is established here; if it had been pleaded, he had left her & denied the Marriage, it wd have created a stronger Presumption; we have one, it is not ousted –

Dr Wynne – – – – Cohabitation is a Presumption in favor of marriage; if they cd prove they Did not live in the reputable manner we say, it might be material

Dr Hay. Judge.... The Ct always distinguishes between a Case of Jactitation & a Case of Interest, in the latter the proof in this Country is much more favorable; in a Case of Marriage inter vivos strict proof is requisite. By the Law of Scotland, Man & Woman by living together, are deemed married. In the case of Mumford & Jefferson before Dr Andrew. A. instituted a Suit of Jactitation agt B. by whom he had several Children. B. pleaded a marriage, but cd not prove it, both Parties being alive, the Judge pronounced agt

X Copwards Case was in Jactitation; Sr Geo. Lee pronounced agt the Marriage, not only because he thought Reputation & Cohabitation insufficient in themselves in Cases of that kind, but because even they were not proved – I believe the Woman had been guilty of some management about obtaining a Register in the Fleet.

Who there was Children.... the Marriage & Cohabitation with general Reputation is a strong presumption in favor of Marriage – Here Cohab[t] is proved at G. but not deduced to the Mans death; It is an antient Transaction so long ago as 1742. clandestine indeed, but such as at that time stood good; the Register was not Evidence & the Parties cd not be themselves examined; on the other hand, there is no Proof that such Marriage did not exist; the management in this Cause is very extraordinary; it is true Parties may assume a Name to cover Turpitude, but after the death of one of the Parties where there is a Child who may be bastardized, a less degree of evidence is sufficient & the Register of the Baptisms is a strong presumption in favor of the Marriage, tho, in other respects the proof is very defective; no Evidence is given to oust this presumption, she has been possessed of the Admon some time, in wch they have acquiesced, upon the whole I am of opinion the marriage is to be presumed, & that the Admon ought not to be revoked, do reject Mrs Morris's Prayer – I think the Bond shd have been introduced...

* No Appealed, but afterwards compromised.....

Commissary of Surry 2 Eliz: E. D.....

Faculty for erecting a Gallery..

Mapletoft & others. v The Vicar. Churchwardens, Pish[rs] of Chertsey.

Grene – Dr Wynne, Bever – Dr Calvert, Burrell – Collins –

Dr Wynne.... 19 May 1764 Citation issued agt the Vicar Ch: Wns & Pish[rs] of Chertsey, to shew Cause why a Faculty shd not be granted to Pembroke. Dundas Mapletoft & Blake, for erecting a Gallery in a Nook on the South side of the pish Church, 14 f: long & 4 f: Broad, 9 feet above the Floor of the Seats underneath, & to confirm & appropriate 9 Pew Seats in such Gallery to them & their families during their Continuance in sd parish, In addition to the Prayer of the sd faculty, there was a Petition signed by Sir Jos[h] Mawbey, the Ch: Wns & 20 of the Inhab[ts] on the Return of the Intimation, an Appearance was given for Wm Whorlett one of the then Ch: Wns, Jn Harris Overseer & 17 Inhab[ts] on whose behalf an Allon was given, to shew cause why the Faculty shd not be granted viz. that the Church was large enough to contain all the pish[rs] who usually resorted to it; that the Seats where the Pet[rs] were seated, were as good, as any in the Church; that the Gallery when erected wd darken the Pulpit & Pews underneath in Winter & heat them in Summer; that the Fabric is old & wd be greatly damaged thereby particularly the S[th] Wall; that at a meeting in Vestry May 3: 1764 held pursuant to Notice, it was agreed by the Majority of those who were present, that no Gallery shd be erected as prayd – that the Petit[rs] are rated very little to Church Rates, Blake not at all; that the Opponents are wealthy pish[rs] & pay 2/3 of the Rates of the pish; on this Plea 11 Witn[s] a Carpenter, & a Surveyor have been exam[d]. In Answer to this, We have given an Allon, pleading that the Church is not large enough, that the Pet[rs] never had any Pews appropriated to themselves & Families, who are obliged to others for their Seats; that the Pews underneath will neither be darkened or heated by the erection of sd Gallery, on y[e] contrary more Light will be thrown into the Church by opening a Window that the Fabric, nor S[th] Wall will be endangered; that at the afd Vestry it was not agreed the Gallery shd not be erected, for that the Vicar, Ch: Wns & several pish[rs] of the greatest property did agree it shd; that they signed no Paper tho, the others did; We have exam[d] Witn[s] Masons & Workmen – Stephen Hunt Mason believes opening a Dormer Window, will not endanger the Roof, will give more light to the Pulpit & desk; the Pews under said Gallery will be a little darkened, but will have sufficient light to read by – the materials of the Wall will not be disturbed by letting in the Woodwork of the Gallery; the Wall will be rather strengthened thereby – Brown Bricklayer says the Wall will not be weakened; is sure the Pulpit, Reading desk & Clerks desk will receive more Light; the Gallery will rather help, than heat the Pews, because it will take off the Sun, wch will

compensate for the Want of Air, that ye Wall of sd Nook may be shaken, but not endangered by erecting the sd Gallery, dont think the Pews underneath will be headed thereby; that if a door is cut thro, the Wall to lead to the Gallery, it will not weaken ye Wall but that it may be repaired; that the Nook is scarce; joins to the Church — Fuller Wright, Surveyor, has inspected where the Gallery is to be built, the Wall will not be shaken, so as to endanger the same; is 2 feet 8 Inches thick — the new Window will afford more superficial feet of Glass, than the Gallery will hide, & give more Light to the Pulpit & Pews under said Gallery than they have at present, such Window may be safely made; the other Witness prove there is not near Room enough to hold all the Inhab^ts that the Petitioners have no Pews appropriated to them, but sit where they can; that the Ct might the better judge a View was prayed; an Experiment was tried by drawing a Curtain before that part of the Window, wch wd be covered by the Gallery — the Arch in the Nook must be taken away, a Door cut thro, the Wall; it will be insisted this is not in the Intimation —

Dr Calvert.... 19 May 1764 Citation with Intimation issued at the Instance of M. D. & B. the Peton was left in the Registry; they say that the Gallery is allotted to them, there will be more room for the other Psh^rs We dont deny this, but say, the Church is suffict to contain all the Psh^rs who usually resort thither; that ye Gallery will darken the Church, particularly certain Seats in the Nook, & we shall prove it will endanger the Fabric; they purpose having a Dormer Window or Skylight in ye Roof, we say Cutting the Beams for that purpose, will endanger & weaken the Roof, that ye Seats underneath will be heated & darkened: It was resolved in Vestry, by the Majority, that no such Gallery shd be erected, there is a regular Entry in ye Vestry Book, signed by 13 Parish^rs in Vestry assembled — That a Gallery was built by the Singers in 1748 but ye Vicar disliking their method of Singing; such Gallery was disused & pulled down in 1755. since wch there has been no Complaint made of want of Room; the Opponents are superior in point of property to the Petitioners; we have examined several Workmen who all agree ye Fabric is very old & supported by Buttresses — We insist the Faculty must be conformable to the Original Prayer, & that no Alterations made since the Citation issued can be regarded

Dr Wynne..... It is I think an established point, that the Gallery wd be a great Benefit to the parish, that more room wd be thereby made, that there is not at present sufficient Room for all the Parishioners & Inhab^ts tho, there is for those who usually come to Church: It is a Rule of Law, if a Church will not contain all who ought to come, it is not large enough — the Ch: Wns are bound to see that all the Parish^rs attend divine Service — I dont say the Ct has a power to compell a Parish to enlarge the Church; but here is a voluntary generous Offer of certain Persons, to do that at their own Expence, without detrimenting the Church; will the Ct deny them this Liberty? It appears from the Opponents Pleas, Interrog: why they oppose the faculty; not from any Inconvenience they will themselves suffer or the Parish, but because they cant bear to see Persons less wealthy, placed in a more honorable Seat — these Rich Men wd have had the same Indulgence if they had applied for it; I hope you will not lose sight of this Motive for their Conduct; It is not necessary there shd be a Consent in Vestry to lead the Intimation; the act of Vestry signed by 13 psh^rs has not the Sanction of the ministers hand, the other has that of the minister & Impropriator; the 13 may have obtained the Act of Vestry by Surprize — the Matter is now in the form of a Cause, it is now at an end, on whose side the Majority is, you will form your own Judgement on the Reasons & Expediency of the Application; there are 2 Objections to the Gallery, that, it will be detriment the Fabric, heat & darken the Pews underneath; how it appears to be a detached Nook, the Fabric therefore cannot possibly be detrimended, it might even be taken down; one of our Witn^s says so far from weakening the Wall as wch the Gallery is to be, the Timbers when let in, will strengthen it — not one of their Witn^s go so far as to say, the Wall will be hurt, but evade, by speaking of the Skylight, wch was never mentioned but by them — a Dormer Window may be necessary or not: our Witn^s say a very small part of the Window will be interrupted, wch can be no Inconvenience — as another will be opened; as to the Inconvenience those who sit underneath will be liable to, the Ct will observe, none of those Persons are examined; the Bottom of the Gallery will be 9 f. from the floor of the Seats below, where then can be the Inconvenience; few common Rooms are higher; the Gallery will shade the Pews; the Opponents have then failed in proving the Points they wd establish; I am instructed, some Alteration will be necessary from the original Prayer, as to with respect to the Arch wch separates the Nook from the Church, the breaking a Door thro, the Wall; to be sure this is discretionary: tho, it is usual to proceed by Intimation, I dont know that Ct is bound to confine its grant to the Contents of that Prayer, if satisfied by view, or otherwise, of the propriety of Alterations; there is Evidence to establish the Safety of the Scheme proposed, it is in evidence several Windows have been opened on the other Sides, if so, why not on the sd Side. The Ch. of Middlesex's Case for erecting a Monument of certain Dimensions in the Church of Walton on Thames, it was opposed, the Ct ordered, the East Window to be enlarged, & the 2 Windows on the North Side, (where the Monument was to be erected) to be substantially stopped up in a workmanlike manner, at her sole Expence; so that there were more & greater Alterations directed, than are now wanted, wch were nothing to original Intimation; but Lady Middlesex undertook to do it; we undertake to make such Windows, that the Fabric shall suffer no damage subject to the farther Direction & Approbation of the Ct

Dr Bever ... This is fighting other People's Battles, without their Consent; there is no Opposition from those who sit under the Gallery, the Minister, or Clerk — tho, there may be many Seats, the Law presumes only one, those of the established Religion, the Church therefore shd be large enough for the whole Parish; many may retract their Errors — the Workmen dont specify what damages can accrue — tho, more may be intended to be done than is expressed in the Intimation, something shd be left to the direction of the Ct — the Opposition is frivolous & peevish; the Obj.^n is, they are not so wealthy, but it is proved they are People of Substance & in good way of Business —

Dr Calvert..... This material wh^ch the Opponents to a faculty are numerous, or few, it is matter of favor not of right; the Motive wch the Dr alledges does not seem founded; he calls it an invidious Opposition; we pleaded the low rate the Petitioners paid, with a view to shew ye principal Burthen wd fall on us; we have a right to a favorable hearing; the Reasons they alledge for their Application, is the smallness of the Church, that it will not contain all the Inhab^ts if proved, this wd be a cogent Reason, if not, then is an End of the Reason; our Witn^s say there is room for those who resort usually to Church, I believe there are none but the Churches of small Villages large enough to contain the whole Body of Psh^rs if they came at once; we know all ought to attend, by Law; & we know many reasons render that Rule impossible to be complied with; must a psh Church be large enough to hold the Crowds who come to a Visitation; wd erecting a Gallery induce Dissenters to come? we have proved there is room enough by the Singers Gallery, being pulled down; wd the Ch: Wns have done that, if they wanted Room? it is attempted to be accounted for oddly; viz. that the Stair Case took up more room, than the Gallery made; it held 25, is that likely? If the Pet^rs are as well accommodated as the other psh^rs not interrupted, or on sufferance from others, but in their own right, they cant complain, the Witn^s contradict each other in saying, they are obliged to different Persons;

The Station of the Pet^rs does not entitle them to better Accomodation than their Neighbours; Soueth the psh Clk, believes the Desk is lighted by the Window behind— they say, they will open a dormer Window, wch is a Confession, it will be necessary; the Gallery will obstruct the air coming to the Pews under it; a Curtain wd only keep out the Sun. not the Air— As to the Fabric, our Workmen say the Wall leans, wants Support, they say it never was weak; why then were the Buttresses built? our Witn^s say it is made of Flint Stones, Brick, wch when dis joined will not cement again; wherever Wall is damaged, the Objection is equal, Wrights Reasons are unlogical, because there are some dormer Windows, therefore there may be many more; when the Window was made, a Buttress was thought necessary— It is worthy consideration, wh^r any Variation can be made from the Petition & Citation, to wch the Sentence, Faculty ought to be conformable, why do we come here, if we know not what we are to oppose; Every Body in the psh is called, because every body pays the Expence; any small thing (as an Accessary to the Principal) might be done, to carry the Faculty into Execution—

Dr Burrell.... I shall beg the Indulgence of a few words, upon a Question which has already undergone so thorough a discussion; The Gentlemen who spoke on the other Side have termed this an uncandid & invidious Opposition, how truly we merit that Appellation, the Evidence before the Ct will sufficiently testify; Perhaps those Appellations were given us, because we had not the Concurrence of the Vicar & Ch: Wrs; Tho that be the reason, I must remind the Drs of the Process, necessarily consequent upon Applications of this nature; viz. an Intimation, or in plain English, an Invitation, to every Person interested, to acquaint the Ct with such Objections, as they think the Petition liable to; if I am founded in this Position, as I trust I am, then, it will not, it cannot be urged again, that the Consent of any Individual is necessary to sanctify such Objections; the lowest, is equally entitled, with the highest Man in the Parish, to offer his Reasons agt the Grant of a Faculty prayd; if they appear well founded, the Ct will pay all possible attention to them; if not, they will be rejected with a becoming Contempt, & perhaps the Party who offers them condemned, with Costs; I do not say, the Opposition of the Rabble, will at first sight, be received with the same favorable Eye, as if it was conducted by Men of Property, because the Education of the latter, is always supposed to be a Check on their Proceedings, to prevent their entering into a vexatious Opposition; where therefore they forfeit the good Opinion of all: they deserve exemplary punishment for their Demerits; the Petitioners have grounded their Application on Want of Room, for the psh^rs in general; of defect of Seat for themselves & families, in particular; that the Ministers Ch: Wrs, & principal Inhab^ts authorize their Prayer; that the Gallery will be productive of no Inconvenience to the Fabric, & the Pa^rs who resort, to the Church, & that they mean to build the Gallery at their own Expence; every part of this Plea, except the last Item, we deny & support that denial by Evidence; the Witnesses tell you, the Church receives

its chief light from a Window in the North, the greatest part of wch must be obscured by the Gallery in question, wch being only 9 f: from the floor of the Pews underneath, must necessarily render them so dark in Winter, & so hot in Summer by preventing the due Circulation of the air, that those who sit therein must be greatly incommoded; that if the Entrance into the Gallery is intended to be on the Inside of the Church, so as the Pews in the North must be removed; if on the outside the Wall wch consists of large Flints & is very old, will be greatly weakened; the Gentlemen answer this, by admitting the fact, & saying they intend to obviate these Objections by opening a Window on the S. side of the North; a dormer Window in the Roof, & a Door way on the outside where the Bone House is; but these Intentions were never communicated to us, till after the Cause was concluded, they were not in the original Prayer, or Intimation, & therefore they cannot avail themselves of this Amendment;

Johns: 178. 176 Kennets par: Antiq. 596

I agree with the Gentlemen, the Authority of appointing, what Wake: 289. 3 Jos: 202 Degge 172 1 Burn: 254. persons shall sit in each Seat, is in the Ordinary, who is to take Order therein; I know also that before the Reformation, no Seats were allowed to distinct Inhab^ts except for some very great Persons; if therefore consistent with these Rules, they can shew themselves entitled, we must acquiesce; but Sir I beg leave to insist they are in no wise the Objects of your Profession; do their Bank demand it? are they rated more, or do they pay near so much, as the Opponents? if not, why are they to be accomodated before their Neighbours? have they shewn themselves in a more inconvenient Situation, or worse accomodated than the rest of the Psh^rs do they not enjoy every advantage in common with them, free from Obligation & ex right of their being parish^rs upon the whole we hope you will think they have failed in the proof of their Plea, & that their Prayer shd be rejected; if not, that at all Events they are entitled to no more, than is contained in the Original Intimation— In Ly Middlesex's Dr Harris's Judge.... case, the Windows wch were enlarged were not in the original Intimation, but an Offer was therein made, to enlarge 4 Windows near the Monument, if the Light was obstructed, an Order of Vestry for application in the manner as the Windows were specified to be filled up

Dr Harris's Judge... The Station of the Person applying for the faculty, is immaterial if he is not regularly seated; my difficulty is with respect to the Intimation; Ly Middlesexes Case don't come up to the Point; nothing was directed to be done there, wch was not consequential; the glazeing Windows was not essential; a Dormer Window in the present case, is not, but taking down the Arch, cutting holes in the Wall, putting up a great Beam is essential; I cant judge of the Inconveniences wch may arise from it; none of the Witn^s speak to this point— I distinguish between what was essential, what not, between the Intimation, & the subsequent faculty—

Dr Wynne..... You are not bound, as where there is the Verdict of a Jury wch has taken a View; an Intimation is very different from a Citation, in a matter affecting the Cause of the Party; Suppose the Ct shd appoint a Surveyor, or if one is app^d by the Parties, direct him to make his Report— Witnesses are often incompetent Judges of the Fact

Judge... I am of Opinion with Dr Wynne, I will grant the Faculty, if they will take it accord^g to their original Intimation, but that they can't do, wanting 3 things more, viz. a Window, a door, & the Beam of the Arch cut; you are under the favor of the Ct; with respect to the Station of the Pet^rs the Room, Light, &

NB. I thought the Sentence rescinding acts, ought to have been appealed from, but Dr Calvert my Leader was of a different Opinion; Greene the Proctor for the Opponent agreed entirely with me, on a Conversation I had with him, after the Appeal was dropped . . .

Heat, I am with you, but as you desire more you must give notice — Grene prayd the Faculty to be decreed, Leave to cut a door Way & build a Stair Case thro, the East Wall of the Nook or Beep of sd Church, to take away the Crown of the Arch, at the Intrance of the Nook, & place a strong Beam of Timber in the room of sd Arch, to open a Dormer Window, if not, to rescind the Conclusion. Collins prayd Grene's petion to be rejected, his Clients to be condemned in Costs; the Judge granted Grene's prayer, by rescinding the Conclusion, & reserved the Consideration of Costs to the end of the Suite ...

Arches. 3. Sess: 2 J. April. 29. 1766.

Nº 62. Ware agt Ware.

Bishop — Dr Harris — Dr Bever — Collins.

Wht a Marriage of a Woman with y Bastard Brother of her Husband is incestuous?

Dr Bever for the Appellatn

This Cause comes by Appeal from the Consistory of Wells at the Complaint of Anne Ware — Sir in May 1722 Geo. Ware & Frances his Wife had Issue a Son named Joseph; 1728 G. W. was convicted of Felony for Sheepstaling, transported to America for 7 Years, from wch it dont appear he returned — May 1732 his Wife Frances was delivered of a Son Thoˢ the Appellate, who was christened by the name of Thoˢ a Base Son of Frances Ware — 1747. Joseph Ware was married to Anne Dobell they lived together till June or July 1755, when Joseph died, Novʳ 1755 the Banns were published between Thoˢ y illegitimate Brother & Anne the Widow, they were married in March 1756 & cohabited together till 1764. when Citation issued from the Consistory of Wells agt T. W. to shew cause, why y Marriage shd not be dechulled on account of Incest; a Libel was given & admitted for Anne, stating these facts, that the Marriage

99 Canon ..... was prohibited by the Laws of God, the 99th Canon 1603 &

Table 1563 ..... the Table of forbidden degrees, or Admonition set forth 1563. "Item

See 2 Burn. fo. 7 & 9. 83. "That by the Laws, Consanguinity & Affinity (letting or dissolving marriage) is contracted as well by unlawfull Company of many woman, as by lawfull Marriage". On Anne's Allon 6 Witnesses were examined, who proved the aforesaid facts — June 1764 an Allon was admitted, on behalf of Thoˢ pleading his own Illegitimacy, & that he was no Object of the Canon, & therefore the Marriage ought not to be set abide; The Judge below

26 March. 1765. dismissed Thoˢ from the Cause, whence Anne has appealed.

Dr Harris .... The facts are in general agreed on between us, except as to the Birth of Thoˢ who they say was illegitimate, but have brought no Witnˢ to prove it, yet, we hope the Ct will think him legitimate, for tho, the Father might be transported, as the Marriage continued, the presumption is, he returned before the Time of his Sentence was compleated — The Proctor gave an Affirmative Issue, & only denied the point of Law.

Dr Bever ..... It is an established Rule, where the father is extra quatuor maria, during the time the Issue was begotten & born, it is to be presumed illegitimate — tho, the present Case is not instituted in a Criminal way, yet being of a criminal nature it ought to be tied down to strict Forms — Dr H alledged the Man took advantage of the Woman's Ignorance, but it is the Reverse, she the Temptations in his Way; the Ct will not suffer her to take advantage of her own turpitude & Misconduct, she is no Object worthy of favor; It is a Question, whˢ such a Relation under the particular Circumstances of this Case is to be deemed incestuous; a Bastard is nullius filius. the Case of Hames & Jeffries reported by Ld Comyns as follows. "as to a Bastard being the Son of no one. See 1 Inst: 123. 157. 6 Co. 65. Ald: 3. 9b-1 Bendl. 102. The Bp of Worcester says the Words in Leviticus are, "You shall not approach to your next of kin". i.e. "You shall not approach to the Remainder of

Comyns. fol. 2. Ld Raym: 68 Comberbach 356 5 Mod: 168 & seq:

your flesh; the Latin says ad proximam Sanguinis sui, by wch it appears, the Intent of the prohibition was, to prohibit an approach to any of his Blood; so the Expositors extend this Precept to Persons who proceed as well from an illegitimate as from a lawfull Embrace; Ld C. J. held, all the Ct seemed to think, it wd be very mischievous, if a Bastard shd not be accounted within 32 H 8. for by that Rule a Man might marry his own Daur, where it is said a Bastard is the Son of no one, this is in Civil respects, where there is an Inheritance

2 Inst: 683

7 Wm 3. Hil. S... Selden de jure Hebr. Lib. 2. c. 10. fol. 191 Ruffell. L. C. 1. par. 32. Upper. Lib. A. C. 19. p. 502

Ld Raym: 68 On prohibn to stay a Suite to the Ct of Worcester, Doctors said the Jews made no difference between Bastards, others, & seemed to the Ct no prohibition shd be granted, for tho Bastards are deprived of Privileges, by particular Laws, the same Reason prohibits them from marrying, as others. adjornatur

M. Cumb: says y Prohibn was denyd See 2 Lev: 254. 255.

Cumb: 386. The Child of a Concubine amongst the Hebrews, was not illegitimate; Bastards are by particular Constitutions & Laws deprived of the privilege of Children; yet the reason of the prohibn seems yet to remain; if there be any morality in the Law, tis as morally unlawfull to marry a Bastard as legitimate Issue: It must be Sanguis naturalis, not Legalis, & Civilis, else a Woman might marry her Bastard Son

Hil. 7 W .... 5 Mod. fo. 168, Seqs. For the Prohibn it was said, By 18 Canon of the Apostles, a man who married his Sisters Daur, Clericus non potest esse, wch is all the punishment, the Church in those days cd inflict, on the person so married; & con: q Levitical Law expressly prohibits, ad proximum sanguinis sui accedere, & when this Law was established, there was no difference between a Child born in Wedlock & lawfull Marriage amongst the Israelites, therefore a Bastard was proximus Sanguinis, amongst these people, whose were the best Expositors of the Law to whom it was first promulged; & all their Commentators on that Law, allow, the unlawfull Issue, to be incapable of Inheritance, tho unlawfull in Nature; the Levitical Law was grounded on a natural as well as politic reason, to enlarge their Kindred & unite their families, for there are natural as well as legal Kindred

See Gibson A 13 2 Burn. 12.

Drˢ Harris .... The Qu: were Joseph & Thoˢ Ware by the same Mother? Were they married to the same Person? if they were, it is immaterial wch we have made out our whole Allon; for it then becomes a Question of Law, wchˢ the Marriage with Joseph, creates such an Affinity, as bars the Marriage with Thomas? Affinity holds the Place of Consanguinity, nobody will deny that; but does this take Place with Bastards? 32 H 8. c. 7.

2 Burn. fo. 9. 83. Abp Parker's Tables set forth 1563 "That by the Laws, Consanguinity & Affinity (letting & dissolving Marriage) is contracted as well by unlawfull Company of Man & Woman, as by lawfull Marriage. If it holds between Brother & Sister, it holds between 2 Brothers, the same bad Consequences arise from a marriage in both Cases; Drˢ B. dont see the word adjornatur in Comyns, the natural Inference then is that a Prohibition was not granted — If then there is a Consanguinity between Bastards, Affinity must be grounded on it, it follows of course, as the Shadow the Substance. Lancelot Instit: Jur: Can: Lib: 2. fo: 118 Nec inherent quod ad Consanguinitatem, vel Affinitatem contrahendam, ex justis nuptiis aliqui, an ex damnato coitu inviem copulati fuerint.

Id: Manlin: 1866

Covarruvias de matrimonio. pt 2. c. 8. §. 7. nu. 3 .... Voet. Lib. 23. Tit. 2. fol. 33. §. 35. de ritu nuptiarum. Carium non tantum ex matrimonio, sed et ex delicto cum meretrice congressu, seu fornicatione, eam nasci affinitatem, quæ ex Jure Canonici præcepto nuptiis impedimento est. Dig: Lib. 23. Tit. 2. L. 14. Si quis filium adoptaverit uxorem ejusdem, quæ nurus loco est, ne quidem post emancipationem filij ducere potest, quoniam aliquando, nurus ei fuit. ib. §. 2. Nec volgo quæsitam filiam pater naturalis potest uxorem ducere: quoniam in contrahendis matrimonijs, naturale Jus & Pudor inspiciendus est. Idem quod in servilibus cognationibus constitutum est, etiam in servilibus affinitatibus servandum est. Lib. 54 nihil interest ex justis nuptijs cognatio descendat an ex concubinatu

Sed Brouwer de jure con: Rubiorum. Lib. 2. Cap. 6. Quia in prohibendis. p. 209 Brouwer. p. 446 affinitas vera

Vinnij Comment. Instit: Lib. 3. T. 10. p. 69. — Decret: Gregor. L. 4. T. 13. — C. 10 Caus: 35 qu: 2. 3. — C. 2. X De consang. & affin:

nam, volgo quasi eam sororem quis vitatur uxorem ducere. L. 36 Etiamsi concubinam quis habuerit sororis filiam licet libertinam, Incestum committitur...

Dr Bever..... The Case of Haines & Jeffries dont appear carried into Execution, therefore is not applicable, the Reports of that Case differ so much from each other, that no Stress can be laid on them — The Appellt has been married 8 Yrs, had 2 Children is not entitled to any Favor from the Ct

Dr Hay Judge..... If Thomas had been the lawfull Brother of Joseph, the marriage wd certainly have been incestuous; but Thos is said to be only a Bastard Brother; they are however Uterine Brothers by the same Mother, therefore there is clearly a Consanguinity between them — Thos & Anne have lived together 8 Years, wch they have Children non constat, wch is very material — By the Jewish Laws according to Selden de Jure nat: & Gent: juxta disciplinam Ebraeorum. Lib. 5 C. 10. fo. 544. Quod ad fratrem & sororem attinet, eandem eiumdem rationem fratris ex Patre, seu Adulterio alterutro parente susceptis, & ejus qui Thoro natus est legitimo; uti etiam Sororis. diversum non esse, sive ex nuptiis, sive ex Stupro prognata fuerint modo eo naturalis Sanguinis genere, eum de cujus nuptiis quaeritur contingant — But the Jewish Laws are out of the Case, the Laws of the Land are the only Rule where Temporal Inheritance comes in question — Haines & Jeffries dont come up to the present Case, it is said the Judges inclined not to grant a prohibition there; I must form my Judgement from the Reason of the thing; a marriage of this Nature appears to me as much contra bonos mores, contra pudorem as if the Party was legitimate; there is a natural Relationship, Consanguinity, Naturale Jus & Pudor in contrahendis matrimoniis inspiciendum est, says the Civil Law; 32 H 8 prohibits marriages to the 3d Degree; the Papal Law goes farther, but then it gives Dispensations, within the prohibited Degrees — It wd follow, if Bastards were not to be considered, as comprized within the Spirit & Meaning of the Prohibition, that Fathers & Mothers might marry their own natural Children: if the Position, that Affinity goes hand in hand with Consanguinity in the Prohibition, I am inclined to think it void in the present Case, but the Matter is too weighty to determine hastily; Jown, the Judge below appears to have done wrong — if there is any Instance, that the Jewish or Civil Law has been received in this Country, I shall abide by it, otherwise the Law of the Land is the Rule — a Marriage may be called in question after the Death of either of the Parties, with respect to the Grant of an Admon, on a preference; I desire the Gentlemen, who are not concerned, will assist me with their Advice next Ct —

takes Plau.....

4th Sess: Archs
Friday May 21
Present
Dr Marriot Mgs Advs:
Dr Duarry
Dr Edwards
Dr Harris
Dr Macham
Dr Calvert
Dr Wynne
Dr Simpson
Dr Bever
Dr Burrell
Dr Compton

The Advocates being asked, Seriatim, were unanimously of Opinion to pronounce the Marriage void by reason of Incest — Dr Harris said he had looked into Vaughan where the Case of Harrison v Burwell was reported, on a Qu: wh: a man cd marry his great Aunt, (in 28 H 8 the Words carnally known are added) in comparing the Acts, he says, if a man carnally know a Woman, without marrying her, he is prohibited marrying her daur, all Persons in Consanguinity & Affinity with her — This Statute is omitted by Hawkins & Cay, as Repealed, but Vaughan says it is in force, & it is supposed to be virtually revived amongst many others by 1 Eliz: See Parkers Tables 1563. & Wheatley on the Common Prayer —

Dr Wynne quoted many Passages from the Digest & Selden wch I noted before

Dr Burrell cited a Cause of Office agt Tho: Hyatt. oth: Hiett for Incest, in had: married & cohabited with 2 Sisters, Mary & Anne Attwood, brought in the Consistory of Worcester in 1723. He had sev: Children by Both. Dr Byrche the then Chancellor gave Sentence agt him Feb: 18. 1724, whose Sentence the Dean of the Arches confirmed on Appeal; from him it went to the Delegates, who

The solemnization of the marriage with the first Sister many was not clearly proved, but the Cohabiting with her for several years was & Elliott owned it.

Cuffend: 13. 6. Ch. 1. 832. fo. 470 — The Roman Laws paid so great a Reverence, to the bare name of Father that they allowed no man to marry his adopted daughter, tho all the Right of Adoption had been formally taken off & reversed — L. 23. ff. 2. L. 55 Dig: de ritu nuptiarum —

Sad 472. 834... The Jews in their prohibn of marriage between Brothers & Sisters, thought it made no difference, wh: the Sister in such a case, came by Adultery, or by a lawfull Bed; nay, if she was born of a Mother in Law in a dishonest Way, the Rule held agt her in this Respect — Qu: if there is sufficient Proof before the Ct of the Illegitimacy of Thomas Ware?

Dr Hay Judge.. By the Ecclesiastical Law, the Carnal Knowledge creates the Incestuous Turpitude; the Common Law Doctrine relates only to Civil Rights — The Proof of Bastardy is not very clear; there is no proper Evidence of the Fathers Transportation before the Ct: if it is necessary to shew the Record, that not being done, the Party must be presumed legitimate, as the marriage clearly incestuous — In the Civil Law there were 3 sorts of Brothers, Frater Consanguineus, Germanus, & Uterinus; all different in regard to Civil Purposes, all had different Rights of Succession, yet they were considered in the same Light, with respect to marriage — By the Laws of England the half Blood cant succeed to an Inheritance, yet a marriage of the half Blood wd be incestuous; the Ecclesiastical Law regards the Publick Honesty — the Puzzle in the Books seems to have arisen from the different Views of considering Relationship; a marriage de Jure, is the only Point determinable here; but the Consequence of such Determination, is, the temporal Rights are affected thereby, wch makes the Ct so mild — The Rule to adjust marriage by, is pointed out by 32 H 8, it is there finally settled, that none are to be controverted, except those, wch are within the Levitical Degrees — if 28 H 8. is in force as Dr Harris contends, there is an End of the Question; If the Illegitimacy is proved; I am of Opinion the Marriage is incestuous, & as such, pronounce it to be void...

touching the Validity of a Codicil

Prerogative 3d Sep: P. T..... No 63 Griffin v Barwell & Hindley

H Stevens Junr — Dr Wynne & Bever — Dr Marriot & Calvert — Greene —

Dr Wynne..... Dec: 30. 1758. Mr Barwell Smith made his Will, & therein bequeathed 2000£ to Eleanor Griffin, & constituted his Couzin Rd Barwell, Frederick Hindley Esq: Exors & 3d Rd B. residuary Legatee. May 22. 1760 The Testator executed a Codicil, wherein, after reciting his said Will, & that he devised certain Lands at Esher in Surry to Major Nath: Bateman & his Heirs, & also his Shaving Plate, Table & Razors, & also the said Major B's death since making sd Will; he by this Codicil revokes sd devise, & gives sd Lands &c. to Rd Barwell & his Heirs. Sep: 14. 1762. The Testator made another Codicil (now in dispute) & after reciting, he had made his Will in July 1761 & given the Residue to Richd Barwell, he by sd Codicil gives 1000£ to Eleanor Griffin over & above what is already bequeathed her; & gives her Niece Ann Howard 100£ & his Godson Thos Smith Barwell, Son of his Cozen Wm Barwell 1000£ Nov: 14. 1762. The Testator died, a Widower, without Children, leaving no nearer Relations, than Cozens German, in wch Degree, Rd & Wm Barwell, being own Brothers, are both related, & are two of his next of Kin. Nov: 15. Rd B. & Fr: H. proved the Will & first Codicil only, taking no notice of the 2d Codi: whereupon 3 Sep. M. T. Collins exhibited a Special Proxy for P. G. & brought in sd 2d Codi: & the same propounded, & prayd a Citation agt A B. & F. H. & Exors to accept Probate of sd Codicil, wch was decreed — Bye day Collins Atton was

admitted, pleading the making & execution of sd Cod: & that the Testor was God father to Thos Smith Barwell, a Legatee therein, that he had declared to divers of his Friends, between the Time he stood Godfather & made sd Codicil, he wd do something for his sd Godson, & leave him at least £1000 & pleading that after making y Cod: he declared, he had remembered his sd Godson & by a Cod: had left him £1000. particularly the day after executing sd Cod: he said in Conversation to Mr Mackenzie (a Subscribing Witness thereto) about y Contents thereof, he had left £1000 therein to his Godson T.S.B. & £1000 more to Mrs Griffin, than he had done by his Will. On this Allon 5 Witnesses have been examined

Bye Day Hil: T. 1764 Skelton for R.B. & K. gave an Allon contradicting the afd Assertions - pleaded the Testator died 14 Nov: 1762. & for 12 Months before & to his Death, was in a bad State of Health & incapable of taking care of his Person or Affairs; that in July 1762 his disorder increased greatly, from wch time he was incapable of transacting Business; & pleading a total Incapacity, at, before, & after y Execution of the Codicil propounded & On this allon 6 Witn: were examined

and y Deed was under the undue Influence of L.G. . . . . .

18 Aug: 1764 a Contradictory Allon to that offered by Skelton was given for L.G. pleading Sanity & Capacity in the Deed, before, after & y Execution of sd Codicil, & several Instances thereof: On this Plea 6 Witn: have been examined - the Witnesses differ materially from each other -

Depons as stated by Dr Wynne

Wm Barwell. visiting Deed about the latter end of Dec. . . . Dept said pray Sir what have you done with the Codicil you desired me to write out last Dec. have you executed it. Deed replied, I have not: Dept said why? my Children are nearest in Blood, after my Brothers, Deed replyd Mrs Browns Children, meaning the Daur. of Dept sd Brother R.B. as the same: Dept said, if you think so, I have done: Deed said no! I always intended to give my Godson (i.e. Depon: Son) £1000. draw out a Paper for that purpose & I will execute it: thereupon, he immediately wrote a Cod: giving £1000 to his Son, read it over to Deed, who also read it over, signed it - Mrs L.G. who lived with Deed was present at y latter part of y Conversation, & said, you sometime ago, bid me get a Paper drawn out, of y same Import, whereby you were pleased to add £1000 to y Legacy you had before left me; She then went out of the Room & returned with a Paper, purporting a Codicil with a Legacy of £1000 to his Son & to him who, thro, mistake was called Wm, but which Cod: was not executed. Deed sat down to Dinner with Mrs L.G. & Miss Anne Howard, the £100 Legacy to Miss R.K. is not inserted in either of sd Codicils

NB There is a variation amongst the Witnesses: Mr Mckenzie says, the Deed told him, he had sent for him to witness the Codicil he had mentioned to him before: then he took the Paper into his hands, & said, See, I sign it as my Deed, & then immediately set his hand to it in the presence of Pearson & . . . . . after signing it, he gave it to Govr Barwell & asked if whether that was sufficient -

In Edmonds speaking of the same fact, says, about 6 Months ago, on his going into the Room, there was a Paper lyeing on y Table, wch his master had signed & bad him sign; that Deed said to Wm B. I have left your Son £1000. Dept dont remember he saw Deed sign; only that the names were signed, when he attested the Paper

Wm Pearson. The Paper was lying on the Table, that Wm Barwell bid him sign it; he did not see Deed, seal, publish, or declare the Paper as his last Will; that Deed did not appear to him capable on Sept 14. of making a Will, or to know at either time what he said or did

Mr Mckenzie Some short time after y Execution, Deed said, you saw what I have done for my Godson & Mrs Griffin, Dept replied no: I did not read the Codicil. Deed said, he had given £1000 to his Godsone Wm L. that she may never want. 17 Sept: Wm Barwell went to visit Deed, who said, do you know what I have done for your Son? On our 2d contradictory allon, we prove a Conversation on Business with Sir Wm Stephenson, Ld Mayor in y presence of Mrs Susannah Bateman: Sir Wm says he went to his House in Red Lyon Square

about a Note given by Mrs Batemans Husband, Dept asked him to forgive the Note, Deed said no! She had trifled with him, & he had given Wm Barwell orders to sue her; Mrs Bateman is examined, who proves Deed writing an Order; & another Person who did Business for the Deed proves his signing a Debenture on the 10th of October, & that the Respondt at Deeds request guided his hand in making only the 2 last Letters of his Surname

Dr Marriott . . . & we prove the Deeds Incapacity previous, at the time of, & subsequent to this Transaction - Mr Glover the Apothecary attended Deed 2 Months before his death - Mr Arnold the Surgeon was in Deeds house 2 days, & within a few hours of the time when he executed the Paper; Mrs Brown, a Lady, who lives in the Neighbourhood, Davis the Testators Bachman who lived with him 14 Years & sat up with Deed every night, particularly on the 13th Sept: the Day the 2d Codicil was executed; Peter Burnell his Gardiner, the great Assiduity & Attention of Mrs L. the Omission in not exhibiting the sd Codicil mentioned as drawn the Year before, or that brought in by Mr Griffin wch she referd to when she said Deed had promised her £1000 - the Exchequer Debenture is not exhibited - the Codicil now propounded was in Godsons Custody. the Deed &c. superannuated, Childish, always more or less confused when the Evidence is read, we hope these will appear such Contradictions in their Witnesses as to induce the Ct to pronounce agt the Validity of the 2d Codicil

Wm Barwell deposes that about Sept 14. a Noon 1762. he went to see Deed & asked him how he did? Deed replyd very bad; that Mr Langley & another Surgeon had told him he had a dropsy in his Stomach - Deed of his own accord directed Dept to write the Codicil pleaded in this Cause, that immediately after Dinner he wrote it, altering only his Sons Name; that Mr Mckenzie who had been fetched by Miss Howard, came with her into the Room - Wm Pearson read the Codicil twice over audibly & distinctly to the Deed who approved thereof - In Edmonds being there, came in; Deed in the presence of Deponent: El: Griffin, Miss Howard, Mr Mckenzie, Wm Pearson & In Edmonds, acknowledged to be his Act & Deed, had before signed the same in the presence of Dept L.G. & A.K. but cant say wch M. P. & E. were then present, but that they did subscribe their Names severally to the Codicil, in the presence & at y request of the Deed & in y presence of each other - that at & during the whole of the Transaction Deed was capable, but after Dinner when the Deed had drank 4 or 5 Glasses of Wine, he appeared more confused, but determined to go thro, with what he had begun, Dept knows the Codicil to be the same by his hand writing - 168 Int: Deed was sometimes confused in his Head, but was not for several Months before his Death of insane Mind, knows Deed was not soon & 14th Sept nor has ever declared as much - to 9 Int. Deed gave him Directions for 3 Cods to his Will, all by word of Mouth, except the Paper given by L.G. the Instructions for the first was Red Lyon Square about nobody was present. " God have you make a Codicil to my Will & let me see how you wd dispose of my Estate, Pearson to 11 & 12 Int. Dept drew the 2 Codicils between 4 & 5 in the Afternoon. dont remember Deed said or declared any thing farther, before the Execution, cant say who was present. L.G. was not Respts desired her to take the Codicil into her Custody for Safety, but she refused, he does not know why - it was read over by Mr Mckenzie -

Wm Pearson Servant to the Deed. deposes to the Deeds great regard for Mr Rd Barwell - Deed on July y 8th. cd not be persuaded but was in his own house - wd say he had a great many little black Devils about him - from July 9. to his Death, was quite superannuated as to his Body & Mind - was a good deal under the Influence of L.G who lived with him, & Deed in a great measure, make him do what she liked - cant say wh: Deed signed the Codicil, or wh: Wm B. guided his hand, nor wh: Deed had any Wine given him, deed did not in Depts hearing publish or declare the Paper, as a Codicil to his last Will, nor did seem to have the least knowledge; that the Paper then laid before him was a Codicil & Deed appeard quite

incapable the whole Day of Sepr 14th - Dep: told the Servants his master had signed a Paper, but knew not what he did; dep: did not know what Paper Deed signed, as it was not read - Deed made no Reply when WB said, "you deliver this as your Act & Deed - Dep: declared he wd not have attested the paper, if he had thought it was a Codicil, because the Deed was not capable

Arnold Langley. Surgeon. Deeds disorder encreased from July to his death - E.G. was of a violent turbulent disposition, so that Deed for a year before his death, was afraid of acting contrary to her Inclination (to 11 Jnt) was at Deeds house 2 days before his Death, when he was carried & sat in his Chair at Table, called for what he wanted

examined on Stern's 2d allon.....

Francis Bridges his acquaintainee with Deed, began a few Days after the date of the Codicil, wch he knows because Mr Mc Kenzie informed him, the Deed had made such Codc that he attested it

Mr Mckenzie Deed said he had left too much to Rd Barwell E.G. never attempted to keep Deed in Custody: hey every body used to see him - Deed told Dep: he was obliged to him for mentioning E.G. to him, for she had been a faithfull Servant & had taken great Care of him ever since his Wife died -

Sir Wm Stephenson sent to know how Deed did & wished he wd allow him to wait upon him, Deed sent word, he was very poorly, but as it was the ..... he shd be glad to see him when Sir Wm talked to him about releasing Jus: Bateman's Debt of 200£. Deed replyd he wd not bate a Shilling, that she had trifled with him; as it was not paid he had ordred his Cozen R.B. to send her word, if it was not paid, he wd sue her for it: S.Wm as he cd not prevail to have her Note delivered up requested Deed to give an Order, for the Interest of 200£ standing in their names as Trustees for Jus: Bateman, in Old S.Sea Anns wch he read to y.e Deed at his request, who well understood it, by reason, he set his name thereto in Deponents Presence -

Susanna Bateman. her Husband Nath.l Bateman had borrowd 200£ of Deed; that Sir Wm S. either told Deed he ought, or desired him to deliver up the Note, or to sign a Note for the Interest Deed answerd, that I will with all my heart, for I know it is what is right.

Francis Williams. one of the Money Porters to the Exchequer. For the last 12 Months of his Life, Deed always did his duty, as one of the Deputy Tellers - used to sign all Bills for Money rec.d in the said Office; save that he grew so weak in Body that he cd not go up into the Rooms, but signed the Bills at the Exchequer Coffee house: Dep: remembers, one day, soon after Oct.r 16. 1762. he carried a Debenture to Deed in his Coach in Bridges Street, who took a Pen from him, signed it as he used to do, knowing what he did - The Money was rec.d on the same Debenture & the Record remains in the Office

Ralph Challin. Carpenter. had a slight knowledge of Deed for about 27 Years; he gave directions about repairing some Houses Deed had in Esher the latter end of Oct.r 1762. Deed gave him Orders to repair the Palsing about his Park at Esher, again talked about repairing sd Houses, but then told Dep: as the Tenants did not pay the Rent well, he thought he shd not live long to enjoy it, he wd not therefore lay out much Money on that Estate

Then the Will & Codicil were read as follow

Will 30 Sep.r 1758

E. Griffin 2000£ 1 Month after my death - All the Freehold Estate at Esher to my Nephew Major Bateman, recovered of Ld Hal: & bought of the D. of Newcastle £ 40£ to my Servant Cath: Poole - a years Wages to every Servant who has lived a year with me - my Watch & 10£ to Hindley - E.G. the Plate, Linnen, China, &c, Coach horses &c except what belongs to the Effects of my Brother Jn S..... House in Orange Str: Red Lyon Square - Rd Barwell all the Residue Wm Price Jn Bambridge

Codicil 22 May. 1761...

all the Bequest to Major Nath.l Bateman, he being dead since the Will, I give the whole to Rd Barwell -

Dr Wynne..

The Exors have refused to propound the Codicil of the 14th of Sep.br 1762 it appears by the Will Mrs E.G. is a Legatee, it confirms the Assignment of a House in Town before made to her - these Bequests shew she was much in y.e Deed's good Graces, the Grounds whereof he declares, is the Care she took of him during a great number of years; it is not unnatural to suppose, as his Infirmities increased, her attention shd increase his Regard, especially when he had no near Relations with him, as the Will & Codicil testify - he gives the Lands he had purchased to Rd Barwell. Wm S. was equally related to him, the presumption is that he had a regard for WS. to whom he had left nothing in his Will, nay it is in Evidence Deed had a Regard for & frequently visited him: this in Evidence, Deed declared he had done too much for Rd B. & was displeased at the Eagerness R.B. expressd to get possession. He gives in the 2d Codicil 1000£ to E.G. & 1000£ to J.S.B. So Sensible does R.B. seem of the Injury done him in this Codicil, that he has given a Plea, stating Deed's regard for him, that he entrusted him with the Care of all his Affairs, a year before his death was quite superannuated & under the Influence of a Boisterous old Woman, that the Codicil was imposed upon him - This is the Picture R.B. desires to exhibit to the Public, of his Relation, Friend, & Benefactor; It is no wonder, a Person so ungratefull to his Friend, shd misrepresent every Act of Assiduity used by his own Brother, & the small portions left to him & E.G. as the Effect of Imposition - The principal Evidence in Testamentary Cases, is Instructions, Declarations corresponding & conformable thereto; it is of such weight as to supply every defect where it is fully established; where Witnesses differ as to the signing & presence, it is presumed they dont remember; but when there is Evidence of Instructions, it casts that Presumption; when Witnesses give defective accounts of Capacity; as if the Party was asleep or inattentive, the Presumption wd then be, that he was incapable, but this vanishes on his declaring the Substance of the Disposition - Supposing an Execution of a Will & the Witt come, depose agt the Capacity of the Deed in recenti facto, declared fully, that was his last Will, it wd operate agt the Depons of wch Mr Mckenzie says Dec.d told him, he cd not do what he was bound by Will he wd do it by Codicil, he wd do something for WS. & his family: perhaps he thought, making a new Will of Lands, might take up time, he meant to benefit WS & to give his Godson J.S.B. 1000£ - The Objection to Mr WS. will vanish from the frankness of his Conduct, conscious he had done nothing wrong; it is plain he knew the Contents of the Will, whereby R.B. was benefitted. WS. says Deed bid him make a Codicil just after his Sons Birth & put his Son in the Entail; that it slept till Sep.br following when Deed talked of it again. WS. asked what had been done; & how he wd dispose of his Estate? Deed cut him short, with some warmth, bid him write a Codicil, therein give his Son J.S.B. 1000£, he wd sign it - If the Ct believes this Conversation, it will be sufficient proof of the Testators Sanity - there is no doubt

In Law, if a man says, I will do something for you, writ it as you will, if it is afterwards read over to, approved & signed by the Deed, it is good - The Story is told in such a manner, as to carry a great appearance of Probability: wh: Mr Mckenzie read the Will 3 Times to Deed as Wms says, or not at all, as he himself depones, is of no consequence with respect to the validity of the Will or Codicil; it only relates to the Credibility of the Witnesses - M. says the Will was signd by Deed in the presence of all the Witns: the 2 other Wm do not contradict him, tho, they dont confirm him; Reynolds cant recollect wh: he saw it signed - It is not necessary in a Will of Lands that the Wrs shd be all present at the signing

Variations of Wrs when no other Circumstances arise do not amount to much, It may arise from their being Persons not used to Business, inaccurate, consequently are confused & not capable of giving so good an Account - Of Deed said to W.B. when Ennold was in the Room, "There, I have given your Son 1800. that is a Publication - It is plain, Deed knew it wd operate as a Testamentary Disposition; the Chief Objection will arise on Pearson's Evidence who is one of the Subscribing Witnesses, he says the Deed was manifestly incapable when he signed the Will; It may be reasonably asked Pearson, if you thought the Deed incapable why did you attest it, if not, why do you retract; a Witness who contradicts his own act & Deed can never be credited - But Davis the Coachman contradicts him, depones that on going into the Kitchen Sepr 12. he heard Pearson say, he had signed something of a Codicil for Mr Wms Child But this is not a more direct Contradiction to Pearson, than he is guilty of in his own Depon, where he Retracts what he has said on his Examon in chief; viz. to 3 Int: he cant take upon himself to say wh: Deed was, or was not capable - after attempting to destroy his own act, he destroys his Depon by his Answer to an Interrog: they have attempted likewise to destroy Ennolds Evidence, by a Witness who says Ennold declared he wished he had had nothing to do with it - but Ennold swears in answer to an Interrog: he never declared Deed incapable or wished to do so - It may be observed perhaps, that the Date of the Will is miscited in the Codicil, it will receive the same Answer - It may arise from Imposition; but it may also arise from want of Memory of Dates, when there is no defect of Understanding; Men of the greatest abilities are liable to these Inconveniences; it wd be very hard to say a man cant make a Codicil, because he cant remember the Date of a Will - Mr M. says the Deed declared the Contents to him, & therefore he himself did not read the Codicil over: 2du: arises on the allon, 1 Wh: they have established the Insanity of Deed at the Time specifyd? 2. Is there such an Incapacity as to found a legal Presumption that he cd not make the Codicil in question? Langleys Evidence is very remarkable; he was with Deed Sunday & Monday previous to the Execution, (on Tuesday 14 Sepr) yet dont relate a single Circumstance of what he observed relative to the Deed, on either of those Days; the first fact he speaks to is on the 14th Sepr when he, Glover & RB saw Deed at the same time, their Depons very irreconcileable to each other - Glover says he went about 10 or 11 in y morning of Sepr 12. to visit Deed, where he met RB & Langley, they enquired slightly about Deeds health knowing he was incapable; Deed would answer a Question or two rationally & then rambled, that Deed knew Depr at first & the Business he came about, for one rational Answer wd make several irrational ones; L says he gave no rational answer, that he cd not make Deed understand the Meaning

Love & Lewis
Foster Wright

Import of any Question; if Mr Glover is to be believed Deed was very capable of such a Codicil, very little more being required than to know one Person from another, however it clearly follows that Glovers Evidence is not sufficient an Incapacity - For Wm St: & Wms B. are very strong, the Deed wd not give away his own Money - he distinguished between that & giving an Order for what he held only as a Trustee - they have failed in one Circumstance they have undertaken to prove, viz. the Custody of E.G. that she was turbulent, & cd make the Deed do what she pleased, except when he was set upon doing anything, then he wd contradict her; if he had a mind to see RB. or Hindley & she was averse, he wd notwithstanding, do as he thought proper - They are so taken up with proving the affection for RB. they lose sight of every thing else; thus his Capacity, free Agency is proved; It is clearly in Evidence he intended to do what he has now done; he declared so, & what he had done, repeatedly, upon the whole the Evidence clearly preponderates in favor of this Transaction

Dr Brown... We are sensible there are great Variations between the Witnesses on both Sides, but we hope when the Evidence is minutely weighed & compared, ours will appear so consistent, as to entitle us to a Decree in our favor. Mr Wm B. is a Person of good Character, tho, I expect to hear his Evidence excepted agt, as it is in favor of his Son - there can be no Doubt but that some Testamentary Paper was executed on the 14th of Sepr the only difficulty is

The Kings Advocate seemed to lay some Stress on the great number of Papers produced on the occasion.... but these are very easily accounted for - Mr Wm B. is a good Witness in Law - Mckenzie can have no Bias, he is unexceptionable, & when added to Wm B. is sufficient, to decide the Question; he was sent for by Deed, & desired to attest the Codr merely as being the next Door Neighbour. what Ennolds & Pearson say about the manner of signing, wh: all the Parties were present is immaterial, as they have Subscribed to the Execution; notwithstanding the Story of the black Devils, he, was partially capable at least - Different Persons will relate the same facts in different manners -

Dr Marriott... Mr Wm B. drew the Codicil to benefit his own Son - Barwell Smith says he did not see the Deed for 6 Weeks after he made the Codicil, of wch he was in possession, & not come to the Deed lest he shd revoke it - Mckenzie says no body guided Deed's hand, in this he cant be credited, because Mr B. acknowledges he guided it - from the time of the Transaction to the Death of Deed was 8 Weeks - The Paper cannot receive force from subsequent Sanity, because he cd not review or revoke the Act, they shd shew a Continuity of Understanding; the saying Let us see what sort of Will you will make? shews the Importunity of Mr B. or the Nonsensicalness of the Deed; none of the Servants are produced, they were afraid to examine them, y Presumption is for us - Davies sat up that very Night; Physicians are only there now & then, a few minutes will make a difference - The Deed takes Mr Langley for Mr Barnes: his Son, who transacted all his Business - The Exchequer Porker & the others prove only a Mechanical Signature, how does it appear he signd any thing, where is the Paper? Does it appear Deed had Houses to repair? Ideas fix themselves in Persons minds when sane & sober, wch they will always talk of when insane or drunk; he was a very rich absurd old man - Persons who are to be benefitted shd employ public Persons, out of the House, Strangers, in drawing up Papers of this nature by wch all Presumption of Fraud wd be ousted.

Dr Calvert... The 2du: arises on the Paper propounded by Mrs E.G. benefitted already under a Will not contested, 2000£ a House, Plate &c. this Circumstance is used by the Gentn on the other Side, to shew the Deeds regard for Mrs E.G. & his Intention to benefit her; but does it follow that because in 1758 he left her the afd Sum &c, that he wd give her more? consider the Character she lived in, he benefitted her sufficiently for a Housekeeper, Nurse - Internal Evidence sometimes operates, where the Contents will apply to the Evidence of the Witnesses; but merely saying it is an officious Will, very little applies to establish it - they express their Surprize, that RB shd impeach the Capacity of that Relation who had benefitted him so considerably; Sir yet it was his duty to do it, in justification of the Testator, however generous he might be, where there is reason to suspect Imposition, he has a right to see, wh: the Share in Contest

belonged to him. I wd not go out of the Way to make Reflections but d Council is justified in saying all that appears in Evidence. the Point I put it on, is, there is no Proof of the Codicil; I know Instructions are not necessary, if the Deed knew what he was about, but we say there was a great Defect of Capacity: Declarations previous & subsequent shew a Capacity, they denote the animum testandi: but those Declarations must be clearly proved, otherwise they will have very little weight; the Ct will not regard them where they are contradictory. the Witnesses must be unexceptionable. If by Mrs Declarations were good we shall have very little Grounds to stand on, but they are concerned in making & attesting the Codicil. Mr WB. begins his Act: in Decr 1760. he was told by the Deed he was ill: the next Day is, have you executed the Codicil? WB. makes a Codicil for Deed gives every thing to his own Son, after the death of RB. after he had so done, he knows the Deed disapproved it, but bid him draw a Cod: that wd give his Son something; this shews a Busyness about Deed; a Person may dispose of his own, as he will, but if directed to dispose of the property of another, he shd consider other Relations, not leave all to his own Son. Mr WB & Mrs L.G. meet, each produces the Codicil most for their own Benefit, the motion for neither comes from Deed, the Legacies of 1000 to Mrs G. 1000 to J.SB. & 100 to Miss Howard arise from the Parties who are to be benefitted. Mr WB is the only Br as he has said the Scene no others cd be Witnesses, there appears a Rapacity in them to get what they cd. after this Introduction, I must now go to the Execution. When Variations are great they must not be deemed mere Mistakes. WB. says he received Instructions before, that Deed executed the Codicil after dinner Pearson denies this, says it was executed after Dinner. by WBs Act: it must be a diff: Paper, for Mrs G. brought in her Cod: between the signing the first & 2d. Deed ordered Gs Legacy to be inserted in the last Codicil, the whole consolidated: could a Person, reading Mrs account, suppose them speaking to the same Act? B. says it was signed before them all, but was sealed afterwards. M. contradicts this. P. dont confirm B. with respect to the Execution, expressly contradicts as to the person who desired him to sign, that he signed by his Masters Order, not at the Desire of Deed. Ennolds cd not be at the Signing, he must be guilty of a falsehood, not a simple Mistake in saying, it was read over 3 times; he is contradicted by all the Witnesses, who declare nothing was said by Deed at the time, (I have left your Son 1000) It can't be relied on because contradicted by as good Authority, as it is asserted; these may be an Excuse for a slight difference, but this is a Series of Contradictions; It follows from what B says Deed was sometimes capable, sometimes superannuated; it is incumbent on the Gent: to shew he was sane at the time he made this Codicil. It will have weight with the Ch, if it is shewn Deed was insane previous & subsequent, especially when there is a Doubt of the Capacity, at the particular period; we have exam: 3 Servants, 2 Surgeons, & a Neighbour, they have br: home to the time of Execution. the misfortune is, that it home to the time of Execution. the misfortune is, that such Expressions, as picking little black Devills off his Legs, are subjects of Ridicule in general, but they are too serious, melancholly to be so here. he cd not be persuaded he was in his own house the Observation on Langley & Glover is ominute, as not to be taken notice of by the Ct. they have argued agt great Contradictions being regarded in their own Witn: but object to trifling Variations in our Ws. they disagree, as to what became of the Cod: after the Execution. M. says Dee: gave it to B. B says he himself delivered it to G. these are essential Contradictions. General Insanity is strongly deposed; their 2d Allegation was to establish Insanity at the Execution, yet they have not produced a single Instance. Stephenson, Bateman stout on a Scheme to try to get 200 out of the Man in that Condition. It was well said by Mrs Advocate that the Paper signed shd have been exhibited? how came WBs to guide Deeds hand, if he was as well able to write, as at another time; was it not an odd time to pitch upon to execute a Codicil; in these Cases there are always Contradictions, the Ct will find out a more moderate way to express itself than by saying the Witnesses are perjured. if there was a doubtfull Capacity the Ct will expect a continued regular Capacity during the Execution.

Dr Hay. Judge. This is a Question depending merely on Evidence & fact, I wont trouble myself with observeing upon what arises out of the Facts It must be taken on its own bottom. the Exors had a right to call on to so . . . . . that Codicil, because it will defeat the Residue. Mrs G. examined 5th on a special Plea. Wm Barwell the Writer. Pet: Mckenzie. Ennold. Pierson & El: Barwell. it has been said & truly, that it is incumbent on the Party propounding, to prove it: if a Doubt arises on the Capacity, the fact of Execution must be established, not contradictory: the materia Witnes. WB. is Brother to the Exor, he is very circumstantial & particular, he went to visit Deed on the 14th in the morn: & on the Interrog: says Deed was asleep, being old; Deed was then waked & brought down when WB. asked how he did, he replyed in a Bad way, the Surgeons said he had a Dropsy & after the usual Questions, he says, not in an abrupt manner Sir, have you executed a Codicil? this Transaction was subsequent to the Birth of Wm Bs Son, he meant by Cod: now propounded, or that given him by the Dep: wherein he had given everything in reversion to his own Son; what he deposes must be. WB says Lets see how you did make a Codicil; Deed answers he had not executed it, then B. reasons with him, Deed answers Mrs Browne's Children are as near as you; though in fact they are not, yet it must be understood from thence, Deed had as great an Affection for her Children. B drops the Discourse: this shews he made an Application to be considered in the Disposition of the Deeds Estate. then B. states what had been done in Consequence of the former Conversation; it is very sensible if B. is to be believed. Deed adds, I always intended to leave your Son 1000 then bid B. draw out a Codicil, he did so, Deed read it over, signed & seald it immediately. it is material to establish the Credit of B. this is Evidence there was such a Paper. Pierson is examined by the Exors, therefore cant be objected to by them. it is said B. dont affirm P. was present. P. proves he was. B. might not take notice, he does not P was not present. it is very material as preparatory to the Execution of the Cod: wch the Witness places in the afternoon. B. then goes on thus: Ely. who was present at the End of the Conversation puts in for a Legacy; the Deed appeared quite passive, did not speak. Mrs G. in a Hurry goes out. it is true nothing proceeds from the Deed, B moves the affair first; after gaining his point, Mrs G. returns, puts in her Claim again; there is no Occasion for the Paper produced by Mrs G. the Legacy of 1000£ to B, 1000£ to G. it is admitted, did not move from the Deed, but the 100£ for Miss Howard, did; to answer the Objection of the Misrecital; this Codicil was drawn by the Deeds direction from Mrs Gs Paper; she mistook the Date. there is a Clashing as to Circumstances in the Execution; B. dont know wch all the Witnesses were present when the Paper was signed. Mr Mckenzie says, Deed sent to him to attest the Codicil he had mentioned before. Ennolds says, the Deed said, "There I have left your Son 1000." Pierson well remembers Mckenzie's name, being subscribed, when he signed. Pd B. bid him sign. It is clear something was done after Dinner, as well as before Dinner. The 2d now comes to the Evidence, how the Capacity is proved at the time of Execution. It is talking in Circulo, as to the Declarations before, after Dinner. The Objections to the Witnesses out of the Internal Evidence of the will are not legal or fatal; that WB, his Wife are interested consequentially because the Son is immediately; by our Law a Son or Father may be examined for each other, are competent Witnesses. the next Objection is that B. has given an Account, to induce a foundation of Incapacity, viz. that Deed was more confused after Dinner; this is a Circumstance much to WBs Credit, that he did not conceal any thing, he says Deed was not the same after as before Dinner, but that he was not liable to Imposition as he believes, considering the Situation of the Gent: there is no reason to impeach his Evidence, because he says he was not at all parts of the Day, equally capable; this will agree with the Account of the Witnesses produced for the Exors, who saw him when he was confused, talking about Black Devils &c. another Obj: to B. is that Pierson is a positive contradicting Witness; but he is not

* connected with what he answers upon the Subscription of the Solicitors name for 3 Codicils, with must be struck out of the Deposition of this Estate.

So, for upon the 3d Interrog: he cant depose, tho, if he was, his a subscribing Witness, (thereby deposes to his own Act, but after deposeing contrary to it a Wd deserves little Credit, tho, there may be Circumstances, where such Contradiction may be credited, but then these must be such Circumstances, as he did not know, when he signed, for very bad Consequences might ensue if Instrumentary Witnesses were suffered to contradict their own Act; yet such Wd may be supported by others— If his own positive Evidence cant avail agt his Act much less his Declarations— Pierson is not a Wt to affect Ennetts Declarations— I have no doubt of an Execution— These are Contradictions objected; if they go to affect Bt M. they will have no Weight: as to the Reading over B. says it was read 3 Times; M. speaks to a Recognition, take notice of the two Legacies of 1000£ each, but none of the 100£ this is contrary to what B. says: there must be a Mistake as was said by Dr Bever, there being 3 Codicils, the 2 may have been read over, & B. might speak of all: This a material Objection: I observe all are examined in 1763 except M. who was not exam: till 1765. wch will account for the age Inaccuracy; I suppose he gives a general Account; wch must be contemporary with the Recognition: there is a Variation between them all as to the Time of Deds Signing: I think P. does not speak to the Signing this Paper, but that before Dinner: This right in Council to point them out, but I think the Variations shew, that Witnesses are not prepared; However they all speak to the Execution— P. admits there was a signing; it is not material wch: they were read over in the presence of the Witnesses, there is sufficient proof of the Execution; they vary as to the Circumstances wch are merely collateral; where the fact is proved such Variations are not so Material, as to the Transaction itself, for none affect the Capacity of the Deed— I think I have cleared Bt M. as to prevarication, their Declarations then must have great Weight— This a strong Circumstance, he intended to leave something to his Godson; with respect to the Instrumentary Witnesses I think there is sufficient Evidence— There is no Question of his affection to Rd B. his Bequests shew it— Incapacity is alledged from July to his death, that he talked in a rambling manner, (said he had hurt nobody, (B. agrees he was sometimes confused, the Servants are of the same Opinion, wch they form from his Expressions: what the Council noticed with respect to the Custody is material: the Exors charge it on the Legatees; the Witnesses disprove it, all say, he did see any whom he set upon seeing: did he shew an affection for Rd B. if he was incapable? the Opinions of these Servants cant be regarded— But Mr Glover speaks positively, that he administered Medicines for the Disorder of his mind; Mr L. speaks to rather more, that he mistook Rd B. a man of 60, for his Son, a Youth; these Witnesses are strong but it is a Medical Account, they speak as Physicians else consider him sensible, I must take the Evidence in their Profession its only Opinion & Collection; I own it is a strong Evidence of Opinion but cant think that shd be relied on, when there is strong Evidence of previous Declarations, subsequent Recognition, the Factum of Execution; besides, Mr Bridges & Mckenzie are as good Judges from their Opinion; it is not necessary to bring in the Papers, the Factum the Thing— I must lay Stress on Sir WS. & Mrs Batemans Evidence; the fact they depose to shew him sensible; it is said to be after the Execution, but facts done after go a great way to support the Capacity at the Time; I think the Exors had good reason to lay this Case before the Ct. but I think the Codicil a fair Transaction, where Exors give a Plea they are liable to
they have been misled by the Servants, but have in some degree proved their Plea, tho they have failed in the proof of the Custody— I decree in favor of the Codicil without Costs—

30 Sep: & 1 Oct 2 1766

Bona Notabilia

Collins pr Bever — Hopwood — agt — Luckis — Dr Harris — Major

Dr Harris....

Nº 64

Wm Hopwood died in Feb: 1765 at Exeter, he by Will appointed Anne Luckis Universal Legatee; the Will was proved at Exeter, notwithstanding wch she has been cited hither by Mary Hopwood as the Widow, Major appears under prokstation, alledgeing Wm H. did not leave goods to found the Jurisdiction; if he Did, that Mary has no Interest; the Bond was in the Possession of the Dead at Exeter, & was for 200£

Dr Hay. Judge...

The Locality of the Specialty creates the Title to the Probate, the Custom of proving in the Prerogative Ct. where there are Bona Notabilia, was founded for the Ease of the Subject, not for the Sake of the Jurisdiction; you have stated, the Man died in the Archdeaconry of Exeter, took Probate in the Consistory, as ye Party therefore can have relief in ye Ct. below, I cannot find a Note of Sir Edw: Simpsons that Sir Rd Raines always pronounced for the Jurisdiction of the Prerogative Ct. when either the Bond, or the Party bound were in different Jurisdictions

France
Dawkins

14 June 1758. Dawkins made a Will, France Ex: who gave an Allon pleading the Jurisdiction, that the Debtor resided in
Sir Geo Lee ordered the Nature of the Debt in the 2d Art: to be specified as the Question was started only on ye Admission of an Allon, not on a final Sentence, I do not consider it, as a Precedent sufficient to warrant a positive Decree, tho, my private Opinion may be the same; I have exam: ye Authorities of the Common Law Books, & find, they all agree in determining, that the Locality of the Bond fixes the Bona notabilia, tho I cannot discover the reason of that Determination.

Wch a Legatee rec: if Writings of a Cottage bequeath by B. can afterwards call on Ex: to prove by Wt

8 Sep: & 1 Oct: Commissary of Surry

Collins — Grainger — agt — Stedman — Cricket — Dr Wynne

Dr Calvert

Dr Calvert....

Nº 65

Lawrence Comet by his Will appointed Anne Grainger his Ex: he left Eliz Stedman (a Niece by the half Blood, one of his next of kin entitled to distribution) a Legacy in these words, "the Leases, all other Writings whatsoever, relating to a Cottage in Mare Street in the parish of Ockley in Surry; Collins alledges, that Wm Grange delivered the Writings to Mrs Stedman, as Ex: that She received them from her, as such, before the Cause began, & therefore acquiesced in the Will, so prayd Probate to his Client; Cricket for Stedman confesses this, but alledges his Client to be the 1/2 Blood of Dead, as next of kin, to have a right to Distributive Share, so entitled to see the Will proved by Witnesses, & prays Collins may be assigned to answer wch: he will prove the Will, or not? Collins, disents, (say Cr: has no right to call for ye proof by Witnesses, unless he returns the Papers, or leaves them in the Registry of this Ct. There is no doubt, but as next of kin, Mrs St: wd be entitled to her prayer; but under the special Circumstances of this Case, had: accepted a Legacy under the Will, she has acquiesced therein, & so is barred; a Party can never be entitled under 2 Contradictory Claims, viz as a Legatee, & by virtue of a right to a distributive Share, if such a Position the Consequence wd be very bad; Suppose A receives a large pecuniary Legacy, she might avail herself of the payment to prosecute a Suit to set aside the Will: It may be said, the Ex: has assented to the Legacy by delivering up the Writings, & is bound by her own Act: but tho, the Ct wd not hear her, if she demanded the Legacy to be refunded; it wd not suffer the Legatee to continue both Claims; if the Will is set aside, Mrs G. will be accountable for the Cottage, all the Assets she has received, to the Parties entitled in Distribution, therefore it is reasonable Mrs S. shd return the Writings before she is at liberty to prosecute the Suit.

Dr Wynne...

Supposing this a Lease for Lives, the Ex: wd have no right to retain it, & the Heir at Law wd have his Action; the Libel is not before you now, does not respect the Right of a distributive Share as N. & M. but wch: as such Mrs S. can call on ye Ex: to prove in solemn form, having by the Receipt of the Legacy acquiesced under the Will, the Dr has not laid down the Doctrine of the Roman Law, that a Legatee

Dig. 94. Tq. L. S. ... impugning the Will shd forfeit his Legacy – they dont state, we demanded the Legacy; they came & offered it, was it reasonable we shd refuse it? It is common in fraudulent Transactions, to give Legacies to the Parties most interested; those who are benefited by a Legacy are seldom consuant in the Transaction; we desire to rel. wh.r the Deed was sensible & how we came to be left out, we have a right so to do –

Dr Harris Judge – I dont think I can concern myself in Papers of this Sort or order Mrs Sedman to deliver them back; Every Exor is bound to prove a Will by Witnesses, it is an Indulgence to prove in common form; if Mrs St. had any particular Equity to demand, she must do it; Equity; she is one of many Relations, & has a right to put the Exr upon a Proof by Witnesses & I am not at Liberty to refuse it. I give no Costs, tho they are sometimes given on a motion; It has often been determined a Legatee may oppose a Will: This is a very particular Case –

4 Sess. T. T. Prorog: Jenner — Dr Wynne — Browne — agt — Browne — Alexander — Dr Collyer — Grant of an Inventory — N°66

Dr Wynne ..... Wm Browne made his Will, therein appointed his Wife sole Exr & Universal Legatee, a Caveat was entred by the Brother, the Caveat was warned, Alexander appd for the Brother who declared he opposed the Will, we stand now assigned to bring in an Inventory for wch I insist there is no occasion; The Use of an Inventory is to have a Constat of the Estate; if the Party cant be benefitted who prays, the reason ceases; a Discretionary power is always exercised by the Ct. Fleet v Holmes Arches 1755 T. P. made his Will, appointed his Wife Exec & gave his Daur a Legacy of 1000£ at 21. The Daur contested the Will, prayd an Inventory, having brought her Legacy into Ct; there was a Sufficient Constat said Sir Edwd, the Daur is not entitled to an Inventory –

Sir Tho Raymond 470 — Boom & Boom. Prerogative 1682 ×

Dr Collyer ..... In the Case of Fleet & Holmes, the Legacy being brought into Ct. the account was gone, so that the only Qu.n before the Ct was upon the Interest; make it appear by Inventory that you are able & willing; a Legacy is something definite –

Dr Hay Judge .. This Case has been strangely conducted on the part of Jos: Brown who contested the Will; his Interest is confessed; he called the Widow before the Ct to have an Inventory, as on an Intestacy, yet confesses the Will, by wch he confesses he has no Interest – Before the Answer were given in, he prayd an Inventory; she was assigned, & if the Proctor

the Alertness of the other Proctor, will not prevent me giving him an Inventory if I can, tho, not as a Brother; the Ct used to do it ex Officio, tis so in the Case of Minors; Tis not so on Debts on account, because, there, must be something certain – Hes says there is something due from the Deed; Upon his Affidavit of credible 300£ appears due; She confesses Assets, but not a certain Sum, that is no precise Answer to the Demand; a Confession of Assets is no Bar to an Inventory, because you can't plead that Confession in a Ct at Common Law; In the Case of Holmes & Dr the Confession was in the Arches where the Demand was made; Boom & Boom is very different from the present Case; in that a Legacy was to be paid at 3 times & 2 Payments had been made, & the 3d tendered, therefore the Ct of Delegates, notwithstanding 21 H 8. would not have ask the Party to decree an Inventory – Does she offer to set it down? I dont say I wd not use discretion, where there was a Confession of Assets accompanyd with a Proposition to depart, or a Proxy, where the Debt was small & the Estate to pay it very considerable; I cant decide the Debt there – I decree an Inventory; unless a satisfactory Declaration is given, or Reason assigned why an Inventory shall

× Boom & Boom 1682. The Judge was of opinion there was no need of an Inventory, the party praying it had no longer any Interest, it appearing there was sufficient to satisfy the Demand viz.t Exors offering to bring the Legacy into Ct; this Sentence was confirmed by the Delegates & afterward on a Commission of Review ..

not be granted; you may give a satisfaction equivalent thereto Justice requires an Indemnity to be given, wch in certain Cases where Trade is concerned, is infinitely difficult & expensive; it is now very different from the Time when the Statute was made, at wch Period, the Chief of personal Estates, consisted of Household Goods, & the Stock on the Farm – Trade was in its Infancy & the Publick Funds had no Existence –

Trinity Term 5 Sess: May 28 Prerogative Ct — Cockerline agt Cockerline — N°67 — Fuller .. Drs Harris & Wynne — Dr Collyer ..... Grene — Dr Collyer .....

Daniel Cockerline died 11 Nov: 1764. had duly executed his last Will in writing & thereby appointed his Brother Mich.l Cockerline, Wm Herd & Sam.l Salt Exors & his Brother M. C. residuary Legatee – 15 Nov. Will & S.S. took probate 3 May 1765, Rob.t Cockerline Fullers Client cited the Exors to bring in the Probate & prove the Will by Witnesses; Grene brought in the Probate & gave an Allon, propounding the Will, on this Allon Witnesses were examined, Publication passed & the Cause was assigned for Sentence on the 2d Assignation – Bye Day in March 1766, the Cause was heard, the Evidence being read, the Ct doubted wh.r it was sufficient to warrant a Sentence, & Fuller had no Authority from his Client to proceed, the Ct ordered the Cause to stand for further Informations; R.C. afterwards wrote Mr Fuller word, he withdrew his Opposition & had appointed Fountain his Proctor, who exhibited for him, alledged Fullers Proxy to be revoked, & declared he wd proceed no further; then Grene prayd to be dismissed & that the Probates might be decreed out of Ct. Fuller objected thereto, Till his Bill was paid, but afterwards waved that Peton, the next Ct Grene repeated his former Prayer when Fuller exhibited as Proctor for Anne Gage & Eliz: Nelson Widows Sisters of Dec.d; Rebecca Wife of ..... Chapman, Mary Cockerline a Minor, Nieces of Dec.d, prayd he might be allowed to intervene for them & that Grene shd be assigned to answer to his Clients Interests; G. denyd F. cd intervene, as the Cause was ended, he being only called upon by R.C. & F. had for him, consented the Probates shd be delivered out of Ct & alledged he cd proceed no farther. Fullers first Peton referred only to his Bill, on wch head, the Ct said Business must not be delayd on that Account, it is the Business of the Proctor to take Care whom he trusts, he has a Remedy at Common Law. as to Intervention, it is mere matter of Favor, not of Right, or strict Law; Intervenire is laid down in the Books to be the same as supplicare, it will then depend on the Circumstances of the Case; but if there is no Cause, if it is extinct with respect to the original Parties, there can be no Intervention; but suppose it is not extinct, it is an improper time to intervene, after the Cause is concluded & Publication passed, when we cannot strengthen our Case, are precluded from making farther Proof; I dont say, they have not a right to come in at all, but it must be originally, we shd propound the Will again; it wd be very strange if they were allowed to take Advantage, & bind us down to what the Ct has obiter, declared to be insufficient proof – the Case is different in a Ct of Appeal; there the Cause may be proceeded in anew; I have no Objection to their Intervening if the Ct will rescind the Conclusion of the Cause & give us an Opportunity of examineing Witnesses on another Allon, as in the first Instance –

Dr Harris .... as Intervenors, they must take the Cause, in the same State it now is; I take Intervention to be not merely matter of Petition or Prayer but of Right – The Ct may oblige every Exor, ex officio to prove by Witnesses – If a Proctor dont call upon all the next of Kin to contest, he must have a reason for his Omission; It is for the Advantage of the Exor to have every body interested, before the Ct we intend giving no Plea, but to hear the Cause on their Evidence –

Dr Wynne ... If Dr's Objection holds, We can not intervene; but by the last Assignation, the Ct assigned the Cause for further Informations, it was not, therefore, at an End; G. prays at a subsequent Day, the Probates may be delivered out of Ct: Fo. for R.C. agrees. Fu. objects on account of

his Bill not being paid, afterwards he waives his Objection, but before the Probate is withdrawn, appears for the present Parties— I cd not think how this was to be distinguished from Intervention in other Causes; I never heard Intervention was matter of Grace; the Dr did not deny Parties might intervene, I have always understood they might intervene at any Period of the Cause, in principio, medio, vel fine, consentiente, vel reluctante, parte principali

There is great reason to suspect Collusion, that B.C. has been satisfied, therefore disregards the Interest of the other Next of Kin; If the Cause has been fairly conducted, they must be supposed to have made the best proof in their power; they have taken no Step to call the next of Kin before the Ct, acquaint us with the Proceedings, therefore it cant be said we had legal Notice before we desired to intervene, we came in when we knew of it

Dr Lay. Judge

I remember the Ct on the hearing, thought the Evidence so confused, it cd not pronounce for the Will; the Plea agt the Validity, was that the deed was in a State of Ebriety when he made it; the Ct having doubts about establishing the Will, gave no Sentence, but asked if Fuller B.C. Proctor consented the Probate shd be delivered out of Ct. he said, he had no Authority to do any thing— The Payment or Non payment of a Proctors Bill, cant detard the Proceedings of the Ct; Fu. prayd to be heard on his Peton, as to delivering out the Probates, till his Bill was paid; he then waves his Peton. Grasn repeats his former Prayer; then Fuller appears for the Next of Kin in question, to oppose y^e Delivery of the Probates; the Ct has made no Decree in this matter, this goes a good way to shew there is a Cause before the Ct; If I decree they have no right to intervene, I must decree the Probates out of Ct, I speak to the Point wch: there is a Cause— I must think that Fountain had consented to the Probate being delivered out, as to his Party the Suit is at an end— I do look on Intervention as a matter of Right, a Party shewing he has an Interest; you must take the Cause in the State you find it, except in matrimonial Causes— There is no doubt, but a Party may come in after Publication, desire to be heard on the Evidence as it Stands; the Qu: is wh: the Probate shall be delivered out, wch depends on another Qu: wh: there is any Cause before y^e Ch: if there is, the present Parties may cotnein, shew why the Probate shd not go out; I am of Opinion the Cause is not over; If I shd say they cant intervene they might enter a Caveat, take out a new Citation; what Dr Collyer said, is an Objection to my admitting his Request, that he cd mend his Case, if a new Cause is instituted, for that Reason, I ought to allow the Intervention, not allow y^e Probate to go out; the Consent of the opponent dont put an End to the Cause, where there is no Decree made; a Party having an Interest may come in any State of the Cause, but must take it in that State—

See Clarke's Ath. 135.

I will never stop Justice on account of a Proctors Bill, & hope never to hear that Objection repeated.....

Easter Term 2d Sess.

Prerog: Ct April 20. 1764

Major

N°68 Winchester Langdale & Wood. v Strode

Dr Clarke

Bog Drs Clarke & Wynn ..... Dr Harris, Calvert. Burrell

Mrs Eliz: Gough died Jan: 23. 1763, leaving a Will & Codicil with 2 Duplicates of the same, dated June 3. 1762. wherein she appointed In Winchester Esq. Geo Langdale & Benj: Wood Exors & Trustees - 2 Sep. Kd. J. Bog exhibited for the Exors; Collins for Lucy Naomi Gough as Daur of the deed, who had entered a Caveat warned by the Exors

N.B. This shd be inserted. fo. 112. bef: Wood and Saunders. . . .

Bog confessed her Interest, was assigned to exhibit Scripts, Scrolls; Bog brought in the Will, Codicil of 3 June 1762. Bogs Client was assigned to exhibit, a fuller Affidavit of Script; Collins brought in a prior Will of Jan: 18. 1760, a Republication subsequent to the Date of the Will of June 1762, wch Collins alledged were material to be introduced— In that Will, Winchester & Francis Lyre Esq were Exors & Trustees; they were assigned to declare wh: they wd propound the Will, when Lyre by Syndal declared, he wd not propound the Will of 1760. whereupon Collins declared he wd propound it; Bog objected to Lyres dismission; There was an Application for the Appointment of an Admor P.L. when Collins named Jn Robertson Esq & Bog. Jn Cater Esq. Bond was decreed to be given by the Admor in 2000. the Security to be reported; Allotion was prayd agt Charles Cornforth Esq. to bring a Letter mentioned in his Ark of Allon. In y^e interim L.N.G. ats Strode remarried wth Strode from whom she had been divorced: Major then exhibited for Mrs Strode; Our Allon was admitted 7 Feb: 1763. We examin our Witn: they have given one Allon, & then another, exhib: a great number of Letters, & done every thing possible to delay the Cause...

Dr Harris

Mrs Eliz: Gough died in Jan: 63. a Widow, leaving one Daur, her only next of Kin; She died possessed of a very considerable fortune, derived from Ferdinando John Paris Esq, who had married her Sister; It will appear by a Letter of Mr Paris, dated Jan: 7. 1746, that he gave his Fortune to the Deed, only in trust for Mrs L.N.G. now Strode; this Letter contains many remarkable Expressions, viz "that he had promised his Wife on her Death Bed, to take care of her Niece Lucy; that he wd not have worked so hard, but to provide for the Dear Child" He says again "I have given you the whole of what I have, wishing I had more to give the same Way; Again "I really trust, you will answer, my often declared Design, therefore will not fetter you with any Trust or Co-Executor"; Again "I beg you will answer my purpose most effectually, in full confidence of wch I have made my Will, relying on your Fidelity; I do beseech you lay it upon your Conscience, not to disappoint my Expectations of you"; We have 60 Letters, Exhibits to shew, that Mr P. looked on L.N.G. as his own Child; maintained, educated her; Mr P. died in Dec: 1759. It appears by Mrs Haslom, she has declared in the presence of her Servants, to Mr Lyre, that she was Trustee for her Daur; She made no Secret of the Fortune being left to her only in Trust, looked on herself, as a mere Trustee, who cd not dispose of any thing; From Mr P's death, she retained her Affection, clearly to Jan: 1760, when she by Will bequeathd all the Fortune left by Mr P. in Trust, to Winchester, Lyre, (whom she also made Exors) for the sole, separate Use of her Daur during her Life, & then, for the Purposes she shd by her Deed or Will appoint; By the Will of 1760 she gave 50 £ apiece to Lyd. & 50 £ apiece to each of their Daurs, other small Legacies amounting only to 150 £ yet as Mr Lyre deposes, she asked her Daurs Consent even to dispose of so small a part of what P. had left her— Mrs G. did not die till 3 years after; In the Spring 1762. She was inveigled, enticed to lodge at Mr Woods at Parsons Green, on pretence of taking the Benefit of the Air; soon after she went thither, there was a Disagreement between her & L.N.G. wch Haslom accounts for thus. That Benj: Wood began to do her ill Offices; that, She was sent on Messages; that Mr Wood told Eliz: Gough, her Daur intended to confine her in a Madhouse, the Betrays even adds; & to take away her Life; hence arose the Disagreement— This alledged by the Exors, the Will of 3 June 62. was made by Eliz: Gough; this is contradicted by the Conduct she held on making that of 1760; for it is in Evidence, She then consulted, asked leave of her Daur to give away a few small Legacies; In the latter she did not consult her Daur; gave 200 £ apiece to her Exors, 100 £ to Mrs Lyre, about 1700 £ in different Legacies, without mentioning them to her Daur; she then directs the Interest of her whole Fortune to be paid to L.N.G. for her Life; & then on a further Trust to be given to her Children & a certain Share of the Proceeds to them till their Attain 21, as the Trustees shall think fit, if she dies without Issue, or having Issue,

such Issue shall die before 21, she then devises the whole Residue to B.W. except 8 or 9000£, wch she gives absolutely to her Daur — In the Codicil she charges her Estate, Real & Personal, with £6000 to be disposed of by her Daur; if she shd die without Children & also on the same Contingency 1000£ to Miss Eyre; & she gives £200 apiece to Mr & Mrs Innes, Mrs Innes — These Persons (by their own Exhibit) Deed expresd great Animosity agt; therefore it is not probable she shd leave them these Legacies; to Mr Winchester on the same Event, she leaves 500£. to Miss A: 200£. to Mr Langoake, a Witness to the former Will 300£; this Will, Cod: appear, made with great Art: considerable Legacies being given to those, who cd have been material Witnesses agt the Will; it appears drawn so, that B.W. will have £20000. Mrs S. has the whole Proceeds for her Life, there is a Provision, if she shd have Children, but none for her Grand Children, if her Children shd die before 21. There is another Circumstance I must mention; that this on the face of the Will appears very specious, that B.W. appears only to have a remote contingent Interest; but in truth, he had a Certainty bequeathed him; at the Time this Will was made, Mrs Strode was upwards of 40, without Children, & divorced from her Husband — They have examined the 3 Subscribing Wits to the Will & Codicil; viz. Jh Prestage, Jn Pearson, & Betty Sparkes; when the Depons are read, you will observe, the 2 former, speak not to the Instructions, or reading over the Will; Sparke indeed speaks to Instructions, but only, as coming from Wood, & on Interrog: says, he received them from B.W. at ten different Times; In his 2d Examon, he says, he beleives, the Will was read over by her Alterations; It is not material what was said, or read to her, it is plain she did not understand the Contents — Mrs S. had a Monon agt W. & E. Exors, to propound the first Will, wch they refused, because contrary to their Interest; & Mr E. is a very unwilling Witness; On their refusal Mrs S. declared, she wd propound it, gave an Allon, pleading Deeds being in Custody at B.W's at Parsons Green & at Cornforth's in Bond Street; Isabella Haslom proves, she went to see Mrs Gough at Parson's Green, when Deed declared to her "she was beset by a parcel of Villains; that she cd not say or do as she pleased; & bad Deponent (Servt to Mrs Strode) go to the Door, to see if any body was listening; She speaks clearly to the Custody at P.G. & a much stronger Custody at London, where she was often denied admittance to Dec: As an Instance of the Custody, she says, Dec: gave her a Penknife in a Case, & bid her take care & give it to her Mistress; she knew it was one she valued, being her Uncles; In the Penknife Case, was a Slip of Paper, containing these remarkable Words written by Deed; "Fear me not, I will not wrong thee, that, depend upon; It is proved Deeds writing by Eyre, & is endorsed Nov: 23. 1762 — Davis proves Deeds affection for her daur, who says, the Day before her death Mrs S. came to see her, on whose Entrance, Dep: quitted the Room, but returned, as soon as Mrs S. went away & asked Deed if she was not very glad to see her Daur, she replied, Yes, her Heart overflowed with Joy — The Exors in answer to our Allon exhibit a Paper, wch I think, wd have been properly exhibited by us; it makes more for us, than them; It is said to be a Note put into a Bag, with 500£ deposited by her in Cs Hands, & to contain the following Words "This Day, I owe to my "dear Child, in Crown Pieces Ten Guineas, & in Cash & Bank "Notes . . . . . for her to keep to herself, well knowing, she will "be kept out of every thing, by those, who have deceived her, "got such large Sums from me, & have weaned her Affection "from me, on pretence of taking care of her, after I am gone; "Yes, the Villain will take care of her Money, She will find "she must be a Slave to him & his insolent daur, & the dirty Slut "his keep" Witnesses have been exam: to prove who are meant by him & his insolent Daur; Eliz: Bean says, that by him, is meant Francis Eyre Esq: & by Insolent Daughter Miss Eyre, his Daur; therefore & by reason she Deed often spoke, in her hearing, agt Mr & Miss Eyre, she must have been imposed upon, when she gave her two Legacies; This Paper is dated Sept 20. 1762 — Mr Cartony answers to the Identity, & says, yet these two Legacies are a Contradiction to the frequent Expressions of Animosity agt them; & beleives Deed knew not what she did, when she bequeathed those 2 Legacies — They have also in their 11th Article pleaded, another Circumstance wch adds us, viz. that Deed said, she wd have no more to do with Mr Innes, for that Jn Innes (who was Father in Law to Eyre) had suffered Bonds to the Amount of 3875£ to be imposed on her wch were only to be paid by Instalments — Cornforth proves her Declaration, That Innes had thus used her ill; therefore she never wd employ him — notwithstanding the Evidence of her very great Affection for her daur, in spite of all the Endeavours to alienate it from her, & notwithstanding her express dislike to these Persons she left her "Dear Child" only 400£. & 1500£ to them; how can this be reconciled! I hope therefore, you will think the Deed executed this Will, rather mechanically, not knowing, what she did —

Here the Evidence was read —

Dr Clark — 2 Sep. April 29 —

This Will is opposed on the footing of Incapacity & Imposition, wch if they shd establish, no doubt it wd be no Will; but if this Charge of Imposition is not supported, by sufficient proper proofs, the Consequence will be, that it was a good Will — These 2 Dus: of Incapacity & Imposition, must resolve into one, of Imposition; for if she was incapable of such an Act, she clearly must have been imposed on; the Imposition carries with it, the Idea of Incapacity — They set out too, at first in another method to oppose this latter Will; viz. on a pretence of a Republication of a former Will; the Merits were to have been rested on this — We might submit it to the Ct; wh: they are not hereby precluded, from useing the Plea of Imposition; if they insist on the Republication, it excludes, the Point of Incapacity; it is absurd to say a Person is capable of reviving an old Will, by republishing, or knowing & remembering the Contents of it, who was not capable of making a Will; on whichever point, the Gentlemen rest their Cause we are at Liberty to insist, on the other, being quite thrown out; why then introduce, these various, contradictory, self destroying Pleas? it shews only a desperate Cause: they rely little, too, even upon these Points; they introduce another, viz: wh: Deed had a power to make such a Will? so you will find a Trust is pretended; The Qu: wh: she had such a Power, I must say, is not cognizable here: Trusts are Creatures of the Ct of Chancery: tho, if cognizable in this Ct, it wd, at present, come improperly before you: the very Suggestion, that she was only a Trustee for her daur, implying what they contest, viz. that she had a Capacity; you cd not go upon the Construction till you had found it to be a Will — By the Evidence, Part of this pretended Trust, appears to be complied with, & as to the Part not complied with, they must resort elsewhere: part of the Will is conformable, wh: the other part is, must depend on the Construction; whereas by pronouncing agt the Validity of the Will, it wd be saying no part ought to be construed at all — She had, or had not, a power to make a Will, on this, you are to pronounce, for, or agt it; if she had no power, they had no right to propound theirs: the Will is to be impeached by Evidence, of Mr P. had: left the Deed only, Trustee for her daur, that Deed has not followed the conditions enjoined: supposing, this, true, what remedy can Mrs S. have, by opposing this Will; the same Objection lies agt their Will; it is equally a reason, for rejecting one, as the other: if then you

Pronounce agt the Will of June 62. you must also pronounce that of 1760, what will be the Consequence? why, she must be declared to have died intestate, by pronouncing for an Intestacy you defeat Mrs P's Intention, the avowed purpose of this Trust, i.e. to keep the Estate out of her Husbands power: the Trust then, being thus defeated, by their Opposition, the Ground of their Opposition to this Will fails: the Court can no more try this Point, than it can hear a Legatee on the Validity of a Legacy. I have hitherto gone on the Supposition of the Trust not having been complied with; there might be, probably was, some Directions given, by Mrs P. to Mrs G. they were private, cannot be known; & it does not appear from P's Letter, bearing even date with his Will, that Mrs G. has fallen short of P's Intention; he appears to have been carefull that his Niece's Husband shd not have the Disposal of his fortune; but there was a Contingency wch he dont seem to have provided for, any more than Mrs G. in her first Will of 1760, from wch we are to judge, that, tho, she ed not leave it away from her Daur, yet Mrs P. laid no sort of restraint on her, after her death, if she died intestate, Mr S. must be Admor of his Wife; in the Will of 1760. Mrs G. leaves the fortune to her daur & Children, & at her death, to be disposed of by Will; but in case she shd omit to make a Disposition by Deed or Will, there is no Clause added, wch can prevent her Husband & posessing himself of her whole fortune on her death. Mr P. was very inderate agt Mr S. was particularly carefull not to benefit him, & ed have no other reason to create any Trust at all, except, to exclude him: our Will therefore seems more conformeable to P's Intention; he had rather it shd go to any body than Mr S. at least he was indifferent whether his fortune went to Mr Wood, or to whom it went after his Niece's death, & had rather leave it to be disposed of by his Sister in Law, than by his Niece: it is difficult to ascertain what was intended by this Trust, & wh: all the Secret Conditions have not been complied with. This Ct has only to consider the Will, on the same footing, as other Wills, as the act of the Deed: I must observe too that a Trust is to be set up, agt Mrs P's declarations of appointing none; for in the letter exhibited he says: "I will not flatter you with any Trust or Co-Executor:" to be sure from the Tenor of this very, odd, inexplicable Letter, there were some directions, given to Mrs G. what they were, does not appear, the Ct will presume, she had done all that was enjoined: if we attend to the Evidence of there being frequent Disputes, between the Deed & Mrs S. very possibly the latter might have looked upon her Mother, as an Usurper, even during her life; but that proves nothing: to satisfy her daur, she might lay Mrs P's Will & Letter before Mr Forrester, the Trust stands entirely on them, for Mr F's Opinion is only collected out of them, for a particular purpose, but they were not laid before him, to say what sort of Powers she had, under that Trust, nor does any Presumption arise, out of the Words of the Letter, that she ed not dispose of a Shilling, without her daur's leave, that she ed not dispose of at her death: & con: it appears most likely, from especially in case of her death: & con: it appears most likely, from the Words of the Letter, that Mrs P. intended to benefit Mrs Strode, only jointly with her Mother; he expresses an Affection for both equally, saying, "from the great regard I have for you, your dear daur; saying," from the great regard I have for you, your dear daur; whatever Mr F. grounded his Opinion on, is what how material; he might think every Parent a Trustee for his Children; the Will of 1760 was in consequence of his Opinion, it was for Mrs Sh: benefit: the same design has been pursued in our Will. She therein leaves

every thing to her daur, her Issue, no matter who has the fortune after their death; a Person suffering that another said so, or so, is no Evidence; Declarations cant be look'd upon, as permanently they prove to no Act done; the Deed's Declarations cant be allowed any weight; unless the Motive can be ascertained, from whence they arose; what the Trust is, the Gentlemen must say, they are on the Affirmative Side. There are Sorts of Trust, express & implied; the former, this cant be, either by Mrs P's Letter, or Will of 1756, or by his Confirmatory Will of 1748. At most it can only be the Letter; the Ct will look on it as a Trust, laid upon the Conscience; every thing will be supposed to be done, agreable to the Charge, our Will is most conformable to the Intention. Its Validity rests on the 2 Points, of Capacity in the Deed, & Imposition in Mr Wood: I need not take up much of your time, to shew, she was capable, & free Agent; the Papers are bulky, the Matter lies in a small Compass; it must relate to the Means used, & precedent to the making, & executing the Will, the Capacity of the Deed, & what passed at the very Juncture, for nothing, subsequent, can apply, except as it may refer to what preceded. The Ct will consider what preceded; it is the Doctrine that Instructions shd lead the Execution: of this you have full Evidence: Sparkes, who drew the Will, is as full as can be; that for Wood brought Instructions in writing to him from the Deed in his own hand; that he made a draught from them, wch she returned to him, & that he made a draught from them, wch she returned to him." In the 2d Examn, he says, "Wood called on him ten times about them." In the 2d Examn, he says, "Wood called on him ten times about them." The Will is a Will prepared with great Deliberation: It may perhaps be said, they did not come from the Deed; the Ansd to the Instructions were in her Hand; by executing a Will of the same Tenor, purport, she recognized the Instructions. It appears, he carried the Draft; that they were read over by him, the Deed & Mr Wood, together, to compare them; that when he made any Mistake in the reading over, Deed corrected him: he speaks also clearly to her Sanity & Knowledge of the Contents, to her executing it, the Duplicates, with all the usual Solemnities. Sarah Bowman's Depon, goes to the Recognition both of the Instructions & the Will; She says, Deed told her in July 1762, she was much easier now, she had made her Will. There was no Interval between the reading over & the Execution, so there was no room for a Surreptitious Will being put on her; it was not huddled up, as suspicious Wills always are: One of the subscribing Ws Partridge was asked by, Deed, some time before, to be a W: to her Will; she told him the Motive; he agreed to be a W: & she accordingly sent to him; he ed not go when he rec'd the Message; but he went a few days after, when she appointed him; all Suspicion of Irony is taken off. 2 of the Ws depose to a very remarkable Expression, she used, for after the Execution, she says to them," do you think I am in my Senses?" they seemed surprized at the Q: & asked her, why She asked? she replies, because they say, I am mad; referring to be sure to Mrs Eyres telling her, she was fit for a mad house: these Circumstances defeat all possibility of supposing any Art used before the Execution. Qu: now, as to the other Ws who speak to the General Capacity, will go far enough, to establish Insanity in Mr Wood, & Incapacity in the Deed? they have only 3 Ws who speak to the Point, & they doubtfully, for they qualify, her being easily imposed upon, by what is no Impeachment of her Capacity, & destroy the force of what they depose, to prove: Isabella Haslom is inconsistent: for she says, Deed was peevish, difficult to please, latterly, & had declared she was beset by a parcel of Villains; the very Circumstance of her being so peevish, made her much less liable to be imposed on; & it is not likely she shd let Persons odious to her, impose on her: she wd certainly be on her guard agt them: where a W: varies from the main point how can she be credible? H. Davis says, she was easily imposed on by Persons, who had a great Ascendency over her: this supposes the very point in question; Eyre says, she appeared capable, otherwise than, as artfully designing Persons might lay deep Schemes for that purpose: this is very nearly the same as the others have deposed: nobody is to be imposed on by Fools: they speak to Incapacity by halves: what great Ascendancy can Wood have had over the Deed, when she refused to lend them 500 the Ws say Deed was invited to Parsons Green by Wood; this can't be called inveigling, as the Dr stated in the Opening; she

not law ...

Wds subsequent Declarations ...

afterwards accepted the offer, for the sake of the air, finding her health improve there, she prolonged her Stay beyond the time she first intended, continued at P.G. a good while, after her daur Patio accompanied her thither,) left them; Wood himself was seldom there; upon her coming to Town, she went to Mr Corn forths, because her daur wd not live with her, tho, she offerd to take a House where she liked, but the daur wd not quit Mr Eyre; how do they endeavour to make out a Custody there, why, by the preventing Persons from breaking in improperly, unreasonably upon this old Lady, who lay in a languishing State a few days before her Death; & is every Footman or Bearer of a Message, necessarily to be admitted to see the Person he is sent to with it? This pretended Custody, wd not affect our Will, it is long after the Date of it; but tho, this subsequent Custody cannot refer back, yet there is a very good reason to be given, for refusing to let the daur go up immediately on her Entrance; she is proved to have been of a warm temper, might disturb this poor languishing old Woman; Woods Character is a very fair one, has never been in the least impeached, wd he then have risqued it by deserving such an Imputation as this? & for what? why, a Trifle, a meer remote Contingency. She has bequeathed about 14875 in present, to take place in case of her daurs death; so we may say, that Sum is to be given away; what great prospect then to Wood, a possibility of coming into as few thousand Pounds, on the death of Mrs Strode, without Issue; the Ct will expect very good Proof of a Charge so odious as this — One Argument used, is, that the daur was not consulted; you see, by the Evidence, Sir, she was very apt to fly out, so that her mother might be desirous of concealing the Contents of this Will from her, for, if told, she was not to have the whole, she wd have been quite furious: She did shew her Affection, she consulted her Interest materially, in not leaving it absolutely in her Power; for we all know how many ways there are, for Husbands to get out of their Wives hands, even what is secured to their separate use — It has been said this Will is artfully drawn: that there is a Presumption agt its being the Deceds own Act, from the Animosity she had expressed agt 2 of the Persons she has appointed Legatees; & that this is shewn by the Papers pleaded & exhibited by us: But you will observe, this Will is prior to the Date of the Papers; she might not think it material to alter it, she might have so far forgiven them: she wd not employ Mr Innes, the motives are good, she was angry with him, she might be pleased: but whatever was her reason for giving these Legacies, or for not striking them out afterwards, it can be none agt the Will itself unless there was some unfairness in the Will — Another Instance of Art, given by Dr Harris, was, that these numerous Legacies, were, many of them, given, to prevent those Legatees from being Witnesses, but how does it appear that these Persons were better qualified to be so, than the others; they were not present at the Execution; they cd know nothing of the Transaction: it was not worth while to sacrifice 2000 for so idle a purpose; Great Stress has been laid on the Exhibit Joa 9 not dat. the Date of this Note is Novr 23. 1762 subsequent to that of the Will; we cd therefore rather insist on it as a Recognition, tho, urged to shew, she did not understand the Contents of the Will, & that it was not her own Act; it may certainly imply, she had not wronged her; she had left her every thing, what wrong then can she be said to have done her — I submit to you Sir, the Consideration of Trust or no Trust, is not before you; that if it was cognizable here no Trust, is not before you; that if it was cognizable here there is not sufficient Evidence, to shew what it was, & that it has not been fulfilled; the Exhibit shews, it was material.

to the Daur, that the Estate shd be secured, out of her own Power: as to the Points of Incapacity & Custody, they have entirely failed in the proof of either, therefore I hope you will pronounce for the Validity of this Will

D'Wynne — I am also Council for the Exors in the Will of Mrs Eliz: Gough dated 5 June 1762. wherein they are opposed by Mrs L. N.S. who besides her Interest as daur of the Decd, has propounded a Will of 1760. as a Legatee I will say the Witnesses go as far as possible to prove the fairness of the Will propounded by the Exors. It is in Evidence, she had previously made a Declaration to Mr Prestage, that her daur had used her ill; Sparke proves that some part of the Instructions, were in Decds own hand writing: he was a Stranger to the Decd; it will then be asked perhaps how he Mrs Gs handwriting? why, by Woods bringing a Copy of the former Will, in the Decds handwriting; She told Pearson the purpose of sending for him, was, to be a subscribing Witness to this Will; after the Execution, she surprized him with the Question, of, Do you think, I am in my Senses? this Ct wd also have been surprized too at her reason, for asking that Question, unless it had been for Mr Eyre's former Speech to her Dowager, I think the fittest place for you wd be a Madhouse"; they prove the Sanity & the Intention to make a new Will; & there is not the least Suspicion of undue Prejudice in these Testamentary Witnesses — The first Objection they go on, is the great Affection of Mr Paris for Mrs Strode, we admit it, they must allow us, as the Papers do, shew, that he had the same; for the Mother; he speaks of a Partner in the Donation, he uses the Words, "you & yours": there does not appear a greater Regard for the daur than for the mother: the Dat. is wh: the Will of June 5. 1762. is the act of the Decd, that day; wh: she had a Capacity & did execute it: this is the only Dat: for wh: it was a Trust or not, is not matter of Inquiry here, it lies, before another Ct — the Gentlemen shd have been aware that the Will of 1760 was not made by Mrs G. from the persuasion in her own mind that she was a Trustee merely for her daur, but from Mr Forresters Opinion, he says she was a Trustee, & had enclosed her a Will conformable thereto as she had directed him: very probably, she made no Secret of Mr Paris's Letter, or of Mr Forresters Opinion grounded on it: there is no time of the Declaration specified, it might have been made immediately after the Opinion, & the Will drawn in consequence of it — She then lived in her own house; in talking of Mrs D's affairs, there used to be high Words, between her & her daur; who wished her mother had not been Trustee, very likely from some doubts expressed by Mrs G. wh: r she was so, or not; nay Mrs D. might not be satisfied of it herself, & very possibly, Mrs G. might in consequence of these disputes, resolve to go to some other Council, to know wh: r she was such a mere Trustee, & that Council might not be of Mr F's Opinion, for Council, as well as, Doctors will differ — However we are not to go on Probabilities, Conjectures — tho, she had been long ill, so bad, as to be in danger of dying her daur wd not take her a Country Lodging; there was nothing particular in her going to Mr Woods, at P.G. other People had lodged there; Mr W. an old Acquaintance offered her his house not particular, that he should offer, without any views: & this no matter what sort of House this was, so that all the Evidence proc con is quite out of the Qu: but it seems to have been a small neat house; Mrs D. wanted her mother to leave it, she refused, an absolute Quarrel ensued; their Ws prove a general Disagreement, the particular Cause is proved by Eliz Beane, who lived with Mr W. she deposes to a most harsh unduty full Expression of Mrs D. viz. I see you say to your Mother, she shd never be at rest, till she had seen the last of her; Deed burst into Tears, & said she was very sorry to hear such an Expression from a Child who came from her own Body; the Impression made by the Expression was very natural, the Occasion of it, was the Connection between

Mrs Strode & Mr Eyre; & yet the Person who used to accompany her, when she went to Parsons Green, also to go & fetch her home, was this very Mr Eyre; this it will be allowd was no conciliating way; & his treatment shews, she was not unreasonably set agt him; how shocking was that Speech of his? Dowager, I think the fittest Place for you, wd be a mad house; & this is an answer to what the Gentlemen said, as to Mr Woods endeavors to prejudice her agt him: there was no occasion for it; she Deed persevereing in her Sentiments of the Speech being according to his real Intentions, notwithstanding his apology forth confirms its being frequent, & the occasion of the dislike: the Daurs Visits continued some time after Mrs Goughs going down; she had abundant Provocation, for making the alteration; yet she provides amply for her daur, tho, not in the Way she wd like. It appears by the Inventory dated Oct? 28. 1761. that Eyre was indebted to y? Estate 3875£ if therefore he had not so grossly affronted her, if she had no reason to think he wd ensure her daur (as She more than hints, he wd,) the teazing her to lend him more money, & her not looking upon the Debt as secure, wd be full reason sufficient, for altering the Will — All this, I am sensible wd come to nothing, if they ed establish y? Incapacity; But none of the Ws speak to the Point, & Mr Eyre had not seen her, of some time. As to Custody, she manag'd her own Affairs, gave her own Orders, she was quite at Liberty; to establish a custody, it must be proved in y? strictest manner: Nothing like it, has been proved; Mr Wood the Master was not there: She ed have left the House when ever she pleased; but it appears, she had a greater Aversion for her own house, else Mr Eyre & Mrs Strode wd have readily afforded her, the Assistance necessary to get away — The Facts deposed to by Haslam contradict her Depon, to a mere Declaration she pretends the Deed made; she left her Daur, the choice of any House but Surry Street — They have pleaded, & the Ws speak to a stricter Custody at P? but even supposeing, they had made out the Endeavor to conceal the Illness; it wd be Custody by a sort of Presumption & Collection: the Servant is not examined; & what method did they take to conceal it? why, the most unlikely; they sent for Lane, the Apothecary, & the Nurse of the Family; there was therefore the greatest Probability, they wd acquaint Mrs S. with her Mothers Illness; & so they did, Lane went, & Davis sent word; — You will observe, the daur never offered to visit her, for 2 months after she came to Town; it is said Cornforth, or Wood, or both, refused to let her see y? Deed; how was this refusal? why C. desired her to remain in y? Parlor, till he sent up word, she was there; it was very proper, in her weak State, that she shd be apprized of it, & her daurs behavior afterwards, shews how necessary, it was, nay that it wd have been justifiable not to let her go up at all — She flew into a violent Passion, & W. said she, shd not see her Mother, till she was cool, wch, when she was a little, she accordingly did; Davis too confirms this, to be the real fact; for y? Words, she deposes, Mr Wood used, are "You sha'nt see your Mother in a passion"; how does she behave, when she is admitted? in a most unnatural manner; she puts herself into a heat, runs up to y? Bed, tells this poor Woman, "she was come, to carry her home to her own house"; what, remove her in that Condition when the Physician wd have kept her quite still, & said the Jolt of a Coach, going by, might kill her: how then ed she possibly bear the motion of one from Bond Str: to Surry Street? & what made the Speech still more cruel, to a house she had all along, express'd such an Aversion to: They have

called it a master piece of Art, on account of Mrs Strodes age make? it unlikely, she shd have Children; I dont know there is any Evidence, of what age she is; they say the Contingency of Children is provided for, not that of Grand Children, perhaps it is not in express words, but I believe the Equity wd extend to them by a liberal Construction of the Bequest, in preference of them to Strangers: But what is the Inference they wd draw? is it an Argument consistent with the other, wch the Gent: made use of? wd they infer, the fortune was given to her Children because it was not probable, she shd have any, & not given to her Grand Children, because it was probable she shd have such? It is not the opinion of Ws wch are to be regarded; I will allow, it is not probable, she shd give Legacies to Persons, of whom she had express'd herself so strongly: let them make the most of it; for it is not incumbent on Parties, to clear up every slight presumption; if it is such as to overturn the positive proof, we have brought, there is nothing now, I think, but the Recognition, wch they have pleaded differently from what they have proved, from Haslams account, it is not established, that either C. or W. were present, when Deed delivered her the Penknife, tho, they have pleaded them to have been so: nor does H. say one word of a harsh message, being sent, as they have pleaded, but quite the reverse, as far as it goes, calling her "Dear Child"! What the motive of this odd Transaction might be, is not at all essential: perhaps, it might be with a View to keep the Daur, a little quiet; she might do it, that she might not think herself quite cut off, as she must be conscious, her behavior had been such, as to deserve it; Mr Lanes Answer to the Interr? quite oversets their Plea, of a pretended Republication & Recognition of her former Will, a Day or two before her Death; He is asked, did not she acknowledge the Will of 1760 to be her hand writing, he answers, he heard the Deed say, her daur had been there with an old Gentleman, & did ask her, wh? a Paper, they showed her, was not of her hand writing? but dont know what that Paper was — This proves y? Capacity beyond all Possibility of doubt — Lane tho, exam: for us, is no willing Witness; the if favorable to either, must be presumed so to Mrs S. being the Apothecary of the Family in Surry Street — The Deed did not say, that was her Will, & this slight acknowledgement merely of her hand writing, cant amount to a Republication or Recognition, therefore —

Dr Harris .... I am Council for Mrs Strode, & must go into y? History of Mrs Gough as far as the Evidence will justify me; she was left in possession of a very great fortune by Mr Paris, who married her Sister, who on her death Bed particularly recommended Mrs S. to his care, favor; he promised his Wife to provide for her, cloathe, & treate her as his own child; he intended his whole fortune for her; she married Mrs S. agt P's inclination & clandestinely; he was very much displeased with it, but forgave her many years before his death: his Attention was then diverted to securing the fortune to her, so that it might not fall under the Power of her Husband: it was therefore to be left in trust: P was desirous of its being a secret Trust, & accordingly at Mrs S's own request committed it to her mother, Mrs G. who ostensibly, Owns, by this Will of 1746, has the whole for herself, but by the Letter, it is very plain, she was only Trustee for her daur: he says, he is sorry he cannot leave Mrs S. a Partner in the Donation: who is to interpret this Letter? Down it is obscure, but it must be all taken together: this refers to her being a feme Covert; "I wish I had more to give" &c Mrs G. at most cd only have had a Moiety to herself; but she was from the whole tenor of the Letter, a mere Trustee to her Daur, of y? whole: P consulted her before he made his Will; she promised him to fulfill the Trust: P asked Mrs S. who shd be her Trustee? she proposed her mother: no Lawyer intervened, no Lawyer can determine the nature of the Trust; none but Mrs G. cd know P's Intention —

It was in order to carry part of it into Execution, that y^e^ Papers were laid before Mr Forrester, viz. to draw a Will, so as to protect her from her Husband — Mr F might think, he was consulted on the Trust, but he was not — Mrs G had no doubt of her being a Trustee, she only wanted information, how best to conform her Will to P^s^ intent; in creating her so; however if the Gent^n^ please, let Mr F have been consulted upon y^e^ Trust, it does not prove her Doubts — in 1760. she gives the Proceeds to her daur; in 1762. when she was less able, she makes another Will for the same purpose: By neither Will is any thing given but the Proceeds: in the Codicil indeed, she has 2000£. The 2d Will bears the strongest marks of some undue Influence, & not knowing what she did; & tho' the Ct cannot determine the Qu^n^ Trust, or no Trust? yet I will venture to say, that seeing a Trustee making an inofficious Will as Trustee, & a Mother, it will look very narrowly into the Evidence — I dont say she was an Idiot, but I may venture to say, she was a very weak woman; that at the mechanical Execution, she was imposed on, she labourd under a temporary Incapacity; it appears she was in the Hands of People who wd impose on her, & that she was so imposed on — The mere Opinions of Ws are not sufficient on either Side; they must give Reasons for such their Opinions: Our Ws do, Wright says, she talked so to him, & forced such strange Stuff into Conversation, that he concluded she was out of her Senses — Haslom says, who ever had a mind to address himself to impose on her, might very easily do it, & tho' she does not in express terms, give the reason, yet it is very naturally to be collected from her Evidence, that she was a very weak Woman, talking to every body of her daurs Conduct & Misbehavior & of Eyres ill Usage of her, there is a fact too wch will shew her being so; this her going on a visit to Bs house: he was only an accidental Acquaintance, & says he had not seen her 18 Months; the reason of her visiting him, is as strange, as her behavior when she is there; what! because she did not chuse to live in Surry Street, cd she find no House, without going to that of a Person, who was rather, a slight Acquaintance; she tells him her private affairs; she gives this Stranger 500£ bids him take care of it, without so much as taking a Note of him for it; I mention these Circumstances, only to shew, how easy she was to be imposed on — W. is said to be an old Acquaintance, so he might; but every old Acquaintance, is not consequently an intimate friend, as such there cd be no reason for her leaving him 20000£ in reversion — W. cd not be a very intimate friend, for he once applied to her, to lend him some money, yet notwithstanding the great regard wch she is pretended to have had for him, she wd not lend honest Ben Wood 200£, tho' Eyre, who was then her Privy Councillor endeavoured to persuade her; yet she cd not deny him face to face, wch is another strong Instance of Weakness: she cd deny nobody anything; She dont lend the Money; W. dont take it amiss; he sticks close; he gets his Wife to invite her to Parsons Green; she might want the air possibly; she went for a few Weeks, or 2 days, & staid Months — This Will too is contrary to Mr Woods own Declaration, if Eyre's Evidence is to be beleived; & I know of nothing said to impeach it; he says that in Nov^r^ 1762. when W. brought Mrs Strode 50£ from her Mother, as a Quarters Allowance, she refused, to sign the Receipt for it, & said, I wish they may not impose a Will upon her; to wch W. answers, I am well assured, she has made no other than that you know of; & I do not believe, she will ever make

another; Mrs Strode might be of inflammatory matter, she might think, & probably did, that she had a right to the Whole therefore rejected the Offer of 50£ but how cd W. with any degree of propriety, assert a thing, so contrary to his own knowledge he is conscious of deserving some Imputation; he wants to shew he was seldom at Parsons Green; he was always there from Sat: urday to M. or Tu: half the Week, from their own shewing, & sometimes he comes in the middle of the Week, he was fetched by Mr Goughs Coach, & she used to carry him; but if he never was there at all, is there no Agent? I dont say they locked the door; it is the Mind they fettered: they have attempted to prove an Absence for a long while at Canterbu: ry, in wch they have greatly failed; for it appears he went Oct: 5th & returnd 12th & Mrs W. was not gone 8 days; the pleading this not proving it, shews, a suspicious Endeavour to ex: culpate himself — It was the People from Surry Street they were afraid of, any body else might come, y^e^ Restriction was agt them; the Coachman says he was not sent by Mr Gough, but he dont say, he was not sent by Davis: the very Question, "how came you by y^r^ knowledge? shews y^e^ Desire of Secrecy; they put her in a Passion by refuseing to let her see her Mother, & then say, that was a reason why they did not let her: such Treatment wd make any body angry: the Qu^n^ is, how the Mother takes it, not how the Daur behaves? Davis was turned out of the Room on y^e^ Daurs coming in, but returned as soon as she was gone, & Deed being asked, wh^r^ she was not very glad to see her daur, replyd, she was overjoyd at it; wd She have said this if she had thought herself so grossly affronted, as is pre: tended, & is it likely Deed she give Orders to S. not to ad: mit her Daurs next Visit, after expressing so much Joy at seeing her the first time; this is not consistent. I must observe, too, that they are in mala fide, at Least Wood & Langdale, for they have sworn in y^e^ Affidavit of Scripts, they know of no other Will or Codicil, than this last, yet Eyre & Gwynn swear to their attesting, the Will of 1760, & Langdale him: self was a subscribeing W^s^ to it; Wood is still more culpable he has that first Will in his possession, & gave it to Sparkes to serve as Instructions for this latter Will — She was in y^e^ hands of Persons who lie under some Suspicions, they ought therefore to have been more cautious in their Affid^s^ W. waits on Sparkes ten times; he brings the ready prepared Will & Codicil, to this weak old woman; it is immaterial wh^r^ she read over the Will to them, or wh^r^ it was read over to her? I must now refer to the Will, as proof, she did not, cd not know the Contents, I must not omit, that this Stranger who heard her, did not ask her any Questions as to her understanding it, or as to y^e^ Instruct: ions — there is no Imputation on Mr Sparkes general Character, it is a very fair one; but Gent^n^ of y^e^ Law never make a Will except they have Access to the Testator, & are acquainted with him, they chuse to be satisfied that y^e^ Instructions come from him; to receive at ten different times Instructions from a Person, to make an absolute Stranger's Will, wd naturally excite a desire to speak to y^e^ Testator himself ab^t^ it: their come: thro, y^e^ Channel of a third Person, wd have deterred ev: Gent^n^ of the Profession: it is very difficult, nay almost impossible to say, wh^r^ a Person is sane, & of Capacity sufficient to make a Will, from seeing that Person once: she leaves large Sums in Charity; such Bequests always accompany Imposition: Deed expresses no resentment agt her daur, why shd she

alter her Will? Whatever Mrs J.s behavior may have been it was forgiven: the Legacies muzzle y.r W.r to this was oweing the Delay, Eyre was an unwilling W.r: Deed might mechanically execute this Will, but did she intend to injure her daur.r? did she know y.e contents? clearly not. Davis says y.e Penknife was found in y.e Country, in y.e Room where Mrs J. lay, while there; perhaps previous to y.e Date of their Will, Deed wrote y.e Note then, & might intend to send it, but did not, till she had been some time in Town, but Davis dont know when it was sent: As to y.e Paper wch Deed gave C. with the money, wch has been exhibited by y.e Gent.n it dont appear, when it was written, for y.e Date is only of y.e Copy, so that tho, it was copied 20 Sep.r 1762, it might have been written originally previous to y.e Date of the Will of 1762 — The Exhibit most plainly shews, she had an affection for her daur, by lodgeing £500 in C.s hands for her private use — In another part of their Plea, they think it right to shew, why Mr Innes did not make y.e Will; certainly they were right as to shewing it, but they are unlucky in the manner in wch they set about it: the Declaration of Deed with respect to Innes, must be previous to making y.e Will, as it was a reason agt his being employd; & this declaration makes it impossible she shd leave him a Legacy; 1/4 y.e Legacy to miss Eyre, how ed she so often tell Mr.s Eyre, he was to have no benefit, how ed she so often tell them — What Opinion must C. himself have had of her Capacity, when he says she might have forgot the Contents of the Will & what? of a Will made only 3 Months before? she dont know these plain Legacies, yet ed have given Instructions for, & have read the Will: it is a Contradiction to suppose it — The Gent.n will say then strike out these Legacies, it might be so if a Person was sane, imposed on; it is not so in case of Incapacity, wch must affect y.e whole Will tho, if 2 Legacies has been falsely read over, or foisted into y.e Will of a Person, of whose Capacity there is no doubt Probate of the Will wd certainly go, without those two Legacies —

Dr Calvert — We do not say, this has not the Appearance of a Will duly executed, but if Deed was under an undue Influence, when the Will was made, it was no Will at all; we are not tied up, to shew, she was locked up, or that they put the Pen in her hand & guided it to sign with; if a Person knows not what she does, or the Will proceeds on false Suggestions, it is equally, not the Act of y.e Testator. Swinburn says, Gro.s Flattery annulls a Will: it is a false Suggestion, the Deed not knowing the Grounds whereon they go, the Deed proceeds on false facts — The Scene of Imposition began at Woods, continued at Cromford; he was an Acquaintance, she wanted the Air, say the Gent.n there was no Appearance of a Scheme in it, perhaps then was no such View at first: it might be formed afterwards, immediately on her Arrival — Is is possible, is it any ways credible, she shd make y.e Declaration pretended, that she went to P.l.y. for the sake of the Air, because her Daur wd not take her a country Lodgeing. She had the Money herself, & ed have got a Lodgeing, she did not depend on her daur; It cant be true, say they, that there was any Contrivance, because the daur accompanyd her, she ded so, but she stayd only a short time; we need not contradict her going out; observe, whom she was surrounded with, all W.s family & generally, one of them, went with her in the Coach — The y.e People of the House were not listening, the precaution taken by y.e Deed of bidding Haslom look, wh.r none of them, were so, shews what she thought them capable of — Mrs Bowman dont say, she ever heard Mr Eyre threaten y.e Deed with a Mad House, she only says, Deed informed her, that she had been informed by some of her Friends, that E. designed to get her to some private Mad House — Our W.s say the Deed received her Information from C. if he was the Person who raised the Report, the same C. so speaking of himself, is rather a suspicious W.s as to the Account given by Bean, how improbable! E. wd never have said it to her in an abrupt manner, if he had said it at all, but there is no Introduction to such a Speech; She gives no reason for Mrs Rhodes making use of such an undutyfull, unnatural Expression; it is incredible she shd have used it without some reason given for it — I will submit to you on other Grounds, Bean is not a credible W.s she is resolved to do her utmost to serve her Party, but overacts herself, for in deposing to the time of W.s stay at Canterbury she says he staid y.e Weeks, whereas Prestage who went with him on Business, & others concerned, who must know best, make the Absence only about as many days — She says, she has seen Deed write, & knows her hand, & on Interrog.r says, she can neither read, nor write — therefore cant answer to y.e Exhibit the Deed has by the Evidence made frequent Declarations of the Trust; from whence, it is clear, she was under that Impression, so that it is not material with respect to y.e Fact on the Will, wh.r she was really a Trustee or not; I wd not argue that she cd not make a Will, or was not a Trustee, but the Point we contend for, is, that she did not make the Will of 1762. i.e. She was under undue Influence & incapable, so as not to be her Act — as to being made in consequence of going to another Council, it is meer Supposition; it is not to be collected, that she went to Mr Forrester to try wh.r she might not leave it away from her daur; the motive of consulting him, was, rather to be justified in leaving all to her daur — The Note inclosed in y.e Penknife Case cant apply to the latter Will, wherein she leaves only a life Estate to her daur, was not this wronging her? it wd be a Quibble, to say she wd not wrong her, when she had made her only Tenant for life, instead of leaving it to her absolute Disposal — The next Argument of Imposition must be drawn from the Contents, for supposeing her consuant of them, wd she have left a considerable Legacy, to one, whom she had called y.r his insolent daur.r? no certainly; for if the Occasion of dislike had arisen, after making the Will, a Person who knew what she did, wd have revoked the Legacy; we dont say, there was a positive deception; Imposition, as to the Mode, is different according to the State of the Persons imposed on; E. ed never intend his fortune shd go to W. if he had not designed it shd vest wholly in Mrs J. he himself wd have left the Reversion amongst his own Relations; there was no occasion for any Injunction of Conscience, if it was to be at Mrs G.s sole disposal; the Instructions were carried by y.e Person to be benefitted by the Will; the Person they were carried to was a Stranger, to the Person, the were said to be carried from; the Drawer of the will is a Gent.n of Credit, in his Profession, wch makes it y.t more extraordinary, that when Instructions had been carried to different times, no Application shd have been made to the Deed herself; if Deed ever did make such a Speech, as is pretended, "do you think I am in my Senses? ed it have escaped Passage? wd he not have spoke of it on his first Examin.n? did she understand what she was about? clearly not, else she wd not have executed a Paper to benefit Persons, she had formerly expressed a dislike to, so contradictory, to her former declaration, of being her daur.s Trustee: & there is no clear proof, that the Instructions carried by W. came from the Deed; there was a base determ.n before the House of Lords in 1763. wherein a Will was set aside for want of Proof, that the Instructions came from the Deed. It came by Appeal from a Decree of the L.d Chan.r of Ireland refusing to set aside a Verdict obtained by the Resp.t on an Issue directed out of Chancery, to try wh.r y.e Will, in the Pleadings mentioned dated 4 Dec.r 1740 be the Will of Rob.t Colvill Esq or not? the Jury

x L.d Rob.t Manners & others v. Stephen Moore Sen.r & Jun.r & others.

found it not the Will of the Deced, & on appeal their Lps were of that opinion, for want of proof, that the Instructions came from the Deced, in such case, (Mr Colvill y Deced being of a very doubtfull capacity,) Instructions were carried by the Apothecary to an Attorney of Character, but not him usually employd by the Deced) as from Mr Colvill, the Draft was prepared, carried back by y Apothecary to the Deced, to whom the Attorney Mr Baldwin, believed it was shewn by sd Apothecary, who carried it back to the Attorney, & gave him directions, as from Mr Colvill, to lay it before Counsell; an eminent Civilian, Common Lawyer settled it, unacquainted with y Deceds singular Situation, as to Sanity, or the Influence Martha Lander had over him, or from whom the Instructions moved, or wh? y Deced had ever seen the Instructions; & the Attorney believes the same was again shewn to the Deced, & was returned to be engrossed; he accordingly engrossed 3 parts, & on the Day of the Date attended y Deced with them, & read over one of the Ingrossments himself, whilst the Deced & the Apothecary looked on the other 2, the Deced immediately executed the 3 parts - There, the Will was duly executed, the Deced must be supposed to know the Contents, by reason of the reading over; he then by recognizes the Instructions, but because they were not proved to have come from him, but rather from Martha Lander, the Will was set aside on the footing of Incapacity & undue Influence - I submit to you, Sir, that y present Case is much stronger - Mr Lyres Expresion in Now? on carrying y Instrument to my Client, must make this Will appear in a more unfavorable light; Mr Lyres Evidence is not impeached, therefore it must be taken to be true - the Deced wd talk even to her Coachmaker of her Affairs - it is natural to conclude, if she knew what she had been doing, a Woman of her communicative disposition wd have dropt some hint of her having made such a Will as this: if there is sufficient Evidence that she was not a free Agent, that she was a very weak woman, that it is inconsistent with her declarations, &c. it cd arise only from Imposition, undue Influence, therefore I hope you will be of Opinion to pronounce agt the Will -

D^r Burrell . . . With respect to this Will of Mrs G. if we can prove the Incapacity & Custody, it at once ceases to be her Will, & it will follow, that some body else made it for her (By y history of Mr Paris related) Mrs G. design was to benefit his Neice exclusive of her Husband; if the Deced chose to try Country Air for the Recovery of her health, it is very extraordinary she shd not provide herself with a lodging - There is a manifest Contradiction between the Depons of the Ws they destroy each other, by deposeing to what are in themselves Inconsistencies; how cd Deced be afraid of being confined in a madhouse by her daur, & yet offer to live with her any where but in Surry Street? Both assertions cant be true; if she was afraid, she cd not offer; if she offered, she cd not believe the Suggestion inculcated by W. C. & their Agents - the Ws who depose to Lyres Expresions, must have mistaken them - The Deceds Expresion in respect to Woods Family, shews, she thought herself beset, & considered them as so many Spies; She did not, at first, intend to stay at S.G. near so long, as she did; her Daur left her: the House was made as inconvenient as possible to the Daur, to oblige her to remove, when she was gone, they had Mrs G. entirely in their own power & made good use of the Opportunity to insinuate themselves into her good Graces, to alienate her Affections from her daur; C. said he wd not suffer any Messages to be delivered wch came from Surry Street; the reason is obvious, because he was afraid of a Reconciliation, it was their Interest to continue the Breach between Deced & her daur - Who was C. what right had he to lay such a Prohibition on the Communication between Deced & her Daur? C. instead of being the first to acquaint Mrs S. with her

mothers Illness, does all he can to conceal the dangerous Condition she was in, took all possible Precautions to keep it from coming to Mrs S's knowledge - Instructions were carried by Wood for drawing this Will, to an entire Stranger to Mrs G. to a Person who was totally unacquainted with the Circumstances of y family & the Deceds Age: there was nothing before him to ascertain the Instructions coming from Deced - The present Case is as similar to Mr Colvills as any 2 Cases can be; Mr Colvills Connections with his Relations, Friends & Acquaintance, were artfully broke by a Designing Person; the Servants were directed not to admit any of his family, yet he had sometimes an Opportunity of seeing them, especially his Nephew, he testify'd & declared a great fondness for him, saying, "he was his Heir." In the present Case, there was the same Prohibition to the Servants, to admit Mrs Strode, there are declarations by Deced of her Regard for her, & the Note enclosed in y Penknife Case is a strong Evidence of the Continuance of it - The Instructions in writing for Colvills Will were carried by the Apothecary, an indifferent Person; the Instructions for Mrs G's Will, by W. the very Person intended to be benefitted: the Attorneys employd, were in neither Case usually consulted in the Affairs of the Testators - It appears not in either Case, who wrote the Instructions, or by whose Orders they were carried to the Drawer of y Will - in Colvills, Baldwin prepared a Draft of the Will, from the Instructions he received, & delivered it to Draper the Apothecary, who he believes shewd it to Colvill & sometime after brought it back to Baldwin, who laid it before Counsell, after wch he believes it was again shewn to Colvill, & returned to him to be engrossed - Sparke prepared a draft of y Will now in question, from the Instructions he received from Wood, to whom he delivered it, he brought him directions for making Alterations, & thereupon he made a draft of a Codicil & gave it to W. to carry to the Deced; some time after it was returned, with directions to engross it thrice over; On y Day of the Date, he went by Woods Appointment, to his House in Dean Street Soho, to meet the Deced & to assist at the Execution, when he, Deced & B. Wood proceeded previously to examine the 3 Copies, wch she executed in the presence of Sparkes, Prestage & Pearson, y Subscribing Ws & Mrs & Mrs Wood, Sparke says in answer to 33d Interrog: That he received Instructions from Wood, ten times, wch he dictated from a written paper, of whose writing, he knows not." I must observe Sparke says Wood applyd to him about the middle of May, & y Will is not executed till 5th of June; he prepared the Codicil on Ws. 2d Application, the Date of wch is supplied & written at once, tho, a Blank appears to have been left for the Day & Month in the Will - In both Cases there is a variation in the Evidence, as to y Execution Baldwin a Subscribing W? to Colvills, swears, that M. Lander & Draper were present at y Execution, & that 2 Duplicates were executed at y same time; but Talbot Hemmett the other subscribing W? swore, they did not recollect any other Persons present at y Execution, besides the subscribing Ws & that any Duplicates were executed at the same time, neither is any mention made of a Duplicate, in y Will, wch is usual, when any Duplicate is executed - Here Prestage thinks, he did not hear y Will Cod: read over to y Test^x Pearson says they were not read over to the Testatrix - Sparke says they were present - In Mrs Goughs no Duplicate is mentioned; Colvills Will was set aside, there being no Proof offered to shew, he gave any Instructions for drawing that pretended Will, or that he ever saw or read it, before it was engrossed - No Proof is offerd that the Instructions proceeded from, or were given by Mrs Gough, for

drawing this Will & Codicil, or that she ever saw or read it over before it was engrossed; I hope therefore you will, on the same Grounds pronounce agt this Will; the reason is equally strong in the present Case - The sudden Execution by a Person of Mr Colvills Capacity, the procuring an Attorney who was a Stranger to him, to be the Agent in preparing & getting it executed, that in a private & clandestine manner by Mr Draper, without suffering the Attorney to receive Instructions from Colville himself, or to converse with him; the Care taken that he shd not discover Colvilles Incapacity or real Intention, shew the whole Transaction to be a crafty & fraudulent Contrivance of Lander & her Associates to accomplish their Scheme, induces their Lps to pronounce agt the Validity of a Will so obtained; the exact Conformity will I hope, induce a Sentence agt the Will now in Dispute, wch was rather a more clandestine Transaction, the Person to be benefitted having himself carried the Instructions -

D^r Hay Judge... Both Parties agree the Deed had a right to make a Will, by propounding each of them one; consequently Mrs Gough died testate - The Will of the latter date propounded by y^e Exors, appears duly executed; the Qu: then, is, wh^r she was capable at that time, & meant it shd ensue after her Death? Mr P. certainly had, from all the Evidence, a great affection for Mrs Strode one of the Parties in this Cause, Mrs Gough the Testatrix had also a great affection for her daur, notwithstanding she had received some Usage from her, wch a warmth of Temper might occasion; & tho, y^e Wit^s prove an improper behavior to her Mother, it had not that effect as to alienate her affection from Mrs Strode - what Mr P^s reasons might be, for leaving a Trust in such a manner, I cant pretend to say; he had acquired a large fortune with a very fair Character in his Profession; many Persons thinking to do a thing secretly (out of y^e ordinary way, are too wise in their own affairs: there is a reason for leaving it in Trust, because Mrs S. was a Feme Covert, but no discernible one, why it shd be a Secret, whatever were his reasons, upon y^e face of y^e Will he made his Sister in Law universal Legatee; y^e Letter is very obscure, but it is plain enough he therein imposes something on her, tho, it does not appear what; it was a confidential Trust only, that it might not go to Mr Strode her Husband, to whom she is now reconciled - Some time after Mr Paris^s death, Mrs Gough goes to an eminent Council, to know what power, she had, he was of opinion, she was a Trustee for her daur but does not say in what manner, or what sort of Trust: she makes a Will in 1760, pursuant to this Opinion, approves & executes it, wch continues till 1762 - Now for a moment I wd suppose, she has violated the Trust; that in this Ct. wd not set aside a fair Will; the Ct of Chancery will set aside any Act inconsistent with the Trust, on proof of such Trust; if I was to say that Mrs G. was tied up from making such a disposition, by the Trust, this wd depend upon the Construction, it must be pronounced to be a Will before the Construction cd be entred upon; the Will then

must stand if it is a fair one tho, the Contents of it as such, cannot, nor ought to be carried into Execution - Factum vel non Factum is the single Question before me, so that it is reduced to a point of Evidence; let us see then, how that stands - Mr Prestage had sev^l Transactions with the Deed; the first Act noticed, is the Preparation; the avowed motive for making this Will, her daurs ill usage; she asks him to be a W^s he consents; she appoints a time; wch not suiting him, another Day was fixed; here is the Animus testandi declared to the W^s a Person quite disinterested, & who is clear from any Imputation whatever; & at the Execution both Prestage & Pearson swear, to the full & true Execution; it appears clear enough from them both, that y^e Will & Codicil were not read over in their presence, & at that instant of time, but the Defect is supplied by Mr Sparke, who swears they were read over, & that if in the reading he happened to make any mistake, she corrected him; this is very strong Evidence not only as to y^e Execution, but his of the Deed; there is a Recognition deposed to by Mr^s Lash week of June, or beginning of July; she had said that she was quite easy now she had made her Will - The Comon Condidit goes only to the Execution & Sanity of the Testator, as the time of it, so a special Plea is given, pleading precedent, subsequent Facts: the W^s say, that immediately after the Execution, the Deed said, do you think, I am in my Senses? wch shews she knew something of an Insinuation, that she was not, wch accounts for the Expression disposed to on the 2d Examⁿ, i.e. they say I am mad - It is plain, she had a knowledge of the Will, & there is as clear Evidence as possible, of the Execution, it is true indeed, there are some Objections, but they are little ones - There is a defect as to proof, that the Instructions came from the Deed originally, & I own, I wonder that Mr Sparke, a Gentleman of Credit & Reputation in his profession, shd receive Instructions so many times from Mr Wood, for a third Persons Will, & not desire to see the Testatrix, & the rather; as she was a Stranger to him, as to her Situation, & affairs - Instructions are not necessary, in the case of an executed Will, for where there is a clear certain Execution, Instructions are implied; there are some odd Things, but as to Custody, there is no colour for the Charge; I must acquit the Gent^n of any thing of that kind; Wood, very fairly, as an Acquaintance, hearing the Deed express a Desire, to try the Country Air for her health, offered his house; the Daur went with her; what! did he inveigle the daur too? & this Daur leaves her, at her own motion contrary to Mrs Goughs desire, who was averse to her return to Surry Street - the Mother was uneasy at her Connexion with Eyre, I am not to enquire why she was so; the Paper brought in to shew an aversion to Mr Eyre, shews also an Aversion to his daur; it cuts both ways; she was however uneasy at her daurs Connexion with him; She expostulated with her upon it; wch produced a Quarrel when, very likely, Mrs Strode, being warm, might let fall those unguarded Expressions spoken of by the W^s It is material to shew the Quarrell between the Daur & Mother, just about the time of making the Will - the Motives are a good Ineption - Mr Winchester was an Exor & Trustee in the first Will, he is so in the 2d, Mr Eyre was one in y^e former Will, but without entring into the truth of what the W^s say, as to his swearing at, abusing, & threatening the Deed with a mad House, wch, at least in part, are scarce credible of any Gent^n his being so considerably indebted to the Estate, might be a sufficient reason for her to substitute other Trustees - She seems even to have had a Capacity rather above the common run; the Story of y^e Penknife, the note enclosed, & even those Reflections on Eyre & his daur, as well as her Objections to Mr Innes, are clear Proofs of it & from what Lane

declares upon Interrd past, when the Paper was shewn her, by her daur in company with Gray — what d that Paper be? probably it was the Will of 1762 — she was asked wh? that was her hand writing? she acknowledges it to be so, but says no more, wh shews both Capacity & Memory. There is no Recognition of the former Will else there cd have been an addition, to what she said, as to its being her hand; she seems from thence, quite sensible, & from what Strode heard down at her Bed side, & exprest a Concern for hair offended her, Mrs G. said, I forgive you &c, & con: there is not any single Act of Incapacity brought; if then the Factum of Execution of the Will, is proved, on the Evidence of the subscribing Wits there is proof of the general Capacity of the Decd, how set the Will aside, even tho, they had proved a Custody at Corn forths, yet that being subsequent to the making & Execution cd not possibly affect the validity of it; but I must say in justification of C. that as to the Custody at his house, there is nothing to prove the charge, Haslom dont swear to a positive refusal of admitting Mrs S. or to the Suppression of Letters; she dont swear to C's insinuating that Mrs S. wd confine her, but that somebody at C's house said so — the fact noticed by Dr Wynne of Lane & Davis being sent for to attend the Decd in her last Sickness, repel the charge of any improper concealment; Lane was the family Apothecary, & certainly wd tell Mrs S. how he found the old Lady. There is a little something at C's wch looked like custody till explained; i.e. Mrs S. seems to have been high Spirited, so was at first properly refused, however she was soon admitted, & then left alone with her mother who then shews a sign of Sanity, desiring her daur to send her some Wine, & specifies where. She is to find it; here is memory. The old Lady did not like to part with money, for that reason she cd not be induced to lend Wood 200£, She was Eyres borrowing her money & teizeing her for more, wch in all probability first caused her dislike to him; I dont know wh? it is natural, but it is the common foible of old People to love to keep their Money. It was well urged by the Council, & it strikes me as a great Objection on the face of the Will, (if not counterbalanced by positive proof of the Execution & Sanity) that she has given Legacies to Miss Eyre, of whom she had expressed herself so strongly. She has left 2 Sorts of Legacies; viz: positive, absolute, small Legacies to several Persons & her whole Estate to her daur for life & after her death to her Children; & then she leaves eventual, large Legacies, very liberally to several Persons: the old Lady thought, after making provision for Mrs S. & issue, she had a right to dispose of the fortune herself as to the Objection of not having provided for her great Grand Children, in case her Grandchildren shd die under 21, I have, for my own part no doubt, but that the Provision in the Will, as? under that disposition extend to the Gr: Ch? of Mrs S. & that by an equitable Construction, the 2d Generation, wd be by a Ct of Equity, be called in to take before Mr Wood; this is my Opinion, & if this wd be so, it will remove the Objection; for say they, she cd not be in her Senses & yet exclude her Gr. Gr. Ch? but this I take not to be Law & Mr Spanke on Interrs, says, he does not imagine, the Deed intended to exclude her Gr. Gr. Ch? from the Inheritance. In the Civil Law, the word Children included Grand Children, & to argue from Equity, the Succession wd be extended to them in such a Case as this: I think it may be collected, by reasoning from analogy on the Law of England respecting Collaterals: By the Statute there is to be no representation after Brothers Sisters Children: suppose then a man dies leaving great Nephews, it was the Opinion of Sir Dudley Ryder & the present C. J. Mansfield that Great Nephews wd be considered as Nephews to the deed Bro? These are respectable Opinions & are applicable to the present case. Piety & Fraud, it is said, often go together, they do sometimes, but she might, x x x x x as dying for old People are often charitably disposed, without any fraud being covered — She might have

Dig. 23. L. 14. §4. . . .

more cash, than is supposed, her motive for leaving Miss Eyre a Legacy does not appear, but because I cant account for a particular Legacy, does not appear, but because I cant account for a particular Legacy, does not appear that I am not to set aside the Will — as to the Note, very probably in order to keep her daur, she chose to amuse her in that manner; how did she wrong her? she only disposes of the money herself, instead of leaving it at her daurs disposal, in case of dying without Issue — With respect to Mr Woods Declaration, very possibly he might think it shd be a Secret; he might have received the Decd's directions, to keep it one; nor do I see, there is any Stress to be laid on it — the Affid: of Script, was at most an Inaccuracy; they cd not mean to suppress the former Will — Upon the whole, this Will of June 1762, appearing duly executed, & there being full Proof of her general Capacity, & it was not a mechanical, but a rational Execution; the Operation of it, is a future, & another Consideration for another Ct: besides, if she had no right to give away the Fortune, in the manner she has done, she certainly had a Power of altering her Exors & Trustees, & why Mr Paris himself did not make Trustees, I cant conceive, but there is sufficient Evidence for me, to pronounce for, & establish the Will, however there being some Circumstances, whereon to found a next Litigation, I give no Costs. Appealed — afterwards the Appeal was dismissed by Strode for want of Money — The Chief Chancery declared Paris's Decree to Mr Gough. [illegible] in Trans. for Mich. Term &c.

Prerogative 2 Sess. Trin. T.

June. 6.

No 69 Clouds . . . . v. . . Davis & Robinson

Admission of Testimony.

Bishop	Fountain	Altham
Dr Marriott & Wynne	Dr Harris & Burrell	Dr Calvert & Bever.

Dr Calvert . . . I am Council for Jos? Butler, Grandfather & Trustee to the Resid: Legatees in a Will of Hannah Clouds; the Decd, dated 1 Oct? 1764. Decd was Wife of Jn Clouds, who agreed to a Separation from her, & by Indre quadripartite dated Aug? 13. 1764. betw: Jn Clouds on d? one part, Hannah C. his Wife on 2d. Jos? Butler on the 3d, Lewis Davis & Jn Robinson on 4th. of the 3 of the moiety of the personal Estate of her Bro? Wm Butler decd, amounting to about 1000 was secured by J.C. to 3d & C. for her sole & separate use, benefit, & her own disposal, as she without her said Husband, shd by any Deed or Writing, under her Hand & Seal, attested by 3 Wits or by her last Will duly executed, appoint; Pursuant thereto She made her Will Oct? 3: 1764. wherein she appointed Lewis Davis & Jn Robinson her Exors; These Persons pretend she made a Will of a latter date. viz. Nov? 3: 1764. appointing them Exors, & Resid? Leg: this latter Will is contested by the Husband of Decd, & we intervene for our Interest, under the former Will, wch we say is destroyed, & therefore bring in & propound a Draft, & oppose both the latter Will & an Intestacy, for wch purpose we are now before you, with this Allegation. In the 3 first Articles, we plead the Indre, Identity, & Subscription of the Parties. . . in the 4 & 5th, that in consequence of this Power, M. C. gave Instructions for this very draft now pleaded by Jos? Butler, dated Oct? 3. 1764. that it was read over to her, & being compared with the Copy, was engrossed, & then read over to, & executed by her; as also that Dr & R. are the Exors therein named. 6th: plead Identity — 7th contains an account of Dr R. applying to Slack, who was appointed to keep & Accounts of Wm Butler's (the Intestate) Estate; that he informed them M. C's share of such undistributed Estate wd amount to 2000 — 8th pleads that after they were acquainted, with the amount of M. C's undistributed Share, they encouraged her in drinking Spirituous Liquors to excess; that she was for sev? Days before, & on Nov? 3. 1764 (the Day of the date of the latter Will) incapable of recollecting the true State of her Affairs, or of understanding any Instrument, that might be read to her, for sev? Days before & after the 2d or 3d of Nov? 1764 not of sound mind, or capable of doing any rational Act — 9th Art: We plead she was intoxicated with strong Liquors, or stupified with the Effects thereof on the 2 & 3 of Nov? 1764. that they told Eliz: Thompson & Mrs Keen, they hoped Decd & Husb? wd not be there before they had done their Business in 10 & 11 Art: the Progress of the Affair is pleaded — 12 Art: That Dr & R. drew the former Will without the Direction of the Decd. 13 Art: that during

the Transaction they several times expressed great Uneasiness least Mrs C. the Husband, or Jos: Butler, the Brother of Deed or any of her Relations, shd come in before the Execution, so, this design be defeated. 12. Art. That the Difference in y^e Legacy to . . . . . is very small. 15 Art: The Legacy is given by y^e Name of.

Dr Harris . . . I am Council for Mess^rs Davis & Robinson, Parties to y^e Deed of Separation, Persons greatly confided in by the Deed, & Exors in both wills. i.e. 1 Oct: & 3 Nov: 1764. There is reason to think this is calculated to put the Exors to expence & to protract the Cause; Mr Benn Agent for Joseph Butler the Intervener did not attend to be examined, till he had undergone a monition, to shew Cause why he shd not be excommunicated for non Appearance to be examined. The Allon with which the Intervener is now before you, consists of 2 Parts, the one propounding the Will of Oct^r the other combating ours of Nov^r I am sure you will cut off all possibility of delay, after so much already. I hope you will reject the whole; I dont mean to oppose it as improperly drawn, but as improper to be given at all. There is, I think, in general a Mischief attends the opposeing an Allon; it is apprizeing Parties of the weak parts of their Cause, it affords them an Opportunity of strengthening them & amending their Plea: Let us proceed first on the Validity of our Will of Nov^r If you are of opinion not to reject the whole, I hope you will confine the Allon to those Articles with controvert the Will of Nov^r for if they cannot destroy that, what signifies their proving the former Will, wch must depend on the validity of the Latter. As to the Latter Articles, the Husband is concerned in opposeing our Will, more than the Intervener; his Proctor alserted he cod give an Allon, yet has not, the Ct wont allow Altham & Bishop to plead the same matter; in the Case of Millar & Shepherd it was not suffered to be done. To be sure Allons may be given by several Parties, if they plead different matter, but in the present Case, it is scarce possible they should: we admit, Altham may plead everything agt the Husband, but we confess the former Will to be Hannah Clouds: If this Allon is agt the Husband, the matters contain'd in the 7th & following Articles relat^g to the latter Will is irrelevant. We admit Altham may be a Contradictor to our Will, in wch Case, what is pleaded in Support of y^e Will of Oct^r 1764 shd be rejected as quite immaterial; at all Events Bishop shd be assigned a precise time to plead, that he may not keep the Exors before the Ct when Altham desists; It wod be hard the Exors shd wait the Issue of the Contest between Bishop & Altham about the former Will.

Dr Burnell . . . Tho Sir, there may be many Articles of the Allon very exceptionable, yet as Dr Harris has waved any particular Objections, It wod not become me to make them; I think, with the Dr, the whole Proceeding has been calculated for Delay; Benn the Attorney of the Intervener, was on the Point of being excommunicated, before he wod attend to be examined, & just before his Examon, comes in, makes an Affid^t that Ja^s Ewer at Aug^t 1765 left at Deponents, the annexed Copy of H. C's Will, & on 26 Sep^r 1765 Sep^t shewd it to B. Hills, who said it was a true Copy of the original draft of H. C's Will executed 1 Oct^r 1764, the original Draft of which, was in his & his Partners, Ja^s Ewer's Custody; on this Affid^t of his hav^g seen a draft in Ewers hands, H. A. were order^d to bring it in. When Bishop wd have pleaded had he not feared Costs, Altham intervened, & asserted he wd give an Allon, whereupon Bishop waved his Peton, knowing Altham wd plead, what he shd have pleaded, & that he shd have y^e Benefit of Althams Evidence on the Merits without being liable to Costs. The present Allon not only propounds the former Will of Oct^r 1764 but affects the Validity of the last Will, of Nov^r One Will is sufficient to be pleaded, if either is proved, then is an End of the Husbands Interest: this manner of pleading tends only to increase Expence, Delay, therefore ought to be rejected. I must observe the Intervener is possessed of £2000 wch shd be the property of the Exors, under the Deed of Separation, wch may account for his intervening; if he was the only Opposer & pleaded the Special matter, he now does, agt the Latter Will, that would restrain him, unless he thereby subjected himself to Costs.

Dr Marriott . . . urged that the Allon pleaded a Draft of a Will unattested, wch was not a compliance with the Condition of the Indenture, & the bad Consequences of allowing such Draft to be set up.

Dr Wynn . . . I am Council too for the Exors of Jn Clouds. H. C. his Wife died Nov: 14: 1764 soon after D. & R. took Probate as Exors of a Will, said to have been executed Nov^r 3: 1764 – Citation issued agt them to bring in the Probate, & prove by Witness, or shew cause why it shd not be declared void, & Admon granted to J. C. the Husband – 2 Sep. H. T. Fountain appeared for the Parties cited – 4 Sep. F. brought in y^e Probate & an Affid^t of Script – Caveat Day Bishop alledged & Affidavit not full – 1 Sep. E. T. Bishop opposed the Will. Fountain propounded it, & asserted he gave an Allon on admision y^e 3 Sep: when F. brought in a fuller Affidavit of Script, & was assigned to hear on y^e Admision next Ct – 4 Sep. The Allon & Exhibit was admitted & Decree for Answers ordered 2 Sep. M. T. Altham intervened for J. B. & brought in an Affid^t of Tho^s Benn that there was the draft of a former Will in the Custody of B. H. & J. E. on wch a Monition was decreed agt them, as the Possessors of an Original Draft of a Will, of y^e Deed, of a former Date, to bring in y^e same on Oath – 8 Jan: 1766. F. brought in the Affid^t of J. E. with the original Draft annexed, & the Cause was assigned for Sentence – 1 Sep. Hil. T. Bishop alledged his Client to be dead – 2 Sep. Monition was decreed agt his legal Representatives – 4 Sep. B. appeared for Edw: Eeily & Jn Welling 2 of J. C's Exors, & F. was assigned to declare, wh^r he wod propound the Draft – he declared he wod not for the Bye day – Altham then propounded it & he & B. each asserted to give an Allon – 2 Sep. E. T. B. & F. opposed Althams Clients Will – A. asserted he gave an Allon on admision the 4 Sep: when B. waved his Allon till he had seen Altham, upon whose Admision we are now before you & wch you will reject if it can appear from y^e manner of pleading, that the Point aimed at cant be established, & that if the Draft cod be established, it cd not have the Effect contended for; wch is to defeat the Husband of that Right, wch prima facie, by Law he is entitled to, the Admon of his Wifes Effects: the foundation of the whole is the Benefit accreueing to H. C. by her Brother W^m Butlers death, reserved to her by Indre; But that Indenture, restrains her to the Exercise of her right in a certain manner; it must be disposed of by her Deed or Will, attested by 3 W^s from this very Plea there is no executed Paper, in consequence of those Powers reserved, wch must be strictly complied with: A Case may be put so, that an unexecuted Draft of a Will, whose Contents are well proved, as well as the fact of its being destroyd, may be established, provided too that the Execution of such destroyed Will can be proved; This however proceeds on the Supposition that those Points can be established, & the proof of Destruction must be beyond Doubt: in the manner they have pleaded, there can scarce be any Proof of the Contents; those who proved the Execution wd not prove the Contents & so vice versa, & indeed in a Case of this nature all Witnesses might to prove both; If then there does not appear a probability of establishing this Paper, you will not admit it; they are different Parties who set up the Wills; what wd expedite the Interest of the Party giving this Allon, wd impede that of the others; the Ct will take care they have all give Allons in time; if you admit the Allon I hope it will be taken together, that we may all proceed together.

Dr Calvert . . . As to the Objection to our pleading the first Will, that they are ready to contest it; this Proposal might be right, & make it superfluous for us to plead the first Will, if they were the only Parties, we had a Contest with, but we have the Husband to contend with likewise: we have a Right to come in; we are called upon by the Citation with Intimation & our own interest &c to come in, we are in time in any State of the Cause before Sentence; the Plea we have given tends rather to shorten, than to delay. Benn underwent an Examon: his affid^t is very clear, as to the fact of the Existence of such Will; however, let his Conduct be ever so culpable, it is not chargeable on my Parties; a Party may intervene, beyond dispute, in any State of the Cause, when it shall be for his Interest: Mr Butler was advised, that this was the proper time as to the Objection of an Impossibility of Proof, we must wait till y^e Merits to judge of that. It has been said, this is only a Draft of a Will, that cant be a Material Objection, for Drafts under peculiar Circumstances have pronounced for: Say they, it must be proved positively by Witnesses; we have said it positively to have been destroyd; the presumption then is, on y^e face of the Plea, that we shall be able positively to prove the Destruction. It is said

the has not on the face of our Plea, complied with the Terms of the Indre, wch requires the Will sobe attested by 3 Wn the original Will was fraudulently destroyd, that, therefore cd not be exhibited; but the Draft is, as Evidence of its Contents, of the Execution: the Law requires a Will of Land, to be attested by 3 Wn yet if upon Trial, it clearly appeared to a Jury, that a Will was so made, so attested, & did really once exist, but had been fraudulently destroyd, I make no doubt, but that on the Contents of such Will, being fully proved by a Draft, the ft. wd be of opinion, that the Directions of the Statute were legally complied with; & if in the case of Lands for wch the Law provides, the reason is stronger, where the Condition is imposed by the Act of Parties only.

Dr Lee ever..... The Objection I started seemed so refined, I own, I cd scarcely understand it; but if I did, I cant help thinking, that splitting one cause into three, wch it tends to, must cause a vast expence & delay. The Rule, that Interveners may appear at any time, will never be controverted here: We intend to proceed pari passu; as to the View pretended, it wd be small game indeed; the Desire of keeping 2000 in his hands: the Objections of Nugatoryness & Impossibilities of proof, are not founded; the fact we charge, is of a very heinous nature, & wd affect not only Mr Butler, but any Pty appearing hereafter, so should be fully pleaded. The Evidence may depose to any thing on that Article...

Dr May Judge... The Qu. is on the Admission of the Allon? Here are 3 Parties in Judgement; the Representatives of the Husband alledge, the Intestacy of K.C.— The Resid. Leg: in Trust Mr Butler, claims under a Will of 1 Oct. 1764 — Davis & Robinson Exors claim under a Will of 3 Nov. 1764. the Sentence must bind all the Parties.x The Qu. now is, wh. the Allon is proper to be admitted to Proof. the Effect on y Proof is a different Consideration: But it was necessary to prove the Power of the Deed to make a Will; the 3 first Articles of the Allon pleads such Power; wch is not disputed; if she had such power, the next Qu. is, what Power did she execute? If the first Will is good the Representative of the Husband is barred, as well as if the 2d is valid; In case of Strangers, where there are next of kin, the former Will must be in plea, in order to prevail agt the next of Kin, for only controverting the latter Will, wd merely establish the Husbands Right; If the Contest had been only between the Exors of the latter Will & the Resid. Leg: in trust of the former Will & such Resid. Leg: be admitted a contradictor, there wd have been no need to go into Proof of the former will, wch wd have been a very different Case from this; however let the Effect hereafter be what it will, the Intervener has certainly a right to plead the former, & controvert the latter Will. To make the Representative of the Husband wait, till the decision of the Suit between the other 2 Parties, with respect to the Validity of their respective Wills, wd be very hard & unreasonable; It wd be keeping a Suit, as it were in a Wardrobe; Bishop ought not to be precluded from giving an Allon; if however, the same matter was to be pleaded over again, the Ct. wd interpose; it wd be material, if the Deed had not conformed to the Power reserved to her. I am clear, that where Fraud is suggested, & she is said to have acted agreable to the Indre, they have a right to plead a draft of the Will so destroyd. They plead, the Will was executed, had been previously read over to her, but was afterwards destroyd without her Directions; shd they then not be allowd to set up the Draft, as a conforming with the Condition imposed? they must prove it, & all the facts alledged: It is not necessary for the same Witness to prove the Execution & the Contents; it wd be scarce possible: if it can be proved that she pursued her Power reserved by the Indenture, that the Will was executed, & the Draft corresponds with the Contents the Proof will be sufficient provided the Destruction can be also clearly made out— I admit the Allon wholly, as I always shall, when the Articles are not specially objected to by the Council, tho, I myself might think some of them exceptionable.....

x The Intervener has the same right to plead as the original Parties.

2. Did this Judge right in dismissing Kirchmans Allon, & decree the Promoter to give Articles

Arches. June. 10. 3 Sess. Trin. G.

No 10 Kirchman & Kidgell .... v Hewit.

Fountain — Dr Collier — Dr Wynn — Stevens.

Dr Collier..... Stated the Case, & the Grievance from wch his Client appealed, viz. The Judge pronouncing that Kirchman the Sequestrator, had no right to appear, refuseing so admit his Allon

Dr Wynn..... Restated the Case, all the Proceedings had, very particularly; the Appeal was interposed Nov. 30. 1765; the Adhesion is dated Dec. 12. 1765. Stevens accepting the Appeal so far as related to the Sequestrator, & tho was in favor of his Party but adhering to the Appeal, so far as it relates to obligeing him, to give Articles, & in that the Judge had not decreed him the Effect of his Monition.

N3 The Adhesion was exhibited; the Proctor for K. confessed the Subscription & Identity, but wd give no Issue to the Adhesion—

Dr Collier... I am Council for Mr Kirchman, not now for Mr Kidgell, tho really his Cause is so connected, that I cannot well enter into the one, without the other— This began by Presentment agt Mr Kidgell, for non residence in his Living of Horne, & a very extraordinary Presentment it was; the Living was sequestred, & the Promoter knew of the Sequestration, the whole purport of it, & the Effect of it, a Curate being appointed; yet tho, the Sequestration had been published, he presents Kidgell for not having appointed a Curate, or personally resided, so that on y Face of the thing, the Promotion must be vexatious & malicious; in consequence of this a Monition issues from the Bp of Winchester, for K. to reside, or shew Cause &c I must here say, I dont know how the Monition came before the Commissary, the Presentment being before y Archdeacon, he may indeed be, but is not described as Official: I may admit K. did not reside, he could not, I do contend it wd have been improper: the Church was then full of Mr Jackson; the Sequestrator had the Bps full Authority to appoint a proper Person to officiate; he had appointed one, if K. had come, he wd have been a Disturber; he was ipso facto under a temporary Deprivation: We have so little to do there, that as the Clergy are to appear at Visitations to give account of their several Cures, if the Bp or Archdeacon were to visit, & amongst the rest summon K. I do not apprehend they cd compel him to appear; he has no Cure to give an account of: A Clergyman then under such Circumstances, wd rather chuse to be absent, as he wd lose all weight amongst the parishioners they bye his Lands, & starve him because he wont reside, where he has no Business, where he cannot officiate; he is abroad, he may be getting his Bread at Dunkirk — This is a fallacious Presentment; it charges that he did not personally reside: the Personal Residence of a Parson, means his Attendance to officiate & do the Duties of the Parish: these he cd not do, therefore they present him for not doing an Impossible thing; It charges too, that there was no Curate appointed by him; this is a down right Roguery, for how cd he? the Living was sequestred, & the Promoter knew there was a Curate appointed by the Sequestrator, on whom the Duty was devolved— If they had said, there was no duty done, I allow prima facie, that K. was the Person to be presented; if he was to excuse himself by alledgeing a Sequestration then the Person to be presented wd be the Sequestrator, who had y Power of supplying y Cure, he was Parson of the Pish; Kirchman's Debt is a very considerable Interest, wch if K. was deprived, wd be lost: has a Such Interest: he has a right to intervene: besides, he is not only a Creditor but has obtained Judgement & Sequestration by Order of y Temporal Ct. It wd be a nugatory Sentence of the King's Bench, if it cd be overturned by a Trick in this Ct. Kirchman's Authority is derived as much from B.R. as from the Bp. nay rather more, for the Bp acts only in obedience to the B.R. the Bp is merely ministerial; it was not at his discretion, to grant the Sequestration or not; It was by Command; the B.R. wd see that its Sentence was carried into Execution; wd it suffer the Freehold to be defeated, wch is not amenable before us; K. wd lose his Debt tho, y B.R. has laid its hands upon the Benefice to satisfy him. What can be a better Interest, than that we have; viz here covered Judgement, the Sheriff had a Writ directed to him, he made a Return; the B.R. ordered the Bp to sequester, he did sequester, & Kirchman is y only Person interested— As to y other Point, it is a criminal Cause, & as in all

causes of Office, the Promoter has given 20s Bond to pay Costs. All causes of this kind are Plenary Causes; the Proceedings must be secundum Allegata & Probata. Presentments are ex parte Evidence. I hope therefore you will be of Opinion, that the Judge did right in ordering Stevens to give Articles; but wrong in rejecting Kirchmans Allegt declaring he had no right to appear.

Dr Wynn.....

The Party appearing before you is Mr Hewit, no matter wh? of his own mere motion, or by request of the Parishioners; he comes with this impudent requeist, Prayer; "That the Minister who has that Living, worth clear 300 pan: who receives the Tythes, & who by all Law, Civil, Canon, is reasonably, equitably bound to do the Duty of the pish, shd be admonished to come to perform it, or shew a proper Excuse; & that he may have the aid of the Bp, to obtain this Justice from his Minister: By the Ecclesiastical Law, it is not sufficient for a Parson to say, I have a Curate - Tho, the Cause assigned by the Dr for his non Residence, were ever so true yet Mr Kidgell now stands in Contempt; & I hope it will not be thought too strong a word for me to use, if I say that the Bp is engaged, by the Intimation he enforce his own Monition: when the Ch: Wdns are asked at the Visitation, whether they have the Personal Service of their Pastor, or their saying no, the Bp then issues a Monition to enjoin Residence within 6 Months, else, says he, come, & lay the Cause before me, why you cannot, or why you shd not be deprived: if then the Judge was warranted in issuing the Monition, I dont know wh? we have not ex debito Justitiæ a right to the Effect of that Monition. This not material as to the Bp, what Evidence he had of the Non Residence for the purpose of admonishing the Parson to reside, for if he had it only by hearsay, that he did not reside, or from the Information of any Person, or extrero motu he wd have a right to issue a Monition: This is not like a Cause of Correction; it has nothing like reforming Manners, it is a mere Admonition & Command, to do what he is bound to do; he was not even directed to certify to the Bp that he had resided; he need only have come to Norwich, resided, then wd have been an end of the whole, he wd not even have incurred any Costs. This is the rationale of this Cause; I shall now submit to you, that neither a Sentence of B.R. nor the Writ directing Sequestration, cd give Kirchman more right than Kidgell himself had, it cd be only conditional, for his Interest to continue so long as K. shd continue possessed of the Living; the Interest is defeasible, the Sequestrators Debt then must be defeasible, if it cannot prevent K's forfeiture: Kirchman had contracted with a Clergyman, he knew what his Title was, & that if his Debtors Title failed there must be an end of his Debt; there is no hardship imposed on him: I think this is improperly called a Suite, it wants the first Requisite; there has been no original Citation; the Party was not bound to appear; he was admonished only to do his Duty, till he made a Cause of it by his Contempt, it was none - It wants that essential foundation Stone of a Suite, the original Citation. The personal residence of a Clergyman is a Duty enjoined by the Statute, Common, as well as, the Ecclesiastical Law. Prima facie he is bound to reside: the Bp says he does not, & orders him to come & shew cause why he does not; he might have made it a Cause, for he might have come, & said, I can't not, or, I am not bound to reside for such reasons of whose propriety the Bp is Judge: Can Kirchman shew Cause why K. did not reside; what right has he to intervene who cannot possibly obey the Monition; when Kirchman prayd Leave to intervene, there was a legal Appearance for the Party himself, who being before the Ct, what pretence cd this Creditor have to appear, not being the Party admonished, & who cd not do every wch K. was admonished to do, he therefore cannot be a Person to appear - I must observe that the Precept of the Ct of B.R. was to sequester the Living for the Payment of this Bond debt, but the Bp was not bound to appoint Kirchman Sequestrator. You as

the Ordinary having a Power over the Ecclesiastical Fee, are to get the man his Debt, the Ct might have appointed its own Officer, it was mere matter of Favor to grant the Sequestration to the Creditor, after it was granted the Ct might have rulled it & granted it to another: a Sequestrator is the Creature of the Ct, he is a mere Bailiff. The Sequestrator cannot maintain an Action for Tythes in his own name, at Common Law, or in any of the Temporal Cts, but only in the Sp: Cts or before the Justices, where they have power by Law so to take Cognizance. In the Case of Berwick & Swanton 1692 It was resolved in the Exchequer, "that a Sequestrator cannot bring a Bill alone for Tythes, because he is but as a Bailiff accountable to the Bishop, hath no Interest." And in the Case of Jones & Barnett 1728 "On a Bill by the Vicar of West Dean in Sussex agt the Defts who was "Sequestrator, for an account of the Profits received, during the Vacation, "it was objected for the Defts that the Bp ought to have been made a "Party, since the Sequestrator is accountable to him, for what he re="ceives; the Ct seemed to think, the Bp shd have been a Party:" It is alledged that Kirchman, is not a mere Sequestrator, but a Creditor also, & therefore has a Lien on the Estate; Kidgell may have been in fault, but says the Sequestrator, I have acquired a Right, & must be satisfied my Debt before you can deprive him: I dont believe that the Doctrine of a Debt preventing a Deprivation, can hold in general, even as to an Estate in Fee, wch is an absolute Property, much less with respect to a Benefice: Would it follow, because a Person happens to have a Mortgage, a Suite brought to evict the Mortgagor out of the Estate, shall stay till the Mortgage is satisfied; is a superior Title to wait? Suppose a Person has an Estate on Condition, shall not another enter for Condition broken, because a Creditor wd lose his Debt. Tho, the Labourer is worthy of his Hire, I did not understand that a Benefice shd be held absolutely by the act of the Party, by the Effect of the Law, by the Act of God. Would not depend on the Bp whether he wd accept such Resignation or not: I do not see why it wd not be as reasonable a Request of the Sequestrator, upon the Death of the Incumbent, for the living to be kept vacant till he shd be paid his Debt. Suppose K. was to have another Benefice incompatible, cd either the Bp or the B.R. prevent the Resignation? No: it wd be void by Operation of Law, tho it may be ever so hard on Kirchman, he has only suffered the common Accident wch all Creditors must run: would it not be strange to say, that a Demand cd not be defeated by a Judge, if it cd be defeated even fraudulently by a Party's own Act. Courts always consider the Consequences their Judgements may have, & if the Sequestrator cd tye the Hands of the Ordinary, very bad Consequences wd ensue; the Parson wd confess Judgement in the Temporal Ct, where no Enquiry wd be made wh? such Judgement was collusive or not; a Sequestration wd issue to his Friend, & the Ord thus retain Possession of the Benefice, set the Ordinary at Defiance, let his subsequent Conduct be ever so scandalous. How far wd this Doctrine go, how absurd! Sequestration like an Inhibition to reside, whereas, it rather virtually implies the Contrary, by the words "if occasion require": wch occasion must be the Rectors absence, for cd the Bp doubt whether it was necessary the Cure shd be supplied? he only meant to provide in case the Minister shd not do his Duty: if he had chose to reside, the Sequestrator must have made the same Allowance to the Incumbent, as he has to Mr Jackson - The Dr has said Kidgell may be getting his Bread at Dunkirk; how can that be? as a Clergyman, by his Order? he can't turn to any Trade, he has no way of getting his Living but by Ecclesiastical Functions; he can't officiate at Dunkirk even if he could, where cd he exercise his Ministry as in his own Parish? where he wd have an Appointment from the Ordinary for serving the Cure: People frequently lose Debts by bad Security: If a Man lends money on Change-Alley Principles, he must look to the Security, he runs the risk. The Pish? have notwithstanding a right to that Degree of Duty, wch the Minister is bound so to do by Law? The Necessity of Residence is considered, enjoined by the Statute Law 13 Eliz. c. 20. Sect. 4. wch enacts "No Lease of any Benefice or Eccle-"siastical Promotion with Cure, or any Part thereof, not being impropriated "shall endure any longer than whilst the Lessor, shall be ordinarily resident "serving the Cure of such Benefice, without Absence above 80 Days in one "year - As to Articles, it seems the most inconformable Prayer imaginable, that where a Party has 2 Modes of Proceeding, the Opponent shall direct which shall be used; if he had appeared on the Monition, & prayd to be

dismissed, you wd have said that having obeyd & come to reside, he never was a Party before the Ct — They have said this is a plenary Cause, but if what I have urged is true, it is no Cause at all — There are only 3 Ways of instituting a Cause of Correction, By Inquisition, Accusation, & Denunciation; this, is none of them; here the Parishioners apply to the Bp, he issues a Monition; it is the tenderest Way of proceeding, & the most summary; the Parishioners pray no Correction for the past; only that it may not be so for the future — The Dr has said it is of the newest Impression, but he will find an ancient Precedent in Gibson's Appendix Tit: 1522. from whence this Process has been taken; Intervention in a Cause of Correction, wch the Dr is pleased to call it, was never heard of; it is the greatest Absurdity imagineable, but there are so many throughout, that I dont know how to follow them; if Articles were to be given at this time, there wd be a clear nullity, wanting the previous Steps; the Precedent shews the Proceedings to be according to antient Practice, he has as good an Opportunity to defend himself, therefore, I hope you will be of opinion, the Commissary did wrong in ordering Articles, & right in rejecting his Allegation —

Oughton Tit: 138.

Dr Collier. The Dr has quoted a Precedent from Gibson, wch, he says, is similar to this, & yet it is not similar, for it dont appear to have proceeded on Presentment: Articles are the more necessary, because this is to avoid a Judgement of the Kings Bench; Articles shd be exhibited to satisfy the B.R. what Grounds we proceed on: We may argue agt their Admission, they wd be rejected, the reason we desire them, is, we suppose they must be [illegible] according to the Presentment, & wd you then admit them, Sr? you let them say, he has not personally resided, must not they have expresly said, that the Duty has been neglected; the use of Articles is, to controvert in limine; We shd be apprized, the Ct shd be apprized, what is to be contested, in a regular manner, not by a flimsey Presentment, but precisely & definitely, we shd certainly oppose their Admission, might plead in Bar; the Dr Sown, has thrown it in every shape very ingeniously, like Counts in a Declaration at Common Law; I apprehend the Ct will be well satisfied of the Facts; Does the Statute absolutely bind; are there no Exceptions? must he reside, able, or not sick or well, dispensed with, or not; there cd be no Collusion in this Case; It was ordred by the B.R. It is the Sequestrators Business to find the Person to officiate: the King has no Interest; the B.R. has none; Mr Kidgell has Some: says the Dr Kidgell may die, so the Creditors Interest may be defeated, but that is the Act of God & cannot be prevented: the B.R. however wd prevent by Prohibition, any indirect practice to defeat its Sentence; the Bp wd refuse a fraudulent Resignation: was it ever known says the Dr that a Mortgagees Claim on an Estate cd stay the Eviction of the Possessor of the Fee; Perhaps this Case may not have happened; if it did, the Ct wd find means, that the Mortgagee shd not be ousted; We dont claim as a Creditor, but under a Judgement: We have taken care to secure the Debt; the B.R. has taken care & given us a Remedy; We are a Sequestrator with an Interest, not a mere rude Sequestrator; as to the Cases out of Bunbury, what sort of Sequestrator do they refer to; was it to a rude Sequestrator, I allow it, it was such, & neither these says no Sequestrator can have an Interest, they mean such an one; We have propounded an Interest, we have clearly deduced it, & the Grievance we complain of is, that it is notwithstanding overruled. . . . . .

Judge. }
Dr Hay. } This is an Appeal from a Grievance in rejecting the Allegation of the Sequestrator, par Adhesion of the Proctor on the other Side, so far as respects the Promoters being ordred to give Articles, who has instituted a Suit, I must think, agt K. for Non-residence; therefore the Appeal consists of 2 parts; K. himself does not appeal, his Proctor only appears, on his behalf alledges it to be a Plenary Cause, & prays Articles: There are 2 Presentments; on those Articles K. obtains a Monition to reside, or shew Cause, why he does not, or why he shd not be deprived? This Monition is divided into 3 Terms of 2 months each; the last Term is peremptory, if he dont appear in 6 Days — The Cause is instituted, I think, in a strange Way, & then to say it is no Cause! It is one of the highest of the most criminal nature; it is to proceed to Deprivation itself, the Punishment reserved for the most criminal Offences: It is in its own nature a Cause of Correction, however instituted; the Monition is agreeable to an Instrument in Gibsons Appendix; there is however a

Difference between that & the present Case; for that does not appear to have been founded on a Presentment: It is not for me so much to enquire, what was the old Proceeding, as what it ought to be: the Bishops formerly perhaps took a great deal more upon them in many respects, than cd be justified; they took Advantages in those Days of Ignorance, wch in more enlightened times wd not be suffered: All canonical Purgations &c have been abolished, the present Rule must be that of natural Justice, that in all Processes the accused, should have the Liberty of defending himself, & the Accuser be bound to prove: I am surprized Kidgell was not advised to object to the Proces, & say, I am not bound to answer to such Monition, wch implies a Censure, charging done something wrong; upon what Grounds? upon a Presentment, wch is itself a Charge, not a Proof: & a censure upon a charge is not allowable: Would a Jury, upon an Indictment, without Evidence find a Person guilty? a Presentment is in the nature of an Indictment: the Judge therefore ought not to have issued the Monition without citing Kidgell in the usual manner to shew Cause, why a Monition shd not issue? Upon the return of such Citation he might have shewn sufficient Cause, perhaps to prevent the Monition issuing at all — In the Case of Mangey & Cookson (Consistory) there was no Presentment but Dr Mangey took out a Citation, agt his licenced Curate, to shew Cause why he shd not be deprived, for not having read the Act of Conformity? Dr Andrews gave Costs agt Dr Mangey; he said it was a monstrous way of proceeding; that the Rule of Law, was, Actori incumbit Probatio, & that the Parish Sr can prove a Negative — And in the Arches Hil: T. 1733/4 in the Case of Orme & Flemming before Dr Betteworth, Monition issued out of the Ct of Winchester agt Owen for Non-residence, he had appeared & alledged himself Chaplain to Lord Brook the Bp had reserved to himself the power of determining how far the Excuse was to be admitted, & this, I think, was the Assertion of the Appeal, but there were many Points in the Cause: on solemn Argument, the Ct was of opinion that Citation shd issue, & that Articles shd be given, issue joined, & reasonable time assigned, & not to proceed immediately: If Kidgell had objected on the Return of the Monition, that he was not bound, I must have determined the Point, but the Qu now is, on the Appeal interposed by Kirkman, there is no Objection on the part of Kidgell, against the Monition, he prays Articles absolutely, upon it; I think it will be necessary to consider it a little presently, he may also perhaps be apt hereafter to object, his not being bound, however I will consider Kirkman's Case first, wh he has a right to intervene? the living was sequestred before the first Presentment; this Right depends on the nature of the Cause; a Party certainly may intervene pro interesse suo, in a Civil Cause, but then it must be a direct, not a contingent Interest: as for instance, a Creditor of a Legatee, cannot intervene in a Legacy Cause, much less can a third Person intervene in a criminal Cause; else all the Consequences will follow that have been pointed out by Dr Wynne: the Sequestrators Interest is, as such, contingent, the Sequestration may be relaxed, he has no right whatever to appear in this Cause, for then the Contracting a Debt wd be a Security agt any Correction whatever — As Kidgell appears & prays Articles without having appealed, he is to be held, there being no Objection to the legal Informality; What sort of Proceeding, to say, there is no Cause; the very nature of the Proceeding itself shews, that the Non-residence is not such an Offence, as, ec nomine incurrs a Deprivation; the Statute itself makes Exceptions, wch shews, the Minister ought to be cited on a Presentment: but taking it for a Crime, they presuppose Deprivation to follow; they present, & then say he shall shew Cause, what? agt himself? Actori incumbit Probatio, the Prosecutor is first to prove a Fact: the Presentment is no Proof: In all the Method of Inquisition, Denunciation, & Accusation, Citation must issue, Proof must be made: the Party might be heard on y^e Admission of the Articles: I am of opinion Articles shd be given; Kidgell has appeared & not objected to the Irregularity of the Proceeding, Citation need not issue, the Purpose is answered: as to Kirkman, I am of opinion, he has no right to intervene, but I give no Costs agt him, pronouncing agt the Appeal & Adhesion: I remit the Cause to the Judge a Quo, who did right in both these Points.

N.B. when Stevens prayed an Issue to the Adhesion, it was a Qu wh he was entitled to one — Clerk is Silent on this head — Gostlin said there was none in Bp Barnes Case, Oldham said there was none given in Bowman & Sharpe at the Delegates . . . . .

Prerogative
June 12....

N°[illegible]

Gardiner v Hazzold als Harrold
Cumberlege

Goodwin — Dr Calvert — Dr Wynne. Fuller

Dr Calvert.... I am Council for Mrs Harrold Exor in the Will of Robt Martin decd, who has been opposed by Gardiner, as Cozen German, & by Mrs Jane Holmes intervening for her Interest as Sister to the Decd; we denied her Interest, but have now confessed it, & the Qu. is wh. Mr Harrold is liable to Costs, for having denied the Interest of Mrs Holmes the Intervener, Mr Harrold has been at a great Expence to find out the Relationship of Mrs Holmes; he cd not immediately discover it, but at last he was satisfied of her being the Sister, so then confessed her Interest; in the mean while Mrs Holmes' Proctor prayd a Requisition, & has examined several Witnesses: the Query then will be, wh. under these Circumstances, we shall fall under the reason, why it has been made a Rule, for those who deny the Interests of Parties to pay the Costs, viz. because the Rule will not hold, if the Party whose Interest is denied runs himself into unnecessary Expences; it is highly reasonable, that if he brings it on himself he must bear his own, in the present Case he shd have staid for our Answers, he shd not have examined Witnesses, or prayd a Requisition; if we had been dilatory in putting in our Answers, the Proctor might have prayd an Assignation upon us, & the Ct wd have assigned us a Time, wch we cd not have exceeded; if Mr Fuller had not been so hasty in examineing Witnesses, but had staid till he had seen our Answers, this great Expence wd have been saved: the Expences have been greatly enhanced by their Behavior, He might have had an Interlocutory for his Clients Interest, we are not therefore to pay now, than we obliged them to go into; you will postpone the Costs till the End of the Cause upon Taxation, or you will mitigate them, giveing only something nomine Expensarum.....

Dr Wynne.... I am Council for Mrs Holmes, Wife of Charles Holmes the Intervener: Harrold, a Stranger in Blood to the Decd, Robt Martin, obtained Probate, pretending himself sole Exor, & Universal Legatee, in the Decds Will. October 1764, the Exor was cited to bring in the Probate, at the Instance of Mr Gardiner; Fuller intervened for Mrs Holmes, alledgeing her to be the Sister; the Proctors for Gardiner & Hazzold denied her Interest, Fuller gave an Allon, & after a very long Interval, Cumberleges Client gave in his Answers, confessing our Interest, Goodwin for Gardiner then brought in a Declaration instead of an Inventory, retracted his denial, admitted her Interest, there has been no Precipitation on the part of my Clients Proctor, the Allon was given Feb: 6th: the Decree for Answers was returned Feb: 13th: the Party took 4 Months to put them in, surely we were right to use our Diligence, & if our Proctor cd get his Witnesses examined within that Time at . . . . by his Requisition, the other cd have put in his Answers; the manner comes after Publication, confesses what he has obliged us to prove; & shall he be excused Costs merely, for this improper affected Delay, in giving in his Answers, & shall we suffer for our Diligence, No, the Ct I am sure will not allow such an Excuse—

Judge } Dr Hay } ... The Proctor did right to examine his Witnesses; What! take 4 Months to confess the Interest of the Sister: It is the Proctors Duty to proceed in proving the Interest as fast as possible; what reason cd there be to suppose, that a Person who had given a Propy to deny, wd retract in his Answers, without any Proof, there was no sort of grounds for him to wait, till the Answers so long delayd were in: I think the Case a gross one, therefore, I condemn Harrold, in full Costs; for in all gross Cases I will not refer the Bill to the Register, but will give what the Proctor can swear to: as I know the Denying of Interests, has been frequently used to bad purposes, to force Parties to a Compromize—

NB. Fuller swore to 60£ & prayd a Monition for Payment agt Cumberleges Client, Goodwins being insolvent: the Judge said he shd have it agt which he pleased.

Qu: Shall the Party also pay for proof of their Interest, tho' confessed? Ct liable to Costs

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Arches
June 10.

N°72 Maddox alis Madox v Giles ol: Madox

Collins — Dr Bever.

Qu: Shall a small Legacy bear Interest?

Judge } Dr Hay } ... This is an Application for payment of a small Legacy with Interest: a Distinction is to be made even between Legacies of small Sums; wh. a Legacy is left only as a Memorial of Kindness, & then, no doubt it was not intended by the Testator to bear Interest, & Interest cannot be supposed to be made: the Condition also of the Party is to be considered, for to a Poor man, a small Sum becomes a considerable Legacy, & Great, or Small are relative, according to the Degree of the Person to be benefitted. Query has the Ct any Rule to go by, in Legacies of small Sums? I take the case of Bradshaw (Bradshaw) to be in point, wch was determined before Sir Geo Lee in 1756. "A Legacy of 10£ was left to a Nephew, to be paid by the Exec: without specifying y time of payment Before her Death she had advanced £2.10.0. to purchase the Legatees Freedom, and that Sum be taken to be paid in part of the Legacy or not: the Ct held it was to be accounted as part of Payment, & that the Exec: did not give it in Advancement of the Party; that it was not to be reckoned, as if intended for the Interest, for the

minimis non curat Lex— I take this to be a true Maxim; In all Cases where a Legacy is given to be paid at a certain time, the Law gives Interest only from that Time: if a Legacy is left generally, then the Law allows Interest only from the Time of Demand except in the Case of Minors, between whom & Majors, a Distinction is to be made: in whose case I shd not scruple giving Interest, tho, not demanded— Exors are bound to pay Legacys, they ought to notify to the Legatees, & pay at the Expiration of the Time fixed by the Testator or by the Law— Upon the whole view of this Matter, I decree the Legacy without Interest, with full Costs.

Consistory
June 11th

N°73 Ernshaw v Patridge

Bargrave — Dr Wynne — Dr Harris — Goodwin

Misnomer of Plt.

Qu: will an Alteration in a Citation under Seal vitiate the Proceß.

Dr Harris.... I am Council for the Deft who has been cited in a Cause of Defamation by Sarah Anne Ernshaw, appears under Protest; alledgeing that the Name Ernshaw was inserted in the Citation, when it issued, but erazed at the Time of its being served on the Deft; that of Ernshaw written over it, in the Original Proceß, for wch reason Deft apprehends the Citation is null— It is on the other part alledged, that y Alteration was made before the Citation was served, & the Excuse made, is, that it is the Name of the Plt not of the Deft wherefore the Proceß is not vitiated— I apprehend, we are, notwithstanding their Allons, well founded in appearing under Protest, wh. the Misnomer is of Plt or Deft that Certainty required in all Proceßes, is wanting here; the Designation of the Party citing, ought to be as precise, as that of the Party cited, there must be no Room left for the possibility of Uncertainty: this Mistake is fatal, the Proceß wanting its first Essential, whatever has been stamped, cannot be altered, under the penalty of 50£ I dont know wh. it is not incurred in this Case; & Sr, you, Sir, are not to levy the Penalty, you wd aid the Law, as much as possible, & discountenance such a Practice— This moreover, you will observe to be a defamatory Cause, therefore most unfavorable, & is to be tyed down to the Strictest Rules of Law— No matter when the Alteration was made, none can be allowed in the name, nothing can be so material; superfluous words indeed may be struck out, but that is not the Case here.

Dr Wynne I am for Mrs Ernshaw who has cited Mrs Patridge to answer, in a Cause of Defamation; The Deft appears under Protest, desiring to avail herself of the Plts Misnomer: the Reason of expreßing Christian & Surname of the Deft in the Citation is, that no Person may be called to answer, till it is certain he is the Person intended; the reason as to the Plts, is, that from the certainty of such Plt the Deft may know her Accuser, I never understood, that putting the Party to the Expence of a fresh Citation, cd answer any good purpose; the Ct then will not let any Advantage be taken of the Spelling, if it can be made out, that the Party is known: There was no Mistake in the Citation when it was served; Qu: then wh. an Alteration in a Citation under Seal will vitiate? This I humbly submit must depend on Circumstances; there can be no certain Rule laid down on this head, for if done with a View to impose on the Ct, or on the Party, then undoubtedly it wd void the Proceß; but here it is done in quite an unartificial manner, so as to leave no possible Suspicion of any such Intention: the way it happened, is obvious enough; the Plt told her name, saw the Citation, & said my name is not spelt so, whereupon it was altered; it was incautious not to set the Seal a fresh, but cannot, I apprehend, affect it: as to the Stamp Act, if the Penalty cd be incurred by this means, the Practice cd not obtain, whereby Instruments are altered every Day at Common Laws, & here in the Common Cases of Licence, upon a Mistake being made, the Party is only resworn, but no new Licence is taken out: on y Whole I hope you will not think the Proceß vitiated by this Mistake.

Judge... Dr Wynne's Opn I am of Opinion that the Name of the Plt being so different, & another name inserted, tho, without any View to impose, the Citation is void therefore the Party Cited must be dismissed with Costs.

Arches
June 17th..

N°74 Bishop. Bate .... v .... Taylor — Alexander

Correction for Doing Duty in Ps Parish

Dr Marriott. Clarke, Calvert — Dr Collyer. Wynne .. Burrell

Dr Collyer... This is an Appeal from Worcester brought by the Revd Henry Bate, perpetual Curate of Clains, agt y Revd Edw: Taylor Mr or Chaplain of the Chapelry of the Hospital of St Oswald, who in the Ct below was dismissed with Costs— It was a Cause of Office originally instituted by Mr Bate agt Mr Taylor, for administring y Sacraments churching, burying, baptizing, &c several of the Parishioners of Clains, whereof Taylor, was neither Minister nor Curate, from June 1757 to October 1758, for wch he articled agt him in y Ct below, stateing himself to be perpetual Curate of Clains, that in consequence thereof the whole Cure of the Parish belonged to him; that notwithstanding, Taylor did, during that Period baptize various children, more particularly the Son of Mr & Mrs Owen, whose Parents were Parish: of C. that on May 17th. 1758, he went to the House of Sam: Lucas &

administred the Sacrament to his Wife, in the pish of Claines & Tything of Whistones: that for so doing he ought to be canonically corrected, that Mr Taylor is a Priest in holy Orders of the Parish of Claines, therefore subject to the Jurisdiction of the Dr & B. prays T. to be admonished to desist for the future, & to be condemned in Costs. The Articles were given in 1758. 9 Witnesses have been examined on them, who prove that T. performed the several Divine Offices, in the Chapel & Chapelyard of St Oswald & in the Tything of Whistones, But Jewkes, Dingley, & Powell say, that the 3d Chapel of St O. is in the Tything of Wh: Nash believes the said Chapel is extraparochial - Dingley to 9 Interry that there has been for 40 Years a Chapel called St Os in the District of the Tything of Wh: & that a Minister has from time to time officiated within that Chapelry, wch you will be pleased to observe Mr Taylor is now prosecuted for - Taylor gave an Allon 9th of October 1760 pleading that he was licenced by the Bp of Worcester to serve St Os Chapel; That the Chapel is in the Suburbs of Worcester between the Parish & Manor of C & the Manor of Wh: a Part whereof is commonly called the Tything of Wh: in wch Tything stands this Chapel; that St O. is a pcl. extraparochial Chapel, not belonging to C. That that part of the Manor of Wh: has distinct pish Officers & is no ways connected with the pish of C. That the Pish.rs of Wh: never had Seats in y Church of C, or served Offices in y pish of C. or were charged to the Rates there, but resorted to the Chapel of St O. to hear divine Service: that the Chaplain of St O. has for time immemorial, claimed & exercised the Right of doing all Divine Offices within y said Chapel for y Inhab.ts of y Hospital, Tything of W. exclusive of the pish of C. & all others: that Buryals, Christenings &c within y Chapel of St O. & Tything of W. have belonged from time immemorial, to the Minister of St O. & do now belong, exclusive of the pish of C. & all others - To this Allon is annexed the Licence from the Bp of Worcester - Then T. gave an additional Allon with 3 Exhibits

N°1. is the Register of Marriages, Christenings of St O. Tything of W. from 1700 to 1762.

N°2. is a Transcript of the Buryals &c. in 1695. 96. 97. - N°3. is a Paper Book found in y Chest called the Evidence Chest, within y said Hospital, being part of y old Writings, Immunities kept therein from time to time, & remaining in y Hands of y Master, Steward of the said Hospital, in wch Book is contained the Exhibit A. wch is a Certificate from y Augmentation Office of the Surveyors of y Counties of Worcester, Hereford & "Which of them by.n Parish Churches, & how far distant they by.n from the parish church within which Parish they stand. - The said Hospital is a Parish Church of itself."

B. is a Certificate from the Inhabitants of W. without Date, but very antient, not addressed to any Person by name, but begins "Right Worshipfull our humble Duties" & was therefore most likely addressed to some Person of Consequence: It is signed by the Constables & others of the Tything, & contains an account of the Inhabitants in y said Tything, amounting to 349. In this Certificate are these Words "How many Poor Soules there are having no certain Church to resort unto, for the hearing Gods Word, since their antient Church, belonging to them, & to an Hospital in the said Tything, was pulled down, but are as it were altogether starved & pyned for want of the Spiritual food for their Soules &c their own Church being dilapidated - C. is a Letter from Rich.d Somers dated Dec.r 15: 1631 without Superscription, but begins "Right Worshipfull," like the last, & was probably addressed to y.e same Person, wherein is the following Clause. "I find thereby you desire to be satisfied of what Parish, that part of the Foregate is, in wch I had formerly satisfied your Worship, & to what place they pay their dues; all wch I make bold hereby to signify to you, in as ample a manner as possible; I cannot altogether on my own knowledge, but on Enquiry made of some of the Antientest men in that Place, & I cannot find it any otherwise, but formerly all that Part of the Tything, of wch I have heretofore written did totally belong to the Hospital Church." & in the latter part of the Letter, is the following Clause: "and all the antient men of the Country near adjoining, with whom I ever had Conference, affirm, that all that part of the Tything have never no other Church, but the Hospital Church - Lib: 3: is a Book belonging to & taken out of the Register of the Dean & Chapter of Worcester, & wch at fol 43 contains an Indre of Lease dated Dec.r 10. 30 Henry 8., made or mentioned to be made between the Bp of Worcester & Jn Harford of the Parish of St Oswald in y Suburbs of y City of Worcester - 8 Witnesses were examined on the Allon - the Rev.d Tho.s Pixell formerly Curate of St O. says, The 3d Chapel is, as he believes, a free extraparochial Chapel, had Parochial Rights & Immunities belonging to it, free & distinct from, & no ways belonging to the said pish of C - that he executed the Office of Minister of St O. 13 Years, during wch he performed all kinds of holy Offices within the Chapel, for the Members & Inhab.ts of y 3d Hospital, & also for the Inhab.ts of the Tything of W. free from the pish of C. & all others, but believes the entire parochial Duty arising within y 3d Tything, has not been altogether been performed by the said Chaplain alone, but sometimes by the Minister of C. at the Option or Convenience of y Inhab.ts of the

said Tything - To 17 Interry - To y best of his Recollection, the Promoter himself when Curate to Mr Brooker, late Minister of C. acting in that Capacity, asked Respondent's leave as Chaplain of St Os Hospital, to perform some parochial Duty in St Os Chapel - To 18th Interry, That Brooker when Minister of C. commenced a Prosecution agt Respondt for doing parochial Duty in y Tything of W. that he left it to y Master of y Hospital, to support the Rights of y Hospital, & soon after, y Prosecution dropt, she to y best of his memory baptized all y Children of Mr Smith, born at y Brittannia in y Tything of W.) in St Os Chapel - Holland Cooksey log has known y 3d Tything from his earliest Youth, tho he thinks it is within y pish of C. yet St O. is a free Chapel with extraparochial Rites & Immunities belonging to it, free & distinct from, & no ways appertaining to the pish of C. That y Inhabt.s of W. have usually from time immemorial resorted to St Os Chapel, That y minister of that Chapel, has from y time of Deponents memory, performed all holy & religious Rites & Ceremonies within 3d Chapel & Tything, for y Master, Members & Inhabt.s thereof, free & exclusive from y pish Church of C. the Minister thereof & all others: that Christenings, Buryals, & other Church Ceremonies, within y Chapel, Tything of W. (Marriages from 1754 excepted) have been constantly performed there, & of right belonged & appertained to the Curate of St O. - To 14 Interry, Believes St Os Chapel is the proper place of Worship for the People of Wh: that he & his father generally paid Easter Offerings to C. & St O. as had: Property in y Tything of W. & also in y pish of C. Rich.d Clarke Dep: Reg.r proves the Exhibits, Oliver proves the Book Lib. 3. to be part of the antient Records, of the Dean & Chapter - The merits will rest on two Points only. 1. Wh.r the Chapel of St O. & the Tything of Wh: are in the parish of Cornh.l 2. If they are, Wh.r Taylor had, or had not a right to do what he did as Curate of St O. We hope, tho the Exhibits A. B. C. are not strictly authenticated Records, great Credit will be paid to them on account of their Antiquity & the Place where they were found, viz. in the Evidence Chest of the said Hospital, where no doubt they were deposited, to clear any doubt that might arise, as to St Os Chapel & Hospital being Parochial, or not - Lib. 3. plainly shews St O. was esteemed a Parish, more than 200 Years ago, & a Contemporary Construction or Interpretation of any Act or Deed, is always esteemed the best, by reason, the Contemporaries are supposed to have the best Opportunities, of being informed of the Propriety of it, the same Argument may be urged in favor of the Letter dated Dec.r 1631. As to the 2d Point, supposing the Chapel & Tything of Wh: are in y pish of C. an antient Church or Chapel, within the pish of another Church, may gain by Prescription a right to exercise Spiritual Functions, within a certain District of the pish, & if we have shewn, that the Curate of St O. for the time being, has had such an Exercise of Spiritual Functions, within the Chapel & Tything of W. he has certainly acted rightly, legally, as it is a Principle in Law, that in antient Prescriptions, a due & legal Commencement is always to be supposed: Several of the Witnesses on both Sides prove, that the Chapel of St O. & Tything of W. have parochial Rites, & that the Curate thereof hath had such an Exercise of Spiritual Functions within y said Chapel & Tything. One Wit.s swears, no Service or Commorancy in the Tything of W. gains a Settlement in the pish of C. Another Wit.s says, he was elected Ch: Wd.n of C. in virtue of a House he had in y pish of C. not as Proprietor of the Brittannia in the Tything of W. It is established Law, that the Parson of a Parish, if he does not the duty of burying the Dead, is not entitled to any Fee; so that Bate, even supposing it in his parish, can have no Cause of Complaint, especially as a right of Burial at St O. is plainly & fully proved, & upon the whole, the Instances of Duty done by Taylor, are within the Chapel of St O. or Tything of W. & are such only as his Predecessors used to do, & as it Wd have been shocking in a Clergyman to have refused the Performance of some of them, when called upon, viz. to baptize a dyeing Child, Evans's Son's & to administer the Sacrament to an expiring christian (Wd.n Duca.s) in neither of wch Cases any Fee is due, therefore Profit &c. not be Taylor's Motive; & as to their having been no Banns published, or Marriages solemnized in St Os Chapel since 1754, we hope that will not be considered as any Proof, of its being in the pish of C. Banns have never been published in Cathedral or Collegiate Churches, yet nobody doubts their being independent Churches, I am therefore to move for the Resp.t Taylor that he may be dismissed with Costs....

D.r Marriott. I am Council for the Appellant & must observe that Mr Taylor was cited under the Description, of belonging to the Parish of C. he appeared under no Protestation, he admits therefore by appearing absolutely, under such Description, that St O. as well as the Tything of W. is in the pish of C. tho this is an Appeal from a Sentence pronounced on the 10th of May 1764 whereby the Judge dismissed Taylor with Costs, I dont say he did wrong, as y matter was laid before him; the Cause was heard ex parte below; we gave Articles Taylor gave an Allon, we gave none, so, by some mistake, the Cause was not fully instructed; for we examined only on the Articles, wch d.d serve only to

Cooksey

Instruct the Cause as to them, not as to the Merits, as they now stand. We appealed then, in order to rectify the Mistake; it is a very different Case from what it was below. I hope you will think, we are entitled to a very different Sentence, wch will be no Reflection on that, in the first Instance. The usual Inhibition, Citation & Monition, have been decreed, issued, served, & returned, a Libel of Appeal given in, & admitted. Issue joined: Bishop for the Appellant gave an Allon of 4 Articles, the first was rejected, & the other 3 admitted, they plead that till the present dispute, the Minister of C. always received Easter Offerings, from ye Inhabts of Wh: Tything, has frequently buryd in ye Chapel yard of St Os Chapel & received Fees for such Service: That the Tythes of W. are paid to the Impropriator of ye pish of C. that ye Parishrs of C. have for time immemorial gone processioning all thro. the Tything of W. to ascertain & note the same, as part of ye Boundaries of the pish of C. & that ye sd Tything, has been from time immemorial constantly deemed & taken as part of ye pish of C. that as such, the Ld of the Manor of C. holds his Court Leet in the Tything of W. as being in, & belonging to the pish of C. wch the sd Lord is obliged to hold in the pish of C. That since ye Commencement of the Marriage Act March. 24. 1754. no marriage has been solemnized in ye Chapel of St Os Hospital: that before the said Act took Place no Marriage was had at St Os Chapel, unless by License, or where Banns had been first published, in the pish Church of C. On this Allon 14 Wts have been examined

Tho: Hardwright has lived 40 Years at C. always heard, understood, & beleives that ever since his Residence there, the Tythes due from the Inhabts of Wh: Tything, have always been paid to the Impropriator of C. About 30 years ago he went processioning (with others) to ascertain the Boundaries of ye pish of C. at wch time, they went round the Out-Boundaries of Wh: Tything as part of the Limits of the pish of C. to the best of his Recollection, & ever since he can remember, the whole Tything of W. has been immemorially adjudged, part of ye pish of C. that the Ld of the Manor of C. annually holds a Ct Leet for the said pish, in the Tything of W. & the Inhabts of sd Tything have been upon several Juries, at the said Court Leets. To 3 Interrg. Beleives the Minister of St C. for the time being, performs all Ministerial Offices & Functions to ye Inhabts of Wh: Tything, as occasion requires: that several of the Inhabts within sd Tything, resort to sd Chapel, as ye proper Place for them to attend Divine Service at. To 3 Interrg. never heard Easter Offerings have been collected, or received by the Minister of C's Predecessors from any of ye Inhabts of Wh: Tything.

Wm Randall has resided in the pish of C. near 40 Years; has been twice a processioning to ascertain the Boundaries of sd pish, viz: abt 25 & 10 years ago, that they went round ye Boundaries of W. as part of the pish of C. has always heard & looked on the Tything of W. to be part of the pish of C. he agrees with the other Witnes, as to the Circumstances of C's Leets, Juries: about 8 years ago he served the Office of Constable for C. & served several Warrants on Persons living within the Tything of W. to 3 Interrg. beleives the Chapel yard of St O. was intended to bury the Poor men belonging to sd Hospital, & if any other Person is buryed there, the Minister of sd Chapel is entitled to a Fee, for the Ground.

Wm Dyer speaks to processioning 33 Yrs ago. to C's Leet & Juries, that the Inhabts of Wh: Tything are summoned & fined for non Appearance. To 1 Interrg. He had 4 Children born, whilst he lived in Wh: Tything, who were all baptized by the Minister of C. who refused to suffer the Minister of St O. to baptize one of them, tho. the Resp: requested his Leave for that Purpose as a favour. he beleives the greatest Part of the Inhabts of sd Tything during the time he lived there resorted to St Os Chapel, as being the proper Place for them to hear Divine Service.

† N.B. These Jwells out of Ct & had not an Opportunity of noting the other part of Dr Marriott's Speech in the Opening.

Dr Marriott & Calvert on Propriety of reading the Exhibits &c. . . . . .

We Object to Exhibit A. That no Copy can be exhibited unless it clearly appears the Original cannot be produced; & that the Book itself out of wch A. is an Extract not being transmitted, no Extract out of it, can with Propriety be used. We object to A that it does not answer the common Rule of Evidence to be the best, that the Case admits of; no Copy of any Original can be admitted, when there is nothing to shew, it is a true Copy: this Paper is not attested; there is no Proof that it is the Copy, of what it professes to be; & the Presumption will be, that it is not the Copy of any Record in a public Office, for it is the Custom in all Offices, for the Clerks to attest what they extract so that, had this been a Copy from the Augmentation Office, the Paper

would have been vouched; the original Design never was to establish this as matter of Evidence, under this Circumstance of its not being vouched; Why don't they plead the Original & get a fresh Copy from the Augmentation Office properly attested; it will be begging the Question, to say it is lost, they shd assign the Accident by wch it has ceased to exist: we can't be told this is a true Copy, because the Original did exist, & is lost, & that because it is lost this Copy is produced; it will be arguing in Circulo. There lies the same Objection of Incertainty to B. that it does not appear to whom, or from whom it was. It was not Evidence, at the time when it was written, because the Evidence of the Persons signing, cd have been had: they shd be living Witnesses: the Credibility of the Paper, must arise from itself; no Place of Custody can give a Paper, a Degree of Credit wch it has not in itself. . . .

Judge . . . Dr Harris for Dr Hay's

you have admitted the Authenticity of these Exhibits by your Answers, as you have allowed the Book, I shall admit the Papers out of it, to be read & shall consider on the Hearing, what weight they ought to have . . . . .

NB. The further Hearing was adjourned to Friday June 27th. . . . . .

Prerogative June 19. . . .

Lovegrove . . . . v . . . . . Lycett.

Altham ——— Dr Clarke & Calvert ——— Dr Harris & Wynne ——— Jenner.

Dr Clarke. Stated the Case. (with see Fol: 157 Book B) & the several Proceedings, with ye Substance of Mr Lycetts Allon (q. vid: Fol. 81. & 92. . . .) shewing how different the Pleas were from the Proofs; especially its being pleaded, that on Sept: 19. 1763 Decd declared to Mr Powell he had made his Will, & Lycett his Extr. &c. whereas on her Examon, she says, he declared to her, he had settled his Affairs to his Satisfaction. and Declarations of Dr Hayes & Dr Battie are pleaded expressive of Custody, the Deeds being in bad hands, declineing to visit, because he had reason to beleive the Medicines were not duly administred as prescribed; & that Dr Battie said the Decd might recover, if taken out of the Hands he was in; whereas in their Examons, they absolutely depose the Contrary; Dr Battie expressly saying, he never was of such Opinion: their other Assertions are as weakly proved, nay are contradicted by their own Witnesses; to all these Pleas we gave in Answer only a very short Allon, being willing to have heard the Point on the Subscribing Witnesses only: I hope you will think, when the Evidence shall have been read, that our Proof is as full, as theirs is defective. We examined on our Part the 3 Subscribing Witnesses to our Will of Sept: 13: 1763: viz: Wm Keene & Ja: Payne, who was also the Writer of it; & on our Allon we examined Steph: Remnant Esq. M. Tucker. Aspin Taylor. Sarah Smith, Jn Hall, Susan Yows, Jn. Fredk Salwasser. Husb Mesiker: Js Carell: Jn Andrews. Sarah Robinson.

Dr Harris. Restated the Case.

This observable, the Will of Sept: 13th, consists of 2 Sheets of Paper, very close written, yet Payne says he took Instructions for it, drew a Draft, & copied it fair in less than 2 Hours. he says Goodchild came to him with the Message, at 10 o'clock, & then he went to Lovegrove, who ordred him, to get ready in half an Hour, wch he did accordingly, & then went to Bray, near a Mile from Maidenhead, where he walked about the Gardens for some time, then was called in by Lovegrove: He then took Instructions, drew a Draft of the Will, & engrossed the same; & Keene says, that at one o'clock, some Person came to him, told him every thing was ready, so that the whole must have been transacted, in less than 2 Hours; wch is in itself incredible, considering the length of the Will & Draft, a Copy whereof is annexed. We prove by Ja: Pile pur: exam: on our 1st Allon, that he has heard the Decd say, Lycett was better than a Father to him, & he proves that Lycett was with Decd Sept: 12. 1763. when he appeared to behave very friendly to him; that Lycett was with Decd at Maidenhead Race time, beginning Sept: 26. 1763. Eliz. Stokes says she has heard Decd say, Lycett was the only Friend he had in the World, & that he told her he wd send to Lycett to settle his Affairs. Pile Jun: to 16 Art: of ye Allon says he knows neither Decd nor his Father were ever admitted to ye Copyhold Estate devised by Deed to Lovegrove, so by the Custom of ye Manor he cd not devise it. Pile Jun: adds Talk with him about it, & that he said, his Father cd not give it away, therefore it came to him; he says, he knew too, that the 1500 said, in Lovegroves Will to have been lent by Decd to Jn Ford on a Mortgage, was lent many years since by Decds Father, as Decd himself very well knew. That Decd told him, as he did not think he shd be well enough to be at the Races, he had invited Lycett & his Wife, to come to his House a few Days & welcome People who

came to his House, & he knows Lycett was there, some part of the Races, that Deed was then ill; this surely proves the Continuance of the Deed's friendship for Lycett to this time. Abychn Stokes, swears that sometime in the Summer preceding Deed's death, Lovegrove & Deed were drinking in his House, & Lo: joking ly said to him, "The World says you are going to die, & that you'll make your Will & leave me your House", on wch Deed said "What the Devil shd I see in your face, to leave you my House, or any thing else. I'll see you damned first"; or words to that Effect. Dr Battie says. Lo: told him, "unless he made use of his name, he cd not gain Admittance" wch he found to be true, for on Oct: 17th Goodchild refused to admit him, tho, he told him he was a Physician, till he said he came from Lo: about the Sunday Sevennight or fortnight after, he found Deed worse, both in Body & Mind, than he did on his first Visit to him; It is remarkable, & Dr has deposed, that ye first time Deed was quite delirious, inconsistent in his Discourse, unfit for any one rational Act, & in a very weak, emaciated miserable way, & in the last Stage of a decayd Liver. Jas Sampson proves Deeds friendship for Ly: even on Sepr 13th. that he & Ly: went to Maidenhead Bridge that very day in Deed's Chaise, wch he had ordred Goodchild to get ready; It is remarkable, on that very Day at 10 o'clock, Goodchild who drove the Chaise, delivers ye Message to Lo. from Deed, mentioned in Rose's Depon on ye Condicil for preparing the Will. Thos Lawrence says on Sepr 28. 1763. he was refused Admittance by Goodchild, who said Deed was very bad, & in a raving Condition, so that he cd not be seen, the next Day he was again refused; it is to be observed, this Witness dont appear to be, nor was any ways connected with Ly: but says he went down, hearing Deed was dyeing, or dead, in order to be paid for a Post Chaise, Deed had of him, so there cd be no pretence for refuseing him Admittance.

Susan Baynthun totally unconnected with Ly: says, that in the Autumn of 1763. She was refused admittance by Goodchild, on wch she supposeing the Refusal was owseing to Lo: went & talked to him about it: he said, he supposed she cd be admitted next Day; whereupon she said, she imagined he wd give Orders accordingly, he replied, he shd not see Deed; that she was admitted, & from ye Order every thing was in supposed, she had been expected, so she, or Mrs Powell who accompanied her, asked Deed's Maid if Lo: had been there that morning, she replied yes. Sarah Robinson, a Legatee in Lovegrove's Will who has released says, after Deed had made the first Will, he was very uneasy about it, & that she well knew him to be so, being with him Night & Day, & she several times after he had made the first Will, (the particular time when, as to ye Month or Day of ye Month cant set forth) heard Deed express great Dislike & Disregard for Ly: & call him Rogue & Rascall, & say, he did not think he wd be just to his Will, & that he wd cheat them all, but he wd put it out of his power, & make a new Will & make another Exor, for he had harboured a Snake in his Bosom. to 2 Art: says, just after Deed had made his 2d Will (but when that was she cant say) he came out of ye Parlour & she heard him say, "Thank God he had settled his affairs & now he hoped he shd be easy. no Credit can be given to this Witness, for besides her being a Legatee, she has lived Servant with Goodchild & his Wife ever since ye Testators Death, & tho, we have proved Deeds friendship for Ly: continued continued to 13th Sepr 1763 by the two Piles, yet she says that between ye making ye 2 Wills (the particular time she cant recollect) she several times heard Deed abuse Ly: that after he had made his 2d Will, Deed came out of ye Parlour &c now all ye Subscribing Ws say, the Will was executed up Stairs in a Bedchamber, & shew how ready she is to swear any thing she is taught, she says to 3d Interry, that from the Sunday preceding the Races wch began Sepr 26. 1763. Deed was not seized with any Delirium, but to ye time of his Death was in a good condition of Mind, whereas Dr Battie swears expressly to ye Contrary on Octr 17th, & that he was still worse on his 2d Visitt a fortnight after. to 9 Interry says Lo: wife is 1st Cozen to Rd Goodchild. John Hall confirms that Relationship subsisting & adds that his fellow Witness Susan Yous is Mrs Goodchilds Aunt. Jn Fred: Salusbery says he went to see Deed 8ber 14th & staid 2 Hours; Deed then told him, he had made Lo: his Exor, on wch he said to Deed, what right had Ly: to make a disturbance, he replyed, I trusted Ly: as a Friend, but I find I have harboured a Snake in my Bosom; & Deed for said 2 Hours was sensible, & well knew what he said & did, & several times afterwards he heard Deed express his Satisfaction, at hav: made his said Will, whereof Lo: is Exor. It is to be observed

this Witness is Partner with Lo: & therefore if any Reflections shd fall on Lo: from this transaction, ultimately this Wr must be prejudiced, for it is to be supposed their Business must be hurt by such a Transaction: But it is apprehended this Evidence can not receive much Credit, for he says the Deed was in his Senses for 2 Hours when he visited him Oct. 14. Whereas Pile Senior says, he was delirious on the 13th & on 17th Dr Battie says he was very much so & unfit for any rational Act, therefore it is not probable, he shd have this one Days Interval of Sense, much less that he shd be able to know any thing of a disturbance Ly: had made: for ye Affair alluded to by this Witness happened ye preceeding Day, during Deeds Insanity as Pile Senr says to 5 Art: of ye 2d Allon, on wch Plts we have examined besides Barnard Anderson, Dr Rd Russell, Jn Pile junr before exam: Jn Hall, Apothecary, Jn Lucas M. B. Abychn & Eliz. Stokes both exam: before, Jn Ford, Susan Pile Wife of Jas Pile Senr Mary Wife of Basil Woodhouse, Basil Woodhouse, Jas Sampson & Eliz. Powell, all 3 before examined, Dr Battie, Andr. Ross. Thos Lawrence & Susan Baynthun Wife of Edw Baynthun Esq - We have exam: 2 of the Subscribing Wrs to our Will of Aug: 26 viz. Jn Clark & Basil Woodhouse, the 3d Henry Lovegrove himself you were of Opinion, Sir, we cd not examine as a Witness, having had his Answers, Upon the whole we hope, you will think, when you have heard ye Evidence, we are founded in our Pleas.

NB. The Evidence was then read, & the Argument deferred to the Bye Day wch See Fol. 180.

Prerogative
June 19

No 75

Bargrave — Stevens v Herringham — Adderley

Drs Marriott & Collyer — Dr Harris

Dr Marriott. The Decd Mr Herringham died in 1760 intestate, leaving Eliz: his Widow & Jn Stevens Cozen German by the Mothers Side; Admon was granted to the Widow, who in 1762 was sued by Jn Stevens to an Inventory & Account & to see Portions allotted, She appeared by her Proctor, gave an Inventory, Account, with a Declaration, that she has always heard & believes Deed had Cozens German by the Fathers Side, viz. Wm Mary & Frances Herringham, who all went to the West Indies, & she has heard Wm afterwards went to Virginia: That she considers them as entitled to 3/4 of the Moiety & Jn Stevens to the other 1/4 of Moiety of the Decds personal Estate: That she has advertized several times & enquired after them, That she might pay them their Distributive Shares, but having had no Account of them, & as not knowing of their Deaths she prayd, she might retain their 3/4 Shares of the Moiety in her Hands till she can be informed wh: the Parties are living or dead: to be enabled to distribute properly & justly. Jn Stevens says, he believes Deed had such Relations, but they went to the West Indies above 20 years ago, & none being heard of since, except Wm who went to Virginia, they are generally believed to be dead. Feb. 18th. the Cause was heard, & the Ct ordered both Proctors to be paid out of the Estate, & reserved to hear further on any thing hereafter arising: On . . . . . the Registrar made his Report, wch was confirmed, & the Ct decreed the Widow to retain 1/2 of Deeds personal Estate as her Share, & to pay the other 1/2 to Jn Stevens, Wm, Mary & Francis Herringham or such of them, as shd be found to have survived Deed, the equal Proportions, deducting 3/4 of that Moiety to be laid out in the Funds, in ye Names of ye Widow, Stevens, the remaining Cozen German & the Registrar of this Ct: a Decree has been hung on the Royal Exchange, to call in the other next of Kin, Notice has also been left at the Place of Abode of the Father of Wm Mary, & Frs H. no Discovery having been made. The present Petition is for the Money to be delivered out to Jn Stevens as the only next of Kin.

Judge — Dr Hay. Mr Jn Stevens who now applies to ye Ct. for ye whole moiety, admits there were such Relations, but wants ye Ct to presume them all dead; I cannot, on ye Evidence laid before me; there must be some legal Evidence, that they died before the Intestate; you must shew me these People did not survive the Decd, by some kind of Evidence, or by some very strong Presumption indeed, for the Widow will consent to nothing, but submits to ye Direction of ye Ct. They are said to have gone to ye West Indies above 20 years before ye Decds death, it is a wide Field, but one is said to have gone to Virginia, wch is rather more definite; you shd make Inquiry there; any Information about them, might lead to a Discovery of the others: I must be guided by Law; Can you say what has been done in any similar Case? Dr Collier said, the Rule has been to give Security, but that is subsequent. As to him who went to Virginia, there is a Specification of a Place with may afford some Lights: you must shew that in point of Law, the Length of Absence will stand in lieu of Proof of the Death of the Parties: I have very great Doubts: I shd be glad to know wh: ye Ct be justified, in making the Decree; I say, the administratrix not consenting, tho, she does not oppose. I dont think they ct be found by the Means used: Advertizements here, a Decree on the Exchange; Enquiry at

Fathers Parish, might, most probably, never come to the Knowledge of Persons in the W. Indies or Virginia for these 20 years; the Advertizements shd have been ever hard on Mrs Stevens, yet it is not for me to Decree, contrary to Law, without Evidence: It seems odd, that I must presume 3 Persons, (who are not said to have gone over in the same Ship, or at the same Time, or that the Ship was lost) to be dead; & that none of them shd survive the Intestate: I wish to be informed wh.r a Person, not heard of with in a certain time, shd be presumed Dead; I desire this for my own Justification; for in point of Law the Ct is Admor, & if I order the Money to be paid to Mrs Stevens, I shall certainly order very sufficient Security to refund, in case of an Application, by any of those 3 Persons, or their Representatives; for it is not known wh.r they were living at the Death of the Intestate; I defer my Decree to July 5th to receive farther Information by Affidavits, or otherwise, as to y.e Death of these Persons & in point of Law. There is a Statute of 1 Jac: to exempt Persons marrying after 7 Years Absence, from the Penalty of Bigamy of Car: 2d & Anne to quiet Landlords in possession agt Lessees for Lives after 7 Years. See fol. 198

Consistory
June 21.

No 76

Greene — Earle v Earle — Addersley

Dr Wynne & Bever — Dr Collyer & Harris

Qu: Is there Proof of the adultery? & shall Def.t have Alimony

Dr Wynne... Stated the Case, wch see folio. 187.

Dr Collyer.... We dropped our Cause of Reconvention, because Mr Earle was at that time inclined to come to an Accomodation, but that Treaty being gone off, we are now before you on the Merits, & take it upon their own Witnesses; We object to the Proof made as too slight & insufficient in Law: one Wn by her own Account, is under Obligations to Mr Earle; another is, or was indebted to him the rest, are his Servants & Dependants: the whole Tenor of the Evidence bears the strongest marks of a Confederacy; & I am sure if it shd appear to you, Sir in that Light, you will be of Opinion to pronounce in our favor.

Frances Nightingale says, she looked thro, a Hole in the Wainscot Partition adjoining to the Dining Room, where Mr Holland & Mrs Earle were, wch Hole Miss Gilbert had made to hear the Conversation, wch she thought wd pass between them relative to her Mother: that she saw Holland kneel down before Mrs Earle, take up her Cloaths, so as she cd see y.e Top of her Stockings, & then kiss her Knee; then Holland stood up, walked about the Room, went to the Door, but believes, did not lock it, then took off his Sword, that she saw no more, because Miss Gilbert desired to look thro, y.e Hole: She speaks to Letters had: passed, & to Meetings between s.d Parties, in consequence of such Letters, & to her going with Mrs E. to Mr H.s Lodgings.

Alicia Gilbert. deposes to H. visiting Mrs E. without her Husbands Knowledge & in his absence, to her corresponding with him, & appointing to meet him at Mrs Gilberts in Arundel Street, where after some time, they were left in the Room by themselves; that Peeping thro, a Hole, she had made in y.e Partition she saw H. on Mrs E. with his Breeches down, & her Petticoats up, & from the Position they were in, she verily believes, they had the Carnal use of each others Body

B. Taylor. Servant to Mr Earle, says, that about Dec.r 1764 H. dined with Mrs E. at Chelsea in her husbands absence; that he attended her twice to Mr H.s Lodgings under the great Piazza Cov.t Garden, & used often to carry Letters to Mr H. from Mrs E. & to carry back his Answers; he is acquainted with Mr H.s hand, by seeing him write the Superscription, & he knows y.e Exhibit to be his Hand: believes, Leonora means Mrs E. because she & H. met at Mrs Gilberts; he speaks also to other Circumstances. To Interry answers he borrowed 5 Guineas of Producent. ....

..... — Garlic heard Mrs E. say she expected H. such & such Days, & he accordingly came on those Days, whence she shd conclude, he came by Mrs E.s Appointment; that they were often left alone together, but can't say wh.r they were locked in, at those times: One Day she went with Mrs E. to H.s Lodgings to dine, but he having dined, they only staid to drink Tea, that then H. went out of the Dineing Room, into y.e Bedchamber adjoining: that on mentioning to Mrs E. what the World said of her Familiarity with H. she confessed the Crim: Con.n at Mrs Gilberts: That a Letter came by the Post wch was taken in by Taylor, who knowing the Seale suspecting y.e Contents, they were tempted to see what they were: Dep.t drew out the Ends, so that they cd not put them in again, because

they were so folded over each other; therefore they broke the Seal, threw the Cover into the fire; that she knows Mrs E. is meant by Leonora, because she has told Dep.t she always signed the Letters so ...

Dr Wynne... I am Council for Mr Earle, who has brought a Suit for a Divorce agt his Wife; you have heard the Evidence, Sir, wch the Dr in the Opening was pleased to call vague, whereas it appears borne, & I hope, will to you so very plain, that I can conceive no Argument can render the necessary Points clearer: She gets acquainted with a Player, at best, not a very reputable acquaintance, for a married Lady, in her Station of life; She writes Letters to him, goes to his Lodgeings; he comes to her at Chelsea, in her Husbands Absence, & without his knowledge; they meet at another Person's House, & are left alone together: the Letters are such, to judge from the Contents of that exhibited, as cd not possibly be written on any other Occasion; & refer to nothing but such a Criminal Correspondence; the strongest Recommendations of Secrecy &c. wch in a licit Intercourse wd be unnecessary; these are all such proximate Acts, as wd amount together to a Proof, even if the Fact itself was not so clearly proved as it is. Nightingale & Gilbert are not interested Persons; Miss Gilbert, says, she dont consider herself now to be obligid, the money is paid: the other 2 are Servants, it is true, but their Testimony is not therefore to be rejected, for Cases of this kind are of such a nature, that the proof wd be impossible, unless such Evidence was received; it must be, unless a Confederacy was clearly proved, then the Ct wd reject them; Persons guilty of such Acts are reduced to such a Situation, that they must trust People of this kind; they put themselves in their power, they make them Confidants, & it shd seem that with their Innocence, their prudence forsakes them: they talk freely of their Shame, to those, who at last betray them, either thro, a Love of Justice, Repentance or Pique; Garlic's Account, is credible & consistent, She was carried by Mrs E. to H.s Lodgeings &c. It will be objected, perhaps, that by the Canon, a Divorce cannot be pronounced for upon Confession of the Parties, & it is true, that Confession alone, is not sufficient, but added to other Circumstances, it will weigh greatly: I wont trouble you with repeating all the Circumstances, but rest the Cause here ...

Dr Bever We have indeed stated, but one single Act of Adultery, but if that is proved, it will entitle us to a Sentence of Divorce, & there is as Dr Wynne has well observed, very full Evidence of it: I shd be sorry to depreciate the most amiable part of the Creation, but I believe, it is certain, when once the Veil of modesty is removed, they are more unbounded, more unguarded in their Passions, than even the Bolder Sex: I wd not aggravate y.e Expressions made use of in the Letter, yet tho, the words are not criminal in themselves, by comparing the Letter with the other Circumstances, they amount to what we want to prove; And tho, we have indeed but one Witness, Miss Gilbert, to the Act, yet the Prelude is fully spoken to by Mrs Nightingale; we are obliged to female Curiosity for the whole Discovery, wch we hope you will be of Opinion is sufficient to entitle us to a Divorce.

Dr Collier. There was no Imputation on y.e Character of my Client, till this present Charge; as every one is presumed innocent till the Contrary is proved, she is still innocent, there is no Sentence agt her, Alimony is justly her Due; she brought Mr E. a very great fortune, & Alimony being her right by the Law of Nature, we like hope that previous to the hearing, you will allot her a proper one, to enable her to defend herself, in case she Cause shd go to another Ct. There are 2 Objections to the Witnesses, of the Fact; viz.t the Matter of Combination; 2dly, that they are all interested; Nightingale says, she & Miss G. went to H.s Lodgeings, to carry him to Chelsea these 2 Chaste Ladies then, if there was any Harm done, are the Procureresses; it dont appear but that Mrs E. became acquainted with H. thro, their means. G. says, the first time they saw each other was at her House, in consequence of a Letter from Mrs E. to H. for that purpose; is not this quite incredible, that Mrs E. shd write a Letter to a Person she had never seen; wd she at once have commenced a Crim.l Conversation; besides is it to be supposed, the chaste Miss G. wd have suffered a meeting at her House, if she

thought it criminal, else she & Mrs N. cd not be so straight laced, as they wd have the Court believe; Persons privy to such Transactions are very suspicious Witnesses; it was invited publickly enough, he came often by their Account, Mrs L. knew or might have known that: it is a free age we live in; ladies do admit Players to Dinner, perhaps to their Toilet, it is no Imputation, they may meet, they may dine together very innocently; there is not fact of adultery yet proved, says the Dr Approximate Acts are sufficient to induce a Presumption equal to Proof, I admit it wd be so, if even they were uncontested, but they are proved in a very equivocal manner: Interest in Witnesses be it ever so remote, is a material exception, else of what use wd be the Interry constantly administered, to know wht & y Witness is interested; what does Taylor say? why only that he carried Letters to & from Mrs L. & H. they might relate to his benefit, to common Business; Domestic Witnesses are, I allow, admissible, but with great Caution; Nightingale says, he has received many obligations from Mrs L. & is now indebted to him 20£. she is therefore an interested Witness; Miss Gilbert is clearly under Obligations to Mrs L. it dont appear when y debt was paid, & there may be Interest, due on that debt: I may admit the Letter was Hollands, & may be to any body else, it is not applicable to Mrs L. & if it was, it is no charge agt her, she cant be affected by it; why not intercept some of Mrs L's Letters, wch answer their purpose; this Letter was never received; it dont appear how she wd have treated it, if received; she might have been angry at his Impertinence; he might have done it of his own head, without any encouragement from Mrs L. then the Story told, is very unlikely as to y fact: it is incredible that Nightingale & Gilbert shd go out of y Room, & these Persons then immediately proceed to such familiarity. & wd not let N. look any longer, but she wd look: it is not said the Door was locked, wch adds to the Incredibility: if they cd trust Gilbert, she might have had a Bed. There is no Harm in going to Hollands, & herself had been there: Presumptions are always in favor of Innocence. Taylor says it down in his account of the Romish Church, that when a Priest is seen embracing a Woman, he is supposed to be giving her his Benediction. For Combination he referred to the Case of Ly Nassau Paulet.

Dr Harris... The Situation of y Witnesses, as well as the Evidence they give, must be considered, the present Ws are peculiarly circumstanced; the whole shews a Privity in Mrs L. to this Affair: it dont appear how or when miss G. paid Mrs L. the 200£ N. & D. are biased Witnesses: how comes Mrs L. to be now connected with these Persons, who betrayd him first & then his Wife; here bailiffs in his Service, Taylor the Errand Boy, by whom they carried on y Intrigue; he lends him 5 Guineas. What a strange account is given of looking thro' y Hole; it was to hear some Story that Miss G. supposed H. wd tell of a Relation of Mrs G. & grounded her Suspicion on an intercepted Letter, wch spoke of H. knowing Mrs G's History; but instead of applying their Ears to the Hole, they applied their Eyes; Miss G. tells a great deal: a very improbable Story, wch on y face of it, must be false; she trips at the first Outset, & if a Witness relates a Circumstance on Oath, wch cannot be true, that Wt is not credible on any others; she is, besides, incredible in an Ecclesiastical Ct. she appears to have been the Pandar by her own Account, yet says, she is a Friend to Mrs L. the Collection therefore wd be, that y whole is by Collusion between them; Mr E withdrew in Novr before he cd know of Mrs E's pretended Intrigue; why did he withdraw? not on acct of his Wife's Adultery, but probably of some Intrigue of his own: H. did not go privately to Chelsea: what Opinion must be formed of miss G. who being Mrs E's friend, after seeing y pretended Act, suffers them to stay & sup at her house; it cannot therefore be true. There was a Scheme, an artfull Train laid: Similitude of Hands is the slightest degree of Proof it: is the most uncertain Evidence, yet this is to be received as proof in a Charge of y most criminal & heinous nature; the Letter is neither signed nor superscribed; it is said, there was a direction to Mrs L. but they burnt it; what, these Servants betray their Mistress, & yet burn the only thing that cd be material Evidence to prove, what they was? This incredible; unnatural to suppose she confessed the Criminal Conversation

if ever there was any, to Garlic her Chambermaid &c.

Judge. Dr Bettesworth. I am very well satisfied, there has been an improper Correspondence carried on, & an improper behaviour, on the meeting of Mr Holland & Mrs Earles, by Mrs Es Confession to her maid; by the Evidence of Nightingale, Taylor &c confirmed by y Depositions of the Act by Miss Gilbert & Depon: nor can I think any of the Ws tho' pecuniarily benefitted by Mrs L. are any ways interested in the Event of this Suit; the money is paid, they cant be affected; their Characters are unimpeached: I am of opinion therefore, to pronounce for the Divorce. It is very extraordinary to apply for alimony, on y hearing of y Cause; they come too late now, tho', they might on Application to y Ct have been allowed it, pendente lite, & if they shd appeal, may perhaps have it in the Superior Ct. N.B. Adderley appealed.

Arches June 23d

Office of y Judge promoted by Dr Bever ..... v. Greenway.

Fountain — Drs Harris & Wynne — Dr Collyer — Holman

Dr Harris... Stated that Articles were given in, 3d Sep. Hil. T. last, & the Case at large, wch see Page 68. and Dr Wynne having read the Evidence in proof of the Articles, proceeded to read the 124 the Canon; upon this Sir, our Suit is grounded, prosecuted by Dr Bever officiating Surrogate of Dr Spry, Official to the Archdeacon of Berks: his appointment is proved, (by 2 or 3 Ws present) to have been read at y Visitation in may 1764. the Original is in the Archives, & cannot be got at: there is not one Offence in the Canon, that has not been committed by this Person, to Acts of negligence, he has added Disobedience to the Decrees of y Judge, sitting in Judgement; he has delayd issueing Probates & Admons. We have 3 or 4 Ws to every fact charged: he detains the Seal, tho' often requested to deliver it up: The Detention of the Seal has caused all this Mischief & Confusion; for if y Judge had it, he cd seal the Probates, Admons &c himself. Every Judge Registor & Seal Keeper: they are in a great measure incompatible; it is contrary 58 Canon 124: it has crept in by Degrees, it is absurd, & the Judge often suffers by it, tho, it is done, I know, in the Country: by this means the Registrar is the Judges Master; he has a Double fee for what the Judge has & the Honor of the order of the Judge: the Dr decreed a faculty for a Pew in the Church to Mr Lewis of this Parish; that Mr Lewis was in Treaty for the Sale of his Estate, wch the Person declares he went off from, because there was no Appropriated Pew so Lewis missed the Opportunity of selling his Estate. He has also refused to issue Citations, wch are not mera gratia, but ex Debito Justitiæ, & it is immaterial wht they were demanded in a criminal or a civil Suit; wht for defamation or in a Cause of mann & Suum; the Persons applying have an equal right to them. When there is a voluntary Promoter, if the Judge was to refuse a Citation in a Cause of Correction, he wd be condemned on it. Mr Bilson an old Practitioner, says he never saw this man in Ct, for ten years last past; that he has appeared neither by himself nor a Deputy; on Novr 1764. & Septr 1765. Dr Bever by reason of this Mans non attendance, was forced to assume a Notary Public, for his Actuary; we thought it neither decent nor proper to point out the time or manner of this Mans Suspension, we leave that entirely to your Discretion; if it is said, the Man is mad, the longer you suspend him, the greater Kindness it will be to him, you may keep him out of Scrapes. With respect to the Seal it is very material in this Case for us to regain Possession, we hope therefore, it being extremely improper for him to hold it, that you will decree a Monition to issue for him to deliver up the Seal within a Week, with Intimation that on Non compliance, he will be excommunicated: you certainly have it in your power to do this; Offences committed by Ecclesiastical Persons, being cognizeable in Ecclesiastical Courts.

Dr Wynne. There is sufficient Satisfaction before you, that y Seal is not delivered up, because being charged with y refusal to deliver it, on Dr Bevers request, he gives no Answer to that Article: the Canon inflicts Suspension on a Registrar not making & issueing out Citations on Application: Bilson proves Greenways neglect in that Respect. Ladds proves his having actually received the Fees for one Citation wch he never issued, in wch case he is liable to a

Severe Punishment, in a different way, in a different Ct. He appears grossly negligent, nay in the highest degree dishonest to the Persons interested in the preservation of Wills - in another Instance, expressly ordred by the Canon, he has neglected to register Wills & Admons ever since 1761. he has been guilty of a gross neglect, in not attending the Ct himself, or if unable, by Deputy. I hope you will be of Opinion, that we have proved our Articles, (particularly decree & Monition agt him to deliver up the Seal -

Dr Collyer — We have given no Plea, as we apprehend; their are some fatalities in this Cause wch seems to be improper to be brought before the Ct. It is a criminal Prosecution, founded on a Penal Canon, as Actions are brought at Common Law grounded upon Penal Statutes, so he has a right to any peremptory or dgal Exceptions at any time before the Sentence: he is to be bound to the very words, for wch reason we apprehend, we are not so properly before the Ct. He has refused Citations. 2dly: may he not be justified in refusing? to be sure he might have been very civil, very easy in granting Citations, it is unaccountable, why he shd refuse, as he wd have had the Fees, but it seems, he did refuse, & the 2dly is wt he was justifiable in so doing? I must consider first, who is the Promoter? It is Dr Bever, as officiating Surrogate of Dr Spry; he says he was legally appointed. I believe he is, because he says so; I wd take his word: but tho I may believe it, that is not sufficient, as before you: it stands upon simple Evidence that there is such an Appointment; why is it not before the Ct. or at least, why not an authentic Copy of that Instrument. it is said Dr Bever applied for y latter, & was refused; why then was not your Authority prayd for a Monition to this man to transmit an Instrument, so necessary to lay before the Ct. the whole Cause rests on Dr Bevers Appointment: it is a criminal Cause, strict proof is required; whereas it rests on the hearsay of those, who heard it read: mine is a Belief that Dr Bever was appointed, but mine is not a judicial Belief: when an Instrument can be had, it is the Law of Evidence, that being pleaded, it must be before the Ct. it cant be supplied by Parole Evidence, (the Instrument must speak for itself; there might arise a Question in favor of my Client, on the face of the Appointment itself: it might not have been stamped, it might not have been duly signed; these wd have been legal Objections, of wch the Ct cannot judge without seeing the Appointment. My Client was excommunicated, he submitted, & under the Absolution, he saves all legal Exceptions: suppose he shd have incurred all the Penalty of the Canon; what does that Canon say? why, that the Party offending shall be suspended by the Bp of the Diocese for 1. 2. 3. Months, or more, & that during the Suspension, he shall appoint some other Notary to act. Hence will arise a Matter, wch I must submit to your Consideration, that we are not now before the proper Jurisdiction: the Bp. of the Diocese alone can punish by the express words of the Canon; if the Bp. on full proof of the facts, was to neglect to punish, they shd come properly before you on Appeal; but on the face of the Canon, the first Sentence must be pronounced by the Bp. I suppose a Penal Statute was to say, an Offence was to be punished by 2 Justices of Peace, &c they refer it to the Quarter Sessions? no certainly, it wd be a good Traverse; so, I apprehend the Words of y Canon must be construed strictly, & that you are precluded by those Words, that no Requisition can justify, your taking Cognizance of the matter in the first Instance - the Dr might have certified to the Bp, who wd have taken Cognisance of his Complaint, he might have articled agt him, for every Bp has an Audience, & may have a Cause by Prevention, the delivery of the Seal by Dr Spry to my Client, might have been sufficient without a special Appointment; when Dr Bevers Appointment is exhibited, you may issue a Monition to deliver the Seals, if you have Jurisdiction; the Law on the Duty of Registers is laid down in Maranta Pra. Tit. 6. N. 13. 17. that there are 2 limitations. i.e. there must be the Mandate of the Judge & 2dly. the Money must be paid - Does there appear to have been the Mandate of the Judge, in any of these Cases? is anything laid before the Ct to shew, he was required by the Judge & refused to issue a Citation; a distinction is to be made between the Judge in Ct & out of Ct. If the Parties applied & the Judge ordred it verbally, the Registrar is bound to issue it, but without the Judge's Order, the Registrar is not bound. the Faculty is said to have been decreed, it was to be made out, does it appear the Dr ever ordred it to issue? Offering the Fees is not sufficient; he gave some Citations, I suppose, when paid; for others he asks money in part of payment; he makes Excuses, gives Reasons for not issueing others

Omnia delaxe Dummodo &c

He says, when applied to for Admons, you must have a Special Commission to swear the Admor: the Offer is nothing, the money must be paid, he insisted, in many Cases, on the money down, he had a right to it by Law - On these Objections, without going into the minuter parts of the Depos, I rest the Causes: all the other Exceptions will be included in our general ones, of the Instrument appointing Dr Bever, Surrogate to Dr Spry, not being exhibited that by the express words of the Canon, there is no Jurisdiction in this Ct. wch cant be founded till the Cause has been before the Bp. that he is justified in his Refusals, till he shd be paid his Fees: I own, I myself cd wish he had behaved more respectfully, but being prosecuted on a penal Canon, I apprehend you are strictly bound to conform to it, & that he must be dismissed from this Suit. -

Dr Harris... The Dr has been so candid to say, he will not argue up still upon the Evidence; Delay alone is sufficiently culpable; if there there was a Delay, tho, the Instruments did ipsum, & this there clearly was; his denying himself, renders a public Officer liable to your Censure: a public Person takes upon himself to be diligent, to expedite Business; it is a Duty to the Public independent of his own Benefit resulting from the neck. It is a maxim of Law, well known "Prohibetur ne quis faciat in suo, quod nocere possit in alieno"; & "Sic utere tuo, ut alienum non lædas" the abuse even of a mans own property is forbid, so that you wont suffer a man to act not only agt his own Interest, but agt that of other Persons, & also agt the Judge's: it was said, the Appointment of Dr Bever by Dr Spry does not appear; there is a sufficient constat of y Existence of such Appointment; it is in proof; Greenway has acknowledged y possession of it: a Registrar is bound to give a Copy of an Instrument, on demand, without the Order of y Judge: But this man has not obeyd the Judges Judice mandante, he has not granted the faculty; as to many Proceses the Dr seems to forget, they are ex debito Justitiæ, not ex meræ Gratiâ; this man was not only offered the Money, but has actually got it, & yet has not issued the Citations, he falls therefore under both Limitations laid down by that Great Lawyer - As to the reason alledged why the Appointment shd have been exhibited, to see wh it was duly stamped; if it was not, the Act is not thereby invalidated. In Danshbees Case wch came by Appeal from Coventry, the Appeal was not stamped; on Exception taken Sir Geo. Lee, determined it was not an Error in limine, that there is a Penalty by the Statute, but the Instrument itself, is as valid in Law, without Stamps, as with; As to the Application to the Bp, it might perhaps have been done in that way, but it was not necessary. It is to the Honor of Dr Bever, that he has prayd Requisitions: the Chancellor has given up his Jurisdiction, he acts for the Bp; if it had not come hither by Requisition, he wd have given Sentence, tho the Bp wd have enforced it: there is another Canon wch says the Bp shall deprive a Clergyman, for certain Offences; Suppose a Minister in the Diocese of Worcester, had been tried on that Canon, the Chancellor wd have pronounced him to have incurred the Penalty, & the Bp wd deprive, but if appealed before you on any incidental Point, before the Cause shd be ripe for Sentence, & you shd retain the Cause if you thought him deprivable, tho the Bp wd not deprive, you wd do it, as having larger Powers in your Patent than any Chancellor of a Diocese -

Dr Wynne... I dont understand Gs Appearance, saving his Right to except; a Party who protests, if his Protest is overruled, is ordred to extend it & appear absolutely; G. did so, appointed a Proctor, & did not pray to be heard on his Protest, therefore church, if G. wd benefit himself by it, he shd have produced it: the Dr objects to the Jurisdiction in the present Case, yet allows it on Appeal; but by Law, where an Appeal lies, Letters of Request lay; Justice might otherwise happen to be defeated, Suppose the Bp himself interested, or the Judge a Capital Enemy; By Letters of Request the Power is delegated to you; I dont know why a Certificate might not be given to the Judge to execute the Sentence, in point of Form if that was necessary -

Greenway Judge

Sentence of Inhibition and decreed agt Greenway by Default. Sundry Articles proved agt him. Sentence of Deprivation decreed agt him by Default. Not to be moved until a Return: to same effect by ye Dean of Arches. Sentence of Deprivation decreed agt him by Default. Not to be moved until a Return: to same effect by ye Dean of Arches. Sentence of Deprivation decreed agt him by Default. Not to be moved until a Return: to same effect by ye Dean of Arches.

This Ct having accepted the Letters of Request, is the proper Place to determine this Cause, if I had not, the Archdeacon of Berks, the Chancellors of Salisbury & Oxford might have taken Cognizance of it. Dr Bever as officiating Surrogate of Dr Spry was bound to complain of an Officer in his Ct neglecting his Duty, if Dr B. had omitted to make this Complaint, the Rights of the Subjects wd have been hurt by his Silence; a charge of neglect of Duty is certainly a criminal Cause, & ought to be proceeded in with great Caution; any Objection to the Regularity of Proceeding, if proved, will be fatal, & the Dr may avail himself of it, to repell the Charge. The first Objection taken by Gs Council, is to Dr B's Appointment by Dr S. but there is that wch effectually made him a Surrogate, the Appointment is proved to be lodged in the Registrars Hands who denies it; this is one of the Articles of the Charge, that he is possessed of the Appointments, & refuses to deliver it, this repeatedly requested by Dr B. so to do - all Appointments are duly registred, & the Originalls usually delivered to the Grantees; the Appointment was delivered to G. Coenter, whether he has, neglected to bring it in, shall be now admitted to the Objection, when he has done Acts under Dr B. as the Officiating Surrogate, it is therefore to be presumed, & lies on the Registrar to shew he is not; I am of opinion Dr B's Appointment is sufficient, as acting Surrogate, he has an equal right to come here with Dr Spry - The next Point is, wh? the Registrar is not very culpable, in refuseing to deliver the Seal; non Constat how he became possessed of it: This highly improper the Registrar shd have the seal, as there can then be no Check on him - 124th Canon directs the Seal shall be in the Custody of the Judge, or some body for him - This very unfit the Registrar shd have it much more retain Possession - As to the Jurisdiction, I don't understand what Canon directs the Punishment to be inflicted by the Bp excepting Canon 122. in cases of Deprivation, for there the Bp must negatively be called in, but he has no right to interfere in the Cause wch leads to the Sentence; It was so in the case of Sir Samuel Bickley Bt Vicar of Bapchild in Kent before Dr Simpson Official of Canterbury sentenced to be deprived for Sodomy; the Dr decreed what ought to be the Sentence, & the Bp of Canterbury went down to pronounce it - the Bp has no judicial power to interfere in his own Ct in criminal or other matter; the Law dont know him there, but by his legal Officer: If there be any doubt, as it comes home by Letters of Request, I am authorized to judge as fully as the Judge a quo - As to the 3d Objection, I am of opinion with the Council, there is sufficient Proof of the Judges Request to G. & the Fees having been paid him; his Behaviour seems to deserve Compassion rather than Punishment; I c? wish a milder Way might be taken, but I must do what is legal; I will lay him under a Monition to bring in the Seal, & enter the Wills & Admons wch have been neglected to be entred from 1761. & certify the Archdeacon thereof under pain of Excommunication, I shall do this ex officio, for in that particular I am bound to do more than is asked; The Canon directs Suspension; & I know a case of Bridgen prosecuted for marrying a Persons one a Minor without Consent of y? Parent, who was excited on the Canon ... wch directs expressly 3 years Suspension wch the Ct c? not vary, tho they pitied the case, & actually suspended him for 3 years. I know Dr B. means to do Justice to the Office. I admonish G. to deliver up the Seal by June 30th. & condemn him in full Costs.

Greenway appealed

Archer
Bye Day
June 23

Dr Bever

No 78 Brown ..... v Hemsworth & Arnold als Arnott — Petition

Longden — Dr Bever — Dr Harris — Goodwin

Berry Duncomb of St Martins le Grand, in the p?sh of St Leonard Foster Lane, by Will nominated Jeremiah Hemsworth & Rowland Arnold als Arnott Exors, & inter alia bequeathed Anne Brown, one of the Parties a Legacy, viz? "And as touching all Monies Cloaths, or any thing else I die possessed of, I give & bequeath to Anne Brown Spinster, now fellow Servant with me, except my Tortoishell Tobaccoa Box wch I will & bequeath to Jn Trenley, Farmer, at Denham Bucks." After Testator's Death viz? March 1764 - Both Exors took Probate & possessed themselves of the Deceds Effects. In Dec? last a Citation issued under Seal of this Ct in a Cause of Legacy, at the Instance of said Anne Browne agt the Exors 15 Sep. Citation was returned - 3 Sep. Arnott was decreed excommunicate for not appearing, — The Purport of Goodwins Petition is, that his Client the Exor no otherwise intermeddled than by taking Probate, he endeavours

Dr Bever ....

" " " 113

the Registring of Wills, & he hath registred all the Wills from the Time mentioned in the Articles, unto this Day by Section of next Term, & commd G. in Costs. Certificate as to objected against, & prayed a Bill of Costs, wch the Judge taxed at £7. 7. 0 made. Cause as usual - Monition with Excommunication embodied for pay? in 15 days, not to go out in 15

The Delegates affirm the Sentence of the Arches in every particular, with additional Costs in the Superior Ct. & Ld Chancellor to be brought in by Mr Registrar. Witness &c. Wednesday, 2 May 1764. The Certificate of Publication of the Monition, & Certificate of Excommunication embodied therein, & also of the Decree of the Delegates affirming the Sentence of the Arches, not complied with by G. is produced by Mr Registrar, & a Certificate of Publication thereof pronounced for by Dr Bever, pursuant to a Monition issued out of this Ct bearing Date the 15th March last, & also a Certificate of the Excommunication being executed on him by Mr Edwards, Apparitor of this Ct. & read. G. had not complied with the Decree by delivering up the Seal & condemned in the Costs of the Suit. Dr Bever moved that the Judge would be pleased to suspend him until the Seal should be delivered up, & also to suspend him until the Costs should be taxed, & the Certificate as to the Costs of the Suit should be brought in, & that he might be condemned in the Costs of this Day's Attendance, which was granted by the Judge. Decree suspending G. from the Execution of his Office, for & during the Space of three Months, if the Seal shall be delivered up, & the Costs paid within that Time, but if the Seal shall not be delivered up, & the Costs paid within that Time, then the Judge doth decree that G. shall be deprived of his Office, & that the Seal shall be delivered up to the Registrar of the Court, & that the Costs shall be taxed by the Registrar of this Court, & that G. shall pay the Costs when taxed, & that the Registrar of this Court shall bring in his Certificate of the Costs of the Suit, & of the Costs of this Day's Attendance, & that G. shall be condemned in the Costs of this Day's Attendance, which are taxed at £3. 3. 0 by the Registrar.

to support it by an Affidavit of his Client J. K. therefore prays to be dismissed - Longden in answer says A B. delivered to J. K the Day after the Deeds Death 20 & upwards, & several things of value belonging to Deed; this he has supported by an Affidavit of Anne Browne & Edw. Capper, therefore prays the Effect of his Citation hoped it will be enforced with Costs -

Dr Harris stated the Case on his Side.

Dr Hay Judge you are proceeding on Affidavits, in a Cause of Legacy, which is not the usual method, the Exor should regularly give a Plea to shew why he is not liable.. how can I hear a Cause of Legacy in this Way?

Dr Harris.. you may hear it on Affidavits where both Parties agree: Longden has answered Goodwin, & is thereby bound..

Dr Hay .... The Consent of Parties cant alter the Mode of Proceeding, it is not usual or legal to give Affidavits in the material points of the Cause; you cant make a Plenary Cause, summary. Petition rejected

On Admiss. of Major's Allegation

Arches
Bye Day
June 23.

No 79 Compton ..... v. Bearcroft — Major

Bagg — Dr Harris. Wynn. Burrell — Dr Calvert

Dr Calvert .... This is a Cause of Jactitation, brought by Mary Catherine Bearcroft als Compton agt Edw: Bearcroft Esq. Major for wch B. confessed the Jactitation & otherwise contested Suit negatively; We are now before you with an Allon offered by us, pleads the Clship, & Marriage - Art 3. pleads the Marriage in the English Chapel at Dumfries according to the Rites of the Church of England -

Dr Harris .... It is not allowable to bring in a Certificate of a Clandestine Marriage, in such Case you will not allow the Register to be proof in England - See Institutes of the Law of Scotland p. 112. Edinb: 1751. See Stat: 3 Jam 2. Scots Acts 1661. agt Clandestine marriages. Persons married in a Clandestine way, in Scotland are to be imprisoned 3 Months.

Dr Wynne ... no Person by Law is authorized to give a Certificate; here is no Proof of it by y? minister of the Parish; Even in Fleet Marriages, when they pretended to produce a Register they rejected it, because it was kept by Infamous Persons; on the face of this Certificate it is no Evidence

Dr Burrell... This Ct will not I am sure depart, in this Case from the constant uninterrupted Practice, or receive that for Evidence now wch has been always hitherto rejected. In the Case of Small by his Guardian v Spence. my Consistory well as the Parson. The Certificate was not allowed to be pleaded tho signed by the Party married as

Dr Calvert... as to the Case of Spence & Small, it was a Clandestine Marriage, said to be solemnized at a Publick House at Edinburgh, therefore clandestine on the face of it - As to the Law of Scotland, it must be specially pleaded, it is foreign Law, not like the Law of England; We have pleaded this Marriage in the usual manner this dont appear to have been a Clandestine Marriage in Scotland; I know no Paper can be received without Oath; we dont produce it, as in itself authentic, we shall establish it by Witnesses: you will take what can be produced; this is very different from the Fleet Certificate, wch c? not be received the Register itself not being allowed as Proof; this is said to be in a Chapel at Dumfries

Dr Hay Judge... I remember many Cases of Certificates from Clergymen, of clandestine Marriages have been refused, but they have been differently pleaded, in Supply of Proof Here it is said to have been regularly Solemnized at Dumfries; The Paper is exhibited not as a Certificate, but as a Paper signed by R. Jameson the minister attested by 2 Witnesses, at the time of the Marriage; Suppose R. J. shd deny the Paper, or be tampered with; this shd lay before the Ct, it might then be of use: I shall be particularly carefull in admitting out any Proof for a Scotch Marriage, the validity of wch has not yet been determined; the Episcopal Church, is in some degree tolerated there by Law; this is not a Clandestine Marriage by the Plea, wch states it to have been solemnized in an Episcopal Chapel; this Exhibit is not offered in Supply of Proof of the Marriage but of the Collateral fact that such a Paper was signed at the 1st Time

Wedcomb & Dobbes they were married in a Publick House, it was pronounced for on slight Proof, the Parties having lain together 2 or 3 Nights, & that by the Law of Scotland such Cohabitation is sufficient; if the Parson & Witnesses were dead it shd be clear beyond a doubt; if this Exhibit cant be received to any purpose it shd be rejected - In a Fleet Marriage the Extract from the Register is not received, because it was made by a Person who is not credible, the Book was not Evidence; as the Source of the 1st has been, not to admit Certificates in supply of the Proof of Marriage, I wd have it uniform, therefore I admit that part of the Article wch pleads the Marriage. I reserve the latter part of y? 2d all y? 3d Article & Exhibit therein pleaded, & wd have the Blanks supplied in the 5th Article.

Prerogative
Bye Day June 25

Dr Clarke...

Atham Nº 80 Lovegrove v Lycett Jenner

Dr Clarke & Calvert Dr Harris & Wynne

The Presumption is in favor of the latter Will; if the Ct was to admit Circumstances in favor of the former agt the latter, wd destroy Will-making: In this case much useless Proof has been offered to prove the Will of August: Circumstantially, instead of attacking our Will, they have gone into long Pleas; their Business was to have shewn Want of Capacity in the Testator & Custody at ye time he made the last Will, whatever is pleaded, which dont refer directly or indirectly to either of these Points, is nugatory; if such a Custody can be shewn, as might influence ye Testator, or procure ye Will in Dr it will create a Presumption agt the subsequent Act, but Positive Proof destroys that Presumption - The motives whereon a Man proceeds can scarce ever be proved, the Act may - Circumstances, Letters, Invitations, Civilityes &c, may be shewn - No Favor granted by Decd to Mr Lycett on 26 Augt will prove Decd continuance in the same mind to Sept 13th. If there was proof that the Custody prevented Decd making a subsequent Will, that wd have weight - 2 of the Subscribing Wts to ye Will of Sept are old Acquaintance, the other, (the Drawer of the Will) is a Stranger a Witness is provided a long time before the Execution, wch dont look like Imposition, the sooner fraudulent Transactions are finished the better. Expedition & Secrecy is always attended to, if the Fraud had been concerted nothing wd have been suffered to transpire - Lovegrove said they must send to the Lawyer, Taylor was abroad &c here the Proceedings were read to.

Mose's saying he wd have nothing to do with the Affair, cant be construed into a Suspicion on his Part, as he was afterwards a Witness, tho, nothing happened in the Interim to remove such Suspicion, if he ever had any; but Goodchild proposing it to him, he might mistake him; it is plainly proof that if there was any fraud Lovegrove cd not be privy to it - the Decd said, let me try the Tackle first: Payne says, on asking Decd how he did, & having no answer, he thought him insane, so put another Question to him, viz how he spelt his name? he told him deliberately - Payne was not directly called up, 2 or 3 Hours intervened, a Person bent, wd have been obliged to finish it in much less Time - all the Person who are considered in the first Will, are considered in this: there is not such a Variation between them, as to induce a Conclusion that they were not the Act of the same Person: the main Object seems to Goodchild, who had the House by the Will of August, the furniture wd have gone to Lycett with whom & G. you are told of a Dispute about the furniture - a meer Stranger drew ye Will, how cd he know ye particulars but from the Testator from whom he was obliged to pick it out by Pieces, the Devising ye Copyhold Estate, by Will, was meer forgetfullness in ye Testator no Argument can be drawn from thence; there is no Impropriety in his saying "I lent Money, tho, I borrowed it of my Father:" The Drawer had in a Manner authenticated the Draft - Having established the Will, we are not bound to account for the reason of the Testator's altering his mind, tho that may be done: Decd says he fear Lycett wd cheat those poor Creatures & refers to the Circumstances of the Furniture &c. The Decd's Declarations wd almost amount to a Revocation of his former Will: the very Circumstances alledged in proof of Decd's friendship for Lycett subsequent to the last Will, prove his Sanity - no Custody is pretended till a Month after when Decd & Lycett arrive -

Dr Calvert...

a more settled & continued Opposition than this, was never given, with less Foundation; we wd have heard it on the Testamentary Witnesses: Lo: was not about the Decd, persuadeing him to make a Will for him, but Decd sent to him, in his Shop, that if he wd come over, & make a Will for him, it shd be worth his while; he was disappointed of a Person, who promised to attest it, wch accounts for the Witnesses who signed, being there - Paynes Character is unimpeached, he acted with proper Caution & asked Questions with becoming Delicacy - Goodchild did not interpose, so as shewd she dictated, the Decd applied to her to refresh his Memory as to what he had said he wd leave, she did so, but never said, "Please to leave." such a Sum to such a One - There being only one Wt to the Instructions is no Objection, one Wt is sufficient to Coll Collateral Circumstances: The whole Progress & Execution is very clear, they must remove these 3 Wts before they will attend to other Circumstances - They have not examined to shew that no such Transaction was had: The Time the Drawer spent

in making the Draft is not important; it is hinted he was a young Man, & there they wd insinuate, he must be longer about it; there cd be no Scheme in employing him, because Lo. meant to have Taylor, who was not at Home; when he was sent for, & this young Man therefore came in his Stead: The Residue they say amounts to 6000 what Argument will they draw from thence; It appears the Decd had no Relations about him, he did not know wch of his Uncle was living - Payne was called in to bring the Instructions, his Affidavit, wch is very full, has been read in Evidence Payne says, This ye 2d Draft of the Instructions, taken from the Decds mouth before he made the Will, the Decd was ill, Powell & the Drs prove nothing of what is alledged; the Apothecary was intrusted with his Health, he was therefore very proper to give Directions; We have accounted for the Decd's change of Sentiments with respect to Lycett, wch the Dislike proceeded from good reasons or bad, is immaterial; the Wts are not contradicted, nor their Characters impeached who speak to previous & subsequent Declarations, it is much in our favor that our Opponents have pleaded so much & proved so little.

Dr Harris...

The Gentlemen have mistrusted their own Cause, & after saying they wd not plead, they have pleaded; there are frequent Declarations of the Decd in favor of Ly: why did he make him Exor? why did he say he was under the highest Obligations to Ly: & that he had been a Father to him: Lycett & Hood were employd by Biddlesons Father; Decd wd not have known where his Securities were, if they had not informed him - The Person entitled, is he who has taken care of the Fortune, from him Decd received the most Benefit - This remarkable Ly: was with Decd Sept 10th & left him on ye 13th, after wch time, it is in proof ye Decd received him, & wanted him not to act as a Visitor, but as Master of the House wch is a Sign of his designing him for his Heir; Decds Letters of Business to Ly: who transacted large Sums for him, contain many Expressions of Affection & Regard: notwithstanding this permanent Respect &c. Lo. has the Effrontery to produce a Will dated Sept 13th. What Lo. said in the Summer shews a Design on the Decd, who plainly intended him nothing - It seems Decd was fond of writing his Name, it is probable the Parties interested put Scraps of Paper before him at first, & after repeated Essays, at a proper time the Will; If Dr had an Opportunity of comparing the Instructions with the Draft, we might possibly discover this Transaction; It is remarkable Payne says he had ye Instructions at Maidenhead, & afterwards, that he used always to burn them when he had got a Draft - The Date of Sept 29th is erazed in the Draft - If the Ct has any doubt about ye 2d Will, you will not suffer it to revoke the other; the Appearance of Custody is very strong, when Goodchild goes out, he carries the Key with him, every body is shut out: the Witnesses who speak to the Declarations, dont specify the Time, the Competency of the Witness (who is Partner with the Exor of the 2d Will) is not destroyd thereby, but his Credibility - Dr Battie deposes not to a sudden, but to a constant & permanent Weakness; a general good Character dont prove a Man will not do one bad thing; Every Knave will on some Occasions: Goodchild is more Benefitted by the latter, than the former Will, his Relations are Witnesses

Dr Wynne

It is certain, the Proof the Ct requires, of the fact & Execution, is different according to the Circumstances of the Case; when a Will is made, in consequence of Resolutions taken long before, in favor of Relations, the Ct accepts of a less Degree of Proof; but where it is done a little while before a Testator's death contrary to a former Intention, Stronger Evidence is necessary - I shall begin with the Connection between the Decd & Lycett first, & afterwards speak to ye Execution wch is doubtfull & liable to be attacked by Circumstances - The Decd was incapable; the only sensible thing he did, was, chuseing a Sensible Man to do his Business; Every thing was referred to Lycett; It is in proof from the Servant, that a general Reputation was established of Decds Reliance on Lycett, he speaks to the first Will, & all the Incidents, & states the Legacies; it was a Friendship of many years carried into Execution, as it were sealed; If Lo. dont rely on the Condidit, he shd plead some Instances of Regard expressd by Decd for him, to establish their Case, you must presume, Decd had taken some Offence at Ly: & transferred his Affection from him to Lo: If the Decd had Goodchilds Benefit in view, it was odd he shd have made the 2d Will, in such a Manner that Ly: is therein more benefitted than G. In his Letters, Decd expresses great Joy at Ly: Recovery from a fit of Illness: yet cuts out his old Friend without Cause; is this likely? consider the Character of Decd, & see if there was any probability of his being a Dissembler? he was a Rough, Swearing Tar, who always spoke his mind; but suppose he meant to dismiss Ly: why shd he pitch on Lo: as the Successor to Ly: I dont say how he was imposed on, it is sufficient if he had not Capacity adequate to the Solemnity of the Act - an incredible

story is told about sending to Lo: to be Exor, which is like going into the High ways & Hedges &c to see. Who's accept the Worship; the Deed expressing a regret he had so long delayd to alter his Will, stands established; the Manner of this giving Instructions is singular; they are not positively proved, a Consequential Proof is not sufficient; the Directions must have taken up some time; Deed & Persons; Jud. ask did the Deed name Lo: Exor & Resid.y Ly: because one Wit. is sufficient to prove Instructions, that Wit. shd speak full to that Point, the Instructions might have been taken at a different time from that, they are said to have been, & indeed the Erasure shews they were — the Custody is very plain — the Interested Witnesses paid by Lo. dont fix the Time of the Declarations. Talwasper says Deed on 14th of Oct.r asked what Right Ly: had to make a Disturbance there, other Wit. speak to the same time nearly, but Dr Battie says the Deed was incapable on the 17th of Oct.r You will compare the Evidence of the Wit. who contradict each other as to this rational Conversation of the Deed

Dr Clarke.... The Erasure wont destroy the fact wch is uniformly deposed to by the Witnesses If that is established, we are not bound to account for it, that pro ratione Voluntas. They object to the Message carried by Goodchild to Lo. & conclude it was sent by the Master: as Goodchild wd have been too great an Idiot to be entrusted ... Would the Age of Payne incapacitate him? tho only 17 he was able to take Instructions for a Will — In the Case of a Will attested by 3 Witnesses, proof of Instructions is not necessary, you declared so in Winchester & Gough; if the Deed named the other Particulars, he named the Exor & Resid: Ly: likewise; he was entangled in his Acquaintance, & found it necessary to preserve a fair appearance; It was ingenious in Lo. to tell Dr Battie that Deed had provided for him: his saying jokeingly to Deed, You will make me your Heir.r dont shew any Intention to impose a Will on Deed: We have proved a strong Recognition — Talwasper's Depon makes agt the Will of August & his Joy at having altered it.

Judge D.r Ray I think myself justified in giving Sentence for the latter Will, & will state my Reasons on the Evidence, as there are Difficulties, Improbabilities with respect to the small space of Time between the first & 2d Will. The first was duly executed; it is necessary therefore for Lo: to shew by clear Evidence, that Deed made the latter Will, by wch Ly: is set aside, has no Benefit. Both in point of Execution, stand upon the same Grounds, as duly executed; the next Qu.n then is, wh.r they are both fully proved; the Proof of a Will differ according to Circumstances, in favorable Cases, less Proof is requisite; as where next of kin are benefited; so e con: where Strangers are benefited or a former Will is to be revoked, a higher & more clear Proof is expected: Payne's Account is very clear & distinct; he is young, but adroit in his Business; It was not the Design to have employd him if his Master c.d have attended. If Basing Wodehouse had been a Wit.o to the 2d as well as the first Will, this Case wd have been greatly cleard. Payne says not knowing (he does not say, doubting) wh.r Deed had his Senses, he asked him how he spelt his Name, & the Deed deliberately. i.e. slowly answerd him he swears positively, Deed did give him Directions by word of Mouth, & that whilst he was giving the Instructions, Deed addressed himself to God, & bad him set down the Legacy to Judy ... that he immediately copied the Will from the Draft & cabrred to the Deed, who was then alone; B. Wodehouse was not thought a good Wit. because his Son was a Legatee & he was to receive the Legacy for his Son; this is a reason for calling in Rose; Payne says, he asked Deed, wh.r he approved those Gentlemen for Witnesses, to be sure, said he: the Wit. dont agree in every particular, but speak to the fact. No Exception is taken to the Handwriting of Biddleston, Rose & Payne confirm each other as to the Message from Biddleston to Lo: to come & help him alter his Will, that he wd make it worth his While; Rose said Lo: consented; a Message of this nature dont imply that if Lo: had not gone, it was to have been carried to another; Goodchild said he must go to Taylor, take him with him, but he being abroad Ja.s Payne went in his Stead. Payne when he came asked the Deed how he did, who shook hands with him, & replyd he was better as to the Execution; 2 of the Instrumentary Witnesses agree Payne knew Deed by Sight, so Identity is proved. If it appeared there was not time for the Transaction, I c.d not believe the Account given by the Witnesses; the Time is certainly very short I have canvased the Time from Paynes Evidence; the Instructions were written down first, the Draft next & then the Will, it is possible, it c.d be done, It is to be credited, unless I c.d find out that his Depon compared with itself, or that of others, c: not be true: Wodehouse saying he wd have nothing to do with it does not intimate what is wanted, it can't fairly

be presumed from thence, that he considered the Transaction as unfair the Instructions are not brought in, I wish they were, P.dent speak positively the Instructions are not brought in, it is not objected to as to their Being at Maidenhead — The Draft is brought in, it is not objected to as differing from the Will, but say they, there is an Erasure in the Date, what is more common than for a Person to mistake; It is under the abbreviated Word exted wch is rubbed out with the Thumb. Would the have brought this Paper in, if it had been unfairly transacted; If it was supposed to have been executed on the 29th, why alter it to the 13th. If no reason to say the subscribing Wit.s did not be credited. But there are Circumstances wch throw a Doubt on the whole Transaction; the Will shews Deed had a firm Intention to benefit Ly: 26th of Aug.t c not Lo. who was a Wit.o to the first Will, the Presumption is strong agt his changeing his Affection in so short a Time; tho. indeed the Motive of this Charge is not necessary to be proved, if the 2d Will is proved; If the Act is proved to be done, the Motive is included therein, in many Cases it is impossible to prove the Motive; Suppose Goodchild moved Deed to substitute Lo. a Legacy: She is the principal Object. 2dly in 1st Will says. I give Mary Goodchild 1000£ for her Attention to my Father, Mother & myself." I dont think Lo. but Ly. the Mover of the 2d Will; there appears to have been a quarrell between Ly. & Ly. I may suppose it was about the Household Goods, as they are given her in the 2d, & not in the 1st Will, if so Ly: lost by quarrelling for a Trifle, if this is true, Mrs G. did wrong but that will not defeat the Act, an improper Act, if done by the Deed is not void on account of Impropriety; Lo.s Observation to Dr Battie, that he expected, or had reason to think he shd be more benefitted, must refer to an Act done: as to what the Wit.s say of the Deeds Declarations, they are too strong considering his behavior Deeds Letter of Sep.r 24th. is very friendly, therefore I can lay no stress on his Declarations, he must be a very great Dissembler. I dont think Evidence is wanting to establish the Will of Sep.r I have considered the Circumstances wch induce a strong Improbability; the Stress lays, on his knowing he had no power to bequeath the Copyhold; the answer is, what has already been given; it was Inadvertency, Inadvertency, not Incapacity. Dyer refers to acts of Capacity that very Day, the Order to the Servant to carry him to the Post House; the Invitation to the Races was subsequent; Capacity is admitted by Ly: on Sep.r 13th. if there is a clear Proof of Capacity the other Difficultys will be superseded, there are very strong Suspicions, but not legal Presumptions of Fraud; wch must be as strong, as Proof itself, to destroy an Act deposed to,

Appeald to the Delegates, who. By what Dr Batty depores, the Custody is certainly proved after making the Will, but considering Deeds Condition, it was not a safe, that admitted of this being open to all the World, tho, Lo.s Behavior was indiscreet. If I was to say the Probabilities are strong enough to induce me to pronounce agt the Will, I must say 3 unexceptionable Witnesses are perjured, however blameable the Conduct of Goodchild or Dovegrove may be, I must pronounce for the latter Will of Sep.r 13th, but considering the suspicious Circumstances attend.g this Transaction, there is not the least Pretence for giving Costs.

Prerogative

Bye Day. June 25 — No 81

Jenner — Noble v Snook — Bogg

Dr Wynne — Drs Collyer & Calvert

Dr Wynne.... Nich.s Moore of Dillingham in Dorsetshire died 6 March 1768, having made his Will 5 March 68, & therein appointed Sam.l Noble sole Exor. Bogg for Eliz: Snook as Sister & next of kin opposed the Will. Jenner propounded it.

Jenners Allon. 1st Art. pleads great Friendship between the Deed & Noble many years before & to his Death, that Deed used to say he wd leave him what effects he should die possessed of — 2d Art. That Deed being seized with Illness sent to Geo. Parrott an Attorney to make his Will, but he being abroad, his Clerk Henry Jennings went to Deed March 5. 1768, at his Lodgings, when he came there Deed told him he had sent for Mr Parrot to make his Will, & gave Jennings Instructions by word of mouth, wch he wrote down from Deeds Dictation in the Presence of Benj.n Brewood, Jn Burford, & Eliz: Noble Widow — Art. 3. pleads 4 sd Instructions as an Exhibit — art. 4. That Jennings prepared a Will from the said Instructions, went again to Deed, & began to read the same to him, but he interrupted him & directed him to read such parts only, as regarded the Instructions; in compliance w.th the nomination of the Exor; Deed well understood the meaning thereof, in token of his Approbation raised his Hand to subscribe, but finding himself unable from weakness, desired Jennings to write his name, & after he had so done, Deed published & declared the same as his last Will, in presence of 3 credible Wit.s who attested the same — art. 5. 2 Hours after Deed had made his Will, Morgan Sanger an Acquaintance of Deed came to visit him, & said he had just been informed, he had made his Will — Art. 6. Deed after execut.n this Will grew worse till he died abt 8 the next morning.

Boggallon. Art.1. Pleads that Nich. Moore died a Batchelor, without Parent leaving William Moore, Susanna, Mary, Jane, & Eliz. Wife of Geo Snook his natural & lawfull Brothers & Sisters, only next of Kin. That Deed at Gillingham 1762. made his Will, bequeathd several Legacies to his Brothers, Sisters & appointed Eliz. Snook sole Ex. Art: 2. That Deed returnd to London about October 1764, a few days after went to see Morgan Sangar, complained he was not well; S. said it was adviseable for him to make a Will; Deed said he had, that it was in the Hands of Mrs Mathews at Gillingham. Art. 3. That on Friday March 5. Jn. Burford called on Deed & found him so very ill, he took no Notice of what Burford said to him. The other Articles pleads the total Incapacity of Deed on March 5th. & the Confederacy of Noble Brewood & Jennings. Burford Depon to 3d Art: says in the same Breath, Deed appeared angry with him, for not having called on him the Day before, & yet that he was not sensible who he was, we apprehend we have fully proved the Execution, & that the Character & Credibility of our Wits are not affected

Dr Collyer... It will appear Nich. Moore made his Will in Nov. 1762, after giving several Legacies, appointed my Client Eliz: Snook Ex. & resid. Leg: he deposited in the hands of Mrs Mathews. A Will is set up by Wm Noble dated March 5. 1765, this is in officious, we must controvert it on acct of the making & manner in which it was obtained, we say it was imposed on him fraudulently, that it is not signed or executed, & is in favor of a Stranger in Blood, & must cancel another made in favor of all his Relations. They in the Condidit speak to a Capacity & Intention, but it will be made clear he had not. Mrs Sangar comes in between the Instructions & making. Henry Jennings is the Drawer of it. They send to an Attorney to come, as in the Instance of Mrs Noble, to make a Man's Will, the Master being unable to come, sends his Clerk; Mrs Lambe where the Testator lodged not being satisfied, sends for another Man to see the Transaction: he makes the Will between 11 & 12 at night, & Deed the next Morning about 5 o'clock, I never saw a Cause where Fraud & Imposition was so clearly proved, since I have attended the Court.

Dr Wynne... The Case stated before Ld come in here) From the Evidence throughout no mention is made by the Deed of any such Relations, as they have pleaded, except a Sister Elizabeth. The Witnesses depose to Deed having great affection for Sam. Noble, at whose House he used to lodge, & expressed Concern that he cd not be accomodated there, & they depose also to Declarations of Deed that he wd benefit Noble. The Opponents has not attempted to prove any Affection between Deed & the Sister in the Country, it don't appear he knew wh. she was living. The Acquaintance with Noble subsisted whilst he was at Lambes, he said he missed the House he used to be at. All the Persons concerned, save one, were very illiterate & indelicate; the Ct will consider who the Parties are touch this Transaction relates; the Deed was questioned by Jennings why he wd give any thing to his Sister, if she was alive. Impatient at being so questioned, he replyed, only to Sam. Noble, whose Interest he considered as his own; this Account of Jennings is confirmed by the other Witnesses. When Jennings began to read it over, the Deed interrupted him, bid him leave out the Preamble. Eliz. Noble says, as far as she remembers, the Will was read over to the Deed. The Will is said not to have been signed by the Testator & that the Statute of Frauds directs a Will disposing of Lands to be signed by the Testator himself, or some other Person in his Presence, at his request; this is fully proved by 3 Wits who also prove the Instructions, Capacity of Deed from his Conversation; Jennings says, he desired them all to take Notice of the fact, that Deed desired another to sign for him, as he cd not write his Name, or make his Mark: The Man was of full Capacity, tho in a very bad State of Health; People often keep their Senses to the last. They have endeavoured to make out Incapacity & Imposition: It will be therefore necessary to compare the Evidence. Lambe speaks to the time Noble was there, Burford to a different time; wch tells the most probable they say there were Attempts to draw the Dispositions from Deed but he cd not gibe the Account; the Talking softly is not pretended to have been done with a View of concealing the Transaction from him. Pen, Ink was brought in by Sangar, who says, shall I make your Will, no, replyd the Deed the Writing & Execution wd take up very little time, if the Deed was in

Such a Critical Situation, it is unlikely, that when an Affair of such Consequence was to be transacted, they wd loiter at an Alehouse; I hope you will think both have fully proved Instructions & Execution, & pronounce in favor of the Will.

Dr Collyer... Where a Will is inofficious, the Law requires the strictest proof of the whole Transaction, especially where the Effects are given differently from what the Law wd point out; in this Case there is a Will in favor of the next of Blood, wch must be set aside (if this is pronounced for) to benefit Mr Noble who was only an Acquaintance of the Deed, only 2 Witnesses speak to ..... Mrs Noble & a Lad later of theirs. Acquaintance are not on a par with next of Blood, Deed dont declare his Relations ever disobliged him. Let us consider the Evidence, Mr Lambe cd not think the Deed sensible, she thought it odd, so many Strangers shd surround him, & therefore desired Burford to come & see what they were doing, he came on purpose, so was probably very observant. Jennings deposes that he asked Deed if he was going to fabricate a Will for his Relations, who answerd No. No. if he is credible Deed intended to benefit Noble: Eliz: Noble hears all this discourse, & said Deed replied, it did not signify, this is very different. In Suspicious Circumstances Witnesses shd agree, but they differ as to Execution, Sealing, reading over, Publication &c their resorting to a Public House to make the Will is very singular, was there no Table, and Room, at Deeds Lodgings, where they cd transact their Business, it wears a bad Appearance.

Dr Talbot... This Transaction has a very unfavorable Appearance, the Deed frequently recognized the former Will, Person in his Station often tell of their Affairs, & are not easily induced to change their Resolutions. The Internal Evidence shd be compared with the Depons of the Wits Jennings was bred a Glazier, Plumber he had but lately been Clerk to an Attorney, therefore cd not be very conversant in their Business, he might be credited if he stood uncontradicted, but there is a great Difference between the Wit Beecwood dont speak to the reading over, Jennings stands single on that Point. I wd not contend, but if Deed may be good. No Time appear when this Will cd be executed; I dont think it will appear to the Satisfaction, to have ever been executed at all. As to Capacity the Witnesses differ extremely ....

Judge Dr Hay... This Case is attended with Difficulty, the Wits differ with respect to the Capacity of the Deed: it is to be lamented, that Wills are obtained in extremity, when he did it at the Importunity of others, yet if Deed had a Capacity when he did it, the Law cant set it aside. Burford says, several Persons were assembled at Deeds Lodgings, but is rather uncertain who they were; If Jennings & Beecwood swear true, the last Will must be supported, tho, to the Prejudice of a Sister, benefitted by a former Will: Jennings says he was applied to by one he did not know; he was a Stranger to the Parties & only came in Parrets Absence; ..... says Deed desired the Nobles might be sent for, & when they came said he had sent for them 2 Days before, tho, they had not heard of it: if Jennings says true he prefer Deed to dispose of his Effects in favor of his Relations, that he was angry, & said, he wd devise to Eliz. Noble. The Confusion arises from the different in point of Time; the first time J. B. & B. were with Deed no mention is made of Zachariah Deering. Parrett went at 11 at night & found Deed incapable, & Deering says, he found a Person there, who they said was Jennings. May it not be presumed L. & B. did not go, till after the Will was executed, & Deed had desired J. to set his Name. Burford depones to Deed saying, only, how do you do Mr Sangar. & then forgot himself. L. & B. talk of their going to Deed at 9 & staying till ½ past 10. How came any Enquiry about the Money, (with taking Mrs Lambe was charged) unless it proceeded from the Deed for tho, J. questioned her, Deed must have acquainted him with the fact. no doubt the Money was the Motive. The Transaction deposed to by J. is credible: B. admits the Account given by J. How came it in the Will that Deed desired particularly to be buryd by the 2 Children of Noble; that is a Proof he was sensible. B. when prest, dont speak to total Incapacity. Upon the whole I think myself obliged to establish the Will, but give no Costs. .....

× This is very material to establish the Capacity of the Deed.

Arches
June 27

No 9

Bishop Bate v Taylor

Dr Marriott. Clarke. Calvert — Alexander

Dr Collyer. Wynne. Burrell.

Dr Collyer... I am Council for the Revd Mr Taylor agt whom Mr Bate has instituted a Cause, for doing Duty in the Parish of Claines, where of he is Perpetual Curate, this Cause was heard by the Chancellor of Worcester, who was of opinion Mr Taylor shd be dismissed with Costs: Mr Bate has appealed, & we are now before you on the Merits of this Appeal, this unnecessary for me to recapitulate the several Proceedings &c We have alledged the Chapel of St Oswalds & that part of the Manor of Whystones called the Sythieng of Whistones, to be extraparochial, that Mr Taylor is chosen Chaplain of St Os. Hospital, by the Masks thereof, who has the right of Nomination, & that he has a Licence from the Bp of the Diocese, (wch is exhibited) this Licence is full Evidence that of Bp intended hereby perform Parish Offices in the Chapel; Dubies have been performed there for time immemorial by the Predecessors of Mr T. in aid of Oral Evidence we have produced Exhibits to conform our Assertion; viz. Register of Baptisms Burryals & Marriages; dis 3. wch contains an account of certain Rights & Immunities, & also 3 other Exhibits marked A.B.C. wch prove this point we bring an Extract from the Augmentation Office wch shews St Oswalds is a Parish Church of itself, we say it is immaterial wht it is in the Circuit of the Pish of C. or not — At Laslewood near Salisbury the Chapel of St Nicholas founded about 1200 is exactly in the same Predicament, Mr T. being extraparochial is subject to no Visitation, this I am aware, the Lyecon Gentlemen will use as an Argt that St O. is not a pish — It is amenable only to the Master of the Hospital; By Implication, from the Exhibits, the natural Inference is the Hospital Church was dilapidated — a Place being situate in ye District of a Parish dont make it the less Extraparochial — It is locally visited by the Bp of Worcester: No Place is subject to a local Visitation, that is subject to any Parish, witness St Katherines by the Tower, & Whitehall; No Settlement is gained in Claines, by living in the Sythieng of Whistones; No Burthens of C. affect Wht & none of the Hospital affect C. wch has been so adjudged as Mr Corksey, & is therefore a clear proof of their Independence on each other; at that Time the People of C. said they did belong to St O. but now they sing a different Song, to answer a different Purpose; if a man intruded into the Office of Chaplain, how can he be entitled to the Fees for doing Duty at St O. We can have no Connection, as to Spiritual Affairs with the Church of Claines, having no Seats there; We rest it on the Licence, the Record of the Immunities, immemorial Service — Mr Pixell speaks strongly to wht being free from C. he says the Service of praying & administering Sacraments to the Sick of Wht is performed by the Curate of C. or Chaplain of St O. at the Option of the Inhabts Brooks wd not have asked Leave to do Duty at St O. if he had a right so to do — There was a Cause of this Sort begun before, & afterwards dropt; I will agree to the Proof of Procession ing, that is no Proof of Wht being Spiritually Parochial. It is said the Tythes of Wh are paid to the Impropriator of C. we dont pretend to Civil Rights, Tythes in Impropriation may be so denominated — Easter Offerings are an antient Acknowledgement, for little Extra Duties performed by the Minister to the Sick &c they are very often not demanded, being so small, they are immaterial to make an Alteration as to St right of doing the whole Service — There are 2 Manors, C. & W. the Cts are held in either according to ye Convenience of the Steward &c if held in St Os Hospital I dont apprehend any Parochial Rights & thereby accrue to St O. It is said no Marriage &c have been solemnized there? or Banns published since the Marriage Act: that proves nothing. Its being extraparochial will account for it.

Dr Wynne... You will observe, this is a Cause of Correction, the Duties arise on a Complaint brought by one Clergyman agt another for having invaded his Rights; no Place is laid where the Offices were performed, except in the case of Burials, it is not insinuated that I acted with any view of Interest — I deny a Clergyman can, by Law, be punished for burying a Corps brought to his Church; on the contrary, if he was to refuse on due notice, he wd be punishable by Canon: it wd be hurtfull to the Minister & Parish; suppose a Traveller was to die, shall he not have Xtian Burial; Suppose a Woman falls in Labour, & there is danger of the Child's Death, shall it not be baptized? as to these Circumstances, if insisted he has not erred; He is objected to for administering Sacraments out of the Church, the only Instances brought, are the Sacrament out of the Church, & Offices of Charity gratis, he 2 Cases of Extremity, where he performed & Offices of Charity gratis, he wd have been culpable if he had denyed: It is at most a Doubt wh wd have been culpable if he had not a right; if we could make it appear there was a usage to do this there wd be no Ground for Articles; if a Man was to go from House to House like a Mendicant perhaps these might be reason to complain; It must be proved to be done with a lucrative view, officiously, intrusively to deprive a Clergyman of his just Dues, & also frequently, or the Complaint will appear litigious & malicious — It is necessary to enquire into the Proof of the Situation of this Place suppose it cd be brought to Light, that this is extraparochial, tho it had been forgot & overlooked till now; of the Inhabts of wh: were three denied to be prosecused for not going to Church, they wd say they had none to go to; they pay no Church Rates to C. Service in Wht Sythieng is said to be no Ele Member in C. They have stated some few Circumstances, to shew, the Sythieng has some Dependence on C. the Processioning is not clearly ascertained, the Witnesses differ as to Time; there is no Evidence of it being constantly done — the Curate of St O. it is said, sometimes collects Easter Offerings in Wht this proves no further than it goes — the Pishs of Wh have no right to Seats in Claines Church; In other parts of C. pish the Proprietors of Lands have Seats appropriated; it must at least be a Doubt wht the Sythieng of Wh is in the pish of C. or not: in point of Usage Mr T. is justified. I have spoken in general only; how much more strongly wd the Evidence operate, if considered as Coram non Judice, the Bounds of the pish coming in Issue. This so laid down in Rolls Abr: 291. Vicar of Boston Case. 15 Jac: would you consider that, when only brought incidentally in Issue with you cd determine, if it came directly before you — Does Bate say T. received Fees from any Persons, let him specify them — No Minister has a right to a Fee for what he dont perform, See Burdon v D'Lancaster. Salk 68 Bate has performed Offices in St O. & received Fees for so doing; he has no more right in the Chapel of St O. than Taylor in the pish Church of C. which is not pretended to have done. B. has pleaded only 2 Acts by T. three were Acts of Charity, for wch he received no Benefit: St O. is Peculiar, extraparochial, independent at Law, in many Instances than one; Easter Offerings are said to have been paid to B. but not constantly. In 1831. The Inhabts of Wh went to church at St Nicholas not at C. when their own Church was Down, why was not the Right then demanded by the Minister of: for this reason, he was conscious he had no Claim.

Dr Burrell Before I enter into a discussion of the Evidence, wch has already been so ably argued by my Leaders, I shall consider what are the Different Chapels known to the Law, & examine the Peculiar Circumstances of each, that I may inform myself & the Ct. to wch, that of St Oswald bears any Resemblance; The first is such as is parcel of or x x x x x adjoining to the pish Church: built for the Convenience of some Family of Consequence, that they might be separated from the rest of the Congregation, & have a particular Place of Burial. The next is a Chapel of Ease, founded with the Consent of the Minister, at the Expence of that part of the Pish who live at a considerable Distance from the Church, in a large pish; but this was subject to certain Regulations; the Chaplain was named by the Rector, was removeable at Pleasure; he was paid by the Pishs who frequented the Chapel. No Font was allowed therein, Baptisms & Burials & Marriages, were to be performed at the pish Church; no Sacraments were allowed there, it being only used in Prayers, Sermons. An Oath of Obedience was due from ye Capellane to ye Rector or Vicar. Annual Processions with Flags &c were paid by ye Inhabts so privileged. The 3d a free Chapel, wch in point of maintenance, Endowment, is much as to the former, & hath perpetual maintenance, towards upholding thereof, by a charitable Endowment, without the Charge of the Rector or Parish. So that a free Chapel is according to the Opinion of some, a Chapel founded within some parochial Precinct for Divine Service, by the Bounty of some well disposed Person, over & above ye Mother Church, to wch it was at the Pishs choice to repair or not, endowed with a maintenance by ye Founder; according to others, those are only free Chapels, wch are of ye foundation of Kings, by them exempted from the Ordinarys Jurisdiction — A Parochial Chapel is defined, to be that, ubi deservitur de Ecclesiasticis, Sacramentis, Sacramentalibus, &c. quod non denegantur accedens ad ecclesiam majorem, prodivinis audiendis, vel recipiendis Sacramentis, habent ad hoc Sacerdotem specialiter limitatum. It hath right of Christening, Burying, differeth nothing from a Church, but in the want of a Rectory, & ye proper Rites, that make it a perfect Parochial Chapel — That if any new Oratory hath acquired & enjoyed this Immunity, it differeth not from a Parish Church, but may be styled capella Parochialis. Again Lyndwood says, ye right of a Parochial Chapel may be by Custom Jus autem in tali Capella, non sit institutus predpredis Curatus, sed voluntibus, ad libitum Prælati, majoris Ecclesia, potest nihilominus in casu talis Capella habere Jura Parochialia, scil: ex consuetudine prescripta — To wch of these does St O. bear any resemblance as some respects to the Jure, in others to the Parochial Chapel, but in no particular does it bear analogy to the Chapel of Ease &c. being entirely free from every kind of Parochial Dependence, & of itself a seperate & Distinct Juris diction from Claines, if therefore Mr Taylors Duty has been confined to St Os Chapel, there cannot be the least Presence or foundation for this Charge; if the Sythieng of Wh is comprized in St Os Jurisdiction, or if C. has a Concurrency with St O. yet T. is not culpable, nay if Wh is dubious wh in C. or no, ye Usage alone will defend T. from Censure..

x ubi ibidem familiaria Sepulcra sibi eligunt.....
x 2 Burn. 216. Degge 186. Watson 336. Kennet 595.....

Lyndwood declarationes mysteriorum Capit: Frat nata. verb. Capellis. fol. 238...

Burn. 217... Lyndw: declaratio: nes. c. ult: v. abanc: quo. fo 277....

Gibbon Dep. Cam: fol. 145

Selden

cætera non desiderandæ

Dr Marriott

all criminal Causes are stricti juris; we do not libel for the fees because we did not the Duty, but we article agt him for hav: done the Duty when he ought not to have done it; we charge S. with hav: busyed 3 or 4 Persons; if he rec: no fee, he shd plead & prove that he did not. S. joins issue on the Law & says the facts are in part true. It is possible St Oswalds Chapel, may have its own parochial Rights & yet not include the Tything of Wh: it may be with respect to itself only. The Inhab:s of Wh: may have their own Officers & yet pay Dues to the Minister of the pish adjoining. It shews how People are drawn by plausible Preachers from their own pish. It is not merely paying the Rates, that makes a pish in the Sense of this Cause; the assorting, in itself proves nothing; As to the Immemorial Usage, the Proof thereof lies on them, for the Presumption will be in favor of the pish Priest — Wh: is admitted to be in y:e pish of C. there cant be 2 Parish Priests. a Benefice is an indivisible. See Lyndwood says the Vicar does not vicem gerere, the Right of the Church is distinct; & Chaplain is a Substitute of the Rector. he is removeable at Will; he is no parochial Minister in his own Nature — No cogent Necessity has been proved to excuse S. the Minister was not absent did not refuse to come, was not sent to by the Parties, it must be presumed S. was too forward — there is a positive Canon wch forbids Priests meddling out of their pish, so early as the Time of Canute the Institution of Priests is very antient; Payment of Tythes from any District makes the Inhab:s liable to the Repairs of the Church of that District, so by analogy liable to pay the Parsons Due; We deny St Oswalds Parish goes beyond the Walls, it was a Dissolved Priory there is no Chapelwarden; the Parish must follow the Tythes

2. Rector of Near Portion of Tythes claimed by Ancient pish of S:t

Dr Clarke

The Suit is properly brought, because the Ecclesiastical Judge only, can correct & admonish Spiritual Persons; the dispute is not about the Bounds of the pish, but wh: the Chaplain of St O. shall exercise Jurisdiction in the pish of C. The single Question is, wh: the Tything of Wh: is part of the pish of C. if it is, it will follow, that none but the Minister of C. can officiate there; No Usage can establish a Right to a Due in A. when it is due to B. on the same account, a right being vested in one destroys the claim of the other — Other Questions may arise, it may be proper to examine the nature & Endowment of St Js Hospital; I will admit the Exhibits prove an Usage of Christening for 60 Years, but does that appear such as to vest a Right? what no more than 3 Instances in 70 years? the Probable Argument is that it was without the Leave of the Minister of C. or overlooked by him; they must prove it done agt his Consent; As to the Survey of the Chauntries wch is introduced, does it prove the Chapel of St O. had a right to perform any of these religious functions; It was to administer Sacraments & Sacramentals to Poor Persons, Inhab:s of 4 poor Houses, how can this extend to the large Tything of Wh:? From the Complaint mentioned in Exhibit B. it is clear there was no Church standing, when that Exhibit was made; the Hospital Church was no more standing than y:e Church belonging to Whitestones; therefore if St Js Hospital is meant if to be proved, & its not being so the Inference is, it was some other Hospital Tenn Lands in the neighbourhood of a Town are extraparochial; the name of a Chapel points to a few, & a Master refers to a few: when Lords of Manors endowed Churches, Parish Bounds were fixed; if it was only subordinate to Wh: wch was the old Church, it will not follow that this being a Chapel of Ease, co: have a right to administer to the Inhab:s of the Mother Church. In the pish of Fulham, Hammersmith has a right of chuseing Church wardens, it is in some points to be deemed independent: It is necessary only to prove they one belonged to the mother Church, for then they must revert back: how the Lay Impropriator of C. is Impropriator of Wh:s Tything. Hamlets except in some respects are independent: some public Token is kept up to shew the dependancy; the Church at Hammersmith is locked up once every year, the Inhab:s attend at Fulham Church: the Wit all say they resort to St O. on account of the distance from Clams Church; they have no Seats in St Os Chapel. Ives & Wright the Spiritl can determine on the Perambulation, if the Custom of Perambulation is established, the Ct cant go agt it. the Inhab:s of Wh: are pollution is established, the Ct cant go agt it. the Inhab:s of Wh: are polled at Elections as Pish:rs of C. the House is differently informed in here from what it was in the Ct below. At all Events there is no room for asking Costs — —

Dr Calvert

This is said to be a Civil Cause in a Civil Right, that the Crimes are not of Ecclesiastical Cognizance, if he thought he ought not to answer he shd have appeared under Protest: It is particularly directed in the Rubric that the Parson shall enquire into the Character of y:e Communicants; the facts are notorious, even from the Exhibits as to the Case of St Martins in the Fields, the only Inconvenience will be, that the Great Persons must go to their own pish Churches to receive the Sacrament; the Dispute is about the Bounds of pish of C. & the Chapelry; we say there is no Chapelry; In the Cases cited from Rolls the Qu: was how far the Bounds of the Vicar & Rector extended. We are Parson by our Licence; Taylor by his Licence is not authorized to perform Ministerial Functions out of St Os Chapel. It says, "to do the Office of Curate in the Chapel of St G. Ours, says "to exercise Functions in the pish of C. the Ordy: do not allow the Consequence of the Processioning, why shd the District of Wh: be included therein, if the Parochial Rights did not follow: I will add to Dr Js List a 5th kind of Chapel i.e. such as are annexed to Hospitals, or Colleges in Universities, they have no Pretence to any Parochial Right; the Minister is licensed, such I apprehend St O. to be; Suppose such a Chapel assumed a right to bury or marry, wd it be suffered. Very few are described to belong to Wh: the Register proves too much, it shews Person of St Mich:s & other pishes were married at St O. he might as well contend for a part of those pishes: the first Exhibit is said to be an Exhibit from the Augmentation Office, the Title appears not to have been given but by the Person who brought it in, it is his Conjecture: the Clerks of that Office wd have authenticated it, if taken from there; when any body may have recourse to the Office a more Authentic proof shd be offered: Paper C. has neither Head nor Tail: If Ch: Church was standing they wd have gone first to that than St Nicholas, it being nearer; this Paper then ought rather to refer to Claines Church as dilapidated; there is no Chapelwarden, so, the Ch: Wens Jurisdiction probably extends to St O. Does a Person serve the Office of Ch: Wn. because he has an Estate in a pish? no. it is the Residence: wch gives you a liberty to exercise the Office, & makes you eligible, I shd scarce have supposed for Sookey either a Justice of Peace or a Barrister, a bigging so bad a reason for his being Ch: Wn. because he has Land in both Places: No Marriages have been solemnized at St O. since the Act, wch confines it to where Banns have been usually published; the reason why they have not been published here is, because it is not a pish Church: Decoding to them, it was a public Chapel, if so it wd still have celebrated Marriages. it not doing so, shews it is a private Chapel; by Composition, as we contend, originally a Piece of Land in one pish, paid Tythes to another; Easter Offerings been entred in a Register we have not proved, indeed, they pay any Dues to the Parson of C. the Ark of our Action, being rejected, wherein we laid that the Tything of Wh: did pay Dues to C. it was rejected, as not being now matter; if the Ct had thought it material we co: have shewn it, if the People paid towards the Support of the Chapel, it wd be a proof the District was included, but there is a private fund for the Repairs; if it was a parochial Chapel, some, tho not all of the Inhab:s wd be seated, it wd be visited by the Ordinary; it is visitable now, by the Bp only as Founder, a mere Local Visitation shews no separate right; the onus probandi lays on them I suppose you thought the Articles insufficient to justify a Censure, we have proved enough to exempt us from Costs, the Pish:rs wd have accomodated matters, it was proposed to abide by an Arbitration 16 Sep: .... the Def:t S. to refrain, wch will exculpate us from the charge of litigiousness.....

Dr Collyer

They institute a Cause of Correction, then try to make it up; how strange, to say we are to blame, to defend ourselves; I dont care wh:r it is a pish or they admit the Papers exhibited to be Copies, if they allow them to be true Copies they are true Copies of Originals; they admit the Book, and what is contained therein, there was then a Dilapidated Church. A spiritual Parish may not be the same as a Civil Parish; it is objected there are no Chapelwardens, the Answer made the Objection salve dit, by shewing the Repairs are provided for; are presentable by the Ch: Wns of C. did they ever visit? I admit wh: is in the local parish of C. Dr Burrells Comparison on the distinction of Chapels was pish

& properly drawn; I dont know any Absurdity in 2 Parsons of one pish but we are not of the same pish. We claim only the spiritual Offices, that for time immemorial; we did not want to contest the Jurisdiction, we have been long desirous of having it tried that it might be established

Dr Wynne.. Drew an Argument in favor of the Defts from the great doubt about the Limits, from the Laws cited; we have exhibited a Transcript wch now is objected tho they have allowed it in their answers; You can have no more Objection to these Copies than you wd to the Book itself; I know this cause even a Monition is a degree of Punishment, as I have lately heard; the Ct can determine incidental Points: It is not incumbent on any Party to prove his right, it is sufficient, if doubtfule, to justify him; the Minister as well as the Churchwds shd see the Parishrs come to Church; he has no colour of right to Easter Offerings; By Stat: of Edw. 6. Easter Offerings are payable where People receive the Sacrament, do they receive it in Ct they do at St O's it is not confined to the People of the Hospital only: in the time of Henry there were Houses belonging to St Bs Hospital, in process of time those were built on the Hospital Estate, the Curate of St O. has as good an exclusive Right to his own Chapel yard as the Curate of C. to his Churchyard: the Canon Law forbids y Demand of a Fee for any of the 7 Sacraments, the Deft is unfavorably represented to have received a Fee from a Person whose Soul B. had the Care of. The Perambulation is to keep up the Bounds of the Manner; I hope you will be of Opinion they have failed in the Proof of their Articles, affirm the Decree of the Judge below with Costs..

Dr Burrell... I do not wonder, the Gentlemen are desirous of relieving themselves from difficulties, wch they are satisfied they cannot conquer, or that they shd wish to impose that Burthen on the Deft wch is too great for them to support: it might be remembered, quod Actori incumbit Probatio, & that every Ct will expect the Person who brings a Charge agt his Neighbour, shd make that Charge good; natural Justice points out this, as an essential, wch ought never to be departed from, & I hope this Case, will not be an Exception; the Kings Advocate surprized me, when he said, if there was any doubt in this case & it is agreed on all Sides the Doubts are numerous & weighty) the Ct ought to determine in favor of the Plt, agt the Exemption claimed, on account of the Tythes being extraparochial; he surely forgot that noble Maxim of the Law, (wch every Judge shd keep constantly in view) that in every Cause, & more especially those of a criminal nature, inter dubias Sententias mitior sit eligenda: In Causes of this Sort every thing wch is charged, but not made good by the Plt must be pronounced agt, & supposed never to have existed; but Sir, as far as possible, we have yielded to this Doctrine, & entred in some measure into this Negative Proof contended for by Dr Marriot, we have shewn the Place alledged by them, to be subject to C. is in fact not so; the Inhabitants of wch have no Seats in the Church of C. are not contributeable to the Repairs thereof, have distinct pish Officers, & gain no Settlement in C. With what Degree of reason or Candor then can those be styled Pishrs of C. who are restrained from enjoying the Benefit common to Persons of that Description? or wd the rest of the Pishrs of C. thank their Minister for obtaining a Communication of their Rights to the Inhabts of wch whilst they continue exempt from the common Burthens of that Parish? Dr Calvert was pleased to say, he wd add a fifth Sort of Chapel to my List, wch came up to the present case, & never pretended to have Parochial Rights; he instanced Chapels of Colleges in the Universities, to wch he joined, not very appositely, Hospital Chapels; I must observe, those very Chapels, he has described, are the Members of College obliged to go once or twice every year in their proper Habits to y Mother Church in token of their Obedience; a token never attempted to be enforced at St Oswalds Hospital. Upon the whole, I hope you will affirm the Sentence of the Judge below, & dismiss Mr Taylor with costs. . . . .

This is certainly a criminal Prosecution; I wish the Parties had agreed as the Dean of the Arches recommended; but that not being the Case, as he appointed me his Delegate, I cd not decline, I must therefore give my Judgement; I am sensible what I shall say, is only incidental

I judge Dr Harris for Dr Gray. with good Sentence in part below, & therefore confirm hearing Clause

as to Whitstones; & cant affect the Bounds of the Parish, if hereafter contested in the Temporal Ct; I know the Spiritual Cts have no Jurisdiction of Bounds: ries, tho they may come in incidentally, as they do in the present Case, & without determining wch? Wch is in C. it wd be impossible to determine this Suit. The Charge agt T. is for doing Duty in the pish of C. T. justifies by pleads that wch is free & extraparochial: the Facts indeed on the Articles are fully proved, but if they were not. T. by his Justification has alledged his right to do all Duties, except marrying, therefore he has virtually confessed them. Every Clergyman has an exclusive right to do Duty in his own Parish; to interfere with him, even on particular Occasions, with the Business of the Minister, either in or out of the Church, is a Canonical Offence, contrary to the general Law. The Questions are these. 1Q. is Whitstones Tything in the pish of Claines. 2Q. is St Oswalds Hospital in the pish of Whitstones? If on that Supposition, Does it enjoy such Rights, as to christen & bury in the Chapel yard, perform Offices in Whitstones, without Offence? the First 2. the Defts Council have given up. Exhibit B. proves a Presentment of the Inhabts for not going to some Church; Claines is not mentioned, but I think it probable C. is meant, as the Hospital Church is said to be dilapidated, they cd not be presented for not going there; they dont say they have no Parish Church, but that it is dilapidated. Exhibit C. is introduced to shew wch is not in C. This is not the strongest Evidence having neither Date, nor address; Oral Evidence has also been offered to shew wch is not in C. Witnesses on their cross Examon prove every thing Date can want (to 16 Interry) in respect to wch: being in C. Clarke the Dep. Regr to 16 Art. says he has many Leases in wch Wch is described to be within the pish of C. There is as little doubt about the Ct Lect Jurisdiction; they call the Bp and of the Manor of C. not of Wch: & C. yet all the Cts are held in Wch: There is full proof from 5 Witnesses (to 13 Interry) as to Easter Offerings Chapeau. Cowcher & Thomas speak to having paid Easter Offerings to B. the 4th Proof on this point is not very full, yet it is strong, when I consider it comes from 5 Witnesses. As to Seats, Cowcher to 13 Interry, says, the Inhabts of Wch: go to Claines Church when they please, & tho, they have no particular Seats there appropriated to them, it is clear, they have no Seats in St O. Chapel B. has pleaded this Again, & added fresh Witnesses, who prove Easter Offerings very fully, tho, the least of all the Facts. Processions are proved as often as is necessary, wch B. strengthens by adding, that the Tythes of Wch: are paid to the Impropriator of C. or his Steward. Hadwright Severn, Smith prove this. I have no doubt but wch: is in C. a Right may arise wch St O. is in wch: Written Evidence is produced to shew St O. is a pish of itself: many Witnesses agree it is in Wch: some contradict it, viz. Sarah Owen. Smith. Webb. & the Augmentation Office, & Lib 3 mentions the Lease wch describes it so, I cant think there cd be such a Lease, if St O. had not a District belonging to it: the Oral Evidence makes it in Wch: the written Evidence says it is not. If St O. is a free Chapel, it is immaterial, wch it is in, or out of Wch: if out of Wch: it is not criminal for christening in that Chapel; the Law is clear, that a Person of one pish may christen, bury, or church, those of another pish. It is not therefore guilty of any fault. In doing Duty at St O. Chapel to the Pishrs of C. But supposeing it in wch: there is Evidence to shew St O. is a free Chapel tho, a private one, with a District: It is in Evidence the Curate of St O. has performed all Offices, except marrying, as long as the Wits can remember; they are greatly strengthened by (the Registers) to the Inhabts of Wch: C. & other Places. Base dont object to 5 burying Persons of other Parishes, it wd be equally wrong in 5 to bury the Inhabts of another pish, as that of C. it wd be equally an Intrusion; B. has not proved either he or his Predecessors have had any right to officiate at St O. nor do any Repairs appear to have been done by the Inhabts of Wch. at St O. wch is governed by Local Statutes, & repaired out of the Estate wch belongs to it: I look on St O. to be a free Chapel, wch by Usage, has gained a right to bury the pishrs of C & the neighbouring pishes; It was a private foundation, originally intended for poor People, it became usual for the neighbours to be buryd there, the Right is from time immemorial; B. contends St O. is a general Burying Place, that is not proved; no one can bury there without had first obtained the Leave of the Chaplain of St O. or the Master, this must be presumed; B. buryd them by Permission rather than of strict right. It is strongly in Evidence 5 has exercised this Function & by administring the Sacrament to Mrs Lucas, christening Everell's Child: there is only 1 Wit to prove the former: wch aided by corroborating Circumstances

as sufficient; I know none stronger than the Right schrip by Mr Taylor no doubt in administring the Sacrament in St Js Chapel, he has done what the Law allows. The general law is, that no minister shd be interfered with in his Duty; as this appears in the Cause to be fully proved; on wch account Mr Taylor must be censured; I shall therefore reverse the Sentence given in the Ct below, admonish Mr Taylor not to do any Duty, out of his own Chapel & Precincts, for the future; As to Cobb, the Registrar will report them, & I will consider thereof & tax them moderately, the Christening being in some degree a case of Necessity....

Prerogative
July 1.....

Collins for H Stevens jun.r

Nº 83

Hull ..... v ..... Jupe ..... Fountain

Dr Wynn ..... Dr Harris

Dr Wynn.....

Wm Hull late of Meer in Wilts, died a Batchelor, leaving Geo, Hull his Bro. & other Relations. after his death Judith Jupe, Spinster, obtained a Probate of a pretended Will, dated Sept.r 18. 1765. as sole Exec.r Citation issued agt her to bring in the Probate, prove by Witnesses, or shew Cause why it shd not be revoked & Deed pronounced to have died intestate, & Admon granted to Geo Hull, & to exhibit an Inventory on Oath. at y.e promotion of Sd Geo Hull. March 22. Fountain appd for P.J. 2 Sess. Dr. Fountain brt in Probate, exhibited Proxy & contested Collins Clients Interest. C. opposed & J. propounded y.e Will, & alleged the grace an Allon. 3d Sess. J. assigned to exhibit all Scripts. 1 Sess. Dr. J. when J. prayd farther time to give his Allon, & new Commission for Scripts. 3d Sess. J. brt in the Commission with Affid.t of his Client & Scripts annexed. 4 Sess. C. alledged J.s Affid.t of Scripts not full. The Obj.n to the Affidavit as not full, is in respect to the 2 first Wills, wch Mrs Jupe mentions as cancelled, without saying how, or in what Manner, or wch they are now subsisting, wch she ought to do; if subsisting, she shd bring the same in, for as 4 Wills were made in so short a time, it may be very material to see what were the Contents of the 2 first, that, before the Allon is debated; but if you shd think the Affid.t full, it is submitted wh.r the Allon, makes out an admissible Case, for if the whole is proved it will not be sufficient to found a Sentence for the Will propounded of the 18th of Sep.r 1765. Mrs Jupe admits in her Allon, the Testator executed a Will Sep.r 21. wch expressly revokes all former Wills, consequently that, now propounded, & the only pretence of any thing done to revive it, is a Declaration made to Glover, as pleaded in the 3d Article, wch if true d.o not revive the Will of Sep.r 18. wch c.o be only done by some solemn act of Execution & Republication —

Dr Wynn.....

The first matter therefore respects the fullness of the Affid.t of Scripts. Facts in the Act. there are 4 Wills, the first is dated Aug.t 1. 1765. the 2d Aug.t 31 1765, when the first was cancelled — a third Sep.r 18. 65. wch is now propounded wn that of Aug.t 31. was cancelled; the 4th. of Sep.r 21. 65. wch is said to have been afterwards cancelled, & is annexed to the Affid.t of Scripts. the other 2 she says she knows of, but gives no account of them in her Affid.t & brings only the cancelled Will of Sep.r 21. 65.

Dr Harris...

The Affidavit appears full, the Dr has not read the latter part of it; Mrs J. says she is only informed, & believed those Wills were cancelled; but adds in the latter part, that no such Papers have ever come to her Possession or Knowledge, save the 4 Wills afd. She speaks to the 2 first merely on Information, does it follow thence, she is possessed of them or dissuading whatever the Ct may think of the Affid.t you will hear our Allon, you wont delay the Cause in this State, merely because there has been some little Slip in the Affid.t These Affid.ts are to be construed favorably, it really does appear strange, a Man shd make so many Wills in so short a time if he was in his Senses

Dr Wynne

Collier says the 2 former do subsist, but tho, she says they are cancelled she does not say how, as she does of the last, she ought to bring them in as well as that of Sep.r 21. this is a very extraord.y Case; a Man in y.e Course of 2 Weeks, makes 4 Wills: it may be material to see who is the Exor in y former Wills; she is Exx in the latter, it may be essential to

the Hearing; she gives no account in whose possession they are or how they were cancelled; for any thing that appears, the 2 former are in her Possession, probably as Exx the Word, destroyd" thrown in at the end of the Affid.t must refer to the word Cancelled" to the Papers may dd exist, tho cancelled; it is not such a Paper as will entitle the Party to proceed —

Judge Dr Hay...

An Affidavit of Scripts shd account for every Testamentary Paper, that comes to, or is in the Possession or Knowledge of the Party who makes such Affidavit: Wh.r the Paper be a subsisting Paper or not, tho' may be made even of cancelled Wills; she says she believes he made 4 Wills, she brings in 2 of them, the last cancelled, but does not expressly say wh.r the others were destroyd, & wh.r by Cancellation; they may subsist tho, subsequently revoked, but if they still exist, they ought to be brought in, under the Affid.t in the latter part of wch she swears no Paper else has come to her knowledge save the Papers brought in, the other 2 Wills, now from thence, I shd suppose she was in possession of the 2 first Wills, & thinks she need not bring them in, tho the Will may be destroyd by the subsequent Acts of the Testator, yet she shd bring them in, if they are in her Possession, or shew they do not exist. The Affid.t is not full, I am clear however that shd not stop the Allon, wch dont depend on the fullness of the Affid.t all Papers shd be before the Ct. She might consider the Papers as destroyd & unnecessary to be brought in, being cancelled by the Deed. this the Tenor of other Affid.ts seems to imply; the whole Vacation shd not be lost for examining Wits on the Allon, wch shd not be retarded, therefore I will hear it —

Dr Harris...

The first Art: pleads Instructions & Execution, that Deed said to Glover, do you keep the Will till you hear from me, if I die before you shall see me again & destroy the Will of Sep.r 21. & said the Will of Sep.r 18th. shd stand; the Qu.n therefore is wh.r such a Declaration can revive the Will of the 18th of Sep.r without some solemn Act of Execution & Republication? I shd think the Destruction of a latter Will, to revive the former to all Intents & Purposes, so speaks Swinburn, Sect. 584. Title of later Testaments; a Declaration is expressed in the Institutes to be a revocation, & in the Case of Vennor & Hine a Declaration was looked on as sufficient for that Purpose.

Dr Wynne....

after reading the cancelled Will annexed to the Affid.t of Scripts, said, I appears to me that the Case stated in the Allon is inadmissible being such an one, as cannot, (if fully proved) establish a Will agt a strong revocatory words; Deeds Directions to Glover are very strange, the Will last made shall not stand.s now whatever the Deed or the Glover might think, the making the Will of Sep.r 21. entirely cancelled that of Sep.r 18. as much as if it had been torn or otherwise destroyd, & by the Act of Glover & Deed the latter Will is as much cancelled as if it had never been made, for G. says he destroyd it by Deeds Order. G. says after he had so done, Deed says to him that Will shall stand; meaning the Will of Sep.r 18th, by this Plea, they mean a Recognition; I object that Declarations alone will not operate as a Republication, will not revive a Will without some Act done by the Testator, they plead Deed had the favorite Will in his own Custody, yet never said where it was or pointed it out, wch Circumstance makes it more necessary that some Act of Revival shd be produced. See the Case of Davis & Evans. Prog: Dec. 3. 1753. 53 If I am right in point of Law this Allon ought not to be admitted .....

Dr Hay. Judge..

at the Time Deed makes the Will of Sep.r 21, he seems not to think it a subsisting Will; he says, if I shd die before you see me again the Will of Sep.r 18th. shall be my Will. I am very far from being convinced of the Rule of Law laid down by Dr Wynne, wh.r it will obtain so far; & therefore I think the fact must be before the Ct, before a Point of doubtfull Law should be determined, & no Objection being made to the Allegation, I shall admit it as pleaded....

See Vol. 1. 94.

X Dr Harris Nothing is more common than to say with of these Wills do you intend shd stand? a Declar.n is sufficient. See sect 524. If A presents 2 Wills to a Testator, asks him, wch shall stand, & Testator takes the first, that stands: If not a declaration, an act? Judge the last. Case I remember is Stylers. Dr Hoon says I am bound to admit a Plea, as if the Law goes very clear, you c.d not be aided, but I am very doubtfull how far y.e Will supports a Will on Circumstances as they stand on this Plea —

N.B. See 193 Prerog.t Ct. dec.r 3.1752 bef. Glee

Davies / Evans

The Davies of Barkway in Hertfordshire, had no neither father Mother, Brother or Sister, but 2 Nephews, & 1 Niece. 7 Dec.r 1749. made a Will, after a draft in his own hand, (exhibited in the house) in wch after leaving Legacies of 30£ each to his Nephews & Niece, & some other Legacies, He made his 2 Nephews Exors & Res: Leg.: there were many instances of affection to his Nephews, & of his intention to make them his Heirs, mentioned by sev.l Wit.s before & after making his Will, but none to his Niece: Econ: some wit.s deposed, they had heard him speak slightly of her; she was married to Evans, Page to the Prince of Wales, who died insolvent a Month after Davis had made his Will; Mr & Mrs Smith with whom she lodged, told Dec.d her unfortunate circumstances, had: called on him for that Purpose at Barkway in their way to Cambridge, he was affected therewith, said his Nephews had deceived him, & told him her Husband had left 500 Pound but that he w.d alter his Will & do something for her; he Dec.d the Smiths to call on him at B. on their return from Cambridge, wch they did, he gave them a letter for her, in wch he said he w.d do something for her, he told the Smiths he had cancelled his Will; afterwards he went to Mr Ambrobus an Attorney at Royston, & said he w.d alter his Will, & desired him to come to B. for that purpose: at the End of Sept.r the Dec.d fell ill, at the request of Mrs Stephens, an intimate Acquaintance, desired his Nephew Jack Davis might be sent for; Stephens sent for both his Nephews, when they came he received them with great affection; the same day, Mr Billing, Mr Bly & 2 others, asked Dec.d if he had settled his affairs, he answered, he had not lived so long in the world without thinking thereof, & that his Nephews were his Heirs; & Bly says he looked at a Wooden Box near his Bed when he said this, & seemed to do as if the key Dec.d had always kept, but on the Nephews coming he delivered all his Keys to them, the next day he died, presently after wch, the Nephews, before all who had been present, when Dec.d said he had settled his affairs, the Day before, search.d for his Papers; first a Bureau, then a Portmanteau, last the Box; Bly saying nothing of Dec.d had: nodded a bit, in that they found the Will of 1749 wrapped up in a Paper, the seal cut off, but wrapped in the middle of it, & Bly says there were 2 or 3 Bank Notes wrapped up with it; Billing says he saw one Paper that looked like a Bank Note, the other 2 Wit.s say, there were no other Papers of Consequence; the Will was thought cancelled & Tho.s Davis took Admon, being called on by Jane Evans to distribute, in Aug.t 1752. Jn.o Davis cited Tho.s to bring in the Admon, shew Cause why Probate of the Will shd not be granted to him? Tho.s brought it in & declared he did not oppose the Will, on wch Jane Evans intervenes & opposes it; For J & T. Davis it was said, there was no dispute of the Will being duly made & executed, the 1 Qu: then was, wh.r it was cancelled? of this there was no Evidence, proving Dec.d had done it; his affection to his Nephews was a Presumption of the contrary, & it appeared by the letter exhibited, they had not deceived him in his Nieces circumstances, his Behavior on his death Bed, shewed, he was not dissatisfied with his Nephews, but intended they shd be his Heirs 2 Qu. if he had cancelled his Will wh.r his Behavior on his death Bed amounted to a Republication? his nodding at the Box was an acknowledgement of the Will contained in it, & the giving the Keys to his Nephews, was a strong indication he intended they shd be his Heirs. Sir Geo Lee. Judge said. It is admitted the Will was made & executed by the Dec.d, how then came it cancelled? it is so, & there can be no doubt, but it was done by Dec.d himself, as it had been always in his Custody, no one else have access to it before his Death, but his Nephews, this therefore is an act plainly done, to destroy the Will; By the Evidence it is very probable, it was done, between his seeing the Smiths & their return; his reasons must be his Intentions to make another Will in favor of his Niece; his Declarations to Antrobus shew, he intended to depart from his former Will, & make a new one, the only Qu: therefore is, are there any Acts sufficient to reestablish the Will? & where there is an express Act, discovering

a design to depart from a Will, there must be a positive Act also to prove a Design to return to it; the Declarations the Wit.s depose to made before his death, were got from them by Questions, & they are not certainly levelled at the Will; there is nothing but the Nod, mentioned by Bly to fix them to that, wch is told in such a manner, & his suffering them to search every where, before they looked in the Box, is so unlikely if he had observed it at the time, that it looks very like a Circumstance thought of afterwards, when it was agreed the Will shd be maintained; it is inserted possible that none of the Wit. but Bly shd know of the Notes found with the Will: Great Step is laid on Dec.d giving his Keys to his Nephews, but if he died intestate, they were the only Persons present entitled to Distribution, who therefore was so proper to be entrusted with them? on the whole of the Evidence the Judge declared the Dec.d died intestate, & pronounced for the Intestacy without Costs.

N.B. Extracted this Case of Davis, Evans from Dr Wynns Note Book.....

Prerogative
July 5.

Altham — Woodward v Sanders — Bishop

Dr.s Harris, Burrell — Dr Wynne

Dr Wynne ..... stated the Case & Proceedings, with the several Articles of the Allegation now offered.

Dr Harris ..... restated the Proceedings, & then said. We pleaded that Anne Ward had declared, the Sanders.s had set the Dec.ds Sister Quartier agt her; in the 1.st & 2d Art: they plead that ..... Sanders lived with the Dec.d Quartier, had no Influence; this wh.r true or false, is not contradictory to our Allon, the material thing is, wh.r Mrs Ward & Dec.d believed it or not; her belief was to be the motive of her actions. The 4th Art: is a general Article & is admissible, if particular facts are pleaded afterwards; I do not oppose the 6.th & 7th Art: they dont say he will not pay, tho, he can; If you do not admit these, you will reject the general Article.

Dr Burrell .... What they plead shd be strictly pertinent; they state in the art that he was in debt to & does not pay, & that he threw himself into the Fleet to avoid Payment; how can he pay, if he is insolvent, they shd prove him able & yet unwilling to pay, what they plead in the next Art: strongly indicates a Presumption, that they erred immediately before; viz. that Mr. ... lent him 50£ to extricate himself from Prison, & that he has not yet paid him; is it probable any Man w.d lend another 50£ if he had not a good Opinion of his Integrity (can his Non payment induce a fair presumption of Dishonesty? Just 2 other conceive it a strong Indication of his Inability.....

Dr Wynne .... In the 2 first Art: of their Allon, they pleaded that the Granddaughter ..... Sanders caused Mrs Quartiers annuity to be withdrawn from Mrs Ward; it is then very material for us, to plead, she had no influence the Plea we proceed on is Imposition; consider her Age, that the Party had neither Power nor Influence, & that Mrs Quartier was of so unsettled a Temper, that it will take off all Imputation of Influence we plead that by the next Post she wrote, to acquaint her Grandmother of Mrs 2s death, it is very probable she cant recollect the every day when the letter was received, the Wit.s will speak to it: the 4th Art: is in answer to them, we plead generally, first, then particular facts, wch the Dr says is necessary to make a general Article relevant. We plead that Woodward threw himself into the Fleet to avoid Payment of a debt, & then took the Benefit of the insolvent Act, wch is as knavish as possible to cut a Person out of a debt; It is a strikeing Instance of Roguery to receive Money for a Person & never account for it; we do not plead he c.d not, we plead he w.d not, but refused, wch looks, as if he.s take advantage of their being no note...

Dr Hay Judge.... Every thing is material wch tends to illustrate the Point in Issue; the 2 first Articles are certainly pleadable; the words, soon after, is sufficient, other Articles, I have some doubt. Woodward has pleaded, he has a general good character, they plead the Contrary: the Objection is not taken to the

Giving Instances of Ws bad Behavior, but this method of pleading might run into a prodigious Length, as the other must be at Liberty to contradict. the 6 Art: they dont object to. (Bishop offered to subdue the 3 special Articles) The best way is to plead generally, otherwise the Opponent may go into Justificatory Pleas, the rule being, that what is pleaded by one Side may be contradicted by the other; it is the Way at Common Law; as particular Charges lead to Questions wch are not material to the Point in issue. If this was any thing that wd disqualify W. from being a W. at Common Law it might be pleaded

N.B. The Reg.r said it was the Practice of late years to plead generally.

Prerogative
July 5.

Gostling — Smith v Maddox — Altham — Sentence

Dr Wynne — Dr Calvert.

Dr Wynne... Benj.a Fish of Great Marlow in Bucks made his Will & appointed Sarah Smith Widow Sole Ex.x It is dated Oct.r 28. 1765. & appears to have been executed in the presence of Wm Allen, Jn Ellis, & Abel Bird whose names are subscribed: On Wm Smith applying for Probate, she was prevented by a Caveat entred by Altham for Abel Hart. There 4 different Assignations were read/ Ellis & Bird, the 2 Surviving subscribing Witnesses do not swear to seeing the Testator sign & seal, but that the Testator was at that time of sound & disposing mind. (Wm Allen the other W is dead, but his Character & hand writing are examined to & proved by Bird) & that Deed pointed to the 3d Paper wch he said Allen had just signed &. is this sufficient to validate the Will?

Dr Calvert... I am Council for Mrs Mary Maddox Niece & next of Kin of Benj.a Fish dec.d they plead in this Allon, that the Will was executed in the presence of Allen & Ellis, then Bird was called in; this neither of the Ws establish; I apprehend there is no Proof that the Will was executed at all, it is so defective, the 1st has no satisfaction of the Execution, Allen the principal being dead; I will not insist, every W must sign in the presence of each other, but the Attestation is contrary to what is in Plea, they say it in the presence of Allen & Ells, but Ells & Bird say, they were called in one after another & desired to witness it, that the Will was not executed in their Presence, the Qu: therefore is, wh.r this is a sufficient Execution?

Dr May Judge. The Ws speak very fully to being requested to attest; I think there is very full proof of Execution, no more is necessary for a Will of Personal Estate, that is Executed & that Deed was capable with is also fully proved. I pronounce for the Will.

Prerogative
July 5

Cumberlege — No 86 — Norris v Barnaby — Longden

Dr Wynne — Dr Harris

Dr Harris.... prayd Longdens Client to be dismissed in consequence of the Assignation made, for the Allon to be given a Week before, whereas it has been given only 3 Days before

Dr Wynn..... made an Apology for the Delay from the difficulty of getting at Reg.r being a Cause of Instr:

Dr May Judge.. The Assignation was to give an Inventory & see Portions allotted to him as a Nephew; but the Admon has not been called in; I will proceed, & not tie up the Party, & this being the only point, I dont see the Necessity of such Haste; In Pedigree Causes Partys must have time to make out & deduce their Claims. An Assignation is not like a Decree, it is to be enforced or relaxed according to Circumstances; I meant it shd be dismissed if no Allon was given, but not for failure of a few Days, as to time: 2 Continuations are sufficient on any Assignation — The Allon was admitted then without Opposition —

Prerogative
July 5.

Greene — No 87 — Jackson Admx of Collins v Innes — Cheslyn

Dr C... — Dr Calvert

In Burrell died Oct.r 2. 1762 leaving Jane Collins Widow, his only Sister & next of Kin. he made his Will May 27. 1762. in writing & therein named Rob.t Griffith his Sole Exor & Universal Legatee, he proved the Will Dec.r 6. 1762. May.. 1763 Citation issued agst him to bring in the Probate & shew Cause why Admon shd not be granted to Eleanor Jackson, Wife of Tho.s J. Admor of Chapman Collins the Sister Appearance was given for G. & the 4 Subscribing Ws were examined, they have given full Evidence of Sanity, Instructions, reading over Execution. Greene gave

an Allon pleading general Incapacity; Griffith gave an Allon pleading Capacity & examined Ws. Thereon, 2 of whom, viz. Tho.s Scudamore Esq.r his Lady, in whose Service he lived, allowed him an Annuity, they depose to seeing him giving Rec.t & Capacity you will find that Jenny Collins who is now setting up an Interest went & would not own her for his Sister, & Nothing not being content w.th it & subscribed W.s are liable to Cost

Dr Calvert... restated the Case for Jackson — We consented to the Probate, we have pleaded Custody. Incapacity &c you will find the Deed was an old man 80 years old who had fits, was so superannuated 5 years before his death that our Ws say he was incapable of receiving the Annuity allowed him by Mr & Mrs Scudamore he was a voter at Hertford. &c. make out, how he was qualified, who was his Tenant &c that he forgot a Barber, his Acquaintance, who had shaved him 20 Yrs; & is also deposed that Griffiths mother, who were endeavouring to get a Deed of Gift from Dec.d asked him wh.t he had signed that Paper, that he answered in a foolish manner he did not know, nor what were the Contents of that Paper

Dr May Judge.... If a next of Kin gives a Plea & fails in the Proof of it, he renders himself liable to Cost; but where there is good ground for Litigation, the Ct will frequently give none, or if given, they are moderated according to the Circumstances of the Case; if there is not Reason to think from the Evidence that it is an unreasonable Opposition, the Ct will moderate them, it is the Case of a Representative of a next of Kin, there are many Instances of forgetfulness in People of 80, I think I ought to pronounce in favor of the Will, but do not give full Costs.

Prerogative
July 5.

Bargrave — No 88 — Best Adm.r of Marcha v Whaley — Grene

Dr Wynne — Dr Burrell

..... [illegible] .....

Wm Peake was sworn Exor. Proved Leg.y & surrendered the Testator without having Proved. March 4. 1764. Admon was granted to [illegible]

Dr Wynne... Anthony Henry Marcha died intestate in 1763. leaving behind him a Widow & 3 Infant Children. The Widow Sept.r 3. 1763 renounced the Admon, as well for herself, as in the Capacity of Guardian to her Children) wch was thereupon granted to Wm Manning a Creditor, who died leaving the Attorney of Peter Marcha, Brother to the Dec.d also a Creditor by Bond in £300, residing now at Leghorn, Admon is also applied for by Charles Whaley a Creditor By Book for 3522£ shows resident at Colchester in Essex. the Bond has been shewn, & Whaley has made Oath of his Debt

Dr Burrell.... Agreed with Dr Wynnes in the State of the Case, who therefore proceeded to the Argument as follows.

Dr Wynne.... The Qu.n now before the Ct is wh.r Admon de Bonis of A. St. M. shall be granted to the Attorney of a Bond Creditor, or to the Simple Contract Creditor himself? the Widow having renounced for herself & Children who are the next of Kin, it is entirely in the Discretion of the Ordinary; my Client who applies by his Attorney is a Relation of the Dec.d therefore ceteris paribus is preferable to the Opponent, but he is also a Bond Creditor, by that has a prior Title, as the Ct usually follows the Rule, laid down by the Common Law, for payment of Debts: another reason is, Mr Best is the prime Obtors; Mr Marcha, being abroad delegates his Power to Mr Best, who tho, an Att.y is responsible in his own Person, he is equally amenable to the Ct with Whalley, must give the same Security.

Dr Burrell..... The Consideration of the Ct is always employd, in attending to the Interest of the Intestates Estate; tho, there is a Preference at Common Law in the Order of paying Debts, that will not weigh in the present Case, you will keep this single Point in view, wh.r the Bond Creditors Attorney or the Simple Creditor himself is most likely to take the best Care of the Effects committed to his Care? I cannot help thinking the Simple Contract Creditor ought to be preferred to the Bond Creditor himself in the Grant of Admon de Bonis, because as the Debt of the latter must be paid first, if the Estate dont extend a Shilling beyond that Demand) it becomes of the utmost consequence to the former, to use this Diligence in the Discharge of his Trust, the more he makes of the Deeds Effects, the less he will lose of his Demand; & con: the Bond Creditor knowing his Debt will take place of all in an inferior degree, becomes less attentive to the Benefit of others, when he is convinced he shall not be a Sufferer; if this Doctrine is allowed I am sure, it will not be denyed, to hold much stronger in the case of an Attorney, who knowing, he himself cannot be a Sufferer, may reasonably be presumed to be more indifferent in the affair than even his Principal,

Qu. Is it a Pr. of a Bond Cred.r in 300. or a Book Cred.r by Journal in 3000 entitled to Admon de Bonis 1st Grant of Adm.n Ld Granmound

In respect to Mr Best's being the first who applied for the Admon, I am sure no regard can be paid to that, when the Court is informed, that my Client applied 2 Hours after- I hope therefore on the whole you will decree the Dt Bonis to Mr Whaley-

Dr Hay Judge. I should have wished the Counsel Ed: have furnished me with Precedents to guide my Determination in so even a Point; The Rule of the Ct: has been to follow the Rule observed in the Order of paying Debts, & to prefer the Superior Creditor in rank, to the Superior Creditor in right of Demand If there were not Assets to answer farther than the Bond Creditor the Possession shd follow the Interest; but if the Value of the Estate is so considerable, as to pay the Simple Contracts also, I see no reason why the Simple Contract Creditor shd not have the Admon: I think the Bond Creditor himself applying has the preference of the Simple Contract Creditor; whether their applying by his Attorney, he is entitled to the same Preference, is the Question? In point of Law, the Constituent & the Nominee are the same Person; no Stress can be laid on the Relationship, he having, as Uncle, no Interest in the distribution; I cant grant it jointly to the Attorney & the Creditor himself; a Person applying himself, has (tho' a farther Prefrence, the Superiority of the Debt is no great matter, as the Uncle is abroad, the Admon wd before deemed to a simple Contract Creditor let it go, in the same manner, as the original Admon, i.e. to Mr Whaley; . . . .

Prerogative

July 5. No 89

Bargrave Stevens v Herringham Adderley

Dr Marriott, Collyer Dr Harris

Dr Marriott. . . . This is a Question of Law on a Presumption of Law arising on Persons said to be dead: Jr: Mr, Wm Herringham went abroad, there was a Brother John, who left a Son, who will swear to his death, & to the Belief of the Deaths of the aforesaid Persons; there is great Uncertainty in the Law Books, I can find no Precedent 1 Salk. 62. is confined to Leases of Copyhold Estate for Lives; if Proof is not made within 7 years, the Reversioner enters- Holt C.J. Holdem ag. Exton was a Case of a Lease for Lives, it is not said to be of Copyhold Lands; if that shd not be the fact, you see, Six they extended the Statute, a Lease for 2 Lives of Father & Son, the Father was presumed to be dead, because he had not been heard of for 15 Years. The Pontifical Law looking on Marriage as a Sacrament allowed no presumptive Evidence, the Civil Law allowed Simple Fame; See Mascardus on presumptive Circumstantial Evidence, in the Situation of the supposed Dead; the Parties have been cited in the Parish where we supposed they lived . . . .

Carthew 246.

Dr Collier. . . . The Qu: is wh: you think it necessary to have farther Satisfaction as to the Death of the Parties, before you decree Distribution to be made according to our Prayer? There are several forms of Citation; the Edictum wch was similar to our Vis & Modis; the Party incurrs the Contumacy . . . . . the former carries a Penalty; the other is calculated only to leave the Ct at Liberty; We have advertized the Parties, if 20 Years longer were laid it would be the same; the End of the Ct seems to be answered by having proper Security to refund. Maxima de Citatione, Quam longo tempore &c. It is said Non reperitur aliquis status Terminus; you must, after the Edict, allow 60 Days for a Party to appear who lives out of the Kingdom; there are no Lands in Judgement before you 5 Geo 2. c 25 Dr Precedents, the Ct of Chancery restrains them to 2 years

Dr Hay Judge. . . . Mr Stevens might have prevented this by taking the Admon into his own Hands; the Money was ordered to be laid out in the Funds for the Benefit of the Parties interested; the Admin: neither consents to, nor opposes the Prayer made by Stevens; the Ct then becomes in a manner responsible; Can the Ct without some proof, that these Persons are dead order the Money to be paid to Stevens, here are three Persons whose Deaths must be presumed; In Chancery a Cause is staid on 2 Years absence of a Party; you are not only to prove them dead now, but that they were dead before the Deceased; In the Prerogative M.T. 1738 the Principle was similar in the Case of Pendleton & Stirling. In Pendleton went to the West Indies in 1725 His father by will bequeathed him a Legacy at 21. his Sister married

1. Shall 3 Persons be presumed dead?

Sterling, & 1735 called on her mother to take Admon to J.P. as dying intestate; the mother was willing to administer if he was dead, but she not know he was dead; the Ct said it was incumbent on the Sister to prove his Death, wch ought not to be presumed; the Sister undertook so to do, & advertized a Reward of 20£ to any who cd ascertain that fact, Two Sailors appeared & deposed that he died aboard their Ship; the Witnesses were rejected as incredible, the Proof adjudged to be insufficient; the mother dismissed with Costs; Hint the Gentlemen cannot fix on any time, when the Presumption is to be founded: if the Law has named a time in a particular Case, the Application must be the Reverse of what is now contended for, I cant extend it in the present case; I am of Opinion, I cant go on the Presumption of the Death of these 3 Persons, I must let it rest, till I have legal Proof thereof; I cant give Stevens the Money safely; the Money being laid out in the Funds, finally no one will suffer; I can make no Order about the Distribution. I will let it go to the first Day of Mich: Term. . . .

2. Shall a joint Admon be granted to Mr or Mrs L. or a joint Admon to both?

Prerogative

July 5 No 90

Shurt v Beckford & Hervey

Bishop. Altham Addenley

Dr Harris Dr Calvert

Dr Calvert. . . . Alexander Pitfield Esq is the Dece'd; he left his Daughter Winifred Ashley Sole Exor & Resid: Leg: for Life, after her Death, subsbituted her Sons, if she shd have any, in default thereof, her Daughters; Mrs Ashley died intestate, leaving Goods of A.P. unadministered, having no Issue Male, but 2 Daurs, Eliz: & Dorothy; Oct. 4. 1752 Admon de Bonis, was granted to Eliz: Wife of Julines Beckford Esq, to Dorothy Wife of the Honble Felton Hervey, both of whom are dead, leaving Goods unadministered of A.P. 10 Dec. 1763. admon de Bonis was granted to Mr Hervey, but never taken out, there being a Suit in Chancery- Mrs Mary Shurt the Grand daughter of the first Testator A.P. has taken out a Citation agt Mesrs Beckford, Hervey to accept or refuse Admon de Bonis; Mr Hervey declares his Acceptance; Appearance has been given for Peter Beckfords Esq, Son XXXX of Julines Beckford who prays a Joint Admon (as Admor to his Father, Mother) with Mr Hervey the Qu: is, whether a Joint Admon shall be granted to Mr Hervey, Mr Beckford or a single Admon to either of the which of them?

Dr Harris. . . . I am Council for Peter Beckford Esq Son & Admor of Eliz. Beckford Grand Daur of Alex: Pitfield Dec'd; Dorothy was first married to Ch: Pitfield Esq (after his Death to the Hon: Felton Hervey. Oct. . 1728. A.P. died, his Daur Winifred took Probate as Exec:- 1753 Winifred Ashley died, a joint Admon de Bonis of A.P. was then granted to E.B. & D.H.- D.H. died in 63. (the Admon survived to E.B. her Son Peter at her Death, took Admon to his Mother, Felton Hervey took Admon to his Wife; Mrs Shurt has taken out a Process agt them as the Legal Representatives of A.P. to accept or refuse the Admon de Bonis; Dorothy married Ch: Pitfield by whom she had Mrs Shurt; who has an Interest in ½ of her Fathers Moiety & Mr Hervey to the other ½. Mr Peter Beckford is in right of his Mother entitled to a Moiety of the whole. . . .

Dr Calvert. . . . My Client is nearer to the Testator A.P. by one Degree than Mr B. Joint Admons are always looked upon with an unfavorable Eye by the Ct. as they are often attended with great Inconveniences; where Parties agree, the Ct will not interfere, but if they are adverse, a joint Admon is always refused, because those who differ at the outset, are not likely to conduct the Admon with Harmony; one of the Persons who applys, for the Admon, is on the Spot, the other abroad, the Dr said that J.H. was entitled only to ½ A. & P.B. to ½. the Act states them in equal Degree of Interest; Mrs Shurt dont desire it may be granted to P.B. she does not object to the Grant of it to J.H.

Dr Harris. . . . Mrs Shurt has an Interest in ½ of Mr Herveys Moiety; there is no Degree in Mr Herveys Case, we have a Degree being the Son of Eliz. B. Resid: Leg: they derive their Right under a Will; it is not like an Intestacy; if you are not at Liberty, to chuse, the Representatives are, as it were, in by the Act of the Testator; a Commission might be sent to Rome to swear Mrs B. in a Months Time, Mrs Shurt does not insist it shd be transacted immediately; as my Client is the great Grand Son of the Testator A. I hope you will decree him the single Admon. . . .

Dr Hay. Judge ... Mrs Hurt is the Person who applies for a Representative, she does not specify to whom she wishes it shd be granted; the Consideration therefore is. who is the most proper Person? I will grant the Admon to that Person who is most likely to answer the Views of the Person who claims; Mr Hervey is in England, Mrs Hurt can apply to this Ct, if he does wrong; This defeat the End & Intent of her Prayer, if I granted it to the Attorney of the Representative of A. I therefore decree Admon de Bonis &c of A to Mr Felton Hervey who being on the Spot can best answer the End proposed by praying the Admon ...

Prerogative.

July 5 1766

H. Stevens Junr. Altham. Collins

Sir Francis Gosling & Pyle v. Walsh & Abel

Drs Clarke & Calvert Drs Harris & Bever. Drs Marriot & Wynne

Dr Clarke ... In Walsh died 15 Jan.y 1766, leaving his Brother Samuel Walsh, his only next of Kin; the Father of the Sam.l W. left an annuity of £160 in Trust for Samuel Walsh; on the Death of the Testator many Testamentary Papers, were found, in Different Bureaus, wch are all of his own Handwriting. A dated 20 May 1738. & a Codicil 31 Oct.r 1738. B. a Will signed by the Deed but not attested 2 Aug.t 1758. C. Codicil 16 April 1762. not signed or attested. D part of an unfinished Draft without Date or Signature E a minute of a Draft of a Legacy to Jane & Margaret Wood as in B. F another unfinished part of a Draft or Transcript.t neither dated nor signed G. a Codicil dated 8 Sep.r 1764. signed by the Deed, & is wrote on the Back of the Paper B. & begins thus "Codicil to the Will." as none of these Papers have been executed in the Presence of Witnesses, the Question is wh.r any, & wch of these Testamentary Schedules can be supported?
In B & C. wch are the most finished are many Variations, particularly in the Directions about carrying on his Trade, of a Music Printer: I will recite a few Particulars.q In B. there is a Legacy of 50£ to the Charity School of St Mary le Strand, if the Bd agree to erect & rail in a Tomb Stone for him. In C. there is no such Condition - In C. there is an Annuity clear of all Taxes - In B. an Annuity of 50£ to his Cozen & 500£ Legacy. Not specifying from what Fund it shall proceed & be paid. In C. he gives the Interest of 500£ 3p.r Ct Ann.s to Mrs Keith & farther to his Exors Sir Francis Gosling & Jn Pyle their Heirs Assigns &c the Interest of £2000 consolidated 3p.r Cents, during the Life of his Cozen Mary Keith; a considerable Legacy to John Abel, his Servant in Paper C. There are so many Obliterations & Inter lineations, as to induce a Doubt wh.r any or which was intended by the Deed to operate as his Will or Codicils - Jane & Mrs Wood 1000£ at 22. if married with Consent of the Exors 2000£. desires that his dear Friends Gosling & Pyle. will be Exors & Guardians to his dear Brother Samuel Walsh & the Children Jane & Mary Wood for wch he leaves them 500 apiece & 50£ Annuity during the Lives of his Brother & the Girls to see they are properly taken Care of - In B. as well as C. there is the same Legacy of 500£ & the Annuity of 50£ is limited, till J & M. W. attain the Age of 21. & during his Brothers Life - There are Legacies in C. not mentioned in B. those E & F. are not propounded - Stevens for the Exors prays Probate of the Paper B & G as a Codicil endorsed - In C. the Deed had described J & M. W. as placed at Mrs Prices at Lisam Green, but that is struck out & Bustard & Kensington inserted; the reason of opening this is, Mr Altham to shew how late the Deed had this Paper C in Contemplation, gave an Affon, pleading when J & M. W. were removed from Mrs Prices, to Kensington, & Mrs Price exhibited 2 small Paper Books, wherein the Deed had made a Memorandum of what Altham has pleaded, whence it appears. J & M. W. were placed at Lisam Green 12 July 1758. & removed to Kensington 19 July 1762. Agreed for Lodging, Board &c. 18£ p.r Annum each.r ...

witnesses have been examined who prove the Handwriting of the Books & Papers.

Dr Marriott ... I am Council for Jn Abel a Legatee in Paper C. wch we propound; there is no Clause of Revocation in any of these Papers. C. is not signed at Bottom but begins, "I John Walsh &c" the Exors are named in all these Papers - Bustard & Kensington, give a Sort of fresh Date to the Paper, E is pleaded but not propounded; we plead Abels being Servant & living with Deed to the Time of his Death; the Wits speak to the Interlineations, to Bustard & Kensington being the Deeds Handwriting, Our Prayer is that the Exors shall be assigned to take Probate of C. together with the Paper. G. Codicil to the Will, Dated Sept.r 8.th 1764 else to take Probate of C. with G. & B. the last will be as to the Intention of the Deed & the Operation of Law on these Papers

Dr Harris ... You will find that the Papers most perfect are revoked consequentially by the Revival of another

Dr Clarke ... I am Council for the Exors. who are so named, in the several Testamentary Papers, & have laid them before the Ct. for your Opinion wch of them shd be propounded & operate; they are all preserved with equal Care, so that no Argument is necessary to induce a Preference on that account; being unexecuted, the Lands to the amount of 1200 p.r Ann: go to the Heirs at Law. Some of these Papers are uncertain as to Date & others as to the fluctuating Intention of the Deed; the Exors think themselves bound in Duty to propound Paper C. tho, they are not so much benefitted therein. B & G. seem to be the most perfect Dispositions: In favor of B. is the Similarity of the other Papers to that, so that it is preserved in Substance; the Deed Intention seems to have been to leave the Bulk of his fortune to his Wife if they married with the Consent of the Exors & Guardians he had named; You will keep your Eye on the Mans Intention, if it is likely to be best promoted by B & G. the Variations in C. are scarcely worth attending to; the Principal are 2000 to Dr Randall, Wm Randall, & Abel each over & above certain other Legacies - In B. he gives 4000 to J & M. W. G is to be considered with B - The Legacies are a clear Proof of the Revival of B & C Revocation of C. else it wd too much diminish the Residuum - To account for what he has done to the Legatees to Randal & Abel - If the Intention is alone regarded, he meant G. to be a Codicil to B. wch he meant to operate as a Will - The others seem a meer Inception; C. is not subscribed, abounds in Obliterations, & not to be taken for a Will, breaks off, like Minutes; even if B. did not stand propped by G. you wd think these C. not denote such an Animus revocandi, as wd revoke B. The Ct will not be very cautious how it looks upon them as revocatory, tho, G. is to be the Cause, there is clear Proof of Deeds Intention to dictate what G. must revive B. from internal marks. G. wd appear subsequent in Intention to the other Papers. G. is not consistent with C. but with B. therefore must be referred to B. only - G is revocatory of the other Papers & reviving B. - That he had some Alterations in Contemplation I admit, but no Intention that C. shd operate, but rather serve as a Minute - The Entry is no Proof that C. was in his Contemplation so as to supersede. G. When the Ct has a Difficulty to ascertain the Intention, there are fixed Rules to determine it if the Will of a Testator is ambulatory, he may by one Act revoke & by a subsequent Act revive, it is immaterial whether such Revocation is in express Terms, provided it is in Substance; if C. is revoked by G. B. is revived; at any rate G. is, beyond doubt, to be accepted as the last Will. if the other Papers are thought consistent therewith. the Exors are ready to take Probate of them likewise ... (Randall)

Dr Calvert ... Mr Walsh having made so many dispositions, it cant be presumed he intended to die intestate; if nothing appears, to shew he ever departed from the Purport of the last Paper G. the Question is therefore, not wh.r any, but which Papers shall be established? the Exors are indifferent, so they receive the Directions of the Ct, but they think B & G. are the Papers wch ought to be pronounced for a Schedule, on the face of it, not only, does not revoke, but will not convey the Estate; in some Cases the Act of God & unforeseen

Accidents may prevent the Execution, but that is not the case here; if Papers are kept by the Testator, some time, & not executed, it must be presumed, he never intended they shd operate. White & White a Will was made in 1747. 10 Feb. 1748 the Testator made a Codicil which was wrote by a Stranger, & not attested. in March 1749. he died; the last Will was set up as a Revocation of the former, but the 1st declared in favor of the first Will, because the Testator had sufficient time to execute the latter, & omitted so to do. Baker & ..... a Will was executed in 1756. another was made but not ..... in 1757. Ld. Chancellor Simpson pronounced in favor of the first, the last having been long enough in the Testators custody to execute it, if he meant so to do. Duke of Somerset & Sir Jn. Jacob. The Will was made 1685. the Testator died 1722. 3 Testamentary Schedules were propounded of a subsequent Date, the Delegates affirmed the Will & rejected the Schedules.

Prerogative. determd. by Sir Geo. Lee. 1748

Decd. by Lord Chancellor Simpson 1750 . . . .

Delegates 1725 . . . .

C. then cd. not revoke B. but if it could, the Will of the Testator being ambulatory, B. might be revived by a Codicil. 2. Bl. 960 in Wyndham's case. A mere Declaration is not sufficient to revoke, if so, it cant revive without an Act; here is an Indorsement in writing. What Paper do the Words apply to, but that he was then writing on? the Contents apply better to one Paper than the other; It is a Repetition of the Legacy of 1762, it is an Addition to the Will of 1758. if the Testator intended the Paper written in 1762, shd stand, he wd not have repeated the Legacy mentioned therein; if he wished the Paper of 58. shd operate, he wd add it. Sericold & Hunter v Heming An Indorsement was construed as a revocation of the 2d Will & a Revival of the first. there the Reference of being paid by my Exors abovementioned was thought too strong. it is not exactly so here, because the Exors are also named in the Codicil, so might stand consistently with the Will of 1758. It will apply agt an Intestacy. He must have the Schedules in Contemplation; the Alteration dont apply to the Time, it was in June 1764. the Paper G. is in Sept. 1764. Considering the two Papers, it does not follow he intended they shd stand.

Dr. Marriott . . .

You will consider the Devises, as enlarged to these same Devisees as in B. the Exors the same, they may be consolidated or stand single; G. is a Paper endorsed; consider the Man writing on loose Sheets, he takes the first; he does not say this Will; It being wrote on this or that Paper, makes no difference; it must be a Codicil to the legal Will. there was a permanent Intention in the Testator to establish C. The Testator reconfirmed Paper C. at some part of the time when J. & M.W. were at Bustards School, the last Receipt is so late as 1766. As to Revocations & Cases, they have some particular Circumstances attending them; if they are not only Alterations, not Revocations, it is very natural to consolidate the Papers; the Law is loose as to the Establishment of Testamentary Papers, strict as to Land; as a Commercial Nation we are at large, but your Discretion is governed by Law: a Will may be good as a Revocation, not as a Will of Lands. Ld Anglesey's case where there were 2 Wills of the same Date, a Codicil referred to one. Here are no Blanks left for the Witnesses, the Presumption is the Testator did not intend it shd operate as his Will, from his not complying with the legal Forms; Here are no Contradictions; what enlarges does not contradict; the Principle of the Case is to be the Guide; If it is considered as a Will having Exors, it is to revoke B. In the Roman Law there were different Ideas of the Heirs; it is not so with us, we have the Admor with the Will annexed; Heres honorarius; if it was not the Testators Intention to revoke, possibly all may stand, but I contend C. may stand . . .

H. of Lords . . . . .

Dr Wynn . . .

This is a very particular Case; the Deeds Intention was clearly to add to his Brothers Legacy; he was considering for a number of Years, how he shd distribute his Estate; this is one of the most favorable Sort of Testamentary Papers, in support of wch. you will aid us, as much as you can consistently with the Rules of Law. I wd enquire what the Law admits to be a Will to convey personal Estate, & how it is applicable to the present Case; No Mode, No Solemnity is required, quocunque modo velit; this is the Law of the Land. Papers not signed, have been pronounced for, it is not requisite to be subscribed at Bottom, for Land, see 3d Levins . . . it was said these are many Obliterations, those which cant be made. Sense of will be set aside, but will not void the rest of the Will; where Obliterations have occurred, the Ct of Chancery has referred them to a Master to report &c

1 Peer Wms 421 . . . .

Masters v Masters. is infinitely stronger, there was not a Word but might be legible, the Testator has made a perfect & consistent Disposition of his Effects; he has taken B. for his model, these are conditional Legacies in B. they are pure & simple in C. If C. had stood by itself, under these Circumstances it might have been pronounced for: the next 2 wch the other Papers will make any Difference; they are as perfect as B. & being later, will revoke it. Ld Langdowns Case, he made a Codicil mentioning a former Will. Rolls Abr. 618. prior to the Statute of Frauds. the legal Acts are not done; the Republication was necessary to make it a Subsisting Will. there is nothing to shew the Deed intended the Codicil wrote on Paper B. shd be connected with it. The Paper C. was full; there was no reason for writing it on B. only. the Alteration in the name of the School, shews, he had the Paper C. in his Contemplation, within a few Months of B. wh. be fore or after, indeed, dont appear: the Ct may suspect he may have made the Alteration even subsequent to G. If C. & G. are taken together, every Intention of the Deed, will be carried into Execution; my Client will be benefitted in the manner you have reason to think the Deed intended.

Lucas. 96

Dr Harris . . . .

I hope you will think the Deed did not carry his Intention into Execution: it is immaterial wh. he did, or did not know 3 Wits were necessary for the Devising real Estate; it is to be presumed he did know, his fathers Will was before him, attested by 3 Wits, he copied all the Common form from thence; taking it for granted, he knew this, he may then be supposed to have wrote B. & signed it, without any Intention it shd ensure as a Will. (This immaterial wh. signed at top or bottom.) C. is as good as B. Exors are therein named, it is signed, & new Legacies are added, it revokes B. & thereby shews the Testators Inconstancy; C is as perfect as B. but the Testator did not intend it shd operate 'till it was attested. If a Person will adopt a Paper as executed, & does not give the Will a proper force the whole is void; the Ct cannot tell what that Person wd have done, if he had known, he cd not leave his Estate by an unexecuted Will.

G. is liable to the same Objections; he wd have taken care to have attested it, if he had intended it shd ensure as his Will; there is therefore a presumption he intended to depart from what he had begun, provided he knew the forms must be complyd with, if not it is void on account of the Uncertainty.

Dr Bever . . .

The Great variety of Papers shew Mr Walsh intended to make a Will, but from the Particular Circumstances of the Papers before the Ct, it may fairly be presumed he did not intend any of these shd operate as such; he was encumbered with Rights; there are several Persons Legatees, who do not appear to be related to the Deed; these Papers are all so uncertain, that I cannot give a preference to any of them; B especially, appears revoked by C. however it is obliterated the Deed appears to have bestowed most Pains on that Paper. Dr Calverts Argument (from the Cases he cited) agt C, as long possessed, by the Testator, or lain by, holds agt all the Papers, it is very different from the Cases where the Testator is suddenly taken off.

Dr Hay Judge

The Exors having brought these Papers before me, I must pronounce according to Law; where offered all together; there are many Instances of the Exors Oath being taken as sufficient in unexecuted Papers; the Exors in the present Case, are willing to take a safe Part; they are commendable for laying the whole before the Ct, that they may be justified; the Papers pleaded by the Exors are undoubtedly testamentary. Paper G. is endorsed on the Back of B.

Abel propounds C. on a view & comparison. I wonder he sho think it for his Interest to propound C. I dont see he is much more benefitted; By B. he has 500. 50 p.Ann: & £75 in addition for carrying on the Trade; if C. was revocatory the Legacy of £75 pan: wd be lost; he pray C may be taken with G. exclusively of B. if C is rejected, he is doubtful if the 5 p Ct = given on the money taken wd compensate for the Loss by B. ..

As to Abel there is clear Evidence the Decd had a great regard for him, he meant to give him the utmost Benefit he could: the next of Kin acts fairly, for if no Paper is valid, he comes in for the whole, as Heir at Law; if obliged so to do the Court wd pronounce with Reluctancy, as the Heir at Law has the Real Estate; how then must the Court proceed; it has been said if the Papers are not good for a full Disposition, they cannot operate at all. that is clearly Law with respect to the real Estate; the Personal is more at large; in all these Cases, I shall always look on it as a presumptive Argument agt a Paper. where there is a mixed Paper . . It is not a conclusive Argument that a Paper shall not be good for the Disposition of personal Estate, because Real, will not pass; it is too much to say where the whole can't pass, nothing shall pass; an Objection was rather hinted than urged with respect to the Uncertainty of them, supposeing they were all equally uncertain, so that the Posteriority of them cd not be ascertained they wd all be void. In L Anglesey's Case there was 2 Wills executed the same Day, the Witnesses knew nothing of the matter, there was a difference in the Bequest named in each Will, & it was insisted both were void on account of the Uncertainty but the Lords were so averse to set them aside for that reason, that they pronounced in favor of both Wills. There is clear Evidence the Decd intended, & in fact executed a Will. I must pronounce on legal Rules, Principles adopted. B. is compleat as to Disposition, & so far as he intended Execution for personal Estate, he adds no Condition. 1762 he intended some Alteration, he obliterated &c, he does not seem to know well how to provide for the Girls; he intended it shd be subscribed, therefore it is necessary to be signed, tho, not material where. G. is subscribed. I thd not think C. so imperfect not to supersede B. if that Paper stood by itself. the Principle of Dr Calvert's Cases apply. an executed Paper can't be revoked by an unexecuted Paper; As to the Case, as between the Exor & Legatee, I cannot consider G as referring to C. it is written on B. wch creates a presumption that it refers to B. The Legacy to Dr Randall can't apply to C. it wd be superfluous; but as an Addition to B. it is material for there Dr Randall had no such Provision. The Removal of the Ladies in 1764 shews he must have C. in contemplation at that time. If he made the Codicil of 64 on the Plan of the Paper wch referrd to that dated 1758. it is a revision, but there is no Evidence to prove he meant it to be part of his last Will; but if he made it. . . . . after Sept: 8. 1764, it wd only shew he intended neither shd stand just in this form, manner; it is plain he did nothing more. a bare Possibility of Posteriority will not operate so, as to work an Intestacy: C. is a mere substantive Paper, he could not intend to consider this as a Part of his Will. I am of Opinion that the Papers B & G. shd be confirmed, decree the Costs to be paid out of the Estate . .

Prerogative — Jenner — No 92 — Stevens v Senhouse — Bishop

July 2.

Dr Wynne — Dr Marriott

Dr Wynne . . . In Smith is the decd, he made his Will 20 Jan . . . . & therein appointed In Stevens, Peter Senhouse, Exors & Resid.y Legatees. Stevens proved the Will, power being reserved to Peter Senhouse; Since the Probate past In Stevens is dead intestate: Jonathan Stevens his Brother, as Admor has taken out a Citation agt Peter Senhouse the surviving Exor, to accept or refuse Probate, or shew Cause why the Admon de Bonis, shd not be granted to Jonathan Stevens — Bishop appears for Peter Senhouse Senior, as the Attorney of the surviving Exor, alledging he is ready to take the Admon with the Will annexed of In Smith; to this Partner objects, & says, his Client applied to Peter Senhouse Sen.r father of Peter Senhouse the Exor, who informed him, his Son went some time ago to Canterbury, since with time he had never been heard of; Jenner has brought an Affidavit that his Client went to the House of P.S. the Exor, whose father & Mother told him, he had left his House, that they had advertized him; Jonathan Stevens has also advertized him in the Papers, & prays a Decree viis & modis to be plaid on the Royal Exchange.

Dr Marriott . . . I am Council for P.S. the Father, & Attorney of the surviving Exor who is properly impowered to take the Admon with the Will annexed of J.S.

Dr Wynne . . . I am Council for Jonathan Stevens, Admor of In Stevens, my Clients is entitled to every thing his Brother was possessed of, & therefore applies to this Court to lid his Claim; an appearance is given for Peter Senhouse Sen.r who says he is the Attorney of his Son: Stevens states his Application to him & his Answer, that he had seen his Son since Sept.r the father acknowledges he is not certain whether he is alive or dead: My Clients prayer is not for the Admon to be decreed to him, but only that it may not be granted to the Attorney of a Person, who possibly may not be entitled to any thing — the Authority of the Letter of Attorney, commenced in 1757. if our Affidavit is true he has not been heard of these 2 Years; if they are rightly informed he has not been heard of for some Months before the Commencement of this Cause, we say that P.S. Junr may possibly be dead, & pray a Citation to ascertain that fact; he is a sole Exor, it might be very different of any thing had vested in him

Dr Marriott . . . The Exor has an indefeasible Interest, the Admon is defeasible; the Exor leads a fugitive Life, was seen in Sept.r has never revoked the Letter of Attorney granted to his Father; they have laid great Stress on their Advertisements in 2 or 3 Common News Papers, very possibly those advertisements may not have come to his knowledge . .

Dr Hay Judge . . . In this Case only one of the Exors took Probate of In Smiths Will, Power being reserved to the other Exor to come in; He who took Probate is since dead intestate, his Representative, has cited P.S. the Coexecutor to accept or refuse &c, no Appearance had been given for P.S. the Representative prays a Citation viis & modis. Why shd the Ct do any thing till the return of the 2d Citation; if no body shd appear the Admon wd go to the Representative of the Exor; Jonathan Stevens does not swear he believes P.S. dead Bishop appears for P.S. the Father as lawfull Attorney of the Son; Query als the lawfull Attorney of P.S. the Coexecutor, & if Stevens does not shew the Coexor to be dead, or that P.S. is not his lawfull Attorney, the Preference in the Grant of the Dcbonis, will be due to P.S. as the Attorney; I dont see any reason to presume the Coexecutor dead; If the Man or his proper Attorney is produced by the Citation prayd, he is allowd to have the Preference. In the Case of a common Law Exor . . . the Citation must Issue agt the next of Kin . .

Prerogative
M. T. 2 Sep. 1766
Dr Hay Judge...

No 93

Lady Vis Mayo ... v. Brown.
Dr[s] ... Wynne ... Dr Collier ... Bargrave

On Admission of Bs allon.

Dr Hays Opinion ...

The several Proceedings on both sides were stated. Major did not press the Opposent; purged the Peton to be brought; the Indulgence of the Ct has been much abused; for at the close of the last Term the Peton pretended to be in agitation, was withdrawn: Ly Mayos peton was laid before the Ct last Session, but I saw Ct do nothing on it; that too is withdrawn; the Question is now on the Admission of the Supplementary allon; it is very late, 8 years after the Original Plea. there have been great Delays on both Sides; Ly Mayo's Act stopped the Cause; she threw Mr Brown into Gaol for Costs, wch she wanted to get before the Cause was proceeded in: this allon is liable to Dr Wynne's Objection, that these things might have pleaded in the first allon; I cannot see why they were not: the first Objection is to the Article wch refers to the Plea of legitimacy of Ly Mayo, that is certainly no different Point, from the Question who is to have the Admonistracy; they might have gone on pari passu; It may be objected on the Hearing, that such Evidence shd not be received, but that is no weight agt the allon; it appears neither Party chuses to come to an End of the affair; I have no reason to refuse the Exhibits, they will not create Delay; Ly Mayo is to shew, that tho. he was the Husband de facto, she was not de Jure, having another Wife then living. I think the allon shd be admitted. ...

Prerogative
3d Sess: Nov. 24 ...

No 94

Gibollet ... agt Lawington & Connor
Fountain — Mr Harris — Gent. — Gostling — Dr Wynne.

Dr Wynne ...

A Decree issued at y[e] Instance of Anne Gibollet wife of Emanuel Gibollet the universal Legatee in the Will of Anne Simpson, dated Dec: 2. 1757, setting forth that a Cause depended in the Prerogative Ct of Cant[y] of bringing in y[e] pretended Letters of Admon, with the pretended last Will & Testament dated Aug[t] 8. 1754 & pretended Codicil dated Sep[r] 21. 1757 annexed, of all & singular the Goods Chattels & Credits of said deed heretofore surreptitiously obtained by Anne wife of Geo Lawington, one of the Resid[y] Legatees therein, & shewing Cause, why it shd not be revoked, & said Will & Codicil be declared void, & why Admon with y[e] true & original Will & Testament dated Dec[r] 2. 1757 shd not be granted to Anne Gibolet, y[e] Universal Legatee named therein & exhibiting an Inventory on Oath, & thereby citing In Connor, as Exor in s[d] Will Dec. 1757 to leave in the Registry all Scripts &c & so declare whether She will propound the said Will Dec. 2. 57. The Decree was returned the Bye day after Trinity Term; an Appearance was given by Gostling Jun[r] for Connor, who brought an Affidavit of s[d] C with a Schedule annexed, being an Account of all Scripts & such Schedule (marked A) being a Copy of a Deed of Gift hereto before executed by Deed, wch I C annexed to his Affid[t] for the satisfaction of Parties, tho he had been advised it was not testamentary; & that the Original wd have been annexed, had not a Suit been depending in Chancery, in wch I C had been called on, to bring such Deed into the Ct &c. Gostling then exhibited a special Proxy under I C's hand & Seal, & alledged he wd not propound the Will Dec: 2. 57. therefore prayd his Party to be dismissed. Fountain for Gibolet alledged said Affid[t] was not full, & prayd I C might bring in the Original Writing; the Judge assigned to hear thereon July 2. it was Continued to this Day. Fountain on extending his Petition, &c. sees to the Affid[t] as not full, because the Names of the Plts & Defts in s[d] Suit in Chancery, are not set forth, nor the time when commenced, or when the order referred to in y[e] Affidavit was made, therefore praying I C may be assigned to exhibit a fuller Affidavit, setting forth the s[d] Particulars. Gostling in answer Affidavit, setting forth the s[d] Particulars. Gostling in answer thereto alledges, that such Deed of Gift appears from the face of the

not testamentary, therefore his Party is not obliged to bring it in; that he annexed a true Copy of it to his Affid[t] of Scripts, to give the Parties every Satisfaction he c[d] that he omitted the names of the Plts, Defts in s[d] Suit, to avoid Redundancy in his Affid[t]: Fountains Client being herself a Def[t] in that Bill filed Oct[r] 28. 1758. by In Eyer Committee of the Person & Estate of Anne Simpson, a Lunatic, who being since dead, said Suit is abated, but may be revived by her Representatives, therefore his Party is amenable to Chancery for the Deed of Gift, & apprehends the Ct can't compel him to bring the Deed in, as it is not testamentary, & that he ought to be dismissed with his Costs, had[t] fully complied with the Decree, as it appears by his Affid[t] that no Will or Deed has come to his Possession or Knowledge.

Dr Harris ...

We have an Affid[t] of Griffiths that there has been no Cause in Chancery these 4 Years, from whence Mr Connor will appear guilty of a great Misdemeanour in what he has sworn. Qu. Shall the Deed Poll be taken as part of the Will of Ann Simpson dec[d]. The Deed was voluntary, on account of affection, the Consideration only 5 Shillings, to In Connor, in trust for Anne Gibolet, not to be liable to the Debts or Controll of her Husband. The Will has the usual preamble; it recites the Deed, & says, my meaning is, that the said Deed shall stand valid, & I do confirm the said Deed, & appoint In Connor Exor for Anne Gibolet ...

Dr Wynne

In Connor the Exor in a Will of Anne Simpson dated 2 Dec: 1757 is objected to by Anne Gibolet, for not having sufficiently described the Suit in Chancery; if such Account was necessary, he has given it, by saying "you know as much as I do" Connor apprehends he is liable to be called on again, therefore thinks he can't bring in the Original; indeed what Purpose would it answer, as the Will has the Deed in it verbatim; this is not suggested to be an untrue Copy of the Deed; It has not the least Complexion of a Testamentary Paper, it has all the Requisites of a Deed; it divests herself & vests the whole in Jo: why shd it be in the Registry of this Ct. Trusts are the very foundation of the Jurisdiction of the Ct of Chancery. ...

Dr Harris ...

The Qu: is wh[r] the Deed is part of the Will? Connor has mentioned this Paper; Gostling own he is possessed of it: Mr[s] S. declares her Will to be in manner following, confirming the Deed, without which there is no Devise; there is no Testamentary Trust, no Legacy, only an Exor; the Will without the Paper is nothing. a Copy is insufficient if the Original can be had: the Doctor said there was nothing for the Deeds to give, she had disposed of all by the Deed; but Mr Gibolet chuses to take under a Will; you c[d] not give Costs to a Man who has not brought in a full Affidavit; the Deed Poll may not be good as a Deed; it may as a Will; so far as it is Testamentary this Ct had Cognizance of it. ...

Dr Hays Judgt ...

I dont look on the Deed to be testamentary; no Paper can be Testamentary wch c[d] take effect before the Testators Death; they might have entered from the Signature thereof: the Deed Poll, as recited in the Will, c[d] be good so far as it goes; but I can't order an Original Paper to be brought, wch on its face is not testamentary; cui Bono? Why shd she desire it? She has 2 Strings to her Bow; for if it is not valid as a Deed, it may operate as a Will; I can't comply with her Application; the next Qu[n] is wh[r] the Affidavit is full? it certainly is, & wd have been, if he had made no reference to the Deed Poll, for this Ct can have no Jurisdiction of a Deed; if a Paper is brought in as Testamentary, it must be current & part of the Will, whereas the Deed took effect in the Life time of Deed; I must reject Fountains Petition; Mr Connor has not been in fault, but as his Affid[t] has occasioned this Application, by mentioning the Deed Poll, I shall only give him the Costs of this Day. L. 1. 6. 8.

Bishop No 95

Stevens ... agt ... Senhouse ... Jenner ...
Dr Wynne — Dr Marriot.

Qu: Wh: Pltf Senhouse Jun[r] survived y[e] Deed? See fol: 205 [illegible]

See the State of the Case fol. 205. ...

Dr Marriot ...

The Cause we shew is the strong Probability, that Pltf Senhouse Jun[r] survived the Deed; it is in the nature of a Joint-tenancy; the Executorship survives, tho. applies, is only an Admor of an Exor, therefore it does not pass to him; it wd be respect to my Client; Stevens has no Claim, but as resid[y] deg: nor does the Admor, there is as the Case of Price & Prices before you, where the Exor had twice renounced; you c[d] not grant the Admon ever to an Exor of an Exor

it is a great hardship upon a Sailor, that his Lre. of Attorney shd not be credited - in Heveningham v Do the, the Party had not been heard of for 10 years, you said you were not founded, in decreeing Distribution, without being satisfied the Party was dead.

Dr Wynne — I shall not contend that Stevens wd have the least Pretensions to the Admon if Senhouse was alive; our affid.t that he went to Canterbury stands uncontradicted; they have offered no proof of his being gone to Sea, tho, I wd not say a Lre of Attv is insufficient to ground a Judgement; yet on Circumstances, when the Presumptions are strong, that the Pty is dead; Proof shd be offered to oust such Presumptions, the Lre of Attv was given 7 years ago; Senhouse Junr has not been heard of a great while; an Averment of an opinion amounts to nothing, without it is a ground for it - you have no Evidence that the right ever vested in P. Senhouse Jr: if on one side there may be a possible Injustice, no Inconvenience ed arise on the other, you will certainly prefer the latter, & grant Admon to my Client to distribute according to law, not to P.S. for the use of his Son; if after admon granted to Stevens P.S. Jr shd appear, such admon wd be revoked; if you granted to the Attorney of P.S. Junr you wd determine on the property of . . . . . (without a possibility of revocation) to the next of kin. We are entitled to half the Residue, wch wd entitle us to the Admon in preference of the next of kin, tho, they shd have a possible Right; if he shd not appear, there may be Injustice in preventing the next of kin from having what they wd be entitled to in default of such Appearance - I pray a new Vis & Modis to P.S. Jr: to accept or refuse, & to shew Cause why Admon shd not be granted to my Client -

Dr Hay Judge — Mr Bishop appeared for P.S. the elder, to save his Contumacy, & pray Admon might be granted to him, as Attorney of the Son - Jr Stevens died without naming an Exor, if he had, the Power wd have been continued, as was well observed by Dr Harris - but his Admor has no such Priority continued, Stevens in virtue of his Principal being a Delegatee, has an Interest; Citation issued agt P.S. Jr wch is returned, without finding him; then Stevens Proctor prays a vis & modis, on the return of wch, he will suppose pray Admon Bishop appears prematurely; for I apprehend no Admon can be granted before the vis & modis is returned; every legal Step must be taken before the Ct can determine on the Grant of an Admon; P.S. Jr as surviving Exor is certainly preferably entitled - I shall wish to be informed, wh.r a Lre of Attorney, by one who claims as Exor, gives the Att.y a preferable Claim to the Admor of a Coexor, who has acted, or wh.r the Ct has a discretionary power. you may still lay your Reasons before me to govern that Discretion; at present, I have only to decree a Vis & Modis at Jenner's Petition . . .

On Holmans Anss & Petition . . . .

No 96 — Stuter Admx of Stratton . . v. Hamblin — On Inventory

Holman — Dr Harris — Dr Calvert — Green.

Dr Harris . . . The Dr says the value of the Estate is not in the Inventory, because it is settled on the Widow & She ought to make her Election, wh.r she will abide by her Jointure, or put this Estate into Distribution, to be liable to Creditors; If a Woman has a Jointure, & no bar in that Jointure the Law dont suffer her to take her Dower; I hope you will order a valuation of those Estates in the Inventory

Dr Calvert — . . . . . Hamblin is the Deed, leaving a Widow & a Sister, Mrs Stratton, since dead; we are before you on the merits of the Protest; the Admx objects only to our not charging ourselves with the Value of certain Leasehold Estates; Green answers, they were not valued when the answers were given in, but have been since, viz.t £.418 - £.82.10.0, with these, he insists she ought not to charge herself, they being settled on the Widow; (we admit this Reply, that being personal Assets, they are liable if in Distribution to answer Debts) & it is a good Answer, she is not chargeable with what is gone from her & cant be liable to Creditors; they say we cant claim under the Distribution & Settlement, I say we may, they offer no proof of the Contrary; it is notorious, a Jointure at Common Law dont bar Dower, unless specially mentioned. In a Jointure after Marriage, the Woman may elect; the Widow is in a Jointure after Marriage, the Woman may elect; the Widow is by Common & Statute Law, & cant be ousted by Implication; this see the Statute of Uses - 27 H.8. C.10.

so laid down by Ld Coke, all the Law Books, the Dr brought no authority to shew a general Jointure barred Dower; it is too hard to say the Widow shall have no Distribution; the Act will never force her to make her Election, it has no Authority so to do; if the Widow may claim both, she cant be obliged to charge herself with these Estates

Dr Hay Judge — The Qu: is on the Inventory, to wch Mrs Stuter has a right; the Party may give one Submodo, on any Proctor saying such ought not to be charged for such reasons; I wont give an opinion wh.r the Widow shall or shall not make an Election, the Ct will have the whole Account of the Deeds & Effects, & the Qu: will then be open on the Merits, wh.r the Widow shall make her Election; I think there must be a valuation of the Estates mentioned; it is admitted the Settlements do not Bar - Jas Nigh. Grenes Client to give a fuller Inventory

Consistory Nov. 26. 30 Sep. — Cricket Dr Harris — No 97 — Wright v Wright — Dr Collier — Clarke

Dr Harris — Stated that a Libel had been given by Mr Wright pleading the Marriage, & Adultery, by the Seduction of John Rupsell a Lad of 17. that 3 Witnesses have been examined, upon whose Evidence I hope you will think the Charge fully proved.

Dr Collier . . . I am Council for Mrs Wright, who is sued by her Husband for Adultery said to be committed with an Apprentice of 17 Years of age; She is about 64 & has had 22 Children by her Husband; Cricket gave a Libel, & the Ct assigned to hear on the Admission the next Ct Day; We say there is an essential Vice in the Proceedings, which cannot be cured, & on wch I must desire the Opinion of the Ct; It is a Rule of Law, that the Admission of the Libel, is of the Essence of a Cause; here is no Libel before the Ct. It will be said, we have consented by giving an Issue; the Proctors may consent to time & Place, but not to the Merits.

Dr Harris . . The Ct cd not assign Cricket to prove, if it had not admitted the Libel. It is therefore to be presumed the Libel was admitted.

Dr Bettesworth Judge . . . . There have been many Assignations in this Cause, without the Knowledge of the Ct, wch helps on the fidelity of the Registrar & Proctors; an Irregularity has happened; the Assignation to answer, implies the Libel has been admitted; I must think the Objection comes too late, & that the Irregularity, if any has happened) has been cured

Evidence . . . John Rupsell Deposes to several Facts, especially, that when he was sitting up for his Master, Mrs Wright came down into the Kitchen in her Shift, the Candle being burnt out, bid him follow her up Stairs, he did so, She said it was not worth while to light another, he might lye down on the Bed by her, he refused; she then said he might get into Bed, he refused to take off his Cloaths, she bid him unbutton his Waistcoat, for the Buttons us'd hurt her Breast, he then deposes to several endearing Expressions, & to his having carnal Knowledge of her.

Dr Harris . . . . I wd ask the Doctor, wh.r any thing is more common, than for a old Woman to many a young man; Rupsel was asked wh.r he had received any money, he answers, he was promised money, but did not expect the performance thereof; it is the Expectation wch destroys the Credit, the Interrogatory being put, the Answer is taken for true; an Objection is likely to be taken by the Dr to his Evidence on this Acc.t but there is strong circumstantial Evidence, that the Lad was seen leaning on the Bed; She confesses "that Rupsell, did, & did, & shall do it again" "& again!" this Confession coupled with Proof on another Occasion, not in order to procure a Divorce, is considered as an Objection - in Grower v. Grower, you pronounced for the Divorce, where there was no Evidence but the Coachman, who was the Particeps Criminis - Wheatley v Fowler Wheatley was prosecuted for Fornication, there was no Evidence, but the Party with whom he committed it, except the Circumstances of his being indecent with other Women; the Ct gave Sentence agt him, which was confirmed by the Delegates on Appeal - the Common Law admits the Evidence of the Particeps Criminis . . .

Query wh.r a Proctor being assigned to prove Facts & Libel had not been admitted, many Acts done by both Proctors subsequent thereto; the Objection can be taken to a Process being null? -

(a) He was a Methodist Preacher at Norwich, the Cause was heard in the Arches & there appealed from Sr Ed: Simpson, to the Delegates . . . . .

Dr Collier ... It is notorious, that this Passion, is the last which leaves Old Women, Is it at all surprizing an old Hag shd want frequent Brushing: I dont rely on the Objection, I stated at the Outset; both the Cases cited, had corroborating Circumstances attending them, this stands unsupported; the Womans Confession depends on the Evidence of the Boy, whose Account is only hypothetical, viz.: "If it was so &c then &c. The old Woman when provoked would say any thing; there was no Compunction of Conscience, it was only a Passionate Quarrel between Husband & Wife. The Confession connected with other Circumstances, might do, but she does not solemnly confess it; they have not examined to the general Interrogs laid in the Articles; where a Person bears Evidence agt himself, his Evidence is repelled; wh.r the Money is received or not, it is clear he has been tampered with; it is not necessary to offer it to a Boy to speak the Truth, he bears Testimony to his own Turpitude

Dr Harris ... If the Evidence of a Particeps Criminis is admitted, he must depose to his own Turpitude, he deposes to two Facts, it is not necessary to enquire wh.r he understood the meaning of Carnal Copulation, he swears to it; he has received, & expects to receive nothing, therefore he cd not have the Reward in Contemplation

Judge .... This is a very particular Case, after a Cohabitation of more than 40 Years, the Man commences a Suit agt his Wife for Adultery committed with a Boy of 17. I must consider what Proof is brought of the Fact; if the Boy is to be credited the proof is full, there is no doubt as to the Admitting the Evidence of a Particeps Criminis, full Credit is given thereto, if it is supported by other Evidence; unless supported by Circumstances & Evidence I know of no Suite in this or any other Ct, where such a Divorce has been pronounced for; I do not think the Words deposed to can be deemed a Confession of the Party; Words spoken in such a manner & under such Circumstances, cant be a Confession of Guilt; others speak to the Declarations of the Confession, but not to such Circumstances as will support a Confession of Guilt; the Boys Confession to another will have no more weight, than his Evidence; he founds his belief on Rupels Declaration, not on what he saw; Harrisons Belief arises from seeing Rupel leaning on the Bed; he dont say, he thought Rupel & Ruth had carnal knowledge of her; there are no Confessions, wch amount to an Acknowledgement of Guilt, of the Woman, to confirm that of the Particeps Criminis, in short, no Circumstances to found a Sentence of Divorce . . . . .

Commissary of Surry.r 3d Sess.n

Nº 95

Mapleroft & others agt the Rector, Churchwardens, Parish.r of Chertsey in Special, all others in General.

Grene — Dr Wynne & Bever — Dr Calvert, Burrell, Collins.

2d: Wh.r y.e Judge shall name Com.rs to survey & report one of the Pties objecting.

Grene petitioned to have Commissioners appointed to survey the Church, at the nomination of the Judge, to make their Report to the Ct: Collins opposed it on the Part of his Clients & produced an Affid.t of Kenton Couse, who says he has been to survey the Church, but having no Plan, is unable to form a Judgement what Damages will arise from the Alterations proposed, tho. he is well assured it will be attended with some .....

Dr Wynne ... The Opposition was on the usual Plea, of want of Room, & inconvenience to the contending Parties; Dr W. stated y.e Proceedings in the Cause; Nothing can be more proper, than our present Prayer, wch is, to satisfy you as Ordinary, & to enable you to form a Judgement

of the Fact, by indifferent Persons; the Opponents controvert this Prayer, & say they have a right to give a Plea to examine Witnesses on the Fact, & to induce you to come into their Opinion, have produced the Affidavit of a Man, who says, he could form no precise Opinion for want of a sufficient Plan; I dont see the Benefit that wd have accrued, if he had been furnished with the Plan, he wanted, for however expositive his Opinion might in such Case have been, it would have been only ex parte; as to the Allon, Proof by Witnesses, it will be mere Matter of Opinion, insufficient; they will get a number of Workmen, & those they find unfit for their Purpose, will not examine; but whatever shd be deposed will be private Opinion, no Satisfaction to the Pt. a Commission must go at last; the Opponents Prayer is Litigious

Dr Bever .... It is the mutual Interest of the contending Parties, that Commiss.rs shd be appointed by authority of the Ct: the Opposition is merely for delay, they will find Persons, who are ready to favor the Opinion they are examined to support; their Affid.t is more to our Advantage than theirs; they might have applyd for the Plan, & the Ct wd have ordered it; M.r Couse does not speak positively ....

Judge ... ? Dr Harris ... ? A Cause of this nature, is very different, from a Dilapidation Cause, in.r which, was a Commission ever denied without the Consent of all Parties? Was the Canon wch hints at such Authority ever put in practice? there is no Law to authorize the Judge to do it: as to the Delay, M.r Grene may thank himself. the Affid.t is not full, & therefore to be disregarded; M.r Collins has said he will plead; I dont sit here to preclude; I can assign a time for the Allon to be given; & shall it stand precisely for the Bye day, I understand the word strictly, & if it is not ready, shall proceed as if no Allon had been offered to be given

N.B. The 2d Allon was admitted on the Bye-Day except the 4th Article . . . . .

Arches & Sessions ...

Nº 99

Hobby Administratrix of Taylor v Duncan al: Taylor

Appeal from Hereford.

2d: Did the Judge right, in refusing to decree an Inventory & Acc.t at the Suite of y.e next of kin?

Crespigny & Grene — Dr Bever — Dr Wynne — Stevens

Dr Bever ... I am Counsel for Frances Wife of Wm Hobby, Sister & Administratrix of Priscilla Taylor, Daughter & one of the Resid.y Leg.ees of Rob.t Taylor of Kington in Herefordshire. April 1760. M.r Taylor made his Will, & directed an Inventory to be made of all his Goods, such part to be sold, as was necessary to pay his Debts & funeral Expences, the Overplus to his Wife for her Life, & then to be distributed in equal portions amongst his 3 Daters, Francis, Priscilla, & Elenor Taylor. he died in 1762. Elenor Taylor proved the Will & then married Alex.r Duncan; 13 April 1765 Citation issued from the Consistory of Hereford, agt her, as Exec.x of the Testa of Frances Hobby Sister & Admin.x of Priscilla Taylor Decd, to exhibit an Inventory of the Goods of Rob.t Taylor Dec.d - The Proctor, Johnson, appeared under Protest for M.rs Duncan, & alledged, she was not obliged to answer the Citation, because the Effects were vested in her by the Will, & her Property, therefore prayd to be dismissed, to this the Pl.tf demurred & the Judge after taking time to deliberate, dismissed the Def.t without Costs, from this Sentence, the Pl.tf appealed; you will observe the Cause is barren of Documents to instruct the Judge, we have therefore been obliged to exhibit the Will & Admon &c. Stevens has confessed the Subscription & Identity, saving any Exception to the Admission of it as Evidence.

Dr Wynne ... This a Cause of Inventory, in the first Instance, heard merely on Protest; in an Appeal from a Grievance, no Notice can be taken of these Papers.

Dr Bever ... You will observe, Sir, extraordinary Irregularities in the Proceedings; I. to determine on the Credit of the Brothers Assertion

without calling for the Will, or even knowing its Existence; we have now called for it, to see on what grounds, we oppose; it is not introducing new Evidence, but calling for some, where there was none; the Judge has committed more than one Oversight, he deliberated out of 2 Ways, chose the wrong; he had a notion, as the Legacy was devised without any trust, that Mrs Duncan had the absolute Property thereof; an Inventory is of common right; it is Law, that whenever there is an apparent ostensible Interest, the Party has a right to call on the Exec: It is not in Contemplation with the Sp. & what is the foundation of the Claim, it is sufficient if it appears on the Face of the Will

Dr Wynne. It never was the Business of a Judge to call for Evidence, 'tis that of the Party to instruct the Cause; if there is any neglect in producing Evidence, the Judge is not to blame; We appear under Protest, the Proctor alledges, that an absolute Property is vested, the other Party denies this; the Affirmation stands good, till it is disproved; the Opponents Proctor shd have referred to the Will; it was not incumbent on . . . . . to take any notice of the Will being in Existence; I did not object to reading the Will & Admon, because it was regularly before you, but I do object to it, as it affects the Judgement below; I submit that the Merits of the Appeal depend on this Question, wh: the Judge did right or not, in his Decision on the Acts before him

Judge . . .
Dr Hay . . . On the return of the Citation the Exec: appears under Protest admitting the Facts laid, but denying the Interest of the Pl: The next of kin have a right to call for an Inventory & Acct: Some third Transaction fair by which, they may possibly be Sufferers; Upon the Citation & the Acts, I am clear the Judge did wrong; Mrs Duncan says, she is not obliged to answer, that the Effects are her sole Property, because, the Bequest is given to her for life, & not the Use thereof only, this was indeed the old Law, but the Modern Determinations are very different. I pronounce for the Appeal, give 23l Costs, to be taxed by the Registrar. . . .

Prerogative 4 Sep. . . . .

No 100

Gough. v. Fletcher & Duncan

Bishop — Farrant — Collins

The Question was whether Bishop was obliged to answer to Farrants Clients Interest, before he propounded the Will, & if he was bound to say wh: he was next of kin or not, or that a general Admission of his Relationship, would be sufficient? . . . .
N.B. The Cause stood, in the Book, on the Petition of all Proctors, but, neither Farrant nor Collins, had wrote to the Exec: Act: The Registrar, Mr Stevens, said they shd have wrote to the Act, as well as Bishop; otherwise, it will be taken down, at the Petition of all Proctors, when Jt C. have no Petition; on this Account, it was adjourned to the next Ct, J. C. ordered to write to the Act; but Dr Hay took notice of the Point in question, about Bishops Answer to Fs Clients Interest—

Dr Hay . . . . In respect to the Question wh: an Exor propounding a Will, is not bound to answer to the Interest of his Opponent, before he propounds such Will; the Delegates determined, the Party alledging this Interest, had a right to an Answer; but to what purpose wd this Answer be, if he is not entitled to distribution, it wd only multiply Suits? In the Case of Grace ag: Calemberg, Louth Proctor for Mrs Grace the Exec: thinking the Will good, would not deny Calemberg's Interest, but allowed him to be a Contradictor; the next of kin did not insist on an Answer; I think by Law, Practice J. is entitled to an Answer but Bishop need not say whether Fs Client is next of kin; it is sufficient if he owns & denyes his Relationship. . .

Prerogative Bye Day. .

No 101

Collins — Mutter and Petrie v. White — Goodwin

Dr Collyer & Calvert — Dr Harris & Wynne

On Collins's Petition

2nd Whether the Substitute of the Attorney of the Exors of a Will, or the Resid: Leg: shall have the Admon with y Will annexed; there being more Effects than will pay Debts & Legacys

Dr Collyer. . . . Jn: White died abroad, having made his Will & thereof Mr Mutter & Gilbert Petrie Exors, (who are both abroad) & Jn White, Resid: Leg: who obtained Admon till the Will shd arrive; & being now arrived Mr White has pursuant to Citation brought in the Admon; the Exors have appointed Messrs Oswald & Mill their Attornies, who having left Business have substituted their Successors, Messrs Ross & Jas Mill, to act in this Business; the 2nd therefore is whether Substitute of Attorney, or the Resid: Legatee, shall be decreed Admon with y Will annexed.

Dr Harris . . . James White, late Chief of Fort James in Africa died a Bachelor in July 1764. leaving John White & Susan Hog, ol: White, his natural & half Brother & Sister, his only next of kin; the Deced made a Will, Codicil & thereof appointed, Wm Mutter, (now at Granada) & Gilbert Petrie (now resident in Africa) his Exors, & said Jn White his Brother Resid: Legatee; & therein bequeathed to Susan Hog, by the name of Susan White his Sister 300l also 400l to Wm White a Minor, an illegitimate Son of the Deced, who hath since October 1764. & now continues under the Care of Jn White; Deced in such Will directed his Exors to remit his Effects, as they collected & received in the same, to Richd Oswald & Co. of London Merchants, to be by them paid to his Heirs— in October 1764. Jn White received intelligence of his Brothers death & soon after a true Copy of Deced's Will & Codicil, he therefore applyed for Admon with said Copy of the Will & Cod: annexed, wch was granted 23 Jan. 1765. & delivered to Jn White under Seal 4 Febr: following, limited till the original last Will, or an authentic Copy thereof, shd be brought in, the Exors being first duly cited & not appearing. . . . .
Jn White waited on Messrs Oswald & Co. who confessed having considerable Effects of the Testator in their Hands; Mr White solicited them for 11 Months to come to an amicable Agreement & Settlement of the Affairs, wch they refused, notwithstanding they have paid the 300 Legacy to Susan Hog, without any Color of legal Authority.
12 Jan: 1766. Jn White in his own name, & in the name of Wm White the Minor, as his next Friend filed their Bill in Chancery, agt Messrs Oswald & Mill for a Discovery of the Deced's Estate, & account of all the Money & Effects of Deced, wch had come to their hands that they might be decreed to pay 400l thereof into the Bank to be laid out for the Minors benefit, & to pay the Residue to John White the Admor— 17 April 1766, Oswald & Mill suggested in their Answers to sd Bill, that they had retired from Business, & previous thereto had recommended Gilbert Ross & Jas Mill to Mutter & Petrie the Exors, in consequence of which, they believed several Remittances had been made to Ross & Mill (to whom on retiring from Business, they on 1 Jan: 1764. paid the Balance of Deced's Estate; White by Order of the Ct. amended his Bill, & made Ross & Mill Defts who 11 Aug: 1766. confessed 2000l more than sufficient to pay Debts & Legacys— 17 April 1766. brought in the Original last Will, Testament, & Codicil of Deced 5 July 1766. Collins extracted a Decree agt Jn White to bring in the Admon &c, & shew cause why it shd not be revoked as surreptitiously obtained, & as expired by reason the Original last Will & Codicil was brought in— 30 July 1766 Goodwin brought in the Admon, wch the Judge decreed to be expired, y last Will, Codicil being brought in; then Collins brought in a Letter of Attorney from Mutter & Petrie to Oswald & Mill, & also a Substitution of Oswald, to Ross & Mill; then he exhibited a special Proxy from Ross & Mill, & prayd Letters of Admon, with the Will & Codicil annexed, to be granted to them for the Use of Mutter & Petrie the Exors; Goodwin prayd the Admon to John White the Brother & Resid: Legatee. . . . . .

Dr Collyer... one of the Exors is at Antigua, the other on the Coast of Africa; the Decd died on his return to England, the Brother possessed himself of a Copy of the Will, on which he obtained a Limited Admon, a mere Custody for the preservation of the Effects, till the Ct was apprized of the Intention of the decd, till it was satisfied, he died Testate, the White is a mere fideicommissarius: these Letters of Admon were to expire at a certain Period; they are temporary, like a Trust, as to substantiate Proceedings in Chancery; you see what use he made of them; he went & demanded the Effects of the Decd, in the Merchants hands, who very properly refused to deliver them: the Resid: Leg: is the most improper Person to have the Admon; his Interest cant arise before the whole Will is compleated; he is the last in the Testators Contemplation to be benefitted; the Ct properly considers how the Purposes of the Law may be best answered; under the present Letters of Admon, he has no proper Authority to receive this Money he filed a Bill in Chancery but the Ct gave no Decree, that he was entitled; he stands now on the same footing as if no Admon was ever granted; there is no doubt, if the Exors were on the Spot, the Ct would prefer them; the Ct is merely ministerial to the Intentions of the Testator; if it is true, that the Substitute of the Substitute is the Substitute of the original Person; the Institute, lays it down as a Rule of Law Quicunque Substituit Substituto &c. I dont know it ever was controverted; It is just like the Substitution of a Proctor, or an Exor of an Exor, who is the Exor of the first Testator, the Credit of these Merchants is established, the Estate can run no risque; a Delegated Judge indeed cant delegate, but that is different in its nature being matter of Judgement; here it is a mere Execution of a Trust.

Dr Calvert... The Right of the Exor in the Goods of the Decd may be conveyd to an Attorney, & with that goes the power, of nominating another Attorney; the Attorney of an Exor gives ample Security to this Ct so that no Argument can be drawn, from the Danger of the Effects not being taken care of: Messrs Oswald & Mill, are favorable in the Eye of the Decd, who left them a Legacy, therefore they do not stand merely as Attornies appointed by the Exors, but as Persons entrusted by the Testator himself; Can the Gentlemen shew, that by Law & Practice of this Ct the Line is drawn at the Attorney? I am told it has been in the case of a Person dyeing abroad, where the Attorney was likewise abroad & appointed a Substitute, wch the Ct allowd, as the Party was a Seaman — I do not note, as similar, but to shew has a discretionary power to grant it to either Party; but I submit, wh: if the Ct cant commit Admon on a Renunciation of one Exor, it can in this case? An Exor appointing another to act, the next of kin, & Resid: Leg: has no right to stand before the Ct; he might cite the Exor & be named, on his refusal to take Probate; but here he accepts. . . .

Dr Harris.... mr White had a Limited Admon, & might do as much as if he had been a simple Admor; Oswald's bad behavior obliges him to take the Admon, without which he refused to give any account & still continued such refusal after White had taken the Admon thereby obliging us to go into Chancery, & now to defeat that Suite bring in the Original Will, & desire a new Admon may be granted to their Substitutes, when they themselves are only the Attornies of the Exors; the Behavior of Messrs Oswald & Mill ought to be considered, they have treated the Ct very ill in disputing its Authority; I always thought, a deputy cd not depute; Dr Tolier recurrid to the Regul: Juris, but the Civil Law is not received in these Points, it is no part of the Law of this Kingdom; I am sure it is very differently laid down in

Coke 9 Rep.... Combes's Case; there is a wide difference between appointing an attorney & giving an Authority to sue; Bacons Abridgt Attorney. V. Authority. He who has an Authority to do an Act for another, other must do it himself, & cannot assign it to another whose Fidelity, Integrity, & Ability, is not so much to be depended on; It would extend to 20 as well as one; the reason of the thing points out the Impropriety. The Attorney represents the Person in whom the Original authority resides; as the Exor of an Exor, the Substitute does not; when a Man has a Power delegated to him, he must act in the name of the Person, who delegated it, I dont doubt your refusing their Prayer; Certainly the Exor, or the Attorney wd have the preference of the Resid: Leg: I hope you will grant us a limited Admon for carrying on the Suite in Chancery, till Persons having a proper Authority from the Exors come & pray it for themselves, Messrs Ross & Mill confess 2000£ in their hands, therefore they ought not to have it. The Exors have been cited, & not appearing, have no Claim but I do not insist on that point. . .

Dr Wynne... The 1st Qu. has the Ct a discretionary power of granting the Admon? 2d Qu. Who under the present Circumstances is entitled? 3d Qu. Can the Attorney come now & claim the Admon? There is no doubt if the Exors were present, they wd be entitled: but can they make a demand for the . . . I do remember something drop from the Ct as if it was doubtfull; the Appointment of an Exor is a personal Confidence; it has been held, this Trust can be conveyd from one to another; by Will the Exor of an Exor may have it; he is on the Spot to carry the whole into Execution; this is very different; No Law, no Practice has been expresly quoted; I own generally, the Attorney of the Exor has been admitted, because the Interest is chiefly in the Exor; here the Exor cant take that power upon him, he wd if present; the Common Law has granted Admon during such absence, where the Exor or (in Cases of Intestacy) next of kin are out of the way; but the present case is out of the Statute put your discretion; for what is the Admor appointed, if not to receive money Due to the Decd? White has called on Oswald & Mill who refuse to pay him; the Resid: Leg: is certainly most preferable, in whom the Estate is to center; I hope you will granted Admon, during the Absence of the Exors, to the Brother & Residuary Legatee. . . .

Judge } Dr Hay } ..... The Practice of the Ct is clear, that the Attorney of an Exor has a Right, to the Admon, with the Will annexed, if he appears; in this case it is not necessary to go into the point whether the Persons praying, as Attornies of the Attornies, have any right to the Admon? the Exors Mutter & Petrie are absent the Admon with the Copy of y^e^ Will annexed, granted unopposed to White the Brother, till the Original Will or an authentic Copy thereof arrived, is expired, the Original being produced; but that wd be a sufficient Authority, under which White wd be a good Admor to discharge Oswald & Mill, who wd have been obliged to have satisfied the Admor & Resid: Leg: Does it stand to reason that the Money shd remain in their hands till the Will shd appear, suppose it had never appeared; the Original Will did not appear till 18 months after it was made; I blame no body for Caution, but I know Merchants are very averse to part with Money; I wonder the Exors or Attornies do not act; Is the Attorney of an Attorney of an Exor the Representative of the first Testator? an Exor of an Exor because y^t^ Privity is continued, he is only y^t^ 3d from y^e^ Testator, the Att^y^ of an Attorney is the 4th. An Attorney of an Exor is permitted by Statute to take Admon, but not a Probate; the Case of y^t^ Sailor mentioned by Dr Calvert was not opposed, it was a Case of Wages, the Attornies were abroad & cd not pray Admon, & the Ct admitted it, but it shd not be drawn into Precedent; I think it shd now be granted absolutely, either to the Attorney of the Exors

or to the Residuary Legatee, who must take out a Citation agt the Exors, to appear properly, if they do not, I have no doubt to prefer the Resid: Leg:

Mr Collins on behalf of Mr Oswald one of the Attornies of the Exors prayd the Admon, but he living in Scotland, out of y^e Jurisdiction. Goodwin prayd to be heard thereon; Cots were decreed agt the Attornies of the Attornies. N.B. on the Caveat Day, Jan: 8. 1767, Mr Miller one of the Exors appeared & took Probate.

Irrogative Bye Day

No 102

Jenner: Muccleston & Norman V Whylie al: Muccleston — altham.

Dr Wynne. — Dr Calvert

Both Proctors are assigned to exhibit Inventories on the Oaths of their respective Clients, on the Admission of Althams Allegation ...

Dr Calvert ... Andrew Muccleston died intestate, leaving Elizabeth his Widow now Whylie; a Caveat was entered on the part of the Widow & warned by Jenner on behalf of Jn Muccleston & Anne Norman, nephew & niece (only next of kin to the Decd) prayd the Admon to them, Altham prayd Admon to his Client; Jenner denied her Interest; we are now before you with an Allon propounding her Interest — the 1st Art: pleads, the Decd lived Servants with Rd Bennet Esq — 2d pleads Affection & Agreement to marry — 3d, pleads that Mr Bennet removed in 1739 from Malden Ash in Essex, to Babraham in Cambridgeshire, & that the Decd, Anne, were married by Jn Champion a Popish Priest, (at Mr Huddlestons at Sawston) in Oct^r 1739. according to the Ceremonies of the Church of Rome — 4th. pleads the Consummation at Mr Bennets at Babraham, & their being acknowledged & reputed to be Man & Wife — 5 Art. pleads Cohabitation at Easter 1739. their keeping a Shop, but on account of bad Circumstances, separated; that they afterwards took a Cheesemongers Shop, & lived together till the Death of Mr M. in 1766 .. 7 Art: pleads Identity. ..

Dr Wynne ... My Objections to the Admission of this Allon, are, that the Widow pleads a marriage in 1739. celebrated in such a manner, as will not entitle her to a personal Interest in the Admon; It is said to have been celebrated by a Popish Priest, at a private House according to the Ceremonies of the Roman Catholic Church By 27 Eliz. c2. The Priest who performed y^e Ceremony incurs the penalties of High Treason

11, 12 W3. The Priest is liable to perpetual Imprisonment for so doing.

23 Eliz. ... The Parties are liable to 12 Months Imprisonment ...

If this had happened since the Marriage Act, it wd have been clearly void, Jews & Quakers being excepted out of that Act, but not Papists — The Present Subject is not meant to establish the Marriage, but an Interest under it; if this Marriage had been solemnized abroad, or in an Ambassadors Chapel in England, according to y^e Ceremonies of the Popish Church, I admit it wd be good, because according to Law; 3 Jac. I. c. 1 § 3. Every Popish Priest Convict shall forfeit 100£ to the King & be disabled &c.

They have not pleaded what Religion the Parties were of tho, their alledging themselves Protestants, wd not entitle them to an Interest under the present Circumstances; but supposing the fact true, it cd hardly be proved, as the Priest wd thereby incur the Penalty of Death, & the Ws being liable to great Penalties, wd hardly venture to be produced; The Cohabitation is rather imperfect, there being an Interval of 12 Years: tho. Cohabitation, owning will induce a presumption, tis where they are not ousted, upon a legal marriage; they cant cure the primary defect; the Question therefore is whether Persons married according to the Ceremonies of the Church of Rome, at a private House the Widow is entitled to y^e Admon or to any Interest in her Husbands Goods?

2 Lu: Can a Party plead a Marriage in England in a private Chapel, by a Popish Priest? Is such Plea relevant?

Dr Calvert ... I find our Allon is opposed on the general Principle, that the Marriage will not entitle the Widow to the Admon, or any Interest in her Husbands Effects; I admit the Penalties on all the Parties, but they will not invalidate the Act when performed, Clandestine Protestant Marriages are liable to Penalties, yet wd not destroy & annul the Act in England, till the Marriage act took place; at last the Dr relied on the Impossibility of Proof, we have pleaded a particular Person present, the Proof rests on us; I have looked into the Statute 3 Jac. I. c1. We do not fall within the Purview of that Statute, we claim nothing in Land, no Customary Share, but only what we have a right to by the Statute of Distributions, wch dont affect us; Every Exception, establishes a Rule in other respects; We are not Papists Convict; I know not that being a Papist, is an indelible Character; a Marriage by a Popish Priest, is in itself a good Marriage ...

Judge? Dr Harris ... I have no doubt the marriage is good, if proved, tho. the Parties are liable to certain Penalties; it has been determined, that a Cohabitation, on an Interest is sufficient to entitle a Person to an Admon; The Law distinguishes, between Marriages, where a Restitution of Conjugal Rites is the Object in Question, & where there is only an Interest to be commenced on the Death of the Parties; I admit the whole Allon as laid ....

Caveat Day 1767 Jan: 8 ... No 103 Stuter Administratrix of Stratton. v Hamblin.

Holman — Dr Harris — Dr Calvert — Grene.

See Fol. 208

2 Lu: Wh: the Widow is barred from her distributeable Share by the Settlement of a Leasehold on her? & wh: they ought not to be brought into Distribution?

Dr Harris .... I am Council for Mrs Stuter; Admon having been granted to the Widow, She gave in an Inventory, to which we objected: & the Ct directed a fuller Inventory, the Value of the Estates settled on Mrs Hamblin, to be ascertained. Her Proctor having alledged there were 2 Leasehold Estates settled on Mrs H. we chose to have them inserted in the Inventory given in on Oath; One of them is now valued at 418£. the other at 282. 10. 0 ..... Grene did not comply with the Order, but exhibited a special Proxy, confessing the Value of each as alledged, to which we agreed, in order to bring the Point to a speedy Determination. the 2d now before the Ct. is, wh? the Widow is barred from her distributeable Share, by the Settlement of the 2 Leasehold Estates, & wh? they ought not to be brought into Distribution?. ...

Dr Calvert .. after recapitulating the several Steps; said, there was another Prayer in Holmans Act; viz. that we would declare, whether we would take in Distribution, or under the Settlement, as we c: not take under both: The Indenture bears Date June 23. 1728, is for settling a Jointure, & Maintenance, on her, in case she shd outlive her Husband. The 2d dated June 24. 1728 is, in Consideration of an intended marriage & a certain Sum of Money to be received for a Portion, he settles on himself for Life; then on his Wife for Life, & then on his Children by the Marriage; 2 Leasehold Estates; one of which, lies in Hampstead Marshall held under Dr Crasen, upon a Lease for 3 Lives, determinable at the Expiration of 99 Years; the other Estate is called Bradley.

x There were 2 Settlements

Dr Harris .... Your Determination that the value of the Leasehold Estates shd be inserted in the Inventory, in a great measure determines the Question; for to what purpose insert it, if Mrs Hamlin was not accountable? I do not remember this Case ever came before the Ct: I have seen opinions thereon, which differ from one another. The Statute of Uses has a particular Proviso, that a Woman having a Jointure, shall not have Dower or Lands; if the Legislature thinks so in Cases where Real Estate is concerned, the Ecclesiastical Ct will act in a similar way with respect to personal Estate; the Statute of Distributions regards Justice & Equality; as for Instances, in Hotchpot, which concerns all the Children but the Eldest Son & Heir, who indeed is excepted; I know nothing which can put the Widow upon a better footing than she does not bring these 2 Estates into Distribution, she will take more than ⅓ which was not the Intention of the Legislature ..

27 H8. C10. .... 23. See the 2d Statute with is not applicable —

Dr Calvert. The Dr hinted there was no expreſs Conſideration to induce the Settlement; the Marriage itſelf is a Conſideration; the Husband may make a Settlement without any Portion; but it is expreſsly ſaid, "in Conſideration of a Marriage Portion to be had"; the Dr holds objected the 27 H 8. c 10, but all the Lawyers hold, that unleſs the Jointure is ſettled expreſsly according to that Statute, it ſhall not bar Dower, but the Common Law ſhall take place; it muſt be an Estate to come from the Husband immediately, but the Intent is not, that ſhe is to have no greater Estate; I find 2 Caſes applicable to the preſent Queſtion. Glover & Bates, where the Queſtion was upon a Settlement as follows, viz: "in full Satisfaction of all Right of Dower, or any Claim or Right by Common" Law, Cuſtom of the City, or any other Uſage, Law or Cuſtom" Ld Hardwick where ſuch expreſs Words are uſed as "any Law Uſage or Cuſtom" it muſt be underſtood ſhe was intended to be barred, as ſhe muſt claim under the Statute of Diſtributions which is a Law, it is expreſsly provided for.

2 Vern. 724 ... Davila v Davila – Davila ſettled 1500£ in full of Dower Thirds, Cuſtom of London or otherwiſe, out of his Real or perſonal Eſtate: Ld Cooper. This will bar her of her Share in Diſtribution, for Words are never to be confined or reſtrained from their natural Signification –

another part of the Prayer is, that we ſhould declare, whether we will take under the Settlement, or the Statute: but if the Settlement bars, we have no Option, & the Court cannot ſay we ſhall claim, if we have no right.

Dr Harris ... I contend, it is a voluntary Settlement, & on no valuable Conſideration; Marriage is not a ſufficient Conſideration; If a Man makes a voluntary Settlement, it is invalid with reſpect to Incumbrances it will not bar a previous Debt: no Court would allow a Widows

2d: if true ... both by the Statute & the Cuſtom

Judge – } When the Cauſe was laſt before the Court, I thought the Widow
Dr Hay ... } ſhould give the Value of the Eſtates mentioned in the Inventory reſerving to her all Rights (due by Law) tho, not immediately diſtributeable because, if ſhe had only a Life Eſtate in them, they would on her Death, be diſtributeable, as well as the reſt of the Deads Effects howeve, it was not determining the Point, the Ct only thought an Inventory ſhould be given, the 2 now is. wh: the Diſtribution ſhall be made, between her & the Siſter, each, a moiety? the 2d: wh: the Marriage Settlement, if good, Bars the Widows diſtributable Share of the Reſidue? Dr Harris has argued only by Analoge, from the Statute of Uſes.

2d: As the Statute of Diſtributions, obliges Children, legally advanced, to bring their advanced Shares into Hotch-pot, as that Stat: meant Equality, the ſame reaſoning holds with reſpect to the Wife. It is to be obſerved there is not a Word ſaid of the Widow, & the Heir at Law is excepted; the Shares advanced, is brought in merely for the Benefit of the Children, & the Wife is to have no Share of it: no Caſes are cited as determined expreſsly in this or any other Court on the Point: In a Caſe entirely new, I wd not determine haſtily, without looking into Precedents, therefore will take time to conſider of it till the firſt Day of next Term –

Hil. T. 5th Geo. Dr Hay ... The firſt point was, whether the Widow ſhould ſet forth the Value of the Leaſehold Eſtate, ſettled on her, upon her Marriage, ſhe refuſed ſo to do. The Ct Decreed ſhe ſhould; for if it is diſtributeable, it is proper the Value ſhould appear, if it is not, no Prejudice can ariſe thereby. The Queſtion now concerns the Diſtribution; the firſt Point inſiſted on, is that a Settlement of Perſonalty in Jointure by 27 H. 8. bars Dower. There is no Expreſſion in the Settlement, to denote whether it ſhould bar, or not: this admitted, that

Coke's Juſtic 41 ... before the Stat: of H. 8. ſhe was not barred at Common Law – By the Statute the Jointure muſt be in Bar of Dower, by exclusive words, which not being expreſſed here, Queſtion whether under the Statute it will be a Bar. Theſe has always granted Adminon with the Interest. It was ſo in Davila, & the Sp: Ct had granted Adminon to the Brother, the Wife being barred Thomas's Quiſtion. Shew Cauſe why it ſhd not be revoked, for on looking into the Settlement, ſhe had barred herſelf: it was doubted whether it ſhd be revoked, being once granted, determined it could, because ſhe had barred herſelf by the Settlement expreſſes as much, it will operate

not only to bar her of a Diſtribution, but Admon – There is another reaſon why & Argument of analogy from real to perſonal Eſtate will not hold; the right of Succeſſion differs, the Half Blood ſhall not inherit to real Eſtate, & Arg: from Analogy will not prove too much, for if it ſo ſhd ... they ſhd in all Caſes – 2dly – If the Widow is not barred, the Settlement ſhd be liable to Diſtribution, becauſe there is no Conſideration – Marriage is a good Conſideration agt the next of Kin, tho perhaps not agt Creditors – If a Man leaves a Legacy, it will be good agt a Reſid: Legatee, but not agt Creditors – If a Man leaves a Legacy, it will be good agt a Reſid: Legatee, but not agt even a ſimple Contract Creditor; it dont follow, that being liable to Debts, it is liable to Diſtribution – The next point is, wh: under y Equity of y Statute, this ſhd be conſiderd as an Advancement of a Child brought into Hotch pot: I think you cant reaſon from thence, y Statute diſpoſes of one, but not of other – 29 Jac. 2. c Stat: of Diſtributions abridges y Widows Right – The Stat: of Jac. 2. puts y Mother on a footing with y Brothers & Siſters; Statutes of this Sort are not to be extended; they ſay nothing about bringing y Widows part into Hotch pot: when there are other Children & this not for y Benefit of y Widow; She is not Benefited by a Child's Share, being brought into Hotch pot; here ſhe not therefore benefited if Child, & if not in that Caſe, ſurely

Bottom

Hilary Term 5 Geo: Prerogative Court –

Dr Burrell ...

No 10A Healey agt Mathews

Bargrave — Dr Burrell — Dr Compton — Goodwin —

Silveſter Healey formerly belonging to the Tyger M.eſſa. but late to the Lenox Man of War to the deceaſed –

24 March 1764 He made his Will & appointed John Healey his lawfull Father (who reſides in Ireland) ſole Exor & Univerſal Legatee. 26 June 1764. He died in London, & on the ſame Day John Mathews, the other Party, (who is an utter Stranger in Blood to the Decd, clandeſtinely ſnapped up a Probate of a pretended Will, dated 31 March 1758. as the ſole Exor therein named, John Healy being then in Ireland, & conſequently unable to oppoſe the Grant of ſuch pretended Probate –

In the Vacation of Trinity Term 1764. a Decree iſſued under Seal of this Court agt the ſaid John Mathews to bring in ye Probate, & ſhew Cauſe why it ſhd not be revoked, together with ſaid Will be declared nuce & void, & why Probate of the true, original laſt Will dated 24 March 1764 ſhd not be granted to Jn Healey the Father of the Decd, & Sole Exor named therein –

7 Septr 1764 This Decree was returned, with a Certificate on Oath of the Due Execution thereof, when Goodwin appeared for John Mathews, brought in the Probate, & both Proctors propounded their reſpective Clients Will, & have examined Witneſſes to prove them – The Subſcribing Witneſſes to the Will of 1758. are Ed Burke Burke a Subſcribing Witneſs to the Will not examined – Chr Tyer, & Richd Streek – Mathews has examined Tyer & Streek together with Geo. Brockbank, who is ſaid to have been preſent at the Execution of the ſaid Will, tho, he is no Subſcribing Witneſs thereto, & thoſe 3 Perſons ſpeak very fully to the Execution ſo that the Fact of their Will, if theſe Witneſſes are to be credited, ſeems to be fully eſtabliſhed –

The Subſcribing Witneſſes to the Will of 1764. are Charles Sakeard Grant, Captain of the Ship, John Powel, the Maſter, & Stephen Gudgeon an Aſſiſtant to the Captains Clerk –

Capt: Grant a Subſcribing Wit: of the laſt Will not examined ..... The whole Effects conſiſt of Wages & Prize Money only, will not amount to 30£ as Capt: Grant wholly reſides in Scotland, the Expence of examining him here, by Requiſition wd have coſt more than the preſent Cauſe wd bear; We have therefore examined only Powel & Gudgeon, which we ſubmit, is ſufficient, as nothing but Perſonal Eſtate is concerned; for tho, there ſhd be many ſubſcribing Witneſſes to a Will, the Party propounding it, is not obliged to examine all of them, but only ſo many as the Law requires to make the ſame a valid Will, as was determined in the Caſe of Woodward v Sanders. But if this Objection is taken, Mathews is liable to it, in a greater Degree, for he has omitted examining Burke, who is not only a ſubſcribing Witneſs, but the Writer of the Will – as there ſome Contrariety in the Evidence of Powel & Gudgeon, it may be neceſſary to ſtate it to the Court – Powel ſays That on or about the 24th of March 1764, the Lenox to wch he Deed then belonged, being at Sea, St. Gudgeon & the Deed came into y Cabin to Capt: Grant & y Deponent, that Deed then executed his Will in preſence of Capt: Grant, Deponent & Gudgeon; that he, Grant ſubſcribed their names thereto, in y Deeds preſence, & particularly mentions, that Capt: Grant aſked Deed if he gave ſuch Will, as his laſt Will, & Deed anſwerd yes, & was at that time capable of making a Will, that the Will propounded by us is the Will he ſaw ſo executed. Gudgeon ſays That on or about March 24. 1764 in

x July 4. 1765. Bye Day after Trinity Term: wch See fol. 24. of this Book .....

B Not where the Widow is not barred as more remote; the Caſes are not immediately applicable; they ſeem only to imply, that where there is no Stipulation, there ſhall be no Bar; there are few Caſes on litigated Points of Diſtribution; the Widow is not to bring thoſe ſettled Eſtates into Diſtribution, all others muſt – where a Man covenants to make a Settlement & carry it into Execution, if diſtributive Share being more than is covenanted for, ſhall be in ſatisfaction thereof – Sam of Opinion, that the Widow is entitled to her diſtributive Share Money –

Pursuance of a message he received from the Deced, who was then ill in his Cuck in the fore part of the said Ship, he went to him, & Deced then desired him to make his Will for some Person, but whom he cannot recollect, tho he thinks it was to his Father; that he accordingly made a Will for him, which Deced approved of & sat up in his Couch & executed in the presence of himself & several others belonging to the said Ship, but whom, he cannot recollect now, Dept: then took said Will to Captain Grant & Mr Powell who signed the same, but not in y presence of the Deced, nor did either of them see the Deced execute the said Will, that the Deced was very sensible at the time of the Execution of the said Will, that the Will in favor of John Healy, is the Will by him predeposed of—

Dr Hay Judge } Tho, Gidgeon is mistaken, his Errors, are not so extraordinary when we consider that most of the Wills executed on board Men of War, are witnessed by the Captains Officers, in the manner he has stated; & when we recollect the number of Wills made by Captains Clerks, & their Assistants, it is not at all surprizing they shd not recollect, the particular Circumstances attending each Transaction, or that the Will in question was executed differently from the rest; which Powells Evidence clearly shews it to have been — Besides Gidgeons Memory appears very defective on other Occasions; for he says, to the best of his Remembrance the Testator died in March 1764, whereas he did not die till the 26th of June following; Upon the whole we hope you will think the Execution of the last Will sufficiently proved, & decree us the Probate thereof—

The first Will was made in View of an Engagement; It was a Transaction between Sailors who probably agreed to give their estates to the Survivor — In these Cases of Seamens Wills, there is always some Difficulties. The last Will was made, when the Deceased was taken ill; tho, the Witnesses differ as to the presence of the Captain, I must establish this last Will, made in 1764, in favor of the Father—

Prerogative. 1 Sess: Hil: Term. — Stevens Junr — Nos 105 — Ames agt Ward — Cumberlege

Dr Harris — Dr Wynne

Dr Harris .... Elizabeth Ames is the Deced; She died a minor, at 14 Years of Age, & as is pretended, made her Will & thereof appointed Jas Ward Exor, & Resid: Legatee he died without taking Probate, having first made his Will & Catherine Ward his Exec.x A Cabeat was entered by Jn Ames Grandfather of the minor agt the Probate of her Will, & he prayd Admon might be granted to him; mrs Ward, e con: prayd the Probate —

Tho: Chapman & . . . . . are the Subscribing Witnesses, who have been examined & interrogated by Stevens, since which he has received Instructions from his Clients, to interrogate the Witnesses a 2d time, & says he is willing to be at the Sole Expence — Publication has not passed — I have known many Instances of Witnesses being reproduced, there is no reason why they should not — There is a Time appointed for the Party to interrogate Witnesses, if he does so within that Time, it is at the Expence of the Party who produces the Witnesses in chief — As Publication has not passed, there can be no Objection; The Difficulty arises by the Agent of the Party being out of Town when the Witnesses were exam: on Interrogatories.

Dr Wynne ..... I am Council for Catherine Ward, Exec.x to Jas Ward, Exor to Elizth Ames; Mr Stevens having given notice, he was ready, the Witnesses were examined as well to the Interrogatories, as to the Allon in Chief — You will observe, there has been a long Interval between the Examination on the first Set of Interrog: & the present Application 24 Hours is y Usual Time given for the administring Interrog: it is fully sufficient for the purpose — In this Case there was a long Interval, between the production of the Witnesses, & the administring the Interrogatories; the Motion I am told is new; for when there has been any Reexamination, it has been for want of proper notice given; the Expence is not material; it may be attended with danger; Witnesses may be talked to, tho they are not actually tampered with; Courts dont approve Witnesses dropping in, one after another; the Doctor said, they dont intend to examine to the same Interrogatories over again; I suppose not, but they may lead to the same; Witnesses may enlarge — The Neglect of the Agent, must fall on the Party which is very usual; Witnesses return from whence they came, thinking all over; there would be no End of Examinations, if the Doctrine contended for, shd be received — It is not alledged in their Act, that they do not intend to plead; As to the Examination of a Witness twice over in Hill v Handford — The Witness had not released a Legacy of 5£, it was therefore necessary to repeat him to his Deposition, otherwise that could not have been used; it was done therefore upon exhibiting the Release, but the Deposition was not altered —

Dr Harris .... If a Party Producent may amend a Deposition, the other Party surely may a fortiori examine again on fresh Interrog: — it is not material whether we plead or not —

Dr Hay Judge I am cautious in all matters of Practice, that are said to be new; I beleive this is new, I think the Ct has a discretionary Power before Publication, on sound reasons, to order a Reexamination, as where Witnesses being examined by Commission, the Commiss.rs make any Mistake; If a Witness refuses to be examined, the Ct will order him to be brought — Hill v Handford, a Witness omitted bringing a Release, when it was exhibited, he was reexamined; No Objection was made to it — If the Adverse Proctor does not give Notice as in the Case of Campbell v Umfreville the Proctor requested Notice might be given when the Witnesses were produced to be examined, the Opponents Proctor neglected to do so, therefore the Ct ordered a fresh Examination — In this Case there was sufficient time to send to the Agent, between the Monition & Examination; Why are fresh Interrog.s desired to be admitted, to remedy the Solicitors Neglect; the Distance of Time ought to be considered; Publication it is said, has not passed; but Witnesses

Wh: Witnesses shall be examined to a 2d Set of Interrog on the same Plea

may be talked to; I see bad Consequences may arise, if I shd order a Reexamination on fresh Interrog.ˢ in this Case, on the Suggestion that the Proctor had not received sufficient Directions; It may happen, that Motions of this Kind may come, with a View to delay; I dont suppose it here. — As no Case is cited where the Ct has gone so far after a Compleat Examination, & Interrog.ˢ given, I wont break into the Practice, especially as the Motion is new. There is a great difference between the Cases mentioned & this. Here, they dont even say, they will not plead.

Consistory

No 106

Fuller — Balderston v.ˢ Balderston — Bargrave

Dr Harris & Wynne — Drs Collyer & Calvert

Dr Harris ... Stated the Cause to be, instituted by Mrs B. agst her Husband for Adultery from 1758 to 1762. & That there was no Reconciliation between them. — See the Case Vol. 92.

Dr Collyer ... Observed the Correspondence wch paſsed between Mr & Mrs B. that they were mere prudential Letters on her part about her not following him to Town. he insisted she was in the absolute Custody of her Brother, who has instituted this Suit without her Consent; that she is inclined to a Reconciliation. — — — —

Evidence ... This Suit was instituted in April 1768. — Mary Pantin sweare to the Defts taking Lodgings for a Lady & 2 Children, Nurse & Footman, whom she thought Mrs Balderston, till her death, when she discovered her name was Laetitia Smith; that they cohabited together as Man & Wife. — She knows nothing of his Carnal Copulation with her; but by hearsay. — Anne Sherman sweare, she fetched a Child from their Bedchamber Morning, so saw them in Bed together. Eliz: Jackson sweare to Smith's paſsing for B's wife about Dcbber 1760, & her being delivered of a Girl, so speaks to Carnal Knowledge.

Dr Harris ... The Adultery is laid to have commenced in 1758, & continued till 1762 — in 1758 he lay with his Maid Servant & had a Child by her, she tells the Story herself, she must know him. — Dudlow speaks to a fact of Adultery with Mrs Smith (a Companion of his Wife's) Nothing can be more fully proved; the Gentlemen admit it, & rest their Defence on a Reconciliation, & say, this Suit was commenced without her Knowledge; they have exhibited 8 Lrs dated in 1760 come in 1761 — that they prove Affection can't be denied, but they do not prove her Knowledge of the Adultery, or that he was settled with Letitia Smith in London, & con: she writes, that when he is settled she will come to London — in another Letter, I hope you wont forget me tho' we are so far apart, a single Man may live cheap — Down, it appears from his Lrs, that he always urged her to come to London; in one of her Lrs she says, she intends to make him a Visit; in another she plain he had put her off; she says, she will not come, being of Opinion, as he says, it wd cause very great Grief to him; how hypocritical! first to press her to come, & when she offers, to persuade her agt it. — All her Lrs are directed to him at Charing Cross, not at Pantins or Ogleys, wch shews, she knew not where he was, or what he was doing. — From 61, to the Commencement of this Suit no Letters are exhibited; from whence I infer, no Correspondence. — they have produced but one Witness to the Reconciliation; She ran away from him, as soon as she found out the whole Affair, ever after shunned him; on his coming to Canterbury, this Woman, (who was reconciled) was frightened; a Stranger comes to the House, she treats him with Civility, soon after the Husband is admitted; she refuses to cohabit with him. He threatens to take her by Force, produces his Pistol, says

she fell into Fits; when she came to herself, she had recourse to Art to evade his power; all the Consent she testified was in consequence of the Force; she referred it to her Brother; She tried to put him off till she had an Opportunity to run away; What Reason has she had to suppose the Suit commenced without her Consent; there is none, that I remember even advised it; they say she shd have done so, it is immaterial, they dont pretend he used Force, nothing is to be collected as to his Assent. She has given a Proxy, there is therefore no Presumption of Force. — She swore the Peace agt her Husband, after the Commencement of this Suit. before Judges Office & Bench who
no Woman can give Articles of the Peace agt her Husband. & always enquired into the Affair; she has given Security. — She has given her Answers; the Gentlemen wd have read them if they dare. that Omission creates a Presumption in our favour. — Can there be a doubt of her resolution, to carry on this Suit? I hope you will divorce this Woman, according to her Prayer. — —

Dr Wynne — I hope you will think the Plt in this Cause entitled to a Sentence of Divorce, when you consider the Proceedings; the Circumstances in Proof will warrant us to call it a Suit of Divorce for Adultery; there is the Birth & Baptism of Children in the name of Balderston; Mr & Mrs B. were married in 1753. & lived together till 1759. In 1756. he solicited Broadridge a Maid Servant to carry on an illicit Correspondence with her, she withstood his Entreaties till 58. In 1759 she was delivered of a Bastard at Canterbury — He is proved to have cohabited with a Woman, as Husband & Wife, at different Places, from 1759. to 1762 in the name of B. & Wife, prove that Woman's death, one of them, says, she visited whilst ill, & saw her, when dead. — It is said, that because she was not conusant at the time of living in the House with him, she cd not bring the Suit, when she did gain the Knowledge of it; the Dr mentioned the Case of the Duke of Beaufort, wch was long before my time. — The Letters exhibited were all wrote within 2 Months, the Light in wch they place Mrs Conduct of Mrs B. is very amiable, fond of her Husband & Children, desirous to extricate him out of his Difficulties; she don't pretend to be blameless, but immaculate as to her Virtue; she seems affected with not knowing when to direct to him; Could he be serious in his Invitation to her? on the remotest view of her coming to London, he puts her off; the Cessation of the Correspondence was sudden, & never renewed; if Mr B. wd have let her be quiet she wd never have brought the Suit; she desired only to live with her Children; the Brother don't keep her in his House, she has separate Lodgings, & receives her own Company; the Ct will not take notice of the Motives if true; it was her Interest not to disoblige her Brother; You distribute the Law, when the Facts are laid before you, & the Adultery being proved, you will not regard her Intentions, but pronounce on the Proofs. ...
They plead. that in the Night of Octr 28. 1768. Mr & Mrs B. laid together a great part of the night, & infer, there then was a Condonatio Criminis & that they had Commerce as Man & Wife; this is proved as fiction. Reynolds says, young Skidmore staid in the House the whole night, the Inference is, it was by the Wife's Order — Reynolds only saw her dressed — he accompanyd Mr B. they forced their way into the House, & confined a Person there. on R going in, he talked to her, she declined seeing Mr B. who soon after came in, professed repentance, promised shew'd behave well for the future, if she wd live with him; she refused; he pulled out a Pistol, said she was his Wife, & shd go to London with him,

in the dead of the Night; it had its effect; she fainted, & when she came to herself, desired she might send for a Friend - Young Skidmore was then sent for: does this look like a Condonatio Criminis? Upon the whole I hope you will pronounce for the divorce . . . . . .

Dr Collyer . . . The Doctors would avail themselves of Contradictions; when it is for their advantage, she is the most affectionate & best disposed Woman to her Husband, who wd not suffer her to live with him; to receive another purpose, she is frightened at the thoughts of his coming to her, is not in the least degree inclined to a Reconciliation, has instituted by Suite & her Children, Wm B. wd have heard nothing of this Suite; the Facts of Adultery are laid 8 Years before; Was such a Suite ever before instituted, at such a distance of Time? is there no limitation? In all Cases of Seperation the facts ought to be known, before the Wife renounces her Husband, renounces her Allegiance, otherwise a wide Door wd be open to Iniquity; it is not sufficient for a Wife, when claimed by her Husband, to say, I will not return, I have heard you committed Adultery 7 Years ago; the Adultery ought to be the Cause of her Elopement; On this account I said, we were in the nature of Plts; we were in possession of a Cause for restitution of Conjugal Rites, before she brought this Suite; we have proved a desertion, He lived amicably with his Wife from 1783 to 1789, when his Circumstances growing bad, he found it necessary to remove to London, to find out a new Plan of life, he informed his Wife thereof, she promised to follow him, but did not, on being requested so to do, she refuses, then her fault commenced, she then forsook her Allegiance as a Wife, & thereby lost her Right to the Satisfaction, she wd otherwise have been entitled to for his Malfeasance - It was Grace, Tenderness that prevented Wm B. from taking out a Process agt her for Restitution of Conjugal Rites; Suppose he had instituted such a Cause, She cd not justify herself on a subsequent fact of Adultery charged agt him - In the Duke of Beauforts case, they had separated by Articles, She was sued for Adultery; It insisted, that where a man puts his Wife voluntarily out of his protection, he has no power of converting his own ill doing, to his own purposes; the Ct said it might be considered in other Causes, but there the Ct pronounced agt her - Wm B. has forfeited her Right, be the subsequent Adultery what it will - Can she say I will live with my Husband, or not, as prudential Reasons sway; It is Duty, not prudential Reasons, that must weigh - He may have her Children - NB The Proxy was read to shew it was her voluntary Act - I know it is her Hand, but how does it appear, she is not influenced by Fremoalt, that he is not at the Bottom of the Transaction; She may give Answers & sign a Proxy under Influence; she is a Ward of Ct that S. claims, she is so much in his Custody, that she dare do nothing without him; the Story dont hang well together, that formerly she shd be so willing to be reconciled, & now is so averse; be it so, we are willing to be reconciled, she has withdrawn improperly, we remit the Offence; It is a Rule in Law, that Reconciliations are always favourable; if there is the least Colour for them, the Ct is bound take notice of them - Lady Savil's Case, Sir George Saville instituted a Suite agt her, for Adultery with Mr Levins, who had made Sollicitations to her which she rejected; he persisted, & one night came into y Garden, to give her a Letter at 2 o'clock in the morning, she opened the Sash to give him a Letter to say she wd not comply; he took hold of her hand, got in, & what followed, may be supposed; She told Sir Geo. Savil, who brought an action agt Levins, but lived with his Wife 4 or 5 days; afterwards, he sued his Wife for Adultery, She pleaded a Reconciliation, wch was pronounced for on appeal to the Delegates & confirmed on a Commission of Review, that Sir Geo. Savil had failed in his Proof, but no Sentence was given, there were 14 Commissioners present; 3 Judges differed; It was observed that an Appearance of a Reconciliation was sufficient, where no subsequent fact was proved She shall not take the Benefit of her own wrong doing - The Evidence is not clear as to the fact, Mr Dudlow is contradicted by Broadbridge - Dudlow also says, she was at the Labor, something being wanted, She went down in so to Mrs B's office, where on entering, she saw Miss Smith standing against the Wall, with her Coats up, & Wm B. agt her; but she can't say positively, they are the Persons named in this Cause, So no Identity is proved, wch shd be in criminal matters; after having eloped Mr B has no right to institute this Suite to satisfy her Revenge, nor cd she institute it, if she had not eloped, for facts committed 7 years ago. We hope you will think so, & that she has no right to take Advantage of her own Laches; & that you will sequester her Person for the promotion of Justice

Dr Calvert . . . To blacken Mr B. the Charge sets out, with an account of his leaving her abruptly & destitute; whereas on the contrary his Behavior appears very affectionate, When he informed his Wife of his Circumstances, she agreed to go to London, & sent up her Cloaths, saying she wd follow him, he expected her 3 Months, & finding she wd not come, sent back her Cloaths; So much I thought proper to mention, to clear up the Charge of Desertion; the Adultery comes next in Consideration, in which no half Proofs sufficient; the fact is laid on the 9th of July 1788 with Mary Broadridge, who tho, often sollicited, never consented till that time, You will observe, she is a single Witness, & a particeps Criminis, deposing to her own Turpitude, who therefore is not sufficient to ascertain the fact, unless supported by Circumstances; to support her, they introduce Mrs La Prose, who deposes only that she lay in, & that the Child was said to be got by Wm B. without identifying what Wm B - the Witness saying by the Ct it being the form of Pleading - The facts laid are such, as wd material, some Particulars wd happen, that Broadridge cd not but enumerate; Dudlow deposes to the dying in - Every fact of Adultery stands by itself, where Variations arise in point of Time, the Ct cant determine which is right; Godly says it was in August 89. Calvert . . those Persons, she dont know whether they are the Parties in this Cause; that fearing the Reputation of her House, she gave them warning, but they did not go for 3 Months after; that she visited them at their new Lodgings; wd her Reputation be less affected by visiting; The Wife knowing the Affair, cd her Husband, Peter Godly of the Children; They dont speak positively to y Commission of Adultery, it is clear they did not know the Parties, else if they saw what they say they did, they cd speak to the adultery - Besides Reconciliation is a Bar to a Suit for Adultery, In Lady Savile Case, there was no Sentence given by y Com^rs of Review so the Sentence of y Delegates stood in full force - What is said by Reynolds is sufficient to evince y Reconciliation; he went prepared to repel force by force, Mr B. made no improper use of the Pistol; Wm B. had been wrought upon by her Brother, to be averse to a Reconciliation; She said, she was glad to live with him again, was ready to overlook his fault, She was much obliged to Reynold for bringing about a meeting; she was desir

to send for any Friend; she accordingly sent for Mrs Adamore & Apothecary to take notice of what passed, not to take care of her, but to be present to shew there was no force used; Mrs B's poverty prevented our examining the two Scudamores, they might have examined them, but we not, because they knew their Evidence wd make against them - The Law never presumes adultery because it is a Crime, but when a man & his Wife meet, the Law will presume Coition, because it is a duty, the Ct inclines to keep them joined in matrimony - The Proxy is of no Consequence, we do not say, she is not the nominal Party in the Cause; why was not Mrs B produced before the Ct to speak for herself; she is in their Possession, why was she not examined before you openly & freely - I apprehend, tho, this is an adultery Cause, you will grant the same Monition, as in a Cause for Restitution of Conjugal Rites; I have known a Separation granted on a Suite of Restitution of Conjugal Rites.

Dr Harris. I find it still remains a doubt, who is the Plt in this Cause; Dr Calvert says Fremoult; Dr Collyer Mrs Balderston; we think Mrs B. It is not expected a Person can speak to a precise month, 6 years ago - Santin proves the Identity, so does Jackson; it is then proved by 2 Wits we want no more - Would Articles be good wch covenanted that a Marry Woman might do as they pleased? the Ct wd not regard them, & the Ct of Chancery wd not presume to grant an Injunction - Dr Collyer says, if the Wife desert, the Husband may do as he pleases, he may keep a Seraglio, & the Wife cant sue him for adultery; this is strange Law; I have seen a Covenant agt bringing a Suite of Restitution, yet I question wh: the Ct wd take Notice of it, if pleaded; They plead a Reconciliation, let them shew it since the Suite began: Mr Fremoult did not refuse Mrs B. an Interview with his Wife, he might refuse his Consent to an Interview - Mrs B. might have gone to see his Wife, but if he had tried to take her away by force. Fremoult might have justified obstructing him, his House being his Castle. - I remember a Case, where a noble Lord kept another Lords Wife a Year & half, the Husband came to see her, but was told he shd not take her away by force, & all the great Lawyers being consulted, were of Opinion, he wd have been justified, in obstructing force in his own House, which was his Castle. . . . . .

Dr Lynne. It is said the Ct will be cautious how it dissolves the sacred Bond of Matrimony, when there is the appearance of a Reconciliation - I dont know a Reconciliation with a Woman after Adultery committed, is less acceptable in the Eye of the Law, than of Mankind in general; nothing can be esteemed more abominable, than to entertain her at Bed & Board, after being guilty of a Violation of the Marriage Vow - as to Compensatio & Condonatio Criminis, there is not much to be said for the Purity of that Doctrine; Ly Savils Case induced me to think, the Condonatio Criminis was not as stated, the Sentence not being confirmed by the Com: of Review.

Dr Bettesworth Judge. . . . Here is a Suite for adultery brought by Philadelphia Balderston agt her Husband; it is said not to be her voluntary Act, but spirited up by her Brother, & that she is averse to it; if this Suggestion cd be made out, it wd be a sufficient Bar to going into the Question; the only Circumstance introduced for that purpose, is the Letters, wch are very affectionate, but she did not know of her Husbands Infidelity at that Time - There is proof of a voluntary Consent, from the Proxy, Answers, & swearing the Peace by Mrs B agt her Husband; The Question then comes to the proof of adultery: 2 facts are charged with different Persons; & more than

one fact with the same Person; the first, is with Broadridge the Maid Servant, who depones to the Truth of it, & is supported by La Grope; The other, is a Series of Adultery & Birth of Children; it is said the Time when the facts were committed, shd be considered, that they lived amicably together several Years, that the Personal was but fault & therefore; she cant avail herself of the facts - the Cause does not rest on facts subsequent, but prior to the removal. He leaves Canterbury, the Wife promises to follow him, but does not, why she did not, is not in Evidence; but her Omission will not justify his Adultery; the Doctrine of Dr C. will not hold as to the Reconciliation an injured Party may remit an Offence so as to disable herself from prosecuting it after; but that is not the present Case; the Letters are foreign to this Question; all he says, if proved do not amount to a Reconciliation - If a Husband sues for Adultery & then cohabits, that may be a Bar in Law to the Suite, but his going to Bed, under the present Circumstances wd not have been a Reconciliation; I think the Adultery is sufficiently proved, & pronounce for the Divorce with 80£ Costs. . . .

Prerogative 2 Sessn. . . . Dr Hay Judge.

A Question of Interest.

No 107 — Forrest agt Wilson

Declarations of a Person, who is dead, is the weakest Species of Evidence that can be offered; these are entirely destroyd, where they are weakened by Circumstances - Possessory Right must be defeated by Proof of a Superior Interest - The Person in possession, (as Prob & Admon) need not set forth his own Interest - If he undertakes to do it, he may, tho, that is not the Point in Question, but whether the Deed came from the same Stock, as the Person who claims as a Sister - Where better Evidence can be had, Declarations are not received - Shand v Gardiner in the Delegates; Declarations uncontradicted were held to be Evidence; but they were full, uniform, consistent, & there was no Counterproof - The Point now in question, is whether the Administration shall be revoked; This does not depend on the Admor proving his Interest - I think the Sister has not made out her Interest in such a manner, as to induce me to revoke the Admon; but I dont think the Admor has strengthened his Interest by the Proof offered in support of it -

Prerogative 3 Session. . . . Dr Hay Judge. . . . .

No 108 — Bridges agt Rhodes

Bog — Dr Lynne. — Holman

I have looked into the Evidence, & from the account given by the Witnesses am perfectly satisfied of the fairness of the Transaction; a Difficulty arises on the Instructions; the Deed apparently intended to benefit 3 Persons; Mr Smith wrote down only 1600£ to answer the Annuities, wch Sum, he afterwards found to be insufficient, & told the Deed thereof, who replyd "very well"; from whence Mr Smith inferd the Deed left it to his discretion to make a further provision for the said Annuities, & so tells Harrison the Writer, to note 2000£; on going away Smith asked Deed, if Jackson shd make the Will, he replyd, no, he wd not have him know any thing of the matter; Smith then named Harrison, to which Deed answerd "yes" thus the Sanity is so far proved; Smith owns he added some parts to the Instructions, wch he carried to Harrison the Attorney, who from them & verbal Instructions also, of Smith, made the Will, but did not carry it to the Testator, till the next day, when he was in agonies, almost in extremis, & could not answer any Questions. till the Pain abated: H. asked the Deed, (before he filled up the disposition of the Residue) wishly, "very well" Then H. inserted the words "unto such Persons, as

are next of kin to me, their Heirs, Exrs, & Admrs, to be equally divided between them? It does not appear the Deceds Intentions were towards it, in that manner. 2dly Did the Deced understand the Words mentioned to him by K. The next day Smith asked Deced if he wd have M. fill up the Disposition, he answered "yes." Smith had told the Deced before, that his Relations wd have the whole, if he made no Will. K. swears, he read over the Clause, disposing of the Residue, to the Deced, & asked him if he approved it, thought Deced said "yes," but being thick of hearing, he enquired of Mrs ..... what the Deced said, who replyd, "yes" also - The Interlineations in the Instructions, must be struck out; Upon this Evidence, it is better to establish the Will - Garnet v Sellers There were no Instructions taken from the Mans mouth, the writer said he wd return the next morning, but on going home, wrote them down. Where he went the next day, the man was dead; tho, these Instructions revoked an executed Will, & were not wrote down to him, as soon as the Decd spoke them, or in his presence, or read over to him, yet as they were committed to writing in the Deceds Life time, Dr Bettesworth pronounced in favor of the Instructions, & his Sentence was confirmed by the Delegates, they having first struck out a Trust inserted by the Writer, who accounted for his doing it....

Prerogative
3d Session

Lewis ..... No 109 ..... agt ..... Lewis, in y Goods of Henry Wm Lewis, decd

Alexander ..... Dr Harris ..... Dr Wynne ..... H Stevens Junr

Dr Harris .... Opened his Case, & moved that Mrs Lewis might be condemned in separate Costs, on account of her Omission in the Inventary, wch she confesses in her Answers

Dr Wynne .... This is a Cause of Distribution; Henry Wm Lewis, died intestate, leaving Alice Lewis his Widow, (who took Admon) but no Children, Henry Lewis the father, has sued the Widow & Admr to exhibit an Inventary & Account on Oath & see Portions allotted:
1 Sess 27. The Citation was returnd - 2 S. an Appearance was given for Mrs L. & she was assigned to exhibit an Inventary & Acct on Oath
4 S. Mrs Ls Proctor brought in the Inventary & Account & alledged the Contents to be true, the Allon was admitted, & H Ls Answers decreed, & Mrs L was assigned to bring in her Vouchers - Sept 3. The Vouchers were brought in, M. D. Mrs L. gave his Answers & confessed the Inventary & Acct to be true save that he is informed, there was money in y Deceds House at his death, omitted, & asserted he gave an Allon 3 Sess M.T. The Allon was admitted pleading the abovementioned Information, & Mrs L. in her Answers says there was not above 40 in the House, & that by her Husbands directions, she was obliged to change a 20 Note, to pay Physicians &c that there did not remain more than 10 at his death, including the Note, the whole of wch, or more, was afterwards expended in the Deceds family, therefore she ought not to be charged therewith; that the Plt dined with her every day, for a month after the Deceds death. These Answers are not contradicted — The Intestate was a Freeman of London, & Mrs L claims all Benefit in the distribution of his personal Estate, accruing to her, as a Freeman's Widow

The Charge in the Inventary & Account	847	4	1½
Receipts since	22	2	8½
	869	6	10
amount of the Discharge, as by the Account ..	113		7
Nett distributeable Share	776	3	3

Of This, Mrs L. says, she is entitled to ½ as a Freeman's Widow, under the Custom of London; to half the other Moiety, under

d Wch? Wheeman of London's Widow shall have her Chamber Furniture or what Sum in Lieu thereof?
2 Shall She charge herself with y Sum mentioned?

The Statute of Distributions, & to her Widows Chamber. I move a Distribution accordingly, & that a certain Sum may be allotted the Widow, for her Chamber, & then Portions allotted of the Remainder, according to the Custom of the City, & the Statute of Distributions.

Dr Harris .... The Widow in her Answers, confesses the Omission in the Inventary. If She expects any Items shd be allowed, She shd exhibit y Voucher. It now stands merely on her Assertion, on Oath, but the Oath of an Exor, is not accepted for more than 40 - I cannot find any thing to shew what the Customary Composition is for the Widows Chamber. I dont know what the Dr claims, but I understand, it is 1/30th part of the whole before distribution....

Dr Wynne .... The Oath of the Party must be taken, when it stands uncontradicted; there cant be a certain Sum, for the Furniture of the Widows Chamber, which is in its nature uncertain; therefore we must leave the Allotment to the discretion of the Courts.....

Dr Hay? Judge? .... This Application appears to me, to be very frivolous, ungenerous on the part of the Father, who was entertained by the Widow, a whole Month after her Husbands death; She says there was not above 40l in the House, that her Husband ordered to change a 20l Note, of wch only 10 remained - I dont know, I can say she is not accountable, for what was in her hands at her Husbands death, but de minimis non curat Lex; She must add the 10l to the Inventary, wch she admits to have been in her hands after Husbands death; as to the Costs, they must go out of the Estate; there is no Pretence for any to be given against her. By the Civil Law the Jus Relictæ was favord highly; So with us is the Custom of London; as to the Widows Chamber, the Value must vary according to the Circumstances of the Party - I decree a distribution of 3/4 to the Widow, & her Chamber, the value whereof must be settled by them, for I know of no determination, what that Valuation is; the Widow must charge herself with the 10l omitted in the Inventary....

Dr Andrew in an Opinion says Not is a proper Mean of the Widows Chamber.

No 110

Bog ..... Compton ..... v. ..... Bearcroft. ..... Major

Dr Harris. Wynne, Burrell ..... Dr Calvert.

Dr Harris .... When we began, last Summer a cause of Jactitation, the Court threw out a Hint, that such a manner of proceeding, might possibly not answer the End proposed, we therefore, who are Council for Mrs Compton, after a Consultation, were unanimously of Opinion, to drop the Cause of Jactitation, & to institute a Suit of Nullity of Marriage. A Citation has accordingly been taken out & Served upon Mr Bearcroft & we are now before the Court upon the Admission of the Libel.
Art 1. pleads the Clause of the Act of Parlt 25 Geo 2. declaring all Marriages void, solemnized in any other Place, than a Church or Publick Chapel, unless by a special Licence, or solemnized without publication of Banns, or Licence.
Art 2. That Maria Catherine Compton was a Minor on y 13th of March 1760, aged 19 or thereabouts, & under 21, & was born at Hartpury in Gloucestershire about March 1740.
Art 3. An Extract from the Register of Baptisms of y Parish of Hartpury &c - & the Identity of M. C. Compton & Sir Wm Compton her Father.
Art 4. Sir Wm Comptons death in 1754, & his Appointment by Will of Dame Sarah Compton, Dr Dalby, & Jn Reeves Esq: Exors & Guardians of his Children - That Dame Sarah alone proved the Will in 1759
Art 5. An Exhibit No 2. containing a true Copy of a Clause of Sir Wm Comptons last Will (remaining in y Registry of y Prerogative Ct) under the Hand of y Deputy Registrar - also the Identity of Sir Wm Compton..

M. where Banns have been usually published.

& whether the Libel shall be admitted, as laid.

Art: 6. That the Marriage was had after March. 25. 1758. viz. March 13. 1760 at the house of Thos Huddleston, Cook & Confectioner at Dumfries by Richd Jameson, (pretending himself, Minister of the English Chapel at Dumfries,) without Banns or Licence. That M.C. Compton was then of Hartpury in ye Diocese of Gloucester, & Edw: Bearcroft, of Droitwich, in the Diocese of Worcester. Neither of them ever resident in North Brittain. That M.C. Compton went from Mrs Dalbys (one of the Testamentary Guardians) to her Brother Sir Wm Compton's house who dyeing, when she was there, she went to her Mothers at Hartpury, & from thence, (without her Consent or ye Consent of either of ye Guardians) with Edw: Bearcroft about March. 6. 1760, to be married at Dumfries. That they were married there March. 13. 1760. merely to evade the Laws of this Realm, & that they returnd from Dumfries to Penrith in Cumberland, the very day the Marriage was performed, & were never commorant in any part of North Brittain, but during their Journey, & for the purpose of the aforesaid Marriage. That M.C. Compton was not a Widow at the Time the marriage was performed, but a Spinster & a Minor, about 19 & under 21. That the said marriage was performd without the Consent of the Testamentary Guardians of M.C. Compton, appointed by Sir Wm Compton's Will.

Art. 7. In supply of Proof, Exhibit A, brought in by Bearcroft in a former Cause, & now remaining in the Registry of this Ct, containing Jamesons Certificate of the Marriage, that it is his hand writing — The Identity of Bearcroft & M.C. Compton attested by 2 Ws

Art. 8. 9. That Bearcroft is subject to the Jurisdiction of the Ct of Arches, by virtue of Letters of Request from the Chancellor of Worcester, in whose Diocese Mr Bearcroft resides.....

Dr Calvert... Mrs B. has confessd herself by several Instruments to be Mr Bs Wife, has lived with him 6 Years as such. & now by some bad Advice, is desirous of annulling the marriage. & offers this Libel for that purpose. the 5 Art. whereof recites part of an Act of Parl: "prohibiting marriage to be celebrated elsewhere than in a Church or Chapel." I dont object to this Article, as improper, in pleading the Law, but as pleading it partially. Would they be suffered to plead part of a Sentence, or even a whole Sentence by itself, where there is another, with which it is connected? if not, by a parity of Reason, this Article must be reformed, there being a Proviso in the Act "That nothing in this Act contained shall extend to that part of Great Brittain, called Scotland; The Allon then goes on, & pleads a Marriage in Scotland; this is not the proper method, for the Case will be found not to agree with the Act. I admit, the Plea as laid, does connect with the Law, because a British Act since the Union extends to Scotland, unless excepted; but this Case, is not adapted to the Law quoted: I suppose it will be said, it is unnecessary for them to plead more of the Law than makes for their purpose, & that we may plead; but the Court will say, you must plead the whole; their Doctrine might be true, if they pleaded a Fact, for then we shd give in a contradictory Plea. Art. 6. It is irrelevant, wh? Mr B, Mrs C. were resident in Scotland; no Law enjoins it; but if it was necessary, it can't be proved, being laid in general Terms: & it is a Rule in pleading, that nothing shd be stated so, as not to be capable of being proved. Mr Bearcroft, by his Answer can speak to his own residence, but not for Mrs Comptons; — How are "Mrs C.s Visits to Sir Wm C. & her Mother" relevant? That they went to Scotland merely to evade the Law", is incapable of Proof; as it is a Criminal Cause, my Client is not bound to answer; if so, it cant be proved by Witnesses. who can only speak to their Opinion of Mr Bs Intention, but their Opinion is not Evidence — "That they were never commorant in North Brittain" "that Mrs C. was about 19 & under 21" is Repetition. They must not plead the same matter, twice over.

Art: 7. They plead "that the Marriage is void by Law" Obj. What Law do they mean? the Law of Scotland? if so, they shd plead the Law of Scotland — I must own myself surprized to find they plead, Jamesons Certificate, which was the only Object of their Opposition to our Plea in a former Cause, & which they strenuously insisted on, & which was not received by them, because they plead a Clandestine, & we pleaded a Solemn Marriage; upon the whole, I shall submit it to you, wh? the Libel can be admitted, as laid, without specifying what the Law of Scotland is; the Ct will think a foreign Marriage being the Point in Contest, ought to be weighed by the foreign Laws.

Dr Harris.... I dont know the reasons of the ..... nor am I concernd to know the Motive — we might have pleaded the Statute generally, without any Recital & we need not have mentioned it — In Eq the Causes the mere mentioning the Statute of Edw. 6. is sufficient — Exception is taken to our saying they were Persons domiciled here, & not commorant in Scotland; the Dr: would not have us plead, they were not resident in Scotland; the whole will turn on this point, that their going was merely to evade the Act, we can shew from the Circumstances pleaded, they went for no other End — The Repetitions are mere minutiæ we introduce the Certificate, to shew that Jameson calls himself Minister of the Chapel at Dumfries; we plead it not with the view of proving the Clandestine Marriage; the Ct in ye former Cause admitted it, as they desired, to be brought agt Mr Jameson, if he shd deny the Transaction; we offer it to prove ye description given of him, in our Allegation; we are not to plead for them, if there is any thing in the Law of Scotland, wch they think beneficial to them, it is their Business to plead it & we rely on Stat: 26 Geo. 2. & have nothing to do with the Law of Scotland. Every one knows best how to tell his own Story....

Dr Wynne.... Our Motives is immaterial, we state the Law, & claim the Benefit of it. It is a Syllogism: the Major Proposition, is the Law; the Minor, are the Circumstances, & the Opinion of the Ct is the Consequence; it is said we are not to plead half a Sentence; be it so; the Proviso is as remote as it can be from the Clause pleaded — to 6 Art. says the Dr, by what Law must they be resident? The Qu: is, wh? Persons taking a Trip to Scotland to be married, are to take the Benefit of the Scottish Law, or to be considered, as if not out of England; the Object was, to bring the Fact as clearly before the Court as possibly; Mrs B. can answer to his own Residence, & to his belief of hers, because she resided in his neighbourhood. We have nothing to do with the Law of Scotland; the Mode of these 2 Suits are different, tho, the Object is the same, we wish to be very particular as to the Facts, therefore we state their going into a Pastry Cooks Shop, & reading over the Ceremony there; we offer the Certificate not as a Record to effectuate the marriage, but in order to shew what kind of a Man, this was, who celebrated it....

Dr Burnett... The Dr objects to our pleading the Law partially, & omitting the Proviso, wch is so material to the Point in issue, & hinted it was like pleading part of a Sentence, or a whole Sentence, by itself when another followd, connected therewith, & necessary to elucidate the Question: I must observe, the Act, is a Public Statute, & therefore we were not obliged to a Recital; but in the Libel, we have pleaded a part, & referrd to the Act itself for the rest, the Instance of ye half Sentence, &c. has no similitude to the present plea, in wch a whole Substantive Sentence, is specified; nor has the paragraph mentioned, any immediate connection with the other, the Proviso being at the conclusion, the Paragraph pleaded, at the Beginning of the Statute 26 Geo. 2.

If the Dr thinks the Proviso material to his Client, let him plead it, & shew, he is not within the meaning & Intention of the Statute — Dr Co. Objects to the 6th Art: the Incapability of Proof, as to the Residence in Scotland; it has been before noted that Mrs B. can answer for himself, & Witnesses may be examined concerning the Residence of Mrs C. The Dr wonders at our pleading Mrs C's Visits to her Brother, Mother, & cannot perceive their Relevancy. I answer, it is pleaded to account for the Time from her leaving Mr Dalby's to her setting out for Scotland; With respect to the Laws of that Country, we have not pleaded it, because we have nothing to do with it, our Charge is the Breach of an English Statute, & if the Dr thinks the Scottish Law will exculpate & bear him harmless, he is at Liberty to plead it in his defence. Upon the whole, I hope you will admit the Libel as it is laid —

Dr Stay... } Judge... }

The Question now before the Court, is the Admission of the Libel; & a most important Question it is; I own, I am not sorry it is brought; for I think it of the highest Importance to the Nation, that it should receive a judicial determination. The Admissibility of this Libel depends on the operation of the Law, with respect to the Validity of the Marriage in Scotland, by reason of 26 Geo. 2 — In the former Cause a Libel of Jactitation was given; the Def: offered a Justificatory Plea; Objection was taken to the Certificate, that it wd not be Evidence, as Jameson if living, must be examined; I thought it might be of Use, as it was attested, if Jameson died before Examination, or denied the Act, tho, in itself, it was no proof of the Marriage, the Man being living, & therefore I received it. If there was a Marriage de facto, clearly proved, how could the Court say, they were free from all matrimonial Contract whatsoever, & forbid him to jactitate? if there was doubt whether the marriage was valid, I shd not have given Sentence agt the Defendant. They have now brought a Cause of Nullity; the Parties not objecting, the Ct, I understand, is bound to receive the Letters of Request; it was so determined in Butlers Case. The Facts laid in this Libel, are, that Mrs M.C. Compton, was baptized in 1740, married March 13. 1760, It states her to be under 21, her Father dead, & Testamentary Guardians appointed by him, who had not consented to the Marriage; that they went to Scotland, & were married at Ruddleston's House at Dumfries — Answers will be proof in all Cases, the Relations could speak to the Alibi, so the Residence is capable of Proof. But the Question is, wh: taking the Fact in all its parts, on the Plea, it is void by the Statute? I am clear the Marriage is not void under the Act, 26 Geo. 2. wch was made to prevent secret & Clandestine Marriages, Fleet Marriages, wch it was impossible to prove, so that the Parties were left in the greatest Incertainty, & the Legitimacy of their Issue was frequently called in Question; to prevent this Abuse, the Legislature interposed, & a restraining Law was made, to regulate Marriage, & annull those wch were not solemnized in conformity to y directions there laid down; all Marriages were declared Clandestine wch were not had by Banns or Licence — a restraining Law shd not be carried beyond the Letter — The Law has made a Proviso, that it shall not extend to Scotland, or Foreign Countries. Suppose I said, that the Subjects of England going beyond Sea to evade the Law, are liable to the same penalties, as if the Marriage was solemnized here against the Law; should I not exceed the Intention of the Legislature, as well as the Letter of the Law? Most certainly: tho, it wd be an Evasion of

That is not the [illegible]

of the Statute, it wd not be a Consequence, that the Act was null void. I will put a case, as evasive, as any that can be stated; Suppose the Contracting parties go into any large parish, remote from their Parents, reside there 4 Weeks, procure the Banns to be published, & the Marriage solemnized; this is a clear Evasion of the Law, which intends that all Minors shd be abridged from matrimony, who have not their Parents Consent, or that of their Guardians; yet this Evasion dont infer the Consequence; the Law does not say it shall not extend to Persons resident in Scotland, but, Generally, to Scotland. You must bring the Case within the Law to shew it is not valid; I give my Opinion now, that this Case may come immediately before the Delegates; I reject the Allon, & dismiss Majors Client, without Costs. Appeal.

13. When y Judge began to enter on the Law, the Plts Council being then unprepared to argue, pray'd the Ct to name a day to hear y Law argued. D Stay at first was inclined to grant it, but afterwards refused to appoint a day for that purpose, & gave his Judgement without hearing the Council on either Side upon the Law tho the Admission of the Libel was the only Point in Question at that time.

Prerogative Ass. Hil. 8.

N° III

Alexander — Pyefinch — V. — Palmore — Stevens

Dr Wynne — Dr Calvert

Dr Calvert.... I am Council for ..... Palmore Exr in the Will of Wm Pyefinch dcd, dated 13 August 1760. it was proved in the Ct of Hereford, & afterwards called in ct the Suit of Jn Pyefinch, the Brother, alledging himself sole Exor in a Will dated 8 July 1762. he has cited my Client to bring the Probate obtained by her & to shew Cause why it shd not be revoked for want of Jurisdiction, & why Probate of a Paper purporting to be the Substance of the last Will of W.P. shd not be granted to him, till an authentic Copy thereof, or the original Will shd be brought in — Oct 2 Stevens appeared for Palmore under Protestation; alledging that Jn Pyefinch had accepted a legacy of 10£ under the Will proved at Hereford; & that She was cited by a wrong name, viz Palmore instead of Palmer — Alexander denied there had been a Sentence; Stevens exhibited a Copy thereof (after Sentence for the Legacy by the Court) & the Order of Jn Pyefinch 20 Oct 1763 to pay the Legacy under that Will — Alexander contests the Subscription of the Exhibits, & alledges the latter Will did not come to his Knowledge before the Sentence of Hereford; this he supports by an Affidt of John Pyefinch; the Substance whereof was, that his Order was dated 29 Oct 1763, & that he was informed of the latter Will by Mr Jones an Attorney about June 1764

Dr Calvert — There is no doubt, but that if Probate be obtained from a Ct not having Jurisdiction, it wd be revoked, let the Effect of the Jurisdiction be what it will — But a Party may preclude himself by appearing absolutely to the Jurisdiction — This a common Rule to appear to save the Contumacy of the Party cited, but then such Appearance is under Protest; here Mr Pyefinch is the Exor, he has acted under the Will, & shall not harass the Def: after she has undergone the Trouble of a Suit; in Rosenberg & Meyer, it was said that having appeared before the Ct, he had submitted to the Jurisdiction, & cd not after object, because he was a Foreigner; therefore it is not to be called in question for a defect in the Jurisdiction; he next prays Probate of a Paper, upon the face of which he is not entitled, it not being even a Copy; can he call ones before he has established his own Will; then indeed he might pray our Probate to be revoked on account of a posterior Will — There must likewise be Certainty in the Person calling, & called — in the formal Courts of Law, the Addition is necessary — See the Case of Rees, Rowlands fol. 7 of this Book, & there cited the Cases of Clarke & Burwood 1719. Kenrick & Lyne 1732. Johnson, Richardson 1733. The Dr will answer, that it is immaterial, if the Party is identified; But I cd not take out a Sequestration agt a Minister, as Rector of St Brides, in a Cause of Legacy, without

2. Shall Def: be obliged to appear absolutely on Suit of Mismomer — 2. Can Plt bring his Suit agt y Exor till he has received a Legacy under it? — 2 Must he not first refund y Legacy so received? — — —

specifying the Name; Suppose the Party did not appear, & was to be excommunicated, wch would be criminous, could that be done by a wrong name? the Paper mentiond, has very little Resemblance of a Will; the Favor of the Ct; as far as Law & Practice will authorize, must be with us; Is it reasonable he shd possess himself of the money, & then fight us with it you will not surely allow him to contest this Will, till he has refunded the Legacy he received under it....

Dr Wynne... all that the Party desires, is to have an Opportunity of laying the Paper before the Ct; there are Instances of Papers revoking a Will, the Contents of the Original being ascertained; the Ct will not trouble itself about the Legacy, we only desire the Probate to be brought in, not to be revoked, till our Will is proved; then he must refund; with respect to the misnomer. 2 of the Cases cited were criminal Cases, Clerk lays it down, that if a Party is excommunicated

the original Citer may proceed in the Testamentary Suite at the same time, the Ct does not give leave to stop on account of Minutia

Dr Hay Judge... I find Probate has been taken in Hereford; the Citation is to shew Cause why it shd not be revoked for want of Jurisdiction — The Election would not give Jurisdiction — in all Cases where Probate has been granted, any Person may call it in, as void in itself because there were Bona notabilia; he might have done that if he had gone no further; but he prays Probate of another Paper — as to the Jurisdiction; if there had not been Bona notabilia, the Citation to revoke, shd have been in the Court of Hereford — I dont think the Proctor ought not to hold; 'tis tender in calling on Parties by a wrong name — the same Precision is not necessary in the Prerogative, as in other Courts for Civil Causes, ubi constat de persona, Error in nomine non valet — What should I do if the Party was to be excommunicated Dr Wynne says, Clarke lays it down, that the Ct shall go on; I dont see how that could be; wherever you have received any thing, it is clear, you must bring it in, before you can controvert the Will; Pyefinch must suffer for the Trouble he has given the Widow; I decree Costs to Stevens Client on account of the misnomer, he must appear absolutely on Peremptory Day 18 March —

Sid. Sir G Lee's opinion in case of Amy Exr Comm Powell 1758.

Prerogative Byed Day

No 112

Stevens — Cauwood & others v Cauwood & Peters — Altham

Collins

Dr Collier — Dr Wynne — Dr Harris

2: Wh. a nude Exr who has given in an Inventory, may be dismissed, become a Witness?

Dr Collier... John Cauwood is the Deed; he made his Will 27 August 1766, thereof appointed Jane Cauwood, & Thos Badger Exors; the other Parties are Sarah Cauwood & ..... Peters Daughters of the Deed; Stevens exhibits a Proxy from Badger, alledges he has renounced the Execution, & prays he may be dismissed; Altham alledges that Badger may afterwards retract his Renunciation, & that if he is not held, no Sentence given in this Cause, will bind him, & he may again propound the Will now contested, & put his Client to fresh Expence — Collins alledges, Badger will be a material Witness, therefore prays him to be dismissed, adding that Badger has not only declared he renounced, but also that he wd not propound, & therefore the Ct will not allow him hereafter to propound the same Beaumont v Sharp It was agreed, that the Rule of Once a Party, & always a Party, was absurd — Winchester v Gough, Sir Ed: Simpson, said he wd dismiss the Party, but there no Inventory

which I take), has been given in the present Case; there is no doubt, that a common renouncing Exor may retract; but whether an Exor judicially renouncing may retract, is another Question; there is a considerable distinction between a party renouncing in common form & in this manner; besides if Exor alTham the obtain, & set aside the Will, you wd grant admon, & then the Exor wd be precluded from propounding the Will, it is irrevocable, unless the Ct is satisfied the admon is unduly obtained; in this Will, Badger is a nude Exor; the Residue is given away, Brown Heath v Pocklington 1719/20 Dutton the Writer was Exor, he renounced, & offered himself as a Witness in the Cause, 6 April 1720 the Judge admitted him to be a Witness; this shews, an Exor, who is not interested may be a Witness; according to the Practice then in use, he was not dismissed from being a Party, but allowed to be a Witness

Dr Harris... Mr Badgers Petition consists of 3 parts; that he may renounce, be dismissed, & examined as a Witness; the 3 Exors have all joined in a Proxy, authorizing Collins to propound the Will; the Exor has done such an Act, as will tye him down to take Probate of the Will, if it is pronounced for, & having once administred, cannot refuse, his Authority being derived from the Will; Whatever an Exor does with respect to the Effects of the Deed, points out his Intention as by saying, I will propound the Will, he points out to the Creditors, to whom they shd apply; you wont suffer him to go backward & forward; but suppose the Renunciation ct be pronounced for, he may prove to be interested; before Probate passes, he may retract his Renunciation, & take Probate jointly with the other Exors; even a nude Exor has a Bias, tho, it is not so strong; you will suffer none to be Witnesses, who can have any possible Bias; I am afraid you cant prevent his Retractation, the Man dont say he renounces for ever; if he may act as Exor, he is an interested Witness; I dont know whether the Ct can say he shall not propound; but if it did, the Affair might go by Appeal to the Delegates, be examined over again; is there any Instance of dismissing a Plt or Exor? there are many Instances in Chancery of dismissing Defts because they are involuntary Parties; In the Case of Beaumont v Sharp, the Party dismissed, was in a Liability as Deft: No reason is assigned to shew him a necessary Witness, we have only their bare Suggestion of his being material; is he a subscribing Witness? Have they not two others? When Partys are desired to be dismissed the Ct ought to have full Satisfaction of the necessity of their Evidence; I know Cases where Exors applying to be dismissed, have been refused; In the Case of Sabell v Newby 1740. Sir Geo Lee cited the Cases of South v Hardy — Hardy v Wise — Hudson v Short & where Exors were denied their dismission — In Beaumont v Sharp there was a particular allegation, stating the necessity of the Witness, there being no other; here there are two Witnesses.

Dr Wynne — The first Objection taken by Dr Harris, is to the Exor having done such an Act, by executing a Proxy, as to disable him from renouncing, says the Dr — a slight Act will bind the Exor, but that Act must respect the Effects of the Deed; the Law means to prevent an Exor getting the Effects into his Hands, so as to embezzle them; the Execution of the Proxy is a mere formality — it is as much in Altham's power to bind the party after signing a Proxy & releasing by desire, as if he had said originally, he would not act in it: what sort of Plaintiff can a nude Exor be? Dr H. calls it a dangerous Precedent, a wanton Application; how can we satisfy the Ct of the Importance of the Depons, till they are published; I see no reason why a Plt shd not be released as well as a Deft

where their Interests are mutual; the reason a Plt is not admitted to renounce in Chancery, is, because he must pay Costs, the same reason does not hold with respect to Defendants

Judge. Dr. Hay... **Boaumont & Sharp** a Caveat had been entered, there were 2 Sisters one of whom Eliz: Bowmont applied for the Admon, considering an Imperfect unexecuted Paper, as no Will; she was accordingly sworn Admin: the Sister entered a Caveat against the Admon passing the Seal; the Question was who shd have the Admon pendente lite, wm the Nephew of the Decd, intervened, & propounded the 2d Paper; the Sister who had been sworn Admin: desired to be dismissd in order to be examined as a Witness in support of the Will, in which she was a Coexecutor with her Brother; several Objections were taken to her Dismission; it was said, once a Party, & always a Party; it went by Appeal to the Delegates, who on a Special Allegation of 20 Articles, were clearly of Opinion, she was a necessary Witness, there being no other Wit but herself, & that a voluntary Party, tho sworn Admin: might be dismissd, where it was necessary, in order to come at Evidence to support a Will — The difficulty with me, is, whether this Person is sufficiently alledged to be a material Witness, having given one Proxy to propound the Will, & then another to renounce the Execution; the second is certainly revocatory; suppose, he did not chuse to go on, without being a Witness, he might desist & let Admon pass; he may be cited, & proceeded agt in absentiam; what would be the Consequence, if an Extor cd in no case renounce; why no Body wd be concerned; the Testator frequently makes the Writer Extor; the Cases adjudged weigh greatly with me — Testators frequently give Writers Instructions & make them Extors; in such Cases, how cd the Wills be proved unless such Extors were allowed to be dismissd, in order to become Witnesses. I wonder the Question shd be so much agitated; the Points in **Bowmont & Sharp** go a great way with me in determining this Question, as it is the last Case adjudged by the Delegates who dismissd a voluntary Party; the Common Law Doctrine differs from that of the Sp: Ct. **Whitton v Layton** The Kings Bench had no doubt, the Will being established, that the Extor might retract his Renunciation & act as Extor — There are Cases where Extors cant resume, as after Admon is passed, during the lives of the Co Extors no power being reserved — But after their deaths the Privity being destroyd, such Extor shall be preferrd before any other Persons; I dont think Mr Badger has acted as Extor in the Eye of the Law, which has respect to the intermeddling with the Effects, by paying Debts or receiving Credits, (such An Extor having done cd not afterwards decline acting — Considering the solemn Renunciation now made in Acts of Ct in order to his becoming a Witness, I think he will not be able to come & take a Probate if the Will is established; & if the Will is pronounced agt, he cannot set it up again, having in Acts of Ct declared he wd have nothing to do with it. I am pursueing the Doctrine in Heath & Pocklington which is the last determination, & think Mr Badger shd be dismissd for the Purpose prayd —

Dr C

№113

Goodwin — Ly Mary Herbert & Pritchard v Ld Gage. — Grene

Drs Harris & Wynne — Drs Calvert & Burrell

Dr Calvert.... The Prayer is that the 2 Extracts referred to in the Affidavit may be brought in (See Hull v Supe: fol. 192.) The Assignation is for every Paper having the appearance of a Testamentary Paper, to be brought in or accounted for; Mr Pritchard says he has received these from Paris, they are then in his Power; if they are alledged

Q. Shall a Ct of a Will receive from abroad all Judged inaccurate & brought as a Script or Scroll if they being under an Assignation to bring in all Scripts & Scrolls

to be immaterial, that is not now the Point in question; they are not to judge of that; As they are mentioned in the Will, tho they shd be said not to be testamentary, yet they must be so, as they refer to the Will

Dr Burrell.. The Hon: Jos: Gage is the Decd, he died at Paris, as is pretended, made his Will, & thereof appointed Ly Mary Herbert & Mr Pritchard. Extors, a Caveat has been entered in behalf of Ld Gage the Nephew, who was warned by Goodwin for the Extors, who admit my Clients Intrest, they stand assigned to bring in all Scripts & Scrolls on Oath, & instead of complying with this Order, an Affidavit is offerd setting forth that the Will is in the Ct of the Chatelet at Paris, that Mr P. has received Copys from his Correspondent, but they differing in words & Substance from each other, he waits for an authentic Copy, & declines bringing in those already received; it appears to me a little extraordinary, that in a Transaction of such Importance the Correspondent shd be so negligent as to send inaccurate Copies, I shd naturally conclude the Inaccuracies are in the Original & not the Transcript; but however that may prove, Mr P. admitting the Copies to be in his Possession, is bound to produce them, that the Court may be able to form its own Judgement;

Dr Harris... Can any thing be testamentary, which is subsequent to the death of the Testator; it must have been wrote by the Decd; an Authentic Copy is now given in, why do they ask these Copies of which no use can be made. *NB. an Authentic Copy was brought in when the Question was going to be argued —*

Judge Dr Hay..... The meaning of Scripts & Scrolls, is, that the Party may have every light in order that he may be able to determine whether he will oppose the Will or no; All Duplicates & Cancelled Wills, every Paper of a Testamentary kind shd be brought in; Mr Pritchard says he has received Extracts from his Correspondent at Paris, whether they are authenticated or not does not appear; the original cant be produced, the Copy therefore can only be propounded; Since P. has thought fit to give an account of these Papers, there can be no harm in bringing them in; the Use will appear hereafter —

№114

Official of Surry v. 2d Sess... — Mapletoft & others, agt the Rector, Ch: Wdns & Parishioners of Chertsey

Grene — Dr Wynn & Bever — Drs Calvert & Burrell — Collins

Q. Shall the Suit abate by the death of one of the Plts? & Is Grenes Appearance for an Extor proper?

Dr Calvert The Intimation was for 4 Pews, to be divided between, Mapletoft, Dundas, Pembroke, & Blake, by Lot, & numbered 1. 2. 3. 4. for them & their Familys, as long as they shd be resident in the parish: Pembroke is dead, therefore, if the Suit does not abate, we are entitled to 3 Court Days to prove our Allon: Grene Appears for Pembrokes Extors, & prays we may be assigned to prove our Allon; we allege, that the Decease of the Party obstructs the Assignation taking place, & that the Suit abates, but if not that we are entitled to 3 Ct Days to prove the Contents of the Allon & Exhibit

Judge Dr Harris My doubt is as to the Executor, from the particular nature of the Suit; How can I grant to the Extor the Intimation for 4 Persons.

Dr Wynne Suppose no Appearance for the Extors, would that have made any Difference?

Dr Calvert They dont shew he had any Wife, it appears he had only a Child; Can the faculty be granted to three?

Judge Grenes Party not having brought a proper Representative, I must reject his Petition, with Costs of the Motion.....

Peculiars
L. T. 3 Sess.

No 115

Peers & ors the Vicar, Church Wardens & Parishioners of Croydon

Jenner — Drs Clark & Calvert — Drs Harris & Wynne — Adderley

Jenner appeared & prayd a Citation agt the Vicar Church wardens, & Parishioners of Croydon, in special, & all others in general, to shew cause why a faculty shd not be decreed to Mr Peers of a Pew in Croydon Church, as long as he & his family shd continue Inhabitants of the said parish?

Mr Peers married the daughter of Mr Wm Simmonds, who had built a Pew with the Consent of the Church wardens in 1722 (7 feet 6 Inches long — 5 Feet, 11 Inches Broad) for himself, his Wife & Family: Jenner alledged, he enjoyd it till his death in 1753, exclusive of all others; that the Pew came to Mr Peers in right of his Wife, & had ever since been quietly enjoyd by him, exclusive of others — Mr Adderley appeard for the 2 Parishioners, Strudwick & Washford, & declared he opposed the Faculty; The Allon sets forth, that the Parish is large, that many have quitted the Church for want of room, & that others were greatly straitened, that the number of Square superficial feet in the Church were, 3015; that the Area of the Pew was 44 feet which is 1/68 part of the whole number afd; that Mr Peers Mansion House & Garden are rated only at 20£ p An: & that if every Person who paid that Sum shd ask a faculty, it would exclude the major part of the Parish: ioners; we contradict Mr Symmonds Enjoying this Pew till his death, exclusive of others, & we say others sat therein; — That the Pew was not built on a Vacant Space, but when other Pews had been built, sufficient to contain 12 Persons; that Mr Peers has only 1 Son, 1 daughter, who do not live with him — That Walter Harris Esq was placed by the Church wardens, & sat in the Pew with Mr Simmonds, & that Tho: Wilkinson was also placed & sat there; therefore the facts alledged in the Citation & Intimation are not true;

Dr Nay. Judge — If you had alledged an Order of Vestry, to ground your application for a faculty, you might introduce it, but it must be pleaded; it is not Evidence to be admitted agt the Admissibility of this Plea.

a shall if Order of Vestry be read not being pleaded

Dr Clarke — I am Council for Richd Peers Esq Alderman of London, who married the Dr of Mr Simmonds, who was possessed of a Mansion House, Gardens, & Estate in the pish of Croyden; he erected the Pew in question at his own Charge, & died in 1753, leaving the Estate to his daughter; in whose right, Mr Peers has ever since enjoyd & repaired the same; If I may mention the Order of Vestry, tho, it is not read, I will observe that on Jan: 18. 1767, a Notice was published in the Church for the Vestry to meet, to consider about applying for a Faculty to be granted to Mr Peers, for the Pew in question, so long as he & his family shd reside in the parish; the Vicar Ch: Wns, & Majority of Parishrs assembled in Vestry, subscribed their assent, Mr Peers immediately applied for ye faculty, & on the Return of the Citation an Appearance was given for Strudwick & Washford, who now offer an Allon, which we oppose, not only on its general irrelevancy, but on it being so particularly, under the Circumstances of this Case, Our application is not to obtain a new Right, but a Faculty to confirm an old one; if we have any, it must be an inbin right, or none at all; if the Church wardens could introduce one, they might as well introduce a Dozen, if they

say the Right is not entire, they must shew the Limitation. the Facts stated shew a long possession in the Family, & the Pew maintained in the best manner originally by erecting & repairing; every Circumstance is favorable; the possession was acquired by a proper Authority, that of the Church wardens; the frequent Sanction the Court has given to their placing, is a strong Argument of the propriety; whether that Consent is sufficient to give a prescriptive right, or not, it is sufficient to obtain a faculty; if Mr Symmonds had applied in 1722 he'd have had one of course; the Presumption is always in favor of the Ch: Wns, at such a distance of time the Ct will presume they did right at first in giving leave; It is not merely ex gratia, but ex debito Justitiæ, from the Presumption that the Ch: Wns are the proper Persons to consent; If no Objection arises on the Citation, the Licence will be granted of course; they should have specified whether Art 2 there were Galleries or not, otherwise the Article of the Area is fallacious, I am informd there are 3 Galleries — They shd Arts. have named the Persons who left the Church for want of Art 3 Room — That Mr Peers is rated only at 20£ p An: for his Mansion House & Garden, is fallacious, for he may pay more for other Lands or Houses; nor w'd the Consequence follow, if it did, all Persons paying 20£ w'd be entitled to a Pew of the same di- =mension; the Alehousekeeper & the Alderman of London w'd be on the same Level, than which nothing can be more absurd — It is said the Pew will hold 12 Persons, & Mr Peers 4 Family consists only of two; tho, that may be true now, it may increase; — Mr Harris is said to have been placed there, 5 but it is not said, he was a Parishioner; he in truth sat there at Mr Simmonds's Invitation; it is alledged, many other Persons applyd for Seats, who? were they Parishioners? that shd be ascertained —

Dr Calvert — If the Application, on our part, appears reasonable, & the Opposition frivolous, & vexatious, the Ct will stop the Suit by rejecting the Allon; the only Indulgence we ask, is to continue Mr Peers where he is already seated, his Prede- =cessor built the Pew in 1722, since which there has been an uninterrupted possession for 45 Years, which is beyond the time allowed by the Canon Law to establish a Prescription tho, that is not an absolute Bar to the Suit, if it was, this Application w'd be unnecessary — the Ct will consider how the possession was obtained; I know the disposition of Seats by Church wardens is not final, it is under the direction of the Ordinary, who will suppose the Ch: Wns right, & not impro- =per, unless strong reasons are offered to induce it; there is no doubt but that every Parishioner may oppose; the Ch: Wns may oppose in the name of the whole Parish; Strudwick & Washinton are 2 Private Persons, they do not ap- =pear to be of any rank: if they are seated, they have no right to oppose, as this is not a faculty for an Alteration of Structure; after so long a Possession, legally obtained, thro' the proper Officers, you surely will not admit trifling facts. Croydon is in Art 5. stiled a large, expensive & populous Parish, so it has been 45 Years, yet Simmonds & Peers have enjoyed their Pew the whole time; but the Church is said, not to be large enough to hold all the Parishioners & Inhabitants, I believe no Church is large enough for all the Parishioners, they should have added "all who usually come"; Art: 2. states the superficial Feet in the Church, & that Pew enjoys 1/68 part of the whole; are the Galleries & Chancel included in this admeasurement? 1/68

Part is not too much for a Person of Mr Peers Rank: They shd specify in the 3d Art: wh: he is rated only for his House
the 4th States that the Pew was not built on a vacant Place;
it is sufficient, the Pew was altered by the Approbation of the
Parish, you will not now go into an Examination of there
having been many, on the Scite of this Pew. 5 Art: The Placeing
Harris, is offered as a Sort of Answer to our Intimation; they
shd state when & by whom he was placed there; but if proved
one Instance wd not be sufficient to oust us of a Possession
we have had so long.

Dr Harris — My Clients Messrs Stredwick & Washford, must be taken on the
Plea to be Parishioners; but the Intimation is agt all
Persons whatsoever; the Parish is much obliged to Persons
who will stand forth in defence of their Rights; It may be
done by an Act of Vestry, but they shd have exhibited it, they
have not laid it before the Ct in their Act; they were
ashamed to do it: the Order of Vestry appears to have been ob-
tained only by a Majority of 2. wch looks as if something
was wrong; If Simmonds himself was to apply, he would
appear unfavorably, to have intruded on the power of
the Ordinary; for no Church warden can give leave to
make a new Erection — Peers has not even a possessory
Right, having never been placed there; he founds his Reckoni-
-ons on having married Simmonds daur, but Simmonds him-
-self, as placed by the Ch: Wns, cd only sit there, & not convey a
Right to another — You grant Faculties, & sometimes take
them away, viz. if the Grantee is lapsus facultatibus, the
Witnesses will say who quitted the Church; General pleading
which dont lead Witnesses, is the fairest way — It does not
appear we have omitted the Gallerys: we have undertaken
to shew Mr Peers has 68. it rests with them to shew he is a
Person of distinction; with respect to the Rate, P. must shew
what other Houses he has, by pleading them — A Repairing will
give a Right, where there is time immemorial; but you know
the Commencement of Mr Peers possession. —

Dr Wynn — I take this to be a Res Integra, tho, the Gentlemen have
urged it, as if the Application was mere matter of form,
tho, one indeed, does acknowledge it, to be a small favor.
The meanest person has as good a Right, as the Ch: Wns
to oppose — Ch: Wns may in Subordination to the Ordinary
grant a temporary possession, but not a permanent one;
they may place a Person, bill the Ordinary directs other-
-wise, but they have nothing to do with building a Pew,
their Authority is not sufficient, the Resort must be to
the Ordinary; Why did not Mrs. apply for a faculty? I may
suggest, he was conscious the Parish wd be incommo-
-ded, & therefore the Grant opposed — The Order of Vestry is
generally brought to lead the Intimation; any Individual
tho, he has a Seat, may shew the Inconvenience likely to
accrue to the Parish, on the faculty being granted, & tho, all
the rest of the Parish shd agree, his Objection will be attended
to: the Ct considers itself as obliged to Parish[rs] who object to
such Encroachments — If a Parish shd encrease after a
Faculty is granted, that wd be a reason for revoking it;
you will observe this is a Vicarage, & that the Chancel
belongs to the Rector & Impropriator, so that the Body only
is left for seating the Parishioners, which is certainly
very disproportionate, & many must be excluded —

Dr Hay. Judge — The only Question is wh: this Allon controverting the grant
of a Faculty, shall be admitted: No Faculty can be granted
without calling all Persons interested; for others, besides

Parishioners may have an Interest; the very Process shews it is
discretionary, & that the Ct will determine on the Circumstances
of the Case — In most Cases leading to faculties, the Party praying
the faculty, sets forth the reasons & Grounds of his Application;
Mr Peers has offered his: the nature of a Faculty is to give an exclu-
-sive right to the Party praying it, & his family, & that the Ch:
Wns shall be precluded from seating any Persons in that Pew;
The Ch: Wns do not object to P's Prayer, but 2 private Persons do;
Individuals may certainly come in & object; they may state
private Injury to themselves, or general Inconveniences to the
Parish, tho, not to any other private Person who does not
complain; they state that the Church is deserted by some for
want of Room, that others are straightened, & that Peers has not
enjoyd an exclusive possession from 1722. The great Question now
is, whether any Parish[rs] will (if the present Application shd take
place) be presented attending their duty at Church, to wch all
are bound by Law, & presentable for non attendance; Mr Peers
Claim in right of his Wife, is proper to be laid before the Ordinary
as a Circumstance to induce the Grant of a Faculty, tho, it is
no Right in itself; I do not agree with Dr Clark, that P. has ob-
-tained an exclusive Right by building & repairing the Pew in
question; he may have a Possessory Right, to sit himself, but
not to exclude others, for then this Application wd be needless.
It might be a different Case if he had brought a Suite of Perter-
-bation; but then the Ch: Wns might have said, he cd not place
Mr Wilkinson elsewhere, & so be justified agt the Perterbation —
There are Rights by Prescription, & Grant of Faculty, different in
Effect & Extent — I remember no Revocation, tho, that may be done
on special Circumstances — The 2d is, wh: I shall immediately
grant a Faculty, without hearing these Persons, for on the face
of the Plea, they are private Persons only; as in the Case of Mrs
Partington & the Ch: Wns of Barnes, if the Objection appears to
arise, from any other motive, than that of public Inconvenience
I shall grant the Faculty & condemn the Opponents in full
Costs, but I must wait to see if the Objections are well founded:
I think Mr Peers has an equitable Claim under the Circumstan-
-ces of this Case, if it is attended with no public Inconvenience —
Appropriations in themselves are not favorable; I do hold the
Minister & Ch: Wns, cannot separately or Jointly give a right to
repair, without applying to the Ordinary — It is materiall to shew
this Pew was erected on the Scite of other Pews, which wd hold
12 Persons, that may be a reason for rejecting his Application
his Family consisting only of 2. If People are by this kept
from Church, the Objection is good; Mr Peers has clearly a
possessory Right, wh: it is exclusive, must depend on the
Proofs; I cant say the faculty ought to be granted absolutely
in the present Instance; I think the 2d & 3d Art: shd be
rejected, as immaterial, & I admit the rest of the Allegation —

Mr Ch: Wns cant give a right to repair without applying to Ordinary

Prerogative V. S. 3 Sess...

H. Stevens Junr — Hull v Jupe — N° 116 — Fountain

Dr Wynn — Dr Harris

Q. Shall the exceptive Allon be admitted?

Dr Wynn — Wm Hull died a Batchelor, leaving Geo. Hull his Brother, & other Relations
Judith Jupe, obtained Probate, as sole Exec: of a Will dated Sept[r] 18. 1765; Citon
issued agt her to prove by Witnesses; the Probate was brought in, & my Clients
Interest confessed; an Allon has been given in & Witnesses examined thereon;
Stevens now offers an exceptive Allon to H. Glover one of the Subscribing Witnesses
Mrs Jupe in her Affid[t] of Scripts mentions 4 Wills. viz. of 4 2d & 3d of Aug: & of 4 18th
& 21st of Sept[r] 1765. She says that of Sept[r] 21. was cancelled by H. Glover by Order of
the Decd — Our Allon consists of 2 Articles; we plead H. Glovers general bad

character, to whose Depon on Oath no Credit ought to be given; that he has since declared to several credible Persons, that he cancelled y^e Will of Sep^r 21. after the Decds death; these Declarations, he in his Depons he denies to have made –

D^r Harris allowd D^r Wynns State of the Case to be right – Glover swears, that on observing to Decd the Impropriety of 2 Wills standing at the same time, Decd bid him cancel the latter Will, for the Legacies were not to his mind; this latter Will was, as it were, in Abeyance; Glover says he tore off Decds name in his presence, & that afterwards he tore off the Witnesses names, when he was at home; he might think, he had not complyd with the Decds Directions; but it was a sufficient full Cancellation – They plead a general bad Character, by which, we are shut out from justifying ourselves, as we might, if particular Facts had been charged; whether Glover made the Declaration above mentioned is immaterial –

Judge D^r Hay } I conceive it is improper to plead particular facts, unless they had directly to the Cause, or unless attended with some extraordinary Circumstances – A General Objection is the best – When a principal Witness on Interrog: answers to a fact relating to himself, it will go in some measure to impeach him; How it will be observed on hereafter, is another Consideration; I will not preclude Parties from objecting; tho. the Charge is not absolutely conclusive, it will go a good way towards impeaching the Character of the Witness –

Allon. a Undue & Sanity Imposition

Prerogative
2 & 3 Sep. 27

Altham — No 117 — Woodward v Sanders — Bishop

D^r Harris & Burrell — D^r Marriot & Wynn

D^r Harris... In this Case Ann Ward, is the Decd, She was an old Woman, who had been supported by Charity, but had received none from any other Relations except her Sister Sarah Quartier, who allowed her 10 or 12 £ a year, which she withdrew about 12 months before her Death, & left the Decd entirely destitute – Dec^r 17. 1764 M^rs Quartier died intestate; Feb. 20 1765. M^rs Ward died – Her Will is dated 16 Feb. 1765, on which Day, it is fully in proof, that M^r Woodward called on Hand, & desired him to go & make Decds Will, that M^rs Ward gave Hand Instructions by Word of mouth, wch he took down in writing, & afterwards burnt, having first drawn the Will, therefrom; that he read over the Will to the Decd in the presence of all the Subscribing Witnesses; that she approved, signed, sealed, & published it as her last Will, & that Henry Hand, Jn Hales, & Herbert Shaw, p Bd Coint. attested the Execution – the 3 first W^s we examined, as also Mary Hales who was present at the Execution, &c. but was no Subscribing Witness, Bd Coint we did not examine, but they did, on Interrog: 5 Mary Hales confirms Hand as to the Instructions, & the other Witnesses speak to reading over the Will to Decd, her approving & Executing it –
Bd Coint to 19 Int^y says Woodward met him in the Street & asked him to go & be a W^s to M^rs Wards Will, that he was averse, but went & heard Hand read over the Will audibly to Decd, & then ask her if she was contented? that she answered in a low voice, she was; that Ministrant, (on hearing the Will read & that Woodward was made Exor,) was about to leave the Room, but Hand saying his attestation was necessary, he signed his name thereto –
M^r Bishop gave an Allon for Sanders, pleading, the Decd to have been in distressed Circumstances, & the last year & half supported by Charity, & by what her dau^r Mary Sanders & her Children c^d spare; that Woodward was a stranger to the Decd, & that the Will was obtained by fraud & Imposition –
This in proof, her Dau^r nor any other Grand Children ever assisted her; except Sarah Sanders, who, Wm Sanders believes, sent Decd £ 0. 5. 3. y^e November preceding her Death, but he believes neither his Mother, nor the rest of her Children sent her any thing –
Mary Knapp says, within 6 months of her Death, Decd with Tears complained to her, of the Unkindness of her Dau^r Anne Sanders, one of her Grand Daurs, to y^e latter of whom she imputed her Sister Quartiers Unkindness; that Decd spoke with Disrespect of her Dau^r & her Children, who never made her any Presents after Quartiers Benefaction was withdrawn –
Jn Hales to 26 Int^y says, Decd, when pinched with Want, complained of her Dau^r...

Rich^d Gregg says, Decd once told him, with resentment, she believd her Childr & Grandchildren, had set her Sister Quartier agt her...
Anne Barnet says, neither Mary Sanders nor her Children, shew ever known to make Presents to or assist the Decd –
It is in proof that Decd knew Woodward many years; that he had been kind to her; that she consulted him on Emergencies, & had lately a great Confidence in him; & prest him to go to Ireland to take care of her Affairs, on her Sister Quartiers death –
Eliz. Rowley to 23^d Interr^y Tho. the Writer of the Will had not rec^d the names of the Dau^r & Wm Sanders, he might learn it from Woodward, who used to read Decds Letters, to her, from her Dau^r & Grandchildren –
..... Decd told her she used often to dine with Woodward before her Sister Quartiers death –
Mary Pocket, in chief, says, She heard Decd express her Regard to Woodward for asking her to dine with him –
M^rs Knapp. Hale & Barnet, agree that Decd prest Woodward to go to Ireland...
There is a Letter from Anne Sanders to Brown, about M^rs Qs death, wherein she desires her Duty to her Grandmother, this is dated Sep. 17. yet this very Anne Sanders 2 or 3 Days after took Admon to M^rs Q. as next of Kin, tho. she knew her Grandmother was living –
There are several Acts of Anne Ward, previous & subsequent to the making the Will, which shew her Capacity –
12 Feb. 1765. The Decd was able to sign an Authority to Hand, to procure her a Commission to administer to her Sister –
Hannah Parsons (who was Servant to Woodward) says, that on the Sat^y morn^g before Decds death, she went to her Lodgings to take away a Plate, (in wch she had carried her some Veal from her Master y^e Day before,) that Decd bid her, desire her Master to come to her directly – On the Morning the Will was made, Decd desired her to fetch her Master –
Mary Knapp adds, Decd bid her send Woodward to her, if she met him –
There are several Recognitions subseq^t to the Execution –
Rev^d M^r Smith & Herbert Shaw the P^sh Clerk... agree, that the Monday after the Will was made, they were sent for to pray by her; Decd, asked Smith, if he knew her? he said no: she answerd if you dont, your Wife does. I am of the Wingfield Family
Mary Pocket says, The Saturday e^r the Will was made, she found Decd in Bed, who said, She had made her Will, & remembered her in it – Decd then paid her 8 S she owed her, & gave her 5 S 6 to bring her Gown out of Pawn –
Mary Knapp. says – On Monday Feb.^y 18. Decd in Conversation with her, declared, she had settled her Affairs – She was then of sound Mind &c –
Mary Hales, says, a Day or two after the Will was made, she told Decd, M^r Bradley, was angry she had made her Will; that Decd answerd, Who would you have me leave it to, but those who supported me, I wont Alter it –
as to Bishops Allon to affect M^rs Woodwards Character, he has failed in the proof of it; None of the Witnesses say W.^s use any bad means to obtain a Will – W^s Support arose from Houses he was possessed of – But his Character is not very material, if Decd knew what she did, & had a Regard for Wood ward –

D^r Marriot... This is a Case, wherein M^rs Woodward, by attending to the Age, Weakness & Judgement, Poverty, & Views of the Decd, has imposed upon her, & induced her to make a Will in his favor, to the utter disinherison of her only Dau^r & Grand Children, who never offended her – The Question is not whether the Decd had a Capacity, but wh^r at the time of making this Will, that Capacity was adequate to the Solemnity of the Act of making her Will; In Cases of this Nature, you will take every Circumstance into your Consideration, & give it its due weight – You will observe, the Will was made, Feb. 16. & M^rs Ward died Feb. 20. 1765 in a very advanced Age; this Transaction being so near the time of her death strengthens the Evidence of her Incapacity ~~&c~~

. . . . Rogers visited the Deed on 7.6.16. at 9 o'clock, in the morning when she was dyeing, appeard insensible, & had a rattling in her throat. She saw Deed. monday & Tuesday. 7.6.17. & 18. found her totally insensible.

Wm Knapp appears to have been the Negotiator of this Will, & to have set the Deed to Sale, as a Security for her Debt.

Mr Woodward, the Extr, appears to have been in Gaol for Debt; he took the Benefit of the Insolvent Act, & is now a Fleet Prisoner at large. He was likewise very instrumental in procuring the Will, he went about the Streets begging Persons to be Witneses to it.

The Will itself is Superabundantly attested; by 4 Wn. The Variation in the name of one of those Witneses, viz. Coint, who is also called Cosnett. The Reluctanee of Coint to be a subscribing Wn. The Averseness of the Opponents to examine this Wn.

The Will itself being unnatural — the palpable mistake therein, by Deed with respect to her own Family, viz. She bequeaths a legacy to Wm Sanders, & 100 to each of his Children, whereas he had never had a Child, had been married only 2 Years, & had wrote to acquaint his Grandmother of his Marriage. (Mr Sanders' Wife had 3 Children by her first Husband.)

NB Most of the Witneses examined by Woodward have Legacies NB only 3 Wn Mr Knapp. Pocket, Mr Hales, who have all been paid before their Examn, & given Releases to Woodward

NB Pocket says nothing of this Conversation in the Peyon

Rogers says, that Pocket (who sat up with Deed, on Saturday night) hearing her ask Deed, if she knew what she had done? said, dont talk to her, for Poor Soul, she is not fit to be talked to, nor have I spoke to her all night, for she dont understand us.

Hand. says, that no Person had a Seal, Herbert Shaw took a Button out of his Sleeve, which being put on the Wax, Ann Ward took it off, & then published & declared the Paper to be her last Will — to 5 Jnt. that Deed was a stranger to him; he never saw her before the Day of the Date of the Will —

D

Q. The Words of 4 Jnt. are. What must become of me, if I give all away?

6 Jnt. denies Deed expressd herself as interrogate when asked to sign, & that Woodward said, "Oh Madam, you shall never want. I'll take care of you." — That 5 or 6 Minutes after the Execution of the Will Ward complaining she wanted money, to pay her Washerwoman, asked Woodward to lend her some, who lent her 2 Guineas, with he borrowed from Respondent

10 & 12 Jnt. Heard Woodward say, he was related to Deed, but not in what degree; never knew, he troubled himself about Deed, till after Qs death, nor believes he wd have taken any notice of her, if he had not heard, her sister had died very rich, & that her fortune wd come to the Deed; except y Common Civilities he wd have shewn her from his former Acquaintance with her.

Mary Hales on Deeds application to Woodward for releif before making to 5 Jnt. y. — y the Will, he answerd "Madam you shall never want for any on y Condition. Assistance in my Power, I will take care of you." & immediately gave Orders to y Woman of the House accordingly. . .

Dr in Chief to 18 Jnt. After Deed executed her Will, before W. left y Room, She told him she owd Money to sev. Persons, & desired him to lend her 2 Guineas which he did; & told her when that was gone she should have more . . . . . .

They are obliged to support a fact wherein their own Characters are concernd, therefore depose in this manner —

The Custody is spoke to by Oliver & Bradley, who asked, but were not allowd to see the Deed — You will observe how angry Hand was with Oliver, when he heard he was employd about Writing for a Commission, to Mr Bishop at Dr Commons.

You must determine, Sir, from accumulated Presumptions, which when the Variety of minute Circumstances, are laid together form the strongest foundation for you to pronounce that this Will, was obtained, by Imposition & Undue Influence, gained over the mind of a Weak & intemperate Old Woman.

Dr Harris

Having mentioned the Particulars in my Opening, I will observe the Deed was dissatisfied with her Relations; that Woodward assisted her in her distrefs, & that she was in her Senses long after the Will was made. The Desertion of her Relations, when she was in necessitous Circumstances produced a Resentment agt them; I will mention the Words of the Persons who speak to those Declarations — 2 Witneses say, it was not mere dilapidation, but Resentment — Quartier allowd her as small Pittance, but withdrew it a year before her Death; this she imputed to her daur & Grand daur Anne Sanders — Eliz. Sanders to 5 Jnt says, Deed sev. times within 6 Mo. of her death told her, she believed her Grand daur Anne S. had been the means of stopping the Annuity — The Evidence on the other Side do not actually contradict this — Rebecca Gould & Eliz. Sanders, speak to Affection in general — Rogers & Eliz. Rowley are the strongest Wn they say, that within 6 Mo of her death, she expresst a concern, she cd not send Presents to her Grand children — Wm Sanders says, in a Lre he received from Dec. in Nov. 1765, she desired him to give her Blessing to his Mother, & tell her, she wished she cd help her — Why was not this Lre exhibited? I dont go so far, as to say, she never had an Affection. The Wn dont say so; but it comes out, that her disaffection arose, from their neglect. I do confine it to about 6 Mo. before her death, when worked up, she expresst her Anger to every Person who came near her — There is a way to discover wh? the Wn speak Truth, by enquiring into the Behavior of the Children to their Grandmother, you must consider the mean Situation to wch she was reduced; Sanders says, she was supported by her Friends, he dont add Relations, except one of his Sisters who sent her 0.5.3. The Abilities, Circumstances of these Children should have been shewn to be very low, in order to exculpate them for not sending some Support to their Gr: Mother; that they were Housekeepers may be collected from Wm Sanders's Letter to his Gr: mother dated Sep. 18. 1762, wherein he mentions his Supping with his Sister, that he himself was a Housekeeper. If they were in an extreme low Degree of life, they wd have given an Allowance pleading it — He is a competent Witness, I will not say he is perjured, but he is not a Credible Witness — If you believe the Deed made the Declarations the Wn mention, you wont suppose agt them — The Letter wrote by Anne is very artfull; that every thing in Ireland is burnt; they want to lull the old Woman to sleep, & conscious of their own Behavior, they wd not only deprive her of Quartiers Allowance, but of all knowledge of any thing coming to her by her death — If Woodward had not been Extr it was supposed Bradley would, there were no thoughts of the Family; Mr Rogers had contributed to supply y necessities of the Deed, & had some Bias on her mind, as she expected to be Extr & not being so was disappointed — The Letter of Anne S. had put a stop to her getting any money, on the Expectation of Qs Fortune; She had a Right, but that to this Shower of Gold, he had supported the Deed; & when her Children had rendered themselves unworthy of her favor, by their neglect of her, whom shd she prefer but Woodward? Dr Matriot made 2 Objects to this Will, viz. Custody, & Incapacity, & produced Oliver & Bradley to support the Charge; I do beleive, considering Mr Bradleys Behavior, it was right to refuse him Admittance; & he had denied Deed Assistance in her Necessities — With respect to the Incapacity, Oliver says absurdly, She had Capacity, to take an Oath, as a Thing of course; what cd be more serious? he must have strange Ideas of Capacity —

Now go to the method of making the Will: There is Evidence of her desire to make it on the Saturday; Woodward asks her who shall make it? she says, Mr Hand; but say the Gentlemen, Mr Hand had never seen her, he gives Hand Instructions with her own mouth; Mr Shaw asked her many Questions, perhaps impertinently, but he corroborates Hands Evidence; Her not knowing what her Substance was, is no Objection, who does know? Smith adds "as I recollect" he seems to be too like many of the Clergy at those times; he abbers over a few Prayers — The

N3. Smith to 22 Wit. says this ..... Clerk says, when Smith asked him, at the p.ish Church, (whither he went after attending the Deed) who she was, he answerd, "this is old woman, that there is a Dispute between Woodward & some other People about a Will Mrs Ward has made". The are many Recognitions, That she knew the very Contents: She tells Pocket she has given her a Guinea; she sends to pay her Debts: — It is objected, that she left Legacys to the several Children of Wm Sanders, who did not exist; he might have had Children if he had not; but this is not in Evidence: It does not appear to you that the old woman knew he had no Children; She knew he had been married 2 years ½ & if he had been a pains taking man, in that time he might have had 3 Children: her Instructions might be, "to Sanders Children, if he has any." those Words might escape Ward in the writing — If a man errs in 2 or 3 things, he may in more, & tho I do not say the Wit. shd expect, yet it shd believe his Evidence with caution; She does not pay her Daur by, entirely, but leaves her 100£ — The Execution, is so strong, as to be insurmountable; it is not in the power, of a supposd Insanity, to shake it —

Dr Burrell — I am Council likewise in behalf of Mr Woodward. sole Exor in the last Will of Mrs Anne Ward dcd, who is opposed by Mary Sanders, only Daur of the Dcd, the single Person entitled to Distribution in case of an Intestacy; This Opposition is founded on a Charge of Drunkenness & Incapability agt her Mother, & of Fraud, Custody & Imposition agt my Client; Heavy as this Charge is, it is so ill supported by Evidence, that I think there can remain little difficulty with the Court, how to frame its Opinion — The Truth is simply this; the Dcd was a woman, far advanced in years, & very necessitous in her Circumstances; after her Husband's Death, she was scarce able to provide for her Support, & was assisted by a small annual Bounty of 10£ from her Sister Quartier, who was the only Relation she had, that contributed to relieve her in her Distress; Dr this Benevolence was withdrawn, about a Year & half before Mrs Ward's Death, without any reason assignd; after which, her Poverty & Distress was so extreme, that she was indebted to the Charity of her Neighbors, for a miserable Support; in this melancholly Situation, She never experienced the least Assistance, from her Daur & Grandchildren, but was treated by them, with utter Neglect; it may naturally be supposed, this unnatural Behavior, raised in her Mind, the strongest Ideas of Anger & Resentment; it is in Evidence, that she frequently expressed her displeasure, at their Desertion of her, to different Persons; said with Tears in her Eyes, their Unduty full Behavior wd break her Heart, & imputed her Sister Quartiers withdrawing her Annual Bounty, to the Advice of her Grand daur Anne Sanders — at the very time, that her Relations forbore their Assistance, She owed her Daily Bread, to the Compassion of Strangers, amongst whom you are told Woodward bore a principal Share; it was not therefore extraordinary, that the Disregard of her Family, should produce Abhorrence in the Dcd, or the kind Interposition of Neighbors be attended with the utmost regard & Esteem; But it will be said, this seeming Disregard of the Dcds Daur & Gr.d Children, was occasioned by an utter Inability in them, to contribute to her Relief, that her daur had a numerous Family, who had scarce wherewith to support themselves, & therefore they cannot reasonably be blamed for attending to the first Dictate of Nature, Self Preservation; I will for argument sake, suppose these to be true; Yet as the Reasons of their withholding their Relief, was unknown to the Dcd, & as she imagined it proceeded, from want of Affection, not of Abilities, Her Act, in consequence of that Idea, is founded in reason & Common Sense; She was unwilling at her death to bequeath her whole fortune to those, from whom she had not experienced the Kindness & Assistance she had a right to expect — The Witnesses of the other Side, have endeavoured to prove, the Dcd had a great Regard for her Daur & Gr.d Children, & Rebecca Gould, & Liz. Sanders speak to a general Affection; Rogers, Rowley carry that Affection up to within 6 Mths of her Death, but they do not

contradict our Assertion; that she expressd her Displeasure at their neglect & Cruelty — But the Plea of Inability, may be reasonably doubted, when you recollect Wm Sanders's Ltr to his Gr.d Mother dated Sept.r 18.th 1786 wherein he says, "I have lately married a very agreeable & fine Lady, I hope my Undertakings will be agreeable to my Friends; I some time ago supped with my Sister; I am now a Housekeeper &c. Do these Expressions indicate extreme Indigence on the part of the Writer? do they not intimate the contrary? & may it not be reasonably inferred, that the Sister was a Housekeeper too? It is said, Woodward was unacquainted with the Dcd; that he never contributed to her support till after Mrs Ward's Death was known, a Report prevailed in Worcester, of her having died intestate, & possessed of a Considerable Fortune, which would come to Mrs Ward; that therefore, however great her Resentment agt her Relations might be, would not be the Object of her Affection — To confute this, I need only remind the Court, of what the Wits say on this head; Pocket says, Dcd expressed a great Regard for W. owned herself obliged to him for frequently asking her to dine with him — Knapp says, whilst Dcd lived with her, (wch was 15 months) she went several times to W. for Advice — Mr Hales, says, the Dcd informed her, before Mrs W.'s death, that she frequently went to W.'s house, often dined there, & was welcome to any thing the House could afford — Ann Barnet says W. was well acquainted with Dcd, & her Husband, 18 Years ago being near Neighbors; that Dcd since her Husb.d's death, (12 years ago) went several times to W — The Wits on the other Side, depose merely to their own Ignorance of that Point — With respect to Dcd being fond of drinking, so as to be intoxicated, several of the Opponents Wits affirm, but none of these pretend to have seen her on the 16th of Feb. the day the Will was executed; even Mr Hales, Gregg, Pocket, Knapp, (who had all been acquainted with her, several Years before her death,) swear positively to her general Sobriety; that she was so on the day of executing the Will, that W. never supplyd her with strong Liquors, or knew her to be given to Drink — The Charge of Imposition, vanishes of itself; there not being a single Wit of either Side, who pretends to charge W. therewith; several indeed are ready enough to give their Opinions, but none of them to shew the Grounds on which they form their Belief — The Proceedings of Mrs S.: the Gr.d daur, on her Aunt Mrs death, shew Mrs Ward's Suspicions were not ill founded; her Conduct were founded in reason; She writes an artfull Letter to Mrs Brown, to inform her of Mrs A. being burnt, & that every thing belonging to her was destroyd; & desires her Duty to her Gr.d Mother: a sufficient Proof of her supposing Mrs Ward alive, & yet the very next Step she readily swears, tho. her mother & Gr.d mother were then both living; the Expression that "every thing was destroyd" cd not indeed one to believe, she thereby meant, to prevent the old Woman, troubling herself about Mrs A.s Affairs, & She might thereby have an Opportunity of rising up with the money — The Kings Advocate objected Custody, & brought Oliver & Bradley to support it; who it seems, went to enquire for the Deed, at Knapp's 16th Feb. 63. & being told by some body, in the Shop, she was not fit to be spoke to, the Answer contrived, to prevent their seeing her, why are they not candidly suppose a fraud Intended, & therefore were unwilling to be convinced: Mr Olivers Account is very extraordenary; he says he waited on the Deed 11 Feb. when he thinks the Deed might have a Capacity to take an Oath, or execute a Bond, as things of course; but not to make a Will; surely this Gentleman's Idea of Oaths, is very singular; or his notion of Capacity very absurd: But it is urged, there is a Cause in the Will itself, which will operate strongly agt the Capacity of the Deed, viz. her bequeathing Legacies to the Children of Wm Sanders, who never had any; there are 2 Ways for accounting for this; first his Wife having 3 Children by a former Husband, which the Deed living at a great distance from them might suppose to be his; 2dly that he had been married 2 Years & might therefore be fairly presumed to have reaped the Fruits of Wedlock —

The Capacity of Deed as well previous, as at & subsequent to the Execution of y^e Will, is in full proof - Knapp says abt 10 days before her death she expressd a desire, in her hearing, to make her Will & sent Dept to Gregg, (an old Acquaintance of Deed) to know if he thought it right she shd make her Will; Rd Gregg confirms Knapp, says he sent word, it was very proper; Hand tells you the Deed on 11 Feb. signd an Authority to empower him to procure her Lres of Admon to her Sister; & Knapp says she saw Deed signd it - Mary Hales, deposes, that y^e Friday before Deed died, she expressd to Dep^t a Desire to make her Will; & that on y^e morning it was executed, she desired Knapp in Dep^ts presence, to send for Wood Ward, for she wanted to see him; on his Arrival, she told him she wanted to have her Will made; She asked, who shd make it, she answd Mr Hand - H Parsons, says a few days before Wards death, she went to her Lodgings for a Plate, (whereon she had carried Veal from W. to Deed) that Deed desired to tell her Master, she wanted to speak with him immediately; this is also confirmd by Knapp, who adds, that Deed desird her to tell W. if she met him, that she wanted him - The Instructions reading over, & Execution of the Will, are demonstrated beyond Contradiction, by every Person present; even Counte acknowledges, he heard it read so, & approved by Deed - Her Capacity subseq^t to this Transaction, is spoke to by Packet, Knapp, Mr Hales, Shaw & Smith - The former tells you, that on y^e Saturday Evening preceding her death, (y^e Day y^e Will was made,) Deed told her, she had made her Will, remembd her in it, left her a Guinea; asked how much she was indebted to her, being told 9 s. paid her; then gave her 1 p Guinea, desired her to go to Mrs Petticues, fetch a Gown out of Pawn, wch she had left as a Security for 9 s - Knapp confirms Packet, adds that on y^e Monday after y^e Execution of the Will, Deed declard to Dep^t she had made her Will, & settled her Affairs to her mind - Mr Hales deposes, that y^e a day or two after y^e Execution of s^d Will, She told Deed, Bradley was angry with her for making her Will, unknown to him; that She replyd "who cd you have me to leave it to, but those who supported me; my Will is to my mind, & I won't alter it - The Account given by Smith & Shaw of her behaviour on Monday 18 Feb. when she was pray'd by is extremely strong; she informs Mr Smith, who she was, gives him an Account of her Family, tells him his Wife knew her, tho, he did not, & joined devoutly with him in Prayer, made her Responses properly - But say the Gentlemen, it is a little extraord^y that when W. asked who shd make her Will, she shd name Hand, whom she had never seen; extraordinary as this may appear, the wonder will cease, when they recollect, she had given Hand, an Authority to procure her Admon to her Sister, on 11 Feb. (i.e. 5 days) therefore nothing was more natural, than that she shd wish to employ the same Person, in an affair of similar Nature, to that, she had before entrusted to him - D^r M. says, her having employd Hand at all, after the Conversation, that had passed between Bradley & Oliver, savors strongly of Imposition; I answer, by no means; Mr Hales to y^e Art accounts for it, by telling you, that Deed soon after her Sisters death came to her Knowledge, applied to Bradley to write to Fred: abt her Sisters affairs; & not hearing from him, after waiting as long, as she thought an Answer might be returned, she applied to W. for his Advice, who recommended Hand - It is noted, that on the first advices, the Deed received of her Sisters death, she seemed indifferent, took no step in consequence of it; but that as soon as it was rumoured about Worcester, that Mrs Q. had died worth a considerable Fortune, which must come to Mr Ward, these People got about her & persuaded her to make a Will; her Indifference, on the former notice, from Ann Sanders Live, may be easily accounted for, when you recollect her Niece wrote word, that every thing belong^g to her Aunt, was consumed; if that was true, Mr Ward had little occasion to

to hurry herself in an affair, from which so small Benefit was likely to accrue, that nobody would advance her any thing on so unstable a security; but when the Deed found, on further Enquiry, there was a prospect of her acquiring a considerable Sum of money, she took the earliest Opportunity, of laying a Plan to secure, what she shd be entitled to; & of bequeathing it to those, who had the fairest pretensions to her Favor - D^r M. says Mr W. propagated false Reports of many Sanders going thro, Worcester, without calling on the Deed, & shabby contriving such Accounts to mrs Ward, imposed on & induced her to make the Will in Question; the Truth is, Wm Sanders told W. with this, who owns he said so, because he was so informd; I may question this Account of Wm Sanders, but tho, true, W. can't fairly be concluded to be the Author, or to have been induced to relate it from a dishonorable motive; nothing is more common, than to repeat what we have been told, which, tho' may not always, be reconcileable to the Rules of Prudence, ought not to be attributed, to so base a design as is insinuated here - That no Offensive Measure might be wanting, a Plea, has been given to attack the Character of my Client & several Wit examined thereon, amongst whom, several, are themselves Bankrupts, or Paupers; 2 or 3 display his Character in a very favorable Light, & the rest, depose indeed to his Poverty, & being deficient in paying his Debts, but own at the same time, their Ignorance of his Abilities & Powers to discharge them - Under these Circumstances, I hope the Ct will think we are justly entitled to a Sentence in favor of this Will -

D^r Harman. This is a Question, arising on a Will, made in extremis, to the prejudice of an only daur, without the Deed hav^g a Capacity adequate to the Act; That she had not an Active legal Capacity; I mean in distinction to a passive Capacity, whereby a Person is brought to do an Act; that the Party benefitted was almost a Stranger; that he took Advantage of the Deeds Ignorance, distress & drunkenness; that this Will was obtained as a Security for a Debt, these are accumulated Presumptions; & tho' Fraud is not to be presumed without good Grounds, yet where there are such, it is Proof; i.e. moral Certainty - it is more probable that she shd disinherit her only Child without Cause; & tho, she might have a glimmering of reason, She had not such lucid Intervals, as will be sufficient to validate this Transaction; The whole pages between the 8^th & 16^th of Feb:^y & on y^e 20^th. the old woman dies; if it shd appear she was ill on the 18^th & insensible on y^e 16^th, the Act will be of no Effect - The Declarations of Parties must stand agt themselves - 8 Witnesses depose to her general Drunkenness; on the other Side 3 Wit^s say they never knew her Drunk; but they were about her during the whole Transaction, & are Legatees under the Will, therefore interested Witnesses: The general Opinion of the Neighbourhood was that the Will was obtained by Fraud; & it is more probable, it shd be fraudulently obtained, than that a whole Neighbourhood shd be deceived; The Vicinity has always met with due respect, in matter of Opinion; Presumptions will lead rather to oust a Stranger, than a Relation; a Witness proving a negative is to be suspected, & attended to with Caution - The Proof of a former Connection between W. & Deed is detrimental to their Cause; for the Witnesses say, they believe, W. & Wife have had nothing to do in this Affair, if it had not been for Mrs Fortune - Knapp sold the Deed for about 3 £ which she owed her; Shaw says he might have been Exor - Strangers are procured for the purpose: Is it the usual manner of having Wills attested? Is it the usual manner of the Witnesses to attest the Will: The Exor is impossession of the

ostensible Proofs; the Witnesses are Legatees – Hand says he took Instructions by word of mouth, & wrote them down; on the Interrg. he says, he wrote them from written Instructions – He is a Proctor, & knows the use of Instructions; he burns them, that they may not rise up, in Judgement agt the Will – Great Attention was paid to her indigent circumstances; W. says, "Oh Madam you shall never want": Hand endeavors to account for the mistakes, but assigns a false Reason, such a one as cd not induce the Deed to act as she did; Every previous Step has been taken that cd hedge round this Will; Her great Resentment agt her Daur cd not be expressed, on account of the Annuity being withdrawn. This Poor Woman appears to have had such an affection, for her Daur & Gr: Children, as to send them Presents of Butter &c. out of her mite; Pocket says she was supported by her Friends & Relations; there might be many of these who contributed – But I will suppose Anne Sanders behaved ill; yet her Act ought not to influence the Deed agt the rest of the Children; I am told it is customary in Ireld to obtain Admon, without swearing oneself to be next of Kin to the Intestate – With respect to the Report, it is admitted W. spread it, every Person who propagates false Reports, has recourse to that stale Excuse, that he heard it; they first raise the Rumor that the Children were gone thro, Worcester for Ireland, without calling on the Deed, & then avail themselves of it – It must have been suggested that Anne Sanders did her a Prejudice, with her Sister A. else She wd not have said, "I cant think she wd do me that Prejudice!" The Clergyman does not say he had any Conversation with Deed about her Spiritual or temporal Affairs; as a Clergyman, he did his Duty, for which he was desired to come, & it required no great degree of Capacity in the old Woman to make her Responses. It is very extraordinary Shaw shd talk of a Dispute about the Will – I will not say, we prove Incapacity at every Instant; but we prove it at different Periods, so near the time, of this pretended Transaction, that great Suspicion must arise agt Capacity; She cd not recollect her Maiden name, wch is the last thing a Woman forgets. Approximate Instances, in some degree prove facts; Mr Bradley might have been [illegible] Mrs Rogers seeing such numbers of low People about the Deed, went in frequently, out of Charity, not Curiosity – when acquainted with the Calamity wch had befallen her Sister in Ireland, the Deed neither expressed Sorrow, at the loss, or Resentment at the Treatment she had experienced from her; This Will is evidently made as a Security for a debt; Can a Will be commuted? Vid. y Cases of Lee & Crugg & Leicester determined in the Delegates N.B. They were y Case of Seamens Wills: the Statute says, That Letters of Attorney, where Testamentary Clauses are inserted, shall be void – This dont extend to other Cases. All their Witnesses being Parties, what they depose in support of the Will is immaterial, what they say agt it, ought to operate .....

Dr Wynne – I am Council, with the Kings Advocate, in behalf of Mrs Anne Sanders, sole Daur & next of Kin of Anne Ward deed; this a Question that requires a strict discussion; the Words used in the Condidit are very strong; they are not mere words of form tho, too often considered so: the Act expects strong proof of the Testator, being of sound mind, memory & understanding; & that she was capable of making a Will, to found its Sentence; where a Paper is offerd, wch carrys marks of Authenticity on the face of it; where it is duly attested, & all Solemn forms are complyd with, there the Presumption is in favor of the Will; but this differs according to the Circumstances of the Case; as where the Deed is a Person who transacts his own Affairs, is in perfect Health, where he has made a prious Will, the Act will presume every thing in its favor, & will expect to see the fraud with its own Eyes; where on the contrary, the Will is not of that description, where the Relations

live at a Distance from the Testator, who is in the Hands of Strangers, those favorable Presumptions are not to be; you will Jam sure, wish to give Sentence in favor of the Relations who have the best right to the Deeds fortune, & if the Law will yet justify such a Sentence, public Justice seems to demand it – There are 2 Questions in this Case: 1st with respect to the Facts; wh: on consideration of the Evidence, you can beleive the Testator capable of doing the Act? 2dly. wh: if you beleive the Evidence of the Facts, the Will is in point of Law, such a Disposition as will prevail? You will observe the Deed had no notice of the Calamity that had befallen her Sister; till Mrs Browns Lre of Dec: 17. not Brown sent for & read her Lre; how did she behave? the News made not the usual Impression on her; she was totally unconcerned, & it dont appear she mentioned it to any body, which confirms Browns Account, that she was insensible, & not capable of understanding any thing of the matter: It is no wonder Wm Sanders was unacquainted with her Residence, as she had no settled Habitation, but lodged at different Poor Persons Houses – Mrs Rogers seems to have acted from a motive of Humanity, & not to have interfered officiously; It has been said, she is a disappointed Person, but there is no foundation for that Surmise, nothing of that nature in Evidence, only a Hint from one of the Witnesses, who thought the Deed wd have considered her, if she had been in her Senses: – The Witnesses not ceasing their Interest, is a reasonable Cause of Suspicion; There is no Evidence the Deed ordered Hand to be employd, & it is very extraordinary she shd first think of a Man, she had never seen? he is versed in the Craft & Mystery of Will making; a day or two after the Transaction he throws the Instructions into the fire: this was very bad behavior in him; as gross a mistake as cd be committed; I have a right to suppose there was something on the Paper, which on recollection, this very able Man thought wd hurt him – The Execution was mechanical; no doubt it was audibly read over to the Deed, who was then asked, several times, is it for your mind? but not a Word spoke to any Answer that she made – Hand says the Deed was capable because she expressed a dislike of her Relations – It is impossible such a Catechism shd have passed, as Shaw relates, without its being taken notice of by the other Witnesses: they speak strongly to prove the facts, they are brought to support: this comes out on an Interrog: only; it wd have been pleaded, as well as the Recognition, if it had been spoken; It must be matter of doubt whether such Declarations passed or not – 2dly A Will, in Law, is supposed to be one of the most serious & deliberate Acts of the human mind; it shd be made with the greatest Solemnity & Circumspection; the Party shd know what she gives away; I do not mean to be trifle, but that she shd have a general Knowledge; & be free from Fear, undue Influence, or Favor; in the present Case several of the xpd Requisits are wanting; the Deed was destitute of every necessary; admitted out of charity, where she lodged, or for some private Purpose we have proved the Deeds Affection to her Child, Gr: Children; that she sent them even the Cloathes off her Back; & when wd withdrew her allowance, lamented she cd no longer send Presents to her Gr: Children; one of your Ws say, she cried with Joy, when she received a Lre from Anne Sanders, & did not believe, she wd do her any harm; these are the Parties disinherited, who is the Person benefitted? one who is an utter Stranger; they have not ventured to plead, that W. ever relieved her in his life; she was (in all probability) terrified by Knapp saying, "I will have my debt secured some?" The Woman was imposed on a word? to her own Idea; she made her Will in W's favor on Consideration

x Shaw – Counte & Mr Wallis

of a Maintenance during her life, which he having no money was unable to do— I hope you will pronounce this will to be obtained by Fraud & Imposition, as such revoke the Probate & decree the Admon to my Client, who is next of kin—

D^r Harris — If the Deed really thought her Relations had used her ill, it is immaterial whether she was founded in that Supposition; Mrs Hand having destroyd some Memoranda, was of no Importance when the Original existed— The Smallness of the Legacies must remove every possible Objection to the Witnesses on that account, no Bias can be supposed to rest on their Minds; Admitting Insanity in the Deed, if she was sane when the Will was executed, that Transaction cannot be affected; every body knows a lucid Interval, is sufficient, to justify the Act of alienatic, if he is taken at a lucky Quarter of an Hour: I never knew the Evidence of any Physician or Apothecary of Use on either Side— there is no wonder that the Inhabitants of a Country Town shd make an old Woman the Subject of Conversation, after her experiencing so sudden a Transition, from being supported by private Charity, to Riches & Affluence; it has been said there was a Bargain made by Mrs Knapp, it is a meer gratis dictum, & unsupported by Evidence; & the Statute mentiond by D^r Marriot relates only to Sailors Wills; an Attempt was made to extend the Equity of that Statute; Sir Ch^s Hedges favord it, but the Ct of Delegates rejected such Extension; their Motives, I need not investigate; The Legislature have set their faces agt all Constructions that tend to impede the disposition of a Man's Fortune; An Englishman may disinherit, & the Ct had no power to exert humanity agt Law: The Statute has been construed equitably in one Instance; for it confines the nullity to where a Will is inserted in the Body of a Power of Attorney, whereas the Ct has extended it to a Will made in Satisfaction of a Debt tho, not embodied, & the Statute goes no further . . . . . .

D^r Burrell — I shall readily agree with the D^r who argued first on the other Side, that if the Deed had not a Capacity, adequate to the Act in question, this Will ought not to stand; but I think, the Wit^s depose, so fully, & satisfactorily, to that point, there can not now remain any difficulty with the Ct; how to determine; they have charged her with Love of Strong Liquors, & being frequently intoxicated, but several Persons, of unblemished Reputations, as to whose Evidence, there is no Objection, & who were generally in her Company, declare they never saw her disguised in Liquor; tho some of them had been acquainted with her many years: the D^r urged the Opinion of the Neighbours, that the Transaction was fraudulent, & inferred the fraud, from such unstable Premises I will give the Sentiments of the Neighbors their due weight, but they ought not to be brought, in Competition, with the unshaken Testimonies of those who swear positively to repeated Acts of Capacity, & that the Deed appeared free from Restraint— The distinction of the Memoranda, by Mrs Hand, is worked up to a grievous Charge against her, & laid as a strong foundation for the most uncandid Suppositions: he probably thought, that as the Will was drawn up almost at the same time, with those Notes, there was no occasion to preserve them: the D^r mentiond, it as customary in Ireland, to grant Admon, without obliging the Party to swear herself next of Kin; if such a Method is adopted there, it is illegal, & absurd; illegal because contrary to the Statute; & absurd, because the End for which an Admon is granted will thereby be defeated: the D^r supposed, some Persons about the Deed, who prejudiced the Mind of her Gr: Daur Anne, & asked her some Question

wch occasioned the Deeds Answer, that she did not think Anne cd do her that prejudice: perhaps this Account is false, but if true, I know no harm in asking the Deed about a Person, of whom she had frequently expressed her disapprobation— This objected, the Deed expressd no Sorrow, on Brown's communicating to her the Accident, that had befallen her Sister; & therefore they infer she had no Understanding; I will presume the reverse: they infer she had no Understanding; I will presume the reverse: that her Sisters ill usage, in withdrawing her annual Allowance, with out any reason assigned, & her insolent Message that accompanied the Guinea, she sent her afterwards, had operated so strongly on the Deeds mind, as to eradicate every Spark of Affection, & to render her totally indifferent to Mrs Quarrier— D^r Lynne said no wd spoke to the Deed answering Hand, when he asked if the Will was to her Mind; the Evidence given by Mrs Hales, Shaw & Coiate, surely slipped his Observation, as they speak fully to that Particular . . .

Judge / D^r Hay — This is a very extraordinary Case; I don't sit here to make Wills, but determine on the reasonableness or Unreasonableness of them, but on the Law, & the legal Evidence before me: where a Will is very unfavorable, the Ct expects a stronger Degree of Evidence, than when it is of a favorable nature: It is not true, that in every Case where a fact of Execution, or general Capacity is proved, the Will must therefore be established; for if there is Evidence of Fraud, Imposition, Threats, Custody, or undue Influence, the Will, tho, ever so well executed, may be set aside: Every Will must stand, on its own peculiar Circumstances, & to determine this, I must look into the Evidence, & form my Judgement wh: I am to pronounce for, or agt its Validity: 100£ is given to the Daur; Hand on an Interim says, he dont remember the Deed took any notice of a Mistake in the Legacys; here is a mistake in respect of the Legacy of 100£ to each of Wm Sanders' Children, who never had any: the Deed however indigent in her Circumstances, it was reported & believed at Worcester wd reap a considerable Benefit from her Sister Quarriers Estate— The Instructions are not fully & satisfactorily proved; the Account given of them is very general— The Writer & Witnesses depose strongly to the Execution & Deed having a general Testamentary Capacity: If the Will stood only on the Evidence of the subscribing Witnesses, in solemn form, it wd have been supported; but the Daur gives a Plea, & examines Witnesses, whose Evidence must be taken into Consideration; in opposition to those, who speak to Capacity at the Execution; if Rogers speaks truth, the Deeds Capacity was not so strong, as the Instrumentary Wit^s assert, Yet a general Capacity is admitted; the Evidence of the other Wit^s shall not be destroyd, if there are no other Circumstances to affect them; the Capacity of old People fluctuating; being better at one time than another: in pronouncing on that great Caution must be used; Coiate himself owns the approved the Will, in a low voice— But the Daur alledges the Will was improperly obtained, by Imposition: I must then, enquire, if the means used, were legal, tho, the general Capacity is admitted: there may be many Ways used, wch are legal, tho, not strictly honorable: I must look into the Circumstances to determine, wh^r the Will was obtained by improper or undue Influence: All agree the Test^r was very old, in extreme necessity, & a very declining Condition: She was in the Hands of Mrs Knapp, a Person very anxious to secure some thing to herself, (when D. was known to have died rich) at least, to secure her debt: Notice was sent, & communicated to her by Brown, of her Sisters Death) in Dec^r She then took no Step to secure D^s Effects; from whence I may fairly collect, the Persons now concerned, were unacquainted with the fact, till after the Receipt of the 22d^re on Feb. 8. 17 all the Witnesses depose to her distressed Circumstances, & agree she was make a Will in favor of any body, who wd support her; Knapp to Coiate says, the Deed sent for Oliver & Bradley to procure some money of them, but they declined to advance any to her; Knapp wanted likewise to be reimbursed the Expence she had been at; She went to them a day or two after they had been with Deed wch was 11 Feb: she says, she went voluntarily to Oliver on the same Account, & thinks that in case either of them wd have

advanced the Deed Money, or wd have engaged to discharge the debt due from Deed to her, Woodward wd have had no Concern in her affairs; thus all his Services to Deed, & her Preference of him to her own family are destroyd - It is clear, from hence, the Will was made on account of distress, not affection: It is mor[e] material, that Mr Hales says to Smt: that before the Will was made, W. used this expression "Dr madam, you shall never want, whilst I can take care of you": The adds indeed, there was no Imposition used; Hand ... dont remember W. used this Expression: after the Will was made, W. gave her 2 Gs: wch he borrowed of Hand; I do not say, a Will made thro necessity & distress, will be of no Effect: a constraint of that Sort simply considered, will not avoid, but it is highly unfavorable wherso obtained, & when accompanyd with other Circumstances may operate towards annulling it - for a man of Honor wd not take advantage of such Pretence: I differ from the Council for the Exor, who has attempted to prove Disaffection on the Part of the Deed towards her Daur & Gs Children, & has failed therein as much as the nature of the Case will admit - The letter from Wm Sanders to the Deed, shews a Respect for the old Lady; I wish her Letter to him had been produced; her Answer, wrote by Woodward wd have been very material - Even the Resentment wch the Wt depose, she shewd, was affectionate, as between such Parties; she testifies a Concern mixed with Tears & Reproaches for their neglecting to write to her; She testifies her affection, by sending them Presents; the little Note, of 5 3. sent by Sarah S. to Deed, is a strong Proof of Affection that subsisted between them. This therefore is as unfavorable a Case as ct come before the Ct. a Will so circumstanced must be liable to no Exception whatever; I do not say it wd be conclusive in itself, that the Test[r] did not know, what she was about to dispose of; but the Probability is, she was ignorant whether Sister left; I conceive it to be highly expedient & necessary, she shd know this, as she labord under such a pressure of Distress; It is clear W. has imposed on the Deed, & propagated such a Report, as will set aside this Will, viz. that Deed Daur was gone thro, Worcester, in her way, to Dublin, without calling on her Mother; Wm Sanders deposes to Knapp saying W. told her so, & to W. owning at the Bull Mouth, he had said So, because he had heard it; The Report is thus traced up to W. whether he propagated only, or invented the Report, is immaterial, when there is any kind of deceit; in either Case he imposed on Deed: Gould speaks of a declaration of Knapp, that Deed Daur wd rue the Day when she went thro, Worcester without calling on her Mother: Hand to q Ink: says, he heard Deed speak of her Daur, with resentment, for not taking notice of her for some time; I conceive this must have been the Consequence of some Discourse on that Topic: This brings it to the common Case of a captious Will, obtained on a false Suggestion, & on that Principle it ought to be set aside - The Report, if not framed by the Exor, was spread by him, & communicated to the old Woman; Under the Circumstances of this Case, when I attend to the Age, Distress, & languishing Condition of the Deed, added to the false Information on which it was obtained, I think there are legal Grounds for me to pronounce agt this Will, & to decree Admon to the Daur as next of Kin, however I might have wished, & c[d] not have determined agt this Will, without legal Grounds.

1769
April 21:
Sentence confirmd with 26s Costs - - - -

N.B. Costs were prayd, but not insisted on, otherwise, they must have been decreed. Cause Appealed -

Consistory
3 Dec[r]

Adderley — James v Harden — Grove

Dr Harris — Dr Collyer

Dr Harris — I am Council for Mary Wife of Wm James, who has brought a Libel of Defamation agt Hester Harden, for saying in the latter end of the year 1766, that Mrs James was a whore, big with Child, & gone into the Country to lye in; 6 Witnesses are examined, who say it was notorious that Mr & Mrs James were parted, & that she had no Commerce with her Husband -

Dr Collyer — The Words laid are not proved; the 5th Article of the Libel pleads that Mr & Mrs James were separated, & that Mrs Harden knew thereof; if the Libel had been opposed, you wd not have admitted this Part to proof, without exhibiting the Articles of Separation: this is the more necessary, for you will find them contradicted by the Evidence, who say, they sometimes lived apart, sometimes together - there is but one Witness who mentions the word, Whore -

Dr Bettesworth Judge — This is a Case of some difficulty; the Libel charges the word Whore to be spoken by the Def[t]: 5 Wn are examined, of whom, only one depones to that word; but Defamation may be proved by strict Implication; it appears Mrs James, was a married Woman, who lived separate from her Husband, which Harden knew; it is in Evidence she told one Person, that Mrs James was gone into the Country to lye in, by wch that Wt supposed she meant to insinuate Mrs James was guilty of Adultery - I think upon the whole there is sufficient Evidence to pronounce that the Plt has been defamed by the Defendant -

a Defamation saying a married woman, who is separated from her husband by consent is gone into the Country to lye in.

Prerogative
4 Dec[r] 67

Adderley — Orts v Tapsell — H. Stevens Jun[r]

Dr Harris & Wynne — Dr Collyer

Dr Collier — I am Council for Mrs Tapsell, Adm[x]: of Hubert Tapsell, whilst living a Creditor of Wargent Nicholson, as such she entered a Caveat, agt any thing being done in his Effects, & being warned, she alledges herself to have a special Interest, therefore prays the Securities may justify: She establishes her Interest in this manner: 1732 Wargent Nicholson, Hubert Tapsell, Factors of the S[th] Sea Co at the Havannah, entered into Partnership, & Articles in Sept[r] 1732. expressing such Articles to commence in Nov[r]? ..... & so continue for 6 Years, & during the continuance of the Asiento Co & that the Profits shd be allotted in the following proportions. 6/10 to Nicholson, 4/10 to Tapsell. this Partnership was carried on till 1737, when they quitted the Havannah, leaving considerable Debts outstanding, wch they c[d] not recover before their departure - 1761 Hubert Tapsell died having made his Will, & therein appointed his Bro[r] Jn Tapsell, & Wargent Nicholson Exors; Tapsell proved, & in Aug[t] 1762, Nicholson died intestate, without having taken Probate of Tapsells Will: in June 1763 Susan Tapsell became Adm[x] to H. T. died: during this Interval, considerable Sums of money amounting to 9500 £ belonging to the Partnership, were remitted from the Havannah, of wch Sum, Susan Tapsell is entitled to 4/10 - We say that Bond being given in 20000 £ for the due Performance of the Trust reposed in the Exor, we have a right to the Securities justifying on Oath - they say it is matter of account between the Parties therefore Mrs Tapsell cannot oblige the Security to justify, the Qu: will be, 1. wh[r] Mrs Tapsell is a Creditrix? & is she entitled, as Adm[x] of a Partner, in a matter of Account between Nicholson & Tapsell, to pray the Securities to justify?

a is Mrs Tapsell Adm[x] of Hubert Tapsell abrd: as such, of Wargent Nicholson?
& is she as Adm[x] of a Partner, in a matter of account entitled to pray the securities to justify? ....

Dr Harris — Wargent Nicholson died intestate - March 1763 Admon was granted to his Widow, who having intermeddled, died, leaving some part thereof unadministred: Anna Maria Orts, is the great Niece, next of Kin of W: N: Admon, as such, has been decreed to her; she has been sworn, entered into the usual Bond, prays Admon may issue under Seal; Stevens & Tapsel Spinster, depents, & alledges she was Adm[x] with the Will annexed,

of Hubert Sapsell decd, who was a copartner & Creditor of Wargent Nicholson decd; & prays that before Admon be permitted to issue under Seal to Mr. Orbs, she do exhibit on Oath, a true Inventory of the Goods of sd Decd, left unadministred, & give sufficient Security faithfully to administer the same, & that such Security do justify themselves to be worth the penalty of the Bond; Adderley contra: alledges Sapsells claim is not fuller or plain, to ascertain any certain or liquidated debt, due from W.N. to H.S. but is matter of Account unsettled, therefore insists S.S. is not entitled to an Inventory on Oath from Orbs, or can oblige the Sureties to justify - Adderley alledged Bond to have been given by sufficient Sureties in 2000ol. who are not objected to by W.N's next of kin, but approved by them; therefore prayd Stevens Petn to be rejected, Sapsell to be condemned in Costs; & Admon de Bonis of W.N. already decreed to his Client may be decreed to issue under Seal - & contra Stevens alledged it appeared by S.S's Affidavit, that W.N. & H.S. were Copartners at H.S's death, & that by Law whoever becomes the Legal Representative of W.N. will by his Survivorship be entitled to receive all monies due & remitted on said Partnerships Account; that large Sums are remitted, & that S.S. as Admx of H.S. is greatly interested the due Admon of W.N. & that by the Law & Statutes of this Realm, particularly 21. H8. c 5. "The Ordinary before he grants "Admon of the Goods of a Person deceased, shall take Surety of "him, or them, to whom he grants the same, for the true Admon "of the Goods, Chattels, & Credits, wch he, or they, shall be so author- "ized to administer." Adderley alledges 2000ol Security given; Stevens denys it appears by any Proceedings in this Cause that the sufficiency of such Security hath been reported, or approved of by the next of kin; Stevens dont object to the Admon paying under Seal to Orbs, the Sufficiency of the Sureties being first enquired into & reported by the Officers of this Ct, or they justifying themselves on oath to be worth 2000ol & prays Ads prayer as to Costs to be rejected.

It by no means appears to you that H.S. was a Creditor, from Mrs S.S Affidt & that she, as his Representative is a Creditrix she speaks only to her belief, the Ct expects Certainty; a Partnership is asserted to have been entred into from 1730 to 1737. Both the Partners were living from 1737 to 1761 - 30 years are nearly elapsed from the Conclusion thereof: it is not to be presumed, that he Exors have made W.N. Exor, if there was an unliquidated Account between them: This is only hearsay, & not sufficient Proof of an Interest, as a Creditrix entitled to an Inventory; a Creditor must shew, not only the Nature of the Debt, but a certain Debt, tho, he need not mention the whole; when the Account is settled, She may turn out, Debtor to W.N's Estate: but supposing her a Creditrix for Argument sake, is she entitled to a Justification, from the Sureties, when the next of kin do not object? the clearly is not; that has been repeatedly determined by your Predecessors: under the Statute of H8. the Bond was given by the Party himself; those Bonds the Common Lawyers esteem illegal, & obtained by Coertion of the Clergy, wch occasioned the Statute of Car. 2.

23. Car. 2. B. R. Ventr. 166. Raym. 223: 2 Keb. 814. 2 Lev. 36. 3 Keb. 219. 2d 6 — .... Bp of Chester v Starr. In debt upon a Bond; the Condition recited, that whereas the Obligor, was excommunicated for not coming to Church, & that the now Plt. at his Instance & Request, had absolved him; that if he shd obey all the lawfull Commands of the Church, that then &c — The Deft demurred, supposing the Condition to be agt Law, & so the Bond void - Hale said, if a man were excommunicated, that there was a Writt de Cautione admittenda; sometimes they took an Oath of the Party, ad parendum omnibus Ecclesiæ

Mandatis licitis & honestis; & that was called Cautio Juratoria, & sometimes, Cautio pignoratitia, was given; he said also, it was held 8 Car. in Com: Banco, that where the Ecclesiastical Ct took a bond, of an Admor to make distribution of what remained of the Intestates Estate, after Debts & Legacies satisfied, or to dispose of so much to pious uses, that the Bond was void; for they presumed the Party in such Cases to be under a kind of Coercion ..... 1 Bulstr. 422 — & admor: natur....

1 Salk. 315.... 6 Anne .... Bp of Canterbury v Willis in debt on a Bond entered into by an Admor to the Ordinary, on taking Letters of Admon; the Question was, Whether Admor by virtue of this Obligation, was bound to go & give in his account in the Spi Ct, without being cited? And by Holt C.J. who delivered the Opinion of the Ct it was said, 1st that it appears by the 31 Edw. 3. that an Exor was compellable to account before the Ordinary, & so was an Admor; but then the Ordinary was to take the

Hoy 78.... 2 Inst. 6.... account, as given in, & cd not oblige them to prove the Items of it, nor to swear to the Truth of them: So it was if a Creditor sued in the Eccesiastical Ct, for he had a proper remedy at Common Law; but if a Legatee had sued for an Acct in the Eccles: Ct, the Deft (before the Statute) was compellable to prove the whole Acct: for the Legatee had no other Remedy, & the Eccles: Ct. wch had a Jurisdiction of Legacies, cd not otherwise do Right; yet in such a Case, if the Exor cd pay him, he cd not sue further, for he had Right done him, & the Exor was not liable; but of necessity, the Right might be done. 2dly - A Person entitled to

Raym: 407.... Distribution, on y 22 Car. 2. is in Consequence entitled to sue for an Acct as a Legatee was: for the Next of kin, is a Legatee by the Statute, & as such, shall have the same remedy, as the other Legatee might before the Statute - The Condition of an Admon Bond was, to account when required. So it appears by Co. Entr. 128. Ergo he was not to account before he was legally cited, wch cd not be ex Officio, & therefore the Stat: of Jac: 2. whereby the Ordinary is prohibited from citing him ex Officio, had really no Effect at all, for the Law was so before: but he account at a Day certain, he must account accordingly (at his Peril, & that without Citation or Suite, & the Acct must be in Ct, & if he comes at the day, & no Ct is held, he shall be excused; for he examinable, unless a Party interested comes in, & controverts it: And truly; that, shall be construed, to bring in his Acct & not, to pay in the Debts of the Intestate; & therefore a Creditor shall not take an Assignment of the Bond, & sue it, & assign for Breach the non payment of a Debt to him, or a Devastavit committed by the Admor, for that wd be need less & infinite -

Before Sir Geo. Lee. 1755.... Ormerod v Newton. Geo. Ormerod, died, leaving 2 Children, & their Mother Guardian; a Creditor prayd an Inventory, & that the Security shd justify: Sir Geo, Lee, said he cd not do it at the Suite of a Creditor; but he wd do it ex Officio, merely for the Benefit of the Minors, & ordered a Justification accordingly.

Dr Wynne.... I am also Council for Mrs Orbs, who after a long Litigation, has established her Interest, but is not yet thought, to have been sufficiently handsome & therefore Mrs Sapsell is desirous of creating a farther delay, under a pretence, she is the Representative of a Creditor of W.N. dead - By Law & Practice, a Creditor has a right to an Inventory, but then the Ct will have a Constat of the Debt & not put Admon to Expence without an absolute necessity: Dr Wynne says S.S. is a Creditrix in 450ol as appears by her Affidavit, which is very long, & very vague: but Length & Satisfaction are different; She speaks only to her Belief of Points, She might know: she calls herself Admx with the will annexed of H.S. the Facts stated, destroy any grounds of her Belief; the War may account for the Interval of 10 years; but what became of the whole till 1761. Can it be imagined, without very full proof, that an Acct of a Partnership of the last date remains at present unsettled; She speaks to her belief of money in the Hands of Barnet & Bland; why did she not inspect the Books of those Bankers, & see what monies stood in the joint

Names of N. & T. then she might speak positively — If she She prove a Creditrix, & so be entitled to an Inventory, she ought not have any Claim to the Securitys justifying, since the Statute of Car. 2. a Creditor can only have an Inventory & account, but I hope you will not think the Evidence before you proves her to be a Creditor —

Dr Collier . . . No Reply, usual on these motions, but Dr Hay indulged Dr Collier

The Statute saying Security shall be given, leaves it to the discretion of the Ct to settle the Quantum — If an Estate requires a Constat, that Constat requires a Security — The Species of the Debt does not alter the case; if a Legatee can have a Bond assigned, why shd not a Creditor, his may be the greater Interest; you may as well decree it, ex Officio to a Creditor, as Sir Geo. Lee did to a minor —

Dr Hay. / Judges } This is a Case which has been frequently before the Ct. I have argued on both sides, & I know several Cases, of Creditors, objecting to an Inventory, or Security, or to the Quantum of it; The present Case is as follows, W. N. died intestate, his Widow took Admon, & died leaving Goods unadministered; Orts is Admx de Bonis non of W. N. — Mrs Sapell is Admx with the Will annexed of H. T. who was in partnership with W. N. & in consequence thereof a Creditor in 4/10 of the outstanding Debts; Mrs Sapell therefore insists, that she is a Creditor of W. N. as She is the Representative of H. T. To this it is objected, first, that her Affidavit is not clear, & dont ascertain any Debt to be due from W. N. to H. T. She has alledged the Partnership was not settled in H. T's lifetime; that since his death 9500 in the Hands of Barnes, Bland, Barbers, & that she is informed, that Orts, as the Admin: of the surviving Partner may receive the Moneys due to the Partnership, that she is entitled to 4/10 of the Money already come to hand, that Orts & her Securities are low Persons, therefore prays they may justify: She says, she is informed & believes; she can swear no more, it being very different from a Debt to her — The Debt I think is clear enough, there being no contradiction to 9500£ being in the said Bankers Hands, 4/10 of which is a certain Sum; Where a Creditor ~~swears~~ makes a certain Demand, it is sufficient; the Ct can go no farther; than, where a Creditor applies, to require an Affidavit of the Debt: I think Mrs Sapell has sworn fully in her Affid: you cant go into a Contradiction when the Ct certifies the debt on Oath — The next Question is, what is she entitled to from the Admx: it is admitted, she is entitled to an Inventory, & even to an Appraisement; but she prays Orts & Sureties may justify the simple Question is, wh? she is entitled to her Prayer? By 31 Edw. 3. The Ordinary was bound to grant the Admon to . . . . . or the most lawfull Friend of the Deed; perhaps the Ordinary took Liberties in his Construction of those words, for 21 H. 8. requires it to be granted to the Wife or next of kin, taking Security for the due Admon of the Goods, Chattels, & Credits of the Deed: I believe it was only personal Security, the Statute did not authorize him to join others in the Bond. before the Statute of Edw. 3. the Ordinary administred the Effects himself; he exceeded his Authority, as he at first obliged the Admor to pay over the Rem? to him under the Statute of Edward, he now directed the Admor to give Security, not to pay Debts, but to distribute as he thought fit: the Ct of Law prohibited the Ordinary, not for taking Bonds to pay Debts, but because he directed the mode of Distribution, & so he granted it to the Wife, or that next of kin, who wd give Bond so to do — Since 22 & 23 Car: 2. no Bonds have been given, other than according to the Tenor of that Statute, so that the Ordinary is now merely ministerial; the Sureties under this Bond, have been considered as bound for the faithfull Admon, viz. that the Admor shall bring in his Account, & not for the payment of Debts.

a under the Statute of Hen: 8.

1713. before Sir Charles Hedges — } Stanley v. . . . . A Creditor objected to the Security, because he was a Bankrupt Man; it went to the Delegates, who said the Ordinary has nothing to do with the Security at the Suit of a Creditor — Oxley Bowwater & Griffin. It was said a Creditor under the Statute of distributions, has nothing to do with the Bond, he has no right to an assignment of that Bond, wch an Admor is bound to give — Hughes v Cook. The Question was wh? a Creditor shd have notice of the Security, & liberty to object thereto; Sir Geo Lee so ord? a Creditor had no right to object — The same Determination took place in Hackman v Black — Young v Hop. 1760. Sir Edw. Simpson determined an Admon Bond was not assignable to a Creditor to sue on it; if so what has he to do with the Securitys, which are only given for the faithfull distribution — (N.B. the Registrar said such a Bond had been delivered out of a Country Ct) The Chancellor of Lincoln gave as a reason, that the Admor had not given an Inventory, as the Statute requires; it was not that the Cred: cd assign as a Breach, that the Admor had not paid his debt; nor a Devastavit: but it was on account of a Breach of the Statute of 31 E. But in the Case of Young v Hop, the Ct said, the Creditor had no right to sue the Admon Bond; if he cd not, then why justify? it was not for him, but the distributee, that the Stat: of Distrib: was made: the reason of the difference might be, that there wd be great difficulty, if these Bonds were to be assignable for Creditors; who under such Circumstances wd be Security for Admons. The Question is not what the Law shd be, but what it is: the Consequence of the Bond not being assignable, is, that the Creditor has no right to object. I will follow Sir Geo. Lee in the Case of Minors & next of kin, in other Cases, I am unwilling to do anything ex Officio, not prescribed by Statute, or the constant & uninterrupted usage of the Ct, after Determinations in the Delegates — It is better the Law shd be certain than variable — I think Adderleys Client, as Admx & next of kin, is entitled to Admon going under Seal, & that Mrs Sapel is only entitled to an Inventory —

1758. Sir Geo. Lee . . . . .

x On appeal from the Consistory of Lincoln . . . . .

A Sess. E. T. Commiss? of Surry

Maplesoff & others. v. the Rector. Ch: Wdns & Parishioners of Chertsey.

Grene — Dr Wynne, Bever — Dr Calvert, Burrell — Collins

Dr Calvert . . . The Question now before the Ct. is, wh? Mrs Pembroke, can intervene for her Interest, in the faculty prayd by her late Husband, or wh? the Suit abates by his death? the Ct has declared an Exor, of a Dead Party is not a proper Person to proceed in the Grant of a Faculty: I dont mean to support it as a general Proposition, that the Cause abates, on the death of a Party; for I have known a Legatee intervene; & in the Goods of Mrs Worthey, the Syndic of a College, had Leave to intervene for his Interest as a Legatee — But I say, a Personal Action, must die with the Person, that there is no Right transmissible in it, that this is of that sort, therefore not within the general Rule above mentioned — There are only 2 Ways, Representation, or Intervention; Mrs Pembroke is not her Husbands Representative, as he has app: Exors; & she can't intervene, as she has no Interest in the Cause; it was a mere personal Indulgence to Mr P. & she had no Interest at the time of this Application; If an Exor dies, a Legatee may afterwards intervene, for his Interest to support the Will, because he had an Interest when the Exor was living; a Party is suffered to intervene, not for the purpose of creating an Interest, but to support one already in Being; Mrs P. is not in that Predicament; besides, the reasons on wch one Person, asks an Indulgence, may not subsist with respect to another; it is probable Mrs P. may cease to be a Parishioner, her Circumstances may be totally altered by her Husbands death; the Privity cant be carried on; if a delay has happened, it is not our fault or that of the Ct, but unavoidable; Suppose only one Person had applied & died before the Grant had taken place, wd the Ct leave it to the Family if it had been once granted, indeed, the Family wd have a right to it — it wd be a great absurdity to grant A Pews to 3 Persons. Even in matters of Grace the Ct thinks itself bound by the Practice; there has been no Intimation, that all Objections may be made to the Pty who

Q. on Opt. the Wid. of a Pty pray a Faculty for a Seat to be allowed to intervene for her. Ink: or does the Cause abate by the Death of the Pty?

No 125

now applies, it is necessary all Persons shd have notice; it is the foundation of all Intimations; this Objection might have been taken at the hearing, but Time & Expence is saved, by making it now.

Dr Burrell — If the Ct had in any degree, given its Opinion, upon this Point as the Gentlemen have hinted, I shd not have presumed to enter upon it now, but I understood, the Extor, was only taken into Consideration; the Ct has determined him to be an improper Person; and I apprehend the Widow also is liable to objection; the Application for a faculty, is an application for that, which is meer matter of discretion, in the Ordinary, to grant or refuse; in this, the peculiar Circumstances & Situation, of the Petitioner ought to be taken into Consideration, upon a due weight of which, the Opinion of the Ct will be founded; Mrs P. might be a very proper Object of your attention, considering his fortune & Situation in the Parish, & the number of Persons he employd; his Widow, with, perhaps, a small proportion of her Husbands Estate, without Trade, or Importance, will be considerd in a diff. point of View; the application from the Died was for a personal favor, which is at an End by his Death.

As to common Law Abatements. v. B.R. Dacres, Duncomb Ventr. 235. vid. 8 Geo. 3. c. 11.

Dr Harris & Dr Sedgley — Tho, the Extor is an improper Person, Mrs P. is not; she is one of the Decds family; if her Situation & Circumstances are different from her Husband, the Opponents may shew it; there is no occasion for a new Intimation: She is not strictly & legally an Intervener, but she is a Representative for the purpose of praying this Faculty. We all know Abatements are not allowed in these Cts, it wd be better if they were not allowed at Common Law; when the Party himself dies, another may go on with the Suit; I have no doubt Mrs P. may in the present Case, go on, as if her Husband was alive. a Faculty may be revoked, & if they can shew she is lapsa a Faculate habere, it will be a Reason: Jobern vs Collins. Act & admit Mrs P. in the place of her Husband. ...

The Widow allowed to intervene.

Trin: Term. Prerog: 2 Sess.

no. 121

Longden — Allen v Chapman & Sparrow — Stevens

Dr Calvert & Bever — Dr Harris & Wynne

On Admission of the Allon given by Stevens.

Dr Harris — Opened, which by mistake was placed after Dr Calvert.

Dr Calvert — Ralph Allen Esq died 29 June 1764, leaving a Widow, but no Child, one Brother Philip, since dead, who had 2 Sons Philip & Ralph, & 1 Daur Mary the Decd also left a Nephew & a Niece, by a Sister, viz. Wm Tucker Esq & Mrs Warburton, Wife of the Rt Revd Dr Warburton Bp of Gloucester; Decd had also other Relations.

aug 1764. The Will & 5 Cod: were proved in Common form.

Nov: 1765. Citation issued agt Jn Chapman Esq, & the Revd Jas Sparrow the Extors, to bring in the Probate & 5 Codicils, & to prove the 5th Cod: (D) by Witnesses, otherwise to shew Cause, why it shd not be declared null, as to Codicil (D) & to accept a new Probate with sd Will & 4 Cods annexd, without (D) at the Promotion of Philip Son of Philip Allen, Brother & one of the Extors named in Decds Will.

Stevens Allon propounding (D) now stands for Admission .....

Dr Harris — Ralph Allen in the Decd: he executed his Will 28 June 1763 in ye presence of 3 Wn. he made a Codicil thereto, the same day wch is attested by 3 Wn.

29 June. he on the back of a former Codicil, of his own hand writing, dated Nov. 10. 1760, (to a Will of 1 August) containing a legacy of £1000 to Mr Pitt confirms that legacy - 29 June 1763 he wrote another Codicil with his own hand, & declared it to be a 3d Codicil to his Will dated yesterday, & subscribed his Name thereto - 6 July 1763. He wrote, signed his name to another Codicil, wch he declared a 4th. Cod: to his Will - In March or April 1764, having a mind to make a new Will, he sent for Mr Lewis Clutterbuck of Bath, his Attorney, & gave him written & oral Instructions for drawing a new Will, wch he drew a draft of accordingly; Decd being to go to Richmond in Surry in May or June 64. desired Clutterbuck to bring him the Draft of the new Will, read it to him. C brought & read it to him accordingly. he approved it, & bid C. engross it agt his Return from Richmond, wch C. did. The Testator returnd to Prior Park 22 June 1764, & sent a Servant

before to C. to desire he wd come to him that day or the next. C came. & Mr Allen asked if his new Will was ready for Execution, being informd it was, he appointed C. to attend with it at Prior Park, the next Friday 29 June; he accordingly C. to attend with it at Prior Park, the next Friday 29 June; But on Sunday 24 June, the Testator was seized with a Fit of Illness, under wch he laboured till 3 or 4 on Friday morn: 29 June, when he died, without executing his new Will - Wednesday 27 June, Allen being then ill in Bed, & having a mind to make a nuncupative Codicil to his Will of 28 June 1763, did in presence & hearing of West his Apothecary, & 2 of his own Servants, nuncupate a 5th Codicil to sd Will; & West as he nuncupated the same, took a minute thereof in writing, wch he & ye 3 Servants signed: By this Allen gave Directions about his funeral & Tomb; he mentioned where his Will lay; that he died in perfect good Will towards Mr Pitt concerning whom there was a Codicil added to his Will; desired that part of a Will, not yet signed, relative to his Nephew Philip Allens marriage, may stand good in the manner intended, by that writing, wch was known to Clutterbuck & Phil: Allen Senr? & said he had not much enquired after his Wife, not knowing wh? she was alive, & that he cd not wish her to live long, in the Situation she was in. after West & the 3 Servants had signed said Nuncupative Codicil, West read it to ye Decd, omitting, only, the Words, "and I think Mr Philip Allen Senior" not being then certain whether Philip Allen Senr had been mentioned in the Nuncupation, by the Testator, who understood & approved, what was so read to him: In the afternoon of the Day Decd died, the said Codicil so nuncupated by him, was opened & read, in the presence of Philip Allen junr & other Relations of the Decd, but his Widow was not then present, being in a very declining State of Health, & all present were of opinion, the Clause in said nuncupation, was expressed in words not proper for her to hear, considering her in form Condition; they therefore directed West to transcribe sd writing, & in such Manner therein given, for his not having enquired much after her; then upon West wrote the nuncupative Codicil (D) now propounded, having compared it with the afd Writing, so wrote from the Nuncupation of the Decd, & it agreeing therewith, he burnt the afd former writing & in a day or two after carried Cod: D. to Thos: Wyatt, Hugh Frazer & Mr Breedon, & read it to them, who all remembred it contained the full Substance, of what the Testator so nuncupated, & subscribed their names thereto, together with Thos: West.

Aug: 1764 The Will dated 28 June 1763, with 4 Codicils & also Codicil D was proved in common form by Chapman & Sparrow the Extors .....

Stevens has propounded Codicil D, as a nuncupative Codicil of Decd & propounded the Clause in the fair Ingrossment of the new intended Nuncupative Codicil, & has propounded an Extract or Copy of sd Clause marked C.C. as a true Extract or Copy .....

Dr Calvert — Mr Allens Will & 4 Codicils, & also Codicil (D) now in Contest, were proved in common form by the Extors; Before a Nuncupative Will or Codicil is proved, all the next of Kin shd be cited; I shall not go thro, all the Arts of the Plea, but submit on the whole, it is irrelevant; if it cant be supported as a nuncupative Will, you will determine it at once, as was done in Mrs Medleys Case. This being a Nuncupative Codicil is reduced to a short Point by the Statute, wch is as follows, "No nuncupative Will "shall be valid, wch is not proved by 3 Wn present at the Nuncupation, & "unless it was made in the last Sickness of the Decd" after 6 Months are "passed after speaking the Words, no Testimony shall be received, unless "such Words were committed to writing, within 6 Days after making "the said Will - No Probate of a Nuncupative Will shall be granted till "14 Days after the Testators Death, & till Process has issued to call in the "Widow & next of Kin - No Will in writing concerning Goods or personal "Estate shall be repealed, nor shall any Clause, Devise, or Bequest therein "be altered or changed, by any Words or Will by Word of Mouth, except "the same be in the Life time of the Testator committed to writing, & "afterwards read to the Testator & allowed by him, & proved to be so done

Stat. 29 Car. 2. Stat. of Frauds.

" by 3 Wr. at the least". No Latitude is left for Interpretation — this is not the Original Paper, reduced into writing, in the Life time of the Testator; and Mr West has in this Transcript varied from the Original as much as he thought proper. It cd. not be the Intention of the Legislature, that different words shd be wrote down, from those the Testator uttered; The Testator never cd. say, "And I think Mr Philip Allen Senr." It was a doubt that West entertained, whilst he was writing it; This is to revoke a Legacy in a Will duly executed. Stokewell's Case. 31 Car: 2. Raym: 334

" The Testator made his Wife Exec: & Resid: Legatee; but she dying " in his life time, he by a Codicil nuncupative, devised to G. R. all " wch by Will, he had given to his Wife, & died." The Qu: was wh " this nuncupative Codicil was good notwithstanding, the Statute " the Ct adjudged it was, & as it were, a new Will, for so much as he " had given to his Wife, & that it did not alter his written Will, " for there was no such Will, the Operation of it being determ- " ined by the death of the Wife, living the Testator her " Husband — The Ct in that Case determined the Codicil to be good, because it was not to revoke a Will, but to dispose of a Residue Lapsed by the death of the Wife; So the Converse will hold, that if the Wife had been living, it wd. not have been good — When a man has given all his personalty away, by Will the Bequest of £3000 must imply an Alteration; So far is it from being committed to writing in the Testators life time that they shew it was wrote down after his death; this very Paper now propounded shd have been reduced into writing during the Deed's Life time; but it was not, therefore cd. not be read over to him; if this Practice was admitted, wch is now contended for, all the Inconveniences cd. be let in, wch the Statute meant to remedy; are Persons present to judge what was proper for the Testator to say? certainly not; they got together & made a new Will; however well they might intend it with respect to the Widow, the Suppression is illegal. The Paper before the Ct differs materially from that of wch it is called a Transcript; the Latitude intended to be introduced is not consonant to the Statute, therefore you cant receive the Plea —

Dr Bever ..... Taking the Account of the Facts as stated, by the Gentlemen, the Cond: is such, as cannot in Law have any Effect; when you consider how it is introduced, you will perceive, it is not the identical Paper given by Mr Allen — There can be no Substitution to any Nuncupation; the Statute of Frauds, is a restraining Statute, & must be taken strictly —

Dr Harris ..... The Drs will not deny, the Codicil was read over, to the Deed, & is attested by 3 Wr. The Statute says, unless the Nuncupative Will, or Codicil, or the Substance thereof &c. It says, no Will &c. shall be revoked &c. The Intention of the Legislature was, that there should be certainty; the Substance was read over; we have told, what was in the first, & not in the 2d, the Ct sees wh: any thing material was omitted; the Statute is complied with; in one Sense, it is not a true Copy, viz. the Expression as to Mrs Allen; is that material? There is something in the Copy wch wants to be explained, viz. there is a lien on the real Estate referred to in the Codicil. There is a mixture of Disposition of real & personal Estate; but this is no reason why you shd not confirm the whole Nuncupation; it wd. prove too much: this Ct will not prejudge another Ct. wch must determine on the Construction of this Codicil. It is to determine what operation this Legacy is to have on those in the Will ....

Dr Wynne .... If we have not shewn in this Plea, a full compliance with the Statute, I admit it is not to be received; the Gent: assert what the Statute dont warrant; that the words must be written on the

identical paper," It only says, it must be taken from the Dictation & from that read over, & written down — It is sufficient, we have pleaded such a case, as may be brought within the Statute, so indue the Ct to admit the Plea —

Judge ... The Question is, wh: the Allon is proper to be received to proof, & this depends, on the question, wh: supposing it proved, the Court can pro- Dr Hay ... nounce for the Paper as a nuncupative Codicil? if the point of Law is clear, that notwithstanding the facts, the Party cant avail themselves of the prayer, the Ct will reject the Plea, but if that is doubtfull, the Plea ought to be admitted, as a possibility of its operating as a nuncupative will, is sufficient inducement to me to receive the Allon to proof: the Statute of Frauds is binding on the Ct. As to Wills of personal Estate, the Stat: directs several Solemnities, in addition to the Roga- -tio Testium required by the Civil Law. The Statute relates to 2 kind of Wills; where a former will is to be affected, & where it is not: I here remark a considerable difference, between the 2 Cases, for in a Substantive nuncupative will, the Stat: says "unless the same or the Substance of it, be reduced into writing," but in the revocatory nuncu- -pative Will, I observe the words are not used; but "the same reduced into writing"; It will be a matter of Argument at the hearing, whether it is the same in Substance, or the very identical words: there can be no doubt, but a Man may say, "Such a part shall be so, so" yet identically the same words, will operate; at present, as I think it Paper is brought in this Shape; why cd. not the Party plead it, at first, as a copy of a Written Codicil, inadvertently destroyd; If Mr Allen had di- -rected it to be written, (wch dont appear) it wd. have been a written nuncupative Will, if the original was reduced into writing & inadver- -tently destroyd. The Qu: in Stonewells Case, wh: revoke the written Will: It is not stated wh? the Nuncupative shd here the Nuncupation was written & read to the Testator; there are 3 Wr who attest it: the Statute dont require the Nuncupation to be signed by the Testator, or attested in writing by the Wrs. The Q. is, wh: the Statute is to be construed so strictly, as to admit of no Interpretation, & wh? where it is not an exact Copy, in immaterial circumstances, the Ct can pronounce for the validity of it; Dr Wynne's went to obviate any doubt; their destroying the Originals, seems to have proceeded from a Tenderness to Mrs Allen; this being a Copy, cd. not be read over; the Engrossment was not read to Deed but the Paper from whence it was taken, was read over to him; I think on the whole, as this Case is the of the Impression, the Allon ought to be admitted as laid .....

Prerogative

Warrant no 122 **Hewson v Keeling & Keeling** Cricket.

Dr Collyer... Hewson is the Deed; a Condidit was given of a Will of a prior date, & in a subsequent Plea of the same Party, was an Article pleading Incapacity; the Objection taken, is, that the 2 Pleas are contradictory, & can not be admitted to Proof, as the nature of the Cause is thereby altered

Dr Wynne... The Cause commenced by Caveat agt a Will of the Decd dated Oct. 1766 the Caveat was warned, an Appearance given for ..... as Exor in a Will of July 1766. this therefore is a Testamentary Cause, & no other; their Petition is, to withdraw the Condidit, & then give this Allon; if not allowd so to do, that they may alter their Pleas: in this Act they allidge. they have a double Interest; What sort of Cause is this

Dr Ayr Judge } This Cause began by Caveat, & is testamentary; the Ct will not allow you to make 2 different Cause of it; in your Condidit, you plead the Will; in your Allon, you plead your being a Daughter; it may be, properly to shew, he wd. not make a Will to prejudice her, the Qu: is, only generally wh: the Allon is admissible, being given by an Exec: & a Daur:

& Can a Ply who has propounded a Will, after plead Incapacity in the Testator?

The Allon will depend on the propriety of pleading..

Dr Collyer... We have examined no Witnesses on the Condidit; our difficulty will be, that if this Will is pronounced agt, we cant establish ours, because we think him incapable; we cant have an Admon because we have propounded ours. The Condidit was unadvisedly given..

Dr Wynne... I must beg leave to insist, they can have no Interest, if it is not under the Will of July: it is extraordinary, they shd give an Art: that wd not have aided this Question: if the Ct cant stand, it is merely as a Circumstance. The Record, where a Party is admitted to be a next of Kin, Affection is unnecessary to be pleaded, being always presumed, unless pleaded on the other side; Art: 3. the Ct wd hardly think this Article admissible, that the Party shd endeavour to establish a Will, by a fluctuating, doubtfull Capacity; where Instructions are not proved, & stronger & fuller Proof of Execution is requisite, & also of reading over: they have no Interest if the Will is not established; a general saying of Inebriety, violent Temper, without particular facts, could only be received as an introductory Article; the Ct will not admit an Article pleading that ... Stewson did so & so, without stating some facts to shew, she is not such as not married &c. Declarations of the Party uncoupled with Facts will not do: it does not appear from the Plea that it was proper. The 8th Art: seems to undo what little was done in the 3d Art: the fact in the 9th is useless; it shews only an Assignment made but no facts to prove Incapacity or Imposition when made; the 10th is as irrelevant, that Stewson went & told these Parties he wd give them 500. every body wd wish to get rid of a dear Suit. no Inference of Fraud &c can be drawn from that.

Dr Collyer.... If we require no Answers, we cant be obliged to prove. cadera desunt.

Dr Hay. Judge When the Cause came before me, the Objection taken was to any matter being pleaded, wch was contradictory to what they themselves had said; in the 3d Article, they had pleaded, the Deed was not in his Senses; now the time of his total Incapacity is contrary to the Condidit, wch is not matter of form, but serious; you shall not plead matter over again, nor any contrary matter; instead of saying his Senses totally failed him, at the time he made your Will, you plead a fluctuating Capacity, wch is a Contradiction to what is said in the Condidit, that he had a full Capacity. I cant conceive, that because you have begun in a testamentary cause, you may not oppose as a daur, in an Interest Cause, as a daur she has a right to oppose any Will; I shd apprehend y Proctor may have an Answer to her Interest. If you set her as a daur to oppose, without subducting the other Plea, you must appear to her Interest; I will never suffer you to leave the Article of dubious Capacity. all these facts generally pleaded may be received, as they do not contradict the former Plea. I must note, that in whatever manner they proceed, if they fail in the Proof, I shall condemn them in exemplary Costs.

Allon admitted..

Prerogative.. Adderley no 123 Peachy v Peachy by her Guardian Irenley

Dr Wynne Dr Harris

Dr Harris.... John Peachy in the Deed, he made his Will & therein appointed his Brother Richd Peachy, Resid: Legatee in Trust for all his Sons & daurs, to whom he gave his personal Estate, to be equally divided amongst them, Share & Share alike, to be applied to their respective Uses: the words of the Will were as follows; "200£ to his Wife Elizabeth in full" " of dower. 100£ to ..... to put him out;" "I give & devise the" " Remainder to my daur Mary Peachy, whom I had by my first Wife" " before marriage, Sarah my daur, & Richard my Son, & the respective" " Shares of my Son & daur, I direct to be applied to their maintenance, &c" " if Sarah & Richd die minors, to my daur Mary, or if one of them, the" " Share to the Survivors, my daur Mary being one.")" " Irenley as Proctor for Elizth Peachy, who was assigned Guardian to Rd Peachy for the purpose of administering, till he shd be 21. 10 April 1767 applied for admon with the Will annexed, the Ct accordingly granted it to Elizth the Widow, Wm the Brother of the Deed (consented thereto) afterwards Adderley appeared for Mary Peachy, daur of the Deed by a former Wife, before marriage particularly described as such, in the Will; as one of the Beneficiary Resid: Legatees: on applying for a commission to swear the Guardian, the Office refused to issue one, because Mary was not before the Ct, & no Proxy of Renunciation was exhibited from her; the fact is, that Mary Peachy, was a minor on the 10th of April, but is now of age, Adderley therefore prays the Admon may be granted to her being a Major & one of the Resid: Leg: &c con. Irenley prays either a simple Admon to his Client, or that she may be joined in an admon with Mary Peachy..

Dr Wynne.... I am Council for Mary Peachy, a natural daur indeed of the Deed, but who is very particularly described in his Will, under which, there is no doubt, but that she is equally intitled with the legitimate Children; I know very well, that under general words to all his Children, it wd be doubtfull wh: the illegitimate was to be included, but in that case, the Court wd admit Circumstances to determine it; By the Will there is only 200 given to the Widow, Richd P. the Prot Guardian died without taking Probate, Wm Peachy was the Survivor, who (consenting) admon was granted with the Will annexed, to Elizabeth the Widow, who Adderley was present & consented thereto, it was not for Mary but Wm, however it was rather by a Surprize, for had Mary been mentioned, the Ct wd have taken care of her; the Office said it cd not be done without a Proxy from Mary, who was equally entitled with the other Resid: Leg: there is a Consent of 2/3 of the Interest; the Ct will never grant a joint Admon, where there is not a consent; It will never decree Admon to one Party for herself, & to the Guardian for the use of another the Minor on coming of age wd have had it, if an Admon had been granted instead of one that was expired; it is a material Circumstance that the Testator has taken the Children out of the hands of the Widow

Dr Harris.... The first Qu is wh: Mary is a Resid: Legatee? for the last Clause says my Daughters; I allow it does not appear, there were more; they are all Resid: Leg: whatever the Doctrine may be with respect to Beneficiary or Resid: Leg: Guardians have always been looked on as the Persons they represent; the Widow has had a decree in her favor; what is done one Day, cant be reworked on another, unless by Appeal: tho, the Judge had decreed it, yet the Office refuses Obedience wch is assuming a very extraordinary power; there is no occasion &c to cite a Minor; if a Major dont appear, he is in Laches; in Admon the prior petend is to be considered; Cases may differ, with respect to Resid: Leg: the Admon was decreed till one of the Wards came of Age, neither of them are; I dont see why a Representative of a Resid: Legatee has not the same right, as the Resid: Leg: himself, I hope at all events you will join them in the Admon..

Dr Hay. Judge.. I own, I think, there can be no Doubt of Mary Peachy being a Co-resid: Leg: from the whole Tenor of the Will; there is only one other daur, Sarah, under the word, Daughters, then Mary must be included; the single Qu is with respect to the Admon; Mary did not appear, as a Minor she cd only appear by her Guardian; but she did not appear at all; in the Case of Resid: Leg: Admon can only be granted during the minority of such Resid: Leg: If Mary had appeared, it wd have expired of course, when she attained 21. seeing her a Co-Resid: Legatee the Office did right; the constant Usage is to have a Renunciation from the Person interested, before you can admit another; if the Admon had passed the Seal, it must have been reworked; I think Mary as Resid: Leg: has an absolute right; I dont found myself on the Consent

Q did y Office right in not obeying y Proxy &c?
& shall y Admon be revoked?

of the Minors, or the Circumstances of Confidence in the Deed but on the Residuary Legatee being of Age, & having a Right; the Court is ministerial; J decree the Admon to Maby Peachy. she giving an Inventory, & Security to justify...

Admon decreed to Mary Peachy

Arches
3 Sep: July 2

Grene — Sawyer & Darnbrook v Silversides, others — No 124 — Fuller
Dr Wynne — Dr Calvert — Dr Harris for A Johnson

Q. Are the Solemnities of the Statute of Distributions complied with?
Q. Is there a proper Rogatio Testium
Q. Shd the Plea. be received to proof?

Dr Wynne... This is a Business of bringing into the Registry, an Admon obtained by Thos Silversides & 2 other Cozens German, next of Kin, to shew cause, why it shd not be revoked, & Admon with a Nuncupative Will annexed be granted to Roger Darnbrook & Wm Sawyer, the 2 Universal Legatees therein named, who bring in an Allon propounding the said Will.

Legatees.....

1 Art: pleads the death of Silversides of Lancaster 27 Jan. 1767. a Batchelor, leaving Thos Silversides, Eliz. Frank, Martha Dixon, & Anne Johnson his Cozens German, & next of Kin; also Robert, Wm, Hannah Darnbrook, Children of Wm Darnbrook, by Hannah his Wife, who was (whilst living) another Cozen German, also Wm Sawyer (the other Party in this Cause) John. Hannah. Francis. Richard. Joseph, & Frances Children of John Sawyer by Frances another Cozen German of Decd—

2 Art: pleads, that 27 Jan: 1767 Robt Silversides being then in the House of his usual Habitation, & sick of the Illness whereof he soon after died, viz. Wed: 28 Jan: having a mind to make a nuncupative Will, did in the presence of Thos Shann his Apothecary Wm Blades, & Rebecca Wise, nuncupate his last Will, as follows; "Being asked by Shann, if he had settled his Affairs, he answered, "No- Shann then saying it was proper he should, Decd answered "Yes, Yes- Shann said a Verbal Will wd do, as there were a sufficient "number of Witnesses present; Decd replyd, "he knew it would" or "words to that Effect, & then declared, that "all his Cozens shd have "100£ apiece, that none of them shd have more than another of "his Effects, but all of them shd be alike" or Words to that Effect this the Witnesses attest—

Dr Calvert... I am Council for 3 of the Admors, who are first Cozens, 3 Darnbrooks, 6 Sawyers who are first Cozens once removed. The Admors are cited to bring in the Admon by Darnbrook & Sawyer as 2 universal Legatees named in the nuncupative Will. But it cant be received as such, the Legislature having prescribed certain forms without which, no Nuncupative Will can be good; the Deficiency in this case is the Rogatio Testium; unless it be proved that the Testator, at the time he nuncupated, bid the Persons present or some of them, bear Witness, that such was his Will, or to that Effect, it is not valid. I understand, the Testator must call the Witnesses, & bid them take notice, other words tantamount will not avail— The Decd cant be said to be consusant of this Will: all the Questions are Shann's, the Decds Answer, Yes, Yes, indicates rather, that he was desirous to rid himself of Shanns Importunity— The Statute requires 3 Wr there are many Cases where equal Satisfaction may be obtained from the Depon of 2, but the form required by the Statute, cant be dispensed with, such a deficiency cant be supplied, any Solemnity omitted, is fatal. The 3d Art: pleads, that previous to the nuncupative Will, the Decd set about making a written Will, gave Instructions for it, & ordered 100 to each of his Relations, but was so weak, he cd not finish it; how can these Instructions apply? if their Completion was prevented by the hand of God, they might be propounded as a written Will, but how do they apply to establish a nuncupative Will? if he was so weak as not to be able to go on with the Instructions, he must be less able at the Nuncupation. all Collateral Relations may be included in the word Cozens, but there are many determinations that none shd come in who can not make out an Interest under the Statute of Distributions, if that is the Rule, Darnbrook & Sawyer can not come in: there can be no Reference from that Paper to this; it is not sufficient to induce

you to admit these Persons; if it could be used at all, it must be as a written Will; besides it shd be annexed as part & explanatory of the Nuncupative Will.

Dr Harris... I am Council for Anne Johnson; the Question is on the Admission of the Allon, wch does not depend on setting forth what the Statute requires, but the matter is quite foreign to the Paper propounded; when the Effects are left in such words as these, they must go according to the Statute of Distributions; if they extended to them, they wd go to all Relations. The Law is very expres; Nuncupative Wills are looked on very unfavorably: the Preamble says, to prevent Frauds; the Rogatio Testium is the principal point, at least one of the most essential; it was dangerous to talk: the Statute to remedy this, required the solemn Rogatio, to distinguish between such a serious act, & common Talk; this is a Rogatio Testatoris, not Testium: the Article mentions a Paper intended to be written; this very paper cuts up the Nuncupative Will: It cant prevail either as a written or nuncupative Will, by their Account, it was revoked by another.

Dr Wynne... I am Council for the Universal Legatees the Decd said all his Cozens shd have 100£ apiece; by this Clause he did appoint there is a Rogatio Testicon; if the Testator at the time directs his discourse to one of the Persons present, & bid him take notice, it is sufficient; I allow the forms prescribed by the Statute are strict; that 2 Wr cant establish a nuncupation, tho, a 3d had heard the purport mentioned by the Deed a day or two before, or after & therefore Sir Ed: Simpson rejected such a Nuncupative Will; you see the Testator had been attempting to make a Will: why is not an Apothecary or Physician as proper to enter into such a Discourse as a Clergyman, who is directed by the Canon Law to put a dying man in mind of his Will; if there Conversation passed, it wd be within the Statute; the Deed was prepared to make his Will; wch is as much within the Spirit & Intention of the Statute as can be; it not being the design of the Legislature to check Will making but only to prevent Frauds, & to introduce Certainty; there have existed Cases, where there were 3 Wr to a Will, & tho, one was perjured, yet as the Statute was complied with, the Will was established. Tho, you can go beyond the Statute, if your Conscience can be satisfied of the fairness of the Transaction you will go as far as you can in the Construction; An earnestness may as well be supposed from the Repetition of Yes, Yes. it will be tantamount: Acts are stronger than words to make a Rogatio Testium: the facts are sufficient to establish Intention & Capacity; I wd allow that the words "all my Cozens," standing substantively, wd be too general to have effect, as a man's Estate wd be reduced to nothing if so shared out; if the meaning can be collected out of the Will, the Ct will allow parole Evidence to establish it, otherwise not. Selwyn v Brown. Ld Cheyneys Case. 5 Co. Rep. 68. parole Evidence was admitted. We plead a declaration of his Intention: it was no executed Paper, therefore cd be only propounded as a Testamentary Schedule, from the Execution of wch the Testator was prevented by Death.

Dr Hay. Judge. I shd be unwilling to reject any Plea, where on the Evidence, there is a bare possibility, that the Party propounding the Paper cd avail himself; but the Statute is peremptory, so that I cant go beyond the Line laid down; the Admissibility depends on the Consequence, flowing from the proof of the 2d Article, wh if cd pronounce for the Will, if the matter of that article shd be fully proved; the meaning & the extent of the word Cozens wd be a subsequent Consideration, & cant be attended to, when the propriety of the Will is examined; if that cd be received to proof, you might

go into the discussion of what he meant, by the word "Cozens" to the Paper, as pleaded wch be relevant. if Sr Cs be at Liberty to receive the Plea: the Statute has many Requisites; if most of them are complied with, & only one omitted, the Will cannot be pronounced for; if the Will was made in his Sickness & he afterwards recovered, Jc: not pronounce for the Will: Shann did properly; his Answer. No shews clearly, those ..... Papers pleaded were nothing in his Estimation: but those Papers might be explanatory of those Ambiguous Expressions, "All my Cozens." yes yes, may be earnest or peevish. Shann told him a verbal Will wch be sufficient, as there was a sufficient number of Witnesses present: this no more than saying there are Witnesses, for if he had directly mentioned, tho, he had not answerd Shann, instead of saying "he knew it," it wd have been the same; or to that effect; it cd be only a positive Answer to what Shann said. the Rogatio Testium, is the Evidence the Statute requires to shew it is a deliberate Act: there may be many other ways to shew the deliberation, but the Statute requires this; there shall be a bidding, according to the Civil Law; Would the Words attends, come hither, have been Evidence of a Capacity & Intention to nuncupate? I dont think those words are equivalent; for I allow that such Equivalence is sufficient; but this is not pleaded; as the Rogatio Testium is in my Opinion necessary by the Statute, I cant indulge myself in a latitude & therefore I think this Allon cannot be received. I remember in the Case of Atkenson & Henley. Decr 1758. an Allon was rejected for want of the Rogatio Testium.

Plea rejected

D

Prerogative
3d Sess. July 7

Dr Wynne

Nº 125

Pyefinch v Palmour ol: Pyefinch.

Alexander — Dr Wynne — Dr Calvert — Stevens

Q. Is the Plea admissible?

This is a Question on the revocation of a Probate, for want of Jurisdiction (wch has been granted at Hereford) for that purpose a Citation issued from this Court, & also to shew Cause why Probate of a Will dated 8 July 1762. should not be granted to Jn Pyefinch Brother of the Deed.

We are now before you on the admission of an Allegation of wch Art: 1 pleads, that Wm Pyefinch the Deed, gave directions for the Will of 8 of July 1762, the Contents where of are set forth in the annexed Paper: the Execution is also pleaded

Art. 2. That the sd Will was left in the Custody of Jas Wellington (one of the Witnesses) to be taken care of by him

Art. 3. That the Testator died 18 May: 1763. without Children or Parents, leaving a Widow & Brother, the Parties in this Cause.

That before & after the making such Will, he professed a great regard & affection for his Brother, & declared to several Persons that he had given his Wife, for Life, the Interest of his Personal Estate, & made his Brother Exor, & residuary Legatee. That this Will remained in the hands of Jas Willinton till 6 Decr when the Deed sent his Servant Hughes to him, for the Will, wch was given to him, after which the Deed returned it & bade him lock it up, not tell his Mistress, that he had made his Will. In this State the Will remained, till a Week after the Deeds death, when the Mistress got it into her Custody, & read it, way angry & tore off the Seal in the presence of ... Shief. That it is now in the Custody of Mary Pyefinch, or since the cancelling thereof has been destroyd (by her Order, without any Copy being taken. That A contains the Substance thereof wch is known to Henry Jones the Drawer, Wellerton, who was a Witness, & W. Shief who heard the

Original Will read over by many Pyefinch. The Prayer is that Probate of Paper (A) containing the Substance of the cancelled Will may be granted to the Brother.

Dr Calvert. My Client is sole Exec: in a Will dated 16 Aug: 1760. they pray Probate of Paper A till an authentic Copy of the Original Will is produced, wch they allege to be destroyd.

I object to the Allon, as being too closely drawn: they have not pleaded by whom the Paper was drawn up, nor when, which is material, as it must have been subsequent to the Deeds death; the Will was made 8 Ye ars ago, how can Jones & Wellington speak to the Contents at this distance of Time? they dont appear they ever saw the Will. It is not pleaded that the Will survived the Deed. The Story is incredible, if she intended to secrete her Husbands Will, that She shd read it over before a Witness, & then cancel it. How did it pass from Hughes to Palmore? did he give it up? that shd be accounted for; it is proper you shd be satisfied what is become of it now: the Paper exhibited is drawn out in the form of a Will as regularly as if it was a Copy.

Dr Wynne... The Dr admitted that Copies have been pronounced for, where there was Evidence, the Will was destroyed: it is immaterial who drew it, or when it was drawn; it is not a Paper you are to pronounce for, but it will lead to a proof of the Original Will, which we say was read after the Deeds death, consequently was seen; it is not the Paper, but the Substance you wd pronounce for on the Evidence of these Persons, who have already made Affidavits, tho they can't be read; The Dr called on us to produce Cases. I answer it is improper we are now only on the Admission of an Allon. We dont call it an authentic Copy, we only plead it as the Substance, wch is sufficient for praying it, till the authentic Copy or Original is produced; what Strengthens our Prayer is, the Widow having herself destroyd it. She got possession of it, by having the Keys; it was locked up in the Deeds House: this is not the first time a Woman has acted indiscretely. She is under an Obligation to bring in all Scripts &c but has not brought in the cancelled Will therefore we cant suppose it exists; it is sufficient if we can prove it subsisted after the Testators death, that she suppressed it, & that this is the Substance of it.

Judge ... When Papers are destroyd by Accident, or by a Party interested, & the Substance is ascertained the Contents may be pronounced for: if you can prove the Testator made a Will subsequent to hers: its Subsisting after his death, her destroying it, & what the Contents were, they may be pronounced for: They assume the proof of these Particulars, therefore the Allon in general is admissible tho, it wd have been stronger, if the time of its being drawn up had been ascertained: if Wellington was the Drawer, he is the most proper person to account for the Contents, but the material Question is, wht this is the Substance of the Will wch was destroyd. I think the Allon may be received, as it stands, tho, unless they can prove the Will subsisted after the Deeds Death, or in other words, the 6th Article, it is in vain to oppose the written Will.

Plea admitted ..

Prerogative
Jenner

Nº 126

Ryley ol: Prosser v Ryley — Bishop.

Dr Wynne — Dr Marriot

Q. Shall a pretended Wife be admitted to offer Evidence to prove herself the Person intended to be benefited by the Husband Will (not a lawfull Wife?

Dr Marriot..... I must insist Mrs Prosser has no right to give a Plea, in order to prove the Intention of the Testator; there being nothing on the face of the Will wch tends to a description. The general Law is, that Legacies are void for Incertainty, viz. a Person leaves a Legacy to his Servant John, & he has 2 Servants named John. There is no legal Certainty in the Act so as to admit her to plead. There is a legal Certainty in my Client: the Construction then is in our favor, for the Ct must construe according to

Law, & according to the Intention of the Testator, which must depend on the Law; The word Wife, has only a legal Idea annexed to it, & cannot mean one who is not the Wife; if a Legacy was bequeathed to an incestuous Wife, she could not take it, as the Wife; Here the Deed had two Wives, he lived in a felonious manner, Bigamy being Felony, he was therefore under a kind of collusive necessity, to benefit this woman, & so drew the Will in this manner: By the words "Mary my Wife," you will conceive he meant "Mary my lawfull Wife," forming your Idea on legal Grounds; there are no words to denote his Intention to benefit Prosper, no description of her, therefore I hope you will reject this Plea...

Dr Wynne... I must answer to Dr Harriots peremptory objection, that the Question is not, who is the Wife in the Eye of the Law, but who was the Wife in the Eye of the Husband (L.d Cheyneys Case 5 Co. 68 is similar to the present) My Client cant be accused of any Misbehavior; we plead the Deed when he married her in 1758 pretended to be a Batchelor, the other Party never claimed the Deed for her Husband, therefore my Client was the apparent Wife, she lived with him 30 Years, & was in all respects innocent of the Transaction; the Expression, "My Dear Wife," in some measure points out the meaning of the Testator, for we plead her being a good Nurse to the Deed, now can it be supposed he meant by those Words, the Wife who had not lived with him for 30 Years before his death; where Explanation is necessary the Ct will always admit it, will I doubt not, admit either of the Parties to shew herself the Person intended by the Deed....

Judge.... I think this a Case of Consequence, not with respect to the Estate, but the Matter in debate. The Fact is, a man had two Wives at the same time, the last Wife lived with him 30 Years before & to his Death, the first did not cohabit with him at all; The 2d Wife was then a Wife de facto, tho, not de Jure: the Question is, whr the Ct can admit Evidence to shew, that by the words "My Dear Wife." the Deed meant his Wife de factor in general. This Doctrine is undeniable, that no Evidence shall be allowed to contradict what appears on the face of the Will, as was determined in a case before Dr Bettesworth, where "a man left a Legacy to his lawfull Wife"; he having 2 Wives; the word, lawfull, had so fixed a Sense, that no Evidence could be received against it; so let the Parole Evidence be ever so strong, it cannot be received agt the positive Sense of the Words of the Will. The Distinction taken by Dr Wynne, is, that you cant contradict, you may explain the Words of the Will; the Question then is, whr the Idea now offered may be received, as explanatory? & I think under the Circumstances of this case, (the word, Lawfull, not being used) the Words My (considering, Dear, in a large Sense, as Beloved, & affectionate,) serve to explain this Will, & shew he meant the Benefit should accrue to the Wife de Facto. I think I may admit the Action, as the Doubt is not who is the lawfull Wife, but who is the Executrix. If he had added descriptive words, viz. "My Wife who lives with me." no Evidence cd have been received to contradict them. Carleton Smith 1723 or 1724 left his Estate to his dear Wife Mary, another Woman, named Frances, claimed it as his first Wife, & contested for her Interest, as Widow, not as the Person meant; the Ct allowed her to oppose for her Interest as Widow. This not necessary. I shd take the lawfull Wife, as such, to be the Person meant, but I admit her to shew it if she can, & the Wife de Facto to do the same.....

C. Hume

Plea admitted

v. Fol: 378. where Dr May pronounced in favor of the Wife de facto

Prerogative

No 127.

Stevens — Ames v Ward — Cheslyn

Dr Harris, Calvert — Dr Wynne & Burrell

Q can a Minor not quite 14 make a Will to dispose of personal Estate?
Q Was this Will obtained by Importunity or undue Influence?

Dr Wynne..... Elizabeth Ames the Deed being under 14 years of age when she made her Will, there being particular circumstances, in order to clear up things the better, it will be necessary for me to set forth the Motives of her doing it. The Deed was the Daur of Wm & Thomasin Ames, who being in very necessitous circumstances, she was taken care of by Mrs Mary Sanderson her Grandmothers half Sister, who being possessed of 2.000 personal Estate & 2 Farms of 180£ p An: made her Will 15 Augt 1763 & therein devised her real & personal Estate to her Niece Eliz: Ames, charged with an Annuity of 20£ p Ann. to Sarah Wilkes & in case Eliz. Ames shd die under 21 & without Issue, directed the said Estates to be sold, & the money to be paid 1/4 to Eliz. Brooks. 1/4 to Sarah Boardman 1/4 to Stephen Sayers & 1/4 to Anne Masters. and after several Specific Legacies gave the Residue to Eliz. Ames, & made Jas Ward & Gibson Lucas Esqrs Exors.

23 Jan. 1765 Mrs Sanderson entered into an Article with Nicholas Jackson for the Sale of the said Estate for £377: to be conveyd to him on, or before 6 April 1765.

9 Feb. 1765. Mrs Sanderson died without re-executing her Will whereby the Article for Sale, became a Revocation, as to the Devise of the real Estates at Wymondham Norfolk

5 March. 1765. Mr Ward & Lucas proved the Will, and it was thought advisable, that a Bill in Equity shd be filed for a specific performance of Covenant; accordingly a Bill was filed, in the name of Eliz: Ames by her next Friend, agt the Exors, Mrs Wilkes the Annuitt Jn Atkins the Heir at Law of Mrs Sanderson, Mr Jackson the Purchaser & the several other persons to whom Mrs S. gave the money, to 21 & without Issue; thereby praying that the Will of the Testatrix might be established, the Trusts carried into Execution, & that the Heir at Law, & all other Parties, might join in the Conveyance thereof, & for other purposes.

Miss Ames after her Aunts death, falling into a bad State of health Mr Ward thought it right to place her at a School near London, where she might have the Advice of able Physicians, & the Benefit of a milder Air than Yarmouth, he accordingly removed her to Mrs Musgraves School at Hammersmith, but finding her health visibly decline, he advised her to settle her Affairs & to make a Will & provide for those Legatees, who wd have been entitled to the freehold Estate, in case she had died under Age, without Issue: she seemed unwilling to do so, & desired to leave what she had to Mr Ward, & he with great difficulty prevailed on her, to leave 30£ p An. Apiece to her Father & Mother, if they shd happen to be alive nor would Mr Ward have accepted of the Residue of her personal if it had not been with a view to apply it in the same manner he proposed to her to leave it. These were the real Motives for prevailing on the Deed to make the Will in contest, but as they are not in proof, they cannot be set forth. Miss Ames, whilst she was in Town wrote the Instructions (the precise Time does not appear) from which a Will was to have been made, when she was 14. (such would have been 7 Sepr 1768) Mr Ward apprehending no Person cd make a Will till 14. but he being informed she cd not live many Days, he on the 9th of July 1768 wrote to Mr Goddard, the Drawer of the Will, requesting him to attend her, relating to her Will. Saturday July 13. Mr G. attended Miss Ames, took Instructions for her Will, wch was drawn, laid before Council, & approved, 15th July. She executed her Will, in the presence of Mr Goddard & Mr Chapman his Partner, & on the 17th Miss Ames died; The Facts of taking the Instructions, executing the Will are fully & minutely set forth in Mr G's

Evidence; after Miss As Death, some unkind things having been said touching Mr Wards Conduct in obtaining the Will, this Intention, tho' honest & just not being publickly known, did lay so heavy on his Mind, that it caused his Death on the 9th of August he having repeatedly declared, neither he nor any of his family shd ever take, or enjoy one Shilling of what was left him by Miss As Will — Mr Ward made his Will, appointed his Brothers Neale, Thos: Ward, his Wife Catherine Exors, & his Wife, his Son James, his daur Catherine Resid: Legs: the Brothers renounced, & the Widow alone proved the Will: Mrs Ward & her Children in consequence of Mr Wards Declaration, were determined to have nothing to do with Miss As Affairs, nor to take any thing under her Will, but offered themselves ready to do any Act, to establish it or not provided Miss As next of Kin, & the Legatees of Mrs Sanderson who entered into Agreements, how Miss As Estate shd be divided, whether the Will shd be established, or set aside — Miss As Father, Mother were repeatedly advertized in the London Gazette, & all the other News Papers, & every Step was used to find them, without effect: on this, the Grandfather presuming them dead, claimed as next of Kin; Mr Wards Council advised the Will to be brought before the Ct. The Caveat entered by her, was warned by Jn Ames. 31 July 1766 The Will was propounded, & an Allegation given by Mrs Ward, in a subsequent Article of it, the Instructions were pleaded in supply of Proof, and they were pleaded to be of the Deceds hand writing: Geldard & Chapman the Subscribing Wits to the Will have been examined, & Eliz: Draper who prove the Instructions were of the Deceds hand writing. After these Wits were examined, & before Publication, the Agreement proposed between the next of Kin & Legatees afd not being carried into Execution, things rested a little, & Mrs W. being very desirous they shd agree amongst themselves how the Estate shd be divided, if the Will was pronounced for. In November last Articles of Agreement were entd into between Jn Ames & the Legatees afd, reciting the principal parts of the afd Facts, & that if the Will of the said Eliz. Ames shd be declared valid by the Sp: Ct; it was understood that the sd Will was advised, & made to the Intent yt said Mr Ward might be a Trustee of yt Purchase money arising by the Sale of yt real Estate, for the said Legatees, & as to the residue of the personal Estate, for her Next of Kin: & the said Jn Ames did thereby agree, that the said Legatees shd receive in equal Portions, the Purchase money, arising by Sale of the said Premises; and the Legatees agreed, said Jn Ames shd have to his own use a particular part of the personal Estate of Mary Sanderson, subject to her Debts & Legacies; Things thus settled, Publication passed, & the Cause stands for Sentence. Thus, the Event of this Cause is immaterial to Mr Ward, yet for the credit of the Family, & to avoid any Slur on the Characters of Messrs Geldard & Chapman, Gentn eminent in the Law, She wishes it may be established. Miss Ames Capacity at the time of giving Instructions & Execution is fully proved, & at the Time of her giving the Instructions, her discreting a Legacy to be left Mr Lucas clearly shews, she knew what she was about. Her not understanding the nature of a Will proceeded from the Tenderness of her Years, It is in proof she wished to be informed, in doing wch Mr Geldard took uncommon Pains, & when she knew what she was about, she appeard perfectly satisfied with it. The Will is of the same Tenure with the Instructions, except the 40 Legacy to Mr Lucas; had Miss A. died without executing yt Will, & leaving only yt Instructions, on an Affidavit of 2 Persons to her hand writing, the Office must have received yt same as her Will, & granted Probate in common form to Mr Ward, whose Motives for obtaining this Will cant be set forth to the Ct. as they are not in proof, but so far as it is Evidence about Mrs Sandersons Effects, the Ct may be informed. . . . . .

NB None of these in Proof. . . . .

NB not in Proof

Dr Harris. . . . I am Council for Jn Ames the Grandfather the Promoter of this Suit against Mrs Ward, Exec: of Jn Ward Esq who was the pretended Exor & Resid: Legatee of Miss Eliz. Ames dec'd. This Cause began by a Caveat entred by Mrs Ward, for the Honor of her Husband: Stevens appeard for Ames, & prayd Admon; & Mrs Ward pray Admon with the Will annexed. Miss Ames died a minor under 14, leaving a Father, Mother since dead, Jn Ames her Grandfather, only next of kin. 15 Augt 1763 Mrs S. by Will devised certain Estates to Eliz. Ames, if she lived till 21, else to be sold by her Exors, who were to give the Money to several Legatees, Mrs S. subsequent to the Will entred into an Agreement to sell the Estate to Jackson, but she died before it was carried into Execution; after Mrs S. died, Miss A came under Mr Wards Care, she was in a very bad State of Health: a Doubt arising on the Construction of the Will of Mrs S. the Opinion of Council was taken, who thought the Agreement with Jackson a Revocation of that Part of the Will wch related to the Real Estate, the Consequence of wch is that Eliz. A. was intitled to every thing Mrs S. left: thus Miss A became an object for an artfull man to work on, & Mr Ward created a sort of Quasi Guardian, began to form a Scheme to benefit himself: finding Miss Ames very ill, he carries her from Yarmouth, where her Friends were, to a School at Hammersmith: it appears from Mrs Draper, that Miss A. had but a short knowledge of Mr Ward; who in less than 3 Mon shews his intention to procure a Will; Geldard appears at some of the meetings with Mr Ward, his Brother &c. Mr Ward declared it neccsary to avoid trouble with the next of Kin, that the Deed shd make a Will at 14, if it could be legally done, (by reason of Mrs S. Legacies of the Monies arising out of yt Sale of Land) in Case Miss A. died before 21 & without Issue; Pursuant to this Declaration Mr Ward dictated the Instructions, even before Miss A. was 14, & illegally, according to his own Opinion, took her Instructions; having thus prepared Mr Geldard he desires him to wait on Miss Ames to take Instructions, in order to have a Will ready, against September, when she wd be 14. He introduces him to Miss A. saying, this is Mr G. who will wait on you when you are 14, to take Instructions for your Will: Then follows, what is extraordinary on the part of G. who desires her to recollect herself, & have the Instructions ready in writing, against he came; thus the whole Plan was concerted, but it seems Mr Ward received Intelligence, she was in great danger, so that it was necessary the Business shd be performd before she was 14. Mr Wards Letter is very extraordinary, & is as follows.

Mr Jas Geldard.

9 July 1765

" Sir, By a Letter I received yesterday, I am much alarmd about
" Miss Ames, & I have wrote to her to desire, that she wd be
" prepared with her Instructions, against you call on her, &
" therefore think you may do so, the latter End of this Week &
" when you have been there, will write me your Opinion there-
" on, & I think that you shd ask Mr Perryn, Whether it is proper
" for her to dispose of that money for which the Estates were
" sold, or leave it without any particular notice thereof;
" Please to let me know in what Situation you find her, for
" 'tis possible she might be born sometime before she was
" christened, & under danger of not living, it might be eligible
" for to have her sign a Will, before the Time of her Christening
" & in case she lived, to have another ready to sign, on the 7th of
" Sept: but this I leave to those of better Judgement to deter-
" mine; I have enclosed you a Letter for Mrs Musgrave, agt you
" Mrs Musgrave says she has been so ill, that she thought proper to

NB She had none

remove her, from the rest of the Children, & she believes Miss Ames thinks, she is now in my House —

Miss Ames, when pressed by Mr G. takes the Paper out of a Trunk, & says "there are what you want," when pressed, she determines not to be seized, says she does not understand it, & calls Miss Thompson to her Assistance, who came, & leaving open the Door G. heard Miss A. say to her, they want me to make a Will – She does every Act with Reluctance; there is a kind of Civil force put upon her, at the signing great Regard ought to be had to her tender Age; I can find no Instance of any Will of a Person under 14, established by this Ct or any other Ecclesiastical Ct – I agree with the Gentlemen that Mr Wards Honor is concerned, but if the establishing that, was Mrs Ward's view in this Suit, she was ill advised to bring it, as it is likely to have a very different Effect from what she wishes; if that was not the motive, she is then in the common Case of all Exors. . .

Dr Wynne . . . I looked on this as an amicable Suit, by reason of the Agreement mentioned above – We are to enquire whether this is such a Will as can be established? the Dr made a preliminary Objection, that the Council shd produce Instances of the Wills of Minors of 14 being established; I am told, a Schoolboys Will whereby he gave all to his Schoolmaster, was established by Sir Geo. Lee, but it dont depend on that; the Law of England as to last Wills of personal Estate, is merely the Roman Law except where, it is altered by the Statute or Common Law of this Land; by the Roman Law a Girl might make a Will at

vid. Domat. Civil Law — 12 & a Boy at 14 – Godolphin Part. 1. Cap. 8. lays it down that the

Godolphin Part. 1. c. 8. §1 Orph. Leg. — Ecclesiastical Court can establish ye Will of. Lord Coke lays down 17 as the proper Age but assigns no Reason why – In Bishop & — Co. Lit. Lib. 2. cap. 5. fo. 90.

NB Sharp 2 Vern. 469. It was agreed a Female may make a Will at 12, a Male at 15 if proved to be a Person of Discretion.

2 Vern. 255-328. Gilbert. 74. --- Hyde & Hyde in Chancery, no Dispute was made, but that a Male of 14 & a Female of 12 might make a Will of personal Estate, & Mr Gilbert said, Ld Keeper Wright agreed thereto in Sharp & Sharp, wherein

L. 5. ff. Qui Test. fac. possunt --- they followd the Rule of the Civil Law, wch says, "in masculis quidem quartum decimum annum spectandum, in fæminis vero duodecimum quidem completum. The Dr threw out the necessity of accumulating Cases, else I shd have thought the Rule so much established, as to have made it unnecessary; I agree with the Dr, that the Ct will be jealous & attend minutely to Circumstances; the Age is an incidental Circumstance, & the Tenderness thereof varies the degree of Proof requisite, I see no reason why the Male may not make a Will till 14, & the Female may at 12, but the Law has drawn the Line; the present Will could only convey personal, not real Estate, or money issuing out of Land, as it is only attested by 2 Witnesses. the Prayer of the Bill, is to carry the Trusts into Execution, it never can be said, that Mr Ward, as her sole Keeper &c. make that prayer, taking the Will to be revoked, & intending to come in himself; the Will cd not operate so as to entitle him: the Residue wd not be so great as represented, therefore no such Temptation as insinuated. Miss Ames came fairly into his Hands; the Parents were in low Circumstances, supposed to be dead; it was a justifiable & laudable Design in the Exor. to advise her to make a Will, as the Consequence of her dyeing intestate wd be, that the Father who was a Sailor, & had deserted his Wife & married another Woman, wd have been entitled to the whole, & the real mother left to starve; Miss A. by Will left the Interest of the whole to her

supposing she left only ye [illegible] — Parents for Life, so far then, the Transaction is fair – But if it was not her own voluntary Act, it cd not be established, however proper

NB – the Q. was this. A. by will after some Legacies, gave ye residue of his personal Estate to his Dr & his Real Estate to her, & her Heirs, & if she died under 21, he gave his real Estate to his Brother. The Dr died at 16, & by Will gave all her personal Estate to B. ye Estate being subject to a Mortgage, ye Bro: who is Heir to ye Testator & his daur br: his Bill to have his Mortgage paid off, out of ye personal Estate. Q. Shall the Personalty in B's hands be applied to exonerate the real Estate? . . . .

the Contents – Does it appear Miss Ames who had a right to the Care of her, she was put into the Care of the Exor by her Aunt; I cant devise properer means to inform her of the meaning of a Will, than was taken; Mr G. first demanded to see her. on talking on the Subject, her Answers were very rational, nothing childish; She was in a bad State of health, did not care to talk, & was rather peevish, & any body wd be so Mr Wards Idea of 14 being the proper Age to make a Will might be taken from the Common Law, by wch 14 is the stated age, for several Acts; Expedition was necessary, if it was only to provide for her Mother; I dont know what use can be made of the Observation, that she thought herself at Mrs Musgraves; she might be fainting: There was no prompting when the Trunk was opened; she delivered the Instructions sealed up; she had her memory entire, directs a Legacy to be given to Mr Lucas, & to distinguish him, from the Clergyman, says the Esquire. G. did not draw the Will immediately, but enquired about her Capacity of Dr Reeves, who answerd, he believed her capable: then he drew the Draft, carried it to Mr Penryn to peruse & settle, informing him of all the Circumstances; he approves & signs the Draft; I will allow there was a Reluctance & Peevishness in the Deed, but I appeal to your notes, whr that proceeded from any Dislike of the Contents of the Will, or from Pain & Languor, if so, that Objection wd hold equally agt the Execution of every Will in the same Circumstances; Persuasion will not appear in an unfavorable light, it was an Act of Charity, if the Party was not interested, & if it was only to induce a Party to do an Act she wd freely have done if in health. Mr G. asked particularly, if she acted of her own free Will, She answerd, very expressly, "I chuse it; with respect to the delivery; she bade Mr G. keep the Will, till he saw Mr Ward, wch was a Confirmation of what she had done: the Case is not unfavorable, & the Will may be pronounced for, as fairly obtained; Mrs Wards motive, to take off any Imputation from her Husband, was good, but that could not be her sole motive, for she was bound to proceed as a Minor was concerned, & without laying the Will before the Ct, as Executrix she would not be justified - - - - - - - - - -

Dr Burrell . . . . I am Council on the same Side with Dr Wynne, in support of the Will of Miss Ames; I likewise understood, this was in the nature of an amicable Suit, till Dr Harris by the hostile manner in wch he opened, proved the reverse; the Question before the Ct respects the Will of a Girl not quite 14. To the validity of wch, 2 Objections have been taken: first, with respect to the manner of obtaining it; 2dly as to the Person who made it; I will begin with the latter, because if the Testatrix could not make a Will, it will be of small Importance, for me to consider, whether it was properly obtained; Dr Harris said the Will of a Minor under 14 is not good in Law, & called upon us to produce Instances, where such a Will has been established; it thus becomes necessary for me to enquire into the Law, & find out, if I can, what is the precise Time fixd to give force & Validity to an Act of this kind; I have looked into different Writers on this Subject, & I freely own I cannot find the Line drawn with that precision & Exactness, as to determine the Question, the Opinions of Writers, × × have varied so much that the Point seems at this Day, × dubious & incertain, and in truth, the Question appears to me, entirely open; Godolphin says An Infant male at 14, & a Female at 12, may make a Testament — Orph. Leg. cap. 8. §1. –
touching Goods & Chattels. Swinburn. Part 2. §2. a Boy cant make his Testament before 14, nor a Girl before 12. after those Ages they may dispose of their Goods & Chattels, not only without the Consent of their Curator or Guardian, but also without the Authority & Consent of the Father, if he or She have any Goods of their own – Most of the Commentators on the Civil Law are of the same Opinion, and the Roman Law being the Ground on which this Question must be determined, unless the Law of England speaks a different Language

it remains for me to enquire how the Municipal Law of this Country stands with respect to the Ability of Minors to dispose of their Fortunes by Will.

3 & 4 E. 6. c. 8. has prescribed 21 as the Time when Persons can dispose of real Estate by Will; for till that time by the Common Law they be accounted Infants

Co. Litt. Lib. 2. c. 8. to 90.

Littleton says an Infant of the Age of 18 may make a Will, but Ld Coke in his Comment on that learned Man, says the meaning of Littleton is, that if after his marriage, he accomplish his Age of 18 Years, at what time he may make his Testament, & constitute Exors for his Goods, Chattels, & the word are so to be × × ×ˢ × understood, as may stand with Law & Reason. I wish Ld Coke had assigned his reasons for this Construction.

1 Jones 210 — Brown v the Chancellor of Litchfield. Prohibition was prayd to the Consistory of Litchfield, for that a Testament of Goods of one under 16 being contested, Sentence was given in favor of the Will, but Prohibition was denied, for the Cause is proper for the Jurisdiction of the Spi: Ct & the determination at what age a Person may make a Will of Goods appertains to them, & if the inferior Ct has given Sentence against Law, the Party may remedy it by Appeal.

2 Mod. 315 — Smallwood v Brickhouse. The Suggestion was, that A under 16 had made a Will, & the Prerogative Ct proceeded to the Proof of it, whereas by the Common Law a Person is not capable till 17, therefore Prohibition was prayd: & that the Common Law hath determined the Time, Cokes Comment on Littleton was cited, 1 Inst. 89. b. where 'tis said that at 18, he may make his Testament & constitute Exors, & the Age of a Person is triable, also in pais but the Ct said, the Proof of Wills, & Validity of them belongs to the Spi: Ct, & if they adjudge a Person capable, the Ct will not intermeddle, for 'tis within their Jurisdiction to adjudge, when a Person is of Age to make a Will, & sometimes they allow Wills made by Persons of 14, & the Common Law hath appointed no Time, so that it depends wholly on the Spi: Law; therefore a Prohibition was denied . . . . . .

Thus then the Common Law, having left it uncertain, at what Age a Minor is capable of making her Will of personal Estate, & the Ct having (in Smallwood & Brickhouse) referrd that Point to the Decision of the Spi: Ct, which seems to have adopted the Rule of the Civil Law, & fixed 14 for Males & 12 as the proper Era for Females, there surely can remain no doubt of the Validity of this Will, in point of Law. And respectable as Ld Cokes Opinion is held in general, it is overruled by 2 Determinations in the Prerogative Ct viz. Atkins v Atkins. 1686. where the Will of a Boy of 14 was held good — Newby v Earle 1708 where a Boy aged 16 left everything to Earle, his Schoolmaster, (at Sydenham in Kent) to the prejudice of his Relations, yet unfavorable as this Transaction appeared, the Court established the Will — But it is said, the Manner of obtaining Miss Ames' Will, was so fraudulent & Imposeing, as totally to invalidate it, whatever the Law might determine as to the first point; So much has already been said by Dr Wynne on this head, that I will not take up your Time in Recapitulating it, & shall therefore content myself with recalling to your Mind the Will of Mrs Sanderson wch gave rise to this Transaction, had she lived to carry her Agreement into Execution, we shd have had no Occasion to trouble the Ct now; but her Death, & the Opinions of Eminent Common Lawyers, respecting the Operation of such Agreement, added to Miss Ames' bad State of Health, induced Mr Ward to wish she might make a Will, in obtaining wch, I can not see any Appearance of Unfairness, any Grounds for the Ct to declare, it was obtained by Imposition, or undue Influence;

before Ld Raymd
before Sr Geo. Lee

Mr Ward advises her to make her Will, she agrees, he recommends a Person of Eminence in the Law, introduces him to her; when informed of her Danger, he writes to Mr Geldard to go & take her Instructions, who went at the time appointed, to the School, was introduced to her by the Mistress, & informed her of his Business, she was indeed peevish & fretfull, but not averse to give him Instructions, she called for her Trunk (wch was kept by the Schoolmistress) Miss opened it, & gave a Paper Sealed up to him, wch she said contained the Instructions for her Will, when asked if she wd add any thing, she said nothing but 20£ to Mr Lucas, being asked wch Mr Lucas, she replied the Esquire, has this the Appearance of an unfair Transaction? much Stress seems intended to be laid on the Instructions being sealed, & an Inference thence drawn, that they were not her Act, but her Delivery of that Paper to Geldard, & her additional Legacy to Lucas (wch cant be denied to be voluntary) will destroy that Hypothesis; it was thrown out, she did not understand what a Will was, supposing that true, did not G. repeatedly explain to her ye meaning of a Will, & was she not desirous of understanding it? did not G. ask if the Instructions were voluntary or by the Advice, or improper Influence of any other Person, & did she not say, they were of her own free Will? not content with these Enquiries, Mr G. asks Dr Reeves opinion of her Understanding & wh he thought she was capable of making a Will? he answerd in the Affirmative; the Will is then drawn up, laid before, & approved by Mrs Perrin & executed the next day: You will observe Sir, that my Clients are not likely to be benefited by the Determination of the Ct having agreed to relinquish any right, they might have, under the Minors Will, being well satisfied that Mr Ward never intended to take any thing under it, but was desirous that the Legatees in Mrs S.'s Will might not be ousted, of the Benefit intended them, by Mrs S. in Case of Miss A's death, & therefore was earnest, Miss A. shd confirm it to them by Will, or gave him an Opportunity of doing it; upon the Whole, I hope you will be of Opinion, that Miss A. not being compleatly 14. was capable of making the Will in question, & that it was not unduly obtained as has been suggested, & therefore ought to be established . . . . .

Dr Harris — The Deed was under 14 at her death; she had been under the Care of her Aunt Sanderson, who devised the Residue of her Estate to her, if she attained 21, if not, part of it was devised to several other Persons, which was to arise by the Sale of a Landed Estate; but after the making her Will, Mrs S. entered into a Contract for Sale of the Estate abovementioned, such Agreement therefore was a Revocation of the Will, pro tanto. The Prospect of Mr Ward in persuading Miss Ames to make the Will in question, was very evident; he wd get 2000£ at all events, & in Case of the Agreement being declared a Revocation of the Will made prior thereto, he wd be entitled to 5000£ more; the Dr who led on the other side, closed his Argument with saying, the Articles entered into between the Legatees in Mrs S.'s Will, — Miss A.'s next of Kin, & Mr Ward's Children & Widow, could not be carried into Execution, as one of the Parties was a minor, if so, it is not binding, but of no Effect with respect to such Minor; the Gentlemen expressed their Surprize at meeting with Opposition, had they not been aware of it, they wd have scarcely have come prepared with Authorities to support their Cause; I said it was doubtfull, wh: a Female could make a Will before 14. I know what the Roman Law says, & the Gent.n have quoted it fairly, but the Civil Law is no part of the Law of this Land; if they can, the Drs may shew when it has been adopted & received in England, the Instances brought are only such, wherein Obiter Opinions have been given, but they have never been reduced into practice; Ld Coke in his Comment on Littleton, thinks a Minor of 14 may not make a Will, & says that Great Writers Words must be understood, as may stand with Law & Reason;

God forbid, that Law & Reason shd not always go together; whatever may be the Roman Law, there is no Reason it shd be adopted here; I doubt Strahan & Godolphin have taken up the Question too hastily; none who were sub patria potestate could make a Will, take it in the Extent, Miss A. had a Father & Mother living; By the Laws of Holland no Person can make a Will till 16 – The Case quoted by Dr Burrell was that of a Boy of 16, in wch there was Evidence his Relations had used him cruelly, & Mr Earle had been very kind to him – In the Case of Atkins v Atkins. 1686 Sir Rich.d Raynes was of opinion, a Boy of 17 might make his Will, but there the Contest was between a Brother & Sister, and there were no Parents living; the other Cases cited by the Gentlemen shew only Obiter Opinions, & that the matters in Contest were referrd to our Cts, who do not appear to have any Decisions on this Point; By the Practice of this Ct no Judgement has been given for the Will of a Person under 16 – The Deed in the present Case, has given a very small Pittance to her Parents, & all the rest to her Guardian, to whom she professed no Regard no Respect, no Obligations; she had been under his Care only 3 or 4 Months, during which he brings her to Town from Yarmouth in a dyeing Condition; I must not omit the Circumstances of this Gentlemans behavior to Miss Ames; soon after her Arrival at London, he throws out Words, that he thought it necessary she should make a Will; I wish he had gone farther & urged the necessity of his being Exor; you will observe how strangely sollicitous & anxious he is; he prepares Mr Geldard by that seeming necessity – It wd have been material if she had made the Instructions; but G. says, she made them by Wards directions; does it appear, she sealed them up? any body might get at them – Geldard behaves civilly; his depon has the appearance of fairness, but he is deputed by the Guardian; Wards Letter to him, shews an uncommon Earnestness to get the Will in question executed by the Deed; she drew the Instructions & named an Exor & Residy Legatee before she knew what a Will was; the Instructions are read over to her, & when the Will is brought to be executed she knows nothing about it; it is thus plain, she was partly incapable of the Act she did, & was partly cajoled into doing it, & partly frightened; like a Person who was about to undergo some dreadfull Operation, she would have put it off if she could; when she found they wd come again, to get rid of being teized, she thought she might as well do it then, as she found it in vain to oppose; the Question is, whr she was intimidated, not whr she was rightly so; if she thought she cd not refuse her Guardian, it is all one, She was carried to a Taylors Shop, & yet thought she was at Mrs Musgraves – By their Account she was only sub modo capable, as far as her Age wd permit; her Reluctance continued to the End; she wd have another Person sign for her; the Terror she was in, cd not proceed from the Disorder of Body; they stuck like Leeches, said, they would come again, & by this means gained their End – This I insist was undue Influence practised upon the Deed –

Voct

New by. v. Earle. 2nd: Truth of Dr Hs assertion as to ye Custom of Silk usage

Dr Calvert

The Gentlemen are sensible, it wd be a leading Objection, that the Person obtaining the Will, is principally, if not solely benefitted thereby. It is said indeed, he did not intend to benefit himself, & that he wd receive much advantage if the Will was established; I had a bad Opinion of the Cause before, I have now a much worse opinion, because the Gent.n go out of the Evidence, in which there is not a Title of this; It is extraordinary, that a Person should first obtain a Will, & then litigate it, only to give back to the Parties benefitted under it, the Shares to wch they were entitled therein; I dont understand how he cd be more benefitted by the Revocation; if the Agreement entered into by Mrs S. with Jackson, is construed a Sale, the Money arising from that Sale will become personal Estate, & follow the Residuum bequeathed to Miss Ames; It is not money arising out of the Estate, but from the Sale of it; Mrs S. having disposed of those Estates in her Life time, they are gone from the substituted Legatees; I should then suppose 700 £ might be an object with Mr Ward; I will contend about the Civil Law, because that is not the Law of this Court, it is therefore incumbent on those who wd avail themselves of the Civil Law, to shew it is adopted here; Godolphin & Strahan are setting down the Civil Law; the Books cited in the Margin are Writers on the Civil Law – It is the Business of the Gentlemen, to shew it has been received by Decisions we are not to prove the negative; an Englishman is bound by the Law of England; Ld Coke is no inconsiderable Authority, he is not used to be mistaken in respect to the Laws of this Country – This is not a common Case, but one of a very suspicious nature; the Deed was very liable to Persuasion & Impo- q open
sition; the Intention & first Design of this Will is very material, the Person from whom the first motion came, is so, likewise; the ostensible reason is to save Mr Ward Trouble, I think the probable Reason, was to put a large Sum into his Pocket; As to the Persuasion, the Caution given by Swinburn is proper that Persuasion, is not laudable, when given to a Person of weak Judgement, who is under the Government of the Adviser when the Estate wch is to be disposed of, is great, & I will add when the Disposition made in consequence of such Persuasion is totally in favor of the Adviser; out of 1500 £ given away in Legacies, 500 £ is bequeathed to Miss Ward, the Exors Daur, tho' an Annuity is left to the Father & Mother of Miss Ames, yet it appears, that they were supposed to be dead; when Mr Geldard was introduced, did any thing drop from Miss Ames, to shew, she was desirous of making a Will? did she say, I am glad he is come, or any thing of that kind? No. She said barely, I shall remember him; When Geldard came to her at Mrs Musgraves Lodging wch she had taken for Miss Ames, she did not speak to him; on his asking her, if she had any thing to say to him, she was silent, which he construed to proceed from Persons being present, & therefore desired them to quit the Room; The Instructions appear to have been written at the directions of Mr Ward, in London; When G. received the Instructions, he carried them to Mr Kitchen an Attorney to reduce them into a Legal Form, which being done, they are sent to Mr Perryn for his Approbation; Dr K. is consulted about her Understanding & Capacity to make a Will but he might not have seen her for the 2 last days, when NB.

it clearly appears she was much altered for the worse, as to the Execution, Miss Thompson endeavord to prevail on her to do it; she either did not know what she was to do, or thought they were imposing on her, or else she had no Inclination to make a Will - But say they, the meaning of a Will, & the nature of the Transaction she was about to execute was explained to her, & therefore she must understand it; Could a Person who had drawn Instructions, be so ignorant, as not to know what a Will was? It was not merely, "I dont know the form of a Will, but it must be the nature, for Chapman tells her, it is to dispose of her Effects, so he considerd it, as if she did not understand the nature of a Will; They must apprehend they were doing something wrong, Otherwise they would not have asked if the Will was of her own voluntary Motion, or by the persuasion & Influence of another? they wd never have asked her so odd a Question, if they had not thought the Case suspicious Chapman speaks of several Expressions, wch Goldard says fell from the Decd at his first coming into the Room, now Chapman was not admitted, till Miss Thompson had been to persuade the Decd to execute her Will: This account has the appearance of an agreement between C & G. what to depose; when Miss Ames was asked if she wd execute the Will she replyd, "I dont care"; a strong presumption this she was unwilling & wished to put it off genteely; when asked what alteration she would have, perhaps Mr Lucas might just then strike her; Her being removed 1/4 of a Mile, without knowing it, shews she was very weak indeed; this Will not only appears to have been made by a minor, but by a Minor in extremis, even allowing the Instructions to be her own, wch indeed she dont appear to have ever understood; a Will obtained under such circumstances, is very much to be suspected, & it is very dangerous to establish it, where that Person is to be benefitted, who had the entire Care & Government of the Testator -

Judge Dr Hay } If I had any Doubt, I would have heard the Reply very willingly - The Case is very particular, I remember none like it; Miss Ames the Testatrix, is under 14. She has therein appointed James Ward Esq Exor & Resid: Legatee, who appears to have had the Care of her Education; a considerable Interest, (at least in reversion) is certainly vested in him, if this Will is established; there are some Estates left over by the Will of Wm Sanderson in case of Miss Ames's death under Age, & some doubts have arisen, how they ought to go. I shall say nothing of the Impropriety of a Minor making a Will in favor of her Guardian, but I shall confine myself to the Legality only, wch is now to be determined -
The Will is dated 15 July. 1763, the Decd died on ye 17th. of ye same Month on this 2 Questions arise.
1 Qu: Wh? the Decd was of sufficient Age to make a Will, or wh? it was made - by a Person in Nonage, (almost in extremis, & so, is void in Law?
If this should be so, the Circumstances are out of the Case, but if it appear, the Decd was of age to make a Will, the next Question
2 Qu: was any Imposition, or other improper Practice made use of to attain this Will, & had the Decd a Capacity at the Time she executed it, adequate to so solemn an act?
As to the 1st Qu. By the Civil Law, a Male at 14 & a Female at 12. may clearly make a Will - But Ld Coke has been cited to shew, that by the Law of England, a Person could not make a Will, till 18. On this Point, I must observe, that so many Authors have since Ld Cokes Time, been of a contrary Opinion, & their Sentiments have been confirmed by frequent Determinations, that a less Age than 18 is sufficient to give Validity to that Act, that I conceive the Law to be now clear, that 18 is unnecessary: By the Practice of the Courts a Minor at 17. may have Probate granted as Executor; but if he is made before 17, Admon must be granted to his next Friend, till that Time, & then it expires of course; this is contrary to Ld Cokes notion, for if a Man may manage an Estate for others, at that age, surely he is of Capacity to dispose of his own by Will: The Law seems capricious in this respect, as Admon cant be taken on account of Minority under 21, & a Probate may at 17, though both equally respect the Management of Affairs. NB
The Common Law has not precisely settled the Age when a Person shall make a Will, it only says at years of discretion, without pointing when that Discretion commences, In Brown v the Chancellor of Litchfield, & Smallwood v Brickhouse, Prohibitions were denied - The 2 Jones. 210.
2 Mod. 310 ..... Law of Executors page. 10. 253. An Infant of years of discretion may make a Will of Goods & Chattels at 14 Years of Age. In all Cases the Ecclesiastical Courts are governed by the Civil & Canon Laws, where those laws are not repugnant to the Law of the Land; nor do I find by adopting the Civil or Canon Law in this Case, I should determine in contradiction to the Common Law, my Predecessors have thought so as is evident from the Cases of Atkins v Atkins 1686. before Sir Perk. Pogs.
Richd Raynes, & Newby v Parke 1758 before Sir Geo. Lee, quoted by the Council; in the last, the Ct was of opinion, that a Male may make a Will at 14 & a Female at 12. wch is the Time of Marriage allowed by the Law of the Land; It has been urged that Swinburn & Godolphin refer only to the Civil Law, but I do not think so for Swinburn gives it as his opinion, that the Civil Law in this Particular, is the Law of the Land; The Case of Hyde & Hyde is clearly in point, there no dispute was made but that a Male of 14 & a Female of 12 might make a Will of personal Estate; Some Line & Rule must obtain; for it is not so well to leave it at large; the Common having laid down no Rule to guide my Decision, what can the Court do better than have recourse to the Civil Law; a Male Infant cannot by any Custom make a Will under 14. Says the Office of Executor 253. & Anderson. 14. If that is the Case, it clears up & tends to point out the time, when Capacity is supposed to exist; upon the whole, I think the Testamentary Age, shd be the same as the Anni nubiles, 14 for Males & 12 for Females; I do not wonder we have so few Cases to the Point, which is uncommon, rarely contested Facts; there is no doubt of the Decd having a sufficient Capacity; she did not make use of a Childish Expression; when asked by G. if he shd wait upon her another time, She answers "Yes as well done now"! The material Question, is, whether, she was under Influence or Restraint, this is to be determined by the Evidence of Goldard & Chapman; there were 3 other Persons who could have given an account, but I have only the Evidence of the subscribing Witness 2 Vern. 255. 328. Gilb. 74

to guide me on this Head; their Depositions are very candid & ingenuous; I think, I never saw any more fair: Geldard says the Hint of a Will came originally from Mr Ward, who at a Meting of Lawyers, propos'd it, to save him Trouble, but never mentioned any Benefit intended himself; the only Motive then assigned by Ward to Geldard, was, to save him Trouble. Mr Ward's Letter points at no Benefit to himself, the whole that can be collected from it, is that Ward wished a Will to be made, that he might thereby be eased from Trouble - It was very proper Mr Geldard shd see the Person, from whom he was afterwards to receive Instructions for making her Will; G. admits when he came to Miss Ames about the Instructions she declined to answer his Questions; but she broke open the Seal of the Paper wherein the Instructions were enclosed, & said, "there is what you want"; Her Answer to the Question proposed about Alterations, is very material; "I would have no other Alteration than £10 to Mr Lucas; being asked what Mr Lucas, she replyes, the Esquire, to distinguish him from the Clergyman; Mr G. accordingly writes on the Letter, Gibson Lucas, Esqr; There appeared nothing reluctant in her on the 13th of July, when the Instructions were given, except her declining to answer Gs. Questions, which, he supposed was occasioned by the presence of Mr Musgrave &c.

15th of July. Mr G. went again; nothing appears to impeach his Behavior, in endeavoring to get the Act done according to the pressing Letter of Mr Ward - Her Expressions, that She had Blisters & declining to answer, seem rather to proceed from an Impatience consequent on her Illness, & from an averseness to being asked Questions, than from any Dissatisfaction at executing the Will itself: The Words "I chuse it" & her desireing Geldard to keep the Will, till he saw Mr Ward, prove the Capacity very strongly; The first day Geldard did not ask, who drew the Instructions; when he did, she answered, she wrote them, by the Directions of Mr Ward; the Expression is rather equivocal: from this Account we must conclude, they were given by Ward; what passed between him & the Deed nobody can tell, but by the Recognition she uses, She establishes & confirms them sufficiently; The Instructions, on the face of them, are wrote at different times, & not signed, from whence I should suppose they had been under her Contemplation more than once: Upon the whole of the Evidence, I think there is nothing to impeach the Conduct or Character of the Subscribing Witnesses I am of Opinion the Deed was of sufficient Age to make a Will, & had an adequate Capacity when she executed it; on what Motive, the Instructions were given, is not my Business to enquire; I am only to look into the Factum & the Law, about both which I am satisfied, & therefore think myself bound to pronounce for the Validity of this Will . . . . . .

N.B. There was an additional Legacy

The Will established

Prerogative. Cricket. No 128. Don v Campbell. Goodwin. Dr Wynne. Dr Harris.

Q. Is the Identity of the Deed sufficiently proved?

State of the Case

Dr Wynne . . . .

August 1765. a Decree issued against Mungo Campbell, Exor of a pretended Will of the Deed, to bring in the Probate, to shew cause, why it shd not be declared void, as by fraud & undue Suggestions obtained; why Admon shd not be granted to John Don, the Guardian of Robert Don, one of the next of Kin of Robert Don the Deced, late of the Elizabeth Man of War - That in the Will propounded, the Testator describes himself of the East India Merchant Ship Prince Edward - the 2 Subscribing Witnesses, are the only Persons examined, who have not proved the Identity, & no Step has been taken to prove Robert Don of the Pr: Edward, & Robert Don of the Elizabeth, was one & the same Person.

Judge & Dr Harris . . . . .

To be sure, there is proof that Robert Don made a Will, who belonged to the Prince Edward, wherein he appointed Mungo Campbell Exor; The Witnesses say, a Robt Don signed a Letter of Attorney to M. C. of East Smithfield, & they say that on searching the Books at the E.I. House, they find that on the same day Robt Don signed such Lre, he received what was due to him; this is a circumstance tending to prove the Identity, wch proof must be greater or less, according to the Circumstances of the Case - In Lady Amelia Butlers Case, the Witnesses did not know her, but swore to the Execution at her House; the Court determined in favor of the Will, on the Improbability of her being personated in her own House; In all these Cases, &c: only rescind the Conclusion for further Proof of the Identity &c: would be only giving them farther time to bring such Proof; I cant say, I can set aside the Will in a Sailors Case, merely for want of the Identity being proved by 2 Witnesses, which indeed is shewn by Circumstances, tho. not directly; Proof might be made by comparing the Lre of Attorney, with the Receipt given at the India House; the Signing a Lre of Attorney, & Receiving money at the India House himself, the same Day, is no Objection; if it was a Case of Consequence, I would adjourn it over to compare the 2 Papers but as it is a Sailors Will, I decree the Probate out of Court to Goodwins Client . . .

Sister of Ld Arran

The Will established

Prerogative. Longden. No 129. Brede v. Thompson, Steele & Thornton. Fuller. Dr Harris. Dr Wynne.

Q. Was Deed sane when he made it Will, when made & a Codicil

Dr Wynne . . . .

David Patrick is the Party deced: he died 2 Feb. 1766 - He made his Will (A) 8 July 1765. a Codicil thereto (B) 28 Jan: 1766. and a 2d Codicil (C) 31 Jan: 1766. also 2 others not dated or witnessed, one of them marked (D) was endorsed on (B) 2 of them were signed compleatly, the other 2 with only the initial Letters of the Deeds name: The Witnesses speak to Acts done precisely, on the Day before his death; It comes out on the Interrogs that he destroyd himself, & was brought in a Lunatic by the Coroners Inquest; it appears by Clay, a Witness examined on the Inquest, & by . . . . . that the Coroner said, the Commission of the Fact, is sufficient Evidence of such Lunacy . . . . . .

Dr Harris . . . .

We oppose the Codicils, relying on the internal Evidence of the Papers themselves, viz. his leaving his Apparel from his Wife, his strange notions, that nobody would receive a small Legacy from such a Wretch as he was &c.

Dr Wynne . . . .

By the Papers themselves, he appears fully capable of manageing his Affairs; he was Butler to Mr March, who entrusted him with the Care of his House, & he transacted his Masters Affairs very well: he conversed sensibly on the 31st of Jan: settled an Account as sensibly as he ever did; he began another Account on the 5 of Febu: &c.

The Will established

A Servant talked with him, the morning of his death, when he was low spirited; the circumstances of his being so, may be a Proof of his Capacity; the most sensible Men are liable to be low spirited; if they meant to avail themselves of the Verdict, why did they not produce it, it is a Record: I dont beleive the Reason given; that could not induce the Jury to give the 2d Verdict; it was to save the Forfeiture; that Verdict will only afford a Presumption of Insanity at the Time he killed himself, not at the Time he wrote the Papers in question; a Man may be seized suddenly; it cant be inferred he had no Sanity when he wrote these Papers, from an Act committed subsequent thereto; as to the internal Evidence of the Papers, the Dr did not enter fully into it; the Alteration in the Residue & the Executor, is a strong Presumption of Sanity No Incapacity can be collected from the words endorsed on (B) or from the Paper wherein the Bank Note is enclosed, wch is superscribed "To the wretched Betty Povey, made more " "wretched by me, the enclosed to be delivered as my Exors think " "proper." The Bank Note was given with the Consent of the present Opposers. As to the other Paper made when under his Disorder of mind, that part that can be carried into Execution is very proper, & must be pronounced for, & bears marks of Sanity, rather than of the Reverse . . . .

Dr Harris . . . 3 Witnesses swear the Deed appeared melancholly a Month before his death; it is impossible, the Reason assigned by Clay could be true, for it wd destroy the Law entirely, wch punishes Suicide, he must be presumed a Lunatic then, sometime before his death; he is stripping his next of Kin in favor of a Stranger; By the Will he provides for his Sisters; it is a very proper Will, he gives all to his Wife - The madness encreased on him when he wrote (C) he then thinks People wont take his Money; he orders Thornton to dispose of his money in Legacies, when he had left nothing to give; he gives away his Wifes Cloaths, & strips her; (D) is stronger still; there is a Paper, wch says "to be given as my Exors think proper." but nothing is mentioned they have endeavoured to explain this, by another Paper . . .

Dr Hay. Judge . . . I think there is full Evidence, that the Testator was capable when these Papers were wrote: a kind of religious Phrenzy does not incapacitate a Person from making a Will; it is not such a Legal Insanity, as disables him: The Verdict goes only to the Time of the Act, it has no retrospect: tho, the Deed was in a melancholly drooping way, no part of the Evidence goes to shew an Insanity sufficient to affect these Testamentary Papers; there is full Evidence they were his Acts, no one deposes to his Insanity at the time he executed them; Upon the Evidence before me, I must pronounce for the Will & A Codicils -

Will & Codicils established . . .

Arches
Bye Day July 14

Goodwin N°130 Balch ol: Burton. v Burton Faulkner

Dr Wynne Dr Harris

Dr Harris . . . . Our Prayer is that you would be pleased to rescind the Conclusion, in order that we may plead & exhibit an Inventory & Account on the Oath of my Client; It is a Cause of Legacy Brought by Balch. Mr Faulkner, my Clients Proctor had Orders to plead, & to bring in the Inventory & Account, they were accordingly ready, but the

Q. Shall the Conclusion be rescinded, the Proctor having erroneously suffered the Cause to be concluded, when he was ordered to plead?

Ct being up sooner than usual, & Faulkner being absent, when the Cause was called over, it was unfortunately forclosed; it is very material to us, for the Extrs says he has expended 80£ more than he has received of the Testators Goods, I hope you will not think the Request unreasonable, it is in your Discretion; you have sometimes done it ex officio.

Dr Wynne . . . . Notice was given of the Conclusion; as Faulkner gave a negative Issue, he shd have given an Inventory & Account; to shew he had fully administred; I am instructed to say Faulkner had notice the Cause wd be concluded, if he did not bring in his Inventory & Account; the several Steps taken down in the Assignation Book are the legal Notice; where a Cause stands, to propound all Acts if nothing is done, at the next Court, it is concluded of course; the Dates shew the Proctor to be very much in fault; why did he not allege this at the next Ct after the Conclusion had passed; the Party himself appears to have been in Laches . . . . .

Dr Hay. Dean . . . . There appears to have been gross Neglects & Delay, in a Cause of Legacy, it began 15 Jan: & there appears no Assignation till the 4th of May; there is no fear of Subornation of Perjury, because nothing has been done; I dont ask whether Notice was given, or not, the Proctor was bound to attend his Business in Ct. Mr Faulkner, may be unfortunate, but his Clients who employd him are more unfortunate; it is very extraordinary for a Proctor to give a negative Issue, & neglect the means to prove the Point; there is no doubt, if Prefuted to rescind the Conclusion the Ct of Appeal wd rescind it, & admit them to plead the Inventory & Account; it wd be Injustice in me to refuse to hear the Party; I shall therefore rescind the Conclusion, & make an Order that Faulkner & not his Client, shall pay all Expences incurred by the Delay

The Conclusion rescinded & the Proctor ordered to pay the Expences of the Delay . . . . . .

Arches

Greene N°131 Cave v Socket Stevens

Dr Harris. Wynne. Burrell Dr Collyer. Calvert.

Dr Harris . . . . . Tho: Corbett of Bromyard Herefordshire, Batchelor is the Deed: he made his Will dated 28 October 1763, & thereof appointed Mary Cave Widow Sole Executrix, & Resid: Legatee.

1 April 1765. A Citation issued from the Consistory of Hereford at the Suite of Jane (Wife of Tho: Socket) Cousin German of the Deed, agt Cave to prove the Will by Witnesses.

9 May. The Will was propounded, & a Common Condidet given, whereon the 3 subscribing Wes were examined, who prove Instructions, due Execution, & Capacity at the Time.

31 October. An Allon was given on behalf of Jane Socket, pleading Idecy, & total Incapacity in the Decd. 18 Witnesses were examined on this Plea, amongst whom were Greenbank Sheldon, Sam: Mills, & Wm Hallward.

27 Feb. & 19 June 1766. In reply thereto, Allons were admitted on behalf of Mary Cave, on which the 3 Subscribing Witnesses, & 15 others were examined.

2 October Publication was decreed, & all Facts assigned to be propounded next Ct.

30 October. Cave without revoking her Proctor gave in an Allon exceptive to the Testimonies of Sheldon, Mills & Hallward.

6 November. The Judge rejected the Allon, on wch an Appeal was interposed, as from a Grievance, to the Arches, wch now comes to be heard on the Question, Wht The Decrees of the Judge below shall be reversed? . . . .

The Objections to the Admissibility of the exceptive Plea, were, that in the said Allon of 27 Feb. 1766 there was, or might have been pleaded, every Particular contained, in the exceptive Allon, that a Term Probatory had been assigned, & 18 Wes examined, & that to admit

Q. Did the Judge right in rejecting an exceptive Allon, ought it not rather to have been reformed? . . .

said exceptive Allon, would be again giving an Opportunity, to admit Witneses, to prove the former Allon of Feb. 27. It is true that some of the Facts laid in the 2d Art. of the exceptive Allon might, & shd have been pleaded in the former, & therefore that after Publication, no such matter ought to be received to Proof but they never were pleaded; & the 1st Art, & the other parts of the 2d 3d Art[s] &c not have been pleaded till Publication had paped, & being if proved a direct Contradiction to what Sheldon, Wells, & millward have sworn, ought not to have been rejected: It is hoped, if the Ct shd think, the Exceptive Allon shd be reformed, yet that the Grievance will be pronounced for & the Decree rejecting the Allon reversed, with Costs as to the Appeal, & that the Judge will retain the principal Cause....

Sheldon to 1 Int: answers. He hath frequently been in Company & conversed with Th[o]: Corbett. the Deed as Gaines, & does not found his Judgement, & Opinion, of his Sanity, or Insanity entirely on Report of other People, but in a Great measure, from his Conversation with & personal Observation of his Behavior, & more especially from that Instance of his Weakness, in selling so considerable an Estate for so small a Consideration; He never declared, that of his own Knowledge, he knew nothing of Corbets Insanity.

Cave alledges: Sheldon has sworn falsely, for, That he has declared to Mr Rowland Hill, as well as to other People, that he knew nothing of the Sanity or Insanity of the Testator, but from Report, & that of his own Knowledge, he knew nothing of Corbets Insanity...

Wm Hallward to 2. 3. 8. 9. 10 Art[s]:... Deed boarded 12 Months with Deponents Father by which he was intimately acquainted with his Capacity; that he was so ignorant he cd not count 20, nor knew wch was most in value, a Guinea, or a Shilling, believes he knew not, one sort of meat from another— Neither did he ever sit at Table during the whole time he lived with Deponents Father, but in a Corner, & putting his Trencher on his Knees at his Meal Times, did eat with a Knife but never with a Fork.

(This contradicts by us. but might have been pleaded before.)

That Cave. Alledges. Deed generally during the time he boarded at Hallwards Fathers House, & always when he chose it, did sit at Table with H's father, & very frequently with H. himself, & at all Times took precedence of H. & held a Knife & Fork at his Dinners.

Samuel Wills— Is certain Deed knew not one sort of meat from another, especially Beef & Mutton, with he cd never distinguish from each other

Cave alledges. That Wells has sworn falsely, for, That one day, at the Time he worked for Edw: Cave, as he was eating a Beef Steak at Caves House, Th[o]: Corbet came into ye room, to Will, & asked him what he was eating, & Will endeavouring to impose on Deed, said, it was a Mutton Chop, whereupon Corbet with some warmth replyd, it is a Lye, for it is a Beef Steak, well knowing it was Beef & not mutton—

D[r] Collier.... I am Council for the Cozen German— We had pleaded a general Incapacity, & Idiocy in the Deed; as a Confirmatory Circumstance we pleaded, that an Issue was tried before Ld Chief Justice Wilmot in 1763, & that a Verdict was found, of the Deed being incapable to make a Will, & that the Heir at Law had the Real Estate delivered up to him, in consequence of the Verdict; They lay to Greenbank Sheldons Charge, having declared in the presence of Rowland Hill, that he formed his Opinion on Reports; if we were to grant, he had made such a Declaration, it is inadvertent; it is said to have been 18 years ago; perhaps he may speak very differently, when brought on his Oath— When an Exceptive Plea is given, the Court will expect

the Circumstances to be specified, & that they shd speak definitely to particular Points; the Allon shd say, he declared it seriously & solemnly; for Mr Hill & may say perhaps, that he joked when he said so: if any Stress is to be laid on the Objection, it shd be said, in what manner he declared it; Mr Hill might try to catch him, & Mr Sheldon might answer accordingly; the manner, the Time, the Occasion shd be specified; a declaration ever so strong could not weigh against his depon on Oath, that he never did declare so; the Court will not easily admit any Exception to a Witness examined & interrogated solemnly.

As to Hallward, they object only to a particular part of his Depon, & yet recite the whole; it is letting in a General Plea, & to open the Cause for that purpose, now, is improper; if the Particular alluded to, will destroy the Credit of the Witness, the rest is unnecessary: for if you can lay a single Point wherein he is falsifyd, the Ct will infer the Witness' want of Veracity in respect to the rest.

With regard to Mills, if the Circumstance is true, it is of small Import; for it wd not set aside or repudiate the W[s] Account of the deed's general Inability to distinguish one Sort of Meat from another...

D[r] Calvert..... The Cause is fully instructed as to facts; whatever will go to ascertain any facts cannot now be received; the Objections must arise from the Depons themselves, or from some fact so repugnant to the Depon that no Faith or Credit ought to be given to the Witness, otherwise the Exception is not pointed; Sheldon might not recollect what he said 18 years ago, will those Words, Spoke at so great a distance of Time, destroy his Credit; which will the Court believe, a Solemn Depon, or a mere declaration? if they could say, that he had sworn it on another Occasion, it wd be relevant: as suppose it laid, that he, at a Tryal at the Assizes, had deposed on Oath, what they say he has declared; It is a slight word inadvertently spoken. An Article shd be so laid that it will appear to the Court, something material must come out on it; But if the Witness was to depose in the words of the Plea, it wd not destroy his Credit— You cant plead matter, contradictory to their Plea, after Publication: Here you plead, he could count 20, & knew the value of money, & different Sorts of meat, we had before pleaded the Reverse. It is not an exceptive Article, what looks most like Exception, is frivolous. As to Mills he lived with Cave 20 years ago; will you let the Credit of Witnesses be impeached at that Distance of Time?....

D[r] Harris.... I do allow, we cant plead matter, contradictory to what we, or they have pleaded; the Question is, wh[r] what we assert, will shake the Credit of the Witnesses, if it is true? If he declares one thing, & depones another it will affect his Credit, tho: not reject him as a Witness: there are fixed Principles, that when a Person declares one Thing, & swears another, such Declaration is admitted to Proof; Our reciting fully, can be no Objection, it is the fairest way: the Doctrine of Specification is exploded, it is to be presumed they are essential Witnesses, if & we recite what is necessary, it is sufficient, Witnesses are not examined to the Recital; the Distinction is whether we can affect the knowledge of a Witness? as if he put a Guinea & a Shilling before the Deed, who distinguished them from each other: Shd Deeds abilities to distinguish meats was known to the Witness, for he tried to impose on him, by saying he was eating Mutton, when it was Beef, & the Deed told him he lied: this will affect the Witness who had sworn before, that the Deed did not know one meat from another. The mode wherein this was declared will come out on the Evidence, they

will depose more or less strong; if any thing is immaterial or improper, let it be struck out; but that shd be no reason for rejecting the whole Plea, It affects the knowledge, consequently the Credit of the Witness.

Dr Wynne... Upon the Interrogatory, the Wr was called upon to answer whether he did declare &c then might have told, how he declared; as because he was asked impertinently; but he answers positively, he never did make any such Declaration: Let Witnesses depose what they will, the Ct will not apply it to the facts, but compare it with the Evidence the Witness has given before. - When Hallward swore the Deed never sat at table at his Fathers House, but went into a Corner to eat; it is material for us to shew he sat at meat with him: I will admit, that if we could examine 20 Wrs to the fact, it wd not apply thereto, but it wd discredit Hallward.....

Dr Burrell..... The whole force & Intent of the Exceptive Plea, is to bring the Veracity of those Witnesses in question, as to particular Facts of Incapacity insisted on by them. The Deed sitting above Hallward, must have impressed that Particular on a Memory so attentive, as his appears, to trivial Circumstances. Mills mentions the Deeds inability to distinguish one sort of meat from another, & particularizes Mutton & Beef, so that he must & ought to be very accurate on that Point, as he lays so considerable a Stress on it, now we insist on the falsehood of that Assertion, & say we can prove, he must knowingly have deposed untrue.....

Judge Dr Hay... After Publication, an Exceptive Plea may be given, & the Exceptions taken out of the Depons of the Witnesses; if a Wr on an Interrog: swears to a fact you can contradict, you may shew he has sworn falsely; if in his Examination in chief, you may also plead, to shew he has contradicted himself - if from the Generality of the Plea, you could not be apprized of the Fact deposed to, you may plead it & examine to it - It is an established Rule, you cant contradict Facts already in issue, as it wd introduce Perjury & Subornation, & Justice wd thereby be defeated; if you cd plead to falsify what was in issue before, it wd be in vain to conclude the Cause; the only Question, is to see, whr the Facts now pleaded, could have been examined in Contreplea before Publication - The Facts of sitting at Table &c might have been particularly contradicted; for a Witness might have been brought to prove that the Deponent sat with him & the Deed at Table: what you bring by way of Exceptions, you could have contradicted below, therefore they are not pleadable now, but shd have been pleaded to contradict the general Allon of Incapacity in the Ct below - on that Account the 2d & 3d Articles are not admissible, nay they seem to be so very immaterial & minute, that they wd avail little, if admitted; the Question whr he knew one sort of meat from another, turns against them. the 5th Art: is different, the Wr answers contrary to his Declaration, this is a material Exception; for the Declaration of a Wr agt his Oath is always received here, & at common Law, to impeach his Credit; the Wr says expresly, he never did declare, here they undertake to prove he did declare so & so, till, he formed his Opinion on Report only - The other Articles are not so much Exceptions to the Witness as Contradictions to the Facts pleaded already, & cannot therefore be admitted. I therefore only admit the first.....

Appeal prom'd & rec'd for: only 5th Art: of Grenes Plea Rec'd.....

Prerogative
By Day. July 16...

Jenner — Nº 132. — Whiting v Smith — Bishop

Dr Wynne & Burrell — Dr Marriot & Harris

Dr Marriot.... Owen Bird is the Decd; he made a Will, in wch my Client is a Legatee; It is neither signed, dated, executed, or attested; there is no Person named Executor, or Residuary Legatee. It contains these words "And all the Residue to my Executors" We plead that it was found locked up amongst the Deeds & other Papers, with the Interlineations therein, & an old cancelled Will - We plead Declarations of his having made his Will, to wrs..... about Sept. or Oct. 1766, that he intended to leave all he had with his Wife, to her Relations

Dr Wynne..... Owen Bird of Ports mouth died a Widower, leaving no nearer Relation, than Sarah Whiting Widow, his Cozen German, only next of kin; as such she applied for the Admon, but was prevented by a Caveat entred by Bishop. wch being warned he appeared 1 Sep. & J. for Ja: White, & alledged him to be a Legatee in a Testamentary Schedule of Decd, & both Proctors were assigned to exhibit & affid: of Scripts, Bishop to answer to Jenners Clients Interest.

3 Sep. Jenner brought in Commission with Scripts, exhibited a Proxy under the Hand & Seal of his Client.

Legacys..... Sea Affn
Eliz. Wallace £..170
Mary Oxford....87.
Anne Do.....87.
John Do.....175.
Hannah Do for Life .175.
Jth. B. Smith...700.
1595

4 Sep. Bishop brought in Com: with Scripts, declared Ja: White wd not propound any, & prayd him to be dismissed, Jenner objected thereto - Then Bishop exhibited as Proctor for Anne 10. } 10. } Wife of John Benham Smith, alledged her to be a Couzin German once removed, & next of kin of Decd, & prayd Admon with the Schedule annexed..

1 Sep. Jenn. J. White was dismissed paying Jenner 6.8 Cost. then Bishop exhibited Proxy under the Hand & Seal of Anne Benham Smith, a Legatee in the aftd Testamentary Schedule & denied Jenners Clients Interest

Anne Smith..350....
Susan Carter..350....
Dan. Hobbs..350....
Sarah Whiting..700....
Mary Wife of Wm Stockman 700.....
3325...

2 Sep. Jenner confessed Ad. to be Cousin German once removed, but denied her to be next of kin to Decd; propounded his Clients Interest, & asserted he gave an Allon, on admission 4th Sep..

4 Sep. Bishop propounded the Testamentary Schedule & asserted he gave an Allon, on admission the Bye Day

My Objection to the Allon, is, that on the face of it & the facts pleaded, you cant pronounce the Paper to be the last Will of the Decd. It is known Law, that an imperfect unexecuted Paper cant be pronounced for, unless it is clearly in Evidence, the Decd was prevented by Accidents, & intended it shd be his Will - There is the Date of the year 1766. There are many Interlineations, & alterations, not only in word, but others more material; there are many Directions to the Exors, & References also, yet no Exors are appointed; it is very clear too, the Decd intended a Benefit to the Exors, therefore it is very imperfect as to the Intention - They plead a Declaration in 1766, that he locked up this Paper, & said he had left some Legacies to his Poor Relations; Supposing all this proved, the Paper cant be pronounced for; (the Decd lay ill 7 Days.) It will prove only, that when this Paper was wrote, the Decd intended to die Testate, & dispose of his Estate in this manner. There have been several determinations, that the Intention must be permanent, & the Person prevented from executing by sudden death. Treves & Treves 1761. 3 Sep. Jenn. J. Josuah Treves in Feb: 1760 gave an Attorney Instructions for his Will Treves v Treves. him to draw his Will agreable thereto; he drew it, & that was also read all over to the Decd, who approved it, took the Draft home, & said he wd consider of it. Nothing more was done till 2 Dec: 1760.

Q. if these Facts laid are proved will they validate the Paper propounded. A. I not can the Plea be admitted?

when the Deed was taken ill at his house at Putney, when being asked, if he had made a Will, replied he had a Plan of a Will by him at his house at London & was very uneasy he had not executed it, & then burst into a Flood of Tears. He died 13 Decr. without executing his Will, wch was found safely locked up at his House in London; these Facts were first laid before the Court by Affidavit, & afterwards by direction of the Ct reduced into a Plea, wch the Ct rejected, having heard Counsel, declaring, if all the Facts pleaded, were proved, it wd not be a sufficient foundation for him to pronounce, for the Validity of the Draft propounded, as the last Will of the Testator.

Execution having been so long unaccounted for.

Hunt v Dixon & Medley. Decr 9. 26. Feb. 1762. a Plea propounding unexecuted Papers was rejected, as not pleading facts, from wch legal Proof could be collected, so as enable them to operate as a Will.

Dr Burrell — In all imperfect unexecuted Papers, where any Space of Time intervenes between the Time of their writing & the Death of the Party, the Ct before it pronounces for them, will expect a satisfactory Cause to be assigned for their remaining so long in the State of Imperfection; as the Deceds Sudden Death, &c. otherwise the Ct will presume the Party departed from his Intention & did not mean to give them force & Validity, & therefore omitted to compleat what he had began. Imperfect Papers are allways looked upon with an unfavorable Eye, & tho, they have been in many Cases pronounced for, yet Strong Proof of Permaneney of Intention, in the Deed has always been required. By their own Plea the Deed in the present Case did not die till 30 March 1767, & they say he told Bucknall, the latter End of Septr or in October, that he had made his Will, so that there was 6 Months elapsed from the time of writing the Paper in question, to the death of the Party.

Duke of Somerset & Sir John Jacob. The Will was made in 1688. the Testor died 1722. 3 Testamentary Schedules were propounded of a subsequent date; The Delegates affirmed the Will & rejected the Schedules.

Prec. Ch. 1748 — White v White. A Codicil wrote & signed by the Testator, but not attested, was set up to revoke a Will of a former Date. Sir Geo Lee declared in favor of the former Will, because the Testator had sufficient time to execute the latter & omitted so to do.

Ibid. 1739. — Baker v Butler an unexecuted Paper dated 1737 was set up to revoke a former Will executed 1736. Sir Edw. Simpson pronounced for the first Will, the last had been long enough in Deeds Custody to execute it if he meant so to do.

2 Ves. 2 H.T. 1762 — Long v Moore. Mr Gideon died leaving a Will date April 7. 1760. after his death, a Testamentary Paper was found all of Deeds hand writing, amongst Papers of moment, the exact time of its being wrote was not mentioned, but Deed within 3 Weeks of his Death repeatedly declared to Mr Woodcock, his Intention to alter his Will agreable to this Paper. W. advised him, to put the Alterations in writing, from whence Instructions might be drawn for a new Will; Mr G. did so, & appointed some day in Sept. for W. to meet him & draw up the Instructions for this writing, the Meeting was afterwards postponed, on account of a large Estate G. had then contracted for. 17 Oct. Mr G. was taken ill, told Dr Watson, who attended him "I am very uneasy, my affairs are not settled, I wish, I cd see Woodcock," who was sent for immediately, but Mr G. died before he came. Sir Edw. Simpson allowed there were proofs, that Mr G. intended to alter his Will, but none that he continued in that Intention to his death, if there had been sufficient proof of the Permaneney of that Intention in deed, I might have pronounced for it, in y present circumstances, I must decree against it.

Dr Marriott — A Person may be determined as to the disposal of his Property, tho, he may doubt whom he shall intrust, with the fulfilling his Intention; They allow that if by Circumstances, the Intention can come out, the Allon is admissible; the Will may be established as far as such Intention appears to be compleat.

Stevens & Stevens. The Decd died before Execution, there were Blanks left, yet the Will was established.

Id. he says, where a Will is imperfect, it shd be good pro tanto.

Brown. Heath & Pocklington, the Ct said, tho, more was intended, it was good for what was mentioned, the Disposition as far as it went, was valid.

Butler & Baker was to revoke an executed Will, wch is very different from the present Case.

Treves & Treves. The Decd declared he wd consider of it; he had deferred executing the Will when the man came, wch distinguishes it from the present Case.

If we know a fact, we plead it generally, as we may, & on a general Plea Particulars come out; here the Papers appear subsequent to a cancelled Will. It was proper to plead he did not think himself in danger when he made the Declarations.

Dr Harris — We plead that the Deed wrote this, with an Intention it shd serve for a Will, & would have finished, but died from home, & as it were suddenly. We say he took great Care of this Paper, that he in consequence of having wrote this, cancelled a former Will; the Drs called for recent Declarations, there may be, what they wish; you wont presume a Revocation; it is finished, it is compleat; you may establish it pro Tanto; no body can say, what Evidence can be brought. The Witnesses speak to Declarations, we dont plead them, I should suppose Dr Lynne mistaken, in the Case of Treves & Treves, it is so extraordinary.

Dr Hay Judge — Nobody can say what will come out in proof on this Allon; it is true, unexecuted Papers must be supported, by Proof of the Deeds Intention, made out by Circumstances, from Presumption, or positive Proof he intended to make a Will; they plead an Intent to make his Will, & that he declared he had made it, about the latter end of Septr 1766; he is taken ill in March 1769, recovered, thought he was well, relapsed, & died a Day after; This may be the Case of a man dying suddenly on a Journey, wch makes it a special Case; nothing yet appears, from whence I can collect, he had any regard to this Paper. if it shd come out when the Interlineations were made, it wd be material to guide me; it may come out, that he made them, just before he went his Journey, therefore it is too early for me to pronounce on the validity of this Paper; I must admit the Allon, to let them shew it was not a neglected Paper, but a subsisting one in the mind of the Deed; The Case of Treves & Treves, as stated, is very strong, to reject the Allon, But besides it being to be distinguished from the present, by the Deed saying he wd consider of it, wch are words importing Doubt, he also said, he had a Plan of a Will by him, so it must have been looked on by the Ct, as implying he had no Will, a Plan of a Will, & a Will being very different, I have no doubt of admitting this Plea, so let the Case be made.

Plea admitted — out: the Paper is compleat, as far as it relates to personal Estate, except the omission of appointing an Executor.

Prerogative — Bargrave — No 133. — Gilbert v Garland & others — Major.

Dr Collyer, Wynne — Dr Harris & Calvert.

Q can the Bond be construed to be Testamentary?

Dr Collyer.... Tho: Gilbert Esq died 30 Novr last. On Dec 31. his Will dated 20. Jany 1760 (with 3rd Be 1761) & a Codicil dated 12 May 1766, both of his own hand writing, were proved by Jas Garland & Stracey Sill Esqrs the Exors therein named; Jas Garland was indebted to the Decd 1000 £ by Bond, dated 8 Novr 1750, which Bond the Decd gave anne Gilbert his Wife, without assigning it to any Person in trust for her use, but from the time he gave it to her, constantly considered it as her sole property, & accounted with her, not only for the Interest, but for such part of the Principal, as was paid him from time to time by Garland. In one of Gilberts Pocket Books is an Entry, wch was originally a draft of a Will wch he executed 29 July 1758. in presence of 3 Wits & by a Memm in his own hand writing, on the opposite Leaf to that, whereon the Draft is wrote, it appears that on Dec 8. he made many Obliterations & Alterations in this Draft, & 20 Jan: 1760 fairly transcribed the said Draft agreable to the several Obliterations & Alterations he had made therein, & executed the same in presence of 3 Wits the Authenticity of these Entries appear, by comparing them with the Will proved by Garland & Sill, with which they agree in every respect, as to Date & Circumstances. Garlands Bond is not specially mentioned, in this Draft, in the Pocket Book, or in the original Will itself, but immediately under the draft of this Will, is a Memm dated 22 Jan: 1761. as follows.

" P.S. The Bond for my Lady. I never knew a more disinterested Wo- "
" :man in my Life; she never gave any hint to desire me to pro- "
" :vide for her, in any shape, & had more valuable Qualities than "
" most men I ever conversed with; This is real Truth ..... "
" NB Let it be remembered, that the Landed Estate is improved "
" a hundred a year, since it came into my Hands, & the Colliery "
" founded, which may be reckoned one hundred & fifty a year "
" clear, in general, & likely to be improved; therefore if any Re- "
" =lations murmur, they are undeserving of what is left to ... "
" their Children. Jan: 22. 1761. St James's Square ..... "

It appears by several Indorsements, on the Back of this Bond that Garland constantly paid the Interest, & from time to time, several Sums in part of the Principal; particularly 19 Novr 1763 40 £ Interest & 100 £ Principal on said Bond: & 19 Nov: 1765. he paid £. 16. s. o. Interest, & £ 80 Principal; & then had reduced the Principal money due on the said Bond to £ 600 - There are 2 other Memm in two other Pocket Books of the Decd, exactly tallying, with the afd Indorsements. the First is, as follows

" Novr 19. of Garland, Interest 40. Ditto Principal 100."
" on my Lady's Bond."

The Second is thus

" Novr 19. of Garland 50. o. o. Principal."
" 16. 5. o. Interest half a year: due Novr 19. 600 £."
" remain for my Lady." .....

The Decd constantly mentioned Mrs Gilbert, by the appellation of my Lady - The Residuary Legatees contend, that the Devise not being regularly made, in a Will, or Codicil, the Bond must sink into the Residuum, & cannot be conveyd, by either of the afd Memm: to Mrs Gilbert, neither of which, they say, by Law, can be considered of a Codicillary, or a Testamentary nature.

Mrs Gilbert apprehends the Intention of the Testator (tho. not exprest agreable to the precise modes of Law,) is the point to be considered, & these Memm: being confessedly of Mr Gilberts hand writing, & strongly declarative of his Intentions, has propounded these Memm: as a

Codicil to the last Will & Testament of the Decd, & amongst other things, pleaded that Mr Gilbert considered said Bond, as the absolute property of his said Wife, & intended the same for her at his death; that Decd by Will gave his Wife an Annuity of 200 £ p Annum & that Decd by Will gave his Wife an Annuity of 200 £ p Annum & 500 £ in money; that the Decd, a short time before his death, told one of his intimate Friends, that he had given his Wife 200 £ p An. & better than 1000 £ in money; meaning the 500 £ given her, in his Will, & the 600 £ due on Garlands Bond.

Dr Harris.... Tho: Gilbert died 30 Novr last; he left a Will as the Will is dated in 1760 but executed in 1761. & the Codicil 12 May 1766. The Exors took Probate: By the Will the Testator says, "I leave Mrs anne Gilbert " who has lived with me many years, & behaved alway like a Wife " 200 £ p An. & 500 £ in money." he leaves 1000 £ to his Sister, & the Residue to his Exors, for the use of his Sister during Life (except Jewels &c wch he bequeaths to his Wife) & 100 £ to each of his Exors - In the Codicil he says, "In case of any Accident before an Alteration of my Will, I desire " have this Paper looked on, & executed, as my Codicil by my Exors. " at the End of the Codicil, is this Memorandum. "My Will in Mr Garlands hands, & a Copy of it in my Bureau." (The Exors have been cited to prove a 2d Codicil marked No 1.) The Bond for my Lady Sept 8 " 6. 1758." Neither of the Exors believe the said Exhibit to be intended by the Decd as a Codicil to his Will.

Dr Collyer..... I am Council for the Widow, who has an Annuity of 200 £ p An. & 500 £ the Will & Codicil leaves the Residue to Dr Reeves, who married the Decds Sister: the Will is made from a Draft, in a Pocket Book with Obliterations &c and corresponds with it: I mention this to shew, that he wrote in a Book, wch he considered, as containing serious matters. It bears date 2 days after the date of his real Will. The date of the Will is wrong: then the following Memm will appear to be entered in consequence of the Execution of the Will; as soon as he had done it; he makes it by way of Postscript: it looks as if it was connected with the Will, be it wrote when it will, & when he had made the Obliterations in the Will he intended should stand he left this Postscript standing: Is it possible a man could have a 1000 £ Bond & be making his Will, yet take no notice of it? he considered the Bond as disposed of to his Wife, & chose this manner of confirming the Gift; he had deposited his Will with a Friend, he keeps this Memm: secret: he conceals this from Dr Reeves & his Wife, to whom he possibly thought it might give Umbrage; he had not given it in Trust, so it was no Gift to his Wife, he might take it back at any Time; but he does all he can to convince the World he intended it her: he calls it my Lady's Bond; he knew this was insufficient to secure it to her, unless he gave it by some Testamentary Disposition: Nothing can arise from the Confession of these Gentlemen; as not believing it to be a Codicil, if they had, they wd have taken Probate of it, but being doubtfull of the Point, they take the Opinion of the Ct: they Ct never confess it in their Answers: the Exors say, they believe he had no other Bond: the only Question, is Can this be pronounced for as Testamentary? Say! By Law there is a difference between a Testament & a Codecil; one Testament will destroy another: with respect to personal Estate, it is immaterial wh: it is a Will or Codicil; if it is the Intention of the Deed, it is a Testamentary disposition; & it is sufficient if the Intention can be proved: if Codicils are ever so numerous, the Exor must take Probate of them; where they contradict each other, the Parties interested share: this Codicil contradicts nothing, it is Substantive, therefore may easily stand, with the Will & the other Codicil .....

Dr Wynne..... I am also Council for Mrs Gilbert: the Deed in 1758 gives his Wife £ 130 Annuity, & 1758 had in Contemplation, an addition of 50 £ to y Annuity.

It is objected that this cant stand as a Substantive Paper, if it could, the Declarations would destroy it - the Mem: were intended only for his private use - He gives a very good reason for benefiting her extraordinarily. It was nothing but a mere mode of speaking: her Title must be the Codicil he had made, for he had received the Interest, tho. he calls it "my Lady's Bond." If a Person left 1000£ Bank Stock, & had sold 400£ it wd be only a Revocation pro tanto, so here tho, in 1760, 900£ was remaining yet in 1768. there was only 600£. A man may make Codicils on as many Papers as he pleases: the Ct will do what it can, to carry them into Execution: Codicils do buoy up, & will swim, as many as can be: they are often kept secret: this is of all Testamentary Dispositions, the most favorable Case; it is a pious Gift: his Declarations of having left her 1000£ is conclusive; the Variety of Inks, shews the wrote at various times. . . . . .

Dr Harris . . . We dont dispute the words signifying Mrs Gilbert; but the Question is, wh he gave this Bond by a Testamentary Codicil, or Testamentary Schedule? It is first a Question of Fact, & then of Law. "It contains the Copy of my Will, in the large middle Drawer. may. 3. 1760." It is not impossible he might make a Copy in 1760 of a Will made in 1754. He transcribed it between 1754 & 1758. he had a mind to alter it, but could not immediately, so made a Codicil in 1758 wch he executed, & copied in the Pocket Book in May 1760 accordg to my Idea, for fear of an Accident: by that Codicil he gives her an Addition of 50£ pr An. - Both the Will of 1754 & Codicil of 1758. are copied in 1760. & I apprehend, on the 8th of Decr 1760, he made Alterations, wch you see in the Will of 1754: by transferring this Codicil into that Copy, he virtually destroys that Codicil of 1758. there is an Obliteration over the Codicil; for the Date is erazed, it is cancelled: 22 Janr 1761. he makes the Mem: as an Apology for giving her 50£ pr An. more. & therefore says the Relations shd not murmur. after the entry of the Copy of the Will of 1754. & before the Entry of "the Bond for my Lady." the Words are not Testamentary - From the Endorsement of the words, "Remains 600 for my Lady." it is plain he did not consider it as testamentary but a mere memorandum only: could he have considered this as testamentary, & yet have omitted to mention it in the Mem: as well as the others? he avoids calling for his Wife tho, he had a great regard for her. Mr Stevenson was here when the Witnesses were examined, they did not chuse to examine him: the declaration of a 3d Person must not be received, when that Person can be examined himself: the Deeds declaration to Mr Hall, & his Declaration to the Exors, is mentioned by them in their Answers to the Court. . . . . .

Dr Calvert . . . The Question is wh this imperfect Schedule is to be received as Testamentary? the Rule is to enquire into the Testators Intentions: the Presumptions agt its being Testamentary, are the most violent, that can possibly be; on the face of it, the Words dont import it to be Testamentary: they may be supplied, but that must be by the very strongest Circumstances: It appears material, when the words were wrote; if in 1754 the Ct cd not pronounce for it: they may have been wrote in May 1760, when he transcribed the Draft of his Will of 1754 into the Pocket Book. In the preceeding folio are these words "Alterations made in my Will. 10 Decr 1760. By executing his Will after, & omitting this Paper, he clearly intended it shd not operate. If this is not connected with the Mem: if it is not implied in the words. it can't be taken as Testamentary. the Mem: refers

the Contents of X

to the additional Annuity, in the Codicil of may 1766. what there are the presumptive Circumstances to support it? the Entry on the Bond is nothing: does it refer to a Will? if it is given by the Codicil, it cd not be hers, in his lifetime: it cd not refer to a Testamentary disposition, because it cd not be hers till his death. it must be with relation to a gift in his lifetime: the Words "left in the Hands of Jas Garland" wrote after the Entry, viz. 13 July 1760 amount to a Republication, or Recognition, & the Bond is not mentioned, so that it wd destroy the Mem: wrote in Jan: 1761. He does not say "as another Codicil," or "a Codicil," but "as my Codicil." The Ct always enquires into the Intention of the Deed for I wont contend that several Codicils cant stand together: the Deed must not intend only to give a Bond, but to give it by his Will: his Intention to give it in his lifetime, will not be such an Intention, as the Ct can pronounce upon - Watches. Jewels. Plate. Furniture in St James's Square, a large Sum of money. You will regard the Testators general Character as to Carefullness, or Carelessness in his Affairs: he is exact, attentive in making his Will: he dont call her "My Lady." any where there he thought it necessary to take care of every Scrap of Paper, he looked upon as Testamentary; he kept them by him he duly executed them, recognized them, in this frame of mind he is supposed by the Gentlemen, to have doubted of the Validity of the Gift & therefore to have set about a Will: but he wd not supply one incompleat Act, by another more incompleat.

Dr Hay Judge . . . Mr Gilbert is clearly dead testate: the Will & Codicil are admitted: the Exors have acted very right according to their notions of the Deeds Tenacity: if the Will & Codicil had been left with the Exors, no doubt they were to prove the Codicil as well as the Will: there was good reason for the Exors to presume, there were no other Testamentary Papers, the Codicil saying, "my Codicil": no Imputation can be thrown on the Residue Legatee who has only 1000. She had a right to see wh any Paper wd open the Income wch was to go to her Children; it is intricate & confused: the Paper propounded, of wch the Ct will pronounce the Exors to take Probate: I observe the Proctor has prayd in the disjunctive: that No 4 shd be taken for Deeds Codicil, or another in another Book, with a Recognition of it. I cant look on the Paper No 8, as Testamentary, but only to be used, to shew the other was so intended; I cant pronounce for that Paper, as part of the Codicil: "the Bond for my Lady" in No 4 / they are distinct Papers: there is afterwards a note of Reference, as to the Improvement of the Estate, & a Colliery, & there are intermediate words between "the Bond for my Lady, & the Nota Bene. I dont think the words "tenderness &c" can refer to the Bond, they must rather refer to the Increase of Annuity: they could not be connected with it on account of the word "therefore" these intermediate words are to be left out, because I look on them to connect with the Annuity, not the Bond - No 4. is all of the deeds set. the Witnesses swear he meant it so go, as by a Codicil, or by a Will: but however it is clear he intended her to be benefited, & the Entries all prove it, & shew, she was to have the Principal, Interest & Interest paid: what has been urged, that if an absolute Gift in his life time, this Ct cd have no Jurisdiction, it is true; all the Evidence that tends to shew that, are only favorable Circumstances to induce the Ct if it can to pronounce for it, as testamentary, if it is not, Ct cd not pronounce for it, however he might intend the Benefit. The Case is certainly favorable, if in Construction of Law there is any thing testamentary in it for me to pronounce on:

Q. Is it testamentary? if Testamentary. Q is it cancelled by the Deed?
I must lay great stress on P.S. to a Bond for my Lady. wch referred to something that had gone before, supposing the Will not cancelled wch was executed in 1754. they wd have been testamentary referendo, & an Appendix to it: it was once testamentary: it is doubtfull when it was wrote; it is said in 1754 or 1760 when he talks of Alterations, or 22 Jan: when the Close of the Mem.m is dated if it was wrote subsequent to 1754. then it was codicillary: if in 1760 it cd not be revoked by the Cancellation in 1758, as D.r Harris said it would be: But if wrote in 1754 & cancelled by the cancellation of the Date of the Paper in 1758. wch I doubt, yet it is revived by the connecting words of 22 Jan: 1761 affirmed & recognized then the Nota does connect the Page before with the Mem.m of 1761. tho the Paper of 1754 is cancelled, it is over the words P.S. the Words "To my Lady." are not erased at that time, so remain in force, & must be deemed a subsisting Codicil to the Will: But it is said to be revoked by a subsequent Act, the subsequent date of July 1761 of my Will being left in Mr Garlands hands. this refers to a distinct independent Paper, & cant be applied to this; it is said where he made the Codicil of 12 May 1766. he did not think he had a Codicil, for that the Words "My Codicil" imply as much; he refers then only to the Will itself: I rather think so, from the Mem.m "my Will is in Mr Garlands hands, a Copy of wch is in my Bureau." he had forgot the Paper he had wrote. In no case Revocations of Papers uncancelled are favorable in Law: Revocations in favorable Cases must be express & not implied: his Omission is a proof he had forgot it; but the omission of the Recognition dont operate in Law: On the whole I pronounce for No.1. I can take no notice of Stevens's Declaration, nor even is it expresly pointed, to shew it was a Codicil; in so favorable a Case, where a Paper once testamentary & not cancelled by Law or Implication must be established as a Codicil in favor of Anne Gilbert.

The Codicil establishd..

Ibid

Cumberlege No.13A Powel v Appes Cricket.

D.r Calvert D.r Wynne.

D.r Calvert.....

By the Custom of London 1/3 of a Freeman's Estate goes to the Widow, 1/3 to the Children, & 1/3 is called the Death's Part, as being left to the free disposal of the Dying man: 11 Geo.3. c 18. §17. takes away y.e Custom except where the Parties were married before 21 June 1725.

Abraham Appes died 11 June 1766. he made his Will dated 5 April 1763. wherein he left to his daur Anne Powel wife of Wm Powel 30£ on condition she executes a Release of her Interest in the 3d of his Estate; on that condition he forgives her & her Husband what they shd owe him at the time of his death; he appoints Rowland Read & Eliz: Appes his Exors: the Mrs Powell, her Husband being dead, accepts the Legacy, & executed a general Release 5 Days after the Testators death; Appes left also an Infant daur, Elizabeth, to whom he gave 200£ on condition, if she died before 21, it shd go to her Mother. he also left a Son Abraham, 1 month old at his death. Elizabeth died the day after her Father; You will observe, that by surviving, she had a right to 1/3 of the 3d due by Custom to the Children of the Deed. (i.e. 1/9) after her death, my Client cited the Mother, to accept Admon to her daur, or shew cause why it shd not be granted to Mrs Powel as half Sister; Mrs Appes accepted the Admon, & has since brought in a Declaration instead of an Inventory, in wch she has inserted only the 200£ Legacy, given by the Father to the Minor and proceeds agt charging herself with it, because if the Minor died before 21, it was given to her; you will observe she has left out the Share of the Fathers Estate, wch the Minor had

Q. Is Mrs Powel debarred from her (those) distributive, of her Sisters fortune, by the Release given of all demands she cd have under her fathers Will, or by y.e Custom of the City of London, or otherwise howsoever
Q. Is not Mrs Powell entitled to an Inventory of her Sisters Effects?
Q. Is y.e Inventory given by y.e Widow full...

under the Custom; Cumberlege for Powel prays a fuller Inventory; that she may declare what that Share of her fathers Effects amounts to; Cricket alledges that Mrs Powel has given a general Release of all demands she could have under her fathers Will, or by the Custom of the City of London, or otherwise howsoever: that she has released all Interest in her own right, or under the Infants Intestacy: Cumberlege replies, that the Release was intended only to bar her of what she was entitled to, in her own right, from her father, but not to what she should come into, by virtue of her Sister Intestacy; that the Party, when she executed the Release, was not apprized, she had a Claim on the Estate, in right of her Sister, & brings two Affidavits to prove this, & says the Word, "howsoever" is only a word of course. Cricket e con: has brought the Affidavits of Appes, Read, saying it was mentioned to Mrs Powel, who was well apprized of its being intended she shd release the whole.....

D.r Hay Judge... The Release may operate against the Widow being entitled, but not against her giving an Inventory: I cant determine the Right at present: if the Deed was a Freeman before the Statute took place it must go according to the Custom; if there is a possibility of a Right, the Inventory shd be full; if the Custom operates, she would come into what was distributeable, so surely on the ostensibility of an Interest as half Sister to the deed Infant, she is entitled to an Inventory, tho, she may have no right to a Constat of Abr.m Appes Effects, as she has barred herself by the Release; but that is not asked; at present the Declaration relates only to the Effects of the Infant, not, what, by Will of the Father, or by the Custom, might come to her; an Inventory is matter of right. it is not full with respect to the Infants Effects, I must therefore decree a fuller Inventory of the Effects of Elizabeth Appes decd.....

Fuller Inventory of Eliz. Appes decd

Ibid

Bogg No.138. Blanchard v Duvernet. Falkner

D.r Wynne D.r Collyer.

D.r Collyer.... Duvernetts Allow reformed was admitted Bye Day of Mich. Term. Feb. 1767 several Witnesses were produced & all examined — Falkner produced two Witnesses, examined one, returned a Compulsory & examined 2 more Witnesses 23 June. 1767 his Term Probatory was continued precisely. 3d Sep: Falkner brought an Affidavit of his Client, & prayd Compulsories; Bogg prays the Cause to be concluded & assigned for Sentence; we hope, tho, one Term Probatory is in a manner expired, you will enlarge it; the Delay is caused by many Witnesses being unwilling to be examined.....

Judge D.r Hay. Falkner has no right to a Compulsory after a Term probatory is out however I will prolong the Term Probatory

Q. is Frenchs Relation, admissible?..

Prerogative

J.S.M.T..... Collins 136 Browne & French v. Ly Sophia Cranston Greene

D.r Wynne, Bever D.rs Harrise Calvert.

D.r Harris... opened, during which, I was obliged to leave the Ct

D.r Wynne 15 Sept. 1764. Jackson Brown made his Will & died in May 1767 Two Caveats being entred, were warned on behalf of Elinor Brown Widow, Relict of the Decd, & Alexander French, two of the Exors: 2 S.S.T. 1767. Collins exhibited for Brown & French, & prayd Probate a Power being reserved of making the like Grant, to Tho.s Ryder, the other Exor. Gostling Jun.r exhibited for Ly Sophia, Wife of James Ld Cranston, alledged the Decd died a Widower without Issue, Father or Mother; & that his Party, was the natural & Lawfull Sister & next of Kin of the Decd. Cushington for Fuller exhibited for the same Party, and all Proctors were assigned to answer to each others Clients Interests, & to exhibit Proxies by next Ct
1 Sep. Dr. J. Collins exhibited a Proxy under y.e Hands & Seals of Browne

And French, confessed Lady Sophia Cranston, to be Sister, but denied her to be next of Kin, or to have any Interest in the Deceds personal Estate, if he shd be pronounced to have died intestate but admitted her to be a Contradictor to the Will, & in presence of Gosling & Fuller, brought Affidt of his Client as to Scripts, & gave an Allon, wch was admitted, & produced as Witnesses, the Subscribing Witnesses to the Will, viz Dr Baker, Mr Shidwick the Deceds Physician & Apothecary, & Sam.l Ward

By the Affidt of Scripts, Browne & French appear to know of no Testamentary Papers, besides the Will propounded, except three former Wills, executed by the Decd, two of wch were destroyd before the other; soon after the Execution of the last Will, & were nearly of the same Effect, save as to the Appointment of Trustees & Extors.

2d Sess. Grene exhibited Proxies under the Hands & Seals of Ld & Ly Cranston, before exhibited by G & F. & denied Collins's Client to be Widow & Relict of the Decd, & alledged he died a Widower without Issue; Collins prayd Publication, & the Cause to be assigned for Sentence

3d Sess. Grene averted he gave an Allon, & was assigned to be heard on Admission thereof on the Bye-Day; this Assignation has been continued to the first Session of this Term.

Grene brought by Cranston's Affidt of Scripts, whereby she deposes, she knows of no Testamentary Paper, except the Will propounded, & also has heard Jas Maccarthy of Holbourn made one or more Wills for Decd wch were executed by him —

Dr Calvert... read the Allon the Purport of wch was, as follows.....

1st. That the Decd was vicious, extravagant, &c and easily imposed on by any who would favor his Vices

Contradicts the Marriage of Eliz Marshall to Browne, pleads she was his Concubine, & had a Child by him, That she had a great Ascendancy over the Decd — That she persuaded him to give her Husband Jas Marshall, a Sum of Money not to trouble him for Criminal Conversation with her, in consequence of wch he signed an Instrument of Indemnity —

That she prevailed on him to suffer the Child to be baptized as his Child by Eleanor his Wife — That this is the Child to whom he has left his Negroes, Lands, &c. in Barbadoes.

That she frequently abused his family; kept all his Money, & obliged him to apply to her for Pocket Money — The Allon pleads several places of their having Criminal Conversation, knowing her Husband James Marshall to be alive — That she married him afterwards during her Husbands Lifetime — The Register of the Marriage is pleaded — also that she perswaded him to go to live at Richmond in Surry, his weakness of Body, & being paralytick a Month before the Will in Question was made —

Dr Wynne... You will observe, the general drift of the Allon, is to shew the Decd was incapable of making a Will; whatever serves to shew that will be admitted, & whatever does not tend to that Point will be expunged — The 1st Art pleads only the Interest of Ly Sophia Cranston & tho, the 2d Art: shd be true, it would have no Influence on you to pronounce agt the Will, wch he might be very capable of making, notwithstanding — the whole is a kind of scandalous History —

Dr Bever... The Law of England allows no Inference of Incapacity, to be drawn from Extravagance — She might win his Affections by her Care & Assiduity — Let her be ever so bad, there was no harm

in receiving a Bounty from him —

when Dr Harris spoke Allon was not in Court

Dr Calvert... We form our Judgement from a variety of Circumstances, it is not necessary, de. She make him out totally incapable; if we can prove he was a very weak man, & easily imposed on by this artfull Woman, that is sufficient; whatever tends to shew a general Weakness, is material; her bad Character & management is so, as far as it serves to shew her Influence, & the Use she made of it the Stringent part, is that she made him go & take a false Oath to procure a Licence, when they both knew she had a Husband living. It not relevant to plead that Signs were used, & that she was the only Interpreter.

Dr Hay... } I am to consider the nature of the facts, their Relevancy, & whether
Judge... } they are capable of Proof. The Qu: is, wh: the Facts pleaded, if true, tend to invalidate the Will? The Party may object General Incapacity, & General Imposition wch will invalidate the Will set it aside. The 18th Article is the Basis, wch alledges a general Incapacity, at the time of executing the Will; the 6. 12th & other Articles tend to shew Custody & Influence by the Exec.x The Execution, I observe is not objected to. I cannot look on the Will as unfavorable wch is to benefit a natural Child, for whom he is bound to provide: a Persons living criminally ought not to affect the innocent Child. The Will must be set aside if the Deed comes out to be incapable; The fact of Mrs Brownes explaining will be difficult of Proof, yet it might be proved thus, as if she gave different Accounts of Signs at different Times, the only Question, then, is, wh: the other Articles come in aid of this, of the 20th. pleading Controul, Influence &c, that she did every thing, & that she obliged him, to have the Children baptized as legitimate, when they were not, by her Ascendency, procured the Hush money to her Husband, & his Application for a Licence by wch he was perjured, if these were constrained Acts, they may operate, if they were voluntary & affectionate Acts, they will rather strengthen the Will. The Criminal Behavior is not urged, as affecting the Will; I shall take no notice of the scandalous History it can have no weight in judgeing of the Will, any farther than as it tends to shew the Tendency; or the Plea I am to take it to be capable of Proof. Most of the Allon is admissible; Part of the 2d Art, wch says he was given to many expensive Vices & Pleasures must be struck out, as an improper description of the Person making a Will, & wch if true, dont warrant the Inference that he could not make a Will; that part wch pleads his being a weak man is relevant; the Pleading the Marriage is proper as connected with the other Articles, the 4th & 5th Art: pleading his Journey to & from St Kitts, must be rejected; 2 Art: must be reformed also the 15th — I dont see the relevancy of the Secrecy of the Marriage as laid, so as to affect the Influence of the Party in this Cause over the Deed; It might reflect on the Clergyman who married them, therefore must be expunged — I admit the Plea, tho, on the face of it, there shd be rather an Improbability, that it proceeded from Influence, I must take them, as they are introduced for Instances of her Influence over the Deed.....

Allon to be reformed...

Arches MS.
2d Sessions.

Stevens 137 Driffield v Pocklington Atham

Dr Wynne Dr Harris & Calvert

Dr Harris... opened

This is an Appeal from Norwich, by the Revd Josh Driffield, Rector of Chelsworth in Suffolk, agt Robt Pocklington Esq of the said Parish, & was in the first Instance a Cause of Office, promoted by the said Pocklington, agt him for refusing, or neglecting to perform his ministerial Duty. 19 July 1763, a Citation was returned agt Driffield. 6 August he appeared by his Proctor thereto, Bond was given by the Promoter to answer Costs, Articles were given on his behalf, with were admitted, Driffield by his Proctor gave a negative Issue; Witnesses were produced & examined, & a farther Allon given on behalf of the Promoter, pleading the times of the Induction of Mr Driffield, & several of his Predecessors into the Rectory of Chelsworth, & the respective times of their Continuance, to wch Driffield gave an affirmative Issue; Publication paped, & the Cause was regularly called on. April 1766, the Judge pronounced, Driffield shd be admonished to perform divine Service, otherwise to say or sing the Common Prayer in the 5th Church of Chelsworth, in the morning & evening of every Sunday, throughout the year accordg to the Act of Uniformity, & also to preach every morning & evening on every Sunday throughout the year, & in such manner as his Predecessors have done, & that he shd perform divine Service on all Saint Days, & all Days appointed by the Church or State to be kept holy, & give notice on the Sunday next preceding Saints Days, & Holy days happening in the Week then next following, on pain of the Law, & condemned Driffield in Costs. Driffield appealed, & the Allon now offered pleads

Allon... 1. Artt: That the Act of Uniformity, has, since the paping, been in many points disused, & not enforced; particularly the Clause enjoyning Morning & Evening Prayer, to be read on every Lords Day, & other Days therein apponted, in every Church, Chapel, &c. That it has been usual & Customary, ever since the paping the Act, in divers parts of this Kingdom, especially the Diocese of Norwich, where are many Ecclesiastical Livings, of very small Value, for one Minister to serve 2 Churches, & to perform Divine Service, but once on a Sunday in each Church.

2. That it was impossible the said Act shd take place, in respect to the reading Morning & Evening Prayer in every Church &c, for that the yearly Income of many Livings in England, & Places ment[ioned] in said Act, are too small to pay for a Ministers Attendance, & reading, the same not exceeding 20£ a year.

3. That the Legislature hath in many Instances, looked on the said Clause of no force, or impracticable, & particularly in the late Act for preventing Clandestine Marriages, it is enacted that Banns shall be asked in Morning Service, or Evening Service, if no Morning Service in such Church or Chapel

4 The Rectory of Chelsworth, is not sufficient for y[e] Rectors maintenance, especially if married, has Children, not amounting at the most extended value at 100£ yearly, deducting Land Tax & Parish Rates, out of wch the Rector must repair Houses..

5 That Joseph Driffield the present Rector has a Wife & 9 Children.

6. That Driffield during the time mentioned in the 3d Articles objected, by leave of the Bp of Norwich, served the Cure of

Kettlebaston in Suffolk as well as Chelsworth, performing Duty at each Church, either morn[g] or afternoon alternately, so that Divine Service & Sermon was performed at Chelsworth every Sunday during said Time.

7 There are 3 fish Churches within a mile of Chelsworth; Kettlebaston is not 2 miles distant. Whilst Proponent served K. the Parish[rs] of K. & resorted to wch Church they pleased, accordg as Service was performed thereat, were satisfied therewith & neither the Promoter nor any other Parish[rs] of C. objected till some difference arose, between the Promoter & Driffield about a Setting Dog.

8 It never was the constant Custom of the Rector of C. to perform Divine Service, twice every Sunday, & other Days appointed to be kept holy, but all his Predecessors ever since the Act of Uniformity, have accepted a Curacy, when they could get it, & by reason thereof never performed Duty more than once on a Sunday at C. & it never has been customary in the said 5th to read Prayers on Saints days, as a Congregation on several Trials, could not be procured to attend the same.

Dr Harris... The Promoter is Lord of the Manor, & stands up for the Cause of the Parish; we plead that by Custom, Service was to be performed on all Saints Days; that he was requested to do the Duty as his Predecessors did. This Allon pleads contrary matter so that the Witnesses were examined to in the Court below. I shall begin with the 8th Artt of their Allon; we pleaded in the 3d 5th Artt of our Allon, that it was usual to read Prayers &c, in their, the contrary is pleaded. I wont prove first Principles, for in the Court below matter Contradictory cant be pleaded, much less in the Court of Appeals, this allowd here tho, it has been disputed in y[e] Delegates in the first part they say there is no Custom, & to confirm that, say the Predecessors used to serve Cures, so the Confirmatory part is as contradictory as the former part of the Article.

Artt: 1. 2. 3. 4 & 5. are as contradictory as the 8th. we pleaded the Act of Parl[t] they contradict it, & say, it is impracticable; I am now considering them as contradictory, taking it in the Light of Impracticability. In an other Light, even supposeing it in time, would you suffer them to say, an Act of the Legislature is impracticable? if it is on view false, you will not suppose it true on an Allon notwithstanding the general Doctrine; they must be satisfied the Statute is impracticable; it is usual to do Acts in fraud of Statutes, but that will not validate the acts done. The 2d concludes nothing. The Stat. of Geo. 2. dont conclude, the Minister might be ill, there are many reasons why morning Service might not be celebrated.

In 4 & 5. He pleads he has a living of 100£ a year, that he has 9 Children, therefore &c. not perform divine Service; this is no reason at all, no Excuse.

6. It dont follow that because, the Bp licenced him, he dispensed with the Statute; he intended he shd have his other Parish supplied, the Bp &c. not approve agt the Statute.

7 We said the Parish[rs] were not satisfied, they cant now say they were; but let who would tell him they wd excuse him it can be no Justification; wd it be sufficient for him to say Duty is performed two Miles off, come over there: the Setting Dog is mentioned too, for what purpose, would you go into proof of the property?

Dr Calvert

Some of the Books say, that if a Statute can be proved never to have been put in use, it may be obsolete, tho standing on the Statute Book; this can't be said of the Act of Uniformity, wch has been generally observed, tho, not in every minute respect — The 2d Art: is merely argumentative & therefore improper to stand; are the Witnesses to point out, where Service was not performed, they will only be Instances of neglect of Duty — As to the Marriage Act, it is before the Ct, as all public Statutes are, the Observation is proper for the Council, but Witnesses cant be examined to it —
The 4th is destructive of itself; the Living is worth 100£ per An: the Livings in London dont much exceed that value, consider what Duty is done; this Living of St Bennets Pauls Wharf is 10o more; this wd destroy their Plea of small Livings, is 100 of that Denomination? A man may have a Wife & 9 Children, yet not be poor, they may be an Advantage to him; the Dr not preach any where without the Bps Licence; we only pray that he may be admonished to do his Duty for the future according to Law, what signifies wt he did it by the Bps Leave, his now before you the Superior Ordinary — Canonically punished, are mere formal words, the future doing his Duty is ye View of the Sentence; when he neglected his Flock & deserted them they were obliged to go to other Churches, it goes too far it is as much as to say, there is no occasion for any Duty at all, he might as well put the money at once into his Pocket; as to the Setting Dog, it is entring into little Piques & Quarrels, it wd prove nothing, this wont excuse Driffield from his Duty, if true it cant be supposed to be the Ground of every thing after. Both the ancient & modern Books of Practice agree that no contradictory Articles, can be received in the Ct of Appeal, any more than below; the only Dispute I have ever known, has been wh: the Art: is contradictory or not; tho: you will hear every body you will cut off all Delay —

Dr Wynne

If no Allon can be given in the Ct of Appeal, that directly, or by Implication contradicts what has been pleaded agt you, it is useless to allow a Plea to be offered at all; I insist that on the face of this Allon, there is nothing wch can have been collected from the Witnesses, or arisen out of their Depons but it is such an Allon, as he must have given on mere sight, of the Allons brought agt him, if he had set up a Defence; this could not arise out of the Depons below, If it is a general Defence agt a general Charge; there is then nothing to preclude us from giving this Plea now; if so, I will consider it as if in the Ct at Norwich, or before you originally, to be tried by the Rules of all Allons; the Charge is grounded on the Act of Uniformity; they admit non User to be an Abrogation of a Statute, & that Custom will abrogate as well as make Law, Impracticability is the strongest Argument agt a Law, there are Instances wherein it has been determined, the Act of Uniformity cant be executed in all Points; in all Places org. Cart. v Holland. where the Deft was dismiss with Costs; & in some cases the Statute cant be carried

Fr. Long. Book. B. 1. A. Fol. 110

x dd. in the Consistory of London def. Dec. 11. 1761. where the Deft was dismissed with Costs

into Execution, it brings on the discussion of the Fact, wh: it can in the present Case; the reason we give is, that the Living is so small; suppose Witnesses shd prove they lived in a Parish in the Country, where it had been insisted the Minister shd do Duty twice every Sunday, & that the Living was so small, no body wd accept it on such Terms; we may rely on what fact we please; this will not burthen the Cause — In the 4th Art: we give a fair account of the Value of this Living, it is for your Consideration how it will aid us; it is not their Case this our Business to make the best use we can of it; they may give an Allon to take off the force of this Article, if they please; the Bp knows, what preferment, the Clergy of his Diocese have; there is a reason for allowing this Man to take a Curacy, his Preferment is small, his Family large, the Bp may on that Account excuse him doing Duty twice every Sunday at Chelsworth: The 48th Canon, says, No Minister shall serve more than one Cure, unless that is insufficient; wch is the present Case: Dr Harris mentioned an Oxonian who preached 4 Times & read Prayers 8 Times every Sunday; so much the more improper, that the Service shd be so irreverently hurried over. I dont know any Law, wch requires 2 Sermons every Sunday; if the Pshrs of Chelsworth did not grumble, no body else had a right to complain; no Notice was taken of this Defect, till the Squire & Driffield quarrelled about the Setting Dog — When a Man is endowed so as to be able to do the Duty of the Living, as the Statute requires; we shew wd Driffield was not; If it shd turn out to be the Promoters own stirring up, will you pay any regard to his Complaint founded on the Construction of the Statute, we insist not only that Driffield, but that former Rector did not perform Service twice a Day, because the Living would not afford it —

Judge. Dr May

The Prosecution being of a Criminal nature it is my Duty to admit every thing by way of Justification of the Deft: The Rule is that in the Ct of Appeal you may plead new matter, & what might have been brought in the Inferior Ct, the Cause being open, but you can't plead contrary matter to what has been in Issue, & on wch Publication has passed; it is not merely the Publication, but the knowledge of the Depons, it is common in the Ct below for a Proctor to say he has not seen the Depons, & then to offer this Plea, but when the Depons have been opened & the Cause heard, nothing contrary thereto can be received; I am clear the Act of Uniformity in general is binding, & that a Clergyman may be prosecuted for not complying with it; but he may shew his Inability so to comply, & why the Service has not been performed twice a Day; it would be a hardship on the Clergy to say they shd comply with every particular of the Act of Uniformity: in the 5th Art: they plead, that Driffield's Predecessors performed morning & Evening Service; if the Deft had pleaded the contrary in the Ct below, he wd have done right; My Duty in a Criminal Prosecution is to admit every thing in Justification of the Deft — the Sentence is not confined to admonition, but censures him for what is passed; the Sentence must be right on the Evidence before the Chancellor of Norwich — The 3 first Articles are extraordinary, they plead the Impossibility of complying with the Statute, because

there are small livings in the Dioces of Norwich, the Justifi-
cation must not be that the Livings there are inconsiderable
but that the Deft's Maintenance is so small, that on Consideration
of his Circumstances the Act ought not to be put in Execution
agt him; what relates to other Livings, is immaterial, & merely
argumentative; how can Evidence be examined to prove the
Law shd not be enforced; there may be Cases where Castles shd
be considered; the Question is wh? your Living is so small:
The Marriage Act is proper to be considered on the Merits, it
is then proper for Argument, tho' not conclusive. Reject
the 3 first Articles.

2 & 3 Arts: states the Deft's Living to be 120 a year, & tho'
think a Living of that value not inconsiderable, it would
not of itself be a sufficient Excuse for the Deft: tho, compara-
tively it may, when the Circumstances of the Man are taken
into Consideration; the Law allows a Clergyman to marry
it will therefore consider the Increase of Family —

6 Art: This is new matter; it will come out wh? he had
a Licence or only a verbal Permission from the Bp, his
having his Diocesans leave, will tend to excuse, if not to
Justify, how far it will go, I dont say now; It will be proved
he d: not serve that Curacy consistent with the Act of
Uniformity: it is alledged here, he did Duty alternately
morning & Evening at C. ork. In Earl. & Holland, Shrepsw
said on the Minister not being able; the Clergy are not
to be harrassed — The Vicinity of the 2 Churches is not laid as
an absolute Excuse, but to account for the Bp's Leave.
his Assertion — that his Parishioners were satisfied, shd be struck out.
I dont think it right to admit that part wch states the
Prosecutors Motive, wch is not my Business to enquire
into, & therefore must be struck out; I am only to enquire
wh? the Minister did his proper Duty —

8 Art: I have some difficulty about the Rule agt
pleading contradictory matter to what has been pleaded
in the Ct below, is strong agt this Article — If you can
alter this, so as to shew his Predecessors took a Curacy
& tried to bring Congregations on Saints Days, so as to save
the Practice by varying the allon, I will allow you to
reform the Articles — Reject the three first Articles
allon directed to be reformed Strike out part of the 7th & reform the 8th Articles.

The Promoter Mr Pocklington died soon after, this allon
was directed, to be reformed, & then the Prosecution dropped.

Prerogative
D. St. J.

Case
24th April 19.
See Vol. 133. Hopwood. V Luckes .....

158

Lushington — Nye v Piercy & Gregory — Fuller

Dr Wynne & Burrell — Dr Harris

John Pope is the Deed; he died in April 176? intestate, a
Batchelor, without Parent, Brother or Sister, Uncle or Aunt,
leaving John Nye, Thomas Linbot & John Roberts his Nephews,
Anne wife of Geo. Piercy, & Martha Wife of Geo. Gregory, his
Nieces & only next of Kin & the persons only entitled in distri-
bution.
28 May Admon was granted, in the Bp. of Chichesters Court
to John Nye, Ann Piercy & Martha Gregory
On the same Day a Caveat was entered in the Prerogative
for the said Anne & Martha
John Nye had reason to think the Deed left Bona notabilia
applied for an Admon to the Prerog: Ct in common form
but finding the above Caveat, the same was warned on
his behalf
9 July. 1 Sess. Trin: Fuller appeared for the Nieces, & alledged
that John Nye had taken Admon jointly with his Clients, in
the Bp of Chichesters Ct, that the Deed had not left Bona
notabilia, & prayd time to exhibit a Proxy to oppose the
Jurisdiction, wch he was assigned to do by the Bye Day, when
the Assignation was continued to 31 July
31 July. Fuller exhib? Proxy, & denied the Jurisdiction, &
Lushington was assigned to declare, wh? he w: propound
the Jurisdiction by the 6th of Oct? when the Assignation
was continued to the Term.
1 Sess. M. T. 6 Nov? Lushington propounded the Jurisdiction
& asserted he gave an Allon, wch is as follows

1 Art. ... That John Pope Deed, resided at Horsham in Sussex in the
Diocese of Chichester, had at his death, Goods, Chattels, &
Credits in Divers Dioceses to the value of 5£ & upwards, &
more than sufficient to found the Jurisdiction of this Ct

2 Art. ... That soon after Deeds death, Anne Piercy & Martha Gregory
took possession of the Goods, Chattels, & Effects of the Deed.
particularly his Books, Papers, & Writings, wch now remain
in their Custody, & they refuse to shew & shew them to the
Party Proponent, tho' frequently by him requested so to do,
the Party Prop: doth allege, that if both, & will fully ap-
=pear by said Books, Papers & Writings, that Deed had
at his death, Goods, Chattels, Credits in divers Dioceses of
5£ & upwards, & more than sufficient to found the
Jurisdiction of this Court

3 Art. ... That Walter Nye of Ockley in the County of Surry, Dioc? of
Winchester, Carpenter, was indebted to the Deed at his
Death, 50£ by Bond dated 16 Nov? 1758, wch Bond is now
in the Custody of Anne Piercy & Martha Gregory. . . . . .

Dr Harris ..... The Admors first agreed & then quarrelled. Nye tried here
to get the Admon singly — The 3d Art. is a general one, &
must stand, or fall by the others — By the 2d he confesses
he has no Evidence of Bona notabilia, he allows he can
have none, but from the Papers; How is this Article
capable of Proof; it will be said from the Answers of
Piercy & Gregory; How can you issue a Mandamus for
Answers without having a Jurisdiction, you cannot
get one; perhaps they will want a Commission of Inspec-
tion, that would be, in other words granting a Search

8 Shall the Plaintiff be admitted? . . .

Warrant; they have only these two Remedies, an Inventory & Commission of Appraisement, in both which Nye will be at their Mercy; they are to shew, the Commissioners are not to hunt & search, you cant give that Instruction, unless you had a Jurisdiction; there is a Canon which enjoins Parties, to make Oath (when they apply to the Inferior Cts for Probates or Admons) there are no Bona Notabilia & let them apply to the Ct of Chichester, where he may have an Inventory & Commission of Appraisement, if he has a Remedy in another Place, you will not give him one here—

The 3d Article, I couple with the first; they shd state where the Bond was at the Time of the Intestates death, without that, the Article is useless; if the Specialty was in possession of the Deed, the Jurisdiction of the Ct is not founded. How can it be proved? you will not force them to come by compulsory

Dr Wynne — An Admon from this Ct is good tho, there are not bona notabilia (a) an Admon from an inferior Ct is void, & every thing done under it, if &c there are Bona Notabilia — The first Article is sufficient, if it stood by itself; the Plt assumes the Proof that the Deed had Bona Notabilia; it admits of Proof by Witnesses & by Answers —

The 2d, is a positive averment; that it does appear; I dont see why you cant have the Answers of the Partys; the Dr said by Canon they must swear there was not Bona Notabilia; I believe there is such a Canon, but it is notorious no Oath of this kind is taken these Parties may refuse to answer voluntarily, but when they are to be examined on Oath, they will be cautious how they speak. Suppose we could prove by Witnesses, that they had seen the Books a short time before the Deeds death, & there appeared simple Contract Debts in the Diocese of Winchester —

with respect to the 3d Art: the Dr assumes as clear Law, that the Debt is where the Specialty is; I have looked into the Books, particularly Wentworths Office of an Exor, & the reason there given is most unsatisfactory; it wd prove too much, that no Debt whatever shd found the Jurisdiction, for the Person of the Debtor who gives a Bond is not more transitory than that of any other Debtor; it is said to be the old Law, this is exploded; It is not pleaded in our Article that Piercy & Gregory have cft they take Admon in y Diocese of Chichester because the Deed died there, the Facts laid are proper if we can prove them —

Dr Burrell — I readily agree with Dr Harris that this is a nice Question, & deserves the particular Attention of the Ct, not only because it concerns the Jurisdiction, but that the relief of an injured Pty depends on it; this Ct will (I am sure) upon all occasions avoid intruding upon other Jurisdictions, but it will likewise support its own, you Sir will hear every Suitor, & administer strict Justice; & I believe, you will find, that the Interposition of the Ct was never more necessary than in the present Case, where the Defts have taken every Step in their power, to violate the Law, & injure my Client; I acknowledge a joint Admon was desired at Chichester to the Plts & Defts who were then amicably inclined to each other, but no sooner was the Admon issued, but the Defts pulled off the Masque, possessed themselves of all the Books, Papers, & Writings of the Deed, & refused to allow the Plt (tho, a Co-Admor, & so equal in power) the liberty of having access to them; Dr Harris says they fell into quarrels; with great reason, such Behavior demanded Resentment, & the Plt finding on Inquiry that the Deed left Bona notabilia applied to this Ct for Admon, but to his Surprize found a Caveat entred by Piercy & Gregory the same Day the Admon was granted at Chichester, than wch there cannot be a stronger Presumption, that there was reason for their Precaution &c. Bona Notabilia, otherwise, it was preposterous for them to take such a Step when all Parties were in Amity with each other.

(a) The Doctrine laid down by y Common Law is this, that in the former case it is only voidable, in y latter, absolutely void —

& there was no Reason to suppose such an Application would be made to the Perog: Ct — We state in the first Article that there are Bona notabilia, & assume the Proof of it, & in the 2d Art: we say it will appear by the Deeds Books &c. I am told the Deed had a Debt owing to him in Ireland, that, if true, will found the Jurisdiction, & the Presumption is in favor of y Plea The Dr desires we shd state where the Bond was at y Deeds death — I say if it was in his Custody it is not Bona Notabilia, when that Point comes to be argued, I hope to be able to offer Reasons wch may induce the Ct to pronounce it Bona Notabilia; I am told, in Cases of this Nature, Payment has been refused without a Prerogative Probate & Admon; the Canon noted by the Dr is Brutum fulmen, it is entirely disregarded, & I do not beleive it is enforced in any Inferior Ct in the Kingdom I hope you will be of Opinion to admit this Plea as laid —

Judge — Dr Hay — Matters of Jurisdiction are as much of Right, as any other Questions, & must be determined by the same Rules; If the Deed died possessed of more than 5£ in different Dioceses, or Peculiars (in wch Ct has a right to the Probate or Admon) of the Province of Canterbury, if the Deed left Effects only in one Diocese, this Ct will not assume the Admon of them; where there is a doubt about the Fact, & a Party asserts the Deed left Bona Notabilia, it would be manifest Injustice to refuse him an Opportunity of proveing it, When one asserts, & another denyes a Position, it must be examined into, & tried;

The first Article would in my Opinion be admissible, if it stood alone; the Plt is to make it out as she can, & has a right to the Defendants Answers to the Allon, & might have exam: Witnesses to prove it, if he had stopped at this General Plea: he may also plead more specially, & go into what he thinks fit, to shew Debts where he can —

The 2d Article pleads that the Books &c in the Defts possession is one way of proving his Position, but not as the only method; the Court wont immediately grant a Commission of Inspection & Appraisement, because that supposes my Jurisdiction to be founded, & would be Inquisitorial indeed — Dr H: said he might have gone to Chichester & demanded a Commn of Inspection & Appraisement, & also an Inventory, so he might but he says the Ct of Chichester has no Jurisdiction, & chuses to come here; the Question is, does the Jurisdiction appertain to them? where a man has two Remedies, he is at liberty to make use of either; he may here demand the Answers of the Defendants, upon Oath, wch they beleive the Jurisdiction of this Court to be founded, by the Papers in their Hands; if he is not aided by their Answers, he may then go to Chichester & pray a Commission of Inspection, to see if they have sworn truly; I beleive the Canon cited, has never been complied with, unless it shd have been in those Jurisdictions where Dr Harris presides, I therefore lay no stress upon it —

v. fol. 133 . . . . . The 3d Articles pleads a Bond; this Point was before me on an Act, in Hopwood & Luckis, I rather gave a Recommendation there, than a decisive Opinion; Suppose it shd turn out, the Bond was not in the Diocese of Chichester when the Man died; there is an End of the Question; if it was in the Deeds possession, at that time, there is room for Argument; I do not enter into the Law now; I am bound to admit the Allon, & require the Answers of the Defts as to the Jurisdiction bill that is founded, I cannot aid, but then the Law would require me to give every Aid in my Power —

M.L. 3 Sess
Commissary of
Surry

(No 139)

Grene — Mapletoft v.al: v Vicar. Ch. Wm &c of Chertsey — Collins

Dr Wynne, Bever — Drs Calvert & Burnell

Dr Wynne ... The Ct having, upon a former occasion, testifyd its Opinion in favor of the Faculty prayd, by the First Intimation, & thereby overruled the Objections taken thrt by the Opponents, I shall consider that Point, as already decided; but an Omission being made, wch wd have frustrated the Intent of our Prayer, the Ct indulged us with a Rescission of the Cause, in order that we might take out a second Intimation, to remedy the Defects of the first; we did so, & in consequence thereof a Plea has been given in by our Opponents, stateing the Order of Vestry of May 28. 1766. that no Leave shd be given, to cut a Door Way thro. the East Wall of the Recess, or to take away the Crown of the Arch at the Entrance thereof, erect a Gallery therein, or open a Dormer Window on the S. Side of the said Church. It stated likewise that the Church was very much out of Repair, as well as the Recess, & that great Danger would arise to the Fabric, by carrying into Execution the Alterations proposed; We gave a Plea in answer, contradicting the whole of their Plea. They have examined 8 Wn & 2 Exers on the Question therefore now before the Ct respects this Point only, wch they have proved their Assertion. I must observe to the Ct that the Opposition to the Grant of the Faculty prayd, appears to me to be founded in Peevishness & Vexation. Frequent Offers have been made to compromise the Affair by submitting it to Arbitration, wch have been constantly rejected; we were desirous it shd be referred to the Decision of Surveyors, to be named by the Ct, as is usual in Causes of Dilapidation, You Sir approved the Proposal, but they refused to comply with it; if therefore, they shd not, after so tedious an Opposition, make out their Assertion clearly to your Satisfaction, I trust you will condemn them in exemplary Costs; I am instructed to say, there will be no occasion for a Dormer Window, as was apprehended, so that we shall not trouble you on that Point; I do acknowledge the Witnesses on both Sides depose strongly in favor of the Propositions laid down, by the different parties; but what they both want to establish, is little more than matter of Opinion, which from the nature of the Evidence, is a very unsatisfactory Issue to rest the determination of the Question upon; In Cases of this sort, the Parties are at liberty to examine whom they please; it is not like Questions of Wills, Marriage &c where they are confined to particular Persons, within whose Knowledge & Information, the Facts came; Parties will naturally sound those, they intend to examine, to know how far they may depend on their Evidence, & whether their Opinions coincide with those of the Principals, if they find any Variation, or material Difference from their own, Such Witnesses will never be examined; Upon the Evidence being compared, you will find the Deft Witnesses contradict one another, & that ours are uniform; So that the Balance being exactly weigh'd, the Scale will preponderate in our favor. Several of their Wn say the Walls of the Recess are greatly decayd & out of Repair; but this is contradicted by Glaspel, one of their Wn, who says the walls of the Recess, are in good Condition to all Appearance, & that, that part of the Wall on wch the Nook abuts, does not hang over; we desire a Liberty of taking away a small part of the Arch, & to put a Beam instead thereof, wch will operate as a Tye, & be able to support a much greater weight, than the Arch itself does, wch is a Gothic Arch & acts as a Thrust; the Witnesses who are examined on our Side, agree, that a Door way may be opened, in the East Wall of the Recess, without Detriment; 2 of these Witnesses viz. White & Hart, measured the Wall, & the latter took a Section of the Nook; We are so well satisfied, that the Alterations proposed, will be attended with no Inconveniency that we have offered to give Security to pay for & make good any Damage that may attend them, & this I am told is not uncommon, but that Parties have usually given Security that no Damage shd accrue to the Church; it was done so in Lady Middlesex's Case, where they wanted to reduce, or stop up a very large Window. I did not expect to have heard any mention made of Tye Beams they are fallacious, & foreign to the Point in Issue, & unconnected with this part of the Church. The Order of Vestry of 28 of May 1766, is very extraordinary, the Pch had no right to give or refuse Leave, that belonged to the Ordinary entirely. I hope you will be of opinion to decree the Faculty as prayd, that the Opposition has been peevish & vexatious, & that we are justly entitled to exemplary Costs.

Dr Bever

Dr Wynne having spoken so fully to the several points in Issue, renders it unnecessary for me, to trouble the Ct with many Observations, especially as the Debate is confined to the Subject matter of the last Intimation; the Witnesses examined, on this occasion, speak merely to their Opinions, in which indeed, they oppose one another very strongly, & therefore the Ct will not gain much Information; the Witnesses on our Side speak more uniformly than the others who differ in their Sentiments, particularly Glaspell, who agrees with our Wn & adds weight to their Sentiments; Hart, interfered merely out of good nature, & therefore greater Stress shd be laid on his Testimony; he thinks cutting a Door way in the East Wall of the Recess will strengthen that part of the East Wall, by reason that the work they will add to the Wall, in making good the Door way, will be much stronger than the old work, the Wall being now composed of materials of a rotten & rotten Quality; the E. Wall, will not endanger, tho, it may weaken it, much stress is laid, on the E. Wall, being a few Inches, out of the Upright, but that is not so material, as it appears to be, it is well known Walls will stand for ages out of the Perpendicular; the Gentlemen seem to be extremely apprehensive on account of the Tye Beams being rotten; I do not believe the Church would be in Danger if they were taken away, as there are Buttresses on the Outside to

strengthen & support it. I must insist with Dr Wynne that the Opposition made to the Grant of this Faculty has been obstinate & ill founded, we hope to be supported in this Opinion, by your Sentence in our favor with exemplary Costs.

Dr Calvert — The Dr was extremely mistaken, (who spoke first on the other side.) in apprehending I was desirous of entering into the Consideration of any Points which had already received your determination; I am equally sensible with that Dr how long this Cause has been agitated & am not less pleased, that it now draws near to a Conclusion; that it has been drawn out to this Length arises from their mistakes, & not from an improper Opposition of my Clients, it was their Business to take Care, they proceeded properly, we were not obliged to set them right, if a Faculty was prayd, which when granted, would not answer the end proposed, the Blame must lay at their own Door, we are told Proposals of accomodation were repeatedly offered by them, & rejected by us; it may be so, but I am ignorant of such Offers; if they were apprehensive of the Church being endangered, the Defts acted the parts of honest Men to abuse Compliance, they had pledged themselves, to their fellow Parishioners, for the prosecution of the Common Cause, & they were willing, nay determined, to take the Opinion of the Ct; We are told our Witnesses are not uniform in their Sentiments, & that they clash with each other: I would beg leave to observe, we have examined three professed Surveyors, & 5 other Wn who are either Masons, Bricklaylrs, or Carpenters; of these, one (viz Glaspell) differs from the rest, in his Opinion, that the Walls of the Recess, are in good Condition, therefore the Gentlemen infer all the other Depons are false; do they mean that one Wn ought to weigh agt 5 others equally unexceptionable? if they do, it will be unnecessary for me to confute such a Position; or do they mean to add Glaspells Evidence in this point to the Account given by their own Wn in order to throw the weight of his Evidence into their Scale; I will suppose the latter, & then insist the Balance is in our Favor, being 7 to 6. But the Drs forget that Glaspells Depon will not turn out so advantageous, as it appears at first Sight; for however he may vary from the rest of our Witnesses, in a particular; in every other, he strongly corroborates their Evidence; if our Wn speak truth, the taking away, the Crown of the Arch, will be attended, with signal Inconveniences to the Church, & the mode proposed to repair the Loss, is fallacious & erroneous; we are told the Church is a very ancient

edifice, frequently in danger of decay, & that different methods have been applied to strengthen it; that at the original Building of the S.d Wall, there was a range of Piers, arches over them, like the Arch now at the Entrance of the work; that at different times, the Apertures of these Arches have been reduced, & Windows made of a less Size; for the purpose of strengthening the S.d Wall. It is said if the remaining Arch should be cut away, the Abutment of the Arch continuous will want proper Support, & as the wall is much decayed will be in great danger of falling, notwithstanding an Oak Beam, 13 f.t long & 15 I. by 12 I. Square shd be placed to support the State of the Roof; under these Circumstances will the Court hesitate a moment wh.r the Application to make the Alterations contained in the Intimation shall be granted, or not; You Sir, are the Guardian of the Church, & you will always take care to avoid giving a Sanction, by your Decree, to a Request, that may be attended with general Inconvenience; if upon the Evidence before you, there remains a Doubt as to the Truth of the Allegations, that Doubt is in itself sufficient to turn the Scale, & guide your Opinion agt the Faculty prayd; I hope & trust you will not be of the same Sentiments with the Counsel on the other Side, that this Opposition proceeded from ill nature, but that it was founded in that Regard wch every One may be reasonably supposed to owe his Neighbours; that their Object, was the Common Good; & that you will reject the Faculty prayd, as unreasonable, & improper.

Dr Burnell — I shall very readily agree with Dr Wynne, that it is very unnecessary, to enter into the Consideration of what passed at the former hearings, & that every thing prior to the Issueing the last Intimation, is foreign to the present Point: we were first agt the Grant of the Faculty prayd, because we thought, it would be attended with Inconvenience to the rest of the Parishioners, & that the Situation & Circumstances of the Petitioners, gave them no Title, to a preference, over their Neighbours: we now say, the Fabric of the Church will be endangered, if the Alterations proposed, are allowed to be carried into Execution; a liberty to erect a Dormer window, made a part of their Application, because the Erection of the Gallery wd obstruct the Light of the Window in the Recess, we are now told, that is unnecessary, tho, the same Obstruction will take place, if the Faculty is granted: the Evidence on both Sides is very strong; but the Drs are aware, the Balance is much agt them, & therefore they represent it as a Matter of Opinion, on wch no Steps shd be laid; they forget surely, that in a Case of this nature, the Ct could not form a well grounded Opinion without the Assistance of Surveyors & Skillfull workmen; & therefore it is a strange Doctrine to lay down, that the Court shd pay no attention to the Depons; but it is hinted, that our Wn are not uniform, but differ from each other, & Glaspells Evidence is cited, to prove their Assertion; I do admit that in one particular, (about the Walls of the Recess being in good

Condition) his Sentiments are not the same with the other Wᵗ but the rest of his Evidence, is as strong in our favor as words can make it; he says "if Tye Beams had not been placed on the inside of the Church & Buttresses agt the outside of the Sᵗ Wall, he believes the weight of the Roof is so great that the Wall wᵈ have fallen down", wch now hangs 5 or 6 Inches over, outwards. he says also, that a strong Oak Beam 13 f long. & 18 I. by 12 I. square, cant support the Plate of the roof so well as the Arch does, because the Timber will of itself sink in the middle." But even allowing what is said to be true, the Evidence of one Person, would bear small Proportion to 5 others, whose Abilities stand equally confessed, & their Characters unblemished. The Drs are very urgent to remove the Crown of the Arch, & to substitute a Beam in its Place; all our Wᵗ say, that, will be attended with bad Effect, they assign reasons for their Opinion, wch I shd think must convince every unprejudiced Person; viz. That the Sᵗ Wall of the Church is built with different materials, wch do not consolidate, that it hangs over several Inches, occasioned by the weight of the Roof, & has been obliged to be supported within & without; that the Wall being cut into, will disturb the materials, & endanger its falling; & by cutting away the Arch, the Abutment of the Arch contiguous will want proper support, because the Beam will be above the Spring of the Arch, consequently cant support it. Dr Bever expatiated upon the accuracy of his Wᵗ in general & Hart in particular; I will only observe, that 3, out of 5 Wᵗ they have examined, however confident they are in their Opinions, never measured the Wall; (I mean, Blow, Main, & Reading) & therefore merit no great Panegyric from their Counsel, for their Accuracy. the Dr expatiated much on the good humour of Hart, (who it seems came from Windsor to give his Opinion,) he says Cutting a door way, will strengthen the last Wall, by reason y work, they will add in making good the door way, will be much stronger than the old Work, the Wall being now composed of materials of a rottenish Quality. This confirms what we said, & is decisive of the Question, that it wᵈ be imprudent to disturb the Wall, for fear of its falling. Dr Bever tells the Ct an Arch is the best support a Building can have; & therefore urges you, to allow them to take it away. That Walls will stand for Ages out of the Perpendicular; therefore suffer them, to do that, wch will endanger its destruction; That the Tye Beams being taken away, the Church, might be as strong as before, hav: Buttresses on the Outside; the Dr mistakes the Use of Tye Beams & Buttresses, the first is placed to prevent the Walls falling in, the last, to keep them from Bulging out. the Gentᵉ plume themselves on the Security they offer, Cᵈ desire to be informed what Security they can give, for the Lives of the Parishᵒ if an Accident shd happen during Divine Service; their boasted Security for the Fabric, relates only to the Time they are about the Alterations; that wᵈ be insufficient, as those alterations may be the Cause of Damage arising, at some subsequent tho. not very distant Period. I hope on the whole, you will be of Opinion to reject the Faculty.

Dr Harris Judge —

I think a Reference, would have been a very fair way to decide this Question; I am the Guardian of the Church; I was satisfied with the first part of Dr Wynne's Case, & in all those respects shd have granted the Faculty, but Grene prayd more than was contained in the Intimation — It is agreed, the Sᵗ Wall is much out of Repair; by the answers of the Parties, who apply for the Faculty, the Church is in a bad way for want of Tye Beams, & the Walls are in a perishable Condition. This is in Evidence the Materials are a mixture of Stones, Chalk, Flint &c, that it is not like a Stone wall, where you may take out a single Stone & no more — Respect must be paid to what Parishioners do in Vestry; tho. it is not binding on the Ct, it is Argumentum ad verecundiam — I cannot enter minutely into the reasoning of the Witnesses about the Spring of the Arch; I dont quite understand it. I know they say, taking down the Arch will be attended with danger, all the Witnesses contest; if there is a doubt, I ought not to grant the Faculty, I have a very great doubt & cant order the Crown of the Arch to be taken down, but if they will take the Faculty, without taking away the Crown of the Arch, I will grant it them —

Sentence deferred to next Ct when the Faculty was decreed except taking away the Crown of Sᵗ Arch.

25 Hil. T. . . . Grene's Clients agreed to accept the Faculty, without being allowed to cut away the Crown of the Arch, & to give Security to make good any Damage, that shd accrue to the Church, by their Alterations: Collins for his Clients acquiesced, & the Faculty was accordingly granted, each Party being well satisfied he was not condemned in Costs —

M. T. & Bye Day Prerogative

Grene (140) Castles & Vaughan Goodwin

Dr Wynne & Burrell Dr Collier & Calvert

Dr Calvert for Dr Collier

Robt Castles in the Deed, he made his Will in 1758, & thereof appointed, his Sisters Grace & Alice Castles, Joint Exors & Universal Legatees, & died in the East Indies some time after 1760. Jan. 9. 1765 Letters of Admon, with the Will annexed, were granted to Tho. Vaughan, as the Attorney of Alice Gibson (formerly Castles) wife of Wm Gibson, the Sister surviving Exec. & universal Legatee named in the said Will; The Admon was soon after called in & Vaughan cited to prove the Will by Witnesses; Goodwin for Vaughan, gave an Allegation propounding the Will & pleading the handwriting of Edw. Calder, one of the subscribing Wᵗ who died in 1763, the other 2 Subscribing Wᵗ are George Anderson & Wm Hall — Christopher Bushell & John Smith prove the handwriting of Calder, Wm Hall is examined to all the Articles of the Allegation — Jn Drover, Wm Hall prove the handwriting of Geo. Castles the Deed —

x 25 Hil T 1766

6 Nov: 1765 Goodwin gave additional Articles to the said Plea, wherein he stated the death of Geo. Anderson, to prove whose Attestation, he examined Edmund Denman, a Soldier in the same Company & Anne Williams, Wife to the deed Witness — We were forced to take out a Sitation by ways & means agt Wm Hall, & from the 12th of May to the 6th of June, he never appeared wch shows he was very unwilling Wᵗ Grene gave an Allegation 8 Jan: 1767, pleading that Deed was very illiterate, & wrote a bad hand, & that the

Alters the Will forged? . . . .

Subscription is not his handwriting — It pleads a Lre of Attorney executed by the Decd, to Wm Hall, in Madrass Road about 8ber 1760, which was subscribed by him — On this Issue 3 Wits are examined, viz. Rob. Hall. In Larrett & Rd Woodcock, who neither of them authenticate the Exhibit; Lan & Hall say, they know nothing of the Execution of the Lre of Attorney, but believe it the Decds handwriting, & Woodcock speaks to the same Purpose. —

Dr Wynne — Robt Castles, late of Madrass, Batchelor, died in the East Indies, some time after the year 1760 —

Jan 2. 1766 Lres of Admon (with a Will annexd) of the goods of the Decd were granted to Tho: Vaughan, as the Attorney of Alice Gibson (ol: Castles) Wife of Wm Gibson, the Sister, surviving Exec: & universal Legatee, named in the said Will; wch at present bears date, the 21st of June, 1750, but the Word (Four) visibly appears to have been wrote, after the word (Fifty) & to have been erazed: — The pretended Subscribing Witnesses are, Edw: Falder — Geo. Anderson — Wm Hall —

Hil. T. a Decree issued at the promotion of Geo: Castles, Brother of the Decd, agt Tho: Vaughan, to bring in the Admon, prove the Will, in solemn form, or to shew Cause, why it shd not be declared void, & Admon granted to Geo. Castles, as Bro: & one of the next of Kin —

Goodwin appeared for Vaughan, brought in the Admon, & 4 Sep. Hil. T. gave an Allon of 4 Art: wch was admitted, & 5 Witnesses examined thereon — viz. Xtopher Bushell & Jn Smith to the 2d & 3d Art: Wm Hall to all the Artt: — Jn Drover & Wm Hill to the 4th Art.

The 1st Art. pleads the Will, in the form of a Contn (Condit, wch is not attempted to be proved —

2 & 3 Artt. plead the Death, Character — & Handwriting of Edw: Falder one of the Subscribing Witnesses

Bushel speaks strongly thereto, frequently saw Falder write & subscribe his name, particularly on the 15th of Novr 1752. he subscribed his name, as a Witness to a Receipt in Deponents Pocket — But no such Receipt is produced —

Smith, says he was intimately acquainted with Falder sevl years before & to his death, wch happened, as he hath heard & believes in 1753 — has often seen him write —

Both Wits say they think, the Attestation of Edw: Falder, appearing on the Will, was wrote by Edw. Falder the Decd —

Wm Hall the only surviving pretended Subscribing Wit absolutely denies any knowledge of the Transaction

In Drover's Acquaintance, he says, commenced with the Testator in 1755, by his being Ship Steward on Bd the Eldgecote, wherein the Decd went to India, he saw him write almost every Day, is well acquainted with his manner of writing, has carefully viewed the name, Robt Castles subscribed to the Paper propounded, as his last Will, & verily believes the Decds handwriting — To 1 Int: Says he & the Decd were Messmates together 18 Months, the last time he saw Decd was in 1759 or 1760 at Madrass, when the Decd was Mate of a Coasting Vessel, that he then dined with Decd on board said Vessel to 2d Int frequently saw Decd write, in keeping an account of his expenses, being his Boats wains Stores, & hath often seen him write Letters, & thinks, but is not sure, he once saw him sign, execute a Bond, or Power of Attorney, in favor of Wm Hall.

Wm Hill says in 1751. one Robt Castles, who he believes to be the Decd, hired himself as a Boatswain of the Prince of Wales, in the Service of the British Fishery wch Dept commanded. That Dd continued on board 12 Months — & in 1752. again entered on board said Ship, & continued on Bd 10 Months during wch time he frequently saw him write, subscribe his name, is thereby well acquainted with his handwriting, has carefully viewed the name Rl subscribed to the Paper propounded, & verily believes it wrote by the afd Rl to 2 Int: is as well acquainted with Rls handwriting as with his own —

6 Nov: 1766. Goodwin gave additional Articles to 4 & afd Allon pleading the Death, Character, & handwriting of Geo. Anderson, another subscribing Wit: & examined Edmund Denman & Anne Williams —

Denman says he was well acquainted with Anderson 4 yrs before & till within 2 Months of his death, became so by being a Soldier in the same Company of Guards, in wch Dept was a Sergeant; he died in Northumberland 10 or 11 years ago, is well acq: with his handwriting, & believes the name G. A. subscribed as a Witness to Rls last Will, the writing of Decd —

Williams, was married to Anderson in April 1751, cohabited with him till within a few months of his death, when he obtained leave to go to his Fathers, at Balmborough in Northumberland, where he died about 10 years ago — She deposes as Denman to his Good Character, her knowledge of his writing, & that the Attestation in question was wrote by the Decd —

8 Jan: 1767 Grene gave an Allon pleading that Rl was very illiterate, wrote a very bad hand, & that the Subscription Rl to the Will, was not wrote by the Decd — That Rl in October 1760, by Lre of Attorney under hand & Seal constituted Wm Hall of the Strand, Taylor, his lawfull Attorney, & exhibits the same in supply of Proof — On this Allon, he examined Robt Hall — In Larrett, & Rick. Woodcock —

Robt Hall was acq: with Rl by his coming to lodge at his Fathers in 1751 from wch time Rl constantly lodged there when at London, by wch Dept became very intimate with him, has often seen him write — that Rl was an illiterate man, wrote a scratching bad hand, has viewed the paper propounded, does not believe it the Handwriting of the Decd, it being a much better & stiffer hand, than he ever did or could write

John Larrett became acq: with Rl about 17 or 18 years ago by his occasionally lodging with Wm Hall, Dept Brother in Law, his acquaintance with Rl till he embarqued on his last voyage for India, frequently saw him write, has viewed the Name subscribed to the paper pleaded as Rls last will; does not believe it his handwriting, by reason Rl was a very bad Scholar, & did not write near so good a Hand —

Rick. Woodcock was well acq: with Rl from 1752 till he sailed for India, where he died; became so, by his being Boatswain of the Pr: of Wales in the British Herring Fishery for wch Dept was Carpenter — That Rl was, very illiterate, when Dept first knew him, could only just make his Letters, but could not join them, & Dept by Decds desire, took a great deal of pains, trouble to improve him, in his writing, notwithstanding wch, Rl during the whole time Dept knew him, continued to write a very bad scratching hand, wch was scarce legible, has viewed the name Rl subscribed to the paper pleaded, as Rls last will of Decd, does not believe it

his writing, & dont think he'd ever write so good a hand.. Hall, Jarrett & Woodcock. know nothing of the Execution of the Lre of Attorney, but believe it the proper hand writing of the Deed, Hall adds, it is just such a scrawling hand as Deed always wrote.

Byeday. Dr Collier. The Question before the Ct is whether the Will propounded is the last Will of the Deed. we say it was duly executed, attested by 3 Wn of whom 2 are unfortunately dead, but we supply their Place, by producing Bushel & Smith, who depose to the Character & handwriting of Falder— Anderson was a Soldier in the Guards where Denman was Sergeant, who with Anne Williams speaks positively to his handwriting—
Drover & Hill have frequently seen the Deed write are well acquainted with his manner & Character of Subscription, & are firmly of Opinion the Subscription to the Will, was the act of Hd the Deed—
Contra: all the Witnesses who support the Will Hall are his Relations, they say the Deed wrote a scratching hand, this is contradicted by others who saw him write the Ship Acct These is no Impeachment of the Transaction but the negative Evidence of Hall— it is not pretended the Deed ever expressed the least Affection for his Brother—

Dr Calvert. The Gentleman on the other side mentioned two things wch I suppose he meant to insist on as objections; as, that it did not appear wh Grace Castles, survived the Deed, if she did, wh she made a Will, or died intestate? Vaughan took his Oath, he of course swore, Wm Gibson was the Survivor; it is now too to object to us as a Party— The other, is the Erasure, but the Ct will not presume a fraudulent Intent from a mere Erasure, unless it is accompanyd by some Overt Act; the Dr must shew it was dated, in a different manner from what it is at present, & the Use intended to be made by the Alteration; if there had been any Alteration in the year of our Lord, the Year of the King must have been altered too— If it was 1752. it wd have been, the 28th year of the King, if 1744. the 18th— The 2d is wh there is sufficient Evidence before you to ground a Sentence in favor of the Will; the Witnesses being dead, the only way left us, is, to examine to their Characters & handwriting— Williams is objected to as a Markswoman, I allow she is not so good a Judge of handwriting, as one who can write, but it is not follow, she could not therefore read, if she c she might have conceived a good Idea of her Husbands handwriting besides, I dont know that 2 Wn are necessary to prove it— Wm Hall creates our Difficulty, who denying his Act, & the other 2 Wn being dead, the Pltf cant expect Evidence of the Execution; But notwithstanding what he says to the contrary, there is a very strong Similitude, between his Signature to the Will, & to the Depon— Where Difficulties of this Sort arise, it is usual to have a Comparison of hands by the most experienced Proctors— The Witnesses on the other Side are all Relations of Geo. Castles; it looks like a Combination; they all agree in the same Story, that the Deed wrote a Scratching hand; what Idea can be annexed to

a Scratching hand? the 2 dead Witnesses must be supposed to be Witnesses to his Sanity & to his Intention to make his Will & they are Wn to every thing that tends to the Solemnity of the Will & still are unexceptionable— The Exhibit is introduced for a Comparison of hands, but it must be beyond all Controversy that the papers so produced, is the handwriting of the Deed; the Oaths of Wn to an Exhibit, as far as their Belief goes, serves as a Standard of Comparison; you might have had better Evidence to this Lre of Attorney, for there are 2 Wn one of wch, Drover is examd they ask him on an Interrogatory, wh he ever attested any Paper— It goes not only to shew a failure in proof, but a Tenderness of examining the Wn to it— Hall is interested to set aside the Will their own Case, shews, he was the Deeds Attorney several years, he must then account to Mr Vaughan for such a Space of time Perhaps he has a better understanding with Geo. Castles, than Vaughan— There is no probability or possibility of Forgery; had that been the Case, why shd we have hit upon Wm Hall to be a Wn we could not procure his Evidence without a Compulsory, acts & modes, this shews we were satisfied with the honesty of our behavior, we shd not otherwise have taken the Pains to get him examined—

Dr Wynne. There is a very great Similitude, between the Blanks filled up in the Body of the Will, & the Subscription thereto, but they are pleaded to be wrote by the same person; the Alteration is very material, because, if the Will was dated in 1752, it wd be totally destroyd, by the Death of one of the Subscribing Wn in 1752. I admit the force of this Objection is taken off by Dr Calverts observation, of the Year of the King; Why has not the Pocket Book been produced, wch Bushel says contained a Rect of Falders handwriting, that wd have been more satisfactory than Belief, they might then have judged by Comparison— I must insist Anne Williams, being a markswoman, is an incompetent Wn as to handwriting, even by the common course of the Office, where an Affidavit of handwriting is required When you consider Halls Depon, supposing it true, these Subscriptions are all dead Letters; there appears no Objection to Halls Evidence, he is a very fair Witness— Comparison of Hands is very fallacious, witness the Case of General Bramptons Will— Wm Hall was particularly acquainted with the Deed, his Son must consequently be so, too; She asked, what c be the Inducement to forge, this Will that, is not necessary for me to inquire; but the Temptation, is the same in this as in other Cases; I cant tell how they the pitch upon Hall;

Dr Burrell. The present Question, regards the proof of the Will propounded wh it is sufficient to found the Ct in a Sentence to establish it; I would observe, there is no Satisfaction before the Ct how the Will came here, where it was made, in whose Custody it was found, or wh Grace Castles survived the Deed, & if she died, who is her Representative? The Paper is stamped with the strongest marks of Forgery & Fraud; the present Date indeed is 1750, but the word Four, appears manifestly erazed, after the word Fifty, the force of this Objection, we are told is removed by the Year of the King, tallying with the present Date; I admit it does, but the Consequence dont necessarily follow, that there was no forgery; that the Persons concerned in the Transaction, were mistaken, as clear, but they found out

X. 6 Persons were examined on one Side. & 4 on the other, to judge upon a Comparison of Hands; each swore infavor of y Party on whose Side they were examined—

their Error, & rectified it immediately, before they had inserted the Year of the King; if the Date 1753 had remained, that wd of itself have destroyd the Will, & manifested the Forgery, one of the Subscribing Witnesses (Falder) Lyeing in 1752 —
There are 3 Wts to the Will; 2 of them are dead — Bushel & Smith depose to Falders hand writing, & yet the former, tho possessed of a Rect wrote by the Wts neglects to produce it; this is a reasonable ground for Suspicion —
Denman & Williams speak to the handwriting of Anderson the latter was a Markswoman, consequently an incompetent Wt to hand writing —
The other Wt Wm Hall, sweares positively, he never signed any Will for the Deed, or was present at such a Transaction if this Wt is to be credited, (& there appears no Objection to his Character) there is an end of the Question, he is related to the Deed, was an intimate Friend & Acquaintance, one with whom the Deed always lodged when in London — The Signature Wm Hall to the Depon, & that attesting the Will Mr Calvert says, is very like each other, Jown Jean not perceive the Similitude, but if it was, no Stress can be laid on it, for the Party who committed the forgery wd certainly be acquainted with & able to counterfeit as some degree the Hands of those he meant to avail himself of —
Hill & Drover speak strongly to their Opinion of the Will being signed by the Deed — Hill knew the Deed 12 Months in 1751 & to 1753 — Drover went to India with Deed in 1753 & continued with him 18 Months, & afterwards saw him once in 1759 or 1760 — & he thinks he once saw him sign a Bond or Lre of Attorney in favor of Wm Hall —
It is a little extraordinary, that Hill's recollection shd enable him to speak to 6 Years distance; & that Drover who is so positive to his Belief, that the Will, was signed by the Deed, shd be so uncertain as, to the Lre of Attorney, to wch he himself is a Wt & wch was executed in Madras Road 19 Octr 1760. Thus stands the Evidence on behalf of the Will; agt it, we have examined 2 Wts Robt Hall & Jn Lovett, who were intimate with the Deed, say he was very illiterate, & wrote a scratching bad Hand; they do not believe the Subscription to the Will his writing, it being a much better & stiffer hand than, he cd ever write — they think the Lre of Attorney was wrote by him, being just such a straggling hand as he always wrote; But the strongest Wt of all, is Rd Woodcock, to whose Character think is not the least Objection, & if his account is credited, it must be decisive with the Ch. viz "He was well acq: with Robt Castles Deed from 1752 "
till he sailed for India, became so by being Boatswain of "
the Prince of Wales, in the British Herring Fishery; that "
Rl was very illiterate, & when he first knew him cd "
only just make his Letters, but cd not join them; he by "
Deeds desire, took a great deal of pains to improve him "
notwithstanding wch, Rl 4 whole time Dep: knew him "
continued to write a very bad scratching hand, wch was "
scarce legible; he has seen 4 Subscription to the Will "
does not believe it 4 handwriting of Deed dont think "
he ever could write so good a Hand —
If this Account is true, Hill must be mistaken who

x Wm Hall says Deed sailed for India in 1754

speaks to his knowledge of Deeds writing from 1751 to 1753. Upon the whole I hope you will be of Opinion, they have not made out sufficient proofs to establish the Will & that you will decree the Admon to my Client & condemn the Opponent in Costs —

D[r] Collins & Calvert

If the Deed subscribed the Will propounded, it is immaterial who filled it up — We dont plead the Receipt, what Bushel says, is only to give weight to his Evidence, by saying how he came to know his Hand — 2 Wts wd have sufficed, Hall is as supernumerary; why shd we take him in to defeat the Intent of our Will? ...

D[r] Hay Judge —

It was a great neglect in those who propounded the Will, in not laying before the Ct the Evidence they were possessed of, they depend wholly on Hand writing; by whom wrote, how received, how delibered, non constat; there is no collateral or arising circumstance from wch something might be collected, as when Grace died, wh the Will was forged before her death; there is no account of any particular affection, or any thing to throw Light on this very obscure case, where 2 dead Witnesses, are contradicted by a living Wt. If a Man is to be perjured, it must not be on Surmize but Facts — I have great doubts on the nature of the Case itself; If there is a forgery, it is committed by 2 Sisters, to defraud a Brother of 1/8 of the Decds Estate; it is a very unnatural Supposition, that the shd combine so sh a so small a Sum; It is a Sailors Will, with 3 Wts one of them is superfluous, & he the only living Wt who can discover the Fraud — It may have been forged — as Hall was the Deeds Attorney from 1750, & probably possessed himself of the Deeds Effects. Suspicions may arise, that he procured the Will in favor of the Sisters, he might think they wd not be severe, in scrutinizeing the Accounts, he might be disappointed by being called on, by Vaughan; but I cant go on Surmises, I am bound by legall Proofs. Falders a remarkable hand; it is fully proved by Bushel & Smith, who say he died in 1753, Bushel compares the Receipt in the Pocket Book, with the Attestation — The Erasure is rather agt the Will being a forgery, for it was more natural, for the Deed, to make a Will, just before, he went to India; I cant rely on it, having no light to guide me —
I think the Evidence of Anderson not quite so fully proved, one being a markswoman, (but she is the Deeds Wife,) tho a markswoman cd see, & I dont know they are incompetent, tho, not so good Witnesses, as those who can write — the Will seems rather filled up by the Subscriber; but Similitude of Hands is most fallacious it must be supported by adminicular Circumstances, where there is no Opposition, Similitude of Hands wd do — there ought to be some Evidence when the Paper was found; when Hall does not contradict his Act, but swears it was not his Act; Halls Evidence wd have been materially affected, if any Receipt had been produced, wherein Hall had wrote his name per extensum; his being the Deeds Attorney, is no absolute proof, to affect his Credit; he may have received money, & be averse to account; but I cant

in plain English at length

determine agt his Evidence, on Suggestion or Surmize, it would be too much to discredit a Wt because she appears unwillingly; but Jown, I think there is room to suspect he knew more of this affair than he is willing to declare — there are 4 Wt who swear directly contrary to 4 others, I am not authorized, to weigh the Evidence, without Circumstances to lead me, if I was, I shd think Drover & Hill were most likely to know the Deeds handwriting — By Law a Scriptum ad quod must be proved, before it is compared with another Writing; the Letter of Attorney is not proved, if it had been proved by one Wt it wd have been sufficient to have founded me in decreeing a Comparison of Hands; the Subscription to the Will & the Lre of Attorney, are very unlike each other — Tho, it is very improbable, yet the Sisters may be concerned in fabricating the Will — I think, there is no auxiliary Circumstance to induce me to pronounce that there is sufficient proof of the Will propounded; I do not give any Sentence, but content myself with saying, Deficit Probatio, non Jus.

Scriptum ad Quod . . . .

The Will not sufficiently proved

appealed

Qu: is not this a Sentence by Implication agt the Will, & are not the Plt thereby entitled to his Costs? The Defts appealed in order to introduce new Evidence, & the Plt adhered to the Appeal, on account of the Judge not giving him his Costs —

M. T. Bye Day Arches

Stevens (Proctor) Thomas & Maddox v Williams Fountain

Dr Wynne Dr Calvert

Dr Wynne

This is an Appeal from the Consistory of Hereford from a Grievance in rejecting an Allon

In the first Instance, this was a cause of Subtraction of Church Rate, brought by Thomas & Maddox, Churchwardens of Bredwardine in Herefordshire agt Jas Williams

17 April. 1763. Johnson Proctor returned the Citation, Holland appeared for Williams & prayd a Libel; the Judge assigned Johnson to Libel by next Ct — Johnson allowed to the next Court to Libel — Johnson gave his Libel, wch was admitted & H. answered negatively.

9 June . . . .

1 Sept. . . . .

1 Art. pleads "That notice was given in the Psh Church (according to the Usage & Custom of the said Psh) to the Inhabts of Psh that they & every of them shd meet at a certain time to make a Church Levy" —

2 Art. "That pursuant to such Notice, the said Churchwns, with several of the Psh & Inhabts of the said Psh, met in the said Church at the time appointed —

11. April. 1765. J. prayd Publication, & all Acts to be propounded next Ct wch was decreed

9 May . . . . H. gave an Allon, wch was admitted; J. answered negatively, & a Decree for Answers, & also to exhibit the Original Rate was decreed —

2 Art. recites the 4th Article of the Libel, & in contradiction thereto, pleads That no notice &c was at any time given for the purposes specified in the 4th Art: by the Minister, or Psh Clerk, of said Psh, or by any other persons, having a legal Authority thereto —

2 Art: recites the 5 & 6 Art. of the Libel, & in contradiction thereto pleads, that, no Psh meeting, was held in the Psh Church agreable to any notice, previously given in the parish Church —

31. Octr 1765. . . H. gave an additional Allon, wch was admitted, & J. answered negatively

It is therein pleaded also, that no Psh meeting was held in the Psh Church, within the time Libellate, in pursuance of any notice previously given in the Psh Church, for the purpose Libellate, & that no Church Levy, was agreed to at a public Vestry held on 22 Octr 1762 —

On both Allons H. examined divers Witnesses.

Jan: 18. 1766. . . . H. prayd Publication, & all Acts to be propounded next Ct

Feb. 17. . . . . when, J. gave the present Allon, wch he prayd to be admitted

H. dissenting, & alledgeing it impertinent, irrelevant, & inconclusive; for that the purport has been already pleaded & proved (as presumed) in the proceedings before had, to wch he refers, & prayd the Allon to be rejected:

The Judge has heard Informations, deliberated to next Ct. . . . .

3 April . . . . . The Judge at the Petn of H. wholly rejected the said Allon, from wch Decree J. appealed to the Ct of Arches

NB. The Publication was decreed below; no Copies of the Depons were ever taken, & J. on the 30th of Novr last, made an Affidavit that he had never seen the Depons, & knew nothing thereof —

Dr Calvert . . . This is a Cause of Subtraction of Church Rate, brought agt my Client by Thomas & Maddox, a Libel was admitted the 4th Art: of wch, pleads that Notice was duly & as usual given to the Pshrs 5 Art: that pursuant to such notice, a Vestry was held, & a Rate agreed to; my Client gave an Allon, in answer to this Libel, pleading that no such notice was duly given, during the Time libellate, & that the Rate is partially & unequally charged; that it was not duly signed at the Vestry, but that several Persons signed at a Style in a field — The Appellant gave an Allon wch the Judge rejected, & I hope you will think, it was properly rejected: it is a Rule that a Party shall not be allowed to repeat his Case, if it has been directly or indirectly laid before the Ct, before, & can come out thereon in 1763. they pleaded the notice was duly given in the Psh the Witnesses might have been examined to that Custom, we considered it as an Issue, for in our Allon we said, no such notice was given, as had been customary in the parish; Now they give an Allon & lay a special Custom in the Parish; it is laid in a very vague manner viz. "that it has been so ever since Mr. . . . . was Minister, who knows how long they have been so; the reason is very strange, that the Minister wd not give the Notice, & the Clerk could not by reason of an Impediment in his speech; he was then a very unfit person to be Clerk; it may be said it is customary first to plead generally, & then specially; it might be so in an original Plea, but they said the

Vestry was duly called, we replyed, not according to the Custom of the pish — they now plead a special matter; wch is included in, & could have been examined to, on the former Plea; it is repetition throughout, not contradictory of ours; you will, I hope, think the Judge did right in rejecting the Allon, as merely calculated for delay —

Dr Wynne..... The Delay was not on the part of my Client: the Ch: Wns they were advised to give an Allon in answer to that of the Opponent; If the Plea is liable to the Objection, it is improper to be received, but I hope you will not think so, we pleaded, that notice was duly given; they give two Allons, pleading specifically that no notice was given by the minister, Clerk, or other person authorized by laws; it then became necessary for my Client to say how the notice was given, for the Wes: not have spoke to the notice in this manner, otherwise — We dont say how long they were Minister & Clerk; it is immaterial; it is a full Answer, that this man was present & consenting to this Rate, his making no Objections at that time, is very material; It is called an Imposition on the whole Pish that cant be the Case, because all but two have signed it...

Dr Hay - Judge — I know not what prevented the Allon being given in 1763; nor how long the Cause has depended; the only Qu: before me, is wh: the Judge did right in rejecting y^e Allon?

The Ch: Wns had pleaded in the 4th Art: of their Libel, that notice was given; Williams in his Allon contradicts that Position, & then another Plea is given for the Ch: Wns, wch in this Ct: is: not have been received, because a Repetition of an Allon (already admitted) is: not be allowed, tho, no Publication had passed; after Publication, new Facts only are allowed; the 3 Qu: is, wh: the facts now pleaded, are such, as could have been Examined to on the former Plea?

they pleaded general Usage, on that the Witnesses could have spoke to the special Custom, laid in this Plea; It is usual to plead special matter, when Publication has not passed, or that special matter could not be examined to, on the general Plea; We publish on every Plea before the Cause can be called on for Sentence; perhaps it would be better not; I dont see the reason for such frequent Publication, but I will not innovate; tho' the Proctor shd swear he has not seen the Depons, his Clerk, or other Persons may, & the Substance may be known without seeing the Depons; I dont know wh: it is proper now Publication is past on the general Plea. Besides, I think it immaterial to go into the particulars of this Custom; Williams dont say no Notice was given, but none by the Minister, or Parish Clerk; now if it was customary to give notice by the Ch: Wn, or by any body authorized by him, such Notice was legal: What Law is there wch requires notice by the Minister or Clerk? I apprehend the Law only requires notice, wch is equally legal if given by the Church warden, or any other authorized by him, & when the Minister or Clerk give notice, they are presumed to derive their powers from the Ch: Wn, who is to lay the Rate, & is y^e proper Person; so that the Plea about the notice is absurd:

& would not avail them, if proved —

In the 3d Article, it is pleaded, that in consequence of such
3 in 3 Art:... notice, they have always met to do other
Business; this Allon, is rather explanatory; you wd not exam-
ine again to that Fact; but there is a new Fact, that Williams
himself was present, & agreed to the Rate, & in the 6th Art:
that all the Pish^rs except two agreed to it likewise, this will
shew the regularity of the meeting — I am bound to admit
so much of this Allon, as pleads new matter, but not what
could have been examined to before, I reject the Explanation
of the Custom for the reason above given; I admit the 3d Art:
when reformed, also the 5th 6th Art: & reject the 1st 2d & 4th Art:
I pronounce for the Appeal by Interlocutory, retain the Cause, &
reserve the Consideration of Costs to the End of the Suit.

Allon received being reformed — appeal pronounced for & the Cause retained

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Q: Shall the Plea be received? Is it in Time?

Ilid — Stevens — Charter v Darcy — Holman

Dr Wynne — Dr Burnell.

Dr Wynne.... We are now before the Ct with an Allon of 4 Articles
1 Art: pleads the Marriage was performed by a Popish Priest, or
one, who pretended, or appeared to be a Popish Priest, & who
read the Service in Latin
2 Art: That the Mother applied to Mr Kesey, Minister of St Nich:
Galway, in July or August to marry them over again, he re-
fused, & desired who the Gentleman was, who had married them
she begged to be excused, saying she had promised not to
discover him, for that he was a Romish Priest
3 Art: That no Person named Rob^t Lewin, being a Clergyman
of the Church of Ireland, hath within 20 years last past,
been Rector or Curate of St Nich: pish in Galway, so much
is known to Mr Kesey & Mr Gifford, 2d Minister of the said
Church, who never heard of a Person named Rob^t Lewin, who
passed for a Clergyman of the Church of Ireland, that ever
resided at Galway or in the neighbourhood thereof
4 Art: recites the 6th Art: of their Plea, & says no marriage
was had between Charter & Darcy, at Mrs Unicks at Rubeen
on the 3d of Oct^r 1759, or at any time before or since, as Mrs
Unick, her family & Servants know; and no Person named
Anthony Mills, was Rector or Curate of St Nicholas Galway
on the said 3d of Oct^r 1759 or for 30 Years next before or since —

Dr Burnell... My Client Mrs Charter was cited, in the Consistory of Salisbury
by the name of Darcy, in a Cause of Jactitation of Marriage
She appeared, & justified the Jactitation, & the Ct below dis-
missed her, from that Sentence Charter appealed to this
Ct: for wch appeal, you pronounced —

15 Mich T. 1765 — Mr Charter gave an Allon stating her Case, & examined her
Witnesses thereon.

25 S.P.T. 1766 — Publication passed, & the Cause was soon after called on for Sentence...

25 H.T..... Tyndal a parted he gave an Allon, which was assigned to be
heard the Bye Day, when it was continued to

15 M.T..... Before which Tyndal died.

45..... Stevens appeared for Charter & prayed the Assignation to be continued
15 H.T. 1767... When nothing ready with his Allon, it was continued, from
Day to Day till

Bye Day H.T.... when an Allon of one Article, was offered, pleading that Charter
was under age at the time of the Courtship & Marriage, in contradic-
tion to our first Article, stating he was of.....

Bye Day. H. T. 1765 — Stevens a pleaded he gave an additional Article, on admission
1 S 2 D ..... which was continued to
2 S ..... when he declared he would give no additional Article...
then his Allon was admitted, but no Witness has been examined
thereon.
3 S. M. T. ..... Stevens has brought the present Allon of 4 Articles
To the admission of this Plea, I now object, as well on account
of its being out of Time, as of its containing matters irrelevant
& what might have been examined to in the year 1765, when
Mr Chaster gave her first Plea; I have always understood, the
Rule of the Court has been, not to allow Pleas, to be offered, after
Publication, the Cause being called on for Sentence; unless such
Plea, should contain, new matter, which did not come to the
knowledge of the Party before, & which from the nature of
it he must be ignorant of- the reason & propriety of this
Rule, is obvious to the meanest Capacity, for if Partys were
at liberty to offer Pleas, when they thought proper, Causes
would never be determined, the Pty who had the longest Purse
must always be successfull; by throwing in occasional
Pleas, he might delay the hearing of the Cause, & thereby
defeat his perhaps injured Opponent, of a fair equitable
Claim; it may likewise attended with another bad
Consequence, the Depons being published, if the Party
who meand to delay the Sute by frequent Pleas, shd have
seen the Depons, he may plead contrary matter, & by
procuring Witnesses to speak, in opposition to what
the other Wt have sworn, obtain an unjust Sentence
by Perjury. To guard agt this, the Ct has constantly
expected an affidavit that the Pty giving the Plea has
not seen the Depons, or been informed of the Substance
thereof
4 S. M. T. 1765 — Lovegrove & Lycett: where a 3d Plea was offered, Yorke
Sir, said, "I think, I shd reject this Plea, because the Party
" has given no Satisfaction, the facts could not be offered
" before, it is always a Rule to reject an admissible Plea
" if not offered in Time, otherwise there would be no
" End of Pleas - I therefore reject this .....
But if the Ct shd think the present Plea offered in
Time, yet I hope it will be rejected, on account of its
irrelevancy, & containing matter incapable of Proof
or if proved, immaterial
1 Art. is in contradiction to the 4 Art. of our Plea, & states
that the Marriage of the 24th of July 1759, was not
performed, by a Clergyman of the Church of Ireland
but by a Popish Priest, or a Person pretending, or appear-
ing to be, a Popish Priest.
This might certainly have been pleaded in 1765: but
I am at a loss to guess what is the Criterion, by wch our
Opponents, can denote, a man to be a Popish Priest,
Do the Persons of that persuasion, carry any visible
mark of their Order, or Religion about them to distin-
guish them from Protestants? I own I cannot conceive
how this part of the Article is capable of Proof, I cant

conceive a Person so indiscreet, as to pretend to be a Papist
in Ireland, where the Laws are to the last degree sangui-
nary & severe;
2 Art. ... The Conversation that passed between Mr Vesey & Mrs C.
the Mother, is absurd & impertinent - It can serve no
other End, or Purpose, than that of endeavouring to place
our Case, in an invidious point of View; it is immaterial, with
respect to the Merits of the Question, if proved, & tends only to
shew that the Curiosity of the Priest, got the better of the Civility
& Politeness of the Gentleman; -
3 Art. ... The View with which this is pleaded, is beyond the reach
of my Comprehension; it is not contradictory to us, because
we never asserted, or even to have been Rector, or Curate of
St Nichs Galway; we never said he was acquainted with Vesey or
Griffin, therefore their knowledge or Ignorance of such a
Person, is of no Importance, & can throw no light upon the
Cause, so that I trust this Article must be rejected -
4 Art. ... This I do not take to be a Contradiction to the 6th Article of our Plea
but with deference to the Ct, I do not see, how the first
Part of it, can be decisive; admitting Mrs Unick & her
Family, were unacquainted, with any Marriage celebrated
at her House, 1 Oct. 1759; is it a necessary Consequence that no
Marriage was then had there, might not a Ceremony of
that Sort, be transacted privately, must it necessarily
transpire, & be communicated to the Osler & the Cook?
I shd apprehend not - I am ready to acknowledge the pro-
priety of the latter part of this Article, provided it was not
objectionable on the general Principle, of its being out of Time;
in other respects, it is very proper, & a very material Point
if they can shew, no Person named Anthony (as we assert)
was Rector or Curate of St Nichs Galway on said 1 Oct. 1759, or
for 20 years next before or since -
Dr Wynne — The Irish Statutes 19. Car 2. c 13. & 1 — 6 Anne.
make it Felony, in a Popish Priest to marry any Couple, where
one of the Contracting Parties are Protestants & Marriage is
null & void ... &c. have never had the Defts Answers, therefore are at Liberty
to plead any Matter that is relevant -
1 Art. ... They pleaded 2 Marriage, it is therefore material for us to shew, they
are both void; the Word, pretended, is used in the Statute - if we
could prove the Marriage was solemnized, in the Latin Tongue, that would
be sufficient -
2 Art. ... Is what the Dr styles a Conversation, which it was very necess-
ary for us to plead, in order to shew, the Intention of the Defts
Mother to observe Secrecy -
3 Art. ... To principally objected to, & said to be no Contradiction; it is
something, to shew they were not married, by a Person known
to be, of the Church of Ireland - it was a Clandestine Transac-
tion -
4 Art. ... This on the face of it, absurd to suppose, the Minister of the an Irish
Parish, would marry at a Public House, in the same poh Transaction
instead of the Church; if he did, it was most probable, the
People of the House were informed thereof, especially when
it was no Clandestine Transaction, but such a one, as the
Mother wanted to establish the notoriety of, & not to conceal -
Judge — 3
Dr Hay — 3 In Gurner Jones before Delegates, the Laws of Ireland were
specially pleaded, without which the Ct cant take notice of the
Effects thereof - If the Marriage is void, in Ireland, where celebrated
by a Popish Priest, the Law shd be pleaded, because so solemnized
here, will not be void - This Case comes very unfavorably before

the Ct for the Pet brings a Cause of Jactitation, & yet pleads in the 1st Arte of his Allon, a Marriage de facto, by a Popish Priest, if that is true, how can I forbid her to jactitate, for she is his Wife, tho, she shd prove not his legal Wife; there is no Similitude betweene this & the last Cause, Publication must be on every Plea: when the Man allows a marriage de facto, a Question of Law may arise, wh: the Woman shd be dismissed from the Cause of Jactitation, on account of its being an illegal marriage as the whole depends on the legality, I shall not determine on the Jactitation, till that is settled.

The 1st Art: going to the Legality of the marriage, is relevant.

2d Art: is not material of itself, but extending to establish the first Art; for if the Conversation is proved, it goes to shew they their marriage by a Catholic Priest.

3d Art: I donot see the use of this Article, how will it enlighten the Cause, by shewing no Rob: Lewin was at Galway or in the Neighbourhood, it is not contradictory to the other Plea, it has nothing to do with the first marriage (24 July 1759) & is wholly inadmissible....

4 Art: It might be in the presence of the Persons pleaded by Resp: without the knowledge of Mrs Unick; it is only a kind of indirect negative; but if they c prove such Person as Anthony Wells was Rector of St Nich: Galway, it might materially affect the Cause; It looks very odd in a Cause of Jactitation to admit a Marriage de facto.

Reject the 3d Art: & must admit the 1st 2d & 4th tho they come very late

3d Art: rejected 4th must admitted

Bye Day M.I Prerogative	Stevens	Soule v Connor	Longden	& Shall admon be granted to the Representative of y^e husband, or the next of kin of y^e Wife?
		Dr Marriott & Wynne		
Stanwix	Stevens as Proctor for Soule alledged, that in Octr 1766 Maj: Genl Stanwix his Wife, & Family were all lost in their Passage from Dublin to England. That Mary Stanwix his Wife made a Will during her Coverture, by virtue of Powers to her Granted, nominated no Exr, but appointed Maj. Genl Stanwix her Husband residuary Legatee for life & after his Decease, appointed her Father Marmaduke Soule Esq & her Mother Lucretia Soule Resid: Legatees for their Lives, & the Survivor; Mr & Mrs Stanwix are dead, as also Mr Soule, & no Admon of the Goods of Mrs Stanwix, either with the Will annexed, or simply as dying intestate, has been granted, therefore St prays Admon with the Will annexed of Mary Stanwix, to be granted to Lucretia Soule, the substituted Resid: Leg.... Longden exhibited for Tho: Connor Esq & alledged himself to be Admor of the said M.G. Jn Stanwix dece'd, praying an Answer to his Interest; Stevens confessed him to be so, but denied, the General to have survived his Wife, or Connor's having any Interest in this Cause, or in the Admon of the Goods of Mrs Stanwix dece'd. Longden denied the Survival of Mrs Stanwix, but allowed, that by the marriage Settlement of Mrs S. with Genl S. she had a power of making a Will, notwithstanding her Cover-		

-ture, wch was to be attested, by 2 or more credible Witnesses that the paper purporting the her Will, is not at all attested, & therefore is null & void. That by Presumption of Law, the General survived his Wife, & she dyeing intestate her Estate vested in him, & that the right, is now consequently in Tho: Connor Esq his only next of kin, Admon Stevens allowed, the Will was unattested by any subscribing Witnesses, but alledged it to be all of her own handwriting, & submits, that the Operation of it is as an equitable Appointment, of what she had by her Settlement, a power to dispose of must be left to a proper Court; & alledged that Mrs S. was at least 40 yrs younger than the General, & therefore is to be presumed to have survived him; but wh: she did or not, or whoever may have the Interest in the Estate, either under the Will, or Appointment, or in case of her dyeing intestate, yet Tho: Connor has not, nor can have any right or Interest, in, or to the Admon of the Goods of the said Dece'd, either with the Will annexed or simply as dying intestate, & therefore prays Admon of the said Mary Stanwix, to be granted to the said Lucretia Soule, with the Will annexed, or simply as dying intestate, Longden dissenting & praying, the Judge wd pronounce for the Validity of the said Will; (on Petition of Both Proctors this Day

Dr Hay — The Judge granted Admon simply to Stevens's Client, the Appointment not being propounded as a Will....

a simple admon granted to one of the Sisters

Ibid	Bogg	Proud v Proud	Addersley	& To which of 2 Brother Admon shall be decreed?
	Dr Wynne		Dr Harris	
Dr Harris	This Object the Grant of an Admon, to which of two Sons ought to be decreed? The Objection to my Client, is, that he was Committee 4 Years ago, & is indebted to the Estate, & as such is accountable to the other Child; Bogg alledges that S. Proud the Younger Son, is in possession of the Estate, & would not account as he declared, till compelled to do so. Several Sums were sent to Rd Proud, to build the great House.			
Dr Wynne	The other Party has given an Affidavit to shew my Client an improper Person, otherwise his being the Eldest Son wd entitle him to the preference. He has had the legal Authority many years, & been so entrusted, as to be enabled to make up the Accounts; if he has not made up his Accts in Chancery, there would be Confusion by decreeing the Admon now to the Brother, I apprehend the Committee must make up his Accounts there. The Opponent has made a rash Suggestion in his Affidavit, viz. that the money lent to his Brother, was the Cause of the Fathers Lunacy; By our Affid: the other Brother is as improper, because indebted to the Estate; so that it stands, as if there was no Affidavit at all; a Joint Admon not being prayd, the Ct will not decree it. Where there occurrs any thing to guide the Discretion of the Ct, it will be attended to. My Client says, that Edw: who goes with Samuel in the Affid: lives as a Servant with him.			

Judge D'Ray — In these family disputes, the Court must go into Particulars: In Admons respecting personal Estate, there is no Distinction necessary between Senior & Junior; I must examine therefore, who is most likely to take Care of the Effects; I observe on Rd Bounds Affidavit, as Committee he has not done his duty and collected in, the Effects — The best rule is to decree it according to the Prayer of the majority of Interest — If a Proxy had been exhibited from Edward, then I shd think it ought to be granted of course to as it is, I think Edward & Samuel joining together, it shd be granted to Samuel, notwithstanding Richard says Samuel has received the Rents of several Houses, &c. which he may have done by his own Authority — I therefore decree the Admon. to Samuel.

Hil. T. 3 Geo. — Prerogative — Dr Marriot....

Bishop — 145 — Senhouse v Stevens — Jenner — Dr Marriot — Dr Wynne

Shall an Admon be revoked, (with was granted, on ye Contumacy of ye Surviving Exor) & Probate be granted to such surviving Exor or a new Admon to his Attorney?

began & stated the Case
If you are not bound by Law, you will not revoke the Admon, to grant it to the Exor, to whom it is of no Importance, as he has no Interest; the Admon was well granted to Jonathan Stevens, in pain of the contumacy of Peter Senhouse; It wd be a dangerous Doctrine to lay down, that you cant tender Parties contumacy, unless they have been personally served; That is very frequently impossible; Senhouse is a man of a rambling Disposition, who leaves no account with his Father, where he goes, & is therefore very improper to be entrusted. The Question is, Whr in point of law, nothing can bind a renouncing Exor? I know, where there are Co-Executors, & one proves, & the others refuse, those who refuse may come in at any time; but in that Case the Execution is vacant; here it is full, for the Person has administered almost all the Effects.

Dr Hay Judge — The Question is, whr the Admon granted on ye Contumacy of Peter Senhouse, shall be revoked & a Probate be now granted to Senhouse, as Surviving Exor?
When Jn Stevens the Joint Exor proved the Will of Smith the Testator, Power was reserved to Peter Senhouse, the other Exor, but it wd have been all one, if it had not; for upon his Appearing he wd have been undeniably entitled to the Probate; Jn Stevens dyeing & Petr Senhouse not appearing, Admon de Bonis of Smith was granted to Jonathan Stevens the next of Kin & resid. Legatee of Jn Stevens, as thinking it best to grant it to the Representative of the Joint Exor, after a Citation viis & modis, had been decreed, & returnd, without effect, agt Peter Senhouse;
If it had appeard that Petr Senhouse had survived, I shd have preferred, his Attorney, as surviving Exor, Residing; of Smith the Original Testator, to the Admor of the Co-Executor decd — It is said Jonathan Stevens has administered almost all the Effects; notwithstanding that, I think I am bound to grant it to Senhouse or his Attorney —
Where an Exor is personally cited, or you could affect him with the knowledge of the Admon granted, he wd be bound by it, but not where the Party is abroad, & as soon as it comes to his knowledge, applys for it —
Contumacy is of 2 Kinds, Voluntary, & presumed;

Voluntary, when the Party knows of the Citation & disregards it. Presumed, when he is only supposed, but not proved to be informed of it; the latter is not conclusive; therefore, I am bound to revoke the Admon, the Exor has a right to the Probate. If it had been granted to the Attorney of the surviving Exor I shd have revoked it, & granted Probate to the Exor —
There are many Cases, where Admons well granted may be revoked —
I have known the Exor coming in person has had it, tho' it has been said, that what is once well granted, cannot be revoked —

Admon. revoked....

Prerogative — Lushington 146 — Nye. v. Piercy & Gregory — Fuller — Dr Burnell — Wynne — Dr Harris

I shd a Bond found in the possession of ye Deed. at ye time of his death, in ye Diocese of C. be proved there the Debtor living in another Diocese. or is it Bona Notabilia & to be proved in ye Prerogative

See the Case stated Fol. 305.

Dr Wynne.... — The Question is whether this Bond, found, in the Deceds house at Horsham (being given to him by a Person, who lives in another Dioces, I authorize the Consistory of Chichester to decree the Admon, or is it to be accounted Bona Notabilia, & the Prerogative Court of Canterbury to have the Jurisdiction?
The 95th Canon settles the Quantum of Bona Notabilia at 5l. It speaks only of Goods & Chattels, in different Dioceses —
The Common Lawyers, indeed, have distinguished, between Debts by Specialty & Debts by Simple Contract, but with some Variation; the Reason assigned, is very unsatisfactory, "because the Person of the Debtor is moveable"; If you could enter into the Reason it would prove too much; for the Person of a bond Debtor, is not more moveable, than that of a Debtor by simple Contract — I dont know any reason why the Cases reported in the Common Law Books are to guide your Decision;
We know of no Settled Rule in our Courts as to this Point Sir Geo Lee gave no Opinion in the Case of France & Aubrey, nor did you Sir, in that of Hopwood & Lukins.

Sept. 1733...

Dr Burnell... — It is admitted on all Sides that the Deed, was Debtor of Walter Nye, of Ockley in Surrey, & in the Diocese of Winchester in 60l by Bond, which was in the Deeds possession, at Horsham, at the time of his Death. Which brings on the Question, how far such Bond, is to be esteemed, Bona Notabilia, & whr it will found the Jurisdiction, of the Prerogative Court of Canterbury, in order the better to clear up this Point, it will be necessary to recur to the Opinions of Ancient Writers upon the Subject. The Ordinaries formerly granted Admons, in respect of the several Goods, which Persons died possessed of, in their several Dioceses, but that being found inconvenient, because the Creditors of the Intestate, were compelled to bring Actions severally, agt the respective Admors, the Prerogative of the Bp to grant Admons, where there were Bona Notabilia in several Dioceses, was, by Composition, or some other Agreement, with is now run into Prescription, vested in him, except where the Rate of Bona Notabilia, was fixed at more than 5l. (as in London at 10l by ancient Composition,) in wch case it was to remain unaltered.
The Old Ecclesiastical Writers, speak very superficially, as to what shall constitute, the Locality of a Bond Debt, so as to include it under the Rate of Bona Notabilia —

Lyndwood Abr... 3 Hen. 5. in his Commentary on a Constitution of Bp Stratford, refers to the Rate of Bona Notabilia, as fixed by ancient Custom at 100 Shillings, a much larger than the present 5£; tho. nothing more is meant by it, than such a Sum, as is worth regarding, or that sets a Man above the state of a Pauper; but he makes no farther Observation upon it, & concludes with this Short description, Debet dici Summa notabilis, sive in Bestia, sive in Pecunia, sive in Pretio, sive in aliis rebus existat.

Conformable to the same Principle

Degl. Lib. Mod. Says, Bona notabilia sunt Bona, Jura, Credita, seu Catalla.

and also. Locationes inter Partes, indentatæ, pro annuum termino, & etiam Provendus, tempore mortis insoluti, seu Fœnum Proficua, habentur inter Bona Notabilia.

So that these words, being all of very general Import, shew, that our Ecclesiastical Law, whenever it thought proper to mention them, meant to include every Species of personal Property, under the same Denomination, & never intended any distinction, between moveable Goods, Money, Rights, or Choses in Action, by whatever way secured, or recoverable.

a Distinction has indeed been taken up, by the Common Lawyers, between Simple Contract Debts, & Debts on Specialty & that so long ago as the Reign of Queen Elizabeth, in Salter's Case, Dyer. 286. which was soon followed, by Brownbridge & Taylor Noell's Abr. 5. & Gee vs Eaton Letter. G. and Byne & Byn Cro. Eliz. 372. & others, in later Times, which are adopted by Swinburn, Wentworth, & Godolphin. But in none of those Cases, was the Rate of Bona Notabilia, the Principal Point, in Issue; none were determined in a Spiritual Court, but arose incidentally in Actions of Debt, between Debtor & Administrators.

No Reason is assigned, why Debts on private Bills of Exchange, Notes of Hand, & other Securities, under a Bond, should be subject to different Rules.

Leases for Years, indented, are as solemn Contracts, as Bonds, yet, they, are taken no Notice of; so that the Law as it is now supposed to stand, wants Uniformity, and Consistency.

Where then is the Bond to be put in Suit? if, in Sussex, the Debtor is not bound to answer there. If, in Surry, where the Debtor lives, it is out of the Jurisdiction, of the Consistory, of Chichester. If at Westminster then, according to Carthew 148, the Bona notabilia must be there, where the Judgement is obtained, because the Record is there.

Suppose it was an India Bond, or a Bond issued by the Chamber of London, on account of the Paving Act. Where would that be suable?

Wentworth's Reason, is very unsatisfactory, & would prove too much, viz that no Debt would found the Jurisdiction, for the Person of a Debtor. By Bond, is not more

transitory, than that of any other Debtor.

Sir Rich. Raines always pronounced for the Jurisdiction of the Prerogative Court, when either the Bond, or the Party bound, were in different Jurisdictions.

as it is a Question never judicially determined, I thought it proper to be brought before the Court, & as we have brought it, in the most easy, expeditious, & least expensive manner, there can be no Pretence for Costs, though you should think the Bond, in question does not amount to Bona Notabilia...

Dr Harris... It is plain Nye tried to Snap an Admon here, but was prevented by a Caveat. The Law has been fixed these 200 years, on what Ground, is at present immaterial; in the Case of Hopwood & Lukins, you said the Law was clear; that the Man lived in London. It dont appear that Walter Nye, at the time of Popes death, lived at Ockley in Surrey, & that he was not subject to the Diocese of Chichester.

Byron & Byron. Cro. Eliz. 471. B died in Lancashire, having a Bond at London; it was decreed that Admon shd be granted by the Bp of London, & not at Chester.

Francis & Aubrey was only heard upon the Admission of an Allegation. In this Case nothing appears to shew y Debtor dont live in the Diocese of Chichester.

Dr Lloyd, Judge In matters of Jurisdiction, it is my Duty, not to assume a Power wch dont belong to me, & to keep what I have, for the Benefit of the Subject. The present Case comes before me, not obly favorably, on the part of the Plt. I was obliged to admit the Allon, because he said this Court had Jurisdiction ——— & undertook to prove it. The relies, on the Cr Administrators, answers, they deny they had Goods in different Dioceses; when this Application was made, the Plt might have applied at Chichester, for an Inventory, & annexed it to his Allon; It is not ascertained whether Nye lives in the Diocese of Chichester, or not, therefore, till that Fact is established, the Plt is not entitled to the Opinion of the Court, whether a Bond found in the Diocese of C. at the time of the Partys Death, shall be proved in that Diocese, or no; I do not enter into, nor determine that Question, but say Nye has failed in proof of his allon, & therefore decree him to pay 5£ nomine Expensarum. No Judgement as to main Point

Prerogative H.T. 25. 1768.

Gostling No 147 Mole v Askin, Fletcher Bargrave.

Dr Wynne. Dr Collier.

Q. Shall the Plea be admitted?

Dr Wynne... Michael Mole married in 1764, & soon after, or at least before May 1767, wrote with his own hand, the whole Paper now propounded, as containing his last Will, or Heads for his Will. No Executor is therein named, but Martha Mole, the Decds Wife, is appointed Universal Legatee for life.

About the 20th of May 1767 She had Issue by him, a Son, who died the same Day, about a month previous to the Decd showed the Paper to Mrs ... Marshal, desired her to read it, which having done, She told the Decd She thought it very imperfect, & that he was very remiss in the Business; that She apprehended if the Paper was good, it would deprive

The Child (of which his Wife was enceint) of any part of his Effects he replyd, it cant hurt the Child, for you know, it cant be of any Signification, in the manner it is; but I will insert the Child, that my Will may be made, when I have a mind, & in pursuance of this, he interlined, between the 1st & 2d lines "and to my Child after her Death." then follow certain words wch are obliterated, (& in case of that Death)

The Party proponent insists that this Paper was not to be of any Effect, till it was reduced into proper form, & to shew that the Decd esteemed the Paper of no Consequence, but to serve to make a Will from; It is pleaded

That the Decd died 12 August 1767.

That the Widow, the Porpondent, was then with Child, but soon after miscarried—

That the Decd had not been well for 4 or 5 months before, but was never so ill, as to lie by, & was not thought in danger 'till a few Hours before his death.

That after the Decds death, the Paper was found in the Pocket of an old working Coat of his, not wrapped in any thing . . . .

These are the Circumstances pleaded by the Party proponent; & then comes the General Article & Prayer, That the Premises are true, of which Proof being made, she prays the Testamentary Schedule may be pronounced for, as valid in Law.

If the Court should be of Opinion, it is not concludent in point of Law so as to pronounce for it, she prays Leave to retract pro=pounding this Schedule any farther, & that the Parties, who are Legatees therein, may be cited to propound it, if they think it for their Interest; if they do not, or propounding this Testamen=tary Schedule, it should not be pronounced for, then that they she shew Cause why Admon should not be decreed to the Widow, as to an Intestacy—

Dr Collier for the Sisters. — I should only submit it to you, Sir, whether the Allon carries that Effect with it, that it is proper to be admitted.

Is it not a Contradiction, that she lays positively her being Universal Legatee, in this Paper purporting to be the Decds Will, & then the Declaration, that it was not intended to be so — The Paper is of a Testamentary nature, & was meant either to operate, or to serve for making a perfect Will — Where is the Use of laying the Declaration so precisely, as about a Month . . . . . The pleading the Words of the Will, is pleading against the Article propounded —

The Interlineation is merely a Memorandum for a Will, if hereafter, he should think fit to make one — The Decd has not signed it; & his positive Declaration will shew it to be only Notes of an intended Will

Dr Prime — This Paper is propounded, & tho, imperfect may under= circumstances be pronounced for; tho, not subscribed, it is signed at the Top, thus, "I. Michael Mole." My Client having found this Paper, (out of Candor) thinks it necessary to lay it before the Court, & not to take upon her; to swear, from private Information, that the Decd left no Will; We plead the circumstance of the Decds declarati= ons, as tending to destroy the force of this Paper; we must leave, to take the Sense of the Court: I agree with the Dr that the Declarations indicate it to be only a Memor: The Use of the latter Article, is, to prevent the Widow being led into Expences, if it cant be established on these Facts,

by being obliged to propound what is against her Interest. for if this Paper is valid, her Interest is only during her Life, if an Intestacy is decreed, she will be entitled to one moiety absolutely..

Dr Hay & Spicer — as the Allon stands before me, the Paper, on these facts (which are taken for true) cant be established; It is certainly of a Testamentary nature; if you chuse to cite the Lega= =tees, you may, without any Decree of mine: they may take the Case differently, but upon this State of the Case it is impossible to pronounce for the Paper. Paper rejected

Gostling prayd a Decree agt the next Court. . . . . Q Was a Will of the 18th of Sept: ever revoked? Q If yes, was it not revived by cancelling the Will of the 21st of September? . . .

Prerogative H. I. A Sess: — H. Stevens — N° 148 — Hull v Jupe — Fountain

Dr Wynne — Dr Harris.

Dr Harris — V. D. N° 116

Wm Hull died a Batchelor, leaving Geo, Hull his Brother, & other Relations: the Decd made 2 Wills, of the following Dates; 2d 31st of August, the 18th & 21st of Sept: 1765. Judith Jupe obtained Probate as sole Exec: of the Will of the 18th of Sept: 1765. This Probate has been called in, & the Quesbion is now whether any, & Which of these Papers shall operate?

The Decd told . . . . . if he should die before he saw him again, he should immediately destroy the Will of the 21st of Sept: & that of the 18th of Sept: stand. Immediately after executing the Will of the 21st of Sept: the Decd said . . . . . "Do thee take care of this Will, for I am not fixed in my mind, which shall stand, tho. I have made this Will. it is not to my mind;" Glover observed how improper it was that 2 Wills should subsist at the same time; the Decd replyd, I have considered of the Wills, & the last Will is not to be; . . . . . neither shall that Will stand, for some of them mentioned there for money, do not deserve it; they have often abused me very scurrilously, have acted very disrespectfully, whilst I have been ill, & shall not have it in their power when I am gone; he then ordered Glover to destroy that Will. In support of Wm Glovers Character, It is in Evidence that he was a good natured man, & nobodys Enemy but his own. Mrs Jupe was the Decds Housekeeper.

1 Was the Will of the 18th of Sept: ever revoked, & did it not always subsist?

2 If revoked, was it not revived, by cancelling the Will of the Will of the 21st of Sept: ?

Dr Wynne — It is in Evidence, that Judith Jupe, was not related to the Decd, but taken as a Servant Girl into his family, 10 Years preceding his death; the 2 former appear to have been burnt by the Person who was employd in making all the Wills; the Contents of these two, do not appear.

The Will propounded devises a Copyhold Estate to 20£ to a nephew & 20£ to Henry Buster

There are the same Witnesses to the Will of the 21st of Sept: as to the 18th & the same Legacies, one of 50£ to his Brother & a Legacy to his Brother in Law, a Clause revoking all Wills by him made, & declaring that to be his only last Will.

Glover speaks fully to giving Instructions for the Will of the 21st as well as that of the 18th & the Ws speak fully to the Execution.

The Dep.t was ordered immediately to destroy the Will left to his Care: He then tore off the Seal from the Will of the 21st of Sept.r but not in the Decds presence - The Decd always declared the former Will shd stand - The Dep.t said it did not look well to have a Will interlined, & that it was better to write it over again, the Decd said it wd be too much trouble

Rob.t Bull Sen.r says Glover told him, the Decd made 4 Wills, & he burnt the last, after his death - he made that Declaration 12th Nov.r 1765 -

Many Wt depose to Glover being an idle drunken Person in the way of Business.

I hope you will think the Evidence of the Will of the 21st of Sept.r being cancelled by him, slight & suspicious, that it depends entirely on one single Witness, & that the Account of a Republication, is not such, as can amount thereto, as they do not pretend the Decd did a single Act to the Will of the 18th, that will amount to a Republication, after the Execution of that of the 21st. If the Cancellation is not proved to have been with the Decds knowledge it is nugatory & ineffectual.

Rob.t Bull says, he knows, many People have been afraid to trust Glover to write any thing for them, fest for Gain, he shd not do the right thing.

The Decd said, "I will keep the Will of the 18th under Lock & Key for I believe, that shall stand." Tho, the other Wt dont go so far as the Writer, yet he corroborates him, by saying he was to take care of it - Glover tore off the Name & Seal, wch he then (I suppose) thought sufficient, but afterwards imagined it not cancelled till he tore off the names of the Witnesses probably he did not tear them off till the Bell rang for the Decds death; the Man who deposes agt Glover, had entrusted him to draw the Balances in an Acct subsisting between them; Debt is no Objection to a mans Character; by Drinking, as it is said he does, he may possibly have forgot Declarations 2 Years ago, & where does this pass. Odd, at an Alehouse, before G. Hull & Imber, who are interested in the Sute - the Dr Jsue, by his Opening, is ready to sell you, that G. is a single Witness; but as to the Account on the 21st of Sept.r he is not a single Witness, for he is corroborated by the two Downes, what they depose to is preparatory to shew a Villainy in the Testator. The Will of the 18th of Sept.r was never destroyd, the Intention remained; the Will of the 21st of Sept.r was only conditional; A man may make his Will legally, & execute, & declare he is not minded to have it operate; the Intention of the Testator, to give force & validity to the Act is absolutely necessary, a mechanical Making is not sufficient; this can be considerd only as a mechanical Act, which was to have force given to it, at a future time; we need not then enter into the Doctrine of Revivals. in Killigrew's Case it was declared, that where 2 Wills contain nothing contrary to each other, they may subsist together. In the present Case, there is the same Exor & the same Legacies in each; there is no Room for an Intestacy

you could not think of saying, he died intestate, he all along shewd an Intention to die testate; he declard at one & the same time that the Wills of the 18th & 21 Sept.r should stand, the Will of the 18th of Sept.r was under Lock & Key - can Evidence viz. of Declarations be admitted to revive a Will? Parole Evidence is of common right, where not impeached, ought to be admitted. Wills are of common Right, there existed no period in this Country, when a man might not make a Will of Personals By the Statute of Hen: 8. a Will is required to be in writing, but no number of Witnesses is specified, not a word of parole Evidence, is mentioned, to revoke such Will; it could be so done of Goods &c

Leonard a man devised Lands, another wrote the Devise without the Testators knowledge, yet the Will was proved... a written Will has been revoked by Parole Evidence subsequent to the Statute of Henry the 8th. Godolphins Orphan Legacy. p. 32.

There is no Instance since the Statute of Car. 2. where a Will in writing, has been revoked by parole Evidence, but many where a Will has been revived; Parole Evidence is continually received to support an Act of common Right; If an Executor wanted to bring proof, that he was intended the Residue, he would be at Liberty to do it - 29 Car. 2. c. 3 Skinners Reps. 227.

1 Jac: 2. T.S. made a Will & gave his Lands to A. he afterwards made a Mortgage to Sir Jn Churchill, the Opinion of the Court was, that the Mortgage was a Revocation, but as the Decd had made a subsequent Declaration, that his Will should stand, it was a Revival of the Devise

Freeman 160 Cotton & Cotton A. devised Land to his Wife &c. 2 Vern: 138. 148.

Vaet: 1. p. 288 1 Testator. poster Test. . . . . 1 Huber. p. c. 06 si Testator. . . .

It was agreed that Slender Evidence was sufficient to support what the Decd had declared, was done animo testandi, & a Trial at Law was refused

A Declaration is sufficient to revive a Will, not destroyd.

In our Courts there are Instances, where Allegations have been received in Jennings & Whitehead it was pleaded in an Allon, that the Will was revived by Declarations, & the Article was received;

This is in direct & presumptive, but there are 2 direct Cases Stacey & Dickens - Vanier & the

" Vanier died 1731, leaving a Widow & a Sister, he left 3 Wills,
" the first dated 1724. the 2d in 1728, the 3d in 1730. the
" first remained uncancelled, the 2 last were cancelled; there
" was proof of the Execution of them all, the Instructions for
" the last Will were found, differing from the others, only as
" to the disposition of 100£, a little before his death, having
" the Will of 1724 uncancelled, in his last Illness, he bid his
" Wife carry it to an Attorney, to know whether it would
" be good; after so long a time, & enquired the next day
" whether she had been; She had not, but went the day
" after by his Orders, & brought answer from the Attorney,
" that it would be good. Per Curiam Mr Vanier certainly intended
" to die testate; the words amount to a Republication, the
" Attorneys declaration prevented a new Will, no doubt, the two
" latter Wills were made after that of 1724, those two Wills
" however being in his Custody (amongst his Papers) cancelled, it is to
" be presumed he cancelled them himself . . . . . .

Dr Dyane

It is in Evidence that the Deed made another Will, the Exor was a Servant Maid taken in at 18: I cant agree with the Dr, that it w: be mere matter of Law; I beleive the Law knows no condibional Will; If it is proved, that the Will of 9br 21st was executed in the presence of 3 Witnesses, you cant regard the Evidence given, against the solemn Act, done by the Testator; I allow it is proper to avail oneself of every Evidence; but it is very dangerous, if any Declaration could defeat Solemn Acts, explain away the Statute; It has been held to a degree of Hardship. Where there are two Persons equally related or connected, the Court will admit parole Evidence to explain which was meant. There are 3 Periods to be attended to, the Execution, the Interval between that & the Death, & the time of the Death. If says the Dr the Ct thinks it in Evidence that the Will of the 21st was cancelled by the Deeds Order, the Will of the 18th was revived; but the Cancellation of one Will, is not a revival of the former Will, tho, it shd remain uncancelled; No Declaration can revive it; most of the Cases are unapplicable; That of Helyar & Helyar was not about a Revival, or a Republication; the mere proof that a Person did make a Will after a former Will, w: not be sufficient to destroy such former Will; in that Case, it was only with respect to the Contents, that one Witness was allowed; that was not the only proof of the Contents; It is Law, that making a due Execution of a Will operates a revocation of the former Will; you may have as many Schedules as you please, but not two Solemn Wills

Glover v Geo Davis & Evans, It was insisted the Will was not cancelled but by Accident, Sir Geo, dec held, the Cutting off the Seal was a Cancellation, wch must be taken to be done by the Deed, he had the Custody — Where an expres Act is done, an other expres Act is necessary to destroy it; the Declarations were as strong as in the present Case, the Deed saying his Nephews were his Exors.

If the Deed did refer to the Contents of the Will of the 18th in that of the 21st of Sept: it shews he was not satisfied with that of the 18th any more than that of the 21st: It is in Evidence from Glover, that the Will of the 18th of Sept: was not the whole, but was to be communicated to the Exec: One Witness is not sufficient to establish the Will, it w: be dangerous if one w: c: gave force to a paper either apparently on the face of it, cancelled, or by Implication of Law; The Declarations will not bear the Construction, if it is fact that . . . . . never saw y: Deed after, the whole Story is incredible — The Will could not be burnt, because it is brought in, annexed to the Affidavit it shews however, he falsifies; I cant beleive a Man w: be such a fool as to tear off the Witnesses names, after he had torn off his own name & Seal; I beleive it was destroyd after the Testators death; I may conjecture, that the Cancellation was as on y: 24th, otherwise the Story they told w: be insufficient; if it is fully in proof that the Will was cancelled after the Testators death, their Cause must be ruined: & you c: not possibly pronounce for the Will of y: 18th of Sept: & if you doubt of y: Proofs of that fact, you will certainly incline to the latter Will . . . . . .

D: Harris

What Interest has Glover to give a false Account of this Transaction? it is improbable Mrs Jupe should hazard an Intestacy for 6£ — It is strange that Bucknell should be the only Witness to speak to the Declaration, his being Clerk to the Agent in this Cause, renders it more suspicious — Stress was laid on the Deeds Inclination to make Entries on the Will of the 18th of Sept: Here is a Declaration coupled with an Act, i.e. Clearing by the Testators Order; it was with this View, not to favor Mrs Jupe, but to cut out the other Legatees, who had used him ill; he could not mean to add any thing in their favor: In the Case of Davis v Evans the Will was actually cancelled I did not attempt to say, Declarations would revive a cancelled Will; the Presumption is, it was done by the Deed — If the Contents c: not have been proved, those Wills c: not have revoked a prior Will, thus the whole turned on the Depon of one W: If the Contents were not proved, the Presumption w: be in favor of the existing Will, for it w: be, that the others were only Duplicates; this making 2 Wills in favor of Mrs Jupe, is a stronger Instance of his Affection for her, than any Evidence; Parole Evidence has always been received to support, but not to revoke a Will; Lord Talbot rejected it when contradictory to a Will . . . .

D: Hay: Judges

Here are 4 Wills, all of which would be good if nothing had been done to revoke them; the Contents of the two first are not known; in both the latter, the Contents are pretty much the same, they differ only in small Legacies; the Deed had no notion of adding by a Codicil; the Will of the 21st was well executed, the fact is admitted, but Glover & the other Witnesses, say, the Deed was not fixed in his Resolutions; had he died on the 21st the Will had been brought before the Court on those Declarations only, it could not have been refused, tho, there had been no doubt of the Declarations so made: on the 25th he went again, Glover says the Deed being asked, wch he sh: destroy, bid him destroy the 2d it was then effectually cancelled, what was done after was immaterial, it is urged agt Glovers declarations that he did not cancel it then, but after the death of the Testator; if the Deed did not give Orders, & Glover is to be disbelieved, this Will w: be improperly cancelled, & must subsist: but it is inconsistent to say Glover sh: not be beleived, & then pray an Intestacy, Glover has no Interest; the W: produced to his Character stood singly on Glover, I dont know wh: that w: not be sufficient, if there was no Objection to his Evidence, there is great Difference between parole Evidences, to revive & to destroy; In this Court & at Law: the Act remains to speak with the Declaration, there is a distinc: tion between an actual Revocation, & one by Operation of Law; a slight Declaration will revive a Will revoked by a marriage, the Revocation here, is by the Will of the 21st there are revocatory words, indeed, in the will itself, altho

it wd. be a revocation in Law – It was laid down in Lord Anglesey's Case, that 2 Wills wch are not contradictory, may subsist – Glover is supported by the other 2 Dr. tho, they do not depose quite so strongly; if it had stood uncancelled, it must have revoked the Will of the 18th. but connected with the Declaration it may be considered, as reviving it: the Cancellation of the last Will, is an Act done by the Decds Order, accompanying his Declarations, it looks as if by cancelling that, he meant to revive the former; I think that is revived, & I must decree Probate to the Exec.: of the Will of the 18th. of September

Prerogative. Ct
H.T. Feb. 23.

Jenner N°149 Whiting v Smith Bishop

Dr. Wynne & Burrell Dr. Marriot & Harris.

Is Schedule & unexecuted Paper, & died T. Testator mean th. the operative as his Will?

Owen Bird died 30 May 1767, leaving Sarah Whiting his Couzen German & only next of kin; after his Death a Cancelled Will was found, dated 4 Jan: 1766, & an unexecuted Paper, wrote in 1766, but no month, or day, specified, these 2 were found in a Bureau wrapped together in a Paper – It will appear, the Decd had good reason for cancelling his Will, viz, that several Legatees therein mentioned, were dead. & 2 Declarations, shew the foundation for making the Testamentary Schedule; he gives what his Wife brought him, to her Relations, & the Sums bequeathed, amount as near as possible to the whole of her Fortune – The Decd died at a distance from home, suddenly, when he was thought to be out of danger – the Decd testified no Intention to destroy the Validity of this Paper, there is no presumption arising on the face of it, to induce you to think, the Decd meant it should not stand; the Interlineations must be subsequent to the writing of it, therefore are rather a Confirmation of it – the Decd was advised to go back to Portsmouth by water, to prevent a return of the Strangury &c. a Boat was provided accordingly – On the 29th. he grew worse, but did not appear in imminent danger till within 10 Minutes of his death

Owen Bird of Portsea, in Hants, died a Widower, leaving Sarah Whiting, his Couzen German & only next of kin, who applyd for Letters of Admon to him, as dying intestate, but was prevented by a Caveat ent by Bishop

Jenner appeared for Sarah Whiting & prayd Admon; Bishop appeared for Ja: White, & alledged him to be a Legatee in a Testamentary Schedule, of the Decd, & both Proctors were assigned to exhibit Affidavit of Scripts, & Bishop to answer to Jenners Clients Interest, the 3 Session

Jenner brought in Commission with Scripts, exhib: Proxy
Bishop brought in Do. . . . . & declared this Client wd. propound none, & prayd him to be dismissed.
Jenner objecting, then
Bishop exhibited for Ann Bonham Smith Wife of Samuel Bonham Smith, Couzen German once removed, & next of kin, & prayd Admon, with Schedule annexed.
James White was dismissed, pay: 2.5.6.8. Costs – Bishop exhibited Proxy under hand & Seal of AB Smith, & denied Jenners Clients Interest; –

Jenner exhibs Proxy, under Hand & Seal of Sarah Whiting, confessed, AB Smith to be Couzen German, once removed, but denied her to be next of kin, or to have any Interest in the Decds personal Estate; Jenner propounded his Clients Interest.
Bishop propounded Schedule (A)
Bishop waved his Opposition of Jenners Clients Interest, & confessed her to be Couzen German, & next of kin of Decd; the Judge condemned Bishops Client in Costs, which were taxed at £64.5.4. & paid . . .
the only Question now before the Court, is upon the Test. Schedule, &

you find the Cancelled Will is regularly executed to carry real Estate; In the Testamentary Schedule, a Blank is left for the Day & Month wherein it was wrote; It begins by giving Directions for his Funeral, to his Exors, herein after to be mentioned; it gives his Exors power to sell his Freholds, Stocks, &c. for payment of Legacies; It gives an Estate to Ja: White for Life, & after his death to such of the Decds Relations, as Wm. White shall nominate; It gives all the rest & residue, of the Real & personal Estate he shd die possessed of, to his Exors, & their Heirs, except by any Codicil annexed to this my Will, I shall think fit to dispose of any part thereof, then to be directed _____ Thus the Will breaks off, without any nomination of Exors, without a Signature by the Testator, without any Attestation by Witnesses, or any Clause of attestation written; you will find many Interlineations in the Paper, some written with a Pencil, & afterwards gone over by a Pen; you will find some material Alterations; you will find Declarations, that the Decd considered this, as a Draft only; Thos. Bucknall Esq Master Builder at Portsmouth, is the single Witness, who speaks farther, than to the finding this Paper, amongst Papers of Moment, to Declarations He deposes to these Circumstances; that in 1766, the Decd & he were at Dep.ts House, about Michaelmas, soon after Mrs Winter's (the Decds Niece) Death; the Decd then asked Dep.t wh.r he had made his Will, for the Dep.t had just then lost his Wife; he replyd, no, but he intended to make it, & to leave his Wifes Fortune to her Relations; after some Pause, the Decd approved of his Design, & said, a Man ought to do what was just; about October or Nov.r 1766, the Decd said, I have made my Will, & have given to my Wifes Relations what I had with her, & have charged money to be paid, out of my Bedenham Estate, to my poorer Relations – It appears in Evidence, that on Monday the 23.d of March, the Decd set out from Portsmouth, was taken ill at Redbridge ab.t 23 Miles from Portsmouth; that he sent the same Day for an Apothecary & Physician, & likewise to Portsmouth, to desire Mr Edw: Winter, who married a Rel.n of the Decs & his own Maid Servant, wd come next morning to attend him; they are both examined; they say, they went on the 24th & found him very ill; Winter staid till the 26th when he left the Decd, better; the Physician thinking him out of Danger; He returned the 28th & found the Physician had pronounced the Decd out of Danger; this Wr returned to Portsmouth the morning of the 29th & brought a Letter from the Decd to Mr Bucknall; who being exam.d in respect to that Letter, says, it is wrote by the Decd, or the Master of the Inn; the Purport is, to desire he wd send a Boat & Chair, to carry him to Portsmouth; Wm Polhill, went to the Decd on the 30th who said he had been

Mary Burchett

very bad, but was now pure, & much better; We dont deny the Paper propounded to be wrote by the Testator, nor to have been found in a Bureau, amongst his Papers, in the condition it now is — It must have been previous to the 25th of Octr 1766 for the 7th Year of the Kings Reign began the 26th & this Paper is stated to be in the 6th year of his Majesty — the Deed lived upwards of 5 Months, afterwards; he was within 25 miles of Portsmouth, sent there to his Relations, yet never mentioned to them or to any body, during the whole time of his Illness, his having made such a Will.

The Doubt will be on the Presumption from the facts proved & uncontradicted, to shew the Decd's Intentions as to this Paper; It is clear Law, that imperfect Papers existing, (where there is no other or only a cancelled Will) may be good pro tanto, tho, such Papers do contain Devises of Real Estate; because the Court goes upon large Principles, & will establish as much of the Disposition, as can be collected, & the Law allows; tho, by the Roman Law the Appointment of an Extr, was of the Essence, yet by our Law it is otherwise, & Admon will be decreed with the Paper annexed. on this Ground, that no Intentions once proved, shall be presumed to be altered, & that Intention shall have Effect;

The first Presumption, is, prima facie, in favor of the Testamentary Paper, & that the Testator intended to carry it into Execution, unless the Contrary is proved; In the present Case, it is plain, he intended such a Disposition, & there is no Proof, no Ground, to suppose a Departure from that Intention; This is different from a Case where an unexecuted Paper is to operate a Revocation of one perfect & executed, for in that Case, the Court will require stronger Proof: It is material, there was a cancelled Will, & that both the Papers, were found, wrapped together in the same Place; if the Deed had not intended this to operate, he wd not have cancelled the other; the Presumption of the Deed's Intention, is the only Ground, whereon the Court can establish Papers, deficient in Point of Form; I remember the Case of Stevens & Stevens Georges Hill 1761. where there was a Draught of a Will, but the Deed died before executing it, there was a devise of Real Estate, & there were Blanks left . . . . . on the hearing, the Court said, it might be good in part — the Ct relied on the Case of where they were governd by the Cases of Comyns 453 — the Deed approves of the stint given by Bucknall; the Date of the Paper, shews the Declaration to be previous to such Date . . . it is conformable to it: afterwards, in consequence of that Idea, on talking it over again with Bucknall, he tells him, he had disposed of his Wifes Fortune, amongst her Relations; his Relations who were benefitted under the cancelled Will being all dead, he made this; his not appointing Extrs, shews only his Suspence in that point, it is difficult to name Trustees; he might know, his Relations wd have the Admon there is nothing in proof agt the peremptory Plea admitted, to shew the Deed intended to die intestate, here is positive proof to the contrary, if nothing comes out to shew

an Intention to die intestate, you will be of Opinion the Deed continued his Resolution to die testate; tho, he made no Extr; or Resid: Legatee, such non Appointment dont shew, he did not mean it shd operate —

The Decds Declarations, of his Intentions to give his Wifes Relations the Amount of her Fortune; his answers to Bucknall are material; he did not say, he intended, but that he had made his Will; he was subject to the Stranguary, wch many do not apprehend to be dangerous; the Physician was of that Opinion; the present Question, is not whether a Paper may be good for personal, which is not good for Real Estate, nor whether a Compleat executed Paper, can be revoked by one that is unexecuted, but what kind of Paper this is? This is a compleat Paper, except that Extrs are mentioned therein, but none are nominated; the Year is specified, that is sufficient; besides it concludes &c. as to shew it is finished: All the Rest. &c Perhaps the Deed never intended to make an Extr; Expect to hear the Gentlemen mention the Decds departure from his Intention, But a Departure therefrom, will not be presumed; in that Case, there must be no Evidence that the Will is compleat; here is a Declaration, with which the Paper corresponds; it cant be destroyd by Length of Time; he looked upon his Intention, as confirmed by the Act done; I am sure it will not be contended, that a Parole Declaration will not confirm a Will, if Parole Declarations can, this Paper is confirmed by the Interlineations . . . . .

D'Wynne — The Court admitted the Plea, of the Deed being taken ill the 28th of March, because Declarations, in Extremis might come out in Evidence, but you see, there are none relative to this Will, to any Body, about him, at that time; the Dr who spoke first says, there is no doubt, but imperfect unexecuted Papers, may be & have been often pronounced for; I believe none but where the Testator was prevented absolutely by the Hand of God, in which Cases, Courts have allowed it for personal Estate, because with respect to that the Law is favorable, & not limited, but not, when Real Estate has been given in the same Will, because it denotes the Intention to be incompleat: And there being no Proof that the Deed was prevented by the Act of God, no Circumstance to shew what prevented his Compleating it, the Presumption on the other Side will be the stronger — The cancelled Will was for Real, as well as, personal Estate; that is regularly excluded, as the Statute directs; as to this Testamentary Paper, the presumption from the Testators writing &c. is ousted by the Disposition of Real Estate, by a Paper, which he knew d: not operate: it is a presumption he did not intend it shd operate at all: it is very different when there is only Personalty; the Law has prescribed no Form, so that, be it ever so imperfect, by his safe Custody, his Intention may be collected, & it will be pronounced for, there being no legal Presumption against it; but we are told a mere Will is not good, because defective in Substance as well as Form; there is no answering Cases, where Circumstances are not stated, the Omission of a single Particular, varies the Case, in Stevens's Case, the Deed died in a few

Days, after y^r Instructions were given. Persons were sent for. W^ch not be executed with more Solemnity; I allow a compleat Paper cant be revoked by Time, but an Incompleat Paper may; every moment weakens it; if the Deed had died immediately after this Declaration, about Mich^s it w^d have altered the Case: I will not say the Ct cant receive Parole Evidence in any Case to influence in Wills, but the Ct will consider the credit of the Deposition; the Witness speaks with precision the Deed might not, he might say something like it. Besides if B. proves any thing, it w^d be that the Deed had made a Will that w^d carry Land, for he says, he had charged Lands with money for his poor Relations; he must know what was necessary to pass Lands; if he intended to compleat it, he w^d have executed it; I know a Will may operate to some Purposes without any Date, but Blanks are always filled up when the Will is compleated. The Paper is wrote merely currente calamo; I know a Will of Lands, will be good without an Extor, but the Stress, I lay, is that he intended One; he was seized with an Illness, undoubtedly, very alarming; he saw Persons, sent Messages; how easy was it for him to have had the Will from Portsmouth; he might have given the Key to M^r Winter; my Client is next of Kin, & entitled to the Admon by Law.

Dr Burnell

The Facts are all agreed between us; the Question is not whether imperfect Papers in general can operate, but w^th this Paper can, under the particular Circumstances of the Case; the Court will aid unexecuted Papers, but not without some Proof to shew a want of Opportunity in the Deed to compleat it, that he was prevented by Accidents, tho, he intended it shd be his Will; I differ with the Gentlemen in the Inferences from Negatives, viz that no Declaration is proved that Deed did not intend it shd operate; I insist: his not declaring it shd, founds the presumption, that he meant it shd not; It is plain the Deed knew what form the Law required, the Accuracy with which the Attestation is drawn looks as if some Lawyer had done it. If he intended this Paper should operate, the presumption, is, that he w^d have noticed some of the many Interlineations therein. The Alterations in the Legacies are material; One gives a Legacy to the Heirs of M^rs Wallace's Body, if she sh^d die before him There are many Directions to the Extors, & many References to their Judgements

They are to direct his Buryal — to pay the Interest of £75 old S^ca An^s to Jn Oxford — the same to Martha Oxford — they are to pay the Interest of £700 to Mary Whiting for life — They are empowered to raise Money for payment of Legacies, to sell or divide his Stocks, Houses in Alverstoke, Portsmouth, for that Purpose — To retain the Rents, Profits of his Real & personal Estate, till they are sufficient to answer the Purposes of the Will They are to pay, out of the Bedenham Estate, Yearly, to M^r Winter & M^rs Crisp, 20£ a piece for their Lives; they are to pay at their Discretion, to each of his Servants, who shall live with him, at his death, 5£, if they shall think them deserving of it.

The Devise out of the real Estate, payable at the Discretion of the Extors, clearly shews the Appointment of an Extor, was, in his Idea not unimportant; the Concludent Clause, w^ch induces an Inference that he intended some Alteration, when he wrote this Paper; "Item All the Residue of my Estates Real or Personal, that I shall die" "possessed of, I hereby give, & bequeath, unto my Extors, & their Heirs, "except by any Codicil, annexed to this my Will, I shall think fit "to dispose of any part thereof, in some other manner therein to "be directed." — —

Notwithstanding this, no Extors are appointed.

We are told, a Declaration was made by the Deed, to M^r Bucknell, in Oct^r 1766, (in consequence of a Conversation with him on the Subject, the mich^s preceding,) that he had made his Will, given his Wife's Relations, the amount of the Fortune he had received with her, & that he had charged his Bedenham Estate with payment of Legacies to his poor Relations — and that the Schedule propounded, contains these Legacies.

what does that prove? but that the Deed, at that time intended to die testate, & dispose of the Legacies as above stated.

It dont prove the Deed continued in that way of thinking; i. con: there is the strongest Reason to believe he did not, by his not carrying it into Execution in 6 Months, viz. from. October 1766 to March 23. 1767.

It may be urged, the Deed thought this Schedule w^d operate; Such an Idea could have existed only, in the mind of a very ignorant Person, a Character which is not applicable to M^r Bird, who clearly understood the common Forms & Solemnities attendant on Wills the Manner of his cancelling his executed Will, demonstrates that, he tore off the Seals, & the Spaces where the names of the Subscribing Witnesses were wrote — no Imperfect Papers have been pronounced for, where the Intention has not been shewn permanent, & the Person prevented from executing it by the Hand of God — That was not M^r Bird's Case who was taken ill with: in 23 miles of Portsmouth, whether he sent more than once, continued ill 7 Days & yet never carried his Plan into Execution, the natural Inference, That he had altered his way of thinking, laid aside any Design he might have formed to give Validity & Force to this Paper.

Dr Harris

There is not a Word of Evidence to shew, the cancelled Will was of the Deed's hand writing — When a Person is disposing of his personal Estate, he is not presumed to know the Law respect^g the disposition of Real; when he does not intend to dispose of Real Estate, he need not conform to the positive Law.

The Dr^s dont know how to get off from Bucknall's Evidence; they allow his Honesty & Veracity, but will suppose he might be inaccurate or mistaken; the Declaration varies this from other Cases; you have established Papers perfect in themselves, if a few words could be proved to shew Intention; the Admon with the Paper annexed, must do every thing an Extor could; his cancelling the Will, is the strongest Confirmation possible he intended to die with a Will; the only Question, is, whether he has carried that Intention so into Execution, that the Law will give it Force; no man talks of a perfect Will, he imagined this Paper was perfect, & not supposing he was dyeing, w^d not send for it.

Dr Hay. Judge.

The Legatee who brings this Paper before, had a right so to do; Imperfect Papers are established or rejected according to Circumstances

N.B. This Cause being heard on y^e Arches by Day, on acc^t of the many Causes assigned for hearing, the Proctors were obliged to consent in Acts of Court, to Time & Place —

you cant argue from one Case to another; Every Case must depend on its own particular Circumstances, for when a Paper is intended to be validated, & is carried into execution, as far as Opportunity will admit, if the Party is prevented by the Act of God, tho, it should contain a Disposition of Real & Personal Estate, it is clear the Paper may be good for Personal only; the Intention of the Deed is the grand Rule to guide the Court; I have no doubt from the previous Conversations with White, Bucknall &c that the Deed intended a will to benefit his Wife's Relations, at that Time; I dont think his cancelling a will goes so far, as to shew, an Intention of making an other; but an Inception of another afterwards, shews an Intention to die Testate: It is clear from Dates & Evidences, that between Mich.s & October 1766, he drew this Paper, for the Reasons alledged by the Council; If the Declaration to B. (that he had made the Will) was to have its utmost weight, it goes only to part of the Will; His giving to the poor Relations, at his Exors Discretion, is a Defect in Substance; there is no doubt, he intended to name Exors, for they were to have the Residue, & to judge of the Servants Merits; therefore it is incompleat in Substance; if he says Exors hereafter, & imposes Acts on them, it is a condition he has imposed on himself, so that not compleating it, It is substantially, as well as formally Defective: If he had only left Legacies to his Wife's Relations, agreable to his Declaration to Bucknall I will not say, how far that Declaration, w.d have cooperated to substantiate & carry such Will into Execution - I cant set up Parole Declarations, inconsistent with the Act itself, & I must think the Declarations w.d be contradictory to the Paper; I cant look upon the Declar.n to Bucknall, as Proof of his having changed his Mind, for, in fact, he has not; it may be consistent in a qualified Sense, that he had made i.e. that he had begun, or drawn a Plan for a Will, wherein he w.d do so, & so. This Paper comes before me, liable to most of the Objections, which attend imperfect Schedules, tho, not all, for there is a Declaration to support it in part, & in part only; he either had an unsettled Intention in speaking these Words, or else the Inference is that he had departed from the Intention, he was in, when he made the Declaration; if he had died suddenly as pleaded, it w.d bring it within the Cases, where the Act of God dont prejudice; how does this turn out? he had an Opportunity, for there is a communication frequently between Portsmouth & Redbridge; he c.d have sent the Key, if he had shewn a Solicitude about the Paper, it w.d be something, but there is not a Syllable of Recognition: I dont think it varies much from his being ill at Portsmouth; it was not a sudden death, for it was an alarming Illness, as was observed by the Council; I am obliged to hear every thing, for by being circumstantial, things may come out upon the Evidence, wch may be material to aid my Determination, wch Circumstances cant appear from

the Plea itself; the Plea is stronger than the Evidence; I am of opinion, the party propounding this Paper, had a reasonable Ground to lay it before the Court, but I think the Cases determined in the Delegates are applicable to this, I therefore pronounce agt the Validity of the Paper & decree Admon to the next of Kin.

Reasons which operated in the Cases.

The Paper pronounced against, Admon decreed to the next of kin. Appealed

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Consistory

Holman

N°150

L.d Bolingbroke v. Lady Bolingbroke

Stevens

D.r Collyer, Harris

D.r Calvert & Wynne

There was only a sham Opposition & therefore satisfied my curiosity by noting the Facts - - -

D.r Collyer.

Libel admitted 5 Dec.r 1767. Sentence given 9 Feb. 1768.

I am Council in this Case for Ld B. has brought a Suit of Divorce against his Lady, for certain Steps & Faux Pas, which we at this Quarter of the Town style, by the vulgar name of Adultery: the Account given by the Witnesses, I will state to the Court, as follows.

Lord & Lady B. being lawfully married in ..... cohabited, had several children, & lived together till the latter End of Sept.r or beginning of October 1765, when Lord B. went to Newmarket, & on his Return, found Lady B. had eloped, he tried every method to induce her to return but without Success, & from that time he has never cohabited with her; In 1766, there grew an Intimacy between Lady B. & Topham Beauclerk Esq, who frequently sent Notes to her at her House in Clarges Street - In June or July Lady B. went to pay a Visit to Ld & Lady Pembroke her Sister, at Tunbridge Wells, where she staid 6 Weeks; Mr B. went also to Tunbridge & staid at the Wells most part of that time, during which he visited Lady B. One Day when he was with her she called for a Glass of water; the Servant who brought it, (being suspicious of some Familiarities between them) as he went down Stairs, heard them go across the Passage, into the Opposite Room, where there was a Couch, they staid there some time & then withdrew; the Servant went afterwards, into the Room, & found the Couch Tumbled, as if by a Person lyeing thereon, & the Window Curtains let down.

When Lady B. returned to London, Mr B. visited her often, at which times, she ordered nobody to be admitted; the Servants often suppose they had lain together on the Couch in the Room where they sat, from observing one Part of the Couch soiled with Shoe Dirt, & the other End with Hair Powder - On Christmas Day 1766 Lady B.s Servant ..... Flockton went by her Order to Mr B. to procure Money for a Bank Note, who replyed he had none at that time, but w.d soon procure it, & accordingly sent her a Purse of Gold, for which she gave Flockton a Guinea — 26 Dec.r Lady B. went to her Country House at Taplow, Bucks. Mr B. frequently visited her there, sometimes staid till 2 or 3 o'clock in the Morning, sometimes he came in a Morning, & would dress there; he ordered in Wine & Provisions, acted as Master they were locked up together at different times, particularly on the 15th of Jan.y - 30 Jan.y Lady B. returned to London ill of the Measles; Mr B. accompanyd her to Cranford Bridge, where he got into a different Chaise & came to London - Lady B. was for some time confined to her Bed, Mr B. was admitted into her Chamber - in March 1767 Lady B. grew visibly pregnant, so that all the Servants took notice of it, She had her Stays let out; She sent for D.r Hunter, (who had attended her on former Lyeings in) who came privately, on foot, to her House; when asked his name, said it was immaterial, & bid the Servant tell Lady B. a Gentleman wanted to speak to her, that D.r Hunter when introduced, found her with Child, & in great Anxiety of Mind; She agreed to correspond with D.r H. under feigned names, said She c.d conceal it from the Servants by discharging them; She hired a nurse Molyneux, had Physic sent to her at Taplow, addressed to Mr B. the Maid tore off the Labels, gave the Phials to her, all the Servants were discharged but her own Maid & a Postilion, who lighted the Fires; before She came to Town to lye in, a new

Bed was put up for her by Mr Bs Upholsterer, at Mr Bs Order the Patterns of which were first shewn to Lady B.—
20 Augt Lady B. was delivered of a Daur by Dr Hunter, in the presence of Mrs Lee her maid, & Mrs Molyneux her Nurse, who contest with Dr Hunter; whilst in Labor, it is proved that Candle was made; Lady B saw no Company, received no Visit; Ld B. sent an open Note by his Valet, to know how she did, to this Lady B. returns an Answer saying She had been ill, but was better, & took no Notice that She was brought to Bed.

lived with Lady B. after her Parting from Ld B. she went to Lady B. in Novr 1765. & left her in April 1766. She Deposes, to Mr B. visiting Lady B. That She has found the Couch covered with Hair Powder & Dirt, & the Pillows thrown down whence she inferrs Criminal Conversation had passed between them— Has frequently seen Mr B. at Lady Bs bedside when she was ill of the Measles— Mr B. lived at Cookham 3 Miles from Taplow, where he frequently visited Lady B., staid till 2 or 3 in the morning— When they were together, Lady B. hath called for Candles, ordered the Windows to be shut half an Hour before it was dark— remembers Lady Bs Stays let out; her having Jumps made; remembers small Boxes being directed for Mr B. at Taplow, who opened them, tore the Labells from the Phials & burnt them— that Mrs Lee gave Dept the empty Phials, which she said, came out of the aforesd Boxes, & that Lady B. had taken the Contents.

went to live with Lady B. in Charles Street 20 Augt 1767, & continued with her 5 Weeks; during which she heard several People go up & down Stairs, but saw nobody she heard in the Kitchen— Lady B. received no Visitors except Mr B. who being in the Kitchen— Lady B. received no Visitors except Mr B. who came 2 or 3 times every day, was admitted into her Bed chamber & staid till 11 at night— Lady Pembroke, Lady Charles Spencer, & Lady Caroline Adair, came once— Dr Turton attended her— Believes Lady B. delivd of a Child whilst Dept was with her—

18 Novr 1767. Dept went to live with Lady B. as her Woman, Housekeeper in Charles Street; never saw Ld B. with Lady B. Mr B. visited Lady B— in June or July 1766 Dept attended Lady B. to Tunbridge Wells, where she staid 5 Weeks— Mr B. visited Lady B. there at Lady Pembrokes— In the Decr after Dept has often seen Mr B & Ld B. together, sometimes alone— Mr B frequently visited Ly B. at Taplow. Dined, supped, & staid with her till 12 at night, at such times they were generally alone— When Ly B. was ill of the Measles Mr B. visited her once a Day in her Bedchamber— In March 1767 Ly B. went to Taplow, where Mr B. again visited her every day generally dined, & sometimes supped with her— Ly B. was ill from May to August, attended by Dr Turton, who was generally ushered into Ly Bs Bedchamber by Mr B— When Ly B. was at Taplow, several Boxes came from Mr Greedale Apothecary, which were always carried into the Parlor, when Ly B. called Dept, & gave her the Phials, which came therein, wch contained Bark, wch Dept gave Ly B— Dept cant say to whom the Boxes were directed. between April & August, a Gentleman (who was a Stranger to Dept but who she has since heard was Dr Hunter) came on foot & asked for Ly B. the footman asked his name, he said, if he wd go up Stairs, & tell Ly B. a Gentleman wanted to speak with her, she wd know who it was— the Footman did so, & Ly B. ordered the Gentn to be shewn up, who staid about ½ an Hour— In

June or July last, Dept observed Ly Bs Cloaths did not fit her, that she grew larger in Size, & continued so to do, till she was obliged to let out her Stays & Gowns, & to wear such Jumps as Women with Child wear— one of the Servants told Dept she believed she was with Child— 10th of August Ly B. was brought to Bed of a Daur, as is said by Dr Hunter— Dept knows not the Father of the Child; has no reason to believe Mr B. the Father, after Ly B was brought to Bed Mr B. was, as usual, almost every Day admitted into Lady Bs Bedchamber— the Cloathes were given to a new Washerwoman, that Ly Bs delivery might not be known—

Deposes that Mrs Lee frequently told Stockton, Ly B. would be at home to nobody but Mr Beauclerk— Dept was ordered by Lee to bespeak a new pair of Jumps— the Servants suspected Ly B. was with Child— Ly B generally lay in a Tent Bed, but about a Week before she came to Town, the last time, a new 4 Post Bedstead, was put up by an Upholsterers Servant, who told Dept his Master worked for Mr B— Dept was told by Mrs Bs maid, the Pattern of that Bed, had been brought for her Master to look at— About 3 Weeks after Ly B. came to Town, Lee told Dept Ly B. had ordered her to discharge her, Dept asked for what, she said, she had no particular Reason— Dept was discharged accordingly the Tuesday following—

was Ly Bs Chairman from 1 Jan: 1766 to the Xmas following; Dept from the 5th to 27th of Septr was constantly at Lady Bs House, during wch Mr B, used frequently to visit her, sometimes twice a Day—

Dept some years ago attended Ly B. as a Man Midwife, when she was delivered of her first Child at Ld Bs— In Jan: or Feb: last Dept received a Note from Ly B. to come to her in the Evening; he conceives from the Contents, it was on some secret Business— when it was dark, he went to her in Charles Street; the Footman asked his Name; Dept refused telling it, but bid the Servant say to Ly B. a Gentleman wanted to speak to her, which he did, & Ly Bs Woman coming down, she bid him to Ly B. who appeared very much flurried & almost fainting, from the Conversation, he then suspected, & now knows, she was with Child— Dept continued to visit her till the 26th of August— the 19th of Augt Ly B. sent word she was very ill; Dept came & found her in Labour, & about 9 o'clock, she was brought to Bed about 11 that night of a Daur, in the presence of her own Woman & Nurse Molyneux— Dept believes Mr B. the Father of the Child, because it was agreed the Affair shd be conducted with great Secrecy, & that Ly B. shd write to him in a feigned name, notwithstanding which, Mr B. was entrusted with the knowledge of the Affair, & attended Dept several times after he visited Ly B. who told Dept he might ask Mr B. any Question with regard to her Health— That during Ly Bs delivery Mr B. waited in the House, & when all was over, Dept went down & told him, he immediately went up to Ly Bs Bedchamber & saw her; Dept visited Ly B. 6 or 7 times after generally about 9 at night, when he found Mr B in the House, & 2 or 3 Times in Ly Bs Bedchamber, from all which, he believes Mr B. begot the said Child— Says every Method was used to keep the Delivery a Secret— That the whole Scheme was managed by her Woman

John Dupont carried the Note from Ld B to Lady B & her Answer as follows— "Ld B. is very sorry to hear Lady B. has been ill, & desires to know how she does"—
Ly B is much obliged to Ld B. & she is a little better—

deposed to the Delivery & Pains to keep it a secret.

Depos: that Mr Beauclerck frequently visited Lady Bolingbroke at Tunbridge Wells, when Lady Pembroke was out that the Couch in the Opposite Room was found tumbled after Mr B & Ly B. had been there, & the Windows almost shut - Depos: to frequent Visits of Mr B to Ly B. in London & Ly B. sending him with a Bank note to Mr B. to get changed, that Mr B. c: not do it then but came & staid with Ly B. till between 11 & 12 at Night; that Dep: going in to take the Things away, saw Ly B. with a handful of Money, shakeing it about, & as Dep: was going out, she called him back & gave him a Guinea - That Mr B. behaved as Master of the House at Taplow, & one Day, Dep: being in the Parlor, Mr B. said, "Come, my Lady, let us shut up the Windows, go to Chap:" which she complied with, ordered the Windows to be Shut, & Candles to be brought, tho, it was then quite Daylight, & 1 Hour & half before Dark - When Ly B. was ill of the Measles, Mr B came three times a Day, & always went up to her Bedchamber - He depos: to Ly B's increase of Size & Appearance of being with Child & confirms Dr Hunter's Account -

was Mr Beauclerks Postilion, depos: to driving Mr B. constantly to Lady B's at Taplow, & to his being desired at the time Ly B. lay in to come & clean the Knives &c

Accep: of the

Husband must be proved & not presumed - - - - - -

The Question before me, is, wh: the Birth of a Child on the 19th of August connected with other Circumstances, amount to Proof of Adultery; the Presumption would have been, that the Child was the Husbands, if there had not been strong Circumstances amounting to a Contrary Proof from Ly Bolingbroke's Separation from her Lord, prior to the time this Child must have been begot - The Secrecy observed between Ly B. & Dr Hunter is material; there is no Evidence from which I can suppose Ld B had any Intercourse with Lady B: the manner in which the Child was brought into the World is very particular: Ld B. is unacquainted with it. Mr Beauclerk was in the House, & went up to Lady B's Bedside as soon as the Delivery was compleated: Ld B's Note is dated the 7th of Sept: Ly B. was brought to Bed the 19th of Aug: Ld B. knew nothing of the Delivery; it is not to be conceived the Birth of the Child of a noble Family wd be kept Secret; all these Particulars shew Ld B. was not the Father; the facts of Powder & Dirt being found on the Couch, are material, when connected with other Circumstances; I have no doubt to pronounce Lady Bolingbroke guilty of Adultery & that the Child was not Ld B's - Where both Parties have violated the Law, a Question may arise how far either are entitled to the Benefit of the Law; I don't say the Observation applys to this Case, because here was no Parting by Consent, but an Elopement on the part of Ly B. who went first from her Lords House to the Duke of Marlborough's (her Brother's) House, therefore Ly B. having gone away & there being sufficient Evidence of Adultery, from the Birth of the Child & other Circumstances, I think Ld B. is entitled to a Sentence of Divorce from Bed & Board. .

Can a Legatee who has rec: his Legacy oppose the Will? or else y Exors to prove in Solemn form.

Hil. Term last

E Term: 1 Session Prerogative

Adderley Ashby v Hay & Thrale H Stevens

Dr Harris Dr Wynne

No 151.

Richd Milson is the Decd, he made his Will dated the 12th of May 1767 & appointed his Wife Dorothy Hay, then Milson, & his Daur Joanna Milson, now Thrale, Exors, who proved the Will, & were afterwards cited to bring in the Probate, & shew cause why Admon shd not be granted, to Elizabeth Wife of Samuel Ashby, the lawfull Daur of the Decd; Stevens appeared under Protest for the Exors, he was ordered to extend that Protest, which he has accordingly done so, & states that the Decd bequeathd by his Will, Seven Leasehold Houses to his Daur Elizth Ashby, for her separate Use, & if she died without Issues before the Expiration of the s'd Leases, then he bequeaths them to his three other Children, to be equally divided amongst them; We say Mr Ashby assented to this Legacy, took possession of the Houses, & received the Rents, Profits thereof by herself or Samuel her Husband, & therefore can't now oppose the Will, having acquiesced therein & been in quiet Possession 10 Months; the Question therefore is,

I don't contend that a Legatee in a Will, having received his Legacy cannot in any possible Case, call upon the Exors to prove the Will by Witnesses; as for Instance, where it appears the Testator made a subsequent Will, whereby the Legatee is more benefitted than he is in the former Will, but then he must bring in the Legacy

a Person so circumstanced, was benefitted 10 £ under a Will, but said there appeared a subsequent Will, which revoked the other, you overruled the Protest made in that Case, but ordered the Legacy to be brought into Court, this Determination is in point; It goes to shew, a Party taking out a Citation, must state such a Case as entitles him to take it out; the Possession is admitted, She having received the Rent, but say in Excuse, She did not know she could controvert the Will; here is no Pretence of any thing having come to her knowledge since the Possession if you allow Excuses of this Sort, there would be no such thing as quieting Possession - The Court will not say, a Party who is a Legatee, retains all Rights, as next of kin, in the same manner, as if stripped of every thing; it wd afford Next of Kin a fine Opportunity of plaguing one another, if they as next of kin, could avail themselves of the Rules, not to be liable to Costs. I suppose you will hear, that it is a favorable Case, for that all Wills are prima facie, by the old Practice required to be proved by Witnesses;

I think in all Cases where a Legatee sets up a Subseq: Will, you shd order the Party to make an Affidavit, that at the time he received the Legacy he knew not of the Subsequent Will, or that he had power to call it in -

The Dr was right in supposing I should call it favorable, for I do say, that by Law, the Exors shd prove the Will by Witnesses; the Proxt does not say that the Legacy shd be restored, but that the Legatee can't now call upon the Exors to prove - This not necessary to bring in the Legacy, for if the Will is established, the Legacy is paid; if set aside, my Client wd have the Admon, as next of Kin, because the Widow is in mala fide, & as you can grant Admon to the Widow or next of kin, you wd prefer the Person who discovered the Fraud, before that Person who committed

Dr.—
It is agreed that Probate passed in 1767, that the Legacy was paid at the same time, & that the Plt, as Legatee, is in possession of the Rents & Profits of the Houses bequeath'd her by the Will; She now as Dair cites the Extors to prove the Will by Witnesses

& shall she be allow'd to call now, for such Proofs as she might have required at first?

+ much Injustice might arise if a Person merely by getting a Probate, was to be esteemed so fixd in Possession, that he c: not be called upon — Every next of Kin may at any time, call in a Probate, upon fresh Information tho, they sh: have received any advantage under that Will they may have received that Legacy, acquiesced in cautiously & inadvertently; as to the manner of doing it, the Court, I take it, orders the Legacy to be brought into Court, before the Legatee is allowed to contest, as he w: otherwise have an undue Advantage & fight the Extors with their own money; the Extor is not in the same Situation, as if she had been called upon to prove in Solemn form, for if she had, the next of Kin w: have been bound There is a difference between a next of Kin & a Stranger Legatee in ordinary cases, because the first will be entitled in distribution, I order the Legatee to bring in the Legacy, before she calls on the Extors to bring in the Probate — Adderley undertook to bring in the Legacy next Court, Stevens to appear absolutely —

Bye Day H. T.
Prerogative

No 152.

Jones v Chapman

Bargrave — Major — Crespigny

Has the King's Proctor a proper authority to pray an Inhibition on hon. behalf of the Crown?

Q. If Crown entitled to intervene under the special Circumstances of this Case?...

I never thought the Letter of the Secretary of the Treasury, was a proper Authority to the Kings Proctor to appear for the Crown, the Letter should be signed by the Lords of the Treasury; they are the proper Officers, & responsible for the Advice given; Application should have been made to the Kings Advocate, & the State of the Case laid before him, had the Proctor acquainted the Kings Advocate, he would have judged whether a Prayer to intervene in behalf of the Crown was proper; the first Question, is wh: there is an Authority to pray an Intervention — the Crown is entitled to intervene under the special Circumstances of the Case. The Court will next consider wh: The Officers of the Crown sh: take care to have a proper Authority, before which they have no right to ask the Opinion of the Court; I never knew such an Application, as the present, made to the Court — It is matter of Consideration what kind of Right the Crown has against an Admon.

I dont remember an Application made, on the part of the Crown, except in the Case of [illegible] to contest the Interest of the Party It began in Sir Geo. Lee's time the

An Allegation however was given; Dorothy Wilson was the Deed; Stote appeared, & without stating any Degree of Relationship, gave an Allon

generally; the Court said the Cause was open, Parties were not there contending, which varies it from the present Case; I will not go farther; the Crown is not apprized of the Consequences, when they pray to intervene in a new Case, & in a new way; the Case should be fully stated to the Crown by its Officers; the Authority given by the Crown must be as good as that given by a private Person; In Stote's case nobody was in possession no Oath was taken by an Admor; It is a Question of great Consequence, wh: the Crown can call in an Admon at any time; I remember a Warrant signed by the Lords of the Treasury, which was not brought to the Court till after the Board was changed; that Warrant was refused till it was signed by the Succeeding Comrs of the Treasury Here an Admon granted by the Court, is called in by a Party, who alledges himself to be next of Kin to the Deed, he has a right so to do, because I am bound by the Statute to grant it to the next of Kin, who is so, the Parties may dispute with each other: It dont appear to me, the Crown is informed of the State of the Case — Sr Geo. Lee admitted the Crown to be a Contradictor to an Interest. ...

E.T. 2 Sess: Prerogative

Jenner — No 153. — Coxon v Jordan & Hills — Bishop

Dr Harris — Dr Marriott

Dr Marriott

John Coxon is the Deed; he made a Will dated 28 March 1744 & thereof appointed his Wife Alice Jordan, then Coxon, & John Hills Extors: they proved the Will in Feb: 1745: The Deed gave his Extors, 3000 £ in trust for his Son John; & if he died before 21, or Day of Marriage, then for his Wife; he gave the Residue to be laid out in the Stocks, the Interest whereof was to be paid to his Wife for Life, & then to his Son John who was about 9 years old, at his Father's Death; his Mother afterwards was at a considerable Expence in the maintenance of her Son John, & in his Education at Cambridge; the Deed was a Pawnbroker, & his Estate consisted chiefly of Pledges amounting to about 3000 £ — If Mrs Coxon, during her Sons Minority had not carried on the Business, there w: not been sufficient to maintain her, & her Son, or scarce any thing left when the Son came of Age on the 31st of Dec: 1757, at which time he was so well satisfied of his Mother's Care & management of the Estate, that to enable her to live comfortably, he releared his specific Legacy of 3000 £, & accepted of 150 £ Annuity for his Life, in lieu of it, which will appear by a Deed brought in, duly executed — Ten Years have elapsed since the Date of this Release, & 22 Years since the Testator's death; The Son being now in Scotland, & very profligate, has thought proper to call on his Mother, tho, he has no Interest, for an Inventory & Account; Jenner took out the Citation,

Bishop appeared for Mrs Coxon under Protest; Jennes has brought in an Affidavit of Jn Coxon, wherein he says, in a very vague & equivocal manner, that he never consented or agreed to any Writing, whereby he did, or any Consideration release the said Legacy; But the Affidavit does admit, he has received some annual Payment, but qualifies that, by saying it was only 40£ p Annum; & by saying, that since the Libellon his Mother came to Scotland, to tempt him to sign a Release of the 3000£, & to take 100 Annuity in lieu of it — Mrs Coxon made likewise an Affidavit, & therein swears, that he has for 10 Years past received an Annuity of 150£, & also to his signing 3 Receipts for Monies in part thereof — We are now before the Court on these Affidavits, & in consequence of our Protestation, pray to be dismissed, as the Ptt has no Interest; we plead peremptorily to the Jurisdiction of the Court in judgeing of the Validity of the Deed, the Operation of which must be left to the Decision of the Courts at Common law

The Act was read.

In Coxons Affidavit states, his Mothers threatening to go abroad with all the Effects &c

Mrs Coxon in her Affidt swears to her Son being addicted to Drinking, & cant account for his Affairs otherwise than by his having drank away his Senses

D. Marriot — He means to insinuate, that her tendering the 2d Release to him, is sufficient Ground to induce the Court to think he did not execute the first —

We appear in the only way we can, under Protest to the Jurisdiction of the Court, or praying Leave to plead the Release in Bar — It is an Objection primo limine; the Court cant enter into the Validity of the Release, or into the Matter of account between the Mother & Son; It has the same Effect as if we appeared absolutely; for if we were so assigned, we could only plead the Release in Bar; I suppose I shall hear it insisted that the Court may determine an Incidentals, that must be where both Parties admit the Incidentals; as where a Mariner's Contract is sealed, admitted by both Parties; the Point before you, is, whr there is a Release, or not, the Validity of it, is not the Question — John Coxon's Conduct is very remarkable, to suffer the Space of 10 Yrs to elapse before he cited his Mother to an Inventory & account; his coming of Age was the proper time to have called for it; he has now no Right, having no Interest; She is sworn to give an Inventory & Acct when duly required, by Law; She cant be now said to be duly required when her Son has signed a Release; he admits in his Affidt that he has received 40£ from his Mother yearly Mrs Jordan swears to his signing Receipts, for 3 Quarterly Payments, the very year after the Release was signed, amounting to £136. 1A. 6. It is the proper Ground of a

Protest, on a Citation, that there is a Release, & there is nothing before you, to shew it was not duly executed —

Prerogative 1746. Williams & Roberts, Thos Roberts made a Will & appointed an Exr, who died in the Testators life time; Administration with the Will annexed, was granted to Shem Roberts, who said Margaret & Robt Williams, the next of Kin, their distributive Shares, they executed a Release, but afterwards cited the Admor to an Inventory & Account, he pleaded the Release, & the Court dismissed him, on hearing the Petition

Dr. 1764 — Hardwick & Grimston — Grimston was Administrator de Bonis non of Admiral Medley, with the Will annexed; he was cited by Grimston the Nephew to bring in the Will; he at first appeared absolutely, & then under Protest, alledging Hardwick had released 6 Years after Probate & 10 Years before the Commencement of the Suit, & therefore had no right to call for an Inventory & Account, & owned the Release, but said he was in Prison when he gave it; the Court did not dismiss the Protester, but assigned the Nephew to file his Bill, & if the Release within a limited time, (suspending Judgement 'till the Validity of the Release was determined in the Temporal Court — &c to certify the Judge of this Ct. of the Decree in Equity —

D. Harris — The Testator died in 1743, when his Son was only 9 years of age, to whom he bequeathed a considerable Legacy; the Widow & Trustee proved the Will; but how did they execute it? they invested no Sum in the Stocks; the Widow says, she continued in Trade successfully, but in 1752 she says the Effects were worth no more than 2000£. The Widow is bound by her Instrument, to give an Inventory & Account; the Son appears to have behaved in every dutyfull manner, he applyd to her several times for an Inventory & Acct: she put him off for 9 or 10 Years, during which he was contented with receiving 30 or 40£ to keep him from starving; Does this Delay prevent his Demanding it now? certainly no — If they christen these Papers, Releases, it is said, the Court cant enquire into them; I know the Court can judge, & look into them to see if they are Releases or not

XX Chamberlain & Shewston. Ld Raym: 73. Vide ap. fin. — I do not quote this on account of the Case, but the Resolution viz. that the Jurisdiction of the Ecclesiastical Ct shall determine on the Validity of Lres Patent, Releases &c provided in such Collateral Matter, they do not deviate from the Rules of the Common Law —

1750 — Millington & Sowsby — Surbot was the Intestate; Admon was granted to the Widow; Millington, Surbots daughter, cited the Widow to bring in the Admon, & shew cause why it should not be revoked, she not being the Widow? The Widow answered, the Daur had given a Release, which was acknowledged; Sr Geo Lee did not regard the Release, said it was no Bar, because he was bound, by the Statute to grant Admon to the next of Kin whether there was a Release, or not; & added, if it had been only a Prayer for an Inventory & Account, he would not have regarded the Release —

Elements of Pldgs — I will suppose the Releases, signed, as they appear, what are the Circumstances you may look into? he might

mechanically sign the Release; he says, he never heard of or saw the Release till sent him by his Proctor; he has an uncertain Residue; he had a Specific Legacy of 3000 which he gave away for 150£ Annuity for his Life, wch is an exorbitant Sum; She imposed on him, by undertaking, tho' a married woman to leave him largely; she vests nothing in Trustees to pay him 150£ p Ann. (which is no equivalent to the Sum paid, for the Purchase thereof) She affrightens him, knowing what will operate on him: I have supposed the Release real, & that you could look into the internal parts of it; I must now insist it is no Release, being conditional, & on the face of the Paper, the Conditions not performed; the Persons named are to invest a Sum in the Funds, sufficient to pay the Annuity none is invested, & the Persons named have not signed it: If you cant enter into Proof by Witnesses, you may at least look at it, & use the Evidence of your own Eyes; you may observe wh: it is signed, sealed or attested; if it is not; it will be no Deed, on the face of it— we are told of Receipts, but none are produced, & we are referred to a Book, with she has not produced for them; it is strange no better Proof has been attempted; but if there were Receipts, it will not be extraordinary, for the man who will sign a Release, will sign a Receipt— The Release is void for want of the Condition being compleated; I hope you will order the Bishop to appear absolutely.—

A Citation has, in this Case, been taken out by John Copon a Legatee in his Father's Will, agt the Exors to produce an Inventory & Account; at the Testator's death, the Legatee was only 9 years of Age, & the Inventory is said to be called for 10 Years after the Party has signed as Release to the Exors; Bishop appears under a Protest & objects to the Jurisdiction; I shall in the first place order him to appear absolutely, he may afterwards plead in Bar to the Inventory & Account, but till he appears absolutely, I shall not give my Opinion.

In Butlers Case I remember Gosling appeared under Protest the Pl[t] overruled it, he appealed to the Delegates, who said he sh[d] have appeared absolutely, & then the Court sh[d] have proceeded; but till the Jurisdiction is allowed the Court cant do any thing—

The Son is admitted to be a Legatee; as such he has a Right to an Inventory & Account; he may indeed give up his Interest various ways — Before the Statute of Jac: the[y] the Court ex Officio, could order an Inventory & Account, since, it can order it only at the Instance of a Party; tho' it is said Jn Copon has released his Interest; he in his affidavit denies it; the Release is brought before the Court, which must have a right to look into

& see wh: it is duly executed; but not to determine the Validity of it— This has been determined in a thousand Instances, the Case of Hardwick & Grimston, is strong in point; the Ecclesiastical Court would not enter into the Question, till the Temporall[t] had determined wh: it was a valid or not: wh: Fair or fraudulent this Ct will not determine; In this Case the Release is denied by the Party; It is on the face of it not general, but Conditional, if the Party did so, or so, & may be; if the Condition is complied with; the Release is on Condition that the Widow shall lay out Money in the Funds, & vest it in Trustees; if it had been duly executed by all the Parties therein mentioned, I cant say it is a good Release in Bar— I mean a Release appearing fully executed, is not to be examined, wh: fraudulently, or how obtained— It was determined in Millington, Sorrell That a Release was not a Bar to the admon claimed, but to the Inventory

This Release appears not to be duly executed, & therefore I decree it to be no Bar, & direct an Inventory & Account to be given by the first Session of next Term.....

Bishop appealed

Release not executed so as to be a Bar to an Acct. pro

D. Raym: 73. S.C. 1 Salk. 118. 5 Mod: 69

XX Chamberlain v Hewetson

The Pl[t] Moved for a Prohibition to the Sp: Court, on a Suggestion that the Def[t] preferred Articles in the Sp: Ct: agt her for Incontinency with Mr Hewetson's Husband, & obtained Sentence against her; Mrs Chamberlain appealed to the Court of Delegates, who confirmed the former Sentence, & decreed the Pl[t] to do penance & pay Costs to Mrs Hewitson: afterwards the General Pardon issued, by which the Penance was pardoned; & now the Def[t] libelled in the Sp: Court for the Costs, where the Pl[t] pleaded the Release of the Def[ts] Husband which the Sp: Court disallowed, & therefore she prays to have a Prohibition granted.

Serj[t] Wright for the Def[t] argued agt the Prohibition, that,

D. C. 33. 1 Ro. Ab. 549. Regula principalis, Ei incumbit probatio qui dicit, non qui negat. to prove which Rule, & apply it to the present Case, he cited 4 Ass. 17. Stanley & Barton Hetley. March 75. p. 112. 2 Roll. 269. Roberts Case.

a Feoffment was tried in the Sp: Court between Trotter & Sheldon.

2. He argued, that it were in vain for any Wife to commence a Suite agt the Adulteress, if this Release sh: be allowed to bar her of her Costs, which are merely the Charges of the Suite, to bring the Criminal to Punishment, therefore these Costs ought not to be releasable by the Husband no more than the Case of Sir Bartholomew Shower

for the Pl[t], argued that the Prohibition ought to be granted, & of that Opinion was the whole Court, and Resolved 1. That the Jurisdiction of the Ecclesiastical Ct shall extend to the Determination of the Validity of Letters Patent, Feoffments, Releases &c which come in Question there, in matter properly within the Ecclesiastical Cognizance, but in the determination of such Collateral matters, they do not deviate from the Rules of the Common Law, for if they do a Prohibition shall be granted.

1 Bol. Rep: 426. 2 Bol. Abr. 298. p. 1. 300 pl. 10.

2. It was resolved, that if a Feme Covert, sue another in the Sp[l] Ct for Incontinency with her Husband, & recover Costs, provided

is liable to the Charges of the Suite, expended by the Wife, he shall have the Costs in Recompence, besides that, the Wife cannot have

a Chattel Interest, exclusive of her Husband; but if the Husband dies, the Wife shall have them, because they were a Chose in action, & they shall not go to the Exors of the Husband; But if the Husband & Wife are divorced a Mensa & Thoro, & the Wife has Alimony allowd her, & she sues for Defamation, or other Injury, & recovers Costs, & the Husband releases them, yet the Wife shall recover them, because they come instead of that, which she has expended out of her Alimony, which was as separate Maintenance, & not in the power of her Husband, & this is the reason of , But if the Wife has a Legacy left her, the Husband may release it — In the principal case a Prohibition was granted. . . .

Prerogative — Cumberlege. No 15A — Cowper v Turner — H. Stevens

E.T. 3 Geo — Dr Wynne — Dr Bever

A are Pawns Bona Notabilia? Can the Ch: take Cognizance of a Set Off? . . .

Wm Cowper of St Mary Newington Surry, in the Deanry of Croydon is the Deed — He made his Will dated the 22: of Sept.r 1766, thereof appointed Rebecca Wife of Thos Turner, his dautr, sole Executrix — The Testator died the 26th of Sept.r 1766, having Goods &c in different Dioceses or Peculiars to the value of 5£ & upwards, sufficient to found the Jurisdiction of the Prerogative Court — On the 26 of Sept.r 1766. Rebecca Turner proved the Will, in common form, in this Court — The same Day Catherine Cowper Widow & Relict of the Decd proved a Will of a prior Date (viz. 8 Sept.r 1766) as Executrix therein named, in the Peculiar of Croydon —

A Citation was afterwards taken out & returnd agt Rebecca Turner Ex.x in the Will 22 Sept.r 1766, to bring in the Probate, & shew Cause why it should not be revoked, for want of Jurisdiction, at the promotion of Cath: Cowper aforesd

25. M.T. 1766 Cumberlege appeared for Rebecca Turner

4S. . . . . He brought in the Probate — M.r Stevens, for propounded the Jurisdiction & asserted he gave an Allegation

This Cause comes on now, upon our Allon & the Answer of Mrs Cowper —

Allon — Pleads the Jurisdiction, & that Cath: Cowper under the Will proved by her, had taken possession of the Decd's Effects; particularly his Books of Accounts, by which it would appear, the Decd had at his death, Goods, &c in divers Dioceses, or Peculiar Jurisdictions, amount.g to 5£ sufficient to found the Jurisdiction of this Court. .

Answer — Mrs Cowper admits, the Testator kept a Pawn & -broker's Shop at St Mary Newington, but denies he had Goods &c to found the Jurisdiction — She admits having the Custody of 3 Books of Accounts of the Decd, which she intends to bring into the Registry; that it did not appear thereby, he had left 5£ &c in diff.t Dioceses &c

That Nehemiah Ward of the parish of St George Southwark was indebted to the Decd in 5£ or a larger Sum for Goods sold & delivered . . . .

Mrs Cowper believes Ward was indebted £ 5. A. 6 1/2 to the Decd, who was indebted to Ward £ 2. 0. 1. & that there was a Balance of £ 3. A. 5 1/2 due from Ward to the Decd, nomore . .

That Samuel Stacey of St Geo: Southwark was in-debted to the Decd £. 0. 12. 6. for a Quarters Rent due at Mich.s preceding his death . .

The Decd died the 26th of Sept.r & the Rent was not due till the 29th, therefore it was no debt to the Decd. & did any Proportion belong to Decd?

Thos Mason of Stockwell, was indebted to the Decd £. 0. 6. 0. & had a Watch of the Decds, in his Custody worth at least £ 3. 3. 0.

Admits both these Items; Believes the Watch worth about £ 2. that Decd was indebted to Mason £ 1. 10. 0. which made the Balance £ 0. 16. 0

That Mrs Brinkly of Streatham owed Decd £ 2. 15. 6. & Mrs Biggs of Streatham owed Decd £. 3. 10. 0

Admits the 2 Items, but says Goods were pawnd with the Decd for the same, at Newington, which she apprehends confines the Locality of the Debt —

Now we apprehend, the Residence of the Debtors, & not the Locality of the Pawns, must determine the Question of Bona Notabilia

The proper Reply to these Answers is, that as it appears upon the face of them, that above 5£ was owing to the Decd from Persons who live out of the Peculiar, that is sufficient to found the Jurisdiction of this Court, as to the Balance. the Court cant enter into that Question, it being matter of Account; I wont lay any Stress on the Rent, because it dont appear of what Nature the Estate is — The Locality of the Debt, is determined by the Residence of the Debtors, except in Cases of Specialty —

Deposits are a kind of manual Mortgage of Personals; Pawns are of a superior Value to the Money lent, therefore it.s be a matter of Account, which disables this Court from the Cognisance thereof

Dr Bygrave — Taking the whole of Wards Debt to be due, it is no more than £ 3. 4. 5 1/2 for the other Debt averred by us, must be a Set Off: So that this cant of itself make Bona Notabilia

The 3d Art: states Staceys being indebted 1/2 of a years Rent; Our Objection is founded on the very Act of Parl.t cited by Dr Bever; for we say, the Party dyeing before the Rent became due, it goes to the next Person entitled to the Premises, & not to the Exor — Joh: doubt whether the Watch, under the circumstances stated, could be considered as a Thing of that Nature, as to be Bona Notabilia; If it is no debt, but was accidentally left with the Party, to prevent the Owner being robbed of it; It resembles the case of Goods a Man has with him, who dies on a Journey —

As to the 7, 8 Arts it is clear the Money taken up, on the Pawns, could not be Debts at the Decds death, because the

v. Salk: 378. . . . N.B. prior to 4 Act of Parl.t

v. Geo. 2 for better pay: of Rents. . . .

Salk: 522.....
Owen 124.....

Decd cr never come by Process to claim the Debt; he cr have no Action of Debt; there is a special property in the Pawnee, defeasible upon Tender of the Money. He may say if you dont come & redeem the Pawn in such a Time, I will sell it; but he cant bring a Process agst the Pawner, because he has what is more valuable—

The Watch comes under the Description of Bona et Catalla; the Question of the Property of a Pawnbroker dont apply, for however he may have a Property, the Pawning dont extinguish the Debt; It exists in the right he has to dispose of the Goods, when the time stipulated for Payment is elapsed

Judge D Hay...

Questions of this kind are not pleasant, but Jurisdictions must be ascertained for the Benefit of the Subject, that they may know where to apply properly. If the 92d Canon was universally attended to, some of these Questions wd not arise; I think the practice of the Canon shd be enforced; when a Probate is applyd for in an inferior Jurisdiction, the Party applying shd take an Oath, that there is not Bona Notabilia where that Oath is not taken, the Probate shd be recorked; I will see wh the Rule is observed in this Peculiar, & set the Example to others: if they had come & pleaded, that the Oath was not taken, I shd revoke the Probate pursuant to the Canon: I have no Difficulty in the present Case; a Probate was taken out in this Court the Day the mandate; the same was done in the inferior Ct on a Will of a Prior date to wm Turners— The Plea comes up to Bona Notabilia; no other Proof being offered, I must take the Answers to be true; but in general Answers are to be received, no farther, than the Party has a right to answer; for if a Plea had been offered stating the Account & Sett Off &c not have received the Allegation, if so, I cant enter into that Question on her Answers, as it wd give a larger Power on Answers, than she was entitled to on the Plea; this Court cant enquire how the Debt arose; it is sufficient if the Deed had Debts due to him, out of the Jurisdiction where it is dated; I apprehend Desperate as well as Sperate Debts, or those wch are barred by the Statute of Limitations wd found the Jurisdiction Stake it, the Pawner has the Interest in the Pledge, the Pawnee has no absolute, but a Conditional Interest; if you dont redeem by a limited time, I will sell the Pledge; if a Case of Bona Notabilia came before me, I shd order Precedents to be search & not determine the Question hastily; Sir R Raynes

always pronounced for this Jurisdiction

I cant go into the Question of a Set Off; & think there is sufficient Ground to pronounce for the Jurisdiction of the Prerogative Court & to dismiss Mr Turner: with 5£ nomine Expensarum— The other Probate is not before me, & therefore I cannot take Notice of it..... Dest dismissed with 5£ nom: Expensarum.
NB. The reason the Judge gave 5£ was, that the Expense of the Interlocutory Decree was £1.6.8. besides the cost of the Allegation & Answers.....

E.T.4 S. May 14 Prerogative

Goodwin No 155 Ly Mary Herbert & Pritchard. v Ld Gage Greene
Dr Harris & Wynne. Dr Calvert & Burrell

Dr Calvert—

The Hon: Jos: Edw: Gage made his Will & Codicils of wch he appointed Ly My H. & P. Exors— a Caveat was entered for Ld Gage as Nephew & next of kin; his Interest was confessed by the Exors, who propounded the Will & gave an Allon wch was admitted on this Allon several Witnesses have been examined, & amongst the rest Albany Wallis Esq to whom Greene administered Interrogs for Ld Gage. Mr Wallis has declined answering fully to the 2d. 5th 6th & 7th. Greene objects to his Answers, as not full, & prays a Monition agt Wallis, to appear at a certain time & Place to answer them fully & that this Cause may be continued, in the State it now is, 'till Wallis shall have undergone such further Examination; Goodwin dissenting & alledging, the Allon given by his Clients was admitted on 13th day after Trin. Term. 16 July 1767 & Ld Gages Answers decreed, that such Decree was served on Greene & returnd 3d Sep. 1767 & continued to 3 Oct: when Greene was assigned to give them by 3d. M.T. from wch time the Assignation has been continued to this Day without Effect; & Goodwin insists Greene has no right to be heard as to the Sufficiency of Wallis Answers to the Interrogs 'till he has brought in his Clients Answers on Oath; but if the Ct shd think Greene has a Right, Goodwin insists, that it appears by Wallis Answers to the 7th Interr: that he is Solicitor to Ly M. H. & M. P. therefore ought not to be compelled to reveal his Clients Secrets, & that the Answers are full so far, as relates to the Merits of this Cause, so prayd Grenes Petition to be rejected. Greene dissenting & alledging, that Goodwin has proceeded to the Proof of his Allon & Will & Codicils therein pleaded, by examining Witnesses, praying Publication, & calling on the Cause for hearing, & therefore that his Clients wd not be benefitted by D Gages Answers, & that his insisting on them will only create needless Delay.

Ld Gage & Interrogs wch with their Answers were as follow

Do you — believe Ly Myth. is possessd of any & what Fortune Real or personal in Great Britain, where situated. Where, & how invested, how does she maintain & support herself?

2 wh Mr Wallis has answered fully to 4 Interrogs: if not, wh wh: they are pertinent, & wh Ld G. insisted to object to: he has given us his answers?....

Answer to 2 Inter.

He is not by Law obliged to answer, by reason he is an Attorney & Solicitor for the said Ly M.H.

3 Inter. Is Jn Pritchard possesd of any & what Fortune either Real or Personal in y^e Kingdom of Great Brittain, where situated, how & where invested?

Answer As Resp^t is Solicitor for Jn Pritchard, he submits he is not obliged to set forth, what Fortune Jn P. is possesed of, or how, or where situated?

4 Int. Did not you as Agent or Solicitor for the Testator y^e Hon. Jos: Edw. Gage, file a Bill in Chancery, & when, agt Ld & Ly Farnham, or some other Person, & whom, relative to the Sum of 38000£ with Interest thereon at 3 p^ct p^ann: from 1720 due to the said Testator, from Henrietta Cantillon afterwards Ly Stafford, as Representative of Rich^d Cantillon Esq^r deced, & from her 2^d Husband Ld Farnham? does it not appear from some & what Proceedings in the said Suite, that at Xmas 1742, there was due to the said Testator, or that he claimed from Ld & Ly Farnham, on account of said demand & Interest 70.000£, & does not such Debt with Interest from Xmas 1742 to the present time amount towards of 140,000£, or some other & what Sum?

Answer He was employd by the Deed to carry on a Suite in Chancery for the recovery of a large Demand, from the Representatives of Rich^d Cantillon Esq^r deed, but submits, he is not obliged to set forth, the State or Proceedings of the Cause, or the Quantum of the Demand—

5 Int. Are not the Proceedings in the afs^d Suite in Chancery ment^d in y^e preceding Article, wholly abated by y^e death of the Testator, & by whom & in whose name, must such Proceedings be revived, & in case Ly M.H. or P. or either, shall obtain a Probate of the afs^d will & Codicils, will it not be wholly in the Option, of the Person obtaining Probate, to discontinue or revive said Suite, or to compound such Demand, for any Sum, they may think proper to accept?

Answer The afs^d Suite abated by the death of the Deced. & must be revived by his Representatives; he apprehends, if Ly My H. & J.P. obtain Probate of y^e Deced's Will, they will have the same Power, which other Exors have, to discontinue, or revive the Suite, or compound the same; but how far the Powers of Exors extend in Cases of this nature, must be determined by Law, & not by this Deponents Opinion—

Dr Calvert— It is laid down in Clarke's Praxis, that, If a Party shall not answer fully, or refuse to answer at all; or say he is not bound to answer, the Ct will assign to hear thereon & if reasonable, will order further Answers—

The first Objection is peremptory— Your Proces wd: oblige them to answer; they are as much in delay, as we are in not calling for our Answers, they wd: now be of no use, as they have examined the Witnesses on their allon; Clarke says, a Witness must answer Interrogatories

if they are pertinentia ad causam, but it is not necessary to be so strict, as that they shd apply immediately to the cause in dispute, wch in the present instance, is the Validity of the Will; Jnterrog^s may be put to answer any incidental Point; the reason for our desiring fuller Answers, is to found a Prayer, that you wd: not let Probate pass to these Exors, without their giving Security: To be sure where a Council or Solicitor is entrusted in any Cause, he ought not to reveal the Secrets of that Cause, but he may speak of things which do not relate to it; An Answer to the Power of compounding y^e Suite ment^d in the 7th Article is very necessary; if they are poor, they may compound it for a trifle, & thereby prevent our recovering what we are entitled to under the Will— The State of the Deeds Effects ought not to be kept Secret, it can be attended with no Advantage & may at any time be ascertained by calling for an Inventory—

D^r Burrell— The Opponents have insisted by way of Bar to our Application, that we have no right to object, till we have given in our Answers; An Observation wch can have very little weight with the Ct, when you recollect, Sir, that they have examined their Witnesses, published their Depositions, & called on the Cause for Sentence, the View with wch Answers are called for; is to save Expence, by unnecessary Proof, as the Proof in this case is made, our Answers now wd: be superfluous; had they objected early in the Cause, perhaps the Ct wd: have stopped Proceedings till we had given them in, but it is now too late to answer any Purpose; Our Information as to the Circumstances of the Exors, becomes very material, by reason of the Demand, on the Cantillon Estate, & will be the foundation of a motion, of the utmost Consequence to my Client, which he intends to make at a future day, viz. that you not decree the Probate to Ly M.H & J.P. till they have given proper Security ———

D^r Harris— I never remember the Answers of a Witness to Interrog^s objected to before; it may be proper, tho, I dont know it; the Question is wh^r the Interrog^s are answered fully, & if not, wh^t Ld Gage is entitled to object, he not having given in his Answers, which we cant compel him to do, by the usual Proces, as he is a Member of Parl^t A Man that will have Justice, must do Justice, the only method you have to enforce a Compliance with your Orders, is by denying him Justice till he gives in his Answers. I wont stop here, Clarke says Pertinent Answers must be given, but they must be given to pertinent Interrog^s What are these Parties, they are Exors, so immaterial wh^r Rich, or Poor: I never knew Exors give Security in this Court; Mandamus^s have issued whenever Security

has been required; the Drs talk of a Proayer they intend
to make, but treat it as actually made, & argue from
it — Mr Wallis was Solicitor to the Testator, whose Exors
& Representatives the present Parties are; they want to
steal an Opinion from Mr Wallis as to the Quantum of
the Estate — I hope you will think he has answered fully
to the Interrogatories, & reject Greene's Petition with Costs —
Till a Party has given in his Answers, he cant pray a
Term Probatory, cannot stir a Step, or oblige the Opponent
to give an Issue in the Cause; Our Client did not want
that Advantage; we chose to bring the Cause on; It is by
Ld Gage's contempt in declining to give his Answers, that
my Client has been put to the Expence of examining
Witnesses — It is inconsistent with humanity & would be
a Breach of Trust in Mr Wallis to reveal his Clients
Secrets; if that was allowed, it wd be impossible to carry
on Business, or preserve Confidence inviolate — These
Interrog: might be properly put to one Person, &
very improperly to another. We might say with as
much reason, that the Interrog: are improper, as they
insist the Answers are. I deny that all incidental
Points in a Cause, are proper to be spoke to; it is not
right to ask after a Constat of the Estate, when the
Validity of the Will, is the Question in issue
The Question is wh: I shall order a monition for the
Reexamination of Mr Wallis to the Interrog: I wish: I shall
stop the Cause till he has answered. If 2. 3. 6. & 7 Interrog:
The Drift of the 2d & 5th is to know the fortune of the
Exors, & the Proceedings in the Chancery Suit in 6 & 7 Int.
Mr Wallis excuses himself from answering, on account
of his being Solicitor in the Cause — I am clear, that
he has answered the 7th fully & properly, as a Lawyer he
refers them to the Law — It is said Ld Gage is in Contempt
& therefore has no right to object — Answers are to be
given in the first Place, & for default thereof the Opponent
may refuse to proceed, or may go on, as he chuses:
I apprehend
However, at that time, they
did not come & object to his examining on Interrogatories
but admitted it, & I am inclined to think, the Party
who has not given his answer, (tho perhaps not entitled
to plead) if his Opponent, examine Witnesses, may cross
examine them notwithstanding; therefore the Objection
is not peremptory at present — the next Question is
wh: the Answers are full? now nothing is more clear
than the Impropriety of a Counsel, Solicitor or Proctor
betraying the Secrets of his Client by his Answers
I am clear the Interrogatory, is not pertinent with

respect to the Matter in Issue, i.e. the Validity of the
Will; Ch. but say they, this leads to an incidental Point
when that comes before me, I shall give my Opinion upon
it; you can lay those Circumstances, before the Ch. in a
regular way, by Affidavits; why ground your Motion
by fishing for Information from the Opponents Solicitor
It wd be proper to object to the Circumstances of a Party
in a case of Admon; but not in the present case; I
think Mr Wallis has answered fully, & shall decree
no Monition for his Reexamination, but give no
Costs —
Greene asserted he gave an Allon on admission rept &
c if not admitted, that y Cause sh be assigned for Sentence
on the 2d Assignation, & Prayd a Reprimand to take Affida-
vits, which was decreed accordingly — — — — — — —

W Answers decreed full. y Monion for his Reexamination refused — — — —

Trin: Term 1 Sess. Prerogative — Dr Harris — Fountain — Battier & others v Robinson — 156 — Longden

Dr Harris & Burrell — Dr Calvert & Wynne.

3 Sess. E. T. 1768. Fountain as Proctor for Jn Rudolph Battier Junior. James Hall, & Peter de la Rive, alledged, that Wm Richardson late of Bros Oak in Wilts, but at Pensacola, the Party deceased, whilst of sound mind &c, duly made, executed his last Will & Testament in writing, dated Nov: 29. 1765. & thereof appointed his Clients abovementioned, Executors. That a Caveat being entered, against granting Probate thereof on behalf of Mary, Wife of the Rev: Wm Robinson, it was warned, & on the Caveat Day after Hil. T. Philips exhibited as Proctor for the Exors, & prayd Probate might be granted to them — Longden exhib: for Mary Robinson, alledged her to be Sister & next of Kin of the Decd; Philips was assigned to answer to her Interest, & both Proctors to exhibit Scripts & Scrolls on the Oaths of their Clients by the 10th of April.

10 April. Philips brought in De la Rive's Affidavit with the Will annexed

1 S. P. S. Philips exhibited a Proxy & confessed Longdens Clients Interest; & Longden brt in a Commission with Scripts on Oath of his Client & approved the Will — Philips propounded it, & asserted he gave an Allon, wch was admitted

2 S. Trin. T. a Commission for Examion of Witnesses was decreed & Philips Return'd viz Sept

3 Sep: 1767 The Commission was returned, Publication decreed, & the Cause assigned for Sentence on the 1st Assignation 1 S. Mic: T.

1 S. Mic. T. Longden asserted he gave an Allon wch was admitted 8 Jan: 1768 & a Decree for Answers decreed.

2 S. . . . The Decree was returned

3 S. . . . Philips appeared & was assigned to give his Answers by the Bye Day

In this State of the Cause, Philips Clients applyd to Fountain to conduct the Cause for them for the future.

Q wh: after Publication is past & Cause called on for Sentence only first Assignation? if Proctor who called it on, is entitled to correct any Omissions of his Proctor, making Affidavit he has not seen or been informed of y Contents of the Depos — vid Oughton Tit. 81 Qu 97 & 98 Gail Lib. 3 Observ: 105 nu. 2 — —

who finding That Anne Richardson the Widow, Relict of the Decd (who has no benefit under the Will) was not made a Party to the Suite.

Hill v Handford That Geo. Bell one of the subscribing Witnesses to the Will & a Legatee therein had been examined without releasing his Interest.

That Sampson Bennet a subscribing Witness to the Will was dead, since the Testator; & his Handwriting was not pleaded in the Condicit.

4 S. Hil. T. 1768 exhibited for the Exors, as hereto fore exhibited by Philips, prayd a Decree agt. ye Widow

Jones Proceedings

5 S. E. T. The Decree was returnd with Certificate of Execution; the Widow has been thrice called, not appearing, ye Certificate has been continued to this day

Fountain alledges, that, tho. Publication has been decreed, neither of the Parties have seen the Depons, or been acquainted with the Contents thereof, as will appear by their Affidavit, therefore he prays, he may be allowed (in pain of the Widow not appearing) again to propound the last Will of the Decd. (dated 29 Nov: 1765) that Geo. Bell may be at Liberty to release his Interest under the Will, & be again produced & examined as a Witness on the said Condicit, or together with the other Witness, repeated to his Deposition thereon — Longden dispenting & alledging, that as Publication has passed, the Cause been called on for Sentence, on the first Assignation at Philips v Peton, by Law & Practice the Witnesses ought not to be repeated to their Depons, & prays Fountain v Peton to be rejected . . . . . .

Dr Harris It is usual for Proctors to give the Reasons, in their Act on which their Objections, this has not been done in the present Case — It would be absurd to say, we may not cite the Proper Parties now, whose might cite originally; The Question is, wh: a Legatee in a trifling Legacy, is an Incompetent Witness, & wh: his Evidence shall be rejected because he has not released his Interest? the Legacy in the present Case is only a Silver Canister; now can it be conceived that Mr Bell who is Agent for the Packet at Falmouth would be influenced by such a Trifle; the Repeating him to his Depon is mere matter of Form but if you have any doubt in that respect, we pray him to be reexamined, which will be an Advantage to them too, as they may interrogate him; You have the Affidavits of 3 Persons; all the Satisfaction that can be expected may be had.

Dr Purrell The present Application of my Clients, is, that you would allow them the Liberty to rectify the Mistakes of their former Proctor, an Indulgence we hope the Ct will grant, if no Inconvenience is likely to ensue; As Mr Longden has assigned no other Reason for his Opposition, than that it is contrary to Law & Practice of this Ct, I shall consider those points only; with Respect to the Law, I know of no Rule decisive therein

1 Oughton Tit 81 . . . Si Pars Actrix vel Rea, produxerit Testes, eorum Dicta publicari obtinuerit, et eadem percontata fuerit, tamen si post Publicationem & Percontationem hujusmodi (id est post publicatas Attestationes) de novo pervenerit ad ejus notitiam, quosdam alios Testes fuisse sibi admodum necessarios; poterit re integra existente (id est ante Conclusionem in Causa) si fuerint probendes in Judicio, eos producere; et sunt recipiendi & admittendi . . . .

Ib. Tit 97. Sq. . . Pars Adversa potest compellere Procuratorem, vel Partem Principalem, Materiam contrariam proponentem, vel Utrosq, ad praestandum Juramentum, quod nec per se, nec per aliquem alium didicit vel percontatus sit Dicta Testium Adversarij . . . . .

Gail. Lib. 1. Obs: 108. nu. 2 Effectus Publicationis est, ut super iisdem, vel directo contrariis articulis, in eadem vel alia Instantia, iidem vel alij Testes produci nequeant, Ratio est, Timor Subornationis.

Sed talis Effectus in multis Casibus non obtinet.

Primo, fallit, si facta publicatione, Pars nondum Copiam attestationum habuerit; aut habita Copia, testificata non dixerit, quo casu, cum cesset ratio Legis prohibitiva, alij testes produci poterunt, etiamsi altera pars dixerit testificata; nam sola Publicatio, non excludit aliquem à facultate alios testes producendi, sed Scientia dictorum.

The Rule of law, then does not relate to all Cases, but is founded upon a Supposition, that after Publication all the Parties concerned, are acquainted with the purport of what the Witnesses have sworn, & therefore to prevent Perjury do not in general allow Examinations to be taken after that Period, unless ample Satisfaction is given, that the Depons have not been seen, & for the greater Caution the Parties may be obliged to make Oath of their Ignorance in that Particular; upon this Principle, the Practice of the Ct has been, to allow Witnesses to release their Interest, when Satisfaction was given that it w: be attended with no Inconvenience — Hill v Handford "Witness had not released a Legacy of 5£. it was therefore necessary to repeat him to his Deposition, which was done on exhibiting the Release, but the Deposition was not altered —

If in the present Case the Ct is satisfied, we have not seen the Depons, (& in that particular, there can be no doubt,) & that consequently the Grant of our Prayer will not be attended with any bad Effects, I hope we shall be allowed to repeat Mr Bell to his Depon, after exhibiting the Release of his Legacy . .

Dr Calvert . . . . This Petition comes after Publication; there is no Affidavit of the Proctor; his knowledge of the Depons is most material if any Advice can be given, it is most likely to come from that Quarter; the Change of Proctor does not render it more favorable; the Cts dont allow of such Excuses, as that the Proctor was mistaken, care shd have been taken to have applyd to a more proper Person originally; It is not sufficient to say, I have done wrong, & want to amend my Error; every Party is to clear his Case, as it goes, his Mistakes are beneficial to his Opponent; vigilantibus non dormientibus succurrit Lex; if the Ct indulges one Party, it is at the expence of the other: The Widow has not been cited; Bell has not released,

Bennets Handwriting has not been examined to; The Prayer is not to be at Liberty to call the Widow, that we shd not object to — If Bell cant be reinstated in his Credit, you will not allow him to be reexamined; If the trifling Legacy is no Objection, why should they desire to reexamine him, it may remain in its present State; the Ct is strict in all these matters; an interested W: is always considered as incompetent the most minute Interest is an Objection at Common Law Does not the W: remember what he deposed, he cannot go back; he may have seen the Depon: It is common for the Examiner to admonish the Witness not to disclose what he has deposed — It dont appear the W: was reexamined in Stile & Hand fore after Publication.

Dr Wynne — The Repeating the Witness, is not a matter of form, he is Testis in re sua, the Court goes on general Principles; in their Act it is stated, he is a Legatee, but not whether he is a specific Legatee, or how. Independent of the Value of the Legacy, can a Witness who is a Legatee be reexamined; can you remove the Bias which the Law presumes was on his mind, when examined if you can, you restore him, else he cannot be produced as a good W: at any time; It is impossible to remove the Bias; for suppose his Interest released, his Reputation, his Safety is the same; he must depose the same matter, wh: you repeat him, & reexamine him; It is stronger after Publication, there is too often, a Person behind the Curtain (who is not visibly concerned in the Cause) called an Attorny, he may whisper, it will be improper, to examine such a Witness, over again; it is impossible to obviate the Difficulty, as what ever may be the Determination, some Party must suffer.

Dr Harris — The Dr allows it is a misfortune to a Party to employ such a Proctor; you will consult your own Breast, what is, & what is not a material Interest: the Value of the Legacy, & the Station of the Person is to be considered; the Dr granting the Ct cd go into general Principles, you might have thought if we had not applied, that for these Reasons he w: not be so interested, as to destroy his Competency; the Office can give the Satisfaction, that the Depons have not been seen or copied; if he cant be supposed biassed, he may retract —

Judge / Dr Hay — I am not surprized the Party has changed his Proctor, for Philips did not inquire wh: the W: was interested, or not, the Q before me, is, wh: the mistake as to Geo Bell, can in the present State of the Cause, be rectified: he appears to be a Legatee in a trifling matter; it is said, if he had not released, he w: not be repelled, but I know Cases, where Witnesses have been rejected in this Court for very trifling Legacys, if that Doctrine holds, it will destroy the Prayer, & can: if the Smallness of the Legacy will make him a habile Witness, there will be no occasion for this Application; there are great Objections to Repeating, & to reexamining; I expected Precedents to have been produced,

matters of Practice, in the Law of the Ct, are not to be determined on general Principles; I think there was a Case determined on general Principles; I think there was a Case in Sir Geo. Lees time, where a Witness was brought to be reexamined, who had not given a full & sufficient Release; the W: had been examined in the Country, by Commission, the Proctor made the same Application; Sir Geo. Lee said it might be done, & that it was the Duty of the Ct to support a W: where it can be done consistent with the Rules of Law, the Practice of the Court, & without danger from Consequences, but this was before Publication wch distinguishes it greatly from this Case; I remember Cases, where the Ct has rescinded the Conclusion, to let in matter, to support a Witness: I dont recollect any Case where a Witness has been reexamined or repeated after Publication: This goes a Step further than the Cases wch occurr to my Memory; I am clear he ought not to be reexamined, even if he could be repeated, & that there must be Satisfaction given, that he has not seen the Depos: The Ct will give all the Aid it can; & therefore let it stand over to the next Ct, that Precedents may be searched for & produced.....

Sentence to stand over & Proceedings are search'd for wch see fol. 375

Arches — Gosling No 57 — Dr Newcome v Dr Markham. — Altham

2 S. Trin: T. — Dr Harris, Wynne — Dr Calvert, Bever.

Dr Harris... — Dr Newcome procured Letters of Request from the Consistory of Rochester, in a Cause of Dilapidations of the Deanery of Rochester The Citation was returned the 2d Session of Easter Term, & Dr Newcome was assigned to libel by the 4th Sess. That Assignation has been continued to this Day, & we are now before upon the admission thereof; It states that Dr Markham continued Dean of R. 2 Years 6 Months, & that Dr Newcome was installed Dean of R. 21 Novr 1767. That Dr M. received from the preceding Deans Exors £1050. with which Sum, he undertook to compleat the Building, & to add, of his own free Will, any additional Sum which might be wanting; that he obtained a Faculty for pulling down that Part of the Building, called the old Deanery, & building on the Scite thereof, a Housekeepers Room, Passage, Brewhouse & Laundry, that he has erected no Housekeepers Room at all; nor the other 3 in the Place specified, & left them unfinished — That in carrying on his intended Plan, a particular part of the House is affected, & cracked so much, that it must be taken down, & rebuilt: That it is the Opinion of a Surveyor, the Execution of Dr M's Plan will exceed the £1050 received, £807 — Our Prayer therefore is that Dr M. may be obliged to finish this Building according to the Plan given in when he applyd for the faculty; and to reimburse Dr N. the Expence of applying for a Faculty to authorize the Alterations made by Dr M. from the original Plan, to prevent Dr N's Exors being involved in Difficulties.....

Dr Calvert... — Dr N. has brought this Suit to oblige Dr M. to compleat the alterations he had begun; it seems Dr M. had obtained £1000 from his Predecessors Exors, applyd for a faculty to pull down part of the Edifice & to make Alterations, but was promoted to St Church, before he had compleated his Plan. The Q. is as to the Admissibility of the Libel?

2. Is the Libel admissible as laid

I might observe upon the Article, wch pleads the Jurisdiction, that it is inaccurate, pleading his being in the Province of Canterbury & therefor liable to the Jurisdiction, wch is not a consequence, since the Statute of Citations — We say no Dilapidations happend in Dr M's time, who never lived in the House. You are not tied down to the nice forms of Common Law Cs unless it appears, Dilapidations of some Consequence happend in Dr M's time, you will deem it sufficient if he delivers to his Successor, the Sum he received from his Predecessor. The money recovered in Bp Gooch's Case was paid over to the succeeding Bps; It has been a Question indeed, wh? the Exors could lay out the money — The present Dean cant expect to come into a new House; it wo? be an unreasonable Restraint, & discouragement to y? Improvement of Ecclesiastical Houses, if a Person was tied down to a strict compliance with the Faculty — Gibson wishes, the Party improveing, might have a certain proportion of the money advanced, returned to him; This Libel wo? be irrelevant if you Sh? think no more due than the 1050l but if you conceive he is liable to pay the Surplus pursuant to his original Plan, the Libel must be admitted, & we must plead a different Estimate

Dr Bever — All Compositions are to be intended fair Agreements for the Dilapidations libellate; Can they say, what was sufficient for Dr M. is not for his Successor; we may conclude the Sum a fair equivalent —

Dr Harris — We have been entertaind with an ingenious Declamation about Dr M's Exemption from this Suit; we are told the 17th Article is not full, I think it is, but will make it fuller if you are of a different Opinion; I will say Dr M. is generous; he has undertaken in the faculty to do it for himself & his Successors; does he now want to recede? the Ct will not let him, & will have great Satisfaction from an Article in our Libel, that Dr M. is able to make good his solemn Promise out of the extraord? Profits of the Deanery which are 700l more than communibus Annis Dr M. himself makes Dilapidations, he leaves the Building unfinished —

Dr Dyonne — Is it reasonable that an Incumbent, the moment he enters on his Benefice, Sh? be obliged to expend many hundred Pounds; I dont say he may not be obliged to paint & white wash; but if floors are wanting he may make his demand on his Predecessor, who being insolvent, unless he can shew he used the most proper & expeditious methods to recover the money, his Exors will be liable to the Demand of the next Incumbent. —

Judge — Dr Markham having appeard to the Jurisdiction, there Dr Hay — can be no doubt on that head; the Libel makes it an extraord? case: Dr M. was Dean of R. a short time, during which he did his Duty, in receiving the money due for dila-

=pidations from the Exors of his Predecessor; Then he applied for a faculty to the Bp, wch was granted after proper Steps were taken. The Material Articles are the 12th & 13th — which say Dr M. has deviated from the Plan he gave in to the Bp, made Alterations & less expensive than he proposed — when a faculty is granted, it is expected, the Plan agreed to Sh? be pursued, but in Deaneries small variations are overlooked; the 13th Article states that in pursuing the Plan, some Dilapidations have happend, that the Front of the Building is become cracked & dangerous & that 830l will be wanting to compleat them; here is a charge of Dilapidations arisen in Dr M's time, unquestionably, if nothing had been done by Dr M. who had only applied for the Faculty, without beginning to carry his Plan into Execution, he wo? have paid over the Money received from his Predecessors Exors, to his Successor; the Difference stated, is, that Dr M. has begun to execute the Plan, a consequential Dilapidation accrued, & the Query is, how far Dr M. is responsible; it has been argued, as if he wo? be liable for the whole Charge, as this has been thrown out, I am ready to give my opinion on the facts supposed; the Time Dr M. was Dean of R. is to be considered; he is liable only to pay, as a Passenger for passing thro, the Turnpike, i.e. the Deanery of R. in his way to Christ Church; he may be chargeable with something for the consequential Dilapidations; but it wo? be unreasonable to make him responsible for the whole, when another is to enjoy the Benefit; the Law says where Dilapidations arise from the fault or Neglect of the Incumbent, he must make them good; but where they happen by the Act of God, a part of the Benefice is allotted for that purpose, viz Ys. Take it, an accidental Dilapidation must be answered for by Dr M — I dont think he is bound to build & make good the whole of the Plan according to the Faculty, for when he undertook it, it was an implied Condition, if he remained Dean of R. If the Plan is too expensive, Dr M. must apply to the Bp, for his Licence to contract it — If Dr M. had made a Tender of any certain proportion, for the Dilapidations accrued during the small time of his being Dean, Sh? have judged of the sufficiency of it; I do not think by admitting the Libel, I am bound to give the whole Sum charged —

Let it stand over to the 4th Session of this Term, for admission, that the Parties may consult about a Tender —

Arches
Trin: I. 25

Office of the Judge promoted by Goddard. v Ward & Miles

Fountain for Grene. Dr Harris Dyvne. Dr Calvert Burnell Cheslyn Jenner

Dr Calvert opend

No 158

May Deft give an Alton Loco responsi in a criminal Suit justifying ye fact?

This is a cause brought by Letters of Request from Dr Tanner & Dr Hall, Deans of Bocking, a Peculiar of the Abp of Cants touchg Jurisdiction the Pish of Hadleigh is subject.

NB The Bp. of L has 7 Livings or Parishes in Essex & Suffolk, under his Peculiar Patronage, viz. Bocking, Stisted, Latchendon & South Church in Essex — Hadleigh, Monks Eleigh, Moulton in Suffolk. All these are Peculiars subject to the Bps Jurisdiction only, or his Commissary, called Dean of Bocking, who are constituted by special Commission impowered sometimes one, sometimes jointly & severally to exercise Jurisdiction in ye over said Peculiars, wch Office has been seldom conferrid on any but such as are Rectors of one of the said Peculiar Churches.

This is a Cause of Correction, wherein the Office of ye Judge is promoted by Tho: Goddard, a gt Tho: Ward & John Miles, late Church-wardens of the Parish of Hadleigh.

1 S. ye S. Goddard gave in Articles wch were admitted

2 S. . . . & the Cause now stands for the Deft to answer to the said Articles, wch are as follow.

1 Artic: By ye Canons, Constitutions & gen: Eccles: Laws of this Realm, no Churchwarden, or other Parochial Officer or any other Person, shall pull down or erect any Pews or Seats, or alter ye same, or any part of ye Fabric of the Church, without a Faculty first obtaind from the Ordinary —

2 Artic: That in defiance thereof Tho: Ward & John Miles in Feb: March. April, or may 1767 fastend or procured to be fastend & stopped up, the ancient middle Door of ye S Side of ye parish Church of Hadleigh, by causing to be erected across the entrance of said Door, a new Wall, or Partition with Lathe Plaister, without any Faculty first obtained from the Ordinary for so doing.

3 Artic: That the Parishioners are thereby prevented entering the said Church, thro, said Door, as they have been accustomd of right to do.

4 Artic: That Ward & Miles, in defiance of ye Canons &c did in Feb: March &c 1767. cause to be erected sundry new Pews, & to be made divers Alterations, in ye said S Isle of said Church, & agt the S Wall thereof, & caused to be enclosed the ancient Passage, leading from ye S Door into said S Isle, by erecting new Pews therein, without a faculty from ye Ordinary first had

5 Artic: By such Alterations, the Parishrs are hindered from going along said Passage to their Seats in said Church.

6 Artic: Ward & Miles were at ye time of making ye sev: Alterations, Ch: Wns of H. & by reason of ye premises have incurred Eccles: Censures, & shd be duly corrected & canonically punished for the same.

7 Artic: Ward & Miles are Parishrs of H. in ye Peculior of Bocking, & subject to ye Jurisdiction of ye Ct of Arches by virtue of the Letters of Request wch you the Judge of this Ct have accepted.

8 Artic: That Proof thereof being made the Promoter prays things may be restord to the very same State they were in before the Alterations & yt the Deft may be canonically punishd & coridemnd in Costs.

The Deft in answer to the said Articles, admit ye Alterations mentioned, & offer the present Allegation to justify their Proceedings, which they pray may be received to Proof . . . .

1 Artic: That Hadleigh consists of near 3000 Inhabts increases daily, & there is not sufficient Room to accomodate the Parishrs to attend divine Service.

2 Artic: That Ward & Miles, (who had been Ch: Wns from 1762 to 1767 inclusive) were frequently applied to by sev: Parishrs for Seats, or Pews in the Church aforsd, & being unable to accomodate them, they consulted with Mr Hewit, sev: other what was the most adviseable way of obtaining room in ye said Church, in order to erect more Pews for accomodating the Parishioners . . .

3 Artic: The middle S Door (was erected since ye building of the Church) ye passage of wch is only 4 feet wide, is almost in ye Centre of ye Church, opposite ye Reading Desk & Pulpit, & let in so much Wind & Rain, that ye Congregation cd not bear it & therefore the Passage was inclosed, with folding Doors ye whereof was always fastend, which reduced ye Passage to 2 feet that very few Persons came in at it, there being 2 other Doors on the same Side; one at ye E end F I 3.2. wide. another at the W. end F I 6.6. wide, wch were always open; that no Corps cd be brought thro, said door, & there was no Passage into the middle Isle, from thence, so that it was of no real use; therefore Mr Hewit proposed shutting it up entirely, as ye Passage thereto wd afford space enough, to erect 2 Very commodious Pews, more advantageous for hearing, than any other part of the Church, being opposite ye Reading Desk & Pulpit . . . .

4 Artic: The S Isle to which said Door led, consisted of 11 very old Pews, in a very ruinous Condition; which being taken down, there wd be sufficient Room to build ye same or a greater number of regular & more convenient Pews, & so hold many more Persons & wd be a great Ornament to ye Church

5 Artic: The Rector of Hadleigh has been generally one of the Deans of Bocking, to wch Jurisdiction H. is subject; & when Repairs or Alterations in ye Pish Church, have been thought necessary, the Ch: Wns have applied to him, who personally surveyd ye Spot, & if he thought them necessary, always gave Directions, (as one of ye Deans) for doing the same, wch ye Pish: Wns looked upon, as sufficient, without any other License or Faculty —

6 Artic: 12 Feb: 1767 Ward & Miles the Ch: Wns applied to Dr Tanner Rector of Hadleigh, & one of the Deans of B. for leave to make the aforsd Alterations, who viewd ye same & gave his Consent & Directions to ye Ch: Wns for ye aforsd Alterations to be done.

7 Artic: Pursuant to Dr Ts directions, Ward & Miles on 24th Feb. 1767. caused ye S Door to be nailed up, & ye Ground where on ye 11 old Pews stood, & ye passage thereto to be measured, & chalkd out, as a Plan for building 15 large & more regular Pews thereon; but wd not carry that Plan into Execution.

Sitt time was given, to see, wh? any Inconvenience Sh? arise from shutting up said Door, or any Objection be made to the intended Alterations by any of the Psh? & therefore let the Door continue nailed up, & the Ground so marked out, & planned, for a month, or more, without proceeding therein.

2 Articl. The intended Alterations were publickly known in the Psh, from the first proposal, till they were executed that Goddard, nor any other Person objected, & therefore y? 23d of March foll? Ward, Miles, caused y? said middle S? Door, to be closed with Lathy Plaister on y? inside; y? old Pews in y? S? Isle to be taken down, & on y? Ground, on wch they stood, y? Passage lead? to said S? Door, to be built 15 handsome, regular Pews, whereby a great deal of Room is obtaind in said Church, & many more Persons accomodated with Seats, than before, & y? Church greatly ornamented; when y? said Pews were finish? y? Psh? in general were well pleas'd, such whose at in y? old Pews, approving y? Alterations, seated themselves in y? new Pews, y? Rem? of wch were appropriated to other Psh? who were before destitute of Seats; that Sh? the Church be ordered to be put into its original form, as prayd by Goddard, such Persons wd again be destitute of any Seat to hear divine Service.

3 Artic. The said Repairs & Alterations being compleated, April 17th by Notice was given in Wadleigh Church that a Vestry was desired, to grant a Rate to reimburse y? Ch: Wns; wch Vestry was held, but Hall & Burrell objected to any Rate being allowd, for that purpose, asserting y? Ch: Wns had made y? Alterations, without consulting any of y? Psh? and even without Dr S. privity or Consent, & thereupon y? Vestry was adjourned; but y? next Sunday a 2d Notice, was given in said Church for holding a Vestry, y? Tuesday foll? to examine the Ch: Wns Accounts & Vouchers, & to make a Rate for paying them the Balance; that such Vestry was attended by sev? of the principal Inhab? Psh? when Dr S. sent a verbal Message by the Rec? Mr Lecke, & a notification in writing, by his Curate? Wm Hewit, that the Alterations & Repairs were done with his Privilege & Consent, under his Inspection & by his directions, as one of the Deans of Ch, to Ward & Miles the Ch: Wns, upon wch it was unanimously resolved by those present that a Rate of 4? in the Pound shd be granted. . . .

10 Artic. Pursuant to y? said Resolution, a Rate was made, & confirmed by Dr S. & paid, on demand, by all y? Psh? therein rated, except Jn Burrell rated 5? 5d 1. 10. 5? — Jn Hall 1. 6 — & about 6 or 7 others some of whom were excused on acct of their low Circumstances

11 Artic. Exhibits the Rate & Dr Tanners Confirmation thereof. . . .

12 Artic. The said Alterations & Repairs, rendered y? Church warm, y? Minister better heard, & made more Room for y? Psh?? is detrimental to nobody, & approved by the Psh? in general. . . . . .

13 Artic. The Promoter is in very low Circumstances & in consideration thereof not rated to the said Repairs, or to the Church or Poors Rate of the Psh, nor is personally injured by shutting up said Door, or other Alterations. . . . . .

Dr Harris — This Rate is signd only by 10 Persons (including the 2 Ch: Wns) out of 3000 of which number, the Parish, is said to consist — Before I enter into the Question, I must observe upon a note wch appears at the bottom of the Letters of Request, signd J.S. if wrote by Dr S. is very improper, & shews him to be a Party, if it is not Dr S. hand he ought to call the Writer to account for his Impertinence to him; you the Purport of the Note is, that he is informed it is usual to take Security from the Promotor to answer Costs, that Goddard is a poor man & therefore shd give Security; this is directing the Dean of the Arches what he ought to do — This is a Criminal Libel, in which Articles have been admitted, to wch the Ch: Wns must give an Issue, & say yes, or no; an Allon loco Responsi was never allowed in a criminal Cause, because there can be no Justification — The Ch: Wns are guilty thereof, in proceeding on the Alterations & Repairs without a Faculty, first legally obtained; I know the Ch: Wns have a power of making Repairs, but not of altering the Fabric without a Licence or Faculty from the Ordinary; in Cases of this sort, the Parish?? are to be called upon for their Assent; The Vestry called to confirm the Ch: Wns Proceeding amounts to no only, out of 3000 Persons; such Authority ought to be disregarded by any Court; these Persons have been Ch: Wns many years, is no very favorable Circumstance, being contrary to Law, as they ought to be dismiss'd at the end of one Year, & others elected in their stead; the Consulting Dr Hewit is no Justification — The 3d Artic: pleads that the Door was built since the Church; that is no reason for stopping it up, the same Authority by wch it was erected, shd be removed; tho' there are 2 Doors on the same Side, you are not to shut up the S: arbitrarily; but say they the new Pews are ornamental, so would the Venus de medicis be; but that is no reason for acting illegally; they say it is customary for the Ordinary of Bokeking to proceed in this Manner, that is setting up a Custom agt Law, & what you will not suffer to be pleaded; It seems the Ordinary gave his directions upon View of the Premises, & pursuant to them the Door was stopp'd up & the Plan Chalk'd out, & left so for a month; but the Parish?? were never consulted, & the Country People who saw the Marks in Chalk probably were unacquainted with its meaning; where Pews are decayd, the Ch: Wns, sh: erect & repair on the same Side; they say the Door was shut up to see what Objections were made to it, & that nobody objected tho' it continued so a Month; the Ch: Wns sh: have called properly on the Parish?? by Citation with Intimation; in default of which they were not bound to object then, but might lie by & object at another Season; Dr Tanners Notification, was unimportant because not founded in Law; being a Clergyman it was no Imputation on him to be unacquainted with the Law; Goddards Poverty is immaterial, as a Parish? he has a Public Right, & may vindicate it when infringed; I suppose the Ct has ordered Security to be given, & that he is answerable for the Costs, so it is immaterial wh? he is poor or rich; he contends that the Ordinary & the People may go together; It is a good & laudable Custom, in cases of Reparation, that the Ch: Wns & Ordinary should, it is otherwise in Cases of Alteration . . . .

N.B. Swore Articles July 10. 1759. Goddard prosecuted Dr S? for defam: gave an Allon loco responsi Hasby Js Consent the matter was surceased & dismissed . . . . . .

The Objection is a peremptory legal Bar; for if we plead, the alterations were made without a Faculty, they cant go into Plea wh: the Alterations were right or wrong; you will not enquire into that Particular; there was such a Suite agt the Ch: Wns of Chelsea for erecting an Organ; the Organ was taken down by Decree of the Ct; when the Ch: Wns applied for a faculty, & it was decreed - they have given no Josue; We desire to know wh: you did, or did not, this, without a faculty? if there was not something in the Allon, which the Gentlemen thought tantamount to a faculty, they w: not have signd the Allon which induces me to take notice of the Contents of it; from the account they give it was high time to instruct the Ch: Wns in their duty, of which this Ct is the proper Judge; the Ch: Wns ought to continue only one year; the 25 H8. c.a. expresly prohibits it; the Canon says, if the Ch: Wn Sh: happen to be rechosen, he Sh: be resworn, wch supposes it an improbable thing to happen; but this Practice has been allowd, for want of Persons to serve the Office; the Objection to the Reelection operates in its full force in this Parish - The Minister, Curate were proper Persons to advise with, but not to direct; It is not merely the Judgement of the Ordinary which is requisite but his Judgement exercised in a discreet & legal manner; the Course of Proceeding is well known, Application Sh: be first made by Petition, then a Citation with Intimation Sh: be taken out; & upon examon of the Case the Ct may decree agt the Consent of the Majority of the Parish[rs] if improper in itself or unduly obtained, but then the Ct speaks by its Seal & the Registrar; the Qu: Was the Instrument legally executed? the Parish[rs] had not the legal warning given, wch was necessary to validate the Act. The 7 Art: wch mentions chalking out the Plan, is rather Burlesque; Where the Law has prescribed a mode of notifying, a different notification will not avail. If all the Psh[rs] had paid, they w: not have been the first who have paid in their own wrong; they might think Dr Tanner was the sole Person to judge; he has however in reality, done nothing, as Ordinary, or Dean of B. The NB under the Letters of Request shews he knew very little of his Judicial Office - It is of very little consequence, who promotes the Office of the Judge, or when; a Party seeing an illegal Act done, is not bound to object at a particular time; he may make his Objection after it is compleated. Goddard tho poor, has an Interest, as a Parish[r] to see things properly carried on, & is highly commendable for what he has done ....

I do not think Dr Tanners NB at the bottom of the Letters of Request impertinent tome - This is a Criminal Prosecution & the Promoter must give Security, or bring into y[e] Registry 30£ to answer Costs, which I find has been done in this Case, therefore Goddards Poverty is of no import; I conceive the Allegation to be an Issue, because it alledges a Justification of what the Churchwardens have done; Ch: Wns are temporal Officers, & are bound by the 85 Canon to put

the Church into proper Order; they may do many things without any Application at all; there are others wch they cant do without the Consent of the Parishioners, & some not without the Consent of the Ordinary; viz. an Organ which may entail a Burthen on the Psh - This Plea is of a mixd nature; the Pews are stated to be out of Repair; if the Ch: Wns had gone no farther, no Application to the Ordinary was requisite; but it seems they wanted more accomodations for the Psh[r] who are very numerous, & for that purpose stopp a door & Passage, this required the Ordinarys Assent; Supposing it an original Q. wh[r] a Faculty sh: go, so far as the Allon shews the Convenience it w: be granted. The next Q. is wh[r] it Sh: be a criminal Suite? to be sure the strict Rules of Citing have not been adhered to, but are there not many Cases, where Archdeacons & other Ordinarys, on Visitations order alterations, with the Consent of the Parish[r] this I conceive to be of that nature; as the Psh[r] here sufficiently apprized, B. & H. objected that Dr T. had not been consulted, the Vestry was therefore broke up; at the 2[d] Vestry Dr T. notified his Approbation of w[t] was done, & his directions to the Ch: Wns in writing, upon which the Persons present unanimously agreed to the Rate, wh: few or many is immaterial; the present bind the Absent; Dr T. confirms the Order of Vestry as Ordinary & Rector; if this comes out in proof, the Q. must be, wh[r] these Acts are proper, or render the Ch: Wns liable to Censure, & wh[r] a faculty is not necessary accord[g] to the strict forms of law - I admit the whole Allegation as laid.

The All on admitted as laid - - - -

Prerogative
25. Trin. I

Founbain — Battier & others v Robinson — Longden

Dr Harris, Burrell — Dr Calvert & Wynne

Firth v Finch 1 S. M. T. 1753. before Sir Geo Lee.

Collins under a commission for examon of Witnesses, had, among others produced In Nicholl a Legatee in the Will litigated, in 100£, for which Legacy, before his Production, he exhibited a Release, & was then examined; & the Commission being returnd; Collins before Publication, discovered Nicholl had a Silver Tankard, & some other Things left him by the Will, wch were not mentioned in his said Release; Collins therefore prayd, that he might produce Nicholl again, on his exhibiting a further Release, as to such particular things, & be resworn, the Commission to be opend, & then Nicholl to be repeated to his Depons before taken under the Common, wch the Judge granted after hearing Council on both Sides - - - - -

Q. Shall a Wn be allowd to release his Int: after exon & Publication, & then be repeated to his Depon, or reexamined? - - - -

Sedgier & Sedger v Mann.

Cheslyn alledged Sam[l] Whitehead, a Witness to the Will, to be a Legatee in a gold Ring; that he had been produced, sworn, & examined, & had not released; alledged the Term Probatory not expired, nor Publication past; prayd his Depon to be suppressed, & that he may be examined again (after he had released, or accepted his Legacy) & be repeated, & offerd to pay Costs for Delay; Adderley dissenting & alledging, he had been repeated & cross examined, & therefore submits he cannot be produced, sworn, & examined, or repeated again to his former Deposition.

30 Jan: 1734

Sir Geo. Lee had, (in his Chambers) heard Council & Proctors declared that Cheslyn may be at liberty, to produce, examine over again, Samuel Whitehead, then Adderley consented that his Depon already taken, may be read, without his making an Objection of his being a Legatee, & condemned him in 1 G. 8. Costs.

The present Case differs from any that have been cited to shew, the smallest Legacy will repel a Witness, D^r King had a Legacy of a Gold Ring; after Publication, an Allon was offerd to shew he had released before Examination; the Ct said, the Allon might be admitted to shew he had received the Legacy before Examination

Francis Simons several Wes had received their Legacys, & given Receipts for them in a Book, wch was brought into Court, but they had not acknowledged the Subscription to their Receipts, Sir Edw: Simpson to enable them to legalize the Receipts, after being examined, repeated, permitted them to acknowledge their Subscriptions, & then to be re-sworn, repeated to their Depons. (D^r May said Simpson rescinded the Conclusion, but Greene who exam: the Wes says he did not the cause not had been concluded)

These Authorities do not come up to the present Case, wch is

To repeat a W^s after Publication, is another Step in the Cause, & another instance of the neglect; if I shd admit a W^s to be repeated after Publication, why not after Conclusion? it will encourage Neglect too much, if a Proctor comes before Publication, I will admit him on the Strength of the Authorities, further, I chuse not to go, but will stop where my Predecessors have; I am of opinion under the Circumstances of this Case, the Witness ought not to be repeated, or re-examined.....

Fountain then desired he might be allowed to repeat the W^s agt the Widow in panam; the Registrars Opinion being asked, said it was not usual to repeat the Wes to their Depons, in pain of a Party called, & not appearing, & Gosling said, the Pty who does not appear is thereby prevented giving Interrog^s. D^r Hay then said, it wd be strange to affect the Widow in her Absence; I declare it not only unnecessary but unjust, to bind a Party, (who is called in the middle of a Cause) by the Evidence & Cross Examions of another.

W^s refusd to be repeated after Publication

After the Sentence was given D^r Compton favoured me with the following Cases....

Anonymous 1 Vern: 253. 5 Oct: 1684

If one of the Parties after Publication paied, has a W^s to examine; upon the usual Affidavit of not having seen the Depons, the Lord Keeper declared, the other Side shd be at Liberty to examine at large, as well as to cross examine the Witness produced by the Party making the Motion.....

2A Oct: 1684 / 1 Vern. 25A — Corporation of Sutton Coldfield v Wilson.

The Q. being wh: a Bond of £500 penalty, was intended for the Benefit of the Corporation, or of the Def^t & the Wes for the Pl^t being all Members of the Corporation, it was objected that their Depons could not be read, they swearing for their own benefit;

which Exception was not allowed as good; & the L^d Keeper said that a Corporation ought to have a Town Clerk, & under Clerks who are not Freemen, that they may be competent Wes upon occasion; & he added, he thought it very hard, in the case of the Water Bailiage of London, that no Freeman of the City, tho it was not 6^d Concern to him, could be admitted as a W^s but there indeed the Fee was in question, & here

& said

at length it appearing, the Def^t had cross examined some of the Pl^ts Wes not only to Questions Easily wh: they were of the Corporation, but to other Questions wch tended to the Merits of the Cause, the L^d Keeper declared that made them good Wes tho Members of the Corporation & their Evidence was decreed for....

1731 2 Peere Wms 647 — Griffith v Gansell..... Dubordieu a Clergyman had been examined as a W^s: an Application was made to the Ct for him to amend his Depon after Publication; the Motion was opposed; the Examiner & the Witness attended in Court, when the former swore he took the Depon truly from the Witness, to whom it was read over distinctly, & then the W^s subscribed the Depon, so read over, with his own name. The W^s being examined did not swear positively that the Examiors had taken his Depon falsely, but that he was induced to believe, he did not express himself, in the manner the Depon was taken, & was positive he did not intend, or mean, to swear as the Examiner had taken, but really intended to swear as the Amendment was desired; that the same was what he had before declared in Conversation, as also what another W^s in the Cause, had positively sworn:

The Ct said, when it appears, either that the Examior is mistaken in taking, or the W^s in making the Depon, it is for y^e advancement of truth & Justice, the mistake Sh^d be amended, & the sooner this is done, the better, for the W^s might be dead, or remote at the Hearing, & it wd be hard & unjust to pin down a W^s to what is a Mistake, by denying to let it be rectified; As to the Inconvenience of amending after Publication, it is impossible to be known till Publication; wherefore let the Depon be amended as desired, & the W^s swear it over again...

Exchequer 1733 — Orlebar v Sowyd. This day the Ct made a general Order, that after Publication a Depon delivered out to be copied they would in no case enlarge Publication, or give Liberty of examining any more Witnesses.....

Ibid

Jenner — Nº 160. — Ryley ol: Proser. v. Ryley — Bishop

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

Dr Wynne — Dr Marriot

Vid fo. 260.....

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 Exect. 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 — 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 D. Mary to shew Cause why it shd not be revoked, & a new Probate granted to her as the Exect. therein named; the D. 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 cd 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 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 cd not answer the description mentioned in the Will, upon the Principle abovementioned, nor cd 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 her & the Admon of Kin & her, the Fact thus proved, cd 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 Wts 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 Wt having only a consequential Interest; if I can weigh Declar.ns I am at liberty to do so. I think the Decds Declar.n 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 Extr — 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 possessd of the Probate, is the Party entitled.

Sentence for the Wife de facto

Consistory — Trin. T. 35. — Dr Calvert

Nº 161 — Hervey v. Coghlan

Will ye Word: offered, & proved, & duely ye Ct to pronounce for the Marriage ....

Dr Collyer & Harris — Dr Calvert & Wynne.

I am Council for Mrs Hervey, ol: Coghlan, Wife of the Hon.ble 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 intailed his Estate on his Grandchildren, & amongst others on Mr Thos Hervey Child abovementioned.

Dr Collyer..... I admit Mrs Coghlan's 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 addressd 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 confessd, the Jactitation; the Mariage Act has stablish a new System of Law.

Dr Harris..... I object to the Particulars mentiond in the 5 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 Defr 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.

If it sh: appear after Publication, that we have made only Semiplena Probatio, we might, (before the Conclusion,) move for the Supplebory Oath; it is not now the time, but it is only an additional Reason for admitting the Allon;

ved. this Case at large in Burn . . . . . It was so agreed in 1y. Bridget Asbornes Case (appeald to the Delegates from the Ct of Arches,) 1717. . . . . .

It is material to us, to shew Mrs Hervey was of no mean family, to render the match improper or unsuitable to the Plt- The proper Steps must be pursued to ascertain the fact, the Art: objected to is a meer formal Article of Courtship; it was more convenient to Mr Hervey to marry Publickly; the Letter of 7th Augt amounts to a Declaration; Iderly the absolute Necessity of proving the fact of Marriage —

This is a very extraordinary Suit, brought by a Gentleman agt a Lady, with whom he has long cohabited as his Wife, for alledgeing herself to be so; the Purport of the Plea now offerd by her, is to Justify the Jactitation; the 3d, 5th Artes only, are objected to; the 1st pleads her Pedigree & Rank, wch is very proper, for every thing is admissible, wch tends to shew she was not in a rank of life, improper to be reckond into the Plts family; besides, it pleads who Mrs Goodwin is, with whom the Deft was at Bath; i.e. that She was Mrs . . . . Sister- If Mrs Goodwin is living she will be a competent Witness, to prove the Courtship at her house at Pall Mall; it is capable of Proof She pleads, that from family Motives, She was obliged to contract privately, She dont plead the mode of Contracting, I suppose it was not a written Contract, or it would have been exhibited; it is not necessary to plead, who was present, that is captable of being provd by Answers.

The 5th Article is particularly objected to, on wch the whole rests; the Mariage is said to have been solemnized by a Person unknown; it is said to be inter Vivos, therefore there sh: be proof of a Fact of Mariage, & the best Evidence y nature of the Case will admit, viz. the Persons present at the Ceremony- It may be made out by subsequent Circumstances; the Lr: wh: such Ld is to write to ... how it will turn out, I cant tell; it is extraordinary the Lady sh: have forgot the Day on which she was married, one Circumstance, which may distract from the Impression such a Transaction generally makes on the mind of a Woman, is, an Intimacy between the Parties prior to the time when the Mariage is pleaded- It is possible, the Subsequent Circumstances, might have flowd merely from the Plt having for the Defts Credit, said She was his Wife; e con. the Reverse is possible: I cannot reject any part of this Allon; which lays Declarations of the Plt, owning the Marriage to his & Her Relations, & that he did every thing possible to testify his Acknowledgement of the —

Plea admitted

Ibid — Funge. v Mins Ch: Wdns Pish & Inhabts of y Pish of St Mary Somerset in a speciall Matter in General

Dr Calvert — Fenner — Addersley — Dr Harris, Compton

Consistory Trin: T. 45. — Gosling — No 16. — Stevenson & Nunes v Muilman — Jenner

Dr Collyer & Harris — Dr Marriot & Wynne.

Dr Harris . . . . I am Council for Mr Richd Muilman, who opposes the Confirmation of a Rate made by the Parish of Allhallows, for the Repairing the Church of said Parish; he now offers an Allon, stating that the Parish have made of 2 Shillings in the Pound, for compleating the

Q. Is a Rate to raise an additional Sum to defray y expence of compleating the Church of Allhallows, legally made, if the Act had expired & they were authorized to raise by a Act of Parlt A. If legal, may be a proper necessary

Repairs of the Church, that Mr Muilman holds a House in the said Parish valued at 120£ pAn. That the Parish is burthend with a numerous Poor, & the Church Rate is paid by 2/3 of the Parishrs. That in 1764. the Church being very ruinous, an Order of Vestry was made on 6th May: to survey the Church- The Surveyors reported on the 13th of Sept: it was more adviseable to rebuild, than to Repair it; upon wch a Committee was appointed at the Vestry to apply to Parlt who obtaind an Act to levy a sum not exceeding 4000£ upon the Landlords of Lands & Houses, that being afterwards found insufficient, a 2d Act of Parlt was obtaind empowering the Parish to raise a further Sum as before said, not exceeding 1000£. That 2 Plans were laid before the Parish for Building y said Church; one being agreed to, they have unnecessarily pulled down a Wall, & in several particulars departed from the Plan, by which they have exceeded the Sums granted by the 2 Acts of Parlt & finding a further Sum of 800£ requisite to compleat the Church, a Vestry was held without previous notice given, & the Approbation of the Rate in question obtaind, by Surprize & additional Sums expended without any Authority of Parlt: . . .

Dr Collier . . . . The Parishioners have a discretionary Power may levy the additional Charges agreed to in Vestry; Mr Muilman entered a Caveat agt the Confirmation of this Rate; he as a Parishioner, who will bear his Part of the Burthen, had a right to object- The Facts, no doubt are true, but a man must not plead every thing, that is true; the Question to be considerd, is, wh: they make to his Purpose; what is the Act of Parlt to this Complaint; the 12th Article is the principal Objection; their laying out a great deal of Money unnecessarily; if he can prove that, it is material that he sh: not be burthend without cause- In the 13th Article, he pleads, the want of Notice & Surprize; My Objection to this, is, that he pleads in this Article matter contradictory to what he pleaded in that preceding; i.e. he has alledged the Vestry to be unduly called, & now pleads this as a due Order of Vestry- The Trustees were authorized by Act of Parlt to lay out the Money, so that their Presence made it a properer Vestry, than if double the number, who were not Trustees, had been present: It was the obvious way, that any deficiency sh: be made up by the Parish, without any farther Application to Parlt Mr Muilman has his Reasons for vexing the Parish. . . . .

Dr Harris . . . . To levy a Rate it is not absolutely necessary, that there should be a Confirmation of it; Repeated Judgements declare that: but we do come for that purpose, we stand therefore in a very favorable point of view; Mr Muilman seems treated; he asked a favor of the Parish, to have a Pew with a chimney in it, which was not agreed to, & therefore he is desirous of being Revengd. It will appear, there was a publick Notice of a Vestry being called for the purpose of settling the mode of making good the Sum wanted: a Notice alone is necessary; but not to specify the Business they are to meet upon; the determination of the 2d Vestry, wd not bind a subsequent Vestry, why then was not one called, to resume the Consideration of the Point in dispute: a Publick Notice, is a legal Notice, without setting forth y Business: It is frequently impossible to do so; suppose other Business had arisen, would the Vestry Acts then done, have been thereby rendered null- He is not at Liberty to say, the Vestry is not legal; as to pulling down London Wall, it is true, & they have built another: the Court will not say the Parish cant meet to replace the Money laid out. i.e. to agree on a mode to defray y extraordy expences incurrd

The Application to this Court, for confirming the Rate, is we are told mere complaisance, but that is not so, it is necessary— what we have pleaded in the 11 first Articles wd have been a legal Bar to the Rate; It was considerd to be too large a sum to raise in the ordinary Way, the Parish therefore applied to Parlt for 40000£, who vested the Money in Trustees, & did not give the Parish a discretionary Power. The words of the Act are very expres; the Parish is em-powerd to lay out & borrow, not exceeding that specific Sum They lay out more—

Neither Parishrs nor Ch: Wns, can pull down Church yard Walls, &c without Application to this Court for a Faculty: the Wall is not pretended to be ruinous— Neither the Vestry, nor the Majority of the Parishrs can oblige an Individual, to pay any part of an Expence illegally incurred— If it was not necessary to give notice of the Business to be transacted, Room wd be left for Oppression & surprize. Upon the whole the Proceedings appear very improper: I don't say in general a detail of ye intended Business is necessary, but in a case of this Consequence, where all but A. or a great Majority of the Vestry are Trustees & therefore interested, it is necessary to note the Business intended to be brought on—

In this Case the Church wardens of Allhallows, apply for a Confirmation of an Order of Vestry duly called, by wch a Rate was enacted; this is objected by Mr Muilman, who owns a House of a considerable Value in the Parish; As to the Rate itself, it may be properly objected to, as unequal, made for an improper Purpose, or unnecessary, but neither of these Reasons are offerd; Mr Muilman states, the necessity of Rebuilding the Church the Agreement to apply to Parlt & the Acts first enabling them to raise £4000 & then £600 by Annuities— That Sum proving insufficient, 600£ more was laid out: The Acts of Parlt say no more shall be raised, than 5000£ by virtue of those Acts. They do not prohibit further Sums to be raised, by other means: this is the principal Objection made by Muilman, which is comprised chiefly in the 13th Article, which cant be considered as absolutely standing by itself, but connected with the 11th & 12th. Mr Muilman being a Parishioner on whom a considerable part of the Burthen will fall, has a Right to object; the present Consideration, is whr on the face of the Plea, there is any plausible Color of Objection; how Mr Muilman says the Walls were pulled down without cause, an Iron Gate has been exchanged for a very expensive Gate of Wood, to defray which the present Rate is made; the preceding Articles with swell the Allon, are to be proved chiefly by Exhibits. At present I must suppose the Articles true, & therefore admit the whole Allon, as laid; if the Articles shd not be proved, Mr Muilman will be liable to Costs. . . . . Plea received

Arches
Trin: I. Bye Day

Longden — No 163 — Atkinson ol. Church v Worger & others — Holman
Dr Bever — Dr Harris

Dr Bever. . . . Mary Paine is the decd; She made her Will dated 30 July 1761. & 2 Codicils undated, She appointed Jas Worger, Edm: Bickerton Worger, & Wm Morell her 3 Exors of her Will.
In the Will, inter alia is this Bequest "To Margaret Church
" my Servant, 300£ Stock, & all that is in the House. . . . .

Q. as to ye Construction of a Legacy: what is meant by ye words all that is in the House? Does it comprehend Money & Furniture, or all other things in my Testators House at her Death?

In the 2d Codicil
" 100£ Stock wch I bought in the year 1762, wch makes 5750£ Stock, I
" leave to Mrs Marg: Wethersby; my Servant knows her; & the 100£
" Stock, that I left to Wm Morell as Exor, & the 100 Stock I left to Mrs Laurence
" they being both decd, I desire they may both be given to Mrs Marg: Wethersby—

" I have desird the favor of Mrs Francis Plumptree to be
" Exor in the room of the decd, & if there shd be any debts, I desire
" the Legakes may not be paid, till the growing Dividends become
" due, & that, to pay them; & what remains, to be divided equally
" amongst my Exors."
The Testator died 21 Decr 1767, & the 3 Exors proved the Will & 2 Codo & found in the House abt 140£ in money, some Plate, China, & great Quantities of Laces, Holland, & Cambrie, not made up, be-sides Furniture, Linnen, Apparell: She died possesd of nothing more than the Stock, wch she has specifically devised to different Persons, named in her Will, Codicils, & what she had in the House, so that she gives every thing away, having no Residue, nor Residg Legatee, save only that She gives to her Exors, what shd remain of the growing Dividend, after first paying them out, what few debts she might owe.
Mrs Margaret Weathersby died in the Testators Life time.
Marg: Church, lived as Servant with the Testatrix to her death & is since married to Aaron Atkinson.
The Testatrix left no Kindred or Relation

Dr Bever. . . . It is confess'd that Marg: Church is entitled to ye Legacy of 300£ the Question arises on the Construction of the Bequest; the Will is drawn by a Woman ignorant of Law, tho it is intelligible enough therefore Allowances aught to be made; the Residue will be about 60 or 70£. this I mention to shew her exactness in the disposal of her Estate her intention being manifestly to appropriate it all, & to leave little more than the Legacy to her Exors. In the 2d Codicil she says, "As for all other Legacies, if they shd decease before me, what I left them "I desire they may be given to my Servant Margaret Church. . . . . She makes a clear distinction between this Residuum to the Exors & the Reversionary Interest to Marg: Church; She has given largely to the Exors & family, therefore would have them contented with the Residue, if ever so small—

Dr Harris. . . . It is agreed, Mrs Weathersby died before the Testatrix, but not before she wrote the Codicils; All the Legacies are Stock; by the word Stock, I contend, she meant, Money; if I am right, she could not mean to add Money to Money, She purposed only to couple Money with Stock; But under the Word Household Goods, Apparel, Jewels &c dont pass, it has been so determind in Chancery, you will then give the Money, or Goods, but not both— With respect to the 2d Query. You find Plumtree is a Legatee of 500£ in the Will, prior to the death of Morell, in whose room She is substituted an Exor, without any Legacy, in that Capacity; the Dead desires the favor of her to be one; She might intend more to fall to her & the other Exors, than She did at first; the Deed leaves Marg: Church, all the other Legacies that might lapse, except Wethersbys.

Dr Bever. . . . I cant define simple Ideas, the word All, must include every thing of every Sort or denomination in the Deeds house, at her death. the Substituted Exor is a Legatee in 500£: the reason of Deeds desiring her to

be Exor is, that She had in the Will made her, sufficient amends for her trouble, without leaving her any thing more.

It is admitted on both Sides, that the Deed made the date of 1761, & 2 Codicils without date; it dont appear when the Exors have taken Probate; the Suit is brought by Marg.t Church who is confessd to be a Legatee in 300£ Stock, & the Exors offer to pay it; but there is a Legacy likewise of all in the House." the Question arises upon the Construction of those Words. It is clear, from the Context of the Will, the Deed meant to benefit her Servant more than the 300£, She meant an actual Benefit, by substituting her to the Exors, who would have been entitled to any eventual lapsed Legacy; the Ct should follow the Intention of the Testator & the better to find out that, should take the whole together, especially where the Person is inops Consilii; By the Words All in the House, considering the Testatrix, as Jdo, why sh.d I restrain them to the Money or Household Goods; there may be Cases where it is very proper to restrain; By Stock, she means, Money, as, "300£ Stock for my Funeral." I must have special Terms to lead me to the Restriction of a general Term; which sh.d take place for the Benefit of a Legatee, unless some Special Circumstances are shewn, of the Deed meaning to restrain it to a particular Species; Here the Deed clearly designs the Reverse; in my Apprehensions, All must be taken in the greatest Latitude, to comprehend every thing in the House, be it what it will, under the favourable Circumstances Church is in — Now for the 2d Expression — She is very accurate in distributing her Fortunes; She adds the Legacies of Morell Lawrence to the 300 left to Weathersby; she then gives the 2 Legacies to her; the Doubt arises on the word Others — whether She thereby meant to exclude the 200£ or the whole; She c.d not mean to exclude the 100£ in the Will; it w.d be a strange Construction to say, she meant eventually 500 to Mrs Church, & yet exclude her from Mr Weathersbys Legacy: when there is a doubt I sh.d give such a Construction to the Words, as will carry the Deeds meaning: I conceive the Legacies now lapsed, shall go to Marg.t Weathersby & not into the Residue, & if any others shall lapse hereafter they shall go to M.r Church; the Words will admit of this Construction; the Qu: is, why M. Weathersbys Legacy sh.d not go to Church, as well as those that Lapse hereafter? It appears to me, that the whole Benefit sh.d go to Church I think this, the more so, as she gave a Legacy to each Exor & therefore did not mean to benefit them beyond what She had specifically bequeathed them, appearing to have no particular Regard for them; I think Marg.t Church is entitled to the whole she has sued for. — The Words comprehend every thing in the House at the Testators death — Are the articles admissible?

Ibid — Fuller — N.o 164 — The Office of Judge promoted by Burr. v Pearsall — Adderley — Dr Calvert — Dr Harris

Dr Harris — I am Council in behalf of the Rev.d Pearsall Rector of [illegible] aft.r whom Mr Burr has articled for non Residence, & we are now before you upon the Admission of the Articles: the Statute having rendered the Def.t liable to Punishment in the temporal Ct for Non Residence, I sh.d conceive you cannot proceed agt him for Eccles.l Censure; besides a Rector is not obliged to Residence; had he a Vicar, had he a Curate, if the Duty was neglected, the Charge sh.d state it; the Citation appear to have been served on the very Living where he was actually Resident; Let them shew what Punishment can be inflicted; they sh.d set forth, that he is obliged to Residence; I must object to the Jurisdiction, by insisting they cant sue in the Sp.l Ct where the Statute has given a Remedy in the Temporal Ct.

Dr Calvert — In Middleton v Croft, the Question of Residence was not in Issue. Could a Statute by enacting a Penalty of 10£ exempt a Minister (who is guilty of a great Misdemeanor) from the Jurisdiction of the Ordinary; It has been asserted, that a Vicar only, & not a Rector is obliged to reside, the Oath of Residence is the Reason assigned; this is a Mistake, for by the Genral Law Rectors were bound to reside, before Vicars were known, with whom the Ecclesiastical Law being unacquainted, a Particular Law was necessary, to bind Vicars also; but Rectories were never intended to be Sine Cura; the Prayer is that he may be punished according to the Exigency of the Law, & the nature of the Offence

Judge D'Arcy — Rector is as much bound to Reside as the Vicar; it w.d be strange, if the Ecclesiastical Ct was to declare the Contrary; if the Doctrine contended for by the Priv Council is true, let them try to avail themselves by a Prohibition; when Articles are promoted I am obliged to receive them; a Difficulty arose about granting the Letters of Request, I wish all those who reside in different Jurisdictions were equally difficult in granting them; I think the general Prayer very proper, & see no Objection to admit the Articles as laid . . . Articles admitted as laid

Ibid — Stevens — N.o 165 — Charter v Darcy falsly called Charter — Holman — Dr Burrell

Dr Burrell — 1763. Julian Charter was cited by Wm Charter to answer in a Cause of Jactitation in the Consistory of Sarum; She appeared & justified it, by averring a Marriage, in proof of which She exhib.d a Certificate, & the Judge, on her making Oath of such marriage, dismissed her from the Suit, from that Sentence Mr Charter appealed to the Ct of Arches

1764. 3 July. The Appeal was pronounced for.

1765. 1 Feb.y The Def.t gave an Allon, stating her Case viz.

1759. Mr Charters Courtship at the beginning of that Year

1759. 24 July, Their Marriage at Galway by y.e Rev.d Mr Lewis

1 Oct.r Their 2d Marriage at Croupeen by the Rev.d Mr Mills

Their Cohabitation with Reputation, Constant owning of Def.t by Pl.t as his Wife, & a Literary Correspondence, between them, & also between him & her Relations, wherein he styles himself her Husband, & subscribes himself Son or Brother, when he writes to her Sr & Mr Bro.r & Sisters. On this Plea Ws have been examined

1 Stephen Darcy, Brot.r of Def.t who deposes to his Sister renouncing the Errors of Popery, & conforming to the Protestant Religion, by performing all the Requisites prescribed by the Statutes: i.e. by reading her Recantation at St Johns . . . Church Limerick 2. July 1759, & Receiving the Sacrament at St Munchins Church Limerick on Sunday 15. July, in Dep.t Presence; taking the Oaths at an Adjournment of the Quarter Sessions (Fr: 17 July) for y.e City & Co of Limerick, & subscribing the Declaration; & recording a Certificate thereof in the Rolls Office Dublin.) he likewise says, he was present in St Nicolas Church Galway, when y.e Rev.d Napper Gifford the Minister published the Banns, between Wm Charter & Julian Darcy, & declared it to be the 3d & last time of asking; he says he was present at the 2d Marriage at the Swan at Croupeen, when y.e Rev.d Anth.y Mills performed

the Ceremony, in the presence of Dep^t: his Mo^r: Bro^r: Hyacinth Darcy, Sarah Conner, Dan^l. Manning his Mrs Serv^t: Dep^t: knows Wm Julian cohab: afterwards as Man & Wife at Limerick abt one Year in one House of one Green an Innholder, he has gone over & staid at Limerick 10 or 12 Days; he says, said Wm had agreed to be married at Galway the 2d time (at Dep^ts Bro^rs desire,) but could not obtain leave of Absence from his Reg^t & therefore they met him at Cruppeen - Plt introduced Julian as his Wife to the Officers, their Wives, & other Persons at Limerick who visited & esteemd her as such - He has frequently seen Wm Charter write, subscribe his name, & is thereby well acq^d with his handwriting; that Julian has at diff^t times shewn him several Letters from Plt's Father, which Lres he read & knows to be Wm Charters Writing, wch were subscribd by him as her Husband - That said Wm, whilst at Limerick, after his said Marriage wrote several Lres to Dep^ts Father Mo^r: Bro^r: & Sisters, wherein he constantly spoke of Julian as his Wife, subscribd himself in his Lres to her Parents, as their Son; in those to Dep^ts Bro^r: & Sisters as their Brother; that the 5 Lres exhibited, are 5 of the s^d Lres & are wrote by the Plt's Father.

Sarah Conner — Confirms Stephen Darcy as to the Courtship & 2d Marriage, & gives y^e foll^g Acc^t of the first Marriage; That about one in the morning of a Day, w^ch beginning of last March was 5 Years (i.e. 1759. She being exam: 16 May 1765.) 2 or 3 days after Julian ret^d from Limerick, She was married, to Wm Charter, in the presence of Dep^t Ja^s Morrice, Marg^t Connor & Daniel Manning & a Ty Burrt, in a Closet of Julians Fathers House at Galway, by a Man in a Clergymans Habit, brought by the Plt, who pronounced them lawfull Husb^d & Wife - Dep^t after s^d Marriage saw several Letters sent to Julians Fa^r Mo^r: Bro^r: & Sisters, signd Wm Charter; wch they said, came from the Plt, who therein spoke of Julian as his Wife, & subscribed himself to her Parents as their Son, to her Bro^r: & Sisters, as their Brother. About last Harvest was 12 Mo^s. She in pursuance of a Lre from Julian, came to England with a Child, Dep^t had left at Nurse with Dep^t Sister, She carried it to Dep^t at Bidston, in Wilts, who was then in such distress, she was forced to apply for Relief to y^e Parish Officers, who refusing to give her any, she acq^d Mr Montague & Sir Edw: Baynton & Justices of Peace, with her Distress; Dep^t was not present when Plt appeard before them, but knows the Parish Officers allowed her afterwards 5^s a Week for y^e Subsistance of herself & Child, & that said Wm Charter gave Security to indemnify them.

Wm Jones Sheriff — Remembers about 1759 or 1760. It was the common Conversation at Galway, that Dep^t had conformd at Limerick, been asked at Church at Galway & married to Wm Charter by the Rev^d Anthony Mills, (Rector of Cummemara in y^e Co^y of Galway) who had retired to some distance from Galway to marry them; It was generally reported at Galway that Wm & Julian publickly cohabited together as Man & Wife. A Copy of the Certificate filed in the Rolls Office Dublin, is exhibited & the truth of such Copy, on Comparison with the Original, is supported by the Depons of Savage Johnson, & Jackson Walsh Gentlemen —

2 J. Trin. T. Tyndal for Wm Charter a sperd he gave an Allon, wch was assign^d for the bye Day & continued to 1 S.M.T. before wch Tyndal died.

1 S. Mic. T. Stevens appeard for Plt & prayd the Assignation to be continued to

1 S. Hil. T. when it was continued from Day to Day, to

1767 Byed. Hil T. when Steven brought an Allon of one Article, pleading his Clients Minority & sperd he gave an additional Art^le on Admiss^n

1767 1 S. E.T. when it was continued to

2 S. . . . Then Stevens declared he w^d give no additional Articles & the Allon was admitted

3 S. . . . Stevens brought another Allon of 4 Articles. stating

1. The Marriage of 24 July, was solemnized by a Popish Priest, or by one appearing so, by reading the Service in Latin —

2. Mr^s Dareys Application to the Rev: Mr Visey to marry her daughter, his Refusal, & enquiry who married her, & Mr^s Dareys answer, that she had promised not to tell, as the Gentleman was a Popish Priest —

3. No Person of the name of Rob^t Lewin, was then, or at any time within 30 Years last past, Rector of St Nicolas Galway.

That no Marriage was had at Mrs Unicks, the Sign of the Swan at Cruppeen . .

The Court rejected the 3^d Article, & admitted the rest of the Allon; but expressing some doubts, wh^r the Law of Ireland, (declaring a Marriage between a Protestant & a Papist void,) should not be pleaded; Stevens subducted the two Allons given, & gave a new Allon, repeading the matter before pleaded, except the 3d Art^le & stating that Wm Charter was a Protestant, & Julian a Papist, at the time of the first Marriage,

19 Geo. 2. . . . & pleading the Irish Statute 19 Geo. 2. declaring every Marriage between Protestant & Papist, had, after 1 May 1746, or between a Protestant if celebrated, by a Popish Priest, null & void.

This Allon being admitted Stevens took out a Commission for exam^n W^s in Wilts, wch was returnd to the Ct executed; he also took out a Requisition for exam^n of W^s in Ireland, which has not been brought in, nor has Stevens prayd Publication of the Exam^n of W^s in Wilts. Holman has called on the Cause for Sentence, which stands for hearing on Mrs Charters Evidence only

D^r Hay Judge — Said he would not trouble the Council, being satisfied with the Evidence given in proof of the marriage & therefore dismiss^d Mrs Charter from the Suite, decreed in favor of the Marriage, & (tho in general a Pauper is not entitled to Costs) yet as he was of Opinion, Mrs Charter was the Plaintiffs Wife, he condemned the Plt in 20 £ Costs, & decreed a Monition & Injunction to take his Wife home, & render her Conjugal Rites. . . . . .

. . . The Judge having appointed some doubt as to the Mode of pronouncing, D^r Burrell cited the following Rules

Clark. Tit. 195. 1 A . . . . . Quoniam Justificatio Jactitationis proposita allegata fuit, si pars Rea probaverit se juste jactitasse, pronunciandum est, non solum Actorem defecisse in probatione Libelli, verum Aliam, pronuntiandum est pro hujusmodi matrimonio allegato, prout pronuntiari solet, in causa matrimoniali, originaliter instituta.

Semiplena Probatio

Delegates . . . . . Gorman v Jones. was a Cause of Contract made in Ireland, the Contract was proved by one Witness only, & the Woman was admitted to her Suppletory Oath, from that Decree the Def^t appeal, but was dismiss^d, & the Decree affirmed . . . . . NB

Williams v Bridget Wynne

Delegates 22 Jan: 1717 Reported 1 Strange 80 & C. Burn. 9. vid — where tho there was no positive conclusive Evidence, but only such as depended on Circumstances viz. Confessions, Letters, & unusual familiarities, yet the Ct thought it amounted to a semiplena Probatio, & that the Judge did right in admitting Mr Williams to his Suppletory Oath, & dismiss the Appeal with 150 £ Costs . . . . . vid Clark

8 Anne. c. 3. Sec. 3 — where any Children of Popish Parents, shall conform themselves to the Protestant Religion

Certificate of the Bp of the Diocese, in which they shall reside, testifying their being Protestants, & conforming , on a Bill

Thereupon

No Persons who have turned, or shall turn from the Popish to the Protestant Religion, shall be deemed a Protestant
x 1 Anne. c 2. ..... within the Intention of this, or the former x Act, or shall take Benefit thereby, notwithstanding such Conformity, unless such Person, shall within the Space of 6 Mo. after they are 18, receive the Sacrament, & make & subscribe the declara-
x 30 Car. 2. English Stat. 2. ..... tion, & shall also take the Oath of Abjuration, & shall file in the High Ct of Chancery, or some other of her Maj.: Courts of Publick Certificates thereof, in like manner, as the Bp.'s Certificate is to be filed.

House of Lords Feb: 6 & 9th 1767 ..... An Appeal from an Order of the Ct of Exch.r in Ireland, directing an Issue, to try, wh.r Jn Meade the Testator, was from his Age of 12 Years, or from any other, & what time, constantly bred, in the Protestant Religion, or not?

Jn Mead the Testator was born in 1684. he by Will, dated 27th Sep.r 1758, devised certain Estates, to his Grand Nephew Godson Mead Hobson; & died 30th Sep.r 1758, Capt.n Sam.l Hobson, his Father proves the Will

5 Jan: 1759, The Resp.t the Rev.d Samuel Mead filed a Bill, charging Hobson with the grossest Frauds in obtaining the Will, & the Testator with Insanity; praying a discovery of the Estate & that the Will might be set aside.

22 May 1759 Deft.s answered, & denied the Fraud & Insanity.

12 Nov: 1759, Resp.t amended his Bill, by charging other Facts as Evidence of Fraud, & that Testator was bred & continued a Papist after 21, that he attended Mass, & received the Sacrament, after the Usage of the Church of Rome, that Testator never read his Re-:cantation, or enrolled any Certificate of his Conformity, & that as a Constructive Papist, he was incapable, by Will, to dispose of any real Estate.

26 Feb: 1760 Deft.s answered the Amendments, asserting the Testator was a Protestant long before 21, & that having from his Mi-:nority professed the Protestant Religion, it was not necessary to enroll a Certificate of his Conformity.

as to the Circumstance of enrolling the Certificate of the Bp. of the Diocese where he resided as required by the Statutes 2 Anne c. 6. Sec. 4. & 8 Anne. c 3. Sec. 3. & It was answered, that the Circumstance of enrolling the Certifi-:cate of the Bp. of the Diocese, is not applicable to Conformity out of Ireland.

The Enrollment of a Bp.s Certificate is required only for particular purposes, viz.t by

2 Anne. c 6. §. 4. To make a Popish father Tenant for life .....
8 ..... c 2. §. 3 To entitle a Protestant Child to a discovery of the Estates of Popish Parents & for other purposes

mentioned in different parts of the said Acts, but not for giving a Convert a Capacity of devising his Estate, & if all the Tests prescribed for particular purposes, are required to remove all disabilities imposed on Papists in every part of either Act; a stricter Test will be required to enable a Convert to dwell in a House in the Suburbs of Limerick or Galway, than to qualify a man to hold the highest Trust in Church or State, & that where Converts from Popery have omitted, any one of the Tests, their Heirs need not pay their Creditors, if their Incumbrances, have not been inrolled in the Court of Exchequer.

It was argued from the Bar on behalf of the Resp.t that the Popery Acts of 2 & 8 Anne. were remedial Laws only, but he was of a diff.t Opinion; for that they were the most rigid, penal, & severe, that ever were known in a free Country; that through the means of an odious Set of Informers in Ireland, Families who for conscience sake, preserved their Religion, were liable to be ousted, by this Set of Men, from their Inheritances, (which they, their Ancestors were in possession of for Centuries) & they & their Families sent to starve; & therefore hoped their Lp.s wo.d never encourage the execution of such penal Laws; I wish, as I am sure, all your Lp.s do, that no Act had ever passed since the Reign of Kin: 8 to force Men's Consciences; those Acts have made more Men Heathens than Christians, & tho. some externally comply, with these penal Laws yet they remain Catholics, in their Hearts.

In the course of my little Experience, I have often lamented the fatal Consequences, wch have resulted from these penal Laws, as well as from the Abuse of them, by this odious Set of Men, above-mentioned, who put them in Execution, not for conscience sake, but to enrich themselves by the Impoverishment of their fellow Creatures.

It is high time your Lp.s Justice sh.d interpose; these penal Laws, were, (for ought I know) made, at a time when there might be some reason for it, wch no Man has ever yet been able to account for, nor indeed in the way they are penned, are they intelligible; the Construction wch the Appell.ts Counsel put upon these Laws, by inverting the Sentences in the Acts, is the true one, for as they now stand, they seem to be mere Nonsense & serve only, to ruin more than one half of the Kings Sub-:jects in the Country where they prevail. It is a lamentable Circumstance in a free Country, to force any Sect of Christians to alter their Consciences; It may do under arbitrary, despotic Princes, but I hope it will never prevail under this free Government.

In the present Case the Evidence is contradictory with respect to the Testator's Religion, till 1711, when he was about 23 years old, at which period of Time, & scarcely before, he had Capacity to distinguish, between the Goodness, & bad-:ness of any Religion. It appears in evidence, that he was before that time, a Student in the Temple, & at 23 years old, called to the Bar in Ireland, & from that time, to the Hour of his death, he was an undoubted Protestant, by doing every Act, & performing every Requisite pre-:scribed by these penal Laws, except that of filing a Certificate, which by length of Time your Lp.s will presume, was done, tho. it is little material, being a mere matter of form, whether it was or not, I never had an Idea, that filing a Certificate made a good or bad Christian.

The Resp.t in the present Case has founded his Title upon the saveing Clause of 2 Anne Sect. 12. wch enacts &c. as has been stated to your Lp.s from the Bar, & I am inclined to think, tho. I give no positive Opinion, because it is not now necessary, for the decision of the Point before your Lp.s, that the Estate in question, is not within the meaning or intention of that Clause; & if it was, a Devise by a Papist to a Protestant, is not contrary to the Spirit or design

of the Laws agt Roman Catholics, which your Ldps very well know, & which, as I said before, are rigid, severe, & penal, & it wd be mispending your Ldps time, for me further to shew they are so.

The Order or Decree before your Ldps has approved 2 Points of Law, wch ought at least to have been discussed before they were taken for granted; i.e. That Children of Roman Catholics in Ireland, are to be deemed Catholics, until by a Conformity, (prescribed by these Laws to be necessary to certain purposes only) they appear to be Protestants; I shall not give any Opinion, as to these Points, for the Reasons before mentioned; It is sufficient in this Case to say, that they are doubtfull, & as they were not debated but taken for granted, the Order appealed from, is on that Account, erroneous & unjust:

A 2d Ground of Error in this Case, is, that the Respt himself, is a Papist according to his own Doctrine; for he is a Son of Catholic Parents, & yet he has not laid before your Ldps any Evidence, of his having enrolled his Certificate, (supposing such Enrolment was necessary) or having been educated a Protestant from the Age of 12 Years according to the Act 6 Geo 3. admitting that this Act related to the Point in question, or to the Statutes of Queen Anne, wch I deny, for the 6 Geo. 3. has no more relation to the Statutes of Queen Anne, than it has to any Act made 500 Years ago; they are not so much as taken notice of, in it; & therefore the Respt ex ore suo stands condemned.

A 3d Ground of Error, in this Order, is, that a Court of Equity ought not to have directed a Tryal, in a matter wch is merely a Question of Law; & then he cited the Case of Swan & Stephens Hospital before their Ldps in March 1760, & the Case of Vane & Fletcher 1 Peer Wms and he said, that tho Swan was one of those odious Informers yet the Respts Case is more unfavorable, because from the same lucrative & mercenary motive, the Respt commenced no Suit agt Mr Meade, his Uncle, in his Life time, but admitted his Uncle's Capacity to take the Estate, & even assisted him in the partition of it; if the Respt had commenced a Suit in the Life time of the Testator he wd then have been able to answer for himself; now he is dead, this Suit is brought, wch ought not to be encouraged; the Respt with a very bad Grace has at this day recourse, to the last Century, to find out a dead man's Religion, to whom he expected to have been Heir, & would now in his Grave impeach it; Who as it appears in evidence, had taken the Oaths, been a Barrister at Law, a Justice of the Peace, & Justice of Oyer & Terminer, appointed by the Government of that Kingdom, & was a Colonel in the Militia, & lived a faithfull Subject to his death; However, tho, the Respt comes with so bad a Grace before your Ldps, you will not deprive him of any benefit, wch he may expect, & therefore you will be pleased to order, that the Respts Bill be retained for 12 Months, with Liberty for the Respt to bring his

Action at Law, if he thinks proper, & that the Order appeald from be reversed, wch was ordered accordingly—

Observations on the Statutes 2 & 8 of Anne.

In these Statutes there are only 4 Clauses, wherein the enrolling a Certificate is expressed to be necessary:

1. The eldest Son of a Papist to make his father Tenant for life. 2 Anne § 4
2. For the eldest Son to become a Protestant within a Year after his Fathers death . . . . . Sec. 14 . . .
3. For a younger Son of a Papist to obtain a maintenance from his Father . . . . . 8 Anne Sec. 3 . .
4. For the Wife of a Papist to get maintenance if she become a Protestant . . . . . Sec. 18 . . .

And the reason of making it necessary in the two first Cases, is to record the Incumbrances affecting the Estates of Papists . . .

And in the two last Cases, to give the Court of Chancery a Jurisdiction to compell a discovery by Bill, nor was there a Case ever determined, wherein the enrolling a Certificate was resolved to be necessary, wherein it was not expresly required . .

Enrolling the Certificate is not required, to enable a Person subscribing a declaration, & taking the Oaths, (& so becoming a Protestant) to be a Guardian . . . . . 2 Anne Sec. 15 . .

Nor to purchase Lands of Inheritance . . . . . Sec. 8 . .

Nor to enable Papists to inhabit houses in Limerick or Galway. Sec. 24 . .

Nor to qualify Papists to vote at Elections . . . . . Sec. 27 . .

Nor to enable Papists to present to a Church Living . . . Sec. 28 . .

The Statute 2 Anne Sec. 27. requires only a General Qualification from all Papists. Viz: to subscribe the Declaration, & take & subscribe the Oaths of Abjuration &c . . . .

The Statute 8 Anne ch. 3. was made to amend the Statute 2 Anne The 8 Anne Sec. 14. making it necessary to enroll the Certificate in the 4 Cases abovementioned, only; & does not extend to any of the other Cases alluded to, by these Statutes . . . . . .

Prerogative Trin: T. Bye Day. — Bishop — No 166 — Clouds v Davis & Robinson. — Fountain

Dr Marriott Wynne — Dr Harris & Burrell

Dr Harris . . . .

Hannah wife of Jn Clouds late of Mayland Point, in the Parish of Westham, Essex, but at Stummerton in the Pish of Hackney in Midx died, is the Testatrix; She had beside her Husband, 2 Brothers, Wm Joseph, who also neglected & deserted her; the Husband appears to have been a bad man, & to have used his Wife ill, who therefore lived seperate from him; in 1762. Wm Butler Bro: of the Testatrix died intestate, possessed of a large personal Estate, wch vested in Jos: Butler his Brother, & Jn Clouds in right of his Wife Hannah; on this occasion, Jos: Butler took some Care of this Sister, by persuading John Clouds to settle a Proportion of his Share, on his Wife; who accordingly agreed to settle 1/3 of his Moiety on her; & 15 Aug: 1764. an Indre quadrupartite, was executed, between Jn Clouds of the 1st part; Hannah Clouds of the 2d Jos: Butler of the 3d Lewis Davis & Jn Robinson of the 4th part; by which it was agreed H. C. shd live seperate from. J. C. who shd transfer into the Names of I. B. L. D. J. R. Hannahs Trustees 5000 £ (being 1/3 of his moiety of 30000 £ part of the personal Estate of W B. actually divided) for her Separate use exclusive of her Husbands Controul, & for such Uses, as H. C. by Deed or writing, under her Hand & Seal, attested by 3 or more credible Wn: or by her last Will & Testament in writing, duly executed, shd direct, limit & appoint. In virtue of this Indre. H. C. on the 3d Nov. 1764, made her last Will & a duplicate thereof, attested by 3 Wn: & appointed L. D. & J R. (2 of the Trustees, named in the Indre:) her Exrs & Resid: Legy: who had assisted her (when she was in the utmost distress deserted by her Husband & Brothers) with their own Charity, & also pro-

=cured her Assistance from others, for whom she always expressed the greatest Friendship; you will find, Dr R. permanded Deed to give more to her Relations, than she at first intended; & that of the 4 5000£. 4075£ is bequeathd by the Will. including 100£ to each of the Exors – That the 2 Sons & Daur of her Niece Mr Descrambes have each 600£, with a right of Survivorship; & Sarah, Anne, & Jane Cowper 20£ a piece with a same Benefit – 500£ is left in trust to the Exors to apply amongst Poor Baptists; Eliz. Cripps. & Thompson. 30£ her wearing Apparel George Slack 50£.

14 Nov: 1764. H.C. died, on wch day the Exors proved the Will; In Clouds the Husb: appearing personally & consenting thereto. soon after which, a Citation issued at the Suit of the Husb: to prove the W: or to shew Cause why Admon shd not be granted to J.C. the Husb: of the Decd, as dying intestate?

Fountain appeard for the Exors, propounded the Will, which Bishop opposed; Fountain gave an Allon, wch was admitted & 5 Ws examined thereon, viz. Merton, Stills, & Ewer the subscribing Ws to the Will; Cockayne & Benn who prove the Execution of the Indre; The Instructions are in Robinsons handwriting; Stills on entering into Decds Bedch: said to Decd I have rec: Instructions from Mr Robinson for making your Will; shall I read them; Dec: answerd yes, by all means; Keene, says, when the Persons abovement: came into Decds Chamber, she went out of her own accord, but listend in the adjoining Room, & heard the Will read over; Cripps (who is a very adverse W:) says She was bid to go out of the Room, but yet admits She heard the Will read over, & the Legacy given to her; She likewise observes, that on 2d Nov: when Dr & R. were gone, Decd said to her, I have given Instructions for my Will – In the Draft of the Will of 10 Oct: 1764. Dr & R. are Exors. Pending this Suit In Clouds is dead leaving 3 Exors Ld. Reilly In Wedings, & Wm Jubb, the latter wd not appear, wch obliges us to proceed in poenam agt him.

altham after intervening on the part of Jos: Butler as Guardian of the Grand Nephew & Grand Niece, & giving an Allon wd proceed no farther.

Bishop on behalf of J.C. gave an Allon, exam: 5 Ws thereon...

Cripps, contradicts herself & is contradicted by every body else;

Golledge, says Dec: w: drink Rum, & sometime before her death, thereby rendered herself ... stupid, but wh: so as to be incapable, knows not.

Rawlings, speaks to Decd drinking a Quart of Spirits a day, but it is to be observd he never saw her after the 8th of August....

Baskerville, is their Attorney

Slack, has seen her drink a glass of Rum, & has himself brought her Rum, & thinks she was incapable, yet he admits about 3 Weeks before her death, viz. 29 Oct: he came to settle an Acc: with her, brought her Money, & desird her to sign a Receipt for it; he says on 1 Nov: he saw the Decd who was then quite dull & he knows, was incapable of giving Instructions for a Will to 12 Jnt. says, he used to bring Decd Bills, & settled the Accts himself to 15 Jnt. Brought Decd an Acct 29 Oct: of Moneys expended from 8 to 20 Oct: in which there is but one Item for Liquor. viz. a Bottle of Madeira; He adds he never thought her capable, but she talkd sensibly the first part of the time she was at Hammerton; It is remarkable that Slack is one of J.C.s Resid: Legs & yet J.C. always esteemd him a Rogue, & called him so.

When Mrs C's Will was read, & he heard she had given Slack a Legacy of 50£ – Cripps says Decd drank a Quart a day, & was incapable of disposing of her Estate; She observes that J.C. visited Decd every Day to her Death, in a very friendly manner, & that she never observd any Cause of Decds blaring him any ill Will; yet to 13 Jnt. Cripps admits being knocked down by J.C. for interposing between them, & taking Decds Part one day when they had quarrelld She says, She never lent money of J.C. since H. C.s death, save borrowing 20£ of him, wch she was to repay, when H.C.s Will was established in wch she was a Legatee

In contradiction to this Plea, Fountain gave a 2d Allon pleading Capacity & denying that Decd was addicted to drinking Spirituous Liquors to excess: on this Plea 15 Ws are examined, who all speak to the Decds Capacity; amongst others the Physician & 2 Apothecaries who attended, say they never saw her in Liquor, tho, they visited her at different Hours of the day, & think if she had addicted herself to Spirituous Liquors, they must have known it; most of the Ws speak to the bad Character of the Husband & his ill Usage of his Wife; Keen says, amongst various proofs of Capacity in the Decd, that she prepard for executing the Will in question, by ordering Breakfast to be got ready for the Persons she expected; Keen also speaks to subsequent Declarations of the Decd in favor of the Will; that on her seeing her sorrowful she asked Decd: if she had taken care whom she trusted, in her Will, She replyd yes, the Exors were honest Men –

Dr Marriott – I am Council in behalf of the Exors of In Clouds, whilst living the true & lawfull Husband of H. Clouds, who appears to have been a poor, ignorant, drunken, stupid Woman, who by the contrivance of Mr Davis & Mr Robinson made no less than 3 Wills between August & November; the first is dated 15 Augt 1764. the very day the Indre was signed, soon after wch Mr Davis carried the Decd to his House & persuaded her to make a Will, in wch he was named Resid: Legatee – the 2d Will is dated 1 October, & the 3d Will 3 Nov: 1764 in both which Lewis Davis & In Robinson are Exors & Resid: Legatees. It is said, the Will was read over, to the Husband, who approved it; I admit it, but his Approbation was conditional, if fairly come by, wch he thought the case when he consented to the Probate, but afterwards finding it otherwise applied to this Ct for Redress; You are told J & H.C. were separated; they did live separate from each other, having continual Differences on account of the Decd addicting herself to drinking Spirituous Liquors to excess; You will observe the difference, in the Signatures, of the different Sheets of the Will, in the first Mrs C's hand writing is strong, in the rest decayed the Inference I w: deduce from thence, is, that she was in extremis when she signed it, & laying other Circumstances together, must have been incapable; the Witnesses who attested, are People brought from a distance, Strangers to the Decd the Parties concernd are aware to the Husband being acquainted with the Transaction;

x not 4th first of 15 August.....

The Instructions for all the Wills are in Robinsons handwriting; the Will of 3 Nov: when read over to Decd, was approved by her only by Signs; It was brought to her engrossed, wch is very unusual; Mr Lewer has annexed to his Affidt of Scripts, the Instructions for the Will of 3 Nov: in those Instructions 2 Legacies to Mrs Descrambes, Mrs Tull of 500£ each are ordered to be left out; I shd be glad to see the Paper in wch they were inserted, they are not in the Will of 1 October, therefore unnecessary to be struck out, as they did not exist, unless some Paper is secreted, which I must suppose, as

they are mentiond in the Instructions for the last Will; again Mr Ribright is ordered to be inserted instead of Mrs Ribrights Legacy of 100£, now Mr Ribright is not mentioned in the Will 5 October A strong Circumstance of fraud, is Mr Robinsons Letter to the Deed, even previous to the Execution of the Indentures, concerning the mode of making her Will. The Proceedings carry the strongest Marks of Imposition, the Instant She has it in her power to dispose of a Proportion of her Brothers Estate, he carries her to his House, persuades her to sign a Will, wherein he had named himself Resid: Legatee, & we have thereby gained a considerable Fortune; You are told the Deed was afterwards sensible of her Error, declard he had imposed on her, was a Villain & sh: never receive any Benefit from her. You observe the Wills of 15 Aug: & 1 Oct: are destroyd - Stills says the Will of 15 Aug: he heard, was cancelled by the Deed herself at Thumberton the 5 Oct: Lwer says Davis burnt it at his House by the Deeds directions - It is admitted Stills burnt the Will of 1 Oct: at Deeds Lodgings, by her directions, the day the last Will was executed - There are several Blanks left in the Instructions for the Will of 3 Nov: wch according to Stills were for the Ethan Names of some of the Legatees, & to insert a Trustee for the disposition of a Charitable Bequest of 500£ to poor Baptists, whence it is evident, they were at a loss on whom to repose their Confidence -

The Evidence being read

Dr Harris ... It is now clear that the Deed was separated from her Husband & that Seperation arose from ill Usage on his part; If his admitted he settled 1/3 of the 1/n he was entitled to (under the Statute of distributions,) of her Bro: Wm Butlers Estate, in trust for her Sole & seperate Use, & disposal, by Deed or Will attested by 3 Ws - that her old Friends Davis & Robinson are 2 of those Trustees, & Exors & Resid: Legatees in her Will - that She always expressed a great Regard for them; it appears they both, or Robinson persuaded the Deed to give, more to her Relations, than she intended; Dr Marriot talkd of expungeing y Residue but that is, in effect, giving up the Will; he says,

Stack deposes, "That Deed told him, that by a will Lewis " Davis had made for her, he had given himself 4000 of her Estate " wch she never intended he sh: have, for that she was under " no obligation to him, & that he had never given her anything " of his own, & she was determined, he sh: never have a farthing " of her Money." Now if this is true, it is very extraordinary, She sh: in both the subsequent Wills take such particular notice of him, & deal out such marks of her Favor to him - The Execution of the Will is as fully proved, as any I ever saw; She desires the Will to be read over to her, wch is accordingly done, audibly & distinctly; when Certain Legacies are mentioned, She pauses, & says they are more than I intended, but on consideration bids the Reader proceed, observing to R. "you are not so kind to yourself, as you ought to be; When finished, it is said She approved it, but not, in what manner Lwer thinks, by Signs, but the fact of Approbation is agreed to by Stills, Lwer: "At the time of Instructions, she says, I will give nothing to these worthless Relations of Mine; Robinson prepes her, she consents; a man may give away from himself; it is to this She alludes afterwards; She takes abundant care that her Exors sh: not be troubled, She expresses her anxiety on that Head to the drawers of the Will; would you then expunge the Residue? The Will was in such a perfect State

x Both in Evidence ... this is

that neither reading over nor Instructions were necessary, & so wincee that, the Husband after hearing it read, was so well apured of it, that he accompanied the Exors, & gave Consent to the Probate .... The Indenture, which is the Ground work & foundation of this Will, being admitted, it will be unnecessary, for me, to trouble the Court, with any authentication thereof; but I must not pass over in Silence the occasion of its being made, which appears to be the drunken & Brutal disposition of the Husband, whose repeated ill usage, in various Instances rendered a Seperation absolutely necessary; You have it in Evidence that the Deed had been reduced to such Distress, as occasionally to be in want of Victuals & to be necessitated to be a Nurse to Sick People in order to support herself; in this Situation, She was refused any assistance from her Relations, any Support from her Husband; & was beholden, to the benevolence, of Davis & Robinson, (the two Deacons of Dr Gills Congregation of Baptists) who by their own Charity, & their Interest with the Congregation, contributed largely to her Relief: thus circumstanced, what is more natural, than that she should be desirous of testifying her Gratitude to them, as soon as She had an Opportunity, in preference of a Husband & Relations who had totally neglected her; that this was the first object of her Attention, is evident from Mr Robinsons Letter, (which the Gent: who opend on the other Side, seemd so much to disapprove;) wch appears to have been wrote to the Deed, prior to the Execution of the Indre, in consequence of Inquiries, made of Mr Baskerville, at the Deeds request, relative to her Ability, to make a Will, at that time & the Consequences of her omitting to do it; It is clear likewise, that she considerd, in what manner She sh: dispose of her Effects, & purposed extendeing her Bounty to that Congregation, by whose Charity she had been relieved: the Passage of the Letter, wch applies to these Items, is as follows" as to the other part I talkd to you about " viz the Consequences of your not making a Will, Mr Baskerville " says, if you die without one, all, that is now made over to you will " return to your Husband again" - "as you intimated an Intention " of doing something in regard to our Debt on the Meeting, that must " be worded, in a very particular manner, or else it will be good for " nothing; that it may answer the end you intend:" The Gentlemen would insinuate from this Letter, that Mr Robinson had been urging the Deed, to make a Will in his favor, as soon as possible; & had made the Enquiries alluded to in the Letter, in order to proceed with Certainty; but the candid & obvious Construction of that Letter, is quite the reverse, that his Application to B. was in pursuance of her Request & that he communicated to the Deed, the Substance of Mr B's advice, in what manner to conduct herself:

Dr Burnell.

Indre. 15 August
Ls Lre. 3 July.

The Opposition to this Will, is founded, in a Charge of Incapacity in the Deed, by reason of her drinking Spirituous Liquors to excess, & an accusation of Celebody, & Imposition, on the part of the Exors: I will now examine into the Grounds of this Charge -

Dr Marriot said there were no Instructions, but what were in Robinson writing, & thence inferrd they did not proceed from the Deed; Now, I conceive, it is immaterial, who is the writer of Instructions, or wh: any Instructions were given by the Deed, provided the Will was read over to & approved by her; but it is unnecessary for me, here to establish that Position, because Lwer says when R. brought him Instructions, for the Will of the 1 Oct: he doubted of their Authenticity, & desird to see y Testatrix; tha R. carried him to his House, where She was, & acknowledged them to be her Instructions, & tho, Lwer was then a Stranger to the Deed, he identifies her, by declaring he saw her afterwards execute the Will 1 Oct: at Kummerton: but then the Instructions

x 2d Nov. She told Cripps She had given Instructions for a new Will

for the Will of 3 Nov: are not proved to come from Deed; they are not, in the same manner as those for y^e former Will, but the Dec: owns them to be hers, when the Will is executed?
It was hinted, that Robinson himself, had made the Will, & told Cripps, he must set up all night for that Purpose; but that is demonstrated to be false by Hills & Ewer, who declare the Will was wrote wholly by Macdonald, & the Duplicate by Cockayne their Clks, that R. was never present & the whole was finish'd towards night on y^e 2^d of Nov^r

reading over & Execution

The Reading over, Approbation, Execution, & Attestation, is proved by Every Person present.
Meriton says, on their coming into y^e Chamber Deed asked if the Will was brought, being ans^d yes, She desired it might be read that Hills read it, & when she came to the Legacies to her great Nieces, Nephews, she said, She thought there was more than she intended for them, when read Hills asked, if she approved it, she replyd yes, & desired to execute it, wch she did in presence of Hills, Ewer, & Dep^t: who attested it
Hills. says. he told Deed he had made her Will, pursuant to Rs Instructions, she desired he w^d read it, which he did, & at y^e end of every bequest, desired her to observe, if it was agreable to her Intent, & she from time to time approved it, except as to the Legacys of 1500£ to 2 Gr. Nephews, & a Gr. Niece, wch she said was too much for them, & speaking earnestly, & throwing her head towards R. added, but you w^d have it so. When read, Deed approved the whole, & said, "Sir, I hope you have taken care that "neither my Bro^r or Husb^d can give my Ex^rs any trouble, because "I know they will, if they can"; confirms Meriton as to Execution & Attestation — as does Ewer also
Even Cripps one of the most Adverse W^s admits, she heard the Will read over audibly to Deed, tho, she was in the next room Keen says the same. So that there cann^t remain the least Shadow of Doubt on that Head.

Subsequent Recognition

Keen to 15. also speaks to a subsequent Recognition by the Deed, That one day after y^e Execution of the Will, thinking Dec: uneasy she ask'd, if she was satisfied with her Will, & if every thing was to her Satisfaction, She replyd it was. Dep^t said I suppose you know who you have trusted, Dec: answered, they, (meaning R & R) were very faithfull honest Men, & she knew to be so —

Blanks

With respect to the Blanks, they were left for the Christian names of three of the Legatees, & one other, accord^g to Ewers acc^t: for the name of a Trustee for the disposal of 500£ to poor Baptists the Deed being in doubt wh^r She put in her Bro^r Joseph or L. Davis —

Destroying the Wills 15 Aug^t & 1 Oct^r 17 Ca.

The next Circumstance of Suspicion, is the destruction of the 2 former Wills; I readily admit the fact, & say it was by the Deeds Order — Hills says he heard Deed herself burnt that of 15 Aug^t about 1 Oct^r at Hummerton; & he, Ewer, & Meriton agree that Hills burnt that 1 Oct^r after the Will of 3 Nov: was executed, at Deeds Lodgings by her desire
The Circumstance sworn to by Cripps, that she was sent out of the Room, when they were going to read the Will, is flatly contradicted by Keene, who was present & left the Room at the same time with Cripps, voluntarily, in this Keen is confirmed by Meriton, Hills & Ewer —
Dr Marriot urged, a farther reason to infer fraud, was the considerable Sum likely to accrue to the Exors, viz: certainly upwards of 1700£, & eventually more than 3200£. I answer, the first Assertion, is founded on a mistake, the Deeds fortune being 5000£, & the Sums bequeathd £4225 — as to the other part of the Assertion, it is mere Surmise, as there is no Constat

of the Quantum of W^m Butlers Estate remaining undivided; Perhaps I shall be told of Slacks Calculating the whole at 48000£ & that he is able to form a Judgement; but you Sir will observe how that Calculation is made, viz, Variety of out Standing Debts of which possibly little or nothing may be recovered —
I come now to the charge of Incapity from Drinking, of which the Deed is strongly accused by 4 W^s
Cripps who lived with Deed, as her maid, for 15 y^rs before & to her death, gives the strongest Evidence that can be conceived; instances her frequently drinking a Quart of Spirits in a day, & continuing so to do, several days together; that she has found her dead Drunk on the Hearth, & that for 2 or 3 M^s before her death, she was utterly incapable; If this Account is to be credited the Will ought certainly to be set aside: but upon examining the Depon of this W^s there are so many Palpable Contradictions, & the Account given, is so opposite to what many W^s of unexceptionable Characters depose, that the Ct will have little Reliance upon her Evidences; to invalidate wch a single Instance will suffice; viz. to 23. Art: she says, on 3 Nov^r & more than a Month before, Deed was incapable of giving Instructions for, or understanding a Will when prepard, & frequently did not know Dep^t: yet this very W^s afterwards admits that Deed on 2 Nov^r after D & R. were gone, told her She had given Instructions for a new Will —
Rawlings, speaks to her drinking sometimes a Quart of Spirits a day, but as he never saw her after July; if true, it will not impeach an act done 3 Nov^r —
Slack has often seen her drink a Glass of Rum, & says he bought considerable Quantities of the Strongest Spirits for her at Hummerton; She appeard utterly incapable ab^t 3 Weeks before her death; Yet he at that time carried her an Acc^t to settle, & paid her Money; used to carry her Bills for Spirituous Liquors, & also Cash, & left such Bills, in acc^t for so much Cash paid for her Use; he settled the Acc^t himself without Deed taking notice of him, & she signd such Rec^t as he thought necessary, for the Money he so paid;
If this Acc^t is true, it is very much to Slacks discredit; as an honest man, if he thought the Deed incapable, he ought not to have entered into an Account, which he might settle as he thought proper, But it is remarkable that one of the Bills mentiond, is before the 1^st, in which there is not a single Drop of Spirits, & the only Item, of Liquor, is a Bottle of Madeira —
Golledge the Mantuamaker was only occasionally with Deed, & as She confines herself to a general Assertion, of Drunkenness cannot be attended to
On the other Side are the Depons of 6 unexceptionable W^s Some of them acquainted with Deed many years, who never heard of her being addicted to Drinking; Dr Clarke & the two Apothecaries visited her, in her last Illness, at different Times of the Day, they all concur in saying they do not believe she was guilty of Drunkenness, & that if She had been, it must have been known to them:
Her Capacity is established by 8 W^s of unexceptionable Characters, who depose to strong Trait of Understanding at different Season, & on different Occasions; She settled Acc^ts with Keen & Cripps within a few days of her Death: She bought Dinner of Graham the Evening She executed the Will — Viz: Saiders kept a daily Intercourse of Business with Deed, till 2 days of her death, being employd by her Master to know what she wanted at his Shop, wch She did every morning, received Orders from Deed, & carried Goods in pursuance thereof with the Bill

of Particulars, which the Deed look'd over herself & paid; I must now observe a little upon Mr Clouds the Husband, whose Character will scarce bear examn; he is represented by all the Wt as a man, greatly addicted to Drunkenness, & when in Liquor, guilty of all sorts of Violence & Brutality to his Wife, who frequently felt the bad Effects of his Vices, one time it is said he very near broke her Arm, at all times behaved very ill to her, so that he is represented as an Object of Terror to her on all Occasion; even Cripps, did not escape his fury & however desirous she may be of representing him in an amiable View, by saying She knew of no cause the Deed had to dislike him, unless it was his constantly endeavouring to prevent her drinking, yet She afterwards admits, he once struck her on the breast & another time beat her to the Ground with the Bellows for interfering in a quarrel between him & his Wife; The Deeds disapprobation of her Nieces behavior is strongly pointed out, by Keen, Graham & Cheetam, who all heard her complain of her in very severe Terms, wanted to turn her out of Doors, & said She was convinced She might as well fling her money down the Kennel as give it to her, or any that belongs to her. She thinks her a fine Lady, & the Aversion she takes to her Niece is extended to the Rest of her Family: Under these Circumstances, there could not be any Inducement to benefit a Set of Persons, who had treated her ill, & had slighted her; & having a dislike to her Relations, She would naturally wish to dispense her favors among those, whose Bounty she had tasted, & whose friendship She had experienced, in which case Mr Davis & Mr Robinson must necessarily be the first Objects of her Attention. after her death, you will observe, the Extors read over the Will to her Husband, that he might be satisfied of the fairness of the Transaction; whilst reading, the only Observation he made, was to express his Content at the whole Contents except the Legacy to Slack, who he said was a Rascal & he was sorry She left him any thing; as a token of his Approbation of the Will, he accompanied the Extors to Drs Commons, & agreed to the Probate; tho he has since altered his Sentiments & brought this Suit to set it aside; I hope, upon the whole, you will think the Deed had a Capacity adequate to the Act, that the Extors were guilty of no fraudulent Practices to obtain this Will, that She had a sufficient reason for giving away her fortune from her Husband & Relations, & confirm the Probate to my Clients....

Dr Marriot

I am Council, on behalf of the Extors, of the Husband, of Hannah Clouds deed, & shall oppose the Will in question on two Grounds; first, I must insist, we have laid sufficient on two Grounds; first. I must insist, we have laid sufficient Evidence before the Court, to overthrow it; 2dly. That the Opponents have not offerd proper Evidence to support the Devise; the Law expects the strongest Testimony, the most convincing Proof, where a Will is propounded by Relations.

If any Flaw, or Reason is found in the Evidence, it is a good foundation for setting aside the Act; the Parties concerned in fabricating this Will, have complied with the forms prescribed by Law, as is generally the Case, in Transactions of this Nature; Wilmot Coleridge Case Miller & Shepherd — Easton v Robins where the Wills were pronounced agt, because Instructions were not proved The Trust, is a strong Reason against these Persons, being Extors & Resid: & Legatees — The Circumstance of carrying the Will engrossed, is very suspicious; when read to the Deed, how does she behave? why, say they, She expressed her Approbation by Signs, or Nods; a very uncommon mode, of giving an Assent, to so important a Transaction; You are told the Deed fainted during the Execution, which may account, for those Nods, or Signs, abovement: & might proceed from her being so ill, as to be unable to speak or understand, what was in agitation; it might likewise be owing to the Testatrix having drank to Excess, & being thereby rendered senseless; Hills & Ewer appear to be Confederates in the Transaction, & to have drawn, engrossed, & carried the Will to Deed without enquiring, whether She had given Instructions for it; Dr Smith & the 2 Apothecarys, were certainly imposed on, as to her Sobriety — Robinsons Letter to the Deed, is only fit to be wrote to a weak, silly old Woman, & under the Appearance of friendship, covers a very bad design; he presses her to come to his House or Davis's to make a Will in their favor, & covers his Intention, with the Masque of Hypocrisy, concluding with a Prayer, unbecoming an honest man in a private Transaction; Much Stress, has been laid, on the Husbands Assent to the Probate, He acted as an honest man should, by acquiescing in the Disposition, till he had reason to suspect, the Will had been, fraudulently & unduly obtained; he then applyd to this Court for aid & we hope you will think this Will ought to be set aside, or that the Devise obtaind by a continuity of fraud, sh: not be established In Bradbury Case Dr Northington set aside a Bond, which the Party said She had been inveigled to give to Bradbury a Methodist Parson under Religious Pretences —

Dr Wynne

Much Stress has been laid, on the Husbands Consent to the Probate & great Surprize expressed, at his alteration of Sentiments afterwards, but that Surprize must vanish, when you recollect the Situation of the Husband, who being in open Consilii, suddenly called upon for his Decision, gave his Approbation, with less circumspection than he ought, & being afterwards convinced of the fraudulency of the Transaction, endeavourd to set it aside: The Extors of the Husband rely on the outlines of the Case: viz. the mean Circumstances, Drunkenness of the Deed, & the Religious Influence with Robinson had over her; they therefore hope, you will require full proof of Capacity of the Deed, & of her Intention to do every part of this Act, with is brought before the Court; we shall be able to shew, this is not a legal Will, the Attention of the Court will not be confined, to the mere Instructions & Execution; the Nature of the Transaction, the Condition of the Persons concerned, must be taken into Consideration — The Deed, we are told, received no Relief from her Husband when in distress; perhaps not, but does it appear he was able to maintain her? certainly no, & con: you have it in Evidence he was himself reduced to great Poverty, what therefore was more prudent, than their living seperate, & endeavouring to

M Instructions for a 300ol Legacy in a Codicil, were proved, but the Legatee (a Maid Servant) who had bro: the Instructions for the Will, being asked, (when they came to execute it) who was the Extor, said, She'd go ask Mrs Hills, & accordingly went out, but not soon after, said She was to be Extor

provide for themselves, by their own Industry. 1763. Wm Butler Mrs Cloudes Brr: died, wch laid the foundation for this Scene; It is said, She had no Regard for her Husband, be itso, that will not account for her disinheriting her Nieces & Great Nieces; Mr Rs Letter is very extraordinary; no man has a right to endeavour to inculcate the Doctrine, that a Woman is not to be reconciled to her Husband; much less, is it becoming, in so religious a man, as R. whose Letter so far from referring to a prior Conversation between him & the Decd, has rather a Reference to. . . . . He is desirous of getting something for the Church, but he will not forget himself; he takes care to explain to her the nature of a Residuary Legatee, to tell her a Res: Leg: is necessary, for tho, it is by no means of the Essence of a Will, it was necessary for him, else the next of kin would have been residuary Legatees; that part of his Letter, which says it is "for the Glory of God," is Blasphemous & merits the Pillory; with respect to the first Will Robinson, (not Davis) brought it to the Decd, accord: to the vulgar Saying, set a Rogue to catch a Rogue; Robinson got it from Hammond, & not from Davis; the Decd was very angry with Davis, on account of that Transaction, & threatned to expose him to the Pastor of the Congregation; 'tis evident Robinson encouraged the Decd in her favorite Foible of drinking, he says 2 or 3 Glasses of Rhen do him a great deal of Good, that She has the Gout in her Stomach, should drink something strong. Those who say, the Decd was not a drunken woman, are Persons who occasionally visited her, & depose to her Sobriety only at those particular Seasons—

Now come to the Execution of the Will in question, the other Circumstances are only to guide your Judgement upon that fact. The Witnesses to the Will do not prove the Identity of the Testator, tho. our Witnesses do; There is a draft of the Will of 10 Octr Wrote by Hills, wch corresponds with the Copy brought by Benn, except in 2 Legacies to Mr Deserambes & H. Tully, wch are omitted in the Will of 3 Novr: Benn swears to the Authenticity of his Copy— Ewer dont tell us, what Instructions were given for the Will of Novr whom was present when they were given, or wh: they proceeded from the Decd. I do not lay it down as a general Rule, that Instructions sh: be traced up to the mouth of the Testator, but that Sh: be given in some Cases, as where doubts arise, upon the Capacity of the Decd, & the Integrity of the Persons concerned in the Transaction, benefitted thereby— Will was so determined in Colvilles Case" who made a Will in 1746, amongst other things gave 2 Legacies of £5000 each to his Sister, half Brother & the Residue in trust for . . . . & Niece of his Mistress Pat: Lander. It was proved, Instructions were given by Baldwin to Barnard an Attorney, for making the Will, that Council's Opinion was taken thereon; that the Will was afterwards carried to the Decd, read over to & executed by him, who was then in his ordinary course of Health, & did not die till 1748. The Will was contested in Ireland & the Decd proved of a slighty turn of mind, & to have been under the Influence of a Mistress, who indeed him to leave the Residue to her Niece; " Justice Robinson directed, that if the Jury was of opinion, the Decd was of a weak turn of mind, & under Influences, then, there was a Chasm in respect to the Instructions, & that ye mere matter of Execution was not sufficient—

The Witnesses to the Will, in the present Case, were entire Strangers to the Decd; no body was about her during the whole time of the Execution, but Davis & Robinson, who being the Parties benefitted sh: in point of delicacy have retired; it would be material. if the Witnesses could give the Ct some satisfactory reasons, why they believe the Testatrix knew the Contents of the Will; what passed in the Parlor, is worthy notice, Hills, Ewer both say on entering Deeds house, they were shewn into a Parlor by Mr Keene, who told them Mrs Cloudes wd be ready presently; that Davis, or Robinson, or both, went out for some little time, & then returned, there being a Blank left in ye Will for a Trustee for disposing of 500£ to poor Baptists, D. or R. whichever went out, said on their return that Mrs Cloudes wd have Mr Davis added as a Trustee, that Hills inserted it accordingly; this is a strong Circumstance to induce a Suspicion, that either D. or R. could make Decd do as they pleased, or, that they ordered Ds name to be inserted, without the Decds directions; upon coming into Decds Bedchamber, Hills, said to the Decd, "I have received Instructions from Robinson, for making your Will, shall I read them?" he never asked wh? she gave R. orders to bring those Instructions: on her bidding Hills read the Will, instead of giving Decd the Duplicate, to examine & compare with the Will itself, as he read it, it is entrusted to one of the other Confederates (Ewer) in this Transaction— The reason assigned for this Neglect on the part of the Decd, towards her Husband & her Relations, is, the Ill usage She had received from the first, & her having received no assistance from either in her Distress; I do admit her Brother Wm to have been culpable in not relieving her, I will acknowledge her Husbands Ill behavior, but I must insist her Brother Joseph does not appear culpable in the least; he had at that time 6 Children, & might possibly be as poor as his Sister; there is no Colour to say he had not done what he could do for her, or that he was able to do any thing; She had likewise other Relations, agt whom She does not appear to have had any Objection, why then sh: she pass them by unnoticed, merely to benefit Strangers; We are told She objected to the Legacies given to the Descrambes, when the Will was reading, but said Robinson would have them inserted; now if she did not intend those Legacies, this is not her Will, but if it is, these Legacies did not come from her; to this we are answered, she approved them afterwards, whatever her original Intention might be, If true, that is a strong Reason for inferring an undue Influence in D & R. We hope you will only pronounce for what is proved, which is no uncommon thing; It was done in the Case of Barton & Robins where the Attorney made himself the Resid: Legatee; the Legacies were proved to come from the Decd, by Persons, who listened when the Will was read over to Decd you therefore pronounced for them, but having no Proof of the devise of the Residue proceeding from Decd, you set it aside & decreed Admon to one of the next of kin, as I hope you will do in the present Case. . . . . It is clearly in evidence, the Decd made 3 Wills in a short time, viz. 1 Blank wch was destroyd by herself— 10 Octr wch Hills burnt by her directions, after the last Will was made— 3 Novr It is agreed that in every Will Davis, Robinson were Exors, & the Witnesses believe Davis was Resid: Leg: in the first; the chief difficulty arises with respect to the Decds Declarations, in respect to the Residue given Davis as afd— 2 Wrs viz. Slack

& Cripps say, that Deed. On being apprized of the Quantum of the Residue, used many harsh expressions agt Davis; said he was a Villain, that she wd expose him, & expressd great dissatisfaction, that he wd get 4000£ by the Residue wch she said was too much for him & wch she never intended him — The Will of 3 Novr was opposed by the Deeds Husband, in his Life time, & that opposition is carried on by his Representatives, who would take the Benefit of the Intestacy, & insist first she is dead intestate as to the whole, or, if not, at least with respect to ye Residue. The Question is not between the next of Kin of the Decd, but betw: her Exors & the Representatives of her Husband: The Circumstances of the Deed, are material; She appears to have been in extreme Poverty a considerable time, to have been neglected by her Husband & Relations, & to have lived on very bad Terms with ye former; in 1763 a large Sum of Money came to her Husband by the death of her Brot Wm Butler her Relations thought it prudent to obtain from her Husband, a Separate Maintenance thereout, & a certain proportion to be at her disposal, the Husband consented & assigns over 1/3 of his 1/2 to Jos: Butler, Lewis Davis, & Jn Robinson in trust for her Sole & Separate Use & disposal; the very day the Settlement was compleated, L Davis persuaded her to go to his house, & make her Will, in wch he was named Resid: Leg: She appeard satisfied with it in general, but displeased that Davis would be so much benefitted; but her Declarations that She had made a Will at Davis's are a proof of her general Capacity at that time; besides the Deed of Settlement shews the Opinion of the Parties, as to her Capacity. by empowering her therein, to make a Will — That she intended to die Testate, is proved by Slack, who says, when the Deed expressed her dissatisfaction at Davis She said, she was going to make another Will, desired him to leave his name with her, & afterwards told him she had made another Will on the 10th wch Will Slack is himself a Legatee; this destroys the Charge of Incapacity from Drunkenness, & confirms her general Capacity; Her Husbands Assent to the Probate, is Evidence agt him, that he thought She had a Capacity; Mr Lewis's behavior appears to be very proper, he wd see the Deed about her Instructions for the Will of 10th he did so, & that Will must have been pronounced for, if it was before the Ct upon the Decds general Capacity & Instructions; But it is this Will sh: be so invalidated & set aside, on account of Imposition; I do agree that every Will obtained by undue Influence, must be set aside, & that the Execution sh: be voluntary, & not merely mechanical; Qu: .. there any Evidence that this Will was fraudulently obtained The Witnesses who attested it, give a satisfactory account of the Execution; they say when Hills came to that part, where 1500£ was given to the Dr & T. Deed said it was more than she intended, but when Robinson was going to explain it, she said go on, & seemed satisfied — The Will of the 3d of Novr only changes ye mode

of benefitting the Relations, who cannot claim in blood, or in any other way than under the Will, as in every other Case the Husband wd be entitled; Cripps ascertains the reading over the Will, & heard the Legacy read, wch was given to her, much Stress has been laid on Robinson's Letter; I have read it carefully, & can see nothing in it, so ensnaring & irretiating; She was obliged to Dr R. for aiding her, when her Relations forsook her. the Difficulty arises on the Evidence of the 2 Wms with respect to Davis; if Deed was so angry with him, as they represent, it is odd, she sh: benefit him so considerably, by making him one of her Exors & Resid: Legs: there is no Evidence produced to shew why She alterd her Opinion with respect to Davis, & yet the fact is, that She did alter it; there is general Evidence of her speaking affectionately of Davis, but no Witness shews how she was reconciled. the fact shews it, the Will of October evinces, she had forgiven him; the Alteration, in the Will is, that the Nephews & Great nieces have large Legacies, instead of the Residue; the Defect of Evidence arises from the want of caution in Robinson omitting to employ an Attorney to take the Instructions; & in the Attorney not applying to the Testator: it would have been more prudent, if Robinson, had communicated the alterations, designd by the Testatrix, thro. another Channel, & not carried them himself; the Particular mentiond by Cripps, prove general Instructions. viz. "after Dr R were gone on 2 Nov: Deed said, She had given Instructions for a new Will." this then brings on the Question, wh a Residue shall be declared void for want of particular Instructions duly proved. I apprehend that Defect is supplied, where there is sufficient proof of a Testamentary Capacity, reading over, & general Instructions — On the whole, I pronounce in favor of the Will of H. Clouds Deed & decree Probate to the Executors, but think there is no pretence for Costs ....

Ibid

No 67

Major Dr Harris — Paty v Sterry — Dr Wynne — Gosling.

Is meant Sterry, meant by Lewis Story?

Dr Wynne

In Paty of Lambeth, is the Deed; he made his Will 20 Augt 1764. attested by 2 Witnesses, & thereof appointed Lewis Sterry of Wandsworth Carpenter called by mistake in said Will Lewis Story of Wandsworth Carpenter & Jas Howson Exors Deed, died 13 Novr 1766 & 29 Novr Probate was granted to Sterry, Howson having renounced, but prior to the Probate issueing, Satisfactory Proof was made to the Office, by the Affidavits of 2 Persons, one of whom was the Joint Exor, as to Sterry's Identity, viz. that he was the Person called Lewis Storey; the Probate not being expeditiously extracted, gave Martha Paty, the Decds Widow, an opportunity of entering a Caveat, & calling on the Exors to prove by Witnesses, but she took no Step, till 2 T. 1767. when L. Major on her behalf, cited Sterry to bring in the Probate, & for him Howson to prove by Witnesses, or shew cause why it sh: not be revoked, & Admon granted to her, as the Widow, & also to exhibit an Inventory —

2 L. E. T. Gosling Junr appeard for Sterry, confessd Majors Clients Jnt

1 S. Dr: T. Major brought in with the Affid: of Scripts, a Will of 30 June. 1761 Wherein Nuce Sterry of Wandsworth Carpenter was an Exor.
Majors Clients Answers have been twice adjudged redundant & not full.
1 S. M. T. Mr Paley hav: denied Sterrys Identity, Gosling gave an Allon, wch was admitted Bye Day M. T. 1 Articles
1 Art: That Sterry was a man of good Reputation, had lived at Wandsworth 20 years, & that no Person named Lewis Storey had lived in that Parish, within the memory of the oldest Inhabitant.
2 That many of Sterrys Friends & Acquaintance used to call him Lewis, & believed his Christian name so to be.
3 Decd was never acq: with any Person named Lewis Story, but was intimately acq: with Sterry, & had a greater friendship for him, than any other of his acquaintance, & that such friendship was more strongly cemented by Decds Son marrying Sterrys Daur:
4 Decd since the Date of said Will, in conversation with Ja: Howson the other Exor, declared, his Bror: Sterry of Wandsworth was one of his Exors.
On this Allon 9 Wt: are examined who prove the facts laid, & on the Condidit Westcot & Walter the 2 subscribing Wt: have been examined, & clearly establish the Will.

Dr Harris ... restated, & said inter alia, they dont allledge any dislike to the Mother or Son; the Point in the Cause, is, wh: Decd knew what he was about, when he executed this Will; it will appear from the first Will, (wherein the Decd has benefitted his Wife,) this Nuce Sterry, is Exor, by that name, & that Decd knew it then; It is in Evidence the Decd had reasons for knowing Nuce Sterrys name; Howson says, the Decd frequented Alehouses; this Will was fabricated & executed at an Alehouse. Wescote the subscribing Wt: did not see the Dec: sign it. Walterfield says Sterry was called Story by mistake. Howson to 3 Jd: says, when he has seen the Dec: fuddled, he dont believe in his Conscience, he could be overruled; this will go to affect Howsons Credit.

Evidence read.

Dr Wynne ... No Will was ever more fully proved, nor Instructions more clearly ascertained; the Writer says, he saw the Decd several times successively; he is sure he saw the Decd seal it, & heard him declare, he published it, as his last Will. A man must be a very honest man, to whose Character so many neighbours wd: speak; what Evidence can the Dr produce of this being a drunken Will: Why, it seems the Man went to Alehouses; we must consider his Station; he was a Sawyer, & paid his Men there; may not a man be fuddled several times, & yet not addicted to hard drinking; I believe, farmers scarce ever make a Bargain without being drunk; it is no Objection, for he might, & must be on his Guard. every body knows what work illiterate People make, when they make a Will; the only Influence to be drawn from the former Will, is, that the Drawer knew Nuce Sterry, or had enquired his name; this Will was made

without Sterrys knowledge; the Dr dont pretend he is not the Person meant; if he is not, who is? we had no business to point the reason of the alteration in the disposition as to the Wife; You will observe Sterry is only a Truste for the Decds daur, not a Person benefitted; several Wt say they used to call him Luce thinking his name Lewis. I hope you will think the Will & the Intention of the Testator clearly proved —

Dr Harris ... I hope you will favor me with a word in behalf of the Widow to whose prejudice this Will is made; I ground myself on it being an Imposition, made at an Alehouse by a drunken man; a Person is as much obliged to provide for his Wife after his death, as in his life time; I rest it on the Circumstances, Instructions are given, & the Draft, made in pursuance thereof, read to Decd who certainly distinguish between Luce & Nuce, Sterry & Storey, he cd: not be in his Senses, & not observe the difference; it is possible he sh: be unacquainted with the name of the Man to whose daur his Son was married; a drunken man, is (I am sure) open to Imposition; I dont know what experience the Dr may have had, but this will is inofficious, to the last degree, & you wd: think, be glad to set it aside; the Wt say the Man appeard sober; not that he actually was sober —

Dr Hay Judge ... I cant enquire into the motives, why the Decd altered his Will. But wh: he did alter it; the Evidence of the subscribing Wt to his Execution & Capacity, is very strong; Sterry was not present. Howson declines acting as an Exor, & assigns his Reason, viz. his inability to run about; the Office must have Satisfaction of the Identity; Orders were given for this Will, 7 or 8 days before it was executed, in the morning; if the Decd was not then very sober, how could he appear to be so? the Wt declares, the dec: said he had made Sterry his Exor, with can only refer to this Will; the Embarras in the mispelling, is only a mistake of the Writer he is identified by the Expression of the Will, viz. "Carpenter in Wandsworth." if there is no other Carpenter of that name, it identifies Sterry: & if there is a Constat of his Person; upon the whole I have no doubt of its being the Act of the Decd & must therefore pronounce in favor of the Will. — Will established

Ibid — Nº 163

Goodwin — Ly Mary Herbert & Pritchard. v Ld Gage. — Grene
Dr Harris & Wynne — Dr Calvert & Burrell

Shall the Ct oblige the Exors to give Security before the Probate is delivered to them?

Dr Calvert ... The Will having been already established, we are now before the Ct upon the Construction of a Clause, disposing of the Residue, as follows, "I also give & leave the rest I have, or may be got by Law, or "otherwise by my Exors herein named, (to whom I give all power "to pursue by Law, or otherwise) "to the Poor of Gr: Britain, that "are really" in Poverty, or in what other manner, my Exors shall "think best, for the Honor & Glory of God; they knowing my Intentions on that Subject." Mr Grene alledges this Bequest is void by Law, & therefore that the Decd is dead intestate, & his Client, Ld Gage entitled, as next of kin (Nephew & one of) to his distributive Share thereof; We say that the Decd had a claim upon the Cantillon Estate, wch amounts altogether to 140,000£, that the Constitution of Bp Stratford wch impowers the Ordinary to demand Security, is now in use, & ought in the present case to be enforced: that in the Province of York it has been usual to take such Security, as is verified by the affid: of Robt Jubb & Rd Mackay — that Ly My Herbert lives abroad out of the Jurisdiction; that Jn Pritchard, is no Housekeeper has no means of maintaining himself, therefore Grene prays they may give Security before the Probate is extracted; Lindwood Lib. 3 Tit. 13. fol. 177.

L. contra. Goodwin denies the Bequest of the Residue is void, or that the Constitution of Stratford is in force, or that it is usual for this Ct to regard the Practice of the Eccles: Cts in the Province of York. he adds that the Judge of this Ct has pronounced for the Will, & that Greene cant avail himself of his Objection now, & that the Testator having reposed such Powers in the Exors they cant now be forced to give Bond.

The Question therefore is, [illegible] This is brought at the Instance of Ld Gage whose Right must be founded, on his Title in distribution, notwithstanding the Will; the reason of its being void, is, the Incertainty of the Bequest, by which it cant be marked out, who are to take under it; who can be said to be the Poor of Gr: Brittain? if any can claim, all can; it would be injurious to the whole to give it to a part; it is then uncertain who can take under this Clause: But if the Bequest to the Poor wont ascertain, the Addition "of being really in poverty" will throw no new Light upon the Question where a Man devised his Estate to 20 of his poorest Relations, the Ct of Chancery determind, it sh: be confined to those who were entitled in distribution —

Who would you admit to bring a Suit agt the Exor in the Ct of Arches? who could give him a discharge?

A Bequest to a man to dispose, as he thinks proper, is not good in another View; because it is dependent on another's Will: Institutio ideo vitiosa est, quia in alieno arbitrio est...

"The Exors knowing my Intention" if there are any such Papers, they are testamentary, & should be exhibited; but you have the affid: of the Exors, there are no such Papers, therefore there can be nothing certain —

Prima facie, in this Ct, if the Residue is undisposed of, it goes to the Exors, [illegible] — Here the Exors cant take the Residue for in the Will each Exor, has a Legacy for taking the trouble of the Execution; The Testator could never mean to give them the Residue, having expresly taken it away, by this Bequest to the Poor, who, that we contend, is void: This brings on, the Query, as to requiring Security from the Exors, wch we say is founded on Bp Stratford Constitution, & is as binding, as those of other Bps, nothing having since intervened to take it away.....

Lend wood fo. 177 Postquam coram Ordinariis juxta morem probatum fuerit
Lib. 3. Tit. 13. " Testamentum, non committatur aliquibus in bonis hujusmodi
" Executio, seu Administratio, nisi talibus, qui debita Administra-
" tionis sua posint, & si oporteat, sufficienter caveant, ac fideliter
" promittant reddere rationem, cum superhoc, per locorum
" Ordinarios, congrue fuerint requisiti.

Eccl. 451. ..... Swinburn, an Author of Repute mentions this Constitution, as
25 Hen. 8. c 19. & 37 Law — The Legislature in the Reign of Hen: 8. passd an Act. to impower 32 Commiss: named by the King to inspect the Canons Constitutions & Ordinances Provincial & Synodal heretofore made, to continue, or alter such as they might think proper, & for want of such alterations, all, wch were not contrary, to the Laws of the Realm, or the Kings Prerogative, were to continue in force till otherwise ordered by the afd 32 Persons —

No alteration having been made with respect to this Constitution it continues to rest on its antient Foundation & on the Act of Parl: afd: You will observe it is only a discretionary Constitution, (si oporteat) wch cant lose its force for want of being used; it

is material that it is in practice in the Province of York; It serves to shew it ought to be construed in force; why not, as well in the Province of Canterbury, as that of York? You will consider the power as discretionary in the Judge, & that one Case may require the Exercise of that discretion, tho, another may not; It was laid down in the Case of [illegible] that the Ordinary ought not to take Security from the Exor, but if the Reasons on which that Decision was given, do not come up to the present case, you will not be bound by that Determination; the Reasons were these, because it dont appear, that the Common Law requires any such Bond, nor that any Canon is produced to shew it is Law in the Ecclesiastical Cts; this Principle applies as well to the Cts of the Province of York, as Canterbury, & the Effect of the Bonds are equal in both — an Exor might be debarrd from the Right given him by the Testator, if he refused to take the Oath of Office — We have laid before you a Case, where the Residue amounts to 150000 £, & in which Prudence requires Security shd be given; you will consider the nature of it, wch is by a Suit in Chancery, wch must be revived; the Power may be easily abused, by Collusion in the Exors, & compounding it improperly; Perhaps it may be asked why we do not apply to Chancery, I answer, if you have a right to determine, it wd be hard to send us elsewhere for Redress; the Reasons given in Sir Rd Raines' Case will operate equally agt the Ct of Chancery interfering; I hope you will think it proper to require Security before the Probate is extracted .....

D'Burnell... The Validity of the Will being already established, we now apply to the Ct to require sufficient Security of the Exors before they have possession of the Probate, & our Application is founded on this Principle, that the Devise of the Residue is void in Law, by reason of Incertainty, & being void, that Ld Gage my Client, as Nephew & one of the next of Kin, is entitled to his distributive Share, under the Statute; consequently deeply interested in the Proceedings of the Exors; we say also, that by a Constitution of Bp Stratford, now in force, this Court has a Power of demanding such Security, as Occasion shall require, & that the Present Case, is of that nature, as will sufficiently warrant us, in this Application, the Residue amounting to 150000 £. But as our Right is founded, upon the Supposition of an Intestacy, It will be necessary for me to establish that Point, before I enter upon the other; It will scarcely be denied, that Devises may be void, for the Incertainty of the description of the Persons to take, or the Thing to be taken; as where "a Person devised his Estate to 20 of the poorest of his Kindred" or where [illegible] Webb's Case

[illegible] Kindred, the Ct thought, these Words gave a right to no Children in particular, or a right to any particular part of the Estate, but that this Clause, was void for Incertainty.

Style 210 ..... Devise of half his Lands to his Wife for Life, & after, [illegible]

the Ct inclined the Will was void.

In the present Case, the Residue is bequeathd to the Poor of Gr: Brittain, generally, without any Trust, to govern or guide the

the Discretion or Judgement of the Exors; I know that under such a description, a Court of Equity, has directed such a Bequest, to be paid, to the Poor of that Parish, where the Testator resided: & the Grounds of the Order, were, the great Probability of the Testators preferring the Poor of his own Parish, to any other in the Kingdom; but that Idea cant be formed in the Present Case, because the Testator died in France, where he had resided, many Years, before his death, & could not have any preference, for the Poor of any particular Parish, in Great Brittain; under these Circumstances, who can be called the Objects of the Testators Bounty? has he expressed himself in such a manner, that his Exors can ascertain, what Poor he intended to Benefit? if he has not, where is the Residue to vest? not in the Exors, for it is evident, the Testator never designed them so considerable a Benefit, by his giving them a Specific Sum for their executing the Trust reposed in them; In this State of Doubt & Uncertainty, what can be more equitable, than that those Persons, whom the Tyes of Blood, & the Laws of the Land, have pointed out, as Representatives of the Deed should be entitled to that, with the Testator has not disposed of; if I am right in this Principle, the Interest of my Client must be a necessary Consequence, as he is admitted to be the Nephew & one of the next of Kin, of the Deed; I shall now proceed to examine, the other Position, how far this Ct has a discretionary Power, to demand Security, from an Exor; It will scarce be denied, that the Constitutions made in the Provincial Synods of this Kingdom, in former Times, were binding upon the Clergy, & that the Laity were likewise comprehended, where those Canons were confirmed by Act of Parl: or antient Usage; In the time of Edw: 2d a Constitution was enacted by Abp Stratford, "empowering the Ordinary after a Will was proved, to refuse committing the Execution of it to any, who were unable, to fulfill the Duty of their Administration, & authorizing such Ordinary, if it was necessary, to take Sufficient Security of the Partys for the due performance of the Trust reposed in them, & their faithfull account before the Ordinary, when legally required so to do."

Lindwood. Lib. 3 Tit. 13. fol. 177...

I am aware, the Gentlemen, will deny, the Authority of this Constitution, & tell me, this Doctrine was exploded in the Case of the King v Sr Richd Raynes. But if I can shew, that Determination, to have proceeded upon improper Grounds, & that the force of this Constitn has been weakened by no subsequent Law, I shd hope, the Ct will lay no Stress on that Determination; The Reasons assigned for the Judgement in the K. v Raynes, were, because Dr Waller had quoted, no Canon Law to shew the Ordinary ought to take Caution; & no Precedent of the Existence of such Usage, in the Province of Canterbury: now It is to be observed, that Dr Waller cited his Law, as the Dicta of Lindwood, & not as the Constitution of Stratford, then a part of the Law of the Land; & the Defect of Precedents in the Province of Cant[y] is utterly inconclusive for it is notorious that the Custom of taking Caution, has existed from time immemorial, in the Province of York to this Day.

1 2

1. Dep[y] Reg[r] of the Prerog[e] Ct of York
2. a Public Notary & Proctor of y[e] said Ct....

as now appears by the Affidavits, of Rob[t] Jubb. & R[d] Macklay. And it would be absurd to suppose the same Doctrine sh: be conformd Law in one part of the Kingdom, & exploded in another: If this Constitution was ever admitted to have prevailed, I will ask, when, & by what Law it has been abolished? that it once existed, nay that it now exists, in the Province of York. is demonstrated by Affidavits

" The Statute 25 H 8. c 19. empowers the King to nominate 32 Persons, (16 of " the Clergy, & 16 of the Temporalty of the upper & neither House of Parl[t]) to " examine the Canons, Constitutions, & Ordinances provincial & Synodal " heretofore made, & such of them, as the King & the 32, or the major part " of them, shall deem, & adjudge worthy to be continued, kept, & obeyed, shall " be from thenceforth, kept, obeyd, & executed, within this Realm, so that " the Kings Royal Assent under his Great Seal be first had to the same: & " the rest of the Canons &c, wch y[e] King so shall not approove, or deem worthy " to be abolish, abrogate, made frustrate, shall from thenceforth be void, " of none effect, & never be put in execution within this Realm. . . . .

" 17. Provided that such Canons, Constitutions, Ordinances, Synodals " Provincial being already made, wch be not contrariant, or repug- " nant to the Laws, Statutes, & Customs of this Realm, nor to y[e] Hurt " of the Kings Prerogative Royal, shall now still be used, & executed, as they " were afore the making this Act, till such time, as they be viewed, searched " or otherwise ordered, & determined: by the said 32 Persons, or the more " part of them, accord[g] to y[e] form, Tenor, & Effect of this present Act...

Nothing was done, in consequence of this Statute, till 1603 when certain Constitutions & Canons made in that Year, were confirmd by King James in Council pursuant to 25 Hen. 8. & ratified by Letters Patent under the Great Seal. as follows. Viz[t].

" We by these Presents do give our Royal Assent, accord[g] to the " form of the Statute (25 Hen. 8.) afd, to all & every of the said Canons " Orders, Ordinances, & Constitutions, & to all & every thing in them " contained — "We enjoin & command by our said Authority & by " these our Letters Patent, the same to be diligently observed, exe- " cuted, & equally kept by all our loving Subjects of this our " Kingdom, both within the Province of Canterbury & York, in " all points, wherein they do, or may concern every or any of " them, according to this our Will & Pleasure, hereby signified " & expressed. -

If then all Constitutions, which were not repugnant to the Statutes, Customs of the Realm, or the Kings Prerogative, & wch were made prior to 25 H 8. c 19. §7. were authorized to be used, subsequent to that Statute, till the King, the Majority of the 32 Com[rs] afd determined otherwise; & if King James & his Com[rs] made no alteration with respect to this Constitution, as I must insist, they did not, the Consequence is evident, that the Ordinary has still a discretionary Power to demand Security from the Exor, as is the daily Practice in the Prerogative Ct of York. But it seems, the Non User of this Power, in the Province of Canterbury, has operated so forcibly, as to destroy the Right, reserved to the Ordinary, by 25 Hen: 8. I own I am at some loss to account for so extraordinary a Position; the Power lodged in the Ordinary, is discretionary, & not coercive, as to this Point; he may require Security, or not, according to the Circumstances of the Case before him, & tho' no Case sh: have arisen in a course of years, where this Power was deemed necessary to be exercised, it cannot be fairly inferrd, that the Law itself is become obsolete, or annulled; the Circumstances of the present Case demand the Execution of this Constitution, one of the Exors residing all

together in France, the other being a Person of no Fortune, & 140000£ depending on their honesty, will I hope plead strongly in favor of this Application, & induce you to insist upon Security, before the Probate passes the Seal (viz. a Bond, with sufficient Sureties, in such Penalties as to the Ct shall seem meet)

D. Harris ... Ld Gage would not be aided, by the Uncertain description of this Legacy, which, being to the Poor of Great Brittain indefinitely, would be disposed of by the King in his Court of Chancery; the Deed declares the Exors know his mind, they had probably verbal Orders from him; but he allows them to dispose of in Charity at their pleasure; The Quantum of the Residue, is by no means ascertained. The Canon of Abp Stratford, has been unfortunately quoted; It dont oblige the Exor, at first coming, to give Security, but if he could not execute or cedes, his Substitute was obliged to give Security, this dont apply to the first Exor; the Cases by Dr Wil

Lindwood. Lib. 3. Tit. 13. Fo. 177. ... Non. v. Reperiit ... laws gave no Security

Si Executor impotentia Juris vel facti impeditus sit quominus exequatur, Potestas agendi, vel distribuendi transfertur in Episcopum.

The Case of the King, agt Sr R. Raines makes against them, Dr Waller could produce no Precedent, no Canon law, therefore the Ct ordered the Mandamus to go. C.J. Holt knew a great deal of Canon Law

The Custom was originally taken up at York, & did not spring out of the Constitution. They alledge, Security should be given before Probate, & to support their Assertion, produce the Canon Law, wch shews it shd be after Probate.

What Reason is there to found the Supposition of Inability or Roguery in the Exors? they have offered no Evidence in support of this Hypothesis, which is merely imaginary; They have not satisfied the Ct, that there is any Residuum; they have produced no Law, nor any Case to apply to the Law, if they had produced any.

Dr Wynne ... where a Bequest is made to a Charitible Purpose, there is no void Devise; the Law always finding out some method of rectifying a mistake, to give such Devise Effect. attorn. Gen. v Sutton 1 Vern: 225

Vern: 26 ... Sr Robert Sutton — Att. Gen. v Price Snell had given a Legacy to found an Anabaptist Lecturer in a Market Town; the Ct determined it shd go to found a Lecture ship of the Church of England; The Testator in the present Case dont confine the Exors by any Directions, but leaves the Residuum to be disposed of in Charity at their Discretion, wch is a clear Bar to the next of Kin. If the Canon of Abp Stratford is in force, the Judge & every Officer of this Court will have incurred the greater Excommunication; for if a Feme Covert comes to your Office, if her Husband, being Alive, does not consent, you will not grant her Probate. It is contrary to the Law of the Land for this Ct to prescribe a Condition, which the Testator has not; the Prerogative Ct of Canterbury will not recurr to that of York, to enquire & learn, what is Law; the Ct of York went upon a right Ground, either always to take Security, or never; but I apprehend they act illegally & cant be justified by Custom; but even supposing there was any weight in what has been urged by the

Gentlemen who are Counsel for Ld Gage, you would not go into the particular Circumstances of the Case without Evidence to support it.

Judges Opinion

The Application is new & extraordinary, & from all that has been said, appears to me, to be ill founded; Ld Gage cannot claim the Residue, unless he is next of kin, if that is not clear his Pretensions are too early; It is by no means clear to me, that Ld Gage is next of kin; It is very doubtfull, wh: the Legacy (thus worded) is void: I rather incline to think it is not; The Constitution of Bp Stratford has been urged in Support of the present Application wh: the Meaning of that Constitution, is, as Dr Harris has explained it, or wh: the Ct has a Discretionary power to demand Bond in particular Cases, or whatever is meant, It clearly does not mean what is done at York, & if it did, it is clearly not Law. The Words Si oporteat, refers to Circumstances, the Court of York could not, therefore, be founded on that Constitution, but on immemorial Usage, seeing it always takes Security; no Attempt of this Nature, has been made since the time of Sir R. Raynes, the Law having been well settled. Bp Stratfords Constitution, means, only, that Security shall be taken on a Case made out; It dont warrant Application to this Court. An Exor can do several Acts before Probate, to wch he is entitled simply, & without Condition. The Court of Chancery, on particular Cases stated, will order Security, but not unless the Party has misbehaved. that Court has Jurisdiction in Cases of Trusts; the Note in Carthew is, that the Exor was compelled to give Security; I can go no farther, than to consider the Validity of the Will; It wd open a great field, for Disputes, if Probates were delayed on Questions of Sufficiency, or Insufficiency; as to what has said of Dr Waller, I must observe, he was one of the ablest Men of his Time; he did not look upon this Constitution to be Law. I think, there is no foundation for me to direct the Exors to give Security. . . . . Costs being asked the Judge, said he believed it was not usual to give Costs, on an Act, but only something nomine Expensarum; & therefore he gave no Costs. . . . . .

v. Hill & Hill Shower — on this subject

Exors not to give Security

Commissary of Surry August 1 1768

No 109

Cheslyn — Sr Tho: Frederick v Horton — Major

Dr Calvert Burrell — Dr Wynne

Dr Wynne ... This is a Cause of Dilapidation instituted by Sir Tho: Frederick Bart: by Being himself, the true & undoubted Patron, in full Right, of the Rectory & Parish Church of Hascomb in Surry. agt the Revd Tho: Horton Rector thereof; the Citation was personally served & returned.

1 S. Trin. D. 1768 Major appeared under Protest for the Party cited. & says, that Sir Tho: F. has not such an Interest as to enable him to institute this Suite, Sir Jn F. his elder Brother having granted the next Avoidance to Jn Serocold in trust to present the Revd Dan: Chandler, & no other Person to the said Rectory. Of the truth of this Position Mr Serocold has made an Affidavit, wch has been read: the Question is not, wh: a Patron, as such, can cite a Rector in a Cause of Dilapidations, (tho, it might admit of a doubt wh: he cd institute such a Suite in the Ecclesiastical Ct, his Right

being undoubtedly temporal;) but wh[r] if he could, as Patron in full Right, he can under the Circumstances of the present Case hav[e] granted away the next Avoidance: if the Court does determine it, you will determine on Common Law Rules, & consider it as an Incidental arising in a temporal Matter; how could he obtain Redress at Common Law! Compare it to an action of Waste, wch can be brought only by the immediate Remainder Man; Sr T. F. complains of a Prejudice done to an Estate, towch another has a Right in Reversion; Mr Serocold, or the Person for whom he is Trustee, are the only persons proper to have brought this Suit. The only Right must be upon the Demise of the Incumbent. They say any Interest will entitle them to bring this Suit, but I apprehend a Remote Interest will not.
an Incumbent is bound to maintain the Houses &c of his Living but he is not to be compelled so to do, at the Instance of every one. the Parish[r] have a Right to his Residence, why dont they present these Dilap[ns] at the Visitation; they might apply properly, if the Parsonage is vastly out of Repair;
the Ct will not suffer a poor Clergyman to be harrassed by a Suit will not suffer a poor Clergyman to be harrassed by a Person of great Fortune, at least. the Ct will see. the Pl[t] has a Right to hold Mr Horton.

Dr Wynne has not adhered to the matter mentioned in the Act wch I apprehend to be the common Rule of Proceeding; he has asserted that a Patron cant come before the Ct. that it is a temporal Right, & is saleable; whatever the Right is, the Incumbent is amenable to the Eccles: Ct, which has a Power to deprive him. Dr Calvert
However, this is not in the Act, therefore immaterial to the present Question, wch is wh[r] Sr T. F.s Right is as good, as if the next Avoidance had not been granted away: The Affidavit is very incompleat, & dont conform to the Rule of Law, that the best Evidence sh[d] be offerd wch the nature of the Case will admit; for in this Affidavit, Serocold acknowledges having the Deed in his posession, yet does not bring it before the Ct: much depends on the wording; a Different Sense may be conveyd. from what is contended for; Dr Wynne compared it to a Tenant for Life, & Sr T. F. to the Reversioner; One must go deep into the Reasoning of the Common Law, to know whether the Cases are similar; perhaps a Person cant bring such an action without being seized in fee; his Ancestor's Clerk is in posession, Sr T. F.s Right can only be interrupted for a time the next Avoidance is not certainly granted; it is only an eventual Conveyance; He has a right, if any Patron can bring a Suit, for supposing he cannot, nobody can; Serocold wd be objected to; Chandler has only a remote possible Interest; a Patron has a Trust so far as to see, that the Parsonage is fit for the Residence of the Clergyman.
Dr Wynne having hinted to the Ct that Sr T. F. wanted to oppress a Poor Clergyman, it is incumbent upon me to inform the Ct that the Bp of Winchester at Sr T. F.s request, wrote to Mr Horton to desire he wd admit proper Persons, send by Sr T. F. to view the Parsonage. & to see if it was in good Repair; & that the Deft refused: they have asserted that Sr Jn. F. conveyd the next avoidance to Serocold in trust for Chandler. we denied it. how do they prove it! Why, Serocold swears, the Instrument

is in his Custody, but dont produce it; I am therefore warranted in still doubting the Existence of any such Instrument: if Serocold has it, why did he not bring it in Court. his omission is a reasonable Ground for me to suspect there is some flaw in it, or some misrepresentation; you will observe they do not pretend the next Avoidance is granted away absolutely, but that it is confined to the presentation of Chandler, if he dies, Sr T. F. is in posession of the next Avoidance — the Law, in order, the better, to preserve Parsonage Houses & other Eccles: Buildings in repair, has not confined the Power of instituting a Suit, to the Ordinary only, but allows every Parish[r]: & other Person interested in the most remote degree, to promote the Office of the Judge. I may compare it to the case of a Lord of a Manor, who by Custom grants out his Copyholds for 3 lives. & yet has a Power (during any part of the Term) to compell the Copyholder to repair his Tenem[t] or to rebuild it, if it is destroyd, by Accident, or otherwise. I hope you will think Sr T. F. has such an Interest, to intitle him to bring this Suit & that you will order Mr Horton to appear absolutely —
Judge. Dr Harris
I have heard the Question agitated, wh[r] a Patron could bring a Suit of Dilapidation, the Opinions of the Profession were asked on that Occasion, & the general notion was, that a Patron could; & part of the Income of an Incumbent, has been laid aside, by the Ordinary for that purpose: I think any Person may bring such a Suit, by promoting the Office of the Judge; I know 2 Causes of this nature instituted by Patrons, in both of which, they proceeded by Articles; I sh[d] have no doubt, if I was sure, they w[d] proceed by Articles. I think, upon the whole, Mr Horton should appear absolutely . . . . . .
The Council for Sr T. F. observing he was a Parish[r] of Hascomb, the Judge expressed his Surprize, that he had not been entitled a Parishioner, in the Citation; & asked Jenner (who app[d] for Chesly) if he asserted, Sr T. F. to be a Pish[r] of Hascomb, wch he speaks he did in Acts of Ct, wch was accordingly taken down; .
Major being asked if he denied Jenner's Assertion, replyd he was ignorant of the Fact, & therefore could neither affirm nor deny

Deft ordered to appear absolutely —

Serjeants Inn. Hov[r] A. 1768.
x Mr De Grey

Bogg — N° 170 — Compton v Bearcroft — Major.

Attorney Gen[l]: Sir Fletcher Norton x & Mr Wedderburne & Serj[t] Leigh. Dr Harris, Wynne & Burrell } Sollt Gen[l]: Dunning, Dr Calvert & Mr Bearcroft . . . . . .

Q. Did the Judge below right in dismissing Deft's Q. Is Deft within the Purview of 26 Geo 2. c Q. Shall the Marriage be set aside as null ab initio?

Dr Harris . . I am Counsel for Mrs Compton, who being a Minor under the Age of 21: subsequent to 25 March 1754. viz, about 13 March 1760. went with Mr Bearcroft the Deft into Scotland, & was married to him at Dumfries, by Bd Jameson, in the House of Tho: Huddlestone a Cook, without the Consent of her Parent or Guardians, & contrary to the Act of Parliam[t] 26 Geo. 2. such Marriage being had without Publication of Banns or Licence: after the Ceremony was over, the Parties repaired to Penrith in Cumberland, where they consummated; I must observe that neither of them was ever resident, in any part of North Britain, the Pl[t] being domiciled at Hartpury in

Gloucestershire, & the Defts at Droitwich in Worcestershire
a suite of nullity of marriage, being commenced in the Ct
of Arches, a Libel was there offerd, stating the Act of Parl.
& the facts abovementiond, as also an Extract from the
Register of the Plts Baptism, & the Certificate of marriage
signed by Jameson; This Libel was debated merely with
respect to the facts, & yet the Judge gave his Opinion
on the Law, which according to the Practice of the
Sp: Ct is always reserved till the facts are proved, on
failure of which it would be unnecessary to go into the
Law; I should therefore hope you will direct the Defts
Council to confine themselves to object to the Facts.

Dr Calvert... I must beg leave to insist, the Practice allows one to
object either to the formal or the Legal Part; if any
Doubt arises on the Law, why should the Parties be
put to the Expence of proving the facts which if estab-
lished will be of no Importance?

Judge Gould This resembles a Declaration in Demurrer, where the
fact is confessd, but is alledged to be immaterial;
the mode of proceeding, contended for, by Dr Harris is
more solemn, but not necessary

Baron Perrot Natural Justice points out, that if a Party makes a
Complaint, which on the face of the fact alledged, appears
vexatory, the Deft ought not to be harrassd, but
immediately dismissd; Can you determine whether the
Judge did right or wrong, before you go into the
Law to learn whether the facts can be material: I
think the Council should argue the Law at once.

Sollr Gen: Mr Dunning There is no Question, but that this marriage solem-
nized there would have been good before the Statute
26 Geo 2. & would be good now if transacted between
Persons resident in Scotland; all I can collect, is, that
Huber a Dutchman has laid down a Position, with
respect to different Provinces, which is very singular,
& will derive no weight from his Ideas; if this was
the Idea of Courts of Justice in Holland, much remains
to prove it ought to have weight in England, where
neither the Canon, nor Common Laws have adopted
this Opinion; It is a Question that does not appear
to have been agitated in Hubers own Country; I sh:
waste your Lps time, in noting the bad Policy of
such an Institution; Every Country has a Power
to prescribe to its own Subjects; but Regulations will
are proper to be observed in England, may be pro-
ductive of Inconvenience, if extended further; the
Legislature, when they thought it expedient to enforce
it, in this Part of the Kingdom, saw the Impropriety
of extending it to Scotland, & therefore expressly ex-
cepted that Country by the Proviso: They have stated
the Allegation as if no such Provision had been con-
tained in the Act; the Allegation, in effect, says, it is
very fit the Regulation sh: have force in Scotland, tho
the Legislature have said otherwise; they say, this

† ind. Huberus de conflictu Legum

Regulation shall accompany Englishmen wherever they
go, if so Scotsmen coming into England might marry con-
formable to the Law of Scotland; but the Legislature
declares it dont mean to substitute a different Law in
Scotland, from what operated there before; we insist that
Scots coming here must conform to the Law of Engld
Foreigners coming to England must comply with the
local Law; you cant extend your Regulations beyond
the Limits of the Kingdom; if the Marriage was so-
lemnized on this Side Tweed, the Law of England must
prevail; if on the other Side, you will enquire how
the Law of Scotland operates in these Cases.....

Dr Calvert. This is a Cause of great Consequence, by the Decision
of which, against the marriage, many Individuals will
be affected, & have the legality of their Marriages called
in question; the Plt, in the present Case, dont pray to be
relieved, against any Imposition of the Deft she was
20 Years of age, at the time the Affair happend, there
in all probability not very open to Imposition; She
entered voluntarily into the Scheme, acquiesced in it
& lived happily with the Deft a considerable time &
never contested the Validity of the Act, till many
years after she came of age. It is a Consideration
for the Gravity of this Court, whether she can come
to be relieved agt her own Act, & confessing her own
Turpitude; Suppose a Person, who intends to marry
another, in order to obtain a Licence, swear himself
a Major, when in fact he is a Minor; would the Ct
allow him afterwards to come & contradict his
own Act, & alledge his own Turpitude to set it aside?
Much Time & Debate has passed before we were
allowed to go into the Merits; I must observe there
are 2 Ways of opposing a Plea; 1. by objecting to par-
ticular Parts, or 2d to the General Law. In the present
case the Country called Scotland, & not Persons who are
Scotsmen, was in the Contemplation of the Legislature.
The Judge below, pronounced for the Deft on account
of the Law, (i.e. the Proviso) which was stated partially
in the Libel; I expect to hear, there is a distinction in
the Proviso between Scotland, & Parts beyond Sea; viz
"That nothing herein containd shall extend to
"that Part of Gr Br: called Scotland — nor to any
"marriages solemnized beyond the Seas; It may
be urged, that the Words are stronger in the latter
case; as if it sh: not be meant as a domestic
Regulation in Scotland only; it is the Usage in
Acts of Parl: to say, nothing shall extend to that
part of Gr: Br: called Scotland; but here it was
inserted on a Supposition, that the Objection might
be made, as to the Marriages solemnized beyond the
Seas; would the Legislature be more strict with respect

† so decided by Dr Harris in 4 Surry Ch. Feb. 1765 Williams. agt Spearing...

to Scotland than foreign Parts; the Preamble & Recital is in very general Terms; according to wch It was the Intention of the Legislature to prevent Clandestine Marriages, but not, that every such Marriage, shd be void without distinction; there is a very material difference between the Preamble & enacting Part of the Statute; there is as Puffendorf observes, the Ratio Legis, i.e. the general Object, & the Mens Legis, i.e. what was intended; here the two are confounded together; the Reason, was the Fleet Marriages; the Object was, to get rid of those scandalous Marriages; it dont appear, that Marriages celebrated elsewhere was in the Contemplation of the Legislature, which has specially excepted those in Scotland; the Gentlemen will endeavour to establish the Clause, as being less general, than I contend for: any Regulations, extend to all the Subjects of the Country, where they are made: All temporary Inhabitants, are subject to them: an act performed by a Temporary Subject according to the Law of the Country where he happens to be, will be valid every where; the reason is, because they are protected by those Laws; many nice Questions arise from hence, wch, I dont think, apply to the present matter in Debate: according to some Authors, Every one carrys with him, his personal Abilities & Disabilities, of Majority & Minority, where ever he goes: Other Authors, who are equally respectables, deny this Position. I dare say we shall hear of Huber de Conflictu Legum; & Scrimshire's Case before Dr Simpson in the Consistory of London. where previous to the Marriage Act, Jn Scrimshire a Minor of 20, was married at Boulogne to Miss Jones aged 18 by an Irish Priest, not resident there, but a Traveller; whereas the Laws of France require Parties to be 25, before they can be deemed Majors, & the Person solemnizing such marriage, must be a resident Priest, settled, where the Act is done; or else licenced: Mr Scrimshire was proved, to be domiciled in England, accidentally, at Boulogne, & no Subject of France; the Parlt of Paris therefore determined, he was to be considered, as if he remaind in England, & subject to the Law of his own Country; his Marriage wd have been good here, at that time: Sir Edw: Simpson determined, on Solemn Argument, that no Personal Qualities cd follow a man into a foreign Country, that the Marriage, being invalid, by the Laws, of France, must be null likewise in England.

(b) Lord S wch says, "in Persons, & other Places."

(c) Vid. Fol. 422

I argue that a Personal Disability cant be carried into a foreign Country, no more than a Capacity to contract: It is said by Huber, that every Contract shall be liable to the Laws of the Country where the Contractor is domiciled; but this is liable to many Objections; if è contra, the Law of the Place where the marriage is had, is to be predominant, the Opponents may ask, wh: an Incestuous Marriage celebrated here between the Subjects of a Country where those marriages were permitted, would be legal, valid, I answer, no, because it is an Abomination, & contra bonos mores; the Opinion of Huber cannot be Law in Holland; for tho he says "Sæpe fit, ut Adolescentes, Sub Curatoribus Agentes, abeant in loca, in quibus Curatorum Consensus, ad matrimonium non requiritur celebrant ibi matrimonium, & mox reducunt in Patriam: Ego existimo hanc rem, manifesto pertinere ad Evasionem Juris nostri, ac ideo non esse Magistratus hic obligatos è Jure Gentium, ejus modi nuptias agnoscere, ac ratas habere: Yet he offers, not one Instance, of his Idea, being adopted by the Courts, of that Country; if he had, to be sure the Determinations of Courts would have proper Weight. I shall perhaps be told, that a man make a Will which shall not operate in all Places; there is no Impropriety in a Man dying Testate in one Country & intestate in another, but this cant apply to a marriage which must be valid every where Voet speaks of nullity of marriage much in the same way; the Authors do say such marriages ought not to be allowd but not that they are not allowd Every State shall recognize an Act done, by its own Laws: It is ludicrous to suppose a man legally married in one State, & not married in another: the Magistrates would not say this is a bad Marriage: If a Frenchman upwards of 21 & under 25 should marry in England, would it be set aside in France?

(a) de Conflictu Legum. Lib. 1 Tit. 3.

Lib. 44. T. 7. L. 21. The Digest says the Laws of the Place where the Contract is made, shd not operate, but those of the Place where it is intended to be carried into Execution; this Doctrine applied to many Questions, is true; as if a Man in France enters into an Agreement with another, to pay money in England, the Laws of England must be the Guide to the Party; It will be said too, that whatever is done in fraudem Statuti, with a view to evade the Laws, is invalid; if this Doctrine is to be applied to the case of a Marriage, the Party must be proved to have alledged something untrue, to procure such Marriage; as Brower de Jure Connubiorum, observes "Si Liberi in eadem cum parentibus degentes Civitate, parentibus orbos, & dein mortuos, se simulaverint, ficto vel adumbrato nomine, ne agnoscerentur nuptiæ, denunciari curaverint, vel non in patria, sed in alia Civitate, Provincia, vel Regno

x Lib. 2. C. 2. A. 5. A. . . . . .

x Digest. 44. 7. 21. Contrahi potest unusquisque in eo loco intelligitur in quo, ut solveret, se obligavit.

" In quo Extranei & ignoti sunt, hæc omnia peregerint,
" irritum esse eorum matrimonium, non tantum ob
" defectum paterni Consensus, sed et ob neglectam
" Legis, cui fraus facta est, Observationem Hollandia Curia
" sapius judicavit." That Banns are asked under fictitious names, or that a false Oath is taken of the Majority of either Party; If a Clergyman had gone with their Parties to Scotland & married them there; would he be liable to be indicted? if not, why are these Parties within the Proviso? one part of the Statute will apply, as well as another.

By 10 Anne. c 19. §178. laying a duty on licences; "all
" Persons celebrating marriage clandestinely without
" Stamps, shall forfeit, the Party, 10£. the Clergyman
" 100£." there is the same Proviso in that Act with respect to Scotland, as there is in the Marriage Act. I would ask whether they would be liable to those Penalties in the present Case? or whether any Court would decree it: The 26 Geo 2. c . . is a restraining Act, & may be considered in the light of a criminal Statute, & therefore ought not to be construed strictly besides, the ill Consequences attending a Sentence to annull the Marriage, & the inconveniences which many Individuals will necessarily experience must have great Weight.

Before D. Ch.r Northington 1762.
" Bedford & Verney. 1000£ was left by Will, by
" to . . . . . on condition that it sh.d be forfeited, if
" She married without the Consent of her Guardians, in
" which Case he bequeathd the said £1000 to
" the Legatee was married in
" Scotland without the Consent of the Guardians, & a
" Bill in Chancery was filed for the Recovery of the said
" Legacy, the Def.t answered the Marriage was had in
" Scotland, in defiance of the 26 Geo 2. & so null & void
" & that She had therefore incurrd no forfeiture:
" Ld Northington said it was as good a Marriage, as if
" it had been celebrated in St Pauls Church, & therefore
" decreed the Legacy to be forfeited . . . . . .

Before S.r Tho.s Clarke Mr of the Rolls
Broak & Oliver, a Woman who was a Ward of Chancery
" being married in Scotland, application was made to
" the Court for a Settlement upon her, in consideration
" of her fortune (viz £1000) Her Guardians alledging it
" was no marriage & declined to pay the fortune; His
" Honor. gave his Reasons, why the Marriage was good, &
" referd it to a Master in Chancery to apportion the
" Settlement to the Fortune. . .
I dont quote them as Cases determind, but to shew the Sentiments of the Judges on this Point: Even, Childrens Children may be affected, if this Marriage

" should be set aside, the Consequences therefore to Individu-
" als, is a material Consideration: for tho. many have been
" married over again, many have not; there is no limita-
" tion in point of Time for bringing Suits of this kind:
In common Cases, no Suit can be brought to set aside
a marriage after the Death of the Parties; but this is
a Nullity by Act of Parliament. . .
There was a Case before the Kings Bench, on the Settlement
of a Pauper. " monday 26 Nov.r 1759. Two Justices removed
2 Burrows. 897. Rex v. Inhabitants of Preston. " Edw. Young jun: Rebecca his Wife, & Mary their Child, from
" Chilham to Preston near Feversham in Kent, & the Sessions
" confirmd in all Points the Order of the 2 Justices.
" The Case as stated to the Sessions, was, that Edw. Young jun.
" being legally settled in Preston, & not being then a Widower
" was on 23.d Jan.r 1758, without the consent of his Father,
" (then living) married by Licence in the Parish Church of
" Feynham, to Rebecca Drury, (who was settled in Feynham, & is
" removed to Preston by said Order, as the Wife of the said
" Pauper:) the said Ed. Young being then an Infant of 20 Years;
" that Rebecca was afterwards brought to Bed, in Chilham,
" of Mary, removed by the Order, whereupon they adjudg
" & orderd, the Order of the 2 Justices to be in all Points
" confirmd; Mr Lee (who had moved to quash these Orders,
" objected to that Part of them, which relates to the Woman
" & Child, for that the Marriage was absolutely null &
" void, by the expres Words of the Marriage Act 26 Geo 2. c 33
" §11, as the Pauper not being a Widower, & being under age
" was married by Licence, without the Consent of his Father,
" who was then living. Mr Knowler who was Council on the
" other side, owned the Words so strong, he could not get over
" them, unless the Ct shall think a declaratory Sentence ne-
" cessary. Mr Robinson, (who was on the same side), entered
" into the Defence of these Orders; cited 2 Str. 1046. to shew the
" word, void, may be construed, voidable; & 1 Mod: 69, 1 Salk:
" 68. Barber & Dennis, where it was held immaterial, wh.r
" the Apprentice de facto was legally so, or not. .
" Mr Norton beginning to speak, Ld Mansfield stopped
" him, commended Mr Knowler for his Candour, in giving
" up the Point, and took the Distinction between Acts of
" Parl.t made against one of the Parties, & for the Benefit
" of another of the Parties, & where such other Party has
" an Election, either to take Benefit of it, or not, & Acts
" of Parl.t made against Both. This is an Act of Parl.t
" made agst Both, & the Marriage is thereby declard abso-
" lutely null & void, to all Intents & Purposes, whatsoever:
" so that it is not like the Cases cited.
" The other Judges concurrd & also observd it was made
" against both, & Justice Foster added, against the
" innocent Children of Both, and he said, it would be
" against the Spirit of the Act, to understand it otherwise
" than that the Marriage shall be absolutely void.
" Wherefore Per Curiam, the Orders must be confirmd as to the
" Man, but quashd as to the Woman . . . . . .

* now Serjt Lee

If the Idea of Domicile is to take Place, it will be subject to this Inconvenience; that Englishmen marrie in Scotland will not be able, to ensure the Validity, of such Marriage unless, they retain to themselves, a Proof, that they resided, so long, in that Country, as may destroy any Presumption, of their going there, to evade the force of the Act of Parl.t which was intended to facilitate the Proof of Marriage, by Licence, or Banns. as the Legislature has not yet determined these Marriages should be prohibited, we hope, in the present Case, that your Lps will determine in favor of the Marriage & dismiss my Client, the Defendant from this Suite....

26 Geo. 2. C33 §11 . . . . .

Mr Beaver

I shall endeavour, my Lords, to construe the 26 Geo. 2. according to the Rules of construing Statutes; if the Marriage is null, the Celebrator will be consequently liable to Transportation: the Gentlemen would have the Proviso extended by Equity, against the very Words. Can they distinguish between a Marriage to be solemnized beyond the Seas, & in Scotland; if the Legislature meant this, why not express it; the Nature of the Contract itself is to be considered; it ought not to be set aside, for the same Principle as Money & Mercantile Contracts, which was the Case of Robinson & Bland; there is a Proviso, that

Burrows Rep:

then shall be no Enquiry whether the Party did, or did not reside: In Bedford v Verney. Bogg: Barnes

& Oliver v Oliver - - - -

& his Wife, the Lt of Chancery concluded the marriage was good; but it would absurd to take care of the Fortune & not of the Person....

The Judges desired these Cases, might be accurately examined for the Information of the Court, adjourned to Thursday Evening at 6 o'clock on the 3 of December

Vid. Fol. 418 Calvert's Speech

Wednesday 29 July 1752

Both Proctors consented to a Court, & parte

Consistory of Glandston 16 June 1752

Jones alt Scrimshire The Chancellor declared, he had a Doubt on a Point, not spoke to by the Counsel. He observed that the Contracts on the Face of the contracting words deposed to by Commins the Priest seemed to be conditional; the words being (If Holy Church will permit) that the Marriage in the present Case, being set aside by the Laws of France, it may possibly be inferred, that it was so. set aside, by reason that Holy Church would not permit such a Marriage, he further observed that no Instance occurr'd to him, where a Marriage by a Romish Priest had been pronounced for in England but where there had been a Consummation (wch would have made the Contract binding on the Parties) without the Intervention of a Priest: He added that

Wednesday 29 July 1752

Scrimshire alt/as Scrimgeor } to be sentenced at the Petition
Jones alt/as Jones } of both Proctors
Altham. Bogg

Both Proctors consented to a Court, & pronounced definitive Sentences in writing which for their Respective Parties, they prayd to be read & promulged; the Judge having maturely considered the Proofs in this Cause made, by his Interlocutory Decree dismiss'd Boggs Client, but condemn'd him in 20s Costs, in the name of Expences, & decreed Monition for Payment in 30 days after Service, not to go out in 15 Days. Both Proctors accepted Decree, as far as make for their respective Parties, & otherwise protested &c. .

The following Particulars were not mention'd by D.r Calvert but are taken from Duplessis de la Mareé Opinion in a Controverted Case, stated in the Proceedings before the Consistory of London

It is an incontestable Principle, that the Validity of Acts must be tryed & adjudged; by the Laws & Formalities of the Country where they have passed; & tho England sh.d not be provided with Laws, capable of punishing for the Breach of them, when a Thing is once done; yet we sh.d conceive, she w.d not determine by any other Laws than those of France, in deciding the fate of a Marriage had in France; & the more so, as our Parl.t has given several Examples, of her scrupulous Observance of foreign Laws, in Cases of Marriages celebrated in different States in the neighbourhood of France, & has lately given a recent one to England herself with relation to a marriage contracted in this Kingdom: Miss Grandsire a Roman Catholic, born of Calais 12 April, having at the Age of 19 years married in England Mr Cocklogon in presence of her Mother, & with the presumed Consent of her Father (who by the Laws of France could not give his express Consent) became a Widow in 1731. On 25 March 1732. She being then 23, married Mr Terrier an English man of a different Religion (without the Consent of her father agt the Edict of 1639) & by a Protestant Minister;

Grandsire & Terrier. Ala Grande Chambre

Mr Grandsire the father appealed from a Grievance, complained of a Rape the prosecution whereof, by his death, he left to his Children, who added all the Prohibitions, from marrying in a foreign Country; from marrying Protestants, & the want of a proper Priest &c. all these Objections were of no weight in the Grand

Chamber against a Marriage solemnized in England by a Widow above 21 Years of age.
If the Parlt of Paris judges of Marriages of French Subjects contracted in England by the Laws of England laying aside those of France, which cannot pass the Sea; It follows from thence by a reciprocal way of reasoning, that it will not judge by the Laws of England, as to the Marriage of English Subjects, solemnized within its own Jurisdiction, but according to our Customs & Usages . . . . .

Delegates
Dec. 5. 1768
J. Harris.

I am Council in this Case in behalf of Mrs Compton, who brought a Suit of Nullity of Marriage in the Ct of Arches agt Mr Bearcroft, in which having given a Libel the Judge thought proper to reject it & to dismiss the Defr from that Decree. She has appeald to this Ct, & Your Lps have ordered us to go into the Law, I am at Liberty to suppose the whole Libel proved; the Defr in his answers to our allon in a Suit of Jactitation (originally brought) that in 1761, he took a Minor, of 20, out of this Kingdom, (without the Consent of her Mother or Guardians) to be married where fewer Ceremonies were requird; he went to elude the Law, & in fraud of the Act of Parlt remaind in Scotland only a few Hours, & did not consummate there; the Question therefore, is, whether the Act done is not void, on account of his going to Scotland with no other view than to avoid the Law; Mr Solicitor Gen: said, that before 1754. the Marriage would have been good; I agree with him, it would have been valid, but not legal. We are asked, how long a Man ought to be commorant in Scotland, to be clear of Elusion; I do not say an Hour, if he can find a Lady there, in whose Company, he is long enough to fall in Love, Court, & marry her; I am to prove, he went there merely to elude the force of the Statute of 26 Geo. 2. I need not inform your Lps of the great Pains taken by the Ecclesiastical & Statute Law of this Realm, to prevent Clandestine Marriages. By the Council of Lateran, the Parties were punished at Discretion — The Canon Law suspends the Clergyman for 3 Years, & excommunicates, the Parties & Witnesses. By 6 & 7 of King Wm 3: a Clergyman celebrating marriage in an extraparochial Place was liable to 100£ penalty. By 7 & 8 Wm 3. c 35. a Parson marrying without Publication of Banns, or Licence forfeits 100£, the Man married 10£ & the Clerk aiding 5£ . . . .
10 Anne. cap. 19. "Every Person in Orders who shall marry "any Persons without Publication of Banns, or Licence "from the proper Ordinary, shall forfeit 100£. If the "Offender be a Poisoner in any Gaol, other than the "County Gaol; on Conviction for such Offence, he shall "be sent to the County Gaol; & if any Gaoler shall "permit any Marriage to be solemnized in his Prison "with Licence, or Publication of Banns, he shall "forfeit 100£ . . .
The Spiritual, as well as the Temporal Courts, have been filled with Suites about Marriage; by which

A. 1216 . . . Stratford's Constit: 1343 Lyndwood . . . Lib 4. Tit 3.

vid. 62 Canon of 1603

& without

Property is rendered uncertain, & strange Confusion must ensue: By the Divine Law, as well as the Roman, the Canon Law, & the Law of Nations, the Consent of Parents is required: "Jure Divino Consensus non modo contrahen- "tium sed Parentum requiritur.

Deut: Cap. 7. V. 3. Concerning the Idolatrous Nations, it is said, "neither shalt thou make marriages with them; thy "Daughter thou shalt not give to his Son; nor his Daugh- "ter to thy Son . . .

Exodus. Cap. 22 V. 16-17. . . . "If a man entice a maid that is not betrothed, & lie "with her, he shall surely endow her to be his Wife. "If the Father refuse to give her, he (the Inticer) shall pay "Money according to the Dowry of Virgins.

Judges . . . Cap. 21. V. 17. 3 When the Tribe of Benjamin was to be extinguished "The Men of Israel swore in Mizpeh, saying, there shall not "any of us give his Daughter unto Benjamin to Wife . . .

Puffendorf Lib. 6. c 2. . . 3 The Natural Law requires, that Children should not oppose the awefull Directions of their Parents . . . . .

Uhl. Tit. 10. Instit. Sect. 12 . . . . Justas Nuptias contrahunt qui secundum præcepta Legum contrahunt. dum tamen. Si filiæ familias sunt, Con- sensum habeant Parentum.
Si adversus ea, quæ diximus aliqui coierint, nec Vir, nec Mulier, nec Dos intelligatur.
The Canon Law was anciently conformable to the Civil: Evaristus Papa in his Decretal Epistle to the Bps of Africa, Decretum. pars 2da. causa 30. Quæstion. 5.
"aliter non fit Legitimum Conjugium, nisi ab iis qui "super feminam Dominationem habent Uxor petatur et "a Parentibus sponsetur, et sacerdotaliter benedicetur. .
I will mention the Reformatio Legum, tho. that System has not received force in this Country, to shew what were the Sentiments of the Commissioners authorized to compile that Code of Law.
"Quoniam sacræ Scripturæ conveniens est, ut matrimonia "pro nullis habeantur, quæ liberi contrahunt &
Thus the Marriage of Minors was, by the ancient Canon Law, annulled, where the Consent of Parents, & the other Requisites prescribed, were deficient. But in 866 Pope Nicolas altered the Course of that Law, & made them Good "Sufficiat eorum Consensus, de quorum Conjunc- tionibus agitur. The Council of Trent (1563) tho it condemns those who asserted "Matrimonia irrita esse sine consensu "Parentum; aut Parentes eas irrita facere posse; yet after- wards says in its Decree De Reformatione matrimonij C. 1. Sess. 24. that unless the Rules there laid down, are com- plied with, the Contracts should have no force or Operation.
I mention it to shew, that in all Countries, but ours they were invalidated long since — In most Roman Catholic Countries the Council of Trent prevails; In France it does not, in respect to Minors entering into a Contract without Consent of Parents; for their Presumption is, that it is a Rape by Seduction. According to Huber, in Saxony Liberi parentum Consensum adhibere tenentur; aliter a Successione excludi possunt, et Conjunctio talis nullitate laborat . . . . .

vid 2 part of 4 Decretum of Greg: 13. Cause 31. Quæst 2. . . . . v. Dumoulin Council of Trent at large in Haynes Speech

Lib 1. Tit. 10. de Conflictu Legum . . . . .

vid. Vinnius In Institut: Lib 1. Tit. 10...

In Holland, Daughters must be 20, Sons 25. before they can marry without Consent of Parents; Banns also are nelepary; Matrimonia aliter contracta pro nullis habentur. These are the foundations of of the Marriage Law, which has the Divine Law for its Precedent, & stood enforced by the Necepity of Settling Property, which was, by these Clandestine Proceedings, afloat in the Kingdom:
Mr Sol.r General contends, that the Statute should be construed strictly, on account of its altering common Right, & being a Penal Law. (In the Case of Bland & Robinson, Ld Hardwick said, upon a Question of a Marriage at Ostend, "You must go to the Ecclesiastical Court, they have the entire Jurisdiction of Marriage.") But I must deny the Marriage Act to be a Penal Law; tho the Clergyman Celebrating the Marriage in England would be liable to Transportation, no Penalty attends the Clergyman in Scotland by this Act; Even in the Case of the Rebels there was a particular Law to punish Such, as had drawn their Swords against their Country. A Statute may be construed equitably, & strictly too; a Court of Equity may judge one Part; a Court of Law may judge another:

Dele Dec

463. a. 466. 467.....

Plowden in Eyston & Studs. gives a Lesson on the Construction of Statutes; he says,
" It is not the words, but the Sense that makes the
" Law; the Letter is but the Body, the Sense is the Soul &
" Life of it; the Word is but the Shell, the Sense is the
" Kernel. Again
" Equity must of necepity take Place in the Exposition
" of all Laws; & Equity makes no difference between
" penal, & other Laws; the best way to expound a Law
" is to consider what Answer, the Law-makers would
" probably have given, to such a Question proposed
" to them.
He goes on, & mentions the Statute 1. Edw. 6. which deprives those, who are guilty of Stealing Horses, of Benefit of Clergy; & he Says
" I by no means commend the Scrupulosity of the
" Judges, who took the Law to be, that he who stole
" one Horse sh.d have Clergy - and procured a Second
" Statute, which ousts him who steals one Horse....
So the Statute of Gloucester
" which gives Waste against him, who holds for Years,
" gives it against him who holds for one Year.....
By Rich.d 2. An Escape against the Warden, is declared to extend to all Gaolers.....

v. Plowden 86. Strange & Croker...

vid. 3 Co. Rep...

In Heydons Case in the Exchequer. 20 Eliz. It is laid down
" That it is the Office of an Expositor to suppress subtle
" Inventions, & Evasions, pro Bono Privato, & to add force
" & Life to the Remedy provided, according to the true
" Intention of the Lawmakers.....

2 Burrows. 897 - q. vid. Fol. 421 of this Book.....

In the Case of the King v Inhabitants of Preston concerning the Removal of a Pauper, his Wife, & Child, Ld. Mansfield said the Statute 26 Geo. 2. was made against the Man & Woman; & Justice Foster, added Yes, & against their Innocent Children too, else the Statute, could not have Effect.

Bed v Constable Vaughan. 179.

The 12 Car. 2. giving a Father a Power of appointing a Guardian to his Child, by Will, was against common Right, & yet has been construed beneficially.
When a Statute is made, which alters the Law, the Meaning shall not be strained beyond the Words, except in Cases of Public Utility.

Co. 5 Rep. 736 Magdalen College Case...

13 Eliz: c. 10. was framed to prevent Leases made for more than 21 Years, or 3 Lives; whereas the 18 Eliz. c. 11. confirms all Leases made to the Queen, tho for a longer time

Plowden " Yet If a Lease were made to the Queen colorably, & to
" make her a Conduit Pipe, only to transfer the Interest
" to another; such Lease is not confirmed, for it is a
" Subtle Invention to creep out of the Law.

13 Eliz. avoids all Gifts made to defraud Creditors, but it did not extend to an Estate conveyd on a good Consideration, to a Person who had no Knowledge of the Fraud.....
Can Clandestinity & common Right agree? certainly not - Clandestinity is allied to Fraud, not to the Common Law; they are Twin Sisters; Shew me a Clandestine Act, & I will Shew you a fraudulent Act. A Man's own Breast must condemn a Clandestine running away with a Minor, in order to marry her.
I shall now proceed to consider the Intent of the Statute; the Preamble declares it was made to prevent Clandestine Marriages, & not merely Fleet Marriages, there I differ from Dr Hay. I must contend that the meaning of the Exception is only to put Scotland on the footing it was before the Union. by the Scots Statute of Car. 2. 1661. we find various Penalties inflicted on the Parties married, the Minister solemnizing & the Witnesses present at these fraudulent Transactions. nay Persons, Inhabitants of Scotland, married out of Scotland, are punishable on their Return, if Banns have not been published in Scotland. It would have been hard to interfere with their Laws; the Legislature says, "Nothing herein contained shall extend to Scotland,
" nor to marriages solemnized beyond the Sea, i.e. Bona Fide marriages; Did any Legislature ever make a Law & purposely leave open, a Door, to evade that Law? Would they say, All you young People who chuse to go beyond the Sea, shall avoid Censure?
17 April 1753. the Lords, acquainted the Lords of Session of their Intention to pass the Law; an authentic Paper to that Purport, was signd by the Clerk of the Parliament; my Conclusion is, that it appears, that no

Immunity... was intended to be given to Scotland. I will say with Dr Calvert, that the Law of the Place is to prevail; but Exceptions prove it; where the Act is Bona fide, if the Parties have it in Contemplation, & a Comity subsists:

Suppose a Traveller borrows Money in France, & pays 10 pCt Int for it, if nothing is shewn to the Contrary, the Court would presume it legal, because bona fide there & that the Englishman had the Laws of France in Contemplation, & a Comity subsists between England & France; Suppose a Man was to contract for the Pudicitia of a Lady; tho it was bona fide, & tho, the Laws of France were in the Contemplation of the Contracting Parties, yet as the Comity is wanting, & it is contra Bonos Mores, Such Contract cannot subsist.

Suppose an Englishman met his Aunt abroad, & by the Permission of the Bp, or the Dispensation of the Pope, married her, the same Reason of being contra bonos mores, would render it invalid. This brings me to the Law of France Hericourt, an Advocate of the French Ecclesiastical Court, reports a Marriage Ao 1716. between a Frenchman & a young Woman of Liege, where the Council of Trent prevail'd; I thought pays hel the Marriage good, for there was no fraud in the Contractors, but the Court was of Opinion, that the Law of France followd the Person of the Frenchman; the Laws of that Country require the Consent of Parents, the Presence of the Curate of the Parish, & many other Particulars to be punctually adhered to; & where they are wanting, consider the Act of Marriage, as a Rape by Seduction, & doom the Major to the Ultimum Supplicium, for the Offence. In Scrimshire's Case, there was a bona fide Marriage, without Evasion, yet it was pronounced not to be good.

Every Act, will be deemed, to be done, mala fide, where the Object of the Contractors, is the Elusion of the Law, of the Country, where they are domiciled. Many Writers accord in this Point, as well as Huber, who the Sollr Genl said, vouchd it merely as his Opinion, not founded on Judicial Decisions; the truth is, Huber wrote as a Gentleman, & not as a Reporter. He says,

Huber de Conflictu Legum diversarum in diversis Imperiis Lib. 1. Tit. 3. fol. 340.

" Sæpe fit ut Adolescentes, sub Curatoribus Agentes, abeant
" in Asiam Orientalem, aliave loca, in quibus, Curatorum
" Consensus, ad matrimonium non requiritur, juxta leges
" Romanas, quæ apud nos hac parte cessant, celebrant
" ibi matrimonium, & mox redeunt in patriam, ego
" existimo, hanc rem manifesto pertinere, ad Evasionem
" Juris nostri, ac ideo non esse magistratus hic obligatos
" è jure Gentium, ejusmodi nuptias agnoscere, & ratas
" habere –

Brouwer de Jure Connubiorum Lib. 2. c. 24.

" Si liberi in eadem, cum parentibus Civitate degentes,
" parentibus Cobos, & ætate majores se simulaverint, falso
" vel adumbrato nomine, nuptias denunciari curaverint;
" vel non in patria, sed in alia Civitate, vel Regno, in quo
" ignoti sunt, hæc peregerint irritum esse eorum ma-
" trimonium, non tantum ob defectum Consensus, sed
" ob neglectam Legis, cui fraus facta est Observationem
" Hollandia Curia sæpe judicavit.

And speaking of Minors under Guardians, he says,

" Si se Majores simulaverint Minores, Dolo malo Poanomi-
" na, Cognomina adumbraverint, ut nesciat Populus eorum
" nuptias pronunciari.

" Si in exteras terras, Domicilium, per aliquod tempus, simu-
" late transtulerint, ut quasi Incolæ, ibi denunciabas, more
" recepto, nuptias contigerent; vel dolo malo fecerint, ne de
" nuptiis certiores reddere eorum Curatores, Nuptiis Præfecti
" potuerint, aliudve quid moliti fuerint, ut in tempore
" incidere non potuerint Curatores, in irritum deduci debet
" ab iis contractum matrimonium, Hoc enim casus fraus
" Legi, cogitata, & facta, totum quod gestum est irritum opera-
" tur negotium, ut quondam Curia Hollandia judicavit.

Brouwer supposes that the Runaways, are married accord: to the Law of the Country, & pretend themselves Majors; but what would he have said, if they had been married clandestinely, in the foreign Country, which includes every thing. Voet quotes the very Case, which is as good as if it was real; and he had been a Judge...

Voet in Pandectas Lib. 1. Tit. 4. Sect.

" Domicilii Judex, Legem possit condere, qua suo per Domici-
" lium subjecto, vetat quid facere, circa res immobiles, in
" alieno sitas Territorio; vel etiam in alieno Territorio, quodam
" exercere actus, pœna in secus facientem, constituta, in
" quantum in eum reversum, pœnam comminatam
" executioni dare potest . . . . . .

To Shew by Analogy that the Common Law annulls every thing done in fraudem Legis; I shall mention the Case of Bland & Robinson, where it was said by the Council, that a marriage in a foreign Country must be governd by the law of that Country; & the Marriage of Persons going from hence were instanced; but Ld Mansfield observd that such marriages might come under a different Consideration according to Huber.

Burrows.

Feb. 1754 ..... In Bedford v Varney & Bogg cal. Mr Bedford the Devisee over of 1000£ given to Miss Phillips, in case she married without Consent of her Guardians, brought his Bill in Equity for Recovery thereof, wherein he stated that She was married to Barnes, without Consent of Guardians She & Barnes, answerd, as Husband & Wife, allowing the fact of Marriage, at Edingburgh, and Bogg & Verney the Guardians, answerd to their Belief; but it was stated to be in Evasion of the Statute; they therefore might have resided in Scotland 6 Months, for any thing that ap-peard to the Court, who committed the Husband.....

Butler v Dolben The Lady ran away with Mr Butler Son of Jr Butler Esq Knight of the Shire for Sussex; She was between 20 & 30. Ld Hardwick when the Question came before him whether the Lady Sh: be committed for the Contempt, or for the Marriage? said for the Contempt & She was committed accordingly; he said the Ct of Chancery had no Jurisdiction to try the Validity of Marriage, &

sent it to the Commons, where it was hung up, by appeal to the Delegates till Mr Butler came of Age, & then droppe— allowing therefore a proper Deference to the Opinions of 2 great Men, where as Judges, they had no Jurisdiction; it is no more than private Opinion ....

5 Geo. 2. c. 30 The famous Act, call'd, De Banbs Act, "That a Lunatic should "not marry, after a Commission of Lunacy had issued, till it "was superseded; Let me suppose, Mr. Newport, on whose account that Act was made, who is now living, sh: have a Lucid Interval, during which he should go to France & marry there; Such Marrige would be good by the Laws of France; but surely this Court would set aside: I dare say a Court in Scotland would set aside this Marriage; the Lords of Session would say, it is elusive: Why then should the present Evasion be allowed? It is objected, that much Inconvenience wd accrue, by bastardizing innocent Children; I answer that out of 13 or 1400 Clandestine Marriages, I do not believe there are above 6 or 7 Couple, who have not been remarried in England; by Confirming these Marriages you erect as great a Nuisance, as the Fleet Prison, in Scotland, & thereby defeat the Act of Parl: I know the Clamours that are raised, agt the Act, as if it wd depopulate the Realm, was contrary to Divine & natural Law; but I say, unless the Civil Contract precedes, there is no religious Contract. There is no Judgement, which is not attended, with some Inconvenience, in the present Case, perhaps some innocent Children may suffer; but on other Hand, Consider my Lords, what infinite Confusion, will be produced by a Contrary Judgement . . . . . .

Dr Wynne... I am Council also, for the Appellant, Maria Catherine Compton, Spinster who brought a Suit of Nullity of Marriage, agt Edw. Bearcroft Esq, in the Court of Arches. Hil. Term. 1767, the Libel was given in, stating the Facts, which she desired to lay before the Court, as a Foundation for her Prayer; that the Marriage might be declared void; That Libel the Dean of the Arches, was pleased to reject; from which Act of his, Mrs Compton appealed to your Ldps, as from an irreparable Grievance, having the force of a Definitive Sentence; for without a Libel admitted, there can be no Cause.

It was made a Question, upon the opening this Libel, to your Ldps, whether the present Consideration, ought not to be confined to the Facts of the Libel, i.e. whether they were such Facts, as were proper to put the Question of Law, in Issue.

It is not contended, for the Appellant, that an Ecclesiastical Judge is bound to admit every Libel or Plea, that can be offerd; that would be liable to all the Objections stated by your Ldps; but it was submitted, that the Question intended to be put in Issue, being Res Integra, & a Question of so much Consequence, as well as extent, it was very unusual, & scarce warranted by Practice to go into it, upon the first sight of the Libel, without giving the Party praying Relief, an Opportunity of laying every thing before the Court, that might possibly tend, in any Degree, to instruct her Case...

Your Ldps have been of Opinion, that the Dean of the Arches was warranted in going into, & determining upon the Question of Law, upon Sight of the Libel; for that is what he most unquestionably has done; he could have no doubt of his Jurisdiction, as was thrown out, what Acts & Ceremonies, will constitute the validity of Marriage, belongs to the Cognizance of the Ecclesiastical Court. Letters of Request having been regularly & legally (in a Case warranted by the 29 Hen. 8. c. 9) granted by the Chancellor of Worcester (in whose Diocese the Defr resides,) to the Dean of the Arches, there can be no doubt, he was the proper Ecclesiastical Judge, to take Cognizance of the Question.

It was suggested, the Libel may have been rejected for being informal & imperfect, because it recites only a part of the Law, & omits the Exception, which takes the Case out of the Operation of the Law: but this could be supposed, by such only, as are unacquainted with the manner of drawing Libels in the Ecclesiastical Court. The Usual form of a Libel, is that of a Syllogism: Of which, the Major Proposition is a Recital of the Law, upon which the Party founds himself.... The Minor, is the Deduction of Facts, to bring his Case within the Operation of that Law... The Consequence, is the Prayer, that Proof being made of the Facts, the Judge will pronounce, his Sentence agreable to the Law.

This is the Form, but it cant be supposed to be the Practice of those Courts, or the Apprehensions of the Parties, that the Judge takes the Law from the Recital in the Libel. The Law upon which the appellant relies, is a Public Act of Parl: of which the Judge of every Court, is bound to take notice, Judicially, & ex Officio. So much of it is recited, as make for the purpose of the Party, for whom it is given in;

But the whole is referred to, & the Form is, to do so in every Libel: By such an Act it is so enacted, as in s^d said Act, to which the Party proponent craves leave to refer, may, & doth appear. If the other Party had given in a Plain answer to the Libel, he might have recited the part of the Statute on which he relies; but that would have been form only, for whether he did, or not, the Judge was unquestionably bound to determine, upon Consideration of the whole Statute, taken together.

What the Appellants motive was for bringing this Suite, I apprehend is quite immaterial for your L^ps to enquire. Whether She had 6 or 7 Years Experience of this Gentleman, before she desired to get rid of him, as was represented by one of the Gentlemen; or whether She ever cohabited with him, for one Hour, as her Husband, non Constat, nor can it make the least difference in the Question.

It signifies as little, whether any indirect means were used, to impose upon her at the Time, or whether she was induced to take the Step, She has now done, by any subsequent Unkindness, the Single Question, is, wh^t the Case is within the Reach of the Act of Parl^t. If it is, the Consequence is not to be avoided; the Marriage is absolutely null & void, & either Party, on application to the proper Court, has a right to have it declared so; And the Case, put by one of the Gentlemen, as a matter of Doubt, whether if a Man under Age, had obtained a Licence, by swearing himself to be of full Age, & should afterwards bring a Suite of Marriage, as having been under Age, at the time the Licence was granted, & not having had the Consent of his Parents or Guardians, the Court would in that Case, & at his Suite, pronounce the marriage to be void, has been determined; the Statute is express, & the Judge could not avoid pronouncing the marriage null; however culpable the Party bring^g the Suite in that Case might be, & however liable to Punishment for his Injury.

But the Party bringing this Suite is liable to no such Objection; She was drawn in during her Minority, to engage in a Contract, concerning the Legality of which, she is advised, there are, at least Great Doubts, which it, most certainly, highly concerns her to have clear'd up; for if it be a good marriage, it is her Duty to go & live with her Husband: if it be not a good Marriage, it would be a Crime for her to cohabit with him, & She has a right to dispose of herself in any other way.

The Gentlemen have not offered to make it a Question, whether the several Facts stated in the Libel, would have constituted a legal Marriage, if they had passed in any part of England: It will not admit of a Question: but they rely Solely on the Exception, by which it is provided "That nothing in this Act contained shall extend to that part of Great Britain, called Scotland." And insist, that this is as plain a Declaration, as words can make, that this Act of Parl^t is not applicable to any Marriage performed, or pretended to be performed in Scotland, between any Persons whatsoever; & this is the single Question between us. In determining upon which your Attention will naturally be directed in the first Place to the Letter, & the plain uncontroverted Intention of the Statute, & the Exception.

The Words of the Statute are, "That all Marriages solemnized in any other Place, than a Church or publick Chapel, where Banns have been usually published, unless by special Licence from the Abp. of Canterbury, or that shall be solemnized without Publication of Banns, or Licence, from a Person having Authority to grant it, & all Marriages solemnized by Licence, where either of the Parties not being a Widower or Widow is under the Age of 21, without the Consent of the Father or Guardian of the Party under Age, shall be null & void, to all Intents & Purposes."

The Words of the Exception are, "That nothing in this Act contained shall extend to Scotland." It does not say, to any marriages solemnized or performed in Scotland, which is the manner in which all the other Exceptions are worded: Viz. "That it shall not extend to the Marriages of any of the Royal Family; nor to any Marriages amongst Quaker, or amongst Jews, nor to any Marriages solemnized beyond the Seas" But That nothing in the Act contained shall extend to Scotland".

Now is not the obvious, Grammatical Meaning, of these Words, that it shall not be the Law of Scotland; That Scotland, i.e. the Kings Subjects inhabiting that Part of the Island, shall not be bound to the Observance of the Rules prescribed in this Act, for solemnizing Marriage; but the Law there, relative to that Contract, shall remain the same as it was, before this Act was made.

What then was the Intention of the Statute?

It is clearly expressed in the Preamble; "Whereas great Mischiefs, & Inconveniences, have arisen from Clandestine Marriages, for preventing them &c, be it Enacted &c".

What Clandestine Marriages are within the view of the Statute, is expressed in the subsequent Parts of it:

Viz.t Marriages celebrated in improper Places; or, if between Minors, without the Consent of Parents or Guardians, or without an Opportunity given them to dissent, by Publication of Banns.

If this Act is not entirely nugatory, it must bind somebody; & if any are bound, they must be the Kings Resident Subjects; who are to live under it, & who claim & enjoy, the Privileges & Benefits of it, as they do of all the rest of the Laws of the Land.

What then was the Intention & Occasion of the Exception?

No Man who is not utterly ignorant of the Laws, and Constitutions of the two Countries, constituting Great Brittain, can entertain a moments doubt about it.

The Legislature was making Rules, relative to a Contract, the Solemnities constituting which, are merely Ecclesiastical.

The Legal Ecclesiastical Constitution of the two Countries, & all their religious Ceremonies, are entirely different; and the most scrupulous Care, was taken, by the Scots, at the Union, to preserve their Ecclesiastical Government & Discipline, upon the same Footing it then was; It is declared by Article 25.th of the Articles of Union, ratified by an Act of the Parl.t of Great Brittain 5. Anne c8. "That the Act for securing "Presbyterian Church Government, be for ever held to "be, & observed as, a fundamental Condition, of the "Union."

To have extended the 26 Geo. 2. to Scotland, therefore, (which it would have extended, but for the Exception) would have been an absolute Breach of the Union; Banns could not be publish'd, or Marriage solemnized, in the manner directed by that Act, without the Reception of the English Liturgy; Licences could not be obtained, without Bps, Bp.s, or, other Ordinaries, to grant them; and therefore, the different Constitution in this Respect, made it necessary, to declare, that the Statute, should not extend, to Scotland; the Legislature either being of Opinion, that the Laws at that time in force in Scotland, for preventing Clandestine Marriages, were sufficient to restrain them, there: or else, intending to make further Provision, for preventing them there, by a Law, adapted to their own Constitution, at some future Time.

That this was the real Intention, & Occasion of insert:ing this Exception, in the Statute 26 Geo. 2. is what I believe no man will deny. That it was any Part of the Intention, of the Legislature, in inserting it, to give force & Validity, in England, to such Marriages, as the pretended Marriage Libellate, no Man will venture to assert.

If then the Intention of the Statute be clear, & this is pu-=ted between us, & if it be such, as may be collected, from the plain, Grammatical Sense of the Words; can there be a doubt, but that the Intention ought to be carried into Execution, even, tho the words of the Exception, taken by themselves, might be turned to another Sense; or, that they were expressed ambiguously.

But how much more forcibly, will this Rule act, where understanding the Words in one Sense, the plain, declared Purpose of the Act, will be carried into Execution; but taking them the other way, it will be totally defeated, & produce nothing, but Absurdity & Confusion; & the mischief, be left, as great, as ever, with the Addition of a most flagrant Contempt of the Law.

Now taking the Statute, altogether, in the Sense, which we, who are for the Pltf, submit, it ought to be understood; those mischiefs & Inconveniences, which it is declared in the Preamble, to have been intended to prevent, will be effectually prevented: the Kings resident English Subjects, who are, beyond a possibility of Doubt, the Objects in Contemplation of the Law, will be bound, either, to obey the Directions of it, or to take the Consequences of a Contract, illegally entered into, if they disobey them: the Authority of Parents & Guardians, & the Security the Law intended, for Minors, will be provided for; & Decency will be observed, in the Performance of a Solemn Religious Rite.

But take it the other Way, & those of the King's resi-=dent English Subjects, who do not chuse to obey this Law; & who find it convenient, to do a piece of that Mischief, which it was avowedly enacted to prevent; have nothing to do, but to get into a Post Chaise, drive, 2 or 300 Miles, till they pass a certain line; there they need not search long for a Dr Jameson, who has a Garret at Dumfries; or if they go into the first Alehouse, by the Road Side; or get him to mutter the Marriage Ceremony, under a Hedge, it is full as well; they turn their Horses Heads directly, & come back, lawfull Man & Wife; by the Law of England, in direct Contradiction & Defiance, to the express Letter, of the Law of England.

This seems to me to be such Law, as if any Traveller were to affirm, he had met with, in some very remote unknown Country, he would be thought to speak with the Licence of a Traveller.

Surely, this is, so very absurd a Practice, that, it is

Scarce treating the Laws of this Country, with due Decency, to suppose it can be legal, or to contend for the Sanction of a Court of Justice in support of it. What is it they rely upon?

They say, it is, it must be admitted, that these Marriages, are valid in Scotland, therefore, they must be allowed, in England, & all over the World: by the known Rule, that a Contract binding where it is made, is binding all over the World..

And it must be allowed, that this is a Rule, of the Law, of Nations; but it is a Rules, liable to as many Exceptions, as any Rule, that can be named..

The World, & Europe in particular, having in these later Ages, been divided, into so many distinct, & independent Governments, under very different Systems of Laws; & the Communication, & Commerce, between these different Societies, having been so much extended & facilitated, a mutual Regard of this Kind, from one Country, to another, became absolutely necessary. For every Man being personally Subject to the Governing Power, of every Country, where he sets his Foot, the Acts he does in that Country, must be done, according to the Rules, laid down by the Laws of that Country; And, to say that an Englishman in a foreign Country, cant enter into a valid Contract, (whether Marriage, or any other,) without observing the Solemnities of the Law of England, would be laying him under a Prohibition, to do the Act at all. The Country he resides in, would not permit it, as a Violation of its Sovereignty; would not allow it the effect of a Contract there, as not entered into agreable to its own Laws; & besides, if an Englishman were allowed, to enter into a Contract, in that manner abroad, it would, in many Instances, be impossible, for want of the Officers, & other Requisites, required by the Law of England..

Again, if a Foreigner removes into England, with his Wife & Family, it would be, the most unreasonable thing, in the World, to say, that tho' he was lawfully married, according to the Laws of the Country, where he was, at the time he married & that his Children were lawfully begotten, according to the same Laws, yet, because the marriage was not entered into, according to the Solemnities required, by the Law of England, his Wife should not enjoy the Privileges of a lawfull Wife; nor his Children be considered as legitimates, nor

Entitled to the Privileges of the legitimate Children of such a Person in England....

It has therefore, been established as a Rule, among different Nations, from a Principle of mutual Convenience, as well as Curtesy, to each other, reciprocally, to allow each others Contracts, to be good: But this is only to be understood, in such Cases, in which such allowance will not be prejudicial, to the Interests of the Country, in which it is demanded, of which the Governing Power in that Country, is the Sole Judge.....

The Instances of this, in Practice, in every Country, & the Restrictions laid upon it, are infinite: By the Law of England there is no particular form prescribed, for a Will of personal Estate. There is no doubt, therefore, that a Will, executed according to the Forms, of any Country, upon Earth, would convey the Testators Personal Estate, in England. But by the Law of England, a Devise of Land, is not good, excepting the Testator be 21, & gives it, by a Will in writing, executed in the Presence of 3 Witnesses — In Irreland, a Person may make a Will, at the Age of 18; in other Parts of the United Provinces, at 20. without distinction of Real & Personal Estate. Suppose an Englishman of 18, resident in Irreland, to make a Will, disposing of his Lands in England; could that Will be supported: a Person would not be heard, in any Court of Justice, who should claim under such a Will: and Why? because the Legislature of England, has declared in general Terms, that a Will made of Lands, by any Person within the Age of 21, should not be taken to be good or effectual in Law.

By the Laws of Ireland. A. Null.....

By the Law of England, a Marriage, between a Protestant, & a Roman Catholic, is allowed to be good: In France such a Marriage is void by an Edict of Lewis XIV. published in 1680, wch declares, "We Will, that our Subjects of the Catholic, Apostolical, " & Roman Religion, may not, upon any Pretence whatsoever, " contract Marriage, with those of the pretended Reformed " Religion; Declaring such Marriages to be void, & the Children " illegitimate, & incapable of succeeding to the Moveable, or " Immoveable Goods of their Fathers & Mothers — " " an English Protestant, & Catholic may be married in France, & the Marriage, would be good in England.

Mirieourt. p. 449

a French Catholic & Protestant, married in England, accord. to the Laws of England, would, likewise, be, undoubtedly, a good Marriage in England.

But, Can it be conceived, they would be suffered to return to France, & claim their Goods there!! Upon what Pretence; if they should say, We were Man & Wife in England they might be answered, that is very true; but you are French Subjects; you knew the Law of France did not

Permit you to marry; The Contract, was good in England, you say: Go then, & Enjoy the Fruits of it in England; but the Law of England, is not binding in France, where the Law of France has declared the Contrary
It is the same in Ireland; By an Irish Statute 9. Geo 2. cap. 12. Sect. 1. "Every Marriage that shall be celebrated after, 1 May 1746, between a Papist, & any who hath been, or hath professed himself to be, a Protestant, at any time within 12 Months, before the Celebration of such Marriage, shall be, absolutely null & void, without any Process, Judgement, or Sentence of Law, whatsoever. ✕ ..."
It is contrary to the very Epence of a Sovereign independent Power, to say, it should: It is, of the Epence, of a Sovereign Power, to bind its own People, by its own Law; To be bound, by the Laws, of no other Country, ex vi Sua, but by Consent, to adopt them. The Doctrine contended for if adopted, would occasion great Confusion; all the Laws, all the Abominations, (as one of the Gentlemen called them) on Earth might be introduced; No Political Regulation could be made, which the neighbouring Country could not defeat; Persons might be Man & Wife, in one Country & obliged to cohabit; & not Man & Wife, in another, & therefore forbidden to Cohabit.
But if this Confusion is occasioned by the Obstinacy & Willfullness of the Parties; who is to blame? It is a great Inconvenience to them, & a much more pityable one, to their Children, who are not to blame at all: but Laws are not to be broke through, to remedy private Inconveniences; the only way to prevent them, is to put the Law in Execution.
Will it be contended, that every Marriage, performd between two English Protestants, in Scotland, shall give them, & their Children, all the same Rights & Privileges though they return, immediately, into England, & live there the rest of their Lives, as it would give to Resident Scots Subjects? Perhaps those who contend for this, would scarce be aware, how far the Principle would go..
By the Law of Scotland, in conformity to the later Roman Law, Marriage legitimates the Issue, which a Many Woman, being single at the time, (& to whose Marriage there was no legal Impediment) have had before the Marriage; & a Man may legitimate all the Children, he has had, by a Woman, by marrying her, upon his Death Bed—
By the Law of England, every one born out of lawfull Matrimony, is a Bastard, tho, Matrimony be afterwards solemnized between the Parties.

✕ L. 6. C. de natural. Lib. 5 Liberis. Nov. 89. C. 8. — Macdonals Instit. of the Law of Scotland P. 121 — Stair. P. 199 — Co. L. 244. a. ...

✕ Could they contract a valid Marriage, by coming to Holy head being married there, & returning immediately to Ireland? surely Not: it is subversive of all Civil Policy; no such Comity can subsist—

Is then this Law, to be changed, by the mere accidental Circumstances, of a Marriage having been performd in Scotland? & shall the Child born in Lawfull Matrimony be barrd of its Inheritance in England, by a Bastard, because his father & mother were afterwards married in Scotland? It cant be doubted, that the Claim of a Child, born before the Marriage of his Parents, tho performd in Scotland, to an Inheritance in England, would be rejected with Indignation, in any Court of Justice in this Kingdom: It would doubtless be treated as our Ancestors treated, the Proposal, when it was made by the Clergy, that the Law of England, should be changed, & the Civil Law adopted in this Particular. It was thought a sufficient Answer to give Nolumus Leges Angliæ mutari, quæ hactenus usitatæ fuere. Yet the Children will be Legitimate in Scotland: If then the innocent Children may be Legitimate in one Country, & Illegitimate in another; why may not their Parents tho married abroad, be refused the Privileges of married Persons at home, when they have brought that Inconvenience upon themselves, by their own Obstinacy & Disobedience —
The notion that when the Contract was made in a foreign Country, the Law of the Country where it was made, must be the Rule in determining upon it, is true in a certain Degree, & under Restrictions in all Countries: but the Country in which it is allowed, in a much greater Extent, than any other, is, the United Provinces of the Netherlands, on account of the particular Constitution of those Countries; which is that of a federal Union of small Territories, who are governd by their own Laws. It has happend, that this Country has produced more Writers upon the Law of Nations, than any other; & yet it has been made appear, from these Writers, that according to their Opinion, & to the Practice of those Provinces, this Rule is subject to innumerable Exceptions: These are all laid together, & the Question seems to be thoroughly sifted, in that Treatise of Huber de Conflictu Legum diversarum, in diversis Imperiis, which I believe your Lps have all had recourse to, & therefore I will not trouble you with Quotations from it; the Result is, that the Rule is to be observed, only Sub hac Exceptione; "nisi ad aliam Rempublicam evidens inde Periculum aut Incommodum resultare queat;" & in particular, that no

Prælectionum Pars. 2. Lib. 1. Tit. 3. .....

Regard is to be paid to it, where it is proved that the Parties went into another Country to make the Contract, merely to evade the Laws of their own; i.e. to do such an act or in such a manner, as the Laws of their own Country will not permit: Such a Practice, he says, no Country is by the Law of Nations, bound to allow of, or to ratify the Acts done, by its Subjects, in such a manner; because it manifestly tends, to the Subversion of its own Laws. And in this I certainly agree with him, in his Treatise de Statutis, which is in his Comment on the Title C. Tit. A. Dig: & upon D. 28. Tit. 2. de Ritu Nuptiarum. Both instance the case of Marriages, in fraud, of their own Laws.
The Gentlemen have thought it necessary, in support of their Side of the Question, to treat these Writers with some kinds of scorn: Who is Huber, said Mr Solicitor Gen: I answer, he is no Legislator indeed, but a very good Lawyer, & a very good Reasoner; the Question is not, who he is, but whether there is Reason in what he says?
Pothier, said, if we could produce the Determinations of Courts of Justice, it would be something; I wondered to hear this remarked by the Gentleman, who read to you out of Voet, the Passage out of Brouwer who was Principal Judge at Leyden for many years, & not a private Professor (he died in 1683) his words are, "Si Liberi in eadem cum Parentibus degentes Civitate, Parentibus Orbos, & Matre majores, se simulaverint, ficto nomine ne a proceribus patriæ nuptias denunciari curaverint; vel non in Patria, sed in alia Civitate vel Regno, in quo Extranei & Ignotissimi hæc omnia peregerint, irritum esse eorum matrimonium, non tantum ob defectum paterni Consensus, sed et ob neglectam Legis (cui fraus facta est) Observationem, Hollandiæ Curia sapius judicavit."
Here therefore is the Testimony of a Magistrate, that there have been repeated Determinations of the Court of Holland, that Marriages performed in foreign Countries, to elude the Law of that Country, to which the Parties were subject, & particularly to get over the want of Consent of the Fathers of the Parties, without which the Marriage would not be valid at home, are void.
I have met with a Case decided in the Parliament of Paris in 1716, which is in point, excepting, that it is said that the Act was done by one of the Parties to evade the Laws of France; in that respect, it is a stronger Case than the present; the Case is related by Mons^r Hericourt in a very good Work, called, Les Loix Ecclesiastiques de France dans leur Ordre naturel: published at Paris 1719. His words in his fifth Chapter which treats of Marriages, Art. 2. §74. are these." Devret maintains, in his Treatise of Abuses, that a Marriage, contracted by a French Person, during Minority, without the Consent of the Father, in Countries where the Discipline of the Council of Trent is followed, is good: There are several Arrets, which have so determined it: Supported

De Jure Connubiorum Lib. 2. cap. 2. §4.

By the Authority of this Author, & the Arrets, I argued in the Grand Chambre, that a Marriage celebrated at Liege without Fraud, between a young Man of Lyons, who was a Minor, & a Woman of the Diocese of Liege, could not be set aside, upon an Appeal, as from an Abuse; I said, this Marriage could not be looked upon, either as Clandestine, or as a Rape by Seduction; because that in the Diocese of Liege, the Consent of Parents to the Marriage of Minors, is not necessary, to avoid Clandestinety, or the Presumption of Seduction: I added, that a Marriage could not be good in one Country, & void in another: that to make an Act valid, it is sufficient to have satisfied the Formalities prescribed, by the Law of the Place, where the Act passed. Nevertheless, by an Arrest, passed in the Roll of Vermandois A^o 1716 It was judged to be an Abuse — (NB. The Decrees of that Court are registred, without any Reasons assigned by the Judges & therefore the Reporter goes on, to assign the Reasons upon which he supposes this Arrest to have been given.) In this Case, says he,) the Ordonnances which forbid Minors to marry without the Consent of Parents, in whose Power they are, seem to have been considered, as personal Laws, which follow the Minors, wherever they go, & which found a Presumption, that they were imposed on, wherever they did the Act: or rather, the Court presumed, from the Quality of the Parties, that there was an actual Subornation of the Young Man, on the part of the Mother of the Young Woman, with whom the Man lodged.

(Appel comme d'abus . . . .)

Qu. It was asked, how long, according to this Method of Reasoning, must a Subject of England have resided in Scotland, before he can safely marry there?

Ans^r The Answer is, the Time of his having resided there is totally immaterial: It is not the Shortness of the Time, of his having been there, that will invalidate the Marriage, but his going with a fraudulent Intention, for no other Purpose, than to evade the Law of England: and whoever would endeavor to invalidate the Act, must prove that it was performed in that Country, merely with that View.
It was said, that the Policy of different Countries, is different, in this, as well as many other Respects: This certainly true, & it is very unreasonable for any Nation to require another, to desert its own Policy, & conform to that of any other: but what has the Policy of one Country to do with the Subjects of the Practice of the other? What right, has one Independent Country to prescribe, what shall be held a good Contract in another? What Injury is done to Scotland, for Instance, if an English Man & Woman, are not allowed the Privileges of married Persons in England, which would be allowed them in Scotland? Is it not very truly stated by Huber lib. 88.

vid. Huber. §8. ✕ That the Injury is rather done to that Country, which affords an Opportunity to the Subjects of the other to evade the Laws of their own Country.

It must be, & was admitted, that the Law of the Place where the Transaction is entered into, cannot be the Rule, when the Performance, the Operation is to be in another Country: On this Principle in the Case of Sir J. Champant agt Ld Ranelagh, when a Bond was made in England, & sent over to Ireland, for the money to be paid there, without mentioning what Interest was to be paid; the Ld Keeper was of Opinion it should carry Irish Interest: Surely this Reasoning will apply to a marriage celebrated in a Foreign Country, between Persons, intending to return, & reside in England immediately. They are to perform the Duties at Home: If any Inconvenience arises from the Conjunction of such Persons, their own Country is to feel them. . . . Political Reasons for forbidding it, may be very strong in one Country, which dont operate at all in the other, or are otherwise provided for. . . .

Prec: in Chan: 128.

In this manner Huber argues §10. of the same Treatise. "Non ita respiciendus est locus, in quo Contractus est initus, ut si Partes alium in contrahendo Locum respexerint, ille non potius sit considerandus." . . . . .

L. 21 ff de R. N. "Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit". . . . . .

"Proinde et locus matrimonii contracti, non tam is est ubi Contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt. Utomni die fit, homines in Frisia Indigenas, aut Incolas, ducere Uxores in Hollandia, quas inde Statim in Frisiam deducunt; idque si in ipso contractu ineundo, propositum habeant, non oritur Communio Bonorum, etsi pacta Dotalia sileant, secundum Jus Hollandiae, Sed Jus Frisiae, in hoc casu, est Loci Contractus". . . . . .

But Consider what is the Respect shewn to the Policy, either of England, or Scotland, by the Parties who get these Marriages performed? & how far the Laws of either are observed in them? . . . . . .

By the Statute 10 Anne of the Parl: of Great Britain cap. 7. §6. It is Enacted, "That no Episcopal Minister within that part of the United Kingdom, called Scotland, presume to marry any Persons, but those, whose Banns have been duly published, three several Lords Days in the Episcopal Congregations, which the 2 Parties frequent; & in the Churches to which they belong, as Parishioners, by virtue of their Residence; & that upon the same Pains & Punishments as are already inflicted by the Laws of Scotland, in Cases of Clandestine Marriages—

There cant be the least Question, that such a Marriage as this is pleaded to have been, performed by a man,

who calls himself, minister of the English Chapel at Dumfries, & (as he certifies) after the manner of the Church of England, at a private House, & without Publication of Banns, between Parties who never did frequent any Episcopal Congregation in Scotland, is within the View of this Statute, & subject to the Pains & Punishments of Clandestine Marriages, by the Law of Scotland. . . Viz

By an act of the first Parl: of Car. 2. 1661. Sess. 1. Cap. 34. "By an act of the first Parl: of Car. 2. 1661. Sess. 1. Cap. 34. whoever marries in a clandestine, inorderly way, or by Persons not authorized by the Kirk, shall be imprisond 3 months, & besides shall pay, each Nobleman 1000 each Gentl: & Burgess 500 £ each other Person 100 marks, & that they remain in Prison till they pay. That the Celebrator be banished, not to return on pain of Death". . .

By an act of Parl: 2. Car: 2. Sess. 2. A: 1672. "whoever shall be married in Scotland, by any Person not lawfully authorized; they shall lose any Rights they may have by that Marriage, Jure Mariti, vel Jure Relictæ, & that by & attour the Pains & Penalties, provided by the act of Parl: in 1661; which act is hereby ratified & renewed."

By Jac. 1 Parl: Sess. 8. cap. 12. "Persons so clandestinely married are obliged, when required, to declare the names of the Celebrator & Witnesses, under the Pains of 2000 £ a Nobleman the Landed Gentleman 2000 Marks: any other Gentleman or Burgess 1000 £. any other, 200 Marks. & to be imprisoned till they declare, or pay: the Celebrator is punishable not only with Banishment, but by such pecuniall or Corporal Pains, as the Council shall think fit: also the Witnesses are made liable, in the Sum of 500.

Now if these Acts of Parl: were to have their Effect over all Marriages entered into in Scotland to evade the 26 Geo. 2 they might go a great way to prevent them; But if any one should offer to set up a Prosecution upon them, to Imprison, or recover the Penalty, it would immediately be said, what have we to do with the Laws of Scotland? we are English; no Regard is paid to the Scots Law here — My Motive is, to shew the Scots are sensible of the Inconveniencies of Clandestine Marriages. Notwithstanding, the Marriage is valid in England, the Substance of the Doctrine will be this.

The Legislatures both of England & Scotland, (as long as they had distinct Legislatures) have been very sensible of the many Mischiefs & Inconveniencies arising from Clandestine Marriages, & have prohibited them by very severe Laws—

In England, they are now, utterly null, & void. . . .

In Scotland, they are stripped of all, or most of the beneficial Civil Effects, & the Parties are punished by heavy Fines & Imprisonment.

Therefore English Subjects, are prevented, from contracting clandestine Marriages in England; & Scots Subjects in Scotland, by such Sanctions, as the Legislature of the two Countries, thought Fit & sufficient.
But if two English Subjects go into Scotland, get married clandestinely there, & come back to England directly, their Marriage is not only valid, & they liable to no Punishment, but as much favord, entitled to as many Privileges, as if it had been celebrated, with the strickest Conformity to the Laws of the Land —
I do not know what words can expose the Unreasonableness of this Opinion more, than the bare stating it:
Can it possibly be Law!
But it has been said, This is a Penal Statute, & as such, according to the constant known Rule, is to be construed strictly.
It has certainly a penal Clause in it, against the Minister, who performs a Marriage in any other Place, than a Church or Chapel, & without Banns or Licence; but with respect to the Parties there is no Penalty.
The Person who performd this Marriage, I presume to be a Resident Scots Subject: he is answerable to the Laws of his own Country; & by them, as I have stated, banishd that Country, not to return on pain of death.
But the Party before you, is not applying for a Penalty, (this is not the Place to apply for it) but praying the Benefit of the Law of England, to be relieved from a Contract, which she was drawn into during her Minority, without the Consent of her Guardians, & contrary to the express Prohibition of the Law. And as it is a maxim of the Law of England, that Penal Statutes, i.e. such parts of Statutes as are Penal, shall be construed strictly; so it is likewise a maxim of the same Law, that the Statutes against Frauds shall be liberally & beneficially expounded: which, tho, it may seem hardly consistent with the former Rule, (most Statutes against Frauds being in their Consequences Penal) yet the Difference is, where the Statute acts upon the Offender, & inflicts a Penalty, as Transportation, the Pillory, or a Fine, it is there to be taken strictly; But, when it acts upon the Offence, by setting aside the fraudulent Transaction, which is the present Case, it is to be construed Liberally. 6. 3 Rep. 82.
It was said by the Gentlemen, & has been strongly urged & very popularly received, in the frequent Discussions, that this Question has undergone, in Conversation & in Print, since 26 Geo. 2. passd, "That it is a Law restrictive of an Act, in which above all others, from the nature of the Act, People ought to be, are in general, & were in this Country, before this Act was passd, left at their Liberty; & therefore the Operation of it, ought to be restraind, within as narrow Bounds as possible.

Blackstone's Commentaries 1. 88.

Now, tho it is certain, that the Equity or the Expediency of an Act of Parl[t] is not a Subject for the Examination of this, or any Court of Justice, yet as the Question is upon the Extent of its Operation; & it is urged by those who maintain the other Side, that it is a Law by which new & unusual Restrictions are imposed; upon an act in which there were before left at large their Liberty, therefore ought to be construed strictly, & restraind in its Operation; it may not be improper to submit to your Lps Consideration, shortly, what Alterations have been made by the late Statute, & how the Law relative to Marriages, as it now stands in England, differs from the general Canon Law on that Subject, as anciently, & now practiced in other Countries, & from what was the Law upon the same Subject in England before the late Marriage Act.
The first Xtian Emperors adopted the antient Roman Law in its full Extent. That Filii Fam. i.e. Children not emancipated, whether Minors or Majors, could not contract lawfull Matrimony (without strictly complying with the Rules prescribed by the Laws) without Consent of their Parents.

Justinian. I. 1. Tit. 10. de Nuptiis.

Justas Nuptias inter se Cives Romani contrahunt, qui secundum Legum Præcepta coëunt: dum tamen si Filii Fam. sint, consensum habeant Parentum, quorum in potestate sunt: nam hoc fieri debere, & Civilis & Naturalis Ratio suadet. § 12. Si adversus ea quæ diximus, aliqui coierint, nec Vir, nec Uxor, nec Matrimonium nec Dos intelligitur.
The most antient Papal Constitutions in the Body of the Canon Law, speak almost the same Language, with respect to the Marriages of Women, without Consent of Parents or Guardians.
In the 2[d] Part of the Decret. Caus. 30. Q. 5. C. 1. Is a Decree, pretended to be a Decretal Epistle of Pope Evaristus, (who died as early as 220 Years after Christ) addressd to the Bishops of Africa.
Tho, it is well known, these early Decrees are Forgeries, yet are they Forgeries of the 8[th] or 9[th] Centuries, which have always been allowed, as Authorities for the Discipline of the Church at that Time. The Words are,

cited by Hargrave 1. 484. Sec. 73.

Aliter legitimum non sit Conjugium, nisi ab his, qui super ipsam Famenam, dominationem habere videntur, et a quibus custodiatur, uxor petatur, et a Parentibus et Propinquis sponsetur, et Legibus dotetur, et suis tempore, ut mos est; cum precibus & oblationibus, a Sacerdote benedicatur. Ita peracta legitima scitote esse connubia. aliter vero, præsumpta, non Conjugia, sed Adulteria, vel Contubernia, vel Stupra, aut Fornicationes potius, quam legitima Conjugia esse, non dubitate. (nisi Voluntas propria suffragaverit, et Vota succurrerint legitima.)
In later Times the Decretals established the differences between Legitimum & rotum Matrimonium, & tho, they forbad the Solemnization of Marriage between Parties, without the Consent of their Fathers, Mothers, or Guardians, & required the Publication of Banns in the Churches of the Parishes, where the Parties live,

And the Priest celebrating without such Publication is to be suspended for 3 years from the Execution of his Office, & the Parties to the Marriage to be enjoind condign Pennance, for their Contempt of the Orders of the Church; yet the Marriage was declard by the Decretals Lib. 4. Tit 3. C. 3. Cum Inhibitio.[m] ... to be valid & indissoluble, agreable to the Decision of the Council of Lateran, held under Pope Innocent the 3d. the last year of King John's Reign, & so remained to the Council of Trent.

[m] These words begin the Chapter

a°. 1215 ....

a° 1547. ....

That Council tho, it has gone so far, as to pronounce an anathema against those, "qui falso affirmant matrimonia a Filiis fam. sine consensu parentum contracta irrita esse" (which was in opposition to the Reformers, who maintaind that the Marriages of Minors, without the Consent of their Parents were null & void, both by the Law of God, & the Law of Nature.)

Yet the same Council in its Decree De Reformatione Matrimonii Cap. 1. Sess. 24. reciting the great Mischiefs of Clandestine Marriages, which the Church had always detested, & which its Prohibitions had not had sufficient weight to prevent, declares them to be utterly null & void: the Words are, "Qui aliter quam presente Parocho vel alio Sacerdote, de ipsius Parochi, seu Ordinarii licentia duobus vel tribus testibus, matrimonium contrahere attentabunt: eos Sancta Synodus, ad sic contrahendum omnino inhabiles reddit, et hujusmodi Contractus irritos & nullos esse decernit, prout eos presenti decreto irritos facit & annullat".

Declar.: du 26 nov. 1639. Art. 1. Henricourt p. 174.

In France the Constitution of the Council of Trent, annulling Clandestine Marriages has been received; but they have gone further, & notwithstanding the Councils Anathema, by an Ordonnance of France published in 1629, the Marriages of Minors under 25, without Consent of Parents, & Guardians, are null & void.

And in some measure to colour their disregard to the Decree of the Council, they have made use of a Contrivance:- By the Canon Law, where it appears, that either of the Parties, was forced, or seduced into a Marriage, it is not good, Consent, which is of the Essence of Marriage, is incompatible with either Force or Fraud. The French Lawyers therefore have declared, that where a Minor under 25, marries without the Consent of Parents or Guardians, the Præsumption Juris, et de Jure, shall be, that the Minor was forced into the Contract, consequently it shall be void.

The Protestant Churches in Germany, I believe in a manner universally, & with a very few Exceptions, o hold the Marriage of a Man under 25, & a Woman under 20, without

o. Viz. Frizeland

The Consent, of the Father or mother, if living, or if they are not living, of the Proximi Cognati, shall be ipso Jure null & void. They were declared to be so in Holland, by an Edict of the States in 1580, which was afterwards declared by the States General of the United Provinces in 1656 to be the Law of all the Countries Subject to their Jurisdiction.

Voet de Ritu Nuptiarum. § 11.

It is well known, that in England, down to the time of the Reformation, the Power of the Popes prevailed, almost beyond what it did, in any part of Christendom: there was scarce any Oppression, or Corruption of the Court of Rome, that was not submitted to, & yet I think it is to be very clearly collected from Bracton, that in his Time, which was the Meridian of the Papal Power, here too, (the Reign of Henry 3d) clandestine Marriages were not held good by the Law of England, so as to entitle the Parties to the Privileges of Persons lawfully married, & to render the Issue legitimate. The Place, I mean, is Lib 2. Cap. 39. "Sciendum, quod in facie Ecclesiæ, & ad Ostium Ecclesiæ, constituenda sit Dos; non enim valet Constitutio, facta in lecto mortali, vel in Camera vel alibi ubi clandestina fuerint Conjugia: quia si non valeant clandestina Conjugia, hæredibus, quoad Successionem nunquam valebunt Uxoribus, ad Dotis exactionem ....."

Held in y^e time of Hen: 3 c 6 ....

However the Provincial Constitutions of the Bps, which did not always square exactly, with the Law of the land, adopted the Decretals, which endeavoured to restrain Clandestine Marriages by Punishment, of the Ministers who celebrated, & the Parties between whom they were celebrated, & all others in any Degree concernd in them, rather than by declaring the Contract void.

There is a Constitution of Mepham, Bp of Canterbury in the Time of Edw. 3. which is in Lyndwood Lib. 4. Tit 3. by w^ch the Decree of the Council of Lateran (which forbids all Persons to contract Matrimony, till the Banns have been first published, in the parish Churches of the Parties, upon several Solemn Days, in the face of the Congregation:) is enjoined to be firmly observed by all Priests, who are ordered to publish it in English: by this Constitution, the Punishment of 3 years Suspension, is inflicted upon the Priest, celebrating such a marriage, & the Constitution is to be enforced upon the Parties cos pœna debita per cellendo. which Pœna Lyndwood in his Glos. says

&c. ....

is arbitraria, cum non exprimatur; & goes on, hodie vero, ut aliqui volunt, Ipsi ipso facto, excommunicati. and by a constitution of Bp Stratford, Mephams immediate Successor, all Persons celebrating, or being present at Clandestine Marriages, incur the Sentence of the greater Excommunication, ipso facto.

Thus the Law stood at the Time of the Reformation: & if it sh^d be considerd what kind of Punishment, the

Greater Excommunication was, at that time of Day, it will be thought, that these Constitutions, did as fair as any merely penal Laws could do, to put a stop to the Evil. In the Reigns of Hen. 8. & Edw: 6 Commissions were appointed by virtue of Acts of Parl.t 25 H8. c 19 – 3 & 4 Edw. 6. c. 11. to Examine the Canons, Constitutions & Ordinances Provincial & Synodal, which had been here-=tofore made, by the Clergy, of this Realm; that such, as were judged worthy, might be obeyd, for the future, & the rest abrogated. The Commissioners appointed by Edw. 6 for this Purpose, compleated a Scheme under the Title of Reformatio Legum Ecclesiasticarum, which tho. it never received the force of Law, has been made public, & may be mentioned, to Shew, what was the Sense of the Great Men, who composed this Scheme; consisting of 16 of the Clergy, & 16 of the Tem-=porality of the Upper & Nether House of Parl.t: with Abp Cranmer at the Head in this Question ... And in the Title de Matrimonio, after directing that Banns shall be published, by the Minister in the Church & that the Man & Woman, shall be openly joined together in the Church, with the Ceremonies therein prescribed; it is expresly declared, that till they have plighted their mutual Faith, in this manner, the Parties shall be entirely free, from each other, & neither can demand any matrimonial Right from the other: & then goes on, "Item præcipimus ut nec Liberi nec Orphani (without mentioning any Age) Uxores ducant, aut ineant, nisi Authoritas illorum interceserit, in quorum potestate sunt: quod si fecerint, tales nuptias omnino non valere sancimus, et ad nihilum recidere.

Hen. 8 & Edw. 6.

25 H8. c 19 – 3. 4 Ed. 6. c 11 –

Reformatio Legum

But the Scheme never having received the Sanction of Law, & no other of the same kind, having ever been brought to any Perfection, the antient Canon Law & Provincial Constitutions, so far as they were not contrary to the Laws of the Realm, or the Kings Preroga-=tive, still remained in force, by 25 H8. cap. 19. Sec. 7. The Canons against Clandestine Marriages certainly did so, & were in many Instances enforced, in the Eccles-=astical Courts, by the Censures, which by those Constitutions they were impowerd to inflict; and the Eccleasti-=cal Courts were justified in so doing, when an Attempt was made, to obtain a Prohibition, to restrain them in the case of Matthey & Martins, where the Resolution was "That if any Person marry without Publication of Banns, or Licence, dispensing with it, they are citable for it into the Ecclesiastical Court, & no Prohibition lies."...

Case. 8 Car. 1. Jones. 257.

The same was held in a much later Case, that of Middleton & Crofts. In that Case Middleton & his Wife were articled against in the Ecclesiastical Court for a Clandestine marriage. Prohibition was applied for, on a Suggestion, that the Power of the Ecclesiastical Court, was taken away by the Statute 7. 8 W3. c 35. by which Penalties were laid on the Clergymen marrying, & the Parties married, without Banns or Licence: which Penalties, were to be recovered in the Temporal Courts: the Judgement was, that the Prohibition stand as to proceeding for the Pltf's being married at an Uncanonical Hour; that Circumstance having been, as far as appears, introduced by the Canons of 1603: & that a Consultation be awarded as to the Residue of the Case....

BR. 10 Geo. 2.

7. 8. W3. c 35.

The Canons of 1603. as far as their Authority goes; which entirely extends, to all Clergymen, & Ecclesiastical Officers, concurred in the same Design, of preventing Clandestine Marriages, by all the Cautions that could be devised, in publishing Banns, & granting Licences, & by punishing such Clergymen, as should contemn their Orders, by Ecclesiastical Censures

62 Canon.....

Canon 62. "No Minister on pain of Suspension Per triennium ipso facto, shall celebrate matrimony between any Persons, without a Licence, granted by some of the Persons, in these our Constitutions expresd, except the Banns of Matrimony have been first published 3 Several Sundays or Holydays, in the time of divine Service in the Parish Churches & Chapels, where said Parties dwell according to the Book of Common Prayer. Neither shall any Minister on the like Pain, join any Persons so licenced, at unseasonable Times, but only between 8 & 12 in the forenoon; nor in any private Place, but either in said Churches or Chapels, where one of them dwelleth: Nor when Banns are thrice asked, & no Licence in that respect necessary) before the Parents & Governors of the Parties, to be married, being under 21, shall either personally, or by sufficient Testimony, signify their Consents given to said Marriage .....

100. Canon.....

Canon 100. "No Children under 21, shall contract them-=selves, or marry, without the Consent of their Parents or Guardians, if their Parents be dead .....

101. Canon....

Canon 101. No Licence shall from henceforth be granted for Solemnization of Matrimony, without Publication of Banns, but upon good Security taken.

102. Canon. - 1 Canon. 102. (1) That there is no lawfull Impediment. (2) That
" no Suite is depending, touching any Marriage, or Contract
" of either of the Parties with any other. (3) That they have
" obtained the Consent of Parents & Guardians (4) That they
" will celebrate said Matrimony publicly in the Parish
" Church, or Chapel, where one of them dwelleth " - - - "
" Acts of Parl.t were made with the same View of discoun-
6 & 7 W.3. c.6. S.52 -tenanceing Clandestine Marriages 6 & 7 W.3. cap.6. Sec.52
enacted "That no Person shall be married, in any Place "
" pretending to be exempt from the Visitation (of y.e Ordinary) "
" without Licence, except the Banns be publish'd & certified "
" & every Person who shall marry Persons, contrary to
" the meaning hereof, shall forfeit 100l. & for the second
" Offence, be suspended ab Officio & Beneficio 3 years - - -

7 & 8 W.3. cap.35 Sec.2 - - - 7 & 8 W.3. cap.35. Sec.2. "Every Person &c. who shall marry "
" any Persons, in any Church or Chapel, exempt or not "
" exempt, or in any Place whatever, without Publica-
" tion of Banns, (according to Law) or Licence, shall
" forfeit 100l - 2d The Same Penalty for substituting
" any other Minister to marry in any Church or Chapel
" to said Parson belonging without Banns or Licence:
" 3d Every Man married without Licence or Banns, to
" forfeit 10l. Every Sexton or Clerk, knowingly assisting "
" at such Marriage 5l

10 Anne. c.19. - 10 Anne. cap.19. "Every Person in Orders, who shall marry "
" any Persons without Publication of Banns, or Licence "
" from the Proper Ordinary shall forfeit 100l. If the "
" Offender be a Poisoner in any Gaol, other than the County "
" Gaol, on Conviction for such Offence, he shall be "
" sent to the County Gaol: & if any Gaoler, shall permit "
" any marriage to be solemnized in his Prison without "
" Licence, or Publication of Banns shall forfeit 100l. "

Upon the whole then, it appears, that Marriages performed in any other Place, than the Church or Chapel of the Parties Habitation, & by Banns or Licence, which implies Consent of Parents, or Guardians, in both Cases, were always prohibited, by the Laws of this Country. Different Provisions had been made at different Times, to enforce the Law in this respect, which had all been found ineffectual, at last comes the 26 Geo. 2. which is not a new Law, prohibiting, what was before permitted; but a new Sanction only: doing that, which almost every other Christian Country, both Protestant & Catholic, had done long before; Viz.t Declaring that

Marriages entered into, in any different manner, than the Law directs, should be to all Intents and Purposes, null & void.

But the Mischief & Inconvenience, it would be of, to great numbers of the Kings Subjects, who have been maried in this manner, & to their Children, if Marriages so had, should be pronounced to be void, have been enlarged upon.

In the first Place, I believe, there are not many, who have been married in this manner, who have not got Marriage solemnized between them in England, afterwards; especially, where much Property depends upon it: & it is not a Contrivance for Poor People; they cannot go to Scotland to be married; they must stay at home, & obey the Law.

But admitting there are many who have not: who is to blame, The Legislature, or themselves? I suppose, they had been married, in the same manner, in England; neither in a Church, or Chapel; without either Banns, or Licence? Nobody will say, this, could be a valid Marriage: Yet the Inconvenience, to themselves, & Children, would be the same; & the wilfull Contempt of the Law, is not more or less; whether the Act were done a mile on this Side, or a mile on the other Side, the Boundary, of the two Kingdoms.

It is said .... It has been acquiesced, in, for a great many years; i.e. these Marriages have not been pronounced void, in a Court of Justice; still for the same Reason: they have never been brought before a Court, to Sentence; for whenever a Cause, has been begun, as it has, in some Cases, by the Guardians of Minors, they have come of Age; & then have married in a legal Manner: Cases have been cited too. Viz. Scrimshire & Scrimshire determ.d in the Consistory of Lond. 1750 - - -
" That was a Cause of Restitution of Conjugal Rites, brought
" by Sarah Jones, calling herself Scrimshire, a.gt John
" Scrimshire Esq; the Case was, that Mr Scrimshire, a
" Gentleman of large Fortune; 18 Years old, being at
" Boulogne in Feb: 1748, got acquainted, with Miss Jones,
" 15 Years old, who lived with one Mrs Dunbar, her
" Relation, there; he was drawn in, to be married to
" her, by an Irish Roman Catholic Priest, according to
" the Romish Ritual, at Mrs Dunbars Lodgings, in the
" Presence, & by the Contrivance of 2 Irish Officers, Mag.r
" Bagot & Magrath; Mr Scrimshires Mother, complained
" of this, (as a grievance done to her Son) first to the
" Civil Court of Boulogne, & afterwards, by Appeal, to the
" Parl.t of Paris; which pronounced, that there was a

" Grievance; declared the Marriage null: condemned the "
" Priest, & two Officers, to the Galleys, for 9 Years: & banished "
" Mr Dunbar, the Young Woman, herself, & all Persons ... "
" present, or in any way concerned in the Marriage: — "

These Circumstances were given in Evidence, before the Chancellor of London, who upon that, dismissed Mr Scrimshire from the Instance of said Sarah Jones

NB. In France are two Ways of Proceeding to annul a Marriage; Before the Official, who is Judge of the Sacrament, & of the Bond formed by it — By what is called, an Appeal from an Abuse, which is made to the Parliament —)

This was the true State of that Case: how it applies at all to the present, I dont see — It was a void Marriage in France; It would have been a Clandestine Marriage in England; It was a fraudulent Transaction, highly unfavorable; therefore the Judge laid hold of the Objection, of its wanting a bonum Tribium, on account of the Place, it was performed in, to set it aside.

Another very material Difference, between the two Cases, was, that the Parties in that Case were domiciled in France; & did not go there with any View, to that Marriage; Mr Scrimshire's Mother had lived at Paris & Boulogne several Years; Miss Jones had lived at Boulogne, as long; Certainly therefore they were to obey, the Law of the Country, where they resided; & the Courts of all other Countries, according to the General Rule, owed respect to that Law; & more particularly where the Act, which the Party would have availed herself of, was a culpable one, & highly unfavorable at home; & therefore the Law of England was not contradicted, but aided, assisted, by the Law of the Country, where the Marriage was solemnized in that Case.

The Point in Issue certainly has never received a Judicial Decision, & therefore, if we had not been led into it by the other side, I own, I should not have thought myself at Liberty, to have cited Obiter Opinions, however respectable the Persons, said to have given them, might be, who had not the Matter in Question, judicially before them.

However, 2 Cases were mentioned, in which Ld Chan Northington, & Master of the Rolls. (Sir Tho: Clarke) are said to have delivered their Opinions, that Marriages of English Persons, had in Scotland;

Brook & Oliver (2)

x Bidford & Verney

(and I suppose merely to evade the Marriage Act, tho, the Circumstances were not particularly stated) were good Marriages in England; & that they made Decrees accordingly; i.e. as they would have done, if the Marriage had been legally solemnized in England: But this, has not been the constant Doctrine of the Court of Chancery, since the 26 of Geo. 2. There was an Instance in Ld Hardwicke's time of a Marriage at Ostend, between 2 Persons, who went from England to be married there, because they could not get married in England, on acct of 26 Geo. 2. This is a stronger Case & more expresly within the Exception, yet Ld Hardwicke ordered it to be tried, in the Ecclesiastical Courts; but the Young Man came of Age, & the Parties were married over again; This was so said by

Barrow. p. 1077. Ld Mansfield in his Argument, in the Case of Robinson & Bland — It was said Ld Mansfield gave an Opinion, on the Validity of Scotch Marriages, in his Argument of that Case: I dare say he did not: he is too well acquainted with the Caution & Deliberation, with which, Opinions ought to be given, from the Bench: but if the Report in the same Book be true, he certainly treated it, as, at least, a very doubtfull Question; & so far he was called upon to do

Action on the Case } " Bill of Exchange for £672, was drawn at Paris, by
Robinson agt " Sir Jn Bland, on himself in England, payable to the Order
Bland " of the Plt, 10 Days after Sight, value received, accepted by Sir Jn Bland —

Verdict for £672 was given for the Plt with Damages, subject to the following Case

That the Bill was given at Paris, for £300 there lent by the Plt to Sir Jn Bland, at the Time & Place of Play; & £372 more lost at the same time to the Plt —

That the Play was fair —

That in France Money lost at Play between Gentlemen, may be recovered as a Debt of Honour, before the Marshals of France, who can enforce Obedience to their Sentences, by Imprisonment: tho. such Money, is not recoverable, in the Ordinary Course of Justice —

That Money sent to play with, or at the time & Place of Play, may be recovered there as a Debt, in the Ordinary Course of Justice, there being no positive Law against it.

It was determined, that, as to the Money won, it could not be recovered

as to the Money lent, the Plt was entitled to it, both by the Law of England, & the Law of France —

It had been laid down in Argument at the Bar,
" That a Marriage in a foreign Country, must be governed "
" by the Law of that Country where the Marriage was had "
" which says Ld Mansfield, is in general, true. But the "
" Marriages in Scotland, of Persons going from hence "
" for that purpose, was instanced by way of Example. "
" they may come under a very different Consideration "
p. 33. . . . " according to the Opinion of Huberus, & other Writers; "
" Then goes on, to mention, the Case of such a Marriage as "
" ostend, which Ld Hardwick ordered to be tried in the — "
" Ecclesiastical Court."

With respect to the General Principle, contended for, in favor of these Marriages, the Opinion of another great Judge, given in the same Cause, is not immaterial, (Ld Ch: Justice Wilmot,) "The Law of the Place where " the Thing happens, does not always prevail; In " many Countries, a Contract may be maintained by " a Courtesan, for the Price of her Prostitution; & one " may suppose such an Action, to be brought here, upon " such a Contract, which arose in such a Country, but " that would never be allowed in this Country; there " -fore the Lex loci, cannot in all Cases, govern, and " direct."

It was stated by one of the Gentlemen, that it was urged in an Argument by Council, in the Case of Bedford & Kenney, against the Marriage, that Dr Lews: Simpson, the late Dean of the Arches, before whom, this very Cause, would have been brought, if it had com- -menced two Years sooner, had declared, he would not grant Administration to a Person, claiming it, as Husband, or Wife, under one of these Marriages. And I believe his Opinion, as to the Validity of them, is pretty well known; & there have been few Opinions which are held in higher Estimation, in the Courts, in which he practiced . . . .

So that, there is reason to apprehend, that Persons of great Ability & Experience have thought differently upon this Question; but they were none of them called upon to decide it judicially. It now waits for that Decision from your Lordships; & I believe all agree, it is high time it should be decided.

As Council for the Plt, I hope it has been made out to your Lps Satisfaction, that the Case stated, in her Libel, is within both the Spirit and the Letter of the 26 of Geo. 2. . . .

2dly That the Law of the Place where the marriage was had, ought not to prevail, but that of the Country of the two Parties, between whom it was had —

3dly. That there is nothing peculiarly harsh, & unfavorable, or unusual in the Provisions of this Law, or peculiar in the nature of the Contract relative to which it is made, which will require or warrant, a narrower Interpretation than other Statutes are to be construed by —

and therefore, I hope, you will admit the Plts Libel, & in due Time, pronounce according to the Prayer of it —

See the rest of the Arguments. Fol. 459 seq.

Adj.t to 28th Jan: 1769.

Arches
Mich.s T. 3 Sess.
Dr Calvert . . .

N.o 171.

Stevens Jun: Thomas & Maddox. v. Williams Fountain
Dr Wynne Dr Calvert

This is a Cause of Substraction of Church Rate, brought 1763 in the Consistory of Hereford, by Watkin Thomas & Jn.o Maddox Churchwardens of Bredwardine in the Diocese of Hereford agt James Williams.

The Foundation of the Churchwardens Suit, is the Church Rate; & here no Church Rate is exhibited; I never knew a Cause where it was not produced, & annexed: till the Rate is confirmed by the Ordinary, no Suit can be brought upon it: as far as the Parishioners may go, it is binding, but not for a Suit.

Qu: . . .

Suppose a Will, in which a Legacy was bequeathed; no Suit could be brought thereon, unless the Will was proved by the Ordinary.

The Question is, whether the Rate is formal?

One Witness alledges a Notice; one Witness, a Son to the Party in this Cause, swears the Clerk of the Parish, has not given notice these 13 Years, on account of an Impediment in his Speech, tho. the former Clerks always did: He is contradicted by the other Witnesses, who say they have heard the Clerk several times give Notice; Maddox is a willing Witness, & much impeached: Bevan is as credible as Maddox, or more so; if he speaks true, there must have been a Confusion as to the Meeting: there is no satisfactory Proof of Notice, or of the meeting when the Churchwardens Accounts were made up, & this Transaction passed . . . .

Judge} Dr May} . . . .

This has been a very long & expensive Suit, which was begun in 1763, & not brought for Judgement till 1768. during that Period Offers of Accomodation have been made without effect: It is a Suit very favorable to the Church Wardens; who are obliged to repair the Church & are liable to be punished by the Ordinary, if they do not; but it is their Duty to take care that the Aspersn:

Qu: Is the Rate formal & legal. . . .

is equal & impartial; Tho, Parishioners rather than Churchwardens are answerable for Partiality, it being their Business to attend the Vestry, & see that the Rate is fairly made. It cant be Law, that the Order should be quashed, because notice was not given by the Clerk or Vicar, but it will be good, if given by the Churchwardens. At the Meeting, it was unanimously agreed, there shd be a Levy of threepence in the Pound, to reimburse the Churchwardens; at that Assessment, the Defr would be liable to pay more than he is now rated, which amounts only to. 1 3/4. Another pays 2 & another 2 1/2. Proof is sufficiently made of notice being given in the Church, & the Meeting held in consequence of it. The Rule by which the Rate was made, is also ascertained, viz. by a Pound Rate, & not arbitrarily; It is true, the Rate was not regularly signed in Vestry, as it should have been, but was prepared afterwards; but this Irregularity is not sufficient to set it aside —

Rates ought to be exactly equal, but there is great difficulty in making them so; the main difficulty is that the Churchwarden, W. Thomas, is charged a farthing in the Pound, less than the other Party, & he must know the value of his own Land.

The Rate was made & assessed by the Parishioners, who considered it as equal, & all paid their quotas except the Defendant; the Rate itself is not exhibited, but the Defence itself supports it.

The Question is, whr the Court, should say, the Defr ought to be dismissed, & the Rate be declared void with respect to him.

A general, or a Great Inequality will certainly quash a Rate, but it would be going too far to set it aside upon a Slight Inequality, especially where the Complainant pays less than the Assessment agreed on.

Caution should be used, on one hand, against establishing Rates, which are wilfully made unequal — On the other hand, One would not give an Opportunity or Pretence to Country Fellows to harrass & ruin Parishes, by trifling & vexatious Law Suits.

Where a Party thinks himself aggrieved & overrated he should offer, what he thinks he ought to pay, If the Defr had said, This Rate is not good, because others pay less in proportion, than myself, but I offer so much, specifying what he allowed to be a reasonable Charge, that would have made a difference But in the present Case no Tender has been made:

Sentence for Pltf with Costs ... With respect to the Defr I must therefore pronounce the Rate good, he being understated in proportion to others tho, he is assessed higher than the Churchwarden: upon the whole, I think he ought to pay the Sum demanded, having made no Tender of a less Sum, & be decreed to pay some Costs; to be heard on Taxation next Court.

Q. Whr Witns examined viva voce without taking down their Depons will found if sp: it in a Sentence? ...

Arches — Greene Nº 172. Pryce v Long & Holland, Bird — Stevens

Dr Wynne — Dr Harris

Dr Harris ... I am Council in this Case for the Respondents: This Suit was begun by a Presentation of the Churchwardens of Weobly, at the Visitation of the Chancellor of Hereford in 1766, stating that the Church was in repair; except the Chancel, the Pavement whereof, had been for some time past, & then was out of Repair, & should be repaired by the Revd Magnus Price the Vicar, & Jn Birch Esq Impropriator, who has the Great Tythes; 15 Jan: 1767. Process issued agt Price, Birch who were cited, &c.

The Vicar appeard in Person, & Mr Birch by his Proctor; the Presentment was read, & Price & Birch, alledged, that they were not obliged to repair the Chancel, jointly, or severally. The Judge then assigned the Churchwardens to justify their Presentment; they undertook to do so.

9 April the Proctor for the Churchwardens, prayd leave to proceed in a Summary way; Price was there, & did not dispent; Compulsorys were decreed for the Churchwardens to bring what Witnesses they thought proper. Depons were taken in Court viva voce, or rather Minutes of the Substance of such Depons..

Dr Wynne ... The Charge must be reduced into Articles, that the Parties may object if they please, to any thing impertinent being admitted.

Tracy Atkins AAA ... The Dr Chancellor would not allow Witnesses to be examined viva voce to prove Exhibits. The Course & Practice of the Court, is the Law of the Court. The whole Proceedings in the present Case are a mere Nullity

Dr Harris .. Our Presentment supplies the Place of Articles, no Objection was taken thereto, & an Issue was given; I have been restrained to the Prosecution of the Appeal, to which full faith ought to be given; the Court will follow as far as possible the Intention of the Parties The Question is, whether on this Evidence, the Sentence of the Judge below was right.

Dr Clay Judge ... When you appeal from a Definitive Sentence, you appeal from every kind of Grievance; you may object to any part of the Proceedings; They are not properly before the Court; It is usual on a Presentment for a

Judge to call on the Party to justify, & answer to the Presentment; if the Charge is confessd, the Judge decrees. If denied, you must go on in the usual way; you cannot proceed Summarily: I look on the Proceedings as wholly irregular & null: the Court cant vary the Method of Proceeding established by Law.

Proceedings set aside

I think it has been done in the Supreme Court of Delegates; Ld Hay once sent for a Witness in an extraordinary manner. I can not hear the Question on this Evidence -

Prerogative M.T. 35

Bellas Nº 173. Allen v. Chapman & Others Stevens

Q. Shall the Allon be admitted?

Drs Calvert, Bever Drs Harris & Wynne.

Dr Harris. I object to the first Article of the Allon now offerd, as being contradictory to itself, & not to our Plea. In respect to the 2d I apprehend it is not sufficient to say, it is not a true Copy; for we said it was the Substance, which is all the Statute requires -

It is not material, the Writer should understand the Paper, or that he or the Bp of Gloucester, did not think it testamentary; their Opinion is nothing. Serjt Wynne proved a Will, many Years after, came a Scrap called a Codicil, the Serjt thought it not one, but the Court was of another Opinion -

The Persons subscribing, cannot depose to their own Turpitude; viz: that they did not remember what the Deed said: you will not admit this: the Statute supposes them to remember.

Dr Wynne It is not sufficient for a Contradiction to be pleaded in an Allon, unless it is a material one: the Question is, Whr the Fact alledged, if proved, can go to the Validity of the Codicil? it was at most a Mistake - It is said not to have been read over to, or understood by the Deed; but we have pleaded the Reverse, & exhibited the Copy, this is a direct Negative, how can it be proved? The Operation is a different Consideration; if he leaves a Debt owing by his Brother, & none was due, the Disposition was nugatory, but it will not vitiate the Paper

They undertake to prove the 5th, Codicil, & plead it very specially as a Nuncupative Codicil: the Court did not give an Opinion, whether it could be pronounced for: but admitted the whole Plea to have the Fact before the Court.

Dr Hay. Judge. the Allon can't be admitted where the Statute is not complied with, but when that is observed there is no knowing how the Circumstances will turn out; Every thing Circumstantial as well as Substantial & essential must be admitted; this Allon pleads material Contradictions, that the Paper differs from that propounded by the Exors; for in that there are References to the Will proved by the Exors - The Clauses the Clerk positively alledged, not to have been read over to the Deed & to shew they were not, it is alledged, that the Estate is not . . . . . It may be material whether it is a Transcript: it must be connected with the first; that the Deed had no Intention: we must see how the Case will turn out hereafter: the 7th Article is the least material; however let the whole stand, in this Case, where the Circumstances are so nice -

admitted.

Ibid. Nº 174. Wood. v. Mole & Askin

Petition

Collins Gostlin Bargrave

Q. Does a Personal Presence in Ct bind one who is not a Party?

Michael Mole died in August last, leaving Martha Mole, his Widow; Susan Mole & . . . . . Fletcher his Sisters, who propounded a Testamentary Paper; the Judge rejected the Plea & decreed Admon to Martha Mole; Michael Wood was then in Court; & as a pretended substituted Residuary Legatee, wants to propound this Paper again the Affidavit sets forth his being Conusant of the Decree; & therefore there is no occasion to cite him over again . . .

Dr Hay Judge. Mr Wood is interested about under this Paper: he was not judicially before the Court; tho, if a man is personally so, he is not obliged to appear; if he would he might intervene & enter a Caveat; he is not bound by what passed between the Widow & Sisters -

no. L5 5s 0d i.e. 8. Costs

Collins prayd a decree with Intimation, against all the next of Kin, to see the Will propounded; returnable next Term, some of them living in the W. Indies.

Nº 175. Mole v Askin & Fletcher

Q. Have they from the proceeded duly & without delay

On the Costs of a Commission of Appraisement -

Gostlin says it appears, from the trifling Articles in the Inventory, that it was done to harrass: She has estimated them at a higher value - the Commissioners adjourned from day to day, unreasonably: they took 5 Days to appraise what only amounts to 70£

Dr Hay Judge. This Complaint comes too soon: you joined in the Commission: the proper time, is, when the Distribution comes in question between the Parties entitled -

Complaint too early.

Consistory

M.T.A Sess:

Gostlin — N° 176. The Duke v The Dss of Grafton — Stevens

Dr Harris & Calvert — Dr Collyer & Wynne

Libel admitted without Opposition. 6 Dec: 1768 Sentence was given for the Divorce 10 Feb: 1769.

1 Art. That the Duke of Grafton in 1755 being about 19 a Batchelor, & free from all matrimonial Contracts, did (with his Grandfathers Consent) his father being dead, & his mother married again) pay his addresses to the then Honble Anne Liddel, aged about 18, with her father Ld Ravensworths Consent, & about 25 Jan: 1756, was married by Special Licence with Consent of the Duke of Grafton & Ld Ravensworth —

2 Art. They lived, cohabited, & consummated by carnal Copulation, & Procreation of Children, till their Separation in 1764.

3 Art. The Dss was delivered of a Daur Georgiana, 8 May 1757 — of Geo. Henry 14 Jan: 1760 — & of Charles in July 1764 — all living begotten by the Duke —

4 Art. The Duke behaved always affectionately to the Dss; notwithstanding which, in the latter End of 1763, & Beginning of 1764. her Behavior created great Disagreements between them; & in the Beginning of 1764, her ill Conduct & Declarations of an utter Aversion to his Grace, determined him to cohabit no longer with her; but as She was with Child deferd acquainting her with his Resolution till after her Delivery (in July 1764) & being out of danger; when he acquainted Ld Ravensworth by Letter, that her ill Conduct determined him to live from her, & that he had deferd acquainting him with it, whilst the Dss was with Child: that Ld R. informd the Duke, that the Dss sh: as soon as She was able, go to Sir Lps House in the North; which She did about 6 Weeks after her Delivery, & staid there till the Winter following: during which time she wrote several Letters to the Duke, acknowledgeing her Misconduct, which the Duke dont think right to annex, unless called on so to do —

5 Art. 11 Jan. 1765 Articles of Separation were entred into, between the Duke & Dss, whereby he allowd her 3000£ pr An. to be paid quarterly from Mich: 1764.

6 Art. From the Separation in 1764, the Duke has never had the Carnal Use of the Dss Body; nor any Conversation, or personal Intercourse with her; nor been one in her Company, tho often requested by her especially at a very Critical Time. as Vide Art: 56

Vide 56 Art. — NB. in Jan: 68 when She was a Month or 6 Weeks gone with Child.

7 Art. After the Seperation, an Intimacy arose between the Dss & Ld Ossory, which increased to an irregular & criminal, & adulterous Conversation between them —

8 Art. In the Summer of 1767, the Dss pretending Illness went to Brighthelmston on pretence of bathing in the Sea, but really to carry on, an adulterous Conversation with Ld Ossory, who came there soon after She arrived; & carried on an adulterous Conversation: Letters & Messages passed almost daily between them; the Earl was almost daily at the Dss House, & when there, they fastend themselves in the Room without permitting any other Person to be there. When Ld O. came, She ordered her Servants, if any body came, She was not at home, unless a Card Party was agreed on, after which, he remained locked up with the Dss several Hours after they were gone — They used to be 2 Hours after dark without Candles, & whilst so locked up, the Duke proposed they committed Adultery —

9 Art: In Autumn 1767, the Dss went to Ld Rs in the North, & staid till Nov: following during which She continued her Criminal & irregular Intercourse with Ld O. by Letters under Cover, to Charlotte Lefebrune, since Dubary (wife of Alex: Dubary;) her Servant & Confidant in London for him to forward to Ld O. who conveyd Letters to the Dss secretly by sending them to her Servant in London, to put them in a Cover & addressd to the Dss by said Servant —

10 Art: She Dss arrived at Seymour Place 3 Nov: — within ½ of an Hour after Ld O. came, & staid with her some Hours; great part thereof locked themselves in a Back Room, up one pair of Stairs, which Room there was no communication, but thro, the fore Room, & thro, a door which led to the Stair Case, which last was constantly fastend — The Door into the Back, from the fore Room was never locked when the Dss was alone, or with any Company except Ld O. — from such back Room, there was a small Room or Closet, which had no Communication, but from such back Room, & from the Stair Case; & such Communication from the Staircase to such Closet, was constantly fastend, so that there was no Communication, to such back Room but thro, the fore Room; nor any Communication to such Small Room, or Closet, but from such back Room, & that there was a Lock in the Back Room, & also in the small Room —

11 Art: From her Arrival Dec: 3. 1767. to 2 June 1768. She continued in Seymour Place, & then removed to Combe near Kingston, Surry, from which Arrival to her going to Combe, Ld O. & She continued their Adulterous Conversation daily: Ld O. visiting her morning, noon, night She ordered her Servants to deny her even to Ld R. by name they sat in the Back Room, were frequently heard to go into the Closet, & after some time to return; the Dss ordered the Servants not to come up, till rung for: Ld O's Visits were about 7 or 8 at Night; he used to stay till abt 2 or 3 in the Morning, in such back Room; continued their former practice of setting in the Dark, 2 or 3 Hours after Dark, & ordered the Servants not to bring Candles till called for — In Xmas 1767 Ld Euston, went to open the

Back Door up one pair of Stairs, where Dd O. & the Dss were & finding it fastend called to the Dss. to let him in, She not answering he bounced agst such Door, & called louder; Mrs Dubarg called to him not to make such a noise, & to prevent his farther Efforts, said his Mama was gone out; Ld Euston said it was false, & continuing to bounce agst the Door, the Dss at last let him in —

12 Art.— The Beginning of Dec: the Dss became pregnant, which She conceald, & on 23 of Augt last was delivered of a Daughter, begot by Dd O— Her Pregnancy was made known to the Duke in April 1768.

13 Art.— 3 June 1768, the Day after She removed to Combe, Dd R. came to dine with her; as soon as She knew of his coming She sent a Letter by her Groom, desiring Dd O. not to come on Account of Dd A. dining there.

14 Art.— Being engaged on 7 June to dine with Sir Gilbert Heathcote & to spend the Evening with Mrs Howe; 5 June She recvd a Letter from Dd O. that he wd come on the 7th: She on the 6th went herself to Sir. Gilb.t Heathcote, & put off the Engagement, & sent Mrs How word, she was sorry She could not see her in the Evening, as She was obliged to go to Town & stay all night, which was false, the true reason being, that she might be alone with Dd O. pursuant to his Appointment

15 Art.— After 6 in the Evening of the 7th of June, Dd O. came to Combe, & staid till past 12. On coming in, he was carried immediately, into the Room where the Dss was, & they immediately fastend the Door, & remained alone together —

16 Art.— They were alone from 6 to 10. when the Bell rang for Candles: the Servant on bringing them in, went into the inward Room, brought out the Bird as usual, & shut the Window Shutters & Door thereof — In an hour after the Bell rang, & on entering, & observing the Door of the inner Room open, he shut it, & observed the Couch tumbled, in such inner Room, & the Dss & Dd O. flurried & much discomposed.

17 Art.— 15 June Dd O. came again to the Dss at Combe, between 7 & 8 in the Evening, & staid till about one in the morn: they were alone all the time (saving at Supper) in the afd Room (vid: 16 Art) & great part of the time locked in —

18 Art.— The Dss herself at almost all the times, Dd O. was with her, gave strict orders to be denied to every body: that if She omitted so to do after 15 June, the Servants understood from the former strict Orders, that no Person should be admitted, they being convinced before 15 June that the Dss & Dd O. carried on a Criminal Conversation.....

19 Art.— Toward the latter End of June last, the Dss grew visibly bigger in the Waist, which was noticed by the Servants & She to gloss it over said frequently, that she grew so extremely fat, that all her Cloaths were too little, tho, the Servants noticed, she was not so fat as She had been

20 Art.— The Duke received several Letters acquainting him with the Criminal Conversation, carried on between Dd O. & the Dss, but being anonymous, he paid no regard thereto; but in the middle of June, he received certain Information, in writing, that She was with Child by Dd O. that She was then about 6 or 7 Months gone: at the same time the Duke was informed Robt Adair Esq Surgeon, frequently visited the Dss, & was intrusted with the Secret, & had the management of her during her Pregnancy; & also that Dd O. had wrote to, & called in person on Mr Adair, tho, he had never before employd him as a Surgeon — the Duke on 25 June 1768 wrote a Letter to Mr Adair to the following Purport...

Duke of Grafton to Robt Adair Esq dated 13 Groav.r Square June 26. 1768...

Sir

The Convincing proof I have made out of the Dss of Grafton's Pregnancy, has led me to think, that her Condition cannot be unknown to you, whose frequent Visits to her, & other stronger Circumstances, wch I have traced, put it beyond a Doubt; I think it but fair, to give you this notice (not that I blame you in any shape, or think that you have been wanting towards me, in not making yourself the Discovery of it to me; I know too well what Delicacy, your Situation puts you under, however this I must say) that having made out my proof without your Information (an Information which many might expect) I should not look upon you in that favorable Light, I have ever done, if, when the Laws of your Country, call upon you, you do not declare what you know; as a man of Veracity; the lowest Person in this Kingdom, has a right to claim this from you, as a Man you cannot deny it to one, to whom you have profess'd a Friendship & to whose father you was so much attached: nor shall any thing convince me, but your most solemn Declaration as a man of Honor, that you are... wholly ignorant of the Affair, & unconcern'd in it... I desire to hear from you, or to see you soon, & am with great truth &c. Grafton.....

This Letter the Duke of G. sent to Mr A. who a few days after the receipt of it waited on the Duke, & on the Duke shewing him, the Circumstantial account he had received, of the Dss' adulterous Conversation with Dd O. &

The certain proof, she was with child by him, & of Mr A's intercourse with the Dss & Ld O. (who had never employd him before) & the Duke calling on him as a man of Honor, to declare whether he was not privy to her being with Child, & entrusted by the Dss & Ld O. with the Knowledge thereof, he replyd, it was much against his Inclination, he had ever been made acquainted with her Pregnancy, that being so, he thought himself bound, as a man of Honor, not spontaneously to reveal it; but thought it equally unbecoming a man of Honor to aver a Falsity, & therefore being so solemnly called upon, he could not avoid declaring, he had been made acquainted with her Grace's Pregnancy; was sorry he was to be called upon as a Witness, but as he found it unavoidable, he saw no means, as a man of Veracity, of concealing it; nor should he attempt to depose in the least Tittle to an Untruth, when called upon, in a Court of Justice: He at the same time told the Duke, he had acquainted Ld O. with his Grace's Letter, & told him he should speak the Truth, when called upon so to do:
The Proponent says the Visits of Mr A. to the Dss, & her & Ld Os Intercourse with him, were on the Subject of her future Delivery; that it was contrived in the most secret manner; & that the Dss & Ld O. repeatedly confessd to Mr A. her Grace's Pregnancy; & that he administred Medicines to, & bled her on that Account —

21 Art — 29 June Ld O. visited the Dss at Combe, & staid with her till near 2 in the morning, & during the whole time save at Supper, the were alone in the afd Room, wch had a Communication, with the unfurnishd Room, saving a Couch, 2 Chairs, & the Birds being there as afd.

22 Art — 13 June the Duke desired Richd Stonehewer Esq to deliver a written Message to the Dss — That Mr S. sent it in a Letter by his Servant 1 July — That it was delivered to the Dss, who said, It requird no Answer —

Duke of G's Letter to Dss of Grafton dated Grosv: Square 30 June 1768.

The Duke of Grafton desires Mr Stonehewer would be so kind to deliver this Message from him to the Dss of Grafton —

" That the Duke of G. has, to his firmest belief, Evidence " already sufficient of the Dss of Gs Pregnancy & Conduct " to entitle him to a Bill of Divorce, he therefore gives " her this Open Notice of it, in order that, on the one " hand she may have an Opportunity to take what " measures, she may think expedient, to demonstrate, " (if she is able) to the World, the Injustice of this Accusation " & on the other, that she may not be disqueting herself

" Or stealth, by trying methods of concealing her Delivery, " the Detection of which, cannot escape the Duke of Gs " Vigilance — "

23 Art — 1 July afd, when the said Message was delivered to the Dss Mr James Brudenell, & Miss Legge, came to visit the Dss at Combe; she was walking in her Garden when they came, but bid her Servant say, she was so much out of Order, she could not see them; tho, in fact, she was in perfect Health, & had no motive for refusing to see them, but the Appearance of her being with Child, and expecting a Visit from Ld O. who came an Hour after they were gone, & staid till near 4 in the Afternoon: when Ld O. came, Ly Georgiana, the Dss Daur, was with her but on Ld Os coming in, she ordered Ly G. up to dress, tho it was long before the usual Time, who being gone, the Dss & Ld O. continued several Hours alone together —

21 Art — The Duke having no Answer to his Message from the Dss, but, "that it requird no Answer; thought it incumbent on him to acquaint Ld Ravensworth with the affair; that if there was no doubt, of the Truth, of the Information, the Duke had received, it might be proved false; & accordingly wrote Ld R. the following Letter.

Duke of G. to Ld Ravensworth

My Dear Lord . . . . . Grosv.r Square 2 July 1768 . . .
" With every Sentiment of unfeigned Esteem, & Regard, wch " I bear to Lady Ravensworth, & your Lp, I have the " Mortification to feel, more & more, every day, that my " Marriage into your Family, has been the Commencement " of all the Misfortunes of it; this Jean ever has " happend, in spite of every Endeavor of mine to turn " that Event, to the Happiness of your Lives, my only " Comfort is, that Jean acquit myself of having rendered " unhappy two most deserving Persons: I could wish " that they had met with from a Daughter that Re- " turn, which was due to their Tenderness, Indulgence, " my Separation from her proves to be the Beginning " only of that Sorrow, which her Conduct since, must " if my Evidence for my present Charge turns out " as clear as the Grounds & Reason I had for that " former Step; I must hope that the Justice of my " Country, will not leave us, long united; Genl Ellison " has already, by last nights Post, acquainted your Lp " with this Affair, which has given him the most " sensible Concern, from the Shock, he well knew, it " must bring to those Friends, to whom he is, so truly " attached; the inclosed Paper is the Copy of one sent " by my Desire, by Mr Stonehewer, to your Daur; yes- " terday Morning: his Servant after staying some " time for an Answer, which he was ordered to bring back,

" was told that it required no Answer: your Dsp will
" see, that it informed her, of my firmest belief, that the
" Evidence I have of her Pregnancy & Conduct, will entitle
" me to be divorced from her: the Steps I am pursueing
" are such, as my own feeling, no more, than the Honor
" & Interest of my Family, & Children, could ever allow
" me to neglect: at the same time I am doing this, give
" me leave to express the Concern I feel, for the Unhappiness
" this Event will occasion to Lady R. & your Lp, to whom
" I shall ever endeavor to profess the perfect Esteem &
" Respect, with which I have the Honor to be. &c &c. . . "
which Letter was received by Ld R.

25 Art. . . . 3 July 1768. Ld O. came on Horseback alone, without any Servant, to Combe, about two in the Afternoon, & staid till next Morning, when the Dss: Post Chaise carried him to London; during all which Time, (save at Supper & Dinner) they were alone together.

26 Art. . . . 6 July 1768. Ld O. came to Combe about 3 in the Afternoon, & staid with the Dsp alone (saving at Meals) till One next Morn: whilst he was there, Ly Jane Scott, & miss Francis Pelham, came from London to see the Dsp; who seeing them coming, & knowing who they were, came into the Hall, & gave absolute Orders they sh: not be let in, on any Account whatever, & accordingly they were refused Admittance. Ld O. returned to London about One the next Morn: in his own Chaise.

27 Art. . . . 5 July the Dsp sent Mrs Dubarq, her Maid & Confidante to London, for Child bed Linnen; who went & brought the Linnen back next day.

28 Art. . . . 7 July Miss Pelham came again to the Dss of G. at Combe who gave express Orders, she sh: not be let in, but to tell her, She was not well, & in Bed; which was not true; for the reason of her not seeing Miss P. was to prevent her being seen big with Child; which her Bulk rendered very conspicuous; & having an Assignation that day with Ld O. to be there: on Miss P. being refused She appeard uneasy; & sent a Message to the Dsp, to beg She would give her leave to speak to her, if it was but for 2 or 3 Minutes: to which the Dsp answered, She could not possibly see her: on being refused Miss P. sent another Message, intreating She might speak to Lady Georgiana; whereupon the Dsp sent Ly. G. into the great Drawing Room, & went herself up Stairs, & locked herself in her Bedchamber: Miss P. staid with Ly G. an Hour, & then went

away very much dissatisfied — as soon as Miss P. was gone (viz abt 12 at noon) Ld O. came & staid alone with the Dsp. (saving at Meals & Tea & Coffee) till 12 at night, & then went to London in a hired Post Chaise, sent for from Kingston; the whole time he was so there that day, the Dsp & Ld O. sat in a Room, where She had never sat before in wch was a Couch, on wch, during the time the Cloth was laid, & when the Servants were going up for Tea & Coffee, or Candles &c, the Dsp & Ld O. sat very close together, openly exposeing to all the Servants (that necessarily attended that day) a Familiarity, that could have no other Source, than an irregular, Criminal & Adulterous Conversation. - - - - - - - - -

29 Art. . . . 9 July Ld O. came about 3 in the afternoon to Combe, & staid till One in the Morning; the Dsp & Ld O. were the whole time alone, carrying on the afd Criminal Conversation saving at Meals time

30 Art. . . . 12 July the Duke of Portland came to see the Dsp at Combe but She refused seeing him, & sent an Excuse, that She was extremely ill in Bed, whereas She was perfectly well saving big with Child - - -

31 Art. . . . 12 July. Mrs Dubarq by the Dss: orders, sorted all the Child bed Linnen, to be ready against her Delivery - - -

32 Art. . . . 10 July, Ld O. sat out for Ireland, & returned to London the 24th of August: during his Absence, the Dsp correspon:ded with him, in a secret manner; the Dsp carrying her Letters to the Post House at Kingston, & frequently going for them there when She expected any from Ld O. - - - - -

33 Art. . . . From Ld O.s going to Ireland to 23 of August the Dsp, from the Conspicuous ness of her Bulk discovering her Pregnan:cy, seldom came out of her Bedchamber, & avoided being seen, by any of her Family, saving Mrs Dubarq, & her own Maid, Hannah Read; & to avoid Suspicion sometimes caused Dubarq, to give it out, that she was so ill, she was obliged to keep her Bed; & at other times that if she was better, she intended going to Goodwood (the Duke of Richmonds Seat) in Sussex - These Reports, the Proponent says to be false; that she was the whole time in good Health, (saving being big) never kept her Bed, or intended going any Journey, but to lay in, at Combe. - - -

34 Art. . . . On the Dsp being informd by Ld O. that the Duke of G. had discoverd Mrs A. being privy to her Pregnancy, She applied to Dr Hunter, who promised to attend, & get a wet Nurse -

35 Art.— About 20 Augt the Dss finding the time of her Delivery near caused notice to be given to her Servants, that she would remove to London, on the 25th Inst: & that they Shd go the Day before to prepare the House — The Proponent Says, the Dss had no Intention to go to London on 25. but intended to send all her Servants, except those she meant to intrust with her Pregnancy, that such Delivery might be secret .....

36 Art.— About 2 in the Morn: of the 23 of August, she was taken in Labour & soon after A Wm Frays her Butler, was ordered to go to Kingston, as fast as possible; there to take a Post Chaise & four & fetch her Lying in Nurse, (Mrs Tyson) who lived in Heyden Street Piccadilly; & to leave a written Message at Dr Hunters, immediately to go to her Grace, who was in Labour; that Frays went to Tyson, ordered her to get ready with all Expedition, & that he in the interim went to Dr Hunters, who not being at home, Frays left the Message, with orders to be sent to Dr H. instantly, wherever he was, & then returnd with Nurse Tyson to Combe —

37 Art.— Her Graces Labour Pains coming on quick, & She anxious to get the Servants out of the House, before she was delivered about 6 in the Morning ordered her Housekeeper, Cook, Coachman, Postilion, & a Footman, to be sent to her House in Town immediately: under pretence, she would herself dine in Town that Day — The afd Servants all went before 8 —

38 Art.— Before they went, (to keep the Delivery as secret as possible) Dorothy Mothersole the Cook (who was the Mother of Children) went into Mr Dubarg's Room, & there saw Child bed Linnen, laid out, in the same manner, as if a Child was expected to be born, which she took notice of, as laid for her Graces Delivery, & from which she suspected, the Dss was then in Labour, no other Person in the House, being at that time, suspected to be big with Child — ....

39 Art.— Shortly after the Servants left Combe, Wm Frays & Tyson arrived, who was immediately shewn up to the Dss' Bedchamber who she found in strong Labour, & was soon after delivered of a Daughter, in presence of Tyson, Read, & Dubarg. & no one else — That the Dss has never notified her Delivery to the Duke, but hath used all possible means, to keep it secret from him & from all her Relations & Friends

40 Art.— That Dr Hunter, who was then attending a Labour in Stanhope Street, receiving the afd Message, ordered his Servant to go to the Crown in Silver Street, Golden Square, & bid him get a Chaise & four, to him in Stanhope Street, where it came. That about 9 in the Morning, Dr H. came out of the House, where he attended, & ordered the Chaise to drive under Hyde Park Wall, & wait his coming; he said, he shd only step in

at Col Fitzroys) 2 Doors from the House where he had been) & be there in a Minute or two ....

41 Art.— A few Minutes after Dr Hunter coming to the Chaise, & observing his own Coachman one of the Drivers, he was very angry, & rebuked his Officiousness, & particularly said, What could be in your head, to think of coming yourself, as you know, you are so remarkable, & so well known, by almost every body, to be my Coachman ——

42 Art.— Dr Hunter, on getting into the Chaise, ordered the Postilion to drive him to Putney; & from thence to Combe: when he came near the Dss House he got out, (it being then almost 10 o'clock) ordered the Postilions to walk the Horses about, & on no acct to come near the House: Dr H. then got over some Rails, & went thro, the Grove to the House, & did not return to his Chaise for some time, & the Postilions drove their Horses under a Hedge ....

43 Art.— The Dss as afd was delivered before Dr H. came, & as soon as he arrived, was shewn into her Graces Bedchamber; but she had notice of his Coming, ordered a Gauze or Veil to be thrown over her face to conceal it, which was done, & Dr H. finding all things right in her Delivery, ordered her proper Medicines, during which the Child was dressd for Dr H. to take away with him, & had on a Mantle, ornamented with Silver Spangles, & when dressd, was rolled up in a Dimmen Cloth so that no part could be seen; with all the Address Dr H. & Nurse Tyson, Dubarg & Read could invent, (so as not to stifle such Child) to make it appear a long Bundle, & being so rolled up, Dr H. abt 12 at noon, took leave of the Dss, & returnd to his Chaise, but first assured the Dss, the Woman he had procured for a Nurse, had a very fine Breast of Milk; that he had been, or sent somebody to taste it, & solemnly promised, such Care should be his particular Care; just as Dr H. was going Wm Dubarg said, "Sir, stay a minute, wont you let "the Dss see her Child before it goes?" or to that Effect. Dr H replyd "by all means" & accordingly the Childs face was uncovered, for the Dss to see it, which She did, & it was then covered up again as before ——

44 Art.— Read attended Dr H to the Chaise, & carried the afd Child rolled up, like a long Bundle, which, from the length, & the manner it was carried, both Coachman, Postilion took for a Child, not being carried like a Bundle, held in the Hand, or under the Arm, but in a laying Position, with the Womans hand underneath, & Lying lengthwise on her Arm: that She put the Child into the Chaise, & then Dr H. got in, pulled up the Blinds, & ordered the Postilions to drive towards Kingston but being got a little way from the Dss House, ordered them

to drive as fast as they could, to his House in London: that they drove very fast, notwithstanding which Dr H's Coachman order'd Mrs Eastcote's Boy, to go faster, which he refused: they arrived at Dr H's House in Windmill Street, in about an Hour; it being about One, when Dr H. returnd home, whereas sometimes getting out, owing to his care in taking out such Child with him, which he did under his Cloak that it might not be observed . . . . .

43 Artt. — Dr H. or his Coachman, ordered Mrs E's Hostler, not to set down in Mrs E's Book, where he had been, but so many miles, that She might not know where the Chaise had been; & ordered the Postilion not to tell any body, & gave him 5s a Crown, promising him 5s Crown more in a Week, if he did not tell where he had been; that the said Charge of such Chaise was entered for Miles, on Mrs E's Books, without mentioning where it had been contrary to common Entries of Chaises hired for Dr H. . .

46 Artt. — That Mrs Golder in Little Earl Street, Seven Dials, was the Nurse provided for Suckling the Child, by Dr H. at £1.11.6 p Mn. whom sent for her to his House in the Afternoon of 23 Augt: to fetch the Child away, on whose arrival Dr H. went with her into his Bedchamber, where the Child lay asleep on a Pillow, dress'd in the aforesd Mantle embroidered with Silver & Spangles - That Dr H. order'd her to take off such Mantle, said, it must be kept clean for the Xmas, when She should have 10 Guineas - The said Child had also a fine scarlet Cloth Robe; Mrs G. desired Dr H. to tell the Childs name; he replyd, do you take great care of the Child, it is no matter for you to know its name, at present; he said, it was born that morning, & directed her to look out for a Lodging in an airy Place; bid her carry the Child home in the most private manner, & not to take a Coach or Chair, till She got out of Windmill Street, & then, gave her a Guinea: That She carried away the Child under her Cloak to her Lodgings, in little Earl Street, without taking a Coach, tho it rained the whole Time . . . . . .

47 Artt. — She took a Lodging in Rathbone Place, & informd Dr H. thereof, who at first approved thereof, but afterwards thinking it not secret enough, directed her to look out for one in Piccadilly; that she took one the Corner of Air Street, where She hath resided with said Child till very lately - That Dr H. hath paid her for nursing said Child, & for said Lodgings; & That the D[uche]ss or Dr H. have repaid, or promised to repay Dr H. . . . . .

48 Artt. — That the clout the Child had on, when Mrs G. took it from Dr H, was marked G. belongd to the D[uche]ss, & had been used for her own Children lawfully begotten . . . . .

49 Artt. — That in the Evening of 23 Augt: aforesd Wm Frays was by the D[uche]ss Directions sent to Seymour Place; for a Silver Saucepan with the D[uche]ss always used to warm her Drink, when She formerly laid in; which he carried her next Morning . . . .

50 Artt. — That Wm Frays when he went to London, carried a Note to Mr Alibeau, saying the D[uche]ss desired, he wd buy for her at Mr Lucas's in Panton Street, Six Hareskins, the same as Women newly delivered, apply to their Breasts, to send them to her by Frays, & not to mention whom they were for: that Frays delivered Alibert the Note too late on the 24th for him to get them, but he went early next Morn[in]g to Lucas, bought the 6 Hare Skins, & carried them to Frays about 7 in the Morn[in]g of 25th, who immediately returnd with them & the Saucepan to the D[uche]ss: that such Saucepan was constantly used, during the D[uche]ss lying in, & y[e] aforesd Hareskins applied to her Breasts - That the Note to Alibert was wrote in French by y[e] D[uche]ss whose manner & character of writing, is well known to him . . . . . .

51 Artt. — From 20 Augt: to 24 Sept[r]: the D[uche]ss Dinner was carried up as usual before her Lying in, to indeed the Servants (not in the Secret) to believe She sat down at Table as usual; That the D[uche]ss never sat down at Table, but Tyson, Dubarq, & Read did - That Tyson was never permitted to go down Stairs, but concealed in the D[uche]ss Bedchamber, unknown to any of the Servants, except Frays, Dubarq, & Read - From 23 Augt: (the Day of Delivery) for near a Month, none of the Men Servants were suffered to see the D[uche]ss: during which time, the Housekeeper, Cook, Coachman, Footman were kept at Seymour Place, & not ordered to return till 21 Sept[r] the Day the D[uche]ss Month was up; but the D[uche]ss recollecting it was too conspicuous to return the very day her Month was up, directed them not to return till the 24th, which they did: the D[uche]ss dined below that day for the first Time since, & for a considerable time before her Delivery . . . .

52 Artt. — 24 or 25 Augt: Ld O. returned from Ireland, & went to Combe about 8 in the Evening of the 25th, & on coming, went immediately into the D[uche]ss Bedchamber, where he staid with her till One in the Morning . . . . .

53 Artt. — Also 28 Augt: Ld O. came again to Combe, dined, supped & lay there, in a Room near the D[uche]ss Bedchamber, & saving when in Bed, was all y[e] time in her Graces Bedchamb[r]:

54 Artt. — From 28 Augt: to the present time, Ld O's Visits have been almost daily; he was always admitted immediately to her Grace, when no other Person was, & used to stay

with her till late in the Evening, & frequently till the next morning, & very frequently be in her Bedchamber with her, for many hours together: particularly 14 Sept.r till 2. in the Morning: & 15th. laid all night at the Dp.s & as She grew well, after her afd Delibery, Ld B. was left with her Grace in her Bedchamber, by her directions 16 Sep.r was in her Bedch.r with her, alone, as before: he has ever since continued his Visits, & still carries on such adulterous Conversation, & used to lay, dress, eat, drink put up his Horses, in her Stables, & otherwise act as Master of the Family; when he has come without a Servant, he has himself put up his Horse, in the Dp.s Stable; wch was the more remarkable, because She never permitted the Horses of other Visitors to be put up . . . . . .

5d Art — Notwithstanding the afd Artifices, the Dp.s delivery became notorious to the Servants, owing to Tyson Dubarg & Read, acknowledgeing they had delivered her as afd: & that D.r H. had taken the Child away . . . .

56 Art — It was pleaded in the 6th Article, that the Duke after the Separation, in 1764 had no Carnal use of the Dp.s Body, or been in her Company, tho. requested at a very critical Time; That such Time was in Jan.r last, when She must have been a month, or 6 Weeks gone: That such Request had for its pretence, her Son Geo. Henry's Illness, whom was then with her — That she frequently press'd the Duke by Letters, & Messages, to come & see him, he being esteemd in great danger: That she not only, so importuned him, but sent the Physical Persons, to intreat him to go & see him: wch the Duke absolutely refused, from a determination of not running the Risque of meeting the Dp.s, or ever going into her House: That when his said Son was carried to Mary bone for the Air, to shew his not going before, did not proceed from want of Affection; he went that very Day to see him — . . . .

57 Art — The Dp.s is of Seymour Place in the Parish of St. George Hanover Square, in the Co.y of Middlesex, & Diocese of London; therefore subject to the Jurisdiction of this Court —

Concerning the Premises, the Duke hath duly complaind

58 Art — to the Judge of this Court — . .

59 Art — That all the Premises were & are true, whereof Proof being made, the Party Proponent prays Right & Justice to be done to him & his said Party; & that you would divorce the said Duke & Dp.s by reason of Adultery . . . .

Libel admitted without Opposition

Prerogative
Bye Day

No. 177. Stevens Butler. v. White. Grene

Dr Harris Dr Marriot

Dr Harris . . . I am Council for Mrs Butler Mother of the Decd who has left 2 Papers. No 1. dated 23 Jan.r 1763. subscribed & superscribed his Will; he therein refers to an Executor, but names none — No 2.

The Mother applied for Admon, with No.s annexd: a Caveat was entered by White, who prayd all Scripts to be brought in, & that the Widow might be assigned to take Probate of both Papers, No 1. as a Will, & No 2. as a Codicil. In the Allon now offerd, they pray No 2. may be taken as a Will — No 1. is called his Will & signd by Decd as such; If No 2. tho. unfinishd, is considerd as a Will, it must revoke the former, being made subsequent thereto: the Decd at one time intended to benefit Mr White, but after alters his Intention, & scratches him out; & tho his name is afterwards mentioned, yet being scratched out at the beginning, the Insertion in any other Part must necessarily have a Reference to that: It will be to revoke an executed Paper by one that is unfinishd. I call on the Dr to shew an Instance, where an executed Paper, was revoked by an unexecuted one, unless the Act of God prevented the Completion: If was incumbent then on them to give an Allon, shewing the Decd was prevented by the Act of God.

Dr Marriot . . . The Will may be valid tho, no Exor is appointed, & tho Whites name is scratched out; for it is inserted in a Subsequent Place: Tho. the Decd waved in his mind as to the Mode, his Intention was fixed as to the Estate a Will has been pronounced for, where the Date arises out of Circumstances . . . .

Dr Hay Judge . . . It will now be too early for me to determine upon the admission of this Allon, what will be the Event of the Suit: If you wanted to know my Opinion on the Validity of this Paper, you should have pleaded when the Testator died — The Rule of this Court, as to unfinishd Papers lying by a Person, a long while, is, That they are considerd to be left incomplete, by reason of the Decds departure from his Intention; the Barely being the Decds writing, & in his Custody, will not be sufficient; I shd imagine it would not operate: You dont say wh.t he died suddenly, nor what Declarations he made: If you shew no more by Evidence & Plea, than by this Allon, it will not be sufficient: the Decd means to give Substantively & not to refer to the other Papers, giving over . . . . .

Qu.e Is the Allon admissible?

Suffield & Page by D.r Hardwicke

admitted

Consistory
Bye Day.

Nº 178. Dr Ibbetson. v. Burchet.

Dr Wynne — Dr Harris.

Has Defᵗ brawld by giving notice of a Poors Rate?...

Dr Wynne... Dr Ibbetson has brought a Suite against ..... Burchet, Overseer of the Parish of ..... for brawling in the Church. Now Tho. we have not proved the charge as laid, yet it is proved, that the Clerk gave out from his own Pew a Notice for a Poors Rate before the Administration of the Sacrament, so I hope you will think he falls under the Statute against Brawling ...

Dr Harris... Read the Articles which charged the Defᵗ with giving notice of a Bull baiting — all the Promoters own Witnesses say, the Notice was given in as decent a manner as possible; The Reason of it being so given, was on account of Dr Ibbetson having set himself against this Rate.....

Dr Wynne. No Person has a right to publish any notice in the Church: The Statute gives no such Right; the Dr will say, it is frequent for Clarks to give Such Notices; but it is not lawfull, against a Statute; & if it was, yet it Shᵈ be given at a time when the Service is not interrupted by it — There is no more a Cessation from Divine Service, between the Sermon & Communion, than between any other Part of the Service....

Judge.... Dr Wellesworth. This is the most extraordinary Suite, I ever remember either as a Counsil, or a Judge: It is brought against an Overseer of the Poor, for Brawling in the Church — An Article is given, chargeing that.....

..... No Plea has been given by the Defᵗ. The Witnesses brought by Dr Ibbetson disprove the Charge, & say the Defᵗ is a quiet, peaceable, Religious Man, not at all inclined to disturb the Congregation: The Suite brᵗ agᵗ him, is for proclaiming a Rate signed by two of his Majesties Justices; Dr Wynne said he had no right to proclaim it as the Rubrick directs it to be

17 Geo. 2 — 17 Geo 2. directs the Overseers to give notice of the Rate, before it can be valid; when notice was to be given the Defᵗ applied to the Clerk, tho. he might have given it himself; the Clerk refused to give it, by Dr Ibbetsons Order; when the Time of Publication came, he chose the most proper Season, viz. when the Congregation were going out of Church; but it is said he Shᵈ have staid, till they were gone; I think he chose the best time, & did it in the most decent manner: I am sorry Dr. Irish. to see such a Suite brought by any Clergyman in the Diocese of London; I dismiss the Defᵗ with 25ℒ Costs against Dr Ibbetson...

Defᵗ dismiss'd with Costs...

Ibid

Nº 179. Hervey v. Coghlan

Dr Collyer & Harris — Dr Calvert & Wynne

Is y allon admissible?

Dr Collyer...

Mr Thomas Hervey now offers a Plea of 20 Articles with Exhibits stating the Particulars of this Transaction; he therein admits his Gallantry, but not any Courtship in the way of marriage. to prove this, he exhibits 2 Letters, which do not denote any Serious Intention of marriage: But this Gallantry, it seems produced a Pregnancy; She then desires Mr Herveys leave to go by his name — He says tho, he went to Tunbridge, he did not live with her there, but she was at her own Expence..... He admits that after She was brought to Bed, he gave her Leave to come to his House for 6 Weeks, that she promised then to go to Ireland, on Condition that he Shᵈ take care of the Child, & allow her 50ℒ pᵃⁿ. He admits, that she did not go to Ireland, & staid with his leave, at his House, 18 Years: but he says the Servants can prove they had Separate Apartments & Separate Beds, & did not live like Man & Wife; We plead that this creating a Suspicion of their Marriage he has sometimes owned it, but not constantly, & that She has done the same; that he was independent, & might have avowed it, & was under no necessity to deny the fact, if it was true; that there being a Reputation, She was his Wife, his Lawyers advised her name to be used in the Fine & Recovery, which she agreed to, but this dont prove a Fact of Marriage — That he wrote a Letter to his Son Capt: Hervey, containing a Declaration that he was not married to Mrs Coghlan; this Letter he intended Shᵈ not have been produced till his Death, but at Capt: Herveys desire he gave it him, & it is now exhibited: That on Ld Bristols Arrival from Spain he in 1763 made an Affidavit, that he was not married to this Woman, he also made another Affidᵗ before Judge Gould to the same purpose, for the Satisfaction of his Family, which is also exhibited; He acquainted Mrs Coghlan with it, who made no other Answer, but that she was very sorry for it & did not deny the Truth of it, & burst into Tears.....

x by Lady Hanmer & Sᵗʰ: Hanmers Wife.....

Dr Calvert. The first Article of this Allon, has the strongest appearance of Contradiction of any; the Courtship is in general admitted, but it is denied to have been in a view of Marriage.... as to the 2ᵈ Artᵉ I doubt whᵗ the Exhibits will justify the Assertion therein contain'd; if it cant be collected from the Letters, you will not admit them, or the Article so such

They belong. They do not agree in Point of time; we speak of one Period, they refer to another
Art. 3 pleads her Application to go by his name on acct: of her Pregnancy; my Objection is that it pleads nothing contradictory to our Article, but exactly what we have pleaded - (Art. 4 & 5) He pleads her being brought to Bed in Pall Mall, & that he had a House in Bond Street: we have pleaded the same - They plead a Deduction from a Fact, to which it is improper to examine Witnesses -
(Art. 7) They qualify her being with him 18 Years, by saying She did not pass as his Wife; this is inconsistent with his former Permission, to preserve her Character, how could that be done if the Servants did not look on her as his Wife - Nothing is so clear, as that a Party, in general, cant plead his own Declaration, tho, it may be produced in some particular Circumstances, as the Declaration of a Dead Man, because it is the best Evidence the nature of the Case will admit; but a Living Party may be examined
Qu. how does the dead man plead his own Declaration?
The affidavits are liable to this additional Objection, that they were made in 1763 when he turned her out of Doors
the Art: which states the manner, in which Mrs H. received the Acct: of his Proceedings, is of no Importance, as nothing can be collected from it, nor from her Refusal to tell Dr Mounsey where she was married; it was very unfair in him to sift her. If the fact is proper Dr M. may be examined, but it ought not be introduced, as it is now stated, by a Letter from Dr M. to Capt: Hervey - The Letter to his Son, I thought had been wrote to his Son by my Client, whereas it appears he was by Lady Hanmer; he can have nothing to do with this Business; it is shocking to entail such Difficulties on him, upon Mrs H's death Bed, to contest Mrs H's marriage -
Art 1A pleads, that in this Letter, he denies his marriage with my Client; but no such thing appears in that Letter, but rather the contrary; he does not contradict the fact, but says She cant prove it, & expresses a hatred against her - We plead the Fine & Recovery, as they do, but they insert a frivolous Observation & Qualification of their own - Their Allon contains no Contradiction but only Repetitions of what we have pleaded .....
Dr Wynne... The 4th Article is calculated only to prove a mere Negative Witnesses cant be examined to it; his own Confession ousts every Presumption wch could arise from the facts he wants to deduce - Their Lying in separate Beds is no Presumption, that they were not married, it is rather the Reverse; for why shd a man allow a woman who is not married to him, live in his House without Bedding, when he might dismiss her, at any time: whether you consider it in the light of a general Tendency, & its being made a Precedent, or in this present Case, It is contrary to all Rules of Evidence;

× Contrary to Justice, & to the favor shewn to Marriage in general - The Letters exhibited give such a Picture of this Gentleman's Mind, that his Declarations ought to be the last to be received

Dr Harris.... We may repeat, they have pleaded the marriage nakedly the Question on the Merits is, whether Reputation will be sufficient whilst the Parties are living? - We add, as well as repeat - from light he owns, in another he disowns her; Could the Agreement pleaded have been entered into, (of allowing 50£ p an) if She was really his Wife? Nothing is more common than to receive Declarations of Persons, when they have no view to a Suit, in rem facto. The Letter to his Son, stands on the footing, of the Declaration of a dying Man, wch is received in all Courts - a Letter of a living Person may be received, in order to confront his Evidence: a married Woman could not have consented to cut off an Entail at his Command without a Consideration; It shews, She was in his Power, & was conscious of it -

Judge Dr Bettesworth The Allon now offered, is in part contradictory, & in part what he thinks will be relevant
1 Art: seems contradictory, for he pleads, he never did court her in the way of Marriage -
2 Exhibits the Letters from which such Inferences & Arguments may be drawn -
Something may be drawn from what is not in them, as his not subscribing himself her Husd: nor addressing himself to her, in them, as his Wife,
3d admits his allowing her to pass for his Wife, & go by his name, but places it in a difficult point of view; It is said not to be proved; the Plea indeed is not on Oath, but the Answers are....
4th. Seems a Contradiction to her Plea of their going to Tunbridge, & living as Husband & Wife; to be sure there is an odd Appearance, the doing some Acts to induce a Belief of their being married....
5th. Is objected to with some weight; to make it stringent, it sh: be pleaded She lived in his House Reformd in Bond Street, for else why sh: She apply to go & live there; there is also a Part objected to, which is improper; for Witnesses cant be examined to Inferences; the Court & Council draw them; the Argumentative part must be struck out
6th. may be received to Proof -
7th. 14. 15. 16 & 17. are objected to as pleading Declarations of Mr Hervey; the rest all on the same foundation; She does not merely plead a fact of Marriage,

But relies on his Declarations; it is therefore material for him to shew, he made different Declarations, on various occasions & at various times, in Confidence to his Friends: on that account they are not to be repelled –

8th. pleads her having given different accounts of her Marriage

9th. contradicts that part of her Plea wch says the Marriage was Secret to preserve his fathers favor –

Rejected 10th. Wch pleads Dr Mounseys Letter, must be rejected, as Dr M is not pleaded to be dead

11th pleads a Letter from her to Mr H. wch is apprehended to be material, as She in no part of it calls herself his Wife, or addresses herself to him as such –

reformd 13th repeats the Fine &c but assigns a Reason, the Attorney is pleaded to be dead; that part wch contains the Attorneys Opinion & advising that Step, must be struck out –

18th. The Declaration therein may be admitted

19th. I also admit

Plea Admitted except 10 Art: & 13 being reformed . . . .

Prerogative Bye Day. Dr Harris . . . .

N°. 180

Fuller — Tomkyns v Biggs — Stevens

Dr Harris — Dr Wynne

. . . . Tomkins is the Deed, he died in London, where all his Estate lies, consisting in India Bonds, other Stocks he left a Brother, who is a Blackwell Hall Factor resident in London, & a Sister a Feme covert, who lives at Bath; the Interests of both Parties are admitted, & each pray Admon; the only difference is, the Sister declares She is ready to make an immediate distribution

Dr Wynne — There are no Debts to delay the Distribution; no Intricacy in the Affair: in general the Court will grant Admon to the Man, in preferance of a Woman, especially of a Feme Covert, whose Husband may interfere & be troublesome: the reason is, that the Business will be sooner ended, & Delays avoided. In the present Case, the Effects will be more expeditiously administerd by my Client Mrs Biggs who offers to come up to Town, & to distribute immediately, but no such offer is made by the Brother. there are no Creditors, your discretion therefore will be determind by those Offers wch have made the most favorable Impression. The Brother cant be compelld to distribute under 12 Mo & then not without a Lawsuit, which he may be best able to support; I hope you will decree a Joint Admon to the Brother & Sister, so as to prevent either being injured, by the Detainure of the Effects & no Distribution being made –

Admon shall be granted to the Bro separately, or jointly with his Sister who is a feme covert but equally entitled as next of Kin, with the Brother

Judge Dr Harris

The Course of the Court is to grant Admon to the male rather than the Female; but there may be Exceptions to every Rule, wch must be accomodated to the particular Circumstances of the Case; I have known the Female preferrd – It is not denied that the Effects in the present Case may be immediately distributed, If there were more sets of Kin, or Creditors, it would alter the Case I will grant it to neither singly: a Joint Admon will force a Distribution – The reason why the Court formerly declining granting Admon to a Man & Feme jointly, was because it would survive, but I do not think that a sufficient Reason, & shall therefore decree it jointly to the Brother & Sister

Joint Admon decreed to Brother & Sister a Feme Covert . . . .

Arches Hil T. 35 Dr Harris . . .

N°. 181.

Falkner — Betts & others v Duhamel — Grene

Dr Harris — Dr Wynne.

I am Council for, Geo. Betts, Ebenezer Moneyman, Jn Rook, & Xtopher Roberts Churchwardens of St John Southwark & as such Legatees in the Will of Rd Knightsbridge of St James Westminster decd; against Anne Duhamel, Surviving Exec.x of the Will of Mr Knightsbridge dec.d who whilst living, was sole Exec.x of the Will of Rd Knightsbridge. dated 28 June 1759 – Rd K. in case he left no Child, bequeathd 50£ to the Ch. Wns of St John Southwark, for the time being to be paid in one Month, after the Decease of his Wife in trust, that they shall lay out, & expend the same in Bricking & Ornamenting the Vault, in which, his Father, Mother & Child, lay interred."

1760 Rd K. died without any Child – . . . . . .

2 Jan: 1763. Alice Knightsbridge proved his Will . . . . . .

2 May . . . . She made her Will, in which after reciting the abd Legacy, She says "That since the death of her Husb: She has bricked & ornamented the said Vault at her own Expence, therefore wills & desires that the 50£ be paid by her Exors, within one Month after her Decease to the said Ch. Wns, in Trust, to be by them placed out in the Funds, or some other Government Securities; & the Interest, Dividends, & Profits, arising therefrom, to be laid out & expended, in keeping the said Vault in Repair:"

Nov. 27. 1765 Alice K. died.

Dec.r 5 Anne Duhamel, as the surviving Exec.x proved the said Will; & was at all times ready & willing to have paid the said Legacy Sufficient Security being given, for the due performance of the Trusts on which the same is devised: & 25 May 1767 She went to the Bank, with design to pay the same to two of the Ch. Wns, provided such Security was given, & Ch.s Waverly Esq of Grays Inn, by her desire, then attended with her, & prodeced to the said Ch. Wns

Q. Are the Ch: Wns bound to give Security for the proper Application of Rds Legacy? & can the Exx of his Exx refuse to pay it without such Security being first given

a proper Instrument to be signed by them for that purpose, but they refused, & have never since applied for payment of the Legacy, till this Suit was instituted. Bye-Day. Hil. T. the Libel was given, a Copy of the Clause of R. K's Will exhibited, & confessed; Mr Duhamel's Proctor exhibited a Copy of Alice K's Will, wch was confessd, & an Affidavit of his Party, & tenderd & left in the Registry 50£ in full of the Legacy, with Interest & Costs if any due by Law. The Tender was afterwards accepted by the Proctor for the Churchwardens, who exhibd an Affidt of Samll Wolley, & Ebenezer Honeyman, with a Draft of the afsd Instrument annexd, & prayd to be heard on his Petn: as to Interest & Costs: Mrs Proctor exhibd Ch. Maverley's Affidt & prayd to be heard as to the Security to be given, before the said 50£ (with £2. 16. 8½ since tendered for Interest due from one Month since Alice K's death, to 25 May 1763. shall be paid out of Court; & wh: Security shall be given as prayd on behalf of Mrs Duhamel; & consequently wh: any farther Interest, or any Costs are due in this Case, is the only Question before the Court, and as it appears, that the said Anne D. was always ready to pay the Legacy, Security being given, & as the Proctor for the Ch: Wns, admits in the Act that Wolley (then Ch: Wn) & Honeyman never had, or made any Objection to give any necessary Security, for the due performance of the Trusts, on wch the said Legacy is devised by R. K's Will, it is hoped the Ct will order Security to be given as prayd; & if so, as the whole Delay of Payment, & Institution of this Suit was occasioned by the Refusal of the Ch: Wns, who do not appear to have ever laid before a Vestry, the Draft of the said Instrument, tho, they swear they brought it away for that Purpose, it is hoped the Ct will pronounce, that no farther Interest, or any Costs, are due in this Case, & dismiss Mrs Duhamel.....

Dr Wynne... agreed in this State of the Case

Dr Harris.... Was Security ever heard of from Trustees? the Testator entrusts them with the Disposition of the Money; no body but the Ct of Chancery, or Persons interested can call upon them — Ornament, is a general Word — the Tender is binding, & cant be receded from: the Ch: Wns refuse to enter into a Declaration of Trust because the Ct of Chancery can see the Trust executed: tho: is it altered by what Alice K. did? the Tender was sub mode

Dr Wynne — There is a difference between the Legacy of R. & Alice K. R. devises it to be laid out directly: Alice directs the same to be laid out, wording it differently, this shews the necessity of a Declaration of Trust —

Judge Dr Hay's — This Suit is brought by the Ch. Wns of St John Southwark, for a Legacy in the Will of Rd Knight of Bridges: the Exs of the Widow appears, & makes a Tender of the Legacy, without Costs, from the time it was due; the Will of the Testator contains an absolute Gift, to be laid out for a certain purpose, at a certain time: the Person bound to pay it, offers it at the time: the Wife had no power to controll her Husbands Will, or to say the Legacy sh: be paid in a different manner; wh: if he had bricked, ornamented the Vault, it wd have been an Ademption of the Legacy is not material; he might have made it so: Her Repair: & ornamenting it, is no Ademption of her Husbands Legacy. She makes a reasonable Proposal, but are the Ch: Wns bound to accept it? I think not — the Tender is accepted; I cant oblige them to enter into such Security In a Trust, the Legacy is absolute; is there instance where Security has been ordered? if they are guilty of a breach of Trust, the Parties interested must apply to the Ct of Chancery — This Ct can only say the Legacy is due — The Offer on the part of the Exs was fair — I decree the Legacy with the Interest & Costs to the time it was tendered, but the Costs sh: be very moderate Reasonably & equitably She was entitled to Security tho, not legally —

Ibid — Stevens — No: 182. — Driffield v Pocklinton — Atham

Dr Wynne — Dr Harris & Calvert

& may Exors take up a Cause of Correction promoted agt a Clergyman, by their Testator?

Dr Harris.... A Cause of Correction having been brought by Mr Pocklinton (promoting the Office of the Judge) in the Consistory of Norwich, agt Mr Driffield for neglect of his Ministerial Duty, it was heard, & Sentence given thereagt Driffield, who appeald to this Court, & pending which Appeal the Promotor died; his Exors willing to prosecute the Cause to Sentence, desire they may be allowd to take it up, as the Promotors Representatives, (2dly) for the sake of Public Justice, & to carry it on to a final Hearing: I conceive any Person may sue a Clergyman for neglect of Duty, whether they are Parishioners, or otherwise; if this was not allowable, there might be room for Collusion; & the Parish might suffer him to desert his whole Duty: if the Prosecutor sh: be insolvent, or go away, the Judge below might be condemned in Costs if made a Party. It cannot be remitted; you cannot say the Judge did right: is the death of the Promotor, to excuse the Delinquent? it is irrational; the Maxim dont apply to this Case; it was not Actio personalis agt Mr Driffield, he is living: a Bond was entered into in the Court below by Pocklinton, whereby he binds his Exors, for Costs: Driffield has made you the Judge; it is very ungracious in him to say

× actio personalis moritur cum persona

He will not abide your Judgement; if the Suit is not suffered to go on, there will be a failure of Justice.

Dr Calvert.... There is no Position better known, than that a Suit does not abate in the Sp: Ct. by the Death of a Party: a meer personal Action, indeed, ceases, because no body else is interested to carry it on, as in a case of Defamation, because it is calculated to revenge a particular Injury: Does Mr P. sue for any particular Benefit, or any Wrong done to himself? he only stood forth with a view to the Public Good; It is the Office of the Judge; tho. promoted by P. there is an Interest in the Court, that the Cause sh: go on — where an Indict=ment is offered to a Grand Jury, when the Person offering it, is dead, the Indictment goes on: there indeed, the Prosecutor is no Party, he only gives his Bill, another Instance, is a Qui Tam action, where the King has an Interest, as well as the Party; such a Suit would not abate at Common Law, where the Doctrine of Abatement is stronger than here; If the Informer Stands in the same Relation to the King, as the Promoter does to the Judge, there is some Inference to be drawn from those Cases;
Costs of 45£ have been given; as Executors has an Interest in all his Estate, they are concerned — No Bill of Revival can be brought for Costs, but when taxed in the Life time of the Deed — These Costs were taxed in the Life time of the Testator, tho, taxd since the Appeal, yet before the Inhibition Kempe & Mackerel. Tracy Atkins.

vid Chancery Practice....

vid Judge Opinion

Dr Wynne.... Mr Pocklinton, the Promoter dying in 1767, a Special Proxy has been exhib: for his Exors — They have deserted the Practice of these Courts, to rely on what is done at Common Law — To argue from Analogy, is not convincing, especially when it is said, that in Civil Causes, at Common Law, Suits cannot revive; It is not the Executor of the Informer, it is the Att: Genl the Public Officer; & here might have been some Similitude if an Officer of the Judge had gone on; This is a Criminal Suit, & a Personal Action brought for his Souls Health & the Correction of his Manners — a Suit may be brought by Inquisition of the Judge, where another takes up the Office; he must take it, as the Law gives it: Could the Cause have proceeded agt the Exors of Mr Driffield? is there any Instance where a Suit could abate by the Death of one Party, & not of the other? It is reciprocal: Courts dont retain those Suits for the sake of Revenge; but of Public Justice, of Public Peace, & the Reformation

of Manners; you go on for the Living, & not for the Dead; Dr Harris mistook, there is but one Cause for reviving this Suit: "because, they, as Exors, have a vested Interest by Costs of 45£." they are changing the nature of the Suit, wch is public Advantage, whereas they do not care wh: Service is done, or not: they are Promoters of the Office & must proceed as such: as to Costs, it is still a Question wh: any are due? If they have an Interest vested in them, & can pray Execution in the Ct below, & if the Judge can give Execution of that Sentence, without an Attempt on your Jurisdiction let them go thither — The Suit is at an end; it is as if no Bond had been given, it is gone; because They can have no Sentence, no Costs can be given, so the Exors cant be liable under that Bond — This is a Criminal, Personal Action, not prosecuted with Effect in the Life time of the Plt: The Exors come as Representatives of the Promoter, & are not to be assigned Promoters; their view by the Act, is to entitle them to Costs in the Court below, not to carry it on for the Sake of Public Justice; If they pray to come as Promoters they must give Bond here; If w: be a different Case considering it as a Civil Suit;

^this general Principle holds in Suits &c..... I wont say how far, pro publico Interesse, if another proper Promoter comes, prays to be assigned, though, —

— I doubt not, on the death of 2d Deft Driffields Exors c: not have been called upon, that the Suit would abate.
I am clear the Deft could not have called on the Exors of the Promoter to go on with the Cause.
I recollect no Case of this nature either in the Ori=ginal Suit, or on Appeal.
There is difference even between a necessary, & a voluntary Promoter

Judge Dr Hay.... I will consider till next Ct.
NB. adds: afterwards to 2 Sep. E.T. for further Information in point of Law. Altham agreed he w: go on to promote 2d Principal Cause on 2d part of the Exors

Prerogative | Falkner | N°183. Betts & Duhamel | Grene

Judge Dr Hay.... This is a Suit brought by the Churchwardens of the Parish of St John Southwark, for a Legacy left by Rd Knightsbridge; of 50£, to be laid out, in repairing & Bricking a Vault;
The Exec: of the Wife, tender the Legacy with Interest from the time of its being due, i.e. a Month after the Testator's Wifes death; It is not denied, that the Wife bricked & ornamented the Vault in her Life time, & she now gives her Husbands Legacy; She had no right to control his Legacy, but it must be paid as conditioned in his Will; If his Legacy of 50£ is undoubtedly due to the

Ch: Wms: The Exor tenders it on Security given to perform the Conditions; that is reasonable, but were the Ch. Wms obliged to accept it on those Conditions? they do not claim under the Wifes Will, but the Husbands: Faulkner accepts the Tender, Fountain desires to be heard on his Petn:
The Court never obliges a Legatee in Trust to give Security, they cannot do it; if the Ch. Wms misapply their Trust, they are accountable in Chancery for the Breach of it:
I decree for the Legacy with Interest, to the Time the Tender was made by the Exec.r on whose part I see no misbehavior She being always ready to obey Pks Order: The Conditions strictly & legally cannot be enforced tho, reasonably, and equitably they ought: I think very moderate Costs shd be given . . . . .

Consistory — Stevens — N.o 184. — Morris v Morris — Collins
4 S. Kil. J. — Dr Harris, Wynne — Dr Calvert.

Q are the Answers full?

Dr Harris . . . The Marriage is laid at May Fair Chapel, we object to the Answer not being full, She shd answer, She was not married at May Fair, or Elsewhere: for if She was married any where else, it wd establish the Marriage, & She must answer: we could not lay a genral marriage, we were to specify some Place

Judge . . . Dr Bettesworth } I wonder the Propriety of the Answers, shd have been so long delayd, the Libel being given above half a year ago, viz.z 18 May 1768, & admitted the Bye day after Trin: Term; the Answers are given the Bye Day after Mich: Term 1769. The Answer to the first Article is objected to, & is the most material of any; undoubtedly the Party is not obliged to answer to any Criminal Matter, or what may necessarily infer a Crime; This is a Cause of Divorce in which so much exactness is not necessary, as it is in genral This Article is only to say, when & where he was married & where was y.e Courtship? Nothing in the Libel pleads their Cohabitation together, as Man & Wife before 1753, therefore there is nothing in the Article which leads to it, so that what relates to their Cohabiting previous to that Time, shd be struck out, as redundant, irrelevant, & impertinent; It is too general, to say, She denies the Article to be true, she does not add, nor in any part thereof, I therefore think this part too general, & insufficient; I do not agree with Dr Harris, that she shd say, nor any where else: She shd not be obliged to go so far; I pronounce for fuller Answers to the first Article.

Fuller Answer decreed to y.e first Article.

Stevens prayd the Judge to take the Answers himself, it being a special Case, who accordingly assigned Monday 27 Feb: for that purpose, unless Collins appeals by that Time . . .

Wh.r a Ply cited to appear in y.e Dining Room of Dr Lam: instead of y.e Common Hall must be cited again, for a criminal & personal Offence.

Ibid — Jenner — N.o 185 — Macalpin v Aldersey — Bargrave

Dr Calvert . . . It does not appear, that the Party is cited for the same Offence as the Words nor Time of speaking them, are expressed in the Citation —

Judge . . . Dr Bettesworth } I take it for granted the Party is cited for the same Offence tho, it dont appear; It is said, a Party once dismiss'd from a Citation cannot be called upon again; It is now the right Time to take the Objection; To give Bargraves Objection all its due weight, I will ask what is the dismiss for? why for a nullity in making the Citation returnable at an improper Place; That will not prevent Justice from taking Place, nor shelter her from being cited again, the Substance of the Offence never came before the Court; I cant think the Party shd be discharged from the Suit, but shd be held under this Citation, & therefore decree her to appear absolutely; The Protest is proper in point of Time but not in point of matter — I reserve the Consideration of the Costs of this Motion, till the Conclusion of the Cause — Bargrave appeard absolutely pursuant to the Judge's Order.

2d Citation held good

Delegates — Bogg — N.o 186. — Compton v Beareroft — Major.
Jan: 28

Att.y Gen: Wedderburn Serj.t Leigh. Drs Harris, Wynne, Burnell } Solr Gen: Dr Calvert. Mr Beareroft

Att.y Gen: mr Delgrey } The material Point, wch falls to our Share, does not depend on the Law of Nations, but on the construction of a dry Act of Parl.t The Facts are stated & acknowledged, & the motives of going to Scotland, are admitted to have been, to evade the Act of Parl.t It is supposed this Marriage was had with all the Solemnities required by the Scots Law between Natives; the Present Proposition concerns the Result of the Law, in England on these facts, & wh.r the Parties are entitled to all the Civil Legal Rights consequent of Marriages in England; It is a simple naked Question, positivi Juris, stripped of all Learning; By the abstract Principles of Civil Society, the Rights of a particular Country are deemed incommunicable to Strangers; In Great Britain, however, the Intercourse with remote Countries, may have increased, a foreigner cannot acquire a Right to be possessed of Lands, cannot inherit them by Descent, by Dower, by Curtesy, in order to be entitled to any of which, he must first be put into the State of a Native, the Right of immoveable Property being special; tho, it is different with respect to moveable Property; Cormier in his . . . . . of Henry y.e 4th of France states precisely the Droit d'Aubaine, in its different Progress, It was extended to the Irish, but not to Engl.d till the Treaty of Utrecht: Several of the Provinces of Germany & Italy are not exempt from it: The 13 Art: of the Treaty of Utrecht gives the Contracting Parties, viz.z English, French,

X The Exemption from it.

X vide 13 Article.

= all the said Goods, Effects whatsoever, according to y.e Laws of Gr. Br. & Fr. respectively, and in manner however, that y.e Inhabitants of Persons intestate, must be possessed of their Goods & Effects, right of rendering upon y.e Subjects of y.e most Xtian K. in those Places, as well by y.e Subjects of Gr. Br. as by y.e Subjects of y.e most Xtian K. in those Places, in like manner, as well by y.e Laws, as by y.e Customs of the Countries, where each Person died; wh.r that may happen in Gr. Br. or in Fr: any Law, Statute, Custom, or Droit d'Aubaine whatever, to y.e contrary notwithstanding . . . .

XX 13 Art. It shall be wholly lawfull, for Merch.ts & others being Subjects of y.e K. of Gr. Br. or y.e most Xtian K. by Will, or any other disposition, either during y.e time of Sickness, or any other time, before, or at y.e Point of Death, to devise, or give away, their Merchandizes, Effects, Monies, Debts belonging to them, all moveable Goods, wh.r they have, or ought to have, at y.e time of their death, within y.e Dominions, any other Places belonging to y.e most Xtian K. moreover wh.r they die having made their Will, or Intestate, their lawfull Heirs, Exors, or Admors, residing in either of y.e Kingdoms, or coming from any other Part, tho, they be not naturalized, shall freely & quietly receive & take Possession of =

a Reciprocal Communication of the Right of Property;
but as the Parl.t of Paris have never regarded it, they will
very seldom determine in favor of the English, for want
of Registring
You must have a Capacity to sue by the foreign Right, to
acquire a legal Right.
Contracts valid in other Countries, will be considerd as
valid here, provided they are not, dolo malo, entered
into with a fraudulent Intent.
Thus a Contract for a Loan of Money, at 8 p.Cent, where
such Interest is allowed, (as for Instance, in the East Indies)
may be recoverd here agt an English Subject, & enforced
with respect to Principle & Interest; In France 6 p.Ct.
is the Legal Interest, if you obtain Judgement there
agt an Englishman, you cant take up the affair here
on that Judgement, but must begin originally here,
may give the Judgement in Evidence — An Action may
be maintaind here, on a Bill of Exchange or Security
into in France, because such Contracts are allowd there:
But if a Person wanted to enter into a Contract for
10 p.Ct here, & knowing it illegal here, went to France
to make it, an Action could not be maintaind in
England on that Contract; the Ct will always look very
attentively whether the Contract is materially foreign:
Suppose a Stock Jobber sh.d contract for half a million
on the Change of Amsterdam, our Cts wd not allow it
for as they entertain such Suits by Comity & not
by Compulsion, they wd look narrowly into them.
an Exception from the Rule laid down, is that the present
Contract, is not like the others; that Marriage is a
personal Contract, that it is for life, & of vast Importance,
therefore not to be judged on those Principles; The
Duration is of no Consequence; can the Gentlemen point
out the essential Difference between personal, and
proprietary Contracts; the Essence of the Contract is
Consent; various nations differ how that Consent
is to be testified; we ourselves have varied at different
times, Particular occasions produced the late Marriage
Act, by wch the Consent of Parent or Guardian, is esteemd
essential to the Validity of Marriage; the Minor is oblig
to have a Guardian for his Marriage, as well as his
Property; Huber says in Frizeland a man may marry, in
what, we call, an incestuous Degree; suppose in England
a man wanted to marry his Niece, & knowing it was
illegal here, wd say, let us go to Frizeland for one Night
it will be good there, & consequently will be so in Engld
afterwards. Nay, the Laws of England wd consider it
as incestuous & annull it. The Statute excepts Marriage
beyond the Sea — In all personal Contracts, as to Property
the Scots are considered in the light of Foreigners; by
the Act of Union they have a different Jurisdiction, &
Rights. The Construction contended for, wd be adhering
to the Words agt the Sense & Reason —
Bracton says a Person is the first night, a Stranger; the

2d a Hospes; the 3d an Inhabitant.
The Legislature of Great Britain would not exercise a
coercive power & authority, over another Country, wch dont
complain of the Grievance, therefore left it, as it stood, with
respect to their own Inhabitants:
The Ct of Kings Bench determind it to be a nullity in the
Case reported by 2 Burrows. 897. Rex. v Inhab.ts of Preston in Kent.
Arguments of Conaenience & Inconvenience can't be
introduced as to positive Law; But weigh the Inconvenience
in this particular Case; there are no Children, the Wife
is the Plt, so that the Inconvenience, if any, can only
fall on the Party herself; but admitting Inconveniences
may arise from a Determination agt the marriage,
are there none on the other Side? What Proposition
is more clearly established, than that no Right can be
derived from moral Wrong — Here all the Consequences
ascribed to a fair Contract, will issue from one that
is false; what can be more wrong than to act in
defiance of the Laws of one's Country? the Point has
received no determination, because Parties have not
brought it to Judgement — in Sir Jn Blands Case an
exceeding good Rule was laid down, as to Contracts; the
Parties had a view to the Laws of England — The reason
operates more strongly here; the Money there was
made payable on an English Security; here they
go purposely to evade the Laws of England — The
Sentiments of Writers and great Men, wont operate
they are not equal to your Lps knowledge.
I am surprized never to have heard of the Cases
called Authorities; I have endeavord to recollect the
Case mentiond, I have looked into my Notes, wch I take fully, &
think nothing could pass like what is mentiond.

Cited by Calvert & Brook & Oliver — by mistake called Oliver & Oliver

It was brought for a Contempt of the Court for running away
with a Ward of the Ct. The Father in his Answer discloses the
Marriage being celebrated at Edinburgh; the Husband only said
he was married; there was no Evidence, if there had, it could
not have been read; She could not forfeit her fortune by
the answer of the Father; there was a forfeiture admitted in
the answer; it would be on Injustice to
do a substantial Wrong; the Ct will not hastily declare.

mr Attorney Gen.l seemd by no means aware of this Account of this Case nor certain of the facts he stated

Sir Tho.s Sewel.... 1762. the Master of the Rolls was ready & willing to
argue it, but did not

Brook & Oliver 3 Hov. 1756. This was a Petition; it is admitted
there was no solemn determination; a man married a minor
whose fortune was vested in Trustees; they prayd the Ct
to order a Settlement to be made adequate to the fortune; they
are willing to consider it as a marriage — a Petition is not
dis contestata — I thought the case had been, that the Woman
was of Age, & had prayd to have her fortune paid to
her, as a Feme Sole, & that the Master of the Rolls had
ordered it out to her, wch wd have been a Judicial
determination, by a great Judicial Authority.

not accurately stated

Mr Wedderburne — The necessity & Propriety of Apologizing increases, as the Argument descends from Council to Council —
This is a Question of Argument, wch must be determind on general Principles; the Cts of Chancery & Kings Bench have no proper Judicature to try it —
Acts of Parl.t must be determind & construed accord.g to the Subject matter — nothing in the determination struck me so much, as in Bedford Case its being put ad verecundiam, & on the Singularity of a Council arguing, that the Legatee had not forfeited the Legacy, because she was never married; Suppose she had married a man who had another Wife, she would yet have done all in her power to forfeit the Legacy; it would have been vested in the Devisee over, the Party having done every thing to contradict the Intention of the Testator; the same will not hold in this Court — In the Domestic Determinations of the Chancery, the Court conciliates matters, as much as possible, & does not wish to be drawn into positive Determinations — That the Law of the Country where the Contract is celebrated is universal, & generally to determine the Validity, I deny: the Reason of the Position

vid. Grotius — will extend, or limit the Range of it — That the Law of the Country shd govern in some Cases, is necessary for the mutual Intercourse of Nations, but then the Contract must be bona fide, there must be no Culpa generis:
Parties must have a Compleat Capacity of Contracting:
Reference must be had to the Place where the Contract is to receive Execution:

vide Huber — Contracts on smuggling Accounts are not good here, Actions brought on them by Persons stepping on the other Side of Carlisle Bridge, wd not be good; tho, they would be between two Parties bona fide, living on the other Side of Carlisle Bridge: Suppose a Person was to make a Mortgage of an Acre in Antigua & to take a Bond of 6000£ here, to get Antigua Interest, would a Court be so short sighted & narrow, as to let this have Effect? There is no Principle of reciprocal Justice & Comity, as to mala fide Contracts; the Capacity of the Contracting Parties must be judged of, by the Laws of their native Country, & not by the Laws of the Place where they happen to be.

In Scotland a minor under 21 may contract Debt by Specialty; it is not void, but he may rescind it, if he plead within 4 Years; he must bring an Action to rescind, & shew it is detrimental to him, otherwise it will not avail: but suppose after 6 years Residence in England, he was to plead Minority, would it be allowd.?

a. after majority — If an Englishman under 25, marries in France, the marriage is good, it wd not be so here, because he has

here a Capacity of Contracting, & this is the Place of his Domicile — Parents in France, after 25, have not a right of negativeing; but for want of a Notification to them, the Act wd be good — In the K. of Prussias Dominions, the Contract of Marriage is not for Life, but the Parties may dissolve it: Suppose Parties married at Berlin; where it is temporary, could their marriage be dissolved here; the Quality & Capacity of the Parties to make the Contract, relates to their Place of Habitation, —— Voet — Qui Testamentum facere possunt says, the ability to make a Will, must be determined by the Law of the Domicile; if that is true, why should it not be necessary in marriage, why should there be any Distinction, between that & other Contracts; It wd follow that all the Rights of Husband & Wife go with them according to the Rule of the Contract; The form of the Contract may be subject to the Law of the casual Residence, but the Validity shd be determined by the Law of the Domicile . . . . . .

Serj.t Leigh — The Parties in the present Case were not married according to the Form prescribed by the Law of Scotland: the Restraining these marriage is attended with great Convenience to the Public, & is according to the Preamble, whilst the Act prevails it must be so considerd; If the Sense contended for by the other Side was to prevail; only those Persons could be restraind who were not the Objects of this Act — Can the Party say, it was hard, when he cannot plead Ignorance of the Law of his Country, wch he meant to evade; was it a bona fide Contract, with respect to the Country, where he meant it shd operate? the Courtesy to other Countries might be extended to the Ruin, destruction of our own Laws. Did the Legislature mean to subject Englishmen to the Law of Scotland, when they excepted the Scots from this Law? In the Case of Preston, before the Quarter Sessions, the Court was obliged to determine, wh.r the Parties were married, or not; it was afterwards said before the Kings Bench, if it was necessary to have a declaratory Sentence, the Law wd be as ineffectual, as if the present Construction was to be established
In Barnes's Case, the Arg.t was, that it was contra bonos mores; Mrs Barnes lived with her Husband; Mrs Compton lives in separation; She thinks the Marriage illegal: it is a proper Suit, on her part, to avoid & excuse living with him — Whilst the Act subsists, it must be taken to be a good & wise Act; till this Judgement, it had some Effect: the Opinion, that these Marriages might be set aside, restraind many prudent Persons, but a solemn Determination will correct this . . . . . .

Sat 4 Feb.

Dr Burrell...

after so much of your Lps Time, has been already taken up, in attending to the learned Arguments of the Gentlemen who have preceded me, it would be Presumption to suppose, any thing I can offer, will throw new Light on the Matter in debate: but as the Question is of the first Impression, & its Importance so great, that the Preservation of Public Order, & the Peace of private Families depends on your Decision; I shall intreat the Indulgence of the Court in offering to their Consideration such Arguments, as appear to me, to be necessary, to instruct the Question, & material to the Interest of the Plt, for whom I have the Honor of being concern'd. In doing this, I shall endeavour to avoid, misspending any of your Lps Time, by a tedious & unnecessary Repetition of those Instances, which have been produced before, & of which you are so thoroughly possess'd

Mr Compton, my Lords, instituted a Suit of nullity of Marriage, in the Court of Arches, agt Mr Bearcroft. In Hilary Term 1767. She gave her Libel, containing the several Facts charged agt the Deft which she pray'd to be admitted, as a foundation for the Judge to cancel & annull the Act, in case she should be able to ascertain & make out the Charge.

When that Libel was argued, even the Defts Council thought some of the Articles so reasonable, that he did not object to them; & yet the Judge, was pleased to reject the whole Libel, & to dismiss the Defr: From that Sentence, the Plt appeal'd to your Lps, who have determined, that the Council ought not to be confined to the Argument, on the Facts laid, but to be allowed to go into the Law; it will not be unfair to conclude, the Libel admissible, & the Charge proved.

What were the Motives which induced the Plt to bring this Question before the Court, may, perhaps, be thought not very material for me to enquire, or for your Lps to consider.

Whether Mr Bearcroft made use of gross Imposition or artfull Insinuation to attain his End, will be of little Importance in the Decision of this Suit.

The only Question, is, whether the Plt, at the time, the Act was done, had arrived at that Period, which the Legislature, has thought it expedient to fix, for the Commencement of Discretion, if she had not, the Deficiency of one Month, or one Year, will create no Alteration in that Particular; the Party, in both Cases, being in the Eye of the Law, supposed incapable of Judgeing for herself, & therefore liable to Imposition—

Great Surprize was expressd, that this Suit was brought, after a voluntary Cohabitation of several Years; & the only Cause which presented itself, to the Idea of the Gentleman, from whom the Observation fell, was, Want of Abilities, in his Client, & Love of Novelty in mine.

Reasons I must confess, of very great Weight & Solidity, if they really gave rise to her Complaint, for what is more natural, than that such a Cause, should produce such an Effect. But as the Observation does not appear to have any other foundation than Conjecture, I hope, I may be allowd, to answer it in the same manner, by opposeing Hypothesis, to Suggestion: may I not reasonably suppose, the Plts Proceedings, flowd from very different motives, than those assigned, by the Defts Council?

May not her Friends & Relations, have pointed out to her, the Impropriety of her Conduct, & the Inconvenience that might result from it? May I not imagine the Plt has acted, on full Conviction, of her having done, what the Laws of her Country prohibited, under severe Penalties? & might She not be desirous of ascertaining, by a legal Decision, a Question of the utmost Importance to herself & her Issue? the Duty She owed her Family, & the Desire of preserving her own Character, were of themselves sufficient Reasons, for being anxious to remove every Doubt, which occurred: the Probability of her succeeding to a very considerable Estate, was another strong Inducement, to bring the matter to a speedy Determination.

Under these Circumstances, will any impartial Person disapprove her Conduct, in being averse to cohabit with the Defr till the Validity of the Marriage is decided? if the Court should be of Opinion that the Act was lawfull, she will readily return to her conjugal Duty: If on the other hand, it shall be deemed null & void, She may, by withdrawing herself, have prevented, reflecting Dishonor on herself, & Infamy on her Issue—

I cannot agree with Dr Calvert, in his Idea, that a man cannot be relieve against his own Act, when he confesses his own Turpitude; the Practice of Courts of Equity, as well as, the Ecclesiastical Courts, produce many Instances to the Contrary: Witness, Actions brought to recover Money lost at Play, & Suites brought for relief agt usurious Bargains, & Post Obits—

The Case supposed of a Party swearing himself a Major, or authorizing another to swear a Woman a Major when in fact such Parties were Minors, in order to obtain a Marriage Licence, received a Judicial Determination in

The Sp.l Court in Trin. T. 1760. in the Case of Frost & Walduck
Frost agt. Walduck. Trin. T. 1760. Consist.y in the Consistory of London —
Frost by her Guardian brought a Suit of Jactitation against "
Walduck, who confessd the Jactitation, & gave an Allegation "
pleading the Marriage, which appeard to have been "
celebrated by Licence, obtaind at Drs Commons, on Walducks "
Affidavit, that Frost was 21 & upwards — Frost proved by "
a certificate of her Baptism, & her Father & Mothers Evidence "
that she was but a little above 19, when the Licence was "
obtaind, & that her fathers Consent was not had. It appears "
that Frost had sworn Walduck, at the Time he made his "
affidavit, that She was 21 & upwards — . . . . . "
Per Curiam. By 26 Geo. 2. c 33. a Marriage of a Person under age, solemnized "
by Licence, without Consent of the Father, if living, is void — "
This proved, that this Marriage was, by Licence; that the Woman "
was under age, & her Father's Consent not obtaind: the Jactitation "
is confessd: Walduck must be enjoind Silence, on that head, for "
the future." NB no Costs were given, as Frost appeard to have "
imposed on Walduck, in making him believe she was of age.
The same Doctrine, was confirmd, in the Case of Williams &
Williams agt. Spearing. 1768. Spearing before the Commissary of Surry, in 1768:
Capt.n Spearing a man of some fortune, paid his Addresses to
Miss Williams, Daughter, of the Revd . . . . Williams Rector
of Horsted in Suffolk, who died in 1741 without appointing
any testamentary Guardian, & leaving a Widow, who after his
death, had married again; Miss Williams had no Fortune;
when Mr Spearing asked if She was of age, she answerd, Yes,
& her Brother confirmd her Assertion; relying on these
Assurances, Mr Spearing, accompanyd by her Brother, went
to Drs Com.s & took out a Licence from the Vicar Generals
Office, having first made an Affidavit, that She was
not a Minor — 12 Aug.t 1758. They were married; they cohabited
together 10 years, & had Children by the Marriage.
In 1764 or 1765 She cited her Husband, in a Cause of
nullity, on account of the Marriage being solemnized, by
a Licence, obtaind on a false Suggestion, contrary to the
26 of Geo. 2. c 33, & without the Consent of her Mother,
She being a Minor born 26th of March 1738. Notwithstanding
these Circumstances, & unfavorable as the Case appeard
on the part of the Plt, the Judge, (Dr Harris) thought
himself merely ministerial, & bound to declare the
Marriage null & void —
The Objection of the Libel being improperly drawn, &
the Law therein partially stated, having been already
confuted, makes it unnecessary for me to say more, than
that we are sufficiently justified, by the constant Usage, &

Invariable Modes of Proceeding, in the Spiritual Court —
We have founded our Complaint, upon the Statute of
the 26 of Geo. 2. c 33, which prescribes certain Forms & Regu-
lations, as necessary to precede the Solemnization of
Marriage, & without which it cannot be valid: We say
they were not observe in the present Case, & therefore
the Act is void.
In answer to this, we are told, that the marriage in questi-
on, being celebrated in Scotland, the Defs.t is exempt from
the Penalties of the Law, by reason of the Proviso, that
nothing therein contains, shall extend to that part of
Great Brittain call'd Scotland.
It therefore becomes proper for me to inquire into &
consider the Causes which produced this Act, the views
with which it was passd, & the natural meaning & import
of the several Clauses that compose it.
It may perhaps be unnecessary to recall, to your Lps
Recollection, the great Inconvenience, the Public had long
experienced, & the signal mischiefs that had accrued to
private Families, from the abominable practice of
uniting, in a clandestine manner, Persons, whom the
Laws of this Country, considerd under a State of Pupillage
& from want of Discretion unable to govern themselves:
Every man, who wished well to the Constitution, saw
the danger of the Disorder, & the necessity of finding out
an effectual Cure; but at the same time, that those
who planned this wise & salutary Law, were desirous
of placing every Obstacle, in the way of Folly, & of
preventing the Inexperience of Youth, from becoming
a Prey to the Cunning of Age; especial Care was
taken, not to extend its Operation, to that Part of
Great Britain, called Scotland; thro, an unwillingness
in the least degree, to intrude, on the Modes of Proceeding
in that Country, which in religious matters, varied consid-
erably from those of England: They remembered, the
Articles of Union, had insured the Continuance of
Presbyterianism to Scotland, & therefore inserted the
Exception, abovementiond, to prevent that, which had
been ratified by the 5th of Queen Anne (cap. 8) from
being infringed by the 26 of Geo. the 2d.
I did not wonder, to hear a Hint of Disapprobation
thrown out, at the General Terms, in which the Preamble
was expressd, for this obvious reason, that the Defs.ts
Interest required, that the Construction of the Act, shd
be narrowed, & circumscribed as much, as possible:
You were therefore told, that the prevention of
Fleet Marriages, was the chief Object of the Legislature
who never entertaind an Idea, of restraining, or vacating
Marriages, celebrated beyond the Tweed.
That, This, was one of the Objects of Parl.t I shall

readily admit: That it was the Chief, or the only Object, I shall certainly deny:
In this I am justified by the Words of the Statute itself, which after stating the Requisites, to be observed previous to the Celebration, goes on, & says, in the
" 18. Whereas many Persons do solemnize Matrimony " in Prisons & other Places, without Publication of Banns, " or Licence of Marriage first had, & obtained; therefore for " prevention thereof, be it enacted, that if any Person " [after 25 March 1754] shall solemnize matrimony, in any " other Place, than a Church, or public Chapel, where " Banns have usually been published, unless by special " Licence, from the Bp of Canterbury, or Licence first had " from some person having Authority, to grant the same, " every Person knowingly & willfully, so offending, being " lawfully convicted, shall be transported for 14 Years: " & all Marriages so solemnized, shall be null & void to " all Intents & Purposes".
" 21. All Marriages solemnized by Licence, where either " Party, not being a Widower, or Widow, shall be " under 21, without Consent of the Father or Guardian " of the Party, so under Age shall be absolutely null " & void . . .
From hence it is clear, that the Disorder complained of, was not confined to the Fleet Prison, but had spread its Infection, to different Parts of the Kingdom: every Town of any Note, had a Keith, or a Jameson ready to violate the Law, & prostitute his sacred Function, for the Wages of his Iniquity:
The Insertion of the words, Prisons, & other Places, shews the Object intended, was, to provide a Remedy, as ample, as the Evil was expensive, not to confine its Operation, to this, or that particular Spot, but to communicate its Influence to every part of England. After allowing Minors to apply to the Ld Chancellor, in case of their Parents, or Guardians Lunacy; or withholding their Consent, unreasonably, & after laying down Rules to be observed, in registering Marriages, the Statute proceeds to note the following Exceptions
" 17. That nothing in this Act contain'd shall extend " to the Marriages of any of the Royal Family.
" 18. Provided likewise, that nothing in this Act contain'd " shall extend to that part of Great Britain call'd " Scotland. Nor to any Marriages, amongst the People " called Quakers, or Persons profesing the Jewish Re- " ligion, where both Parties, are Quakers, or Jews; Nor to " any Marriages solemnized beyond the Seas. . . . "
The Plain & obvious Construction of which Words, is, that it shall not affect such of the Kings Subjects, who are bona fide, Inhabitants of Scotland, domiciled in, & amenable to, the Laws of that Country —

Besides, your Lps will observe, the very particular manner in which the Provisoes are worded; in the Precedent, as well as the subsequent parts thereof, the Exception is clearly extended to the Marriages of the Royal Family, & Quakers & Jews; but in the part relative to Scotland, the Word Marriage is omitted; the natural & necessary Inference of which is, that the Legislature would have made use of the same Terms, if it had meant to give this Exception the same Extent with the rest.
The General Object of the Laws, appears from the Preamble to have been, Clandestine Marriages; what was meant to be comprehended under that Term, is specified in the Body of the Act.
The Source from which the Exception flowed, was, the Essential Difference, which subsisted, in the two Kingdoms, with respect to their Ecclesiastical Government: The Inhabitants of Scotland, it is well known, were so averse to Episcopacy, & so bigotted to their own forms of Religion, as to take the utmost care, at the Union, to preserve it inviolate; if therefore A Proviso had not been inserted to prevent the Statute extending to Scotland, their Federal Union, must have received a violent Infraction by the Introduction of the English Liturgy, & the Jurisdiction of the Ordinary; the necessary Attendants on marriage Licences, & the other Requisites prescribed by this Act. — That this was the intention will hardly be denied; that it never entered into the Idea of the Legislature to give force & Validity to a Marriage, solemnized as the present; by the Proviso abovementioned, will not admit of a Doubt: there can be no colour of Reason to suppose, that any Men, when deliberating on the most effectual method to put a Stop, to a great national Evil, would be so unmindfull of their object, as to leave a door open, which would render the Law useless & ineffectual.
But, tho, the Words of the Clause, should bear a different Construction, than that we contend for, yet when it comes to be considered, that the admitting them to be taken in one Sense, will add Spirit & Vigour to the Law, & understanding them in the other, will totally defeat the end of it, little Doubt, will, I trust, remain, which Construction shall prevail.
But we are told, all penal Statutes should be construed strictly, & as strong as possible in favor of the Accused; That the Law, on which the present Suit is brought is of that nature; that the Deft is not within the Letter, therefore is entitled to a favorable Construction, & to be exempt from the Severities of it.
Now, under your Lps Correction, I apprehend, strictly speaking

This is no Penal Statute, at least, not such a Penal Statute, as demands a literal Construction
It enacts, that whoever does not conform, to the Regulations therein prescribed, shall not enjoy certain Privileges; i.e. the Children born of such Marriage, shall not inherit; the Wife shall not have Dower: but with respect to the Def[t] there is no Penalty laid on him; no Corporal Punishment; no Deprivation of Life, Liberty, or Estate: Perhaps it may be urged, that the Clergyman who celebrates the Marriage, is made guilty of Felony, & liable to be transported for 14 Years: but that is of no Importance in the present Case; for the Statute not extending to Scotland, where the fact was committed, the Clergyman is not liable to be punished.
But if the Statute was penal, in the strictest Sense of the Word, no necessary Consequence is derived from thence, that the Court in its Construction, must adhere to the Letter.
However indulgent & lenient the Expositors of Law have been, in the Interpretation of Penal Statutes; However Motives of Compassion might plead in favor of the Accused? yet such was the Wisdom & Prudence, Such the Attention of our Ancestors to the public Safety, that they have with a stubborn Constancy forborne to indulge Individuals, at the Expence of Justice, when they were convinced, that an ill timed Compassion, would be attended with signal Inconveniences to the Com=munity –
The Commentators on the Civil Law, as well as the Municipal Law of our own Country, speak full to this Point.

Code — Code Lib. 1. Tit 14. 5.
Non dubium est, in Legem committere eum, qui verba Legis, contra Legis nititur voluntatem: nec penas insertas Legibus, evitabit, qui se contra Juris Sententiam, vava Praerogotiva verborum fraudulenter excusat –

Puffendorf... Puffendorf de officio Hominis & Civis. Lib. 1. Cap. 17. § 10.
Potest Lex ad casum, qui in Lege non exprimitur extendi, si constet rationem, quæ in illum casum quadrat, unicam fuisse, quæ Legislatorem moverit.

Giurba Edit fol Lugd. 1634. — Giurba in Decisionibus Regni Siciliæ. Decisio 86. nu. 26. —
In contrahentium facultate esse non debet, Legem circum=venire: et Is in fraudem Legis facit, qui salvis verbis, Sententiam Legis circumvenit.

Heineccius — Heineccius in his Comment in Legem Juliam Papiam Poppæam speaking of the Roman Law, says. "Omnibus Institutionibus in fraudem Legum inventis, Jura obstant."
& the Reports of Cases adjudged at Westminster, support & confirm this Doctrine;

Plowden 82. — Plowden in his Comment on the Case of Partridge & Strange, observes, that Mr. Justice Saunders said, "tho "a Statute gives a Penalty, yet Things that are not within "the Words, shall be taken within the Equity; for the Words

are but the Image of the Law, the life & Soul whereof, rests in the minds of the Expositors.
The Statute of Westm[r] 3. c 2. Quia Emptores Terrarum. doth enacts "That on alienation made by the Tenant, of part of the Tenancy, he shall hold pro' particula illa, secundum Quantitatem Feodi, has been construed of the Quality & Value, & not of the Quantity: the Value & not the Extent of the Ground, being the meaning & Intent of the Law.

Plowden. 203. b — Stradling v Morgan. The Intention of the Lawmakers, is the sure Rule of interpreting a Law; which the Judges must collect, sometimes from the occasion, necessity of enacting it; sometimes from the Words themselves; & sometimes from foreign Circumstances: & the Intention of the Lawmakers, must be taken, according to what is consonant to Reason & Discretion. . . .

Plowden. 248. — D[r] Berkleys Case. What is taken to be within the Intention of an Act, tho, not comprehended within the precise words of it, is equivalent to what is within the express words, & as strong. . . .

Plowden. 353. — Stowel & Zouch. Every Law consists of two Parts; the Words, & the Sense: these two make up the Law: & it is the Office of an Expositor, to put such a Sense upon the Letter, as is consonant, to Equity & right Reason. . .

Hardres. 213. — Vere v Sampson & others. All Law must receive an equitable Construction, whether for or against the Offender: it cannot be accounted a Law, that does not admit of Construction. .
If Equity then, admits of a liberal Construction, which the Authorities cited justify me in asserting; there cannot exist a Case, which has a fairer Claim to that Construction than the present; by doing this, you will ensure Obedience to the Law, & Security to the Minor.
I do not mean, to controvert, the Truth of the Position, laid down by D[r] Calvert, that Contracts, which are valid in the Place where they are executed, shall be binding all over the World; but however true, this may be as a general Rule, it is liable to many Exceptions: Different States, indeed, have, for their mutual Convenience, entered into a tacit Compact, to give Force & Validity to each others Acts: but this reciprocal Civility cannot be supposed, to extend to Contracts, which may be essentially detrimental to the Interests, or derogatory to the Laws of either Country; of which the Sovereign Power is the only Judge; every independent State having an undoubted Right, to pronounce a Contract invalid, either; because, it is defective in Form, or transacted between Persons to whom such particular Agreements are prohibited.

Hence it happens, that in some Countries, the Subject is deemed to carry his personal Disabilities, wherever he goes, whilst in others, they are supposed to cease with his Residence, & that he is no longer amenable to the Law, than whilst he lives under, & enjoys the Protection of it. Hence it may be enacted, by Civil Powers, that Marriages, shall not be contracted, between Persons of great Rank in the State, without the intervening Consent, of Public Authority, the Force of which may amount to this Effect, that all Matches contrary to such Injunction, shall either be declared void, or divested of certain Privileges with which they would be otherwise attended.

Gaston of France & Marg.t Ph of Lorrain: Merlecourt. cop. of Matrimony. 381–

Thus, on a Question proposed by Louis the thirteenth, on the Marriage of Gaston de France, the Kings only Brother to Margaret Princess of Lorrain, (as Mericourt reports, in his Treatise on the Ecclesiastical Laws of France, & in the 81. Section of his Chapter on Matrimony)
The Clergy of France assembled in 1635 declared, that according to the Usage of the Kingdom, approved by the Church, the Princes of the Blood, who had Pretensions to the Royal Succession, could not contract marriage, without the Kings Consent; if they did, that it was Null. In conformity to which Determination the Marriage of the Duke of Guise, was set aside, a few years after. The Particulars of which were, as follows.

Duke of Guise & Comtesse de Bossu nov. 1641 ....

Henry de Lorrain the 2.d Duke of Guise, 16 of Nov.r 1641 married at Bruxels, Honoré de Berghes Comtesse de Bossut, after observing all the Formalities, prescribed by the Laws of that Country; the Validity of the Marriage was brought in question at Rome before the Court of the Rota, & Judgement given, by Default, in favor of the Marriage, 5 of March 1666. In an Appeal of Abuse, to the Parl.t of Paris, that Court after fifteen Hearings, declared it improperly transacted & null: the sole Reason of annulling it, was, its having been celebrated, out of the Kingdom, without the Kings Permission.

What the Clergy had declard to be binding on the Royal Family, was soon after extended to all the Kings Subjects, by the Edict of Aug.t 1669. which being found inadequate to the End proposed, the Declaration of July 16: 1685. has added Penalties against such Parents, Tutors, & Curators, who shall approve those Marriages: It prohibits all Persons, of every Rank, for the future, from consenting to the Marriage, of their Children, ^Pupils, ph a foreign Country without the Kings express Consent, under Pain of the Men being sent to the Galleys for Life, & perpetual Exile of the Women, with Confiscation of Effects.

Edict of 1669 ..
Declaration of 1685.

This gave rise to a very remarkable Suite in the Beginning of this Century.

Charpentiers Case.

A French Catholic named Charpentier, a major, resident at London, married a Catholic minor, living also at London, according to the Rites of the English Church. He himself brought an Appeal, as of abuse, against his own Act, & unfavorable

x Qu: How happend it, that the Cause was heard before the Rota in the first Instance, the Concordat having taken Place before, between France & the See of Rome? ....

as this Transaction appeared, on his Side, the Grande Chambre by its Arrest of 16th of march 1725 annulld the Marriage, Attending to the manner the fact was done, & not to the Person who did it.

In Japan, we are told, the Prince chuseth Wives for his Nobles. In some States marriage contracted between a Subject & a Foreigner; between a noble Person, & one of low Birth are declared void.

The Laws of England, ever attentive to the preservation of its Commercial Interests, have allowed its Subjects, (in whatever part of the World they happen to be,) the privilege to bequeath, their personal Estates by Will, without prescribing any particular mode of doing it: whilst, on the other hand, the Testamentary disposition of real Estate, is attended with several Restrictions; the Testator must be 21; the Will must be in Writing, executed in the presence of, & attested by 3 Witnesses.

Other Countries have fixed different Periods, at which the power of Alienation shall commence;

In Frizeland, as Dr Wynne observed, a Person may make a Will at 18. in other parts of the United Provinces, not till 20. If an Englishman of 20, resident in Holland, should by Will dispose of his real Estates in England, the Heir at Law, would have an undoubted right, to take possession, & consider it as the Act of a Person, who had no legal Capacity to do it. It is one of those personal Statutes, which according to the opinion of many Writers, are personally binding on the Party, & which as Voet, in his Commentary on the Pandect says, "Territorium statuentis egredi potest, sic ut in loco domicilii, qualitate ac habilitate quadam praeditus aut privatus, per Statutum personale, ubique locorum, pro tali habendus sibi adeoq quoties de personae qualitate quaritur, ad Actus Civiles; in universum ejus determinandi potestas, est penes solum domicilii Judicem; qui sic de persona sibi subjecta, ex Jure domicilii statuere potuit, ut quod edixerit, judicaverit, ordinaverit, de personarum Jure, ubicunque obtineat, quocunque sese Persona contulerit."

Voet. Lib. I. Tit. 4.

Another Exception to this general Rule, is, when the Operation of the Contract, is to take place in a different Country, from that, where it is made, & into which, the contracting Parties retired, with no other view, than to elude the force of their domestic Institutions: a Doctrine, which it is the Interest of every State, to disapprove & condemn; & which, if once admitted into practice, would be utterly subversive of all Law.

The particular Constitution of the United Provinces, (consisting of several Members, governd, by their own distinct Laws) has made them more immediately concernd, in the discussion of this Question; & the general Opinion of those, who have wrote upon the Subject, is, that

Practices of that nature, should always be discouraged, as tending to weaken, & destroy, the Bonds of civil Government: Amongst these, It has been more particularly considered by Huber, in his Chapter de conflictu Legum diversarum, in diversis Imperiis; the Result of whose Deliberation, is, that the Jus Gentium has laid no obligation, on the Magistrates of one Country, to ratify the Acts of their Subjects, done in another, into which they have gone, merely to evade the Laws of their own State: the Place where the Act is to be carried into Execution & not where it commenced, being more particularly the Object to be regarded: & upon this principle, it has been determined, that where a Sum of Money, is lent in one Country, & made payable in another, the Creditor is entitled, to the Legal Interest of that Country where he is to receive his Principal, unless it shall have been otherwise agreed between the Parties.

Pralectionum Lib. 1. Tit 3 . . . .

And to this purpose Huber argues, when speaking of Marriage, he says

" Locus matrimonii contracti, non tam is est, ubi contractu
" nuptiarum initus est, quam in quo contrahentes matri-
" = monium exercere voluerunt; ut omni die fit, Homines
" in Frisia indigenas, aut Incolas, ducen. uxores in
" Hollandia, quas inde statim in Frisiam deducunt,
" idque si in ipso Contractu ineundo propositum
" habeant, non oritur Communio Bonorum.

Of the same Sentiments is Voet who in his (Treatise de Statutis) Comment on the Pandects, observes

Lib. 1. Tit. 4. § 14. . .

" Si appareret aliquem, ut evitaret molestiones sui domicilii
" solemnitates, in fraudem Statuti, alio profectum esse,
" rebus expediendi gratia, ac mox reversum; vix est, ut
" ad Bona, in loco domicilii sita, sese extenderet effectus;
" cum indignus videatur, ullo beneficio & comitate,
" qui domicilii jura, consulto, ac fraudulenter, spreverit,
" circumvenit, elusit.

But we are told, the Reasoning of Huber, ought to have no weight, being only the Ideas of a Dutch Commentator, which do not appear to have been adopted, by the Courts of Justice in that Country. Dr Calvert admits, the Importance, of such Decisions, if any can be produced: a Difficulty, which there must be immediately removed, by repeating the Substance of what he cited from Brower who in his Treatise de Jure Connubiorum, Lib. 2. c 24. says

× Principal Judge at Leyden

That, where Children, living with their Parents, obtain Marriage, by assuming to themselves a false name, and pretending their Parents Death, & their own Majority; or, by repairing into another Province for that purpose, such marriages are null, as well on account of the want

of Consent, as their Contempt of the Law; and have been frequently set aside by the Court of Holland: who says the same Author, paid so much reverence to the parental authority in regard to Marriage

" Ut Scortatio habeatur, spretis parentibus facta Conjunctio
" injusta Uxor, liberi illegitimi. art. 13. Polit: Hollandiæ Constit.
art: 10. Zealandiæ . .

Lib. 1. c. 11. § 4. . . .

Lib. 3. Disp. 18. dub. 29. fol. 243. . . . . }

The Commentator on Sanchez de matrimonio, says,

Si Incolæ loconum, in quibus Decretum Tridentini obligat, in fraudem ejusdem, adirent ea loca, ubi non obligat, ut ibi possent libere, absque Parocho, & Testibus, matrimonio copulari, invalidum erit matrimonium, quia fraus nemini patrocinari debet . . .

Decision. 124. . .

Riccius in his Decisions of the Archiepiscopal Court of Naples, has this Case.

Edictum Curiæ Archiepiscopalis, prohibens Clericis, asportationem armorum, an liget Clericum, extra Diœcesim, propefinem, ad illius fraudem?

Clericus Neapolitanus, captus fuit cum armis, extra Gryptam Suburbii Plagæ, qui locus est, de Diœcesi, Ordinarii Pulcolanum, & in Confinio Neapolis: cum dicta armorum asportatio, quam fecerat prædictus Clericus, in prædicto loco, præsumi debeat facta, ad finem evitandi tantum panam statutam contra facientibus, quod notorie demonstrabatur ex loci vicinitate.

The same Author observes

Si Statutum disponit, quod nulla mulier, habens virum possit se obligare in judicio, vel extra in Bonis, vel in persona, sine consensu ejusdem viri, tunc Statutum non se extendit ad mulierem, se obligantem extra Territorium: Secus tamen, si appareret, in fraudem Statuti exiisse Territorium; quia erit nulla obligatio, perinde ac si facta esset, in Civitate: contrahi enim dicitur in fraudem, quando quis contrahit extra Territorium, & statim revertitur.

Any Evasion of a Law, at Rome, was considerd in the same Light, as an absolute Breach.

Lib. 1. Tit: 3. l. 29 Dig. de Legibus }

In fraudem Legis facit, qui salvis verbis Legis, Sententiam ejus circumvenit.

Lib. 1. Tit. 2. § 3. .

Schultingius, in his Comments on the Institutes of Caius notes the following Particular relative to the Evasion of the Caninian Law.

The Consul Junius Caninius, in order to restrain the Ostentation of the Romans, procured a Law, that no man should by will, manumise more than a certain number of Slaves, in proportion to the whole Corps, he maintained, the reason which induced Caninius to make it, was, his apprehensions, that the State might be corrupted, by the great Influx of this Species of Men, whom the Romans

at their deaths, manumized without distinction: In order to elude the force of this Law, It was the common practice for a Man, when he found himself dyeing, or past recovery, to take no notice of them, in his Will. but, "scribere Epistolam qua totam familiam manumittit:" upon this a Question arose, whether all obtaind their freedom? the Decision was, "Cum Titius Epistolam hanc, legis fraudandæ causa conscripserit, Servis ultra legitimum numerum, nihilo magis libertatem competere; sed iis qui primo loco scripti sunt, usque ad numerum, lege definitum, libertate donatis, cætera in Servitute manere."

Comment in Lib. 1. Tit. 10. Institut: de nuptiis

Vinnius (who was a Dutch Professor) says, "apud nos, lege cautum est, ut qui matrimonium contrahere volunt, adeant Civitatis suæ, aut loci, in quo domicilium habent, magistratum, aut Ecclesiæ ministros, atque ab iis petant, ut hic Contractus trinundino in Ecclesia, aut proclamatio promulgetur, aliter matrimonia contracta, pro injustis, et nullis habentur....."

Art. 13. Polit: Ord.

The Laws of France have been so particularly attentive to preserve the Respect from Children to Parents, that they have declared the Marriages celebrated without their Consent, Rapes by Seduction, & as such, null & void: & upon a Presumption, that such Marriages are the Consequences of Seduction, the Ordonnances of the Kingdom, have considered the Seducers, as Infractors of the Public Peace, & therefore punished them with Death — and tho, says Hericourt, sur les loix Ecclesiastiques de France, they have not annulled those, contracted by Persons

Cap. du mariage Sec. 75

between 25 & 30, for want of such Consent, yet the Edict of 1556, allows the Parents, to disinherit, & exclude them, from the Succession for their Irreverance.

The Case of the young Man of Lyons, married to a Woman of the Diocese of Liege, already cited from Hericourt, is strongly in point

I will trouble the Court with an Instance from the Reports of Mons^r Cochin, which was brought before the Grand Chambre by Appeal 9 June 1705 wherein Dame Louise Françoise Sampson was Appellant, & Charles calling himself de Sampson de Milon was Respondent —

Vol 2. Cause 11 —

James Joseph Sampson de Milon, of the Province of Maine being garrisond at Dieuth, married there Marie Anne le Grand, by whom he had the Respondent, whose Legitimacy was disputed, upon the Ground, that the Marriage was null for want of the presence of the Pastor of the Parish, where the father was domiciled.

Cochin argued, that every man has a Domicil by Birth, to which he belongs, after his Majority, until he has exchanged it voluntarily for another, where he takes up his abode, with a determined resolution of remaining there, & for want of which, the Domicil which belongd to him, at his Birth, continues to his death.

Thus the Parties who made the Contract at Dieuth, had no Power of contracting, beyond what the Laws of their

Country allowed — It is a certain maxim established by the Laws of Church & State, that the presence of the Proper Pastor, is essential to the Validity of Marriage, & the Curé of Dieuth could not be considered, as the Proper Pastor of James Joseph de Sampson of the Province of Maine, who was accidentally garrisond there a few Months. Itself by its Arrets of 16 July 1711. & 2 Dec^r 1715. declared the Marriage fraudulent & null.

another Instance, is that of Symphorien de Serre, a French Soldier, who being a Prisoner of War, in Holland, married Elizabeth de la Prairie, at Ostend, according to the Rites, and Ceremonies of that Country. On his return to France, his Mother brought an Appeal of Abuse, & availd herself of the want of her Consent, of the presence of the proper Curate, & the Kings permission to marry, out of the Kingdom: And the Marriage was annulld by the Parl^t Arret of 16 July 1711.

Again, by an Arret of 1 Sept^r 1728 of the Tournelle of the Parliament of Paris, a Marriage between Majors in a foreign Country, because celebrated by a Person, who was not the Curate, where the Parties were domiciled, was set aside.

The Parliament of Paris in Schrimshire's Case determind the Marriage to be void, considering it as a Rape by Seduction.

Another Exception to this Rule, is, where the Action is contra Bonos mores, as of a person married within the prohibited Degrees, in a Country where it is permitted; for tho, a Marriage of that Sort, might be valid in Persia it would on account of the Turpitude, be here set aside.

A Question was asked, How long an Englishman must reside in Scotland, to enable him to marry there?

The Time, I apprehend, is immaterial, if the Intent of going there was not fraudulent, & to commit an Infraction of the Laws of England — The Party who calls the Legality of the Act in question, must prove the Fraud, if he does not, the Act must remain in full Force.

The Opinions of L^d Northington in Bedford & Verney & of Sir Tho^s Clarke in Brooke & Oliver, have been urged, to induce your Lps to decree in favor of this Marriage: Allow me to observe, that the Question of the Legality of Marriage, was in neither of those Cases directly before the Court: & however respectable, their Opinions may be, they are opposed, to the Sentiments of other very great Authorities, equally entitled to the Attention of the Court. In Butler & Dolbens Case L^d Hardwick, would not decide on the marriage, but sent

It to be tried in its proper Jurisdiction, the Spiritual Court, where the Parties coming of Age, the Question was never decided. In Robinson & Bland D. Mansfield called it a very doubtfull Question. Under these Circumstances, I trust your Lps, will consider it, with all the Attention, its importance demands.

I will now, for Arguments sake admit the Truth of the Position, that the Laws of the Country, where the Contract was entered into, shall be the Guide to determine its Validity: but the Right of the Contracting Parties, can be derived from no other Source than a personal Subjection to the Institutions, & a tacit Obligation, not to disturb the Oeconomy of the Laws of that Country. It is then necessary to enquire, what Regulations have been made, by the Laws of Scotland, in respect to Marriage, & how far they have been complied with in the Case before you?

By an act of Parliament of Car. 2. Parl.t 1. Sess. 1. Cap. 34...
" His Majesty statutes & ordains, that whatsoever Persons
" shall marry in a Clandestine, & inorderly way, shall be
" imprisoned for three Months, & shall pay, each Nobleman
" £1000 Scots, each Baron & landed Gentleman 1000 Merks,
" each Gentleman & Burgess 500, & other Gentleman 100 Merks.
" His Majesty prohibits & discharges, all Men & Women, having
" both their ordinar Residence within this Kingdom to get
" Marriage to themselves, with others within the Kingdom of
" England, or Ireland, without Proclamation of Banns
" here, in Scotland, & against the Order & Constitution of this
Church & Kingdom (under divers Pains & Penalties)

" By 1 Wm & Mary Sess 8. cap. 12. Persons clandestinely married, are
" obliged, when required, to declare the names of the Celebrator, &
" Witnesses, under the pains of £2000 the Nobleman, the landed
" Gentleman 2000 Merks, any other Gentleman or Burgess 1500,
" any other 200 Merks; and to be imprisond till they declare, or
" pay: the Celebrator is punishable, not only with Banishment,
" but by such pecunial, or Corporal Pains, as the Counsil shall
" think fit, & the Witnesses are made liable in 100£.....

By 10 Anne. cap. 7. §6. It is enacted, "That no Episcopal
" Minister, within that part of the United Kingdom, called
" Scotland, presume to marry any Persons, but those, whose
" Banns have been duly publishd, three several Lords days,
" in the Episcopal Congregations, which the two Parties frequent, &
" in the Churches to which they belong, as Parishioners, by virtue
" of their Residence. N.B. under the Pains inflicted by the Laws of
Scotland, in Cases of Clandestine marriages—

The Account given by the Parties, & the Certificate of the Celebrator are sufficient Proofs, that no part of the Law of Scotland, has been adhered to; the marriage being celebrated, in a private House, between minors, belonging to no Episcopal Congregation, without Consent of Parents, & without Banns, on account of which Defects, both the Celebrator, & the Parties, are liable to the Penalties of the Laws...

But I would ask, in what manner, the Penalties can be levied, in the present Case, on the Offenders, who are Natives of, & domiciled in England? The Acts of Parl.t & Laws of Scotland, have no force beyond their Border; the Offenders have no Moveables in Scotland which can be impounded for the Penalties, & their Persons are out of the reach of Justice, before the breach of the Law is known..

Both Countries, sensible of the Inconvenience of Clandestine marriages, have laid them, under various Restraints: but if the Doctrine contended for by the Defendant, was once established, the Laws of both would be equally useless; for by pleading, the Place where the Act was done, to exempt him from the one, & the Domicile in Bar to the other...

It has been insisted, during the course of the Argument, that the Statute on which this Suite is brought, is restrictive of an Act, which, the Laws of Nature, & Nations, & the municipal Laws of our own Country, had always considered, as necessary to remain free; & that therefore, the Construction should be as limited, as possible.

But, I believe the History of former Times, & the Sentiments of those, who have wrote professedly on the Subject, will convince your Lps, how slight the Foundation is, on which this Principle is built.

B.6. ch. 2. " The Right of Parents over their Children says Puffendorf
" ariseth from that Duty, which Nature lays on them, to
" take care of their Offspring; which cannot be duly exercised,
" unless the Parents have power, to direct & govern the
" actions of the Child, in order to procure his Benefit and
" Safety, which he through want of Judgement, is incapable
" of apprehending & providing for.

fol. 55. 56. And Vinnius in his Comment on the Institutes says.
" Civilis et Naturalis Ratio suadet, ut Ingenus Parentis Con-
" tractum matrimonii præcedere debet..

How the Divine Law stood in this particular, may be learnt from several Parts of Scripture

Exodus Chap: 22. Verses. 16. 17. "If a man entice a maid that
" is not betrothed, & lie with her, he shall surely endow her
" to be his Wife — If her Father utterly refuses to give her unto
" him, he shall pay Money according to the Dowery of Virgins....

Deuteronomy. Chap. 7. Verse. 3. Speaking of the Idolatrous Nations,
" Neither shalt thou make marriage with them; thy Daughter
" thou shalt not give unto his Son, nor his Daughter, shalt
" thou take unto thy Son—

Numbers Chap. 30. Verses. 3. 4. 5. "If a Woman vow a Vow unto
" the Lord, being in her Fathers House, in her Youth, & her father
" hear her Vow, & hold his Peace at her, then all her Vows shall
" stand; but if he disallow her, in the day, that he heareth,
" not any of her Vows shall stand..

fol 311..... Taylor, in his Elements of Civil Law, says. "So much Respect
" was paid to the Patria Potestas, by the Roman Law, that the

" Want of the father's Consent, was an Impediment to
" the Loyalty of Marriage, which no subsequent Concurrence
" could take off.

Digest. Lib. 23. Tit 2. l. 2. "Nuptia consistere non possunt,
" nisi consentiant omnes, id est, qui coëunt, quorumque in
" potestate sunt.

By the Jewish Law, it was one part of the father's Power, to cancel, & to make void, the Vows of his Son and Daughter—

Nor was this Doctrine of paying a due Reverence to Parents, confined to the more polite Nations of Antiquity; but adopted also by those, who were styled Barbarous,

Cap. 18. . . . . amongst whom, Tacitus says of the Germans, "Singulis
" uxoribus contenti sunt, exceptis admodum paucis, qui
" non Libidine, sed ob nobilitatem, plurimis nuptiis ambi-
" untur: Dotem uxori Maritus offert; Intersunt Parentes
" et Propinqui, ac munera probant.

In Japan Marriages are entirely directed by the Parents, or if they are dead, by the next Relations.

In Peru under the Government of the antient Incas, we are

B. 6. C. 36. . told by Garcilasso de la Vega, That all Matrimony engaged in without the Parents Approbation, was declard null, & the Children illegitimate.

The Court has already been informd, that the Roman Law, with respect to Marriage, was adopted by the first Christian Emperors; That the same System was received into the Body of the Antient Canon Law, as the Decretal Epistle of Anastius, abundantly testifies; & if, at the distance of several Centuries, the contrary Doctrine was laid down

A° 1215 . . . . by the Council of Lateran, and confirmed by that of
A° 1547 . . . . Trent; yet it is clear, how much these Clandestine Marriages were the Object of their Attention, by the various Censures and Penalties, inflicted on the Parties concernd.

The Provincial Constitutions, in imitation of the Decretals, enjoind the publication of Banns, under the Pain of three years Suspension, to the Person, who celebrates the Marriage, and punishing the Parties at the Discretion of the Ordinary.

The Canons of 1603 concurred in the same design, by laying additional Restrictions on the Minister, in regard to the Time & Place of Marriage; & by enjoining Minors, to have the Consent of the Parent, or Guardian, first to be signified in Person, or by sufficient Testimony: by disabling the Minor from contracting

Provincial Canons. 62. 100. 101. 102 . . . . till 21 — by denying Licences, without Security given, that the Law shall be punctually complied with. Nor have the Provention of Clandestine Marriages been less the Object of the Statute, than the Canon Law.

6 & 7 W. M. c. 6. 352. prohibited the Celebration of Marriages, without Banns or Licence, under 100 penalty against the Minister, for the first Offence, & of 3 Years Suspension for the Second. . . .

7 & 8 W. 3. c. 35. 84. laid a penalty of 10£ on the Man married, and 5£ on the Clerk assisting at such Marriage without Banns or Licence.

10 Anne c. 19. continued the penalty of 100£ on the Minister, & if he was a Prisoner, in any other than the County Gaol, he was to be sent

to the County Gaol, on Conviction of the Offence; & the Gaoler knowingly permitting such Marriage forfeits also 100£. Hence it is clear, that these Marriages, have been always prohibited in England; that they have at various times, been laid under various Restrictions; & that these Restrictions have been found, inadequate to the End proposed, the Statute of 26 Geo. 2. c. 33. was made, to remedy the Defects of the former Laws, by annulling all Marriages, which were not celebrated, according to the Directions of that Act. . . .

I am very sorry, my Lords, my Duty to my Client has obliged me to take up so much of your Time, in offering to your Consideration, so many Cases, and Opinions: I have endeavourd to avoid the Repetition of those produced before; & out of the numbers that occurred to me, to select those only, of allowd Authority, who have wrote on the Law of Nations, & the solemn determination of Judges: I will now take the Liberty of saying, that if on the one hand, your Determination in favor of the Pltf, is likely to be productive of Inconveniences, so many rash & inconsiderate young People. So, on the other, It will be attended with fatal Consequences to the Public, if you should allow the Evasion of the Statute, to pass with Impunity; the Justification of which, even aggravates the Crime; by breaking the Laws of another Country: and, as if the Waters of Tweed, had the same Properties, with those of Lethe, that twice crossing them, will ensure Oblivion to the Delinquents, for their Contempt, and Infraction of the Laws of both Parts of the Kingdom.

It is neither our Province to argue, nor your Lps to consider, the Nature of the Law itself, which now, in one Instance awaits your Decision:

It is of no Consequence, what our private Opinions may be in abstract Reasoning upon it: whether it is, as the Defts thinks, an Infringement on the natural Rights & Liberties of Mankind; repugnant to the first great Command of God and Nature to his Creatures, "Be fruitfull & multiply & replenish the Earth!" or, whether in a great commercial Nation, it is a mere absurd, aristocratical Law, destructive of Equality, the great Principle of Trade & Liberty; & whilst it has for its object, the Aggrandizement of a few great Families, forgets the Step it puts to Population:

These Considerations, I say, my Lords, have nothing to do with the present Question.

You have before you, a positive Law, to guide your Judgement, which daily Experience proves, to have been most shamefully eluded, and set at defiance.

In the System of Ethics, which I learnt, I was taught to reverence, & obey, & to endeavour to carry into Execution every positive Law of the Community, in which I lived, tho, in my Conscience, I thought it hard, cruel & unjust: and whoever will controvert this, must set up the Judgement of Individuals, in opposition to the Laws of their Country, which must be attended with Confusion.

If in the Opinions of many, the Marriage Act stands in this Predicament, yet, still, it is an Act of Parliament, not carried through the two Houses, unnoticed & unattended. It is fresh in our Memories, with what Wit, Abilities, and Judgement, it was attackd; with what Time & Attendance every Clause of it, was considerd; & with what Perseverance it was carried into a Law.

As such, it ought to be obeyd:

And if Compassion on one Side, pleads for the deluded Transgressors of it, hurried away by Youth & Passion; the Voice of Justice, on the other, must be heard for those, who have a Right to Legal Successions, where Law has rendered illegitimate, the Offspring of such Marriages, not rightly & duely solemnized.

Besides, even Compassion may be misled: & the true Object be, the annulling every such Marriage.

Art & interested Design, often make a Prey of unguarded Youth, Innocence, & Fortune, & the truest Compassion would be, to set them free. But, put Cases how you will, the Knowledge of the Guilt, must attend the Breach of the Law, by the very manner of committing it. The Breach of an Act of Parliament, deserves Punishment, & therefore from your Lps Decree, we flatter ourselves, this Marriage, will be set aside. ...

Lib. 1. Tit. 3. § 4. de conflictu legum

In Holland says Huber, a will made before a Notary, & 2 Witnesses, is good; In Zryeland it is not good without 7 Witnesses; The Hollander make his Will according to the Laws of Holland, & thereby bequeaths Goods in Zryeland; Huber thinks the Judges of Zryeland must, in that Case, be governd by the Laws of Holland. Sed Quare

§ 6. Contracts entered into in one Country, shall bind in another, "nisi ad aliam Remp. evidens inde Periculum, aut Incommodum resultare queat."

§ 11. "Effecta Contractuum certo loco initorum, pro Jure illius "loci, alibi quoque observantur; si nullum inde Civibus alterius "crescentis præjudicium, in Jure sibi quæsito; ad quod Potestas "alterius loci non tenetur, neque potest extendere. Jus diversi "Territorii — Si Jus loci in alio Imperio pugnet, cum Jure "nostræ Civitatis, in qua Contractus etiam initus est, con- "fligens cum eo Contractu, qui alibi celebratus fuit, magis "est ut Jus nostrum, quam Jus alienum servemus ...

§ 12 Qualitates personales certo loco alicui Jure impressas, ubique circumferri, & personam comitari, cum hoc effectu, ut ubivis locorum, eo Jure, quo tales Personæ alibi gaudent, vel

" subjecti sunt, fruantur & subjiciantur.
" In quibusdam Provinciis, qui viginti annos excesserè, pro majoribus habentur, & possunt alienare bona immobilia aliaque Jura Minorum exercere, in illis etiam locis, ubi ante 25 annos, nemo censetur esse major: quia legibus ubique judicabis aliarum Civitatum, in suos subjectos, quolibet alia potestates, comiter effectum tribuunt, qualenus suo, suorumque Juri quæsito, non præjudicetur.

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pl. lib. 2. Tit. 3. p. 146. Code Frederique. If a Person has different Domiciles, Banns are to be published, in the different Places of the Parties Residence.

Ibid. § 29. p. 145 No Priest of the Roman Catholic Religion, shall without our permission, marry any of our Subjects, if they do, such Marriage, shall be null, tho, accompanied by Carnal Copulation; the Children born of such Marriage, shall be illegitimate, the Priests imprisoned, & the Parties, severely fined.

Ibid. p. 147 A marriage is void from the Beginning, for want of the Consent of Parents, Tutors, & Curators ...

[redacted] Dr Calvert. My Lords, I lament extremely the Loss of Mr Solicitor Generals Assistance, in this very important Question; for want of which, this Case must come naked & unadorned before you; Much Pains has been taken, on the other Side, to conciliate the favor of the Court; a great variety of Cases, have been cited; which, are so numerous, that I fear it will not be in my Power to answer them; Whatever may have induced the Legislature, to frame the Regulation in question, it must be admitted, to be a severe Law, & relative to an act, which of all others, ought most to be encouraged; Matrimonium enim est Causa favorabilis: The Question is, whether the present Marriage, is within the Act; the Words are express; the Statute is penal, & restrictive, & as such ought to be construed literally & strictly; In the case of Reniger, Fogasa. Plowden. p. 17. "It is said to be a Principle of the Common Law, that penal "Statutes shall be taken strictly, & not extended by Equity, to "their prejudice, against whom the Punishment is inflicted.

Plowd. p. 86 Partridge v Strange & Croker, all the Judges agreed, that it cannot " be taken by Equity, for it is a penal Statute, & altho, it is made " in avoidance of Perjury, & Oppression, yet it shall not be extended " by Equity.

Keilway 96 b Every Statute which is penal, & which is in derogation of the " Common Law, shall be taken strictly; & a Statute penal is " such, as gives a man corporal Punishment, as Imprison- " ment, or Forfeiture of Money, & those Statutes, which give " Remedy, that was not by the Common Law, shall be taken " with Equity.

But it is said, Laws should be construed according to the Intent of the Legislators, & Cases were cited, where such Constructions had taken Places; the Principal Case relied on Plowden. p. 439 seems to have been that of Eyston & Studeley, which was

a Case of Jointure, where, tho, the Woman was within the restraining words, yet it was shortend by Interpretation; there are many Instances of restraining Acts being shortend:

Coke p^t 3. p. 7... In Heydins Case, four Things are said to be considered in the Construction of Statutes 1. What was the Law? 2. What Mischief is to be provided against? 3. What Remedy is appointed? 4. The true Reason of the Remedy.

We agree that the Judges are to determine according to the Intent of the Makers of the Act.

The Gentlemen undertook to shew, that the present Act, was no Innovation of the Law, but an Affirmance & Continuance of it, or a Republication of a former Law. Their Conclusion surpriged me, when I consider, this Statute has first introduced a Nullity of Marriage. Clandestine Marriages were declared good at the Beginning of the 13th Century, at the Compilation of the Decretals; & so continued till the Council of Trent in 1563, which declared them void unless celebrated in the presence of the Parish Priest, or of one of equal Authority, & of 2 or 3 Witnesses; but there is no pretence to say the Decrees of that Council was received here.

Lib 2. c 39... The Quotation from Bracton, de Locis constitutionem, that it must be ad Ostium Ecclesiæ, is against them. It would be absurd to say, Dower could not attend Clandestine Marriages, if they were not good

Mr Justice Gould said, If Dower was claimed, & the Heir pleaded ne unques accouplee &c. it was sent to the Bishop to certify.

276... Stratford ab: 1333.... Lyndwood in verb. Clandestina, says, in all these Cases the Marriages are good. There is no subsequent Law to make them void. Does not every body see how great a difference there is between Pains, Penalties & annulling the Marriage & between the Parties being punish'd & the Act being declared void: We did not mean to find fault with the Act, the Intent of which, certainly was, to prevent Clandestine Marriages; the Act in the annulling Clause states, that, "Whereas Marriages are celebrated in Prisons" one Intention

^ of the Clause... was not to lay Scotland, under the same Restrictions, as England; They say the Clause was calculated only to prevent it becoming the internal Policy of Scotland; but it must mean more, from its being placed amongst the other Exceptions; The two Policies have been considered; there are many Scottish Acts, which punish Clandestine Marriages, there are many likewise in England; If the Act lays a Restraint, the Subject in question, must be shewn to be within that Restraint; there is no better way to interpret a doubtfull Statute, than by considering the other Parts, to discover the Spirit of it; It is enough for us, if the Gentlemen have not shewn, an Intent, in the Legislature to take away the Privileges of Marriages so celebrated in Scotland; the Legislature, aware, of what Consequence Declaring them void, might be to the Descendants of such Marriages at a remote period, provided Registers, to preserve Evidence of Marriages, & to make the Proof more certain & easy: In these Registers, it will appear wh^n they were celebrated

By Licence or Banns; if by the former, whether by the Consent of Parents as the Statute says no Inquiry shall be made into the fact of Residence; will your Lps suffer a constructive Nullity to take Place? If the Statute has not provided for it, will you declare them void? there are many Instances of evading Laws here; would such Evasion be construed to bring the Party within the Law; they have been guilty of no mala fides; they went openly, not under false Names or under any pretence of a Consent, which they had not obtained: Is this the first Statute, where the Provisoes have not answered the Ends proposed: it may be a Casus omissus, which Courts of Justice are not bound to supply; where the Law is defective, a new Statute may be made to amend & explain it:

19 Geo 2. c 13... By the Irish Act of Parl^t Protestants & Papists cannot marry suppose they come over to England to avoid the force of the Irish Law, would their Marriage be void? I think not, at least there has been no Determination on that Head; This is no Illustration of the Case in Point, (tho, brought for that purpose) it is in fact the same Case, so that no Decision being produced the Authority remains in equilibrio. The Case may be illustrated by arguing from a stronger.. The Collision of Laws does

If a man commit a Robbery in France, & fly to England, there is no Law in this Country to try him. If two Englishmen fight in France, & one of them is killed, the other cant be tried here, unless by the E. Marshal, as is laid down by Lord Coke.

If the Question was open, as to what the Effect of going into another Country, would be,

The Contract is not an universal, but a general Rule.

I dont call Marriage, from the nature of the Contract a divine Contract; but from its Extent, its moral Dubies &c I dont deny it to be a civil Contract.

What can be more absurd than a Collision of Rights, a Confusion of Dubies, to be man & wife in Scotland, to be Fornicators in England.

Suppose, said the Att^y Gen^l Money lost at Play abroad; I say the Case supposed, is not similar, but if the Law limited the Sum to be playd for, & there was a Proviso that the Law should not extend to Cornwall, Money lost there by 2 Berkshiremen, beyond the Sum specified would be recoverable, if the Laws of Cornwall allowed the Inhabitants to play for so considerable a Sum: as to Bargains made abroad, between two Englishmen about Stockjobbing, they would not be good, because

Referential to England, under which Law alone they could claim the Cases from Herricourt & Cochin in respect to the Ecclesiastical Laws of France, are to be so determined, because the French Lawyers have laid it down, that the Personal Qualities follow the Person every where; a Minor in France being considered according to the Genius of their Laws, as a Minor every where — I did not quote the Case of Scrimshire, as in the principal Case, similar, but to establish a particular Point. It goes to shew, we do not adopt the French Law, as to personal Qualities, Abilities, & Disabilities following every where; for then Scrimshire's Marriage would have been good here. all the Difficulties of proving a Scotch Marriage resolve only into its being a blandestine Marriage, & the Objections are common to that with all others. The Cases I cited, are, at least, the Opinion of Great Men in our Law; if the facts are ascertained, if they are confessed it is the same Thing, there is no Reason for producing Evidence;

It was found
that so late as last Week, Doubts have been made whether Marriages could be solemnized in St Pauls Cathedral or not —

Brooke & Oliver. 3 Nov. 1759. came on, upon a Petition only, without any Evidence being examined; it is very improbable the Judge would pronounce the Lady a Fornicator, when She came only for her Fortune.....

Mr Bearcroft... Instead of the Construction of an English Statute, I have heard a great deal of foreign Law — With respect to Monies borrowed in foreign Countries, we pay that Regard to the Laws of such Country, as by giving Credence to a Judgement so far, as to allow it to be Evidence of the Debt. Another Reason is the Duration of the different Sexes, & the number of Consequential differences, which are not to be met with in other Contracts; the same Consent can dispolve, as gave birth to other Contracts, but not to this — As to the variation of the Clauses, if the Legislature had this Case in view, they would not have contented themselves with leaving out a word, but would have expresly have provided for the Case.

The Marriage in Scotland declared good & valid.... The Attorney Gen.l might have a right to make free with the Judgement of the Court, but in any other it would have been considerd as a libel.....

cætera desunt....

Q. Has Deft proved this marriage to Plt? ...

Consistory — Bishop. No 187. Chudleigh v Hervey — Holman

3 S. Hil. T. — Drs Collyer. Calvert. Wynne. — Drs Harris. Burrell

Dr Collyer. This is a Suit of Jactitation, brought by Mrs Eliz. Chudleigh agt the Rt Hon.ble Augustus Hervey, for alledging that he was married to her; as long as this Report, was confined to idle Conversation, we thought it beneath us to take notice of it, but when we found it began to gain ground, so as to affect our money Concerns, it became highly necessary to clear ourselves from the Aspersion, by citing Mr Hervey to answer our Complaint before this Court. It is a little extraordinary, if Mr H. thought himself my Clients Husband, that he did not bring a Suit of Restitution of Conjugal Rites, long ago; nothing can be more improbable, than the account, of a Lady marrying, a Person she was so little acquainted with, in so sudden & abrupt a manner; Mr H. has examined a Person, who lived with him as a Servant, at the time the Marriage is laid, who only deposes to his Master dancing with Miss C. at Winchester Race.

Econtra. We plead that the Plt has gone by her own name, & done every thing as a single Woman — viz.t

That she took a lease from Ld Berkley of Ground for building a House in Hill Street in April 1763.....

That She sold that House afterwards to Hugo Meynell Esq.....

..... kept Cash at the Bank .....

..... Took a lease of Grounds at Kensington of Butcher 14 July 1762 .....

..... borrowed £5160. by Mortgage Bond, of John Drummond 22 March 1765 & 18 April 1766 .....

..... borrowed 1900£ of Wm Field by Bond in Trb. 1765....

..... Gave Wm Field a Lre of Attorney to act for her & to take out Admon to her Mother in her name.....

That Field was concernd for her 14 or 15 years, & never believd her married

That ..... Sliteroft designd & conducted her House when Building at Kensington about 11 or 12 years ago (i.e. abt 1757) that he always did & still does apprehend her to be a single Woman, & gave her Receipts for many thousand Pounds as such ...

Exhibits. A. Her Warrant of appointment as a Maid of Honor 1743..

B..... 1751. 17 April. Her Reappointment on y P. of Ws death....

C..... 1753. 14 April. Ld Berkleys Lease to her of Ground in Hill Street

D..... 1757. 3. Trb. Her Admission by y Dean & Chapter of Westm.r as Tenant of the Manor of Knightsbridge....

E..... 1762. 14 July. .... Butchers Lease of Grounds at K.

F..... 1762. ..... Mrs Hammers Letter to her.....

G..... 1763. 11 June, Mrs Hammers Will & Legacy to E.C. —....

H. I... 1765. 1 Nov. ..... Mr Merrils Letters to EC.....

K..... 1767. 1 Jan. Mr Merrils Will & Legacy to EC.....

L..... 1766. 18 April. Mr Drummonds Mortgage Deed.....

M..... 1756. .. Trb... Administration Act to Wm Field as Att.y to EC. daughter of H.C. decd.....

N..... 1766. 5 May. E Cs Presentation of..... Julian to the Living of Hartford Devon, in her maiden name.....

Is it probable Mr Drummond would have lent the Plt a very considerable Sum (£1000) on her Bond, if he had not been convinced She was a single Woman? Is it likely She should marry a man upon an Acquaintance of 3 Days, that the Marriage should be unknown to any, but the Witnesses, who were present at it, & are now dead, or that the Plt & Defts should have consummated at Mr Merrils, without the knowledge of the Servants?

Dr Harris... I am Counsel for the Rt Hon.le Augustus John Hervey, agt whom . . . . 1768. a Citation issued, at the Suit of Eliz: Hervey, calling herself Chudleigh, in a Cause of Jactitation of Mariage

1 S.M.T. 1768. Mr Hervey appeard by his Proctor, & prayd a Libel, which was given & admitted, in answer to which Mr K. confessd the Jactitation.

2 S.M.T. Mr K. gave an Allon of 6 Art: which was admitted without Opposition.

(1) That in 1743 or 1744 he became acquainted with Eliz.th Chudleigh at Winchester Races, & he being then about 17 or 18, a Minor free from any matrimonial Contract, privately made his addresses to her, then also a Minor & a Spinster about 18. That she received his addresses, without the Knowledge of any of her Relations, or Friends, except her Aunt Hanmer, (decd) & that they mutually contracted themselves to each other

(2) That Alt. then being a Lieut: on board the Cornwall lying at Portsmouth, went, in July 1744, to Jn Merrils Esq.r at Lainston, in the parish of Sparshot Hants, where E.C. then on a visit there. with Mrs Hanmer; that the Ship being under Sailing Orders for the West Indies, it was proposed by Alt & Mrs Hanmer, that he should marry E.C. privately, at Mr Merrils House - That on the 4th of August 1744, they were accordingly married, at Mr Mrs House, about 11 at night, by the Rev: Thc: Amis, (decd) in presence of Mrs Hanmer, & Mr Mountenay (decd) according to the Rites of the Church of England.

(3) That they consummated at Mr Mrs by having carnal knowledge of each others Bodies, by laying in the same Bed, naked & alone, but without the Privity of any of Mrs Family & Servants. . . .

(4) That Alt staid 2 or 3 days at Mrs, then returnd to his Ship at Portsmouth, & in Novr foll.g said for the W.I. that on acct of certain Circumstances of his family, the Marriage was agreed to be kept secret, & therefore E.C. agreed to go by her maiden name of Chudleigh - That he did not return to England till 16 of Octr 1746, when he visited E.C. several times, as his Wife. in Conduit Str. where she resided, & received, acknowledged him to be her Husband, but they did not publickly own their Marriage, or cohabit together as Husband & Wife.

(5) Alt. 28 of Nov. 1746 went to Sea again, & returnd to England in Jan.y following - that differences arising between E.C. & Alt on account of her Conduct, they continued to live seperate from each other, & Alt forbore visiting her - In May 1747, Alt said for the Mediterranean, & continued abroad till Dec.r foll.g that Alt never visited her after-

their Seperation, to this Time -

(6) That there is a public voice, fame, Report &c . . . . .

Mrs C. in her Answers denies the Marriage -

We have examined 6 Witnesses on our Plea, who depose to Mr K. coming over to visit E.C. at Lainston at Mr Merrils as pleaded, & to the general Opinion of the Family & others that Plt & Defts were married -

4 S.M.T. Bishop gave an Allon for E.C. of 24 Articles, the Purport whereof is to shew a General Reputation of her being a Single Woman, & her doing various Acts as a single Woman from 1743. to 1768 inclusive; on that Plea She has examined 14 Witnesses, who depose to the Facts laid, but in none of these Transactions Mr K appears to have had the least participation:

you will find in 3 of these Transactions she is only called Spinster, in several, only Eliz: Chudleigh, in others by the middle Term of Mrs Chudleigh - We shall be able to shew that Marriages have been pronounced for, without proof of a Fact of Marriage, on Cohabitation, Consummation, & general Fame -

Dr Collyer The whole account given by the Defts of this Transaction, is so very extraordinary, that I think it is impossible to be credited: She tells you that a Lady of eighteen had so far laid aside all Delicacy, as in the Space of 3 or 4 Days to admit of his Courtship be married to him, & have that marriage consummated, without any Licence, without any Ring or other Necessary Symbol, & without having any body to give her away: will the Court beleive that a Clergyman of Reputation, would without any motive or reward, marry them in the manner stated at 11 at night, & thereby render himself liable to Suspension for 3 Years & Excommunication: Why did not Mr Hervey bring a Cause of Restitution of Conjugal Rites long ago? It is clear the pretended Witnesses, lived long after the pretended marriage: besides what reason was there for Secrecy? Craddock might have been trusted: the Maidservants exam.d by the Defts were not conscious of any Consummation; Suppose he had proved it, unless he had proved the marriage too, it would be of no Importance; the Defts says he was 3 Years in the West Indies, it is singular that no Correspondence, no Letters should appear between a young Couple during that Period; the Court cant expect us to prove certainly & positively they never were married but we can shew it presumptively from the Circumstances above mentioned; We shew a continued series of Acts done by the Plt as a single woman, that she was constantly visited & received as such, & to prove this we have produced several Witnesses, not so mean as those produced by the Defts I hope you will declare he has failed in Proof of the Marriage, & condemn him en Costs . . . . . .

Dr Calvert.... The Deft seems to have had a good deal of Patience, since the Marriage is laid to have been celebrated so long ago, as 1744. the single Question between us, is, whether you have sufficient Evidence to pronounce E.C. & M. Husband & Wife, the two Persons said to be present, are dead, there remains then no positive Evidence of the fact, and therefore it must be considerd as a mere Assertion; Being laid as a Clandestine Marriage, every thing is to be presumed against it, & tho. it may be supported by Circumstances, yet they will not carry the same degree of favor that Solemn Marriages do: I do not mean that Clandestine Marriages must be positively proved at such a distance of Time; but if there is no positive proof, there must be strong, undeniable Circumstances, such as constant Cohabitation & Reputation . . . . . & Birth of Children. In this Case what proof has Mr K. brought to supply that defect: it is pleaded that he was in England 3 Months after the Marriage, but is there any Proof of even a single Visit at that time; It is mere Report, arising from his having danced with & visited her; he might be fond of her, the World swell'd it into a marriage: Mr K. asserted as a fact what he has not proved; a fact unfavorable in itself; we have not stopped here, we have not contented ourselves with shewing his failure of Proof, but that from the Time of his boasting of this Marriage, her general Reputation has been that of a single Woman; we have proved by Witnesses & Exhibits which cant falsify; the Witnesses say they have never known him visit her, or have any Intercourse with her, the Acts she has done as a feme sole, are very strong: Would any Banker or Attorney advance money to a Woman as a feme Sole, who was only suspected of being married, the Land Security is nothing, her Note of Hand would be better than such a Mortgage: would her Mother leave her a Legacy as Miss Chudleigh, if she knew her to be Mr Herveys Wife? Mr Hammer who is said to have been present at the Marriage, could not have directed to, & addressd her, as Mrs Chudleigh, if the fact was true: the Absurdity of a married Woman being a Maid of Honor, is very striking; I think upon the proofs, it is impossible for the Pt to establish this Marriage . . . .

Dr Wynne.... In this Case, the Conscience, the Liberty, & the Property of my Client is deeply affected, by the Imputation of Mr K. whose Proceedings cannot be too strongly impressd on your Mind; the Court & the Law knows how to distinguish between Cases which are favorable & unfavorable; the Law of England, as well as of all other Countries inclines to favor Marriage, not only because of the solemn form & religious Rites, but for the infinitely serious Consequences it is of to Society, that the Contract should be perma-

:nent, & the Duties performed; it is calculated for the Procreation of Children, the Hindrance of Sin, & the advantages of Social Converse; these are the Ends for which it is favord in the Eye of the Law - Is this such a Marriage? a few words muttered over at 11 at night between a Boy & Girl, who are then said to go to bed together, & afterwards they separate, & never cohabit together, or form any Society: but only make polite Visits: what end of Justice in private Life, can a Sentence in favor of such a Marriage answer? could there be any conjugal affection now? can the purpose of a married Life be answerd? he has not even offerd to do his Duty; yet if he could prove the fact, in this Action, you must pronounce for the Marriage: the Legislature have declared such Marriages (as this is laid to have been) mischievous: their Declaration will have an Effect on you; the Secrecy of the Transaction tho, asserted, is not proved; not one of her Relations knew it: so late as this Cause is brought I should have been glad to know, when the Witnesses actually died, for it is rather suspicious, that it should be suffered to prevail so long on Report, without a Suit being instituted to contradict it: I am in the Dark as to the Time - It appears they visited at Mr Merrils, that there was a Chapel, Mr Amis did duty there, but it would from its nature be impossible to prove

The general Rule of Law is, that an actual proof, of the Fact, in ter vivos is necessary, if the Case is capable of Proof. but here it was an utter Impossibility; are there any concomitant Circumstances, previous or subsequent, to supply that Defect? I have the Oath of neither Party, it is a Satisfaction I could have wished: There is nothing leading to the Evidence of the Courtship; so far from any proof of Cohabitation, there is rather the contrary; there is no Proof of the Fact of Marriage, none of subsequent Cohabitation;)

We have produced Witnesses, who saw Mr Mountnay die the Clergymans Death is proved irrefragably. The Proof of non Cohabitation is the same kind of Proof, as when a Marriage is pronounced for on Cohabitation

" Morris & Williams No fact of Marriage was proved this, " asserted, at the Fleet; Cohabitation was proved, therefore " the Marriage was pronounced for, & Admon decreed to " the Widow." Where therefore no Cohabitation is proved, or other foundation appears for the Report, except that some body chuses spargere voces ambiguas, in order to make another Persons life uneasy, the Præsumptio Juris, et de Jure is that no such Marriage was ever celebrated....

D. Farris. There is no Improbability in this Story, Parsons, married Persons, every day, at any time, under Age, He would not wish to confirm an Act of this kind

Conran & Dc.
Mrs C. claimd restitutn. She had been a common woman. alld. Gt. presents at ye mar: were bad. Mr. had her taught to dance, call'd her his wife. Dr. Simpson yong. Predecessor pronounced her married, on Appeal Sr G. Lee said, as she was a comon woman, he pronounced agt the marriage...

If it was not true: it is extraordinary he shd. claim a Lady under such Circumstances; They have stated what are the Ends of Marriage: Why did not Mrs Chudleigh come before? tho. la fact cant be proved, Witnesses may speak to Circumstances of General Reputation &c. Craddoc proves that; they had a Quarrel on his Return; very likely. She did not take the notice of him, which he thought she should; it is not improbable that a young Lady should fall in love with a Man & marry him in 3 Days, & then on an Absence of 2 years grow cooler; the Exhibits only shew, she call'd herself on every Opportunity, Miss Chudleigh; what married Women borrow, must be paid by the Husbands, who suffer continually by their Extravagances.

Dr Burnett...

The Single Question before the Court is, whether we have made out our defensive Plea, that we were married to the Pt. The Law has specified various modes of ascertaining that Point.

Woods Civil Law p. 122.

1. By Witnesses present at the Solemnization
2. By Cohabitation of the Parties.
3. By Public Fame & Reputation.
4. By Confession of the married Persons, & other Circumstances which if they amount to a half Proof, ought to be extended in favor of Marriage.

One of these Species of Proofs is clearly made out, viz Comon Fame, which is deposed to by no less than 6 unexceptionable Witnesses; Tho. we have not proved the fact of marriage, on account of the Death of the Witnesses, alledgd to have been present, yet so many Circumstances previous & subsequent thereto, appear in Evidence, that the Court is sufficiently warranted in Inferring the fact. much Stress has been laid on the Pt having done various Acts under the Character of a single Woman, but nothing can arise from thence to affect us, as we do not appear to have been acquainted with any of those Transactions; Great Surprize has been expressd that we did not bring a cause of Restitution long ago, the Answer is obvious, it was Her Interest to keep it Secret, a want of an affluent Fortune, the Apprehensions of disobliging our Family, & other prudential Reasons operated agt a Discovery. If the Plt knew the fact alledged was untrue why did She delay her Suite of Jactitation so long? Her Honor, her Ease, her Happiness, are not of more Consequence now, than at any other Period, but Dr Collyer says, She brings the Suite now because her Fortune began to be affected by the Report. & that our only view was to oppose herself of that; Surely the[y] has not forgot the various Mortgages, Bonds, & Securities given by the Plt for the Loan of Monies, exhibited amongst her Acts as a single Woman; do these exhibit such Indications of Wealth as would induce the Deft or any other Man to engage in an expensive Law Suite for; If the Deft did not proceed on motives of Honor & Conscience, I shd conceive these Circumstances would

have induced him, to resign his Pretensions to this Lady; But if upon the whole, from the misfortune of the Witnesses being dead, who were present at the Marriage, we are deprived of the Ability to prove our Case to the Satisfaction of the Court, yet I hope you will think us sufficiently founded in our Jactitation.

Judge... Dr Battesworth

Dr Collyer having advised the entry of a Caveat agt any Suite being instituted for Adultery, the Judge said.

This is such a Caveat as I never saw; if it had come before me, I should have declared my Opinion very freely upon it. This is a Suite of Jactitation brought by Mrs C. agt Mr K. wch being confessed, it was unnecessary to examine Witnesses upon it: the Question is wh. Mr K. has made such proof of Marriage as to induce me to pronounce them Man & Wife; the Secrecy of the Transaction, tho. asserted, is not proved not one of the Ladys Relations knew of it: so late as this Cause is brought, I should have been glad to know, when the Witnesses actually died, for it is rather suspicious, that a Report should be suffered to prevail so long, without any Suite being instituted to contradict it; I am in the dark as to the time; It appears the Parties visited at Mr Morris's, that there was a Chapel, & that Mr Amis did Duty there, but it would from its nature be impossible to prove

the general Rule of Law is, that it is necessary to bring actual Proof of the Fact inter vivos, if it is capable thereof but in this Case it is utterly impossible. are there any Circumstances concomitant, previous, or subsequent to supply that Defect, upon which I could pronounce? there hardly could be.

I could have wished to have had the Satisfaction of the oath of either of the Parties; the Answers not being read, I have no right to look into them. there is no Evidence of Courtship, nothing leading to it; So far from proving Cohabitation, the Proof is rather the Contrary; there is no proof of a Fact of Marriage, Cohabitation, or Courtship, I cannot pronounce him to be the Husb. of Mrs C. there are Proofs of her doing Acts as a single Woman there are no Letters to shew a Correspondence: I can have no doubt in pronouncing, that Mr Kervey has failed in Proof of his Allon, enjoin him perpetual Silence for the future & condemn him in Costs (Bill amounting to 200£)

Marriage Cause never does transire in rem judicatam, if Mr K. can supply other Proofs, he may at any time receive the Suite. Qu: how does this Doctrine agree with the Sentence?

Prerogative
4 S. Hil: T.

Cheslyn No 188. Cave & Borgh v Gardner Bishop &

Dr Wynne & Burrell Dr Collyer & Calvert

Dr Wynne... Wm Gardner, formerly a Soldier in the E.I. Co. Service, but late belonging to the E.I. Ship Grosvenor is the Decd. He was Son of Wm Gardner a Publican at Portsmouth, & enlisted in the E.I.Co. Service for 5 years. Whilst at Bencoolen, his father married his Housekeeper, by whom, he had a daughter Elizabeth, & hav: acquird an easy fortune in Trade, retired to Wickham near Southampton, where he executed his Will 7 August 1764, by which he gave his said Son Wm G. 500 £ 3p[r]ct Bank Ann[s] his Daur 2000. his Wife 230 Consol. 3p[r]ct Bank An[s] for Life, rem[r] to the Daur, & made his Wife Exec[x] & Resid[y] Leg: gave his House, Goods, Plate &c to his Wife for Life, remainder to his Daur:
17. Sep[r] 1764. the Widow proved the Will
10 Dec..... Francis Jones wrote to Wm Gardner in the E.I. acquainting him with his Fathers death, the Legacy left him, & his Mother in Laws desire, that he sh[d] procure his Discharge, & informed him of his hav[g] a Sister, named Betsey, born in June after he left England.
W.G. on the Receipt of this Letter, acquainted the Comander therewith, who gave him his discharge, & he together with Jn Chrishley, Rd Hynes, & Wm Curry, (who were likewise Soldiers at Bencoolen,) entered onboard the Grosvenor Indiaman, as Mariners, or Seamen, for England...
W.G. being very ill with the Scurvy, on his Voyage, on the 8th of August 1766 nuncupated his last Will in presence of 3 Wt[s] & thereby gave the 500 left him by his fathers Will & all other his Effects, to Jn Chrishley, & died a few Minutes after such Nuncupation.
3 Nov. 1766 the Will was reduced into writing, subscribed & sworn to, by the 3 Witnesses present at the Nuncupation.
Jn Chrishley being at the time of W.Gs death, in a declining State of Health, executed his Will in presence of 2 Wt[s] in writing, dated 11 Sept[r] 1766 & appointed Jn Cave & Eric Borgh 2 of his Ship Mates, Exors & Universal Legatees who have proved his Will.
W.G. dyeing a Batchelor, without father or Mother, leaving E.G. an Infant, his Sister by the half Blood, his only next of kin
24 Dec. 1766. a Decree issued against her, to appear & shew Cause, why Letters of Admon, with the nuncupative Will annexed, should not be granted to J.C. & E.B. Exors of J.Ch. whilst living, the Universal Legatee in y[e] Will of W.G. decd. The Decree was personally served on E.G. & returnd
8 Jan. 1767 & the Certificate continued to.
1 S.H.T. when Bishop appeard for her Mother & testamentary Guardian, & opposed the Will & Cheslyn was assigned to declare, whether he would propound it, by next Court...
2 S. Cheslyn propounded the Will for Cave & Borgh &
gave an Allon of 3 Art: (wch was admitted 3 S)....
On this the 3 Wt[s] in whose presences the Will was nuncupated, were examined, who have clearly proved it

4 S Publication passed, & Bishop confessd the Subscription, Identity of the Exhibit annexd, & gave an Allon, which
2 S E.I. was admitted, the 4th Art: being reformd
On this Allon they examined 3 Witnesses.
Major Frith, who deposes to Hynes Bad character, & thinks he would swear any thing for Gain or Reward.
Capt. Sanders. & Mr Cowherd. who give Hynes a good Character & think quite the Reverse
Capt. Sanders says Chrishly did not tell him, G. had made his Will to them, but said, Deed had given him, his Gold Buttons, Snake, & Buckles. Cowherd differs from Sanders, touching what passed between Chrishly & the Captain on examining the Chest. Stubback differs so essentially from all the a[d] Wt[s] that if he speaks truth, they must all be perjured.
1 S. M.T. 1767. An Allon was given & admitted, (tho. opposed) for Cave & Borgh, in answer to Bishops allon, It consisted of 9 Art[s] On which 5 Witnesses were examined.
Ynyr Burges, Pay Clerk at the E.I. Houses has proved the Certificate (annexd to the Allon) signed by him; also that Hynes received his Wages, & Cave the Wages of Chrishley, as Seamen on board the Grosvenor.
Jos. Freeman, Wm Bell, Geo Hoffman, & Simon Smith, who corroborate the Witnesses to the Will, by fully proving Affection, Declarations &c Smith swears to seeing the 3 Wt[s] on the Day of Deeds death listening to something, he was saying, & one of them afterwards told him, he was so bad, he could not make a written Will, but had made one by word of mouth
3 Wt[s] give Hines a good character as to his behavior dur[g] y[e] Voyage.
Stubbacks Evidence is full of Contradictions.
No Suspicion of fraud is attempted, no Affection proved for the Sister, great Affection for Chrishley
2 Wt[s] never heard any Report of a Will made by the Deed.
4 other Wt[s] say it was a Common Report amongst the Crew.
The Will is in all respects agreable to the 29 Car. 2.
The Deed being a Seaman, at Sea, at the time of the Nuncupation, 2 Wt[s] will be sufficient to establish it, according to the Statute....

Dr Collyer... The Will now propounded appears, in a very suspicious & exceptionable point of View, there is great reason to believe it an affair managed by the Mess[s] mates of the Deed, in order to secure his Effects to themselves. The Surgeon's account is, that he visited him about the middle of the Day, & found him insensible: the different accounts given by the Wt[s] in regard to trivial Circumstances heighten the Suspicion of fraud; one Wt[s] says when the Deed sat on the Chest to make his Will, he was in his Shirt & Trowsers, another, Says, in his short Jacket & pair of Breeches: Hynes says Deed bid him call Chrishly, & bid Him, Hines, take the Key & go & fetch the Gold Buttons; another Wt[s] says Deed gave Chrishly the Key: It will be a doubt on the Evidence whether Chrishley was ever present at all. Stubbacks Ignorance of the whole Transaction, tho. said, within 5 minutes of his being there, is very extraordinary. The Capt: says to Chrishley, Take

the Cloaths, but I must keep the Buttons &c for the Deeds Expes, if C. knew Deed had made a Will in his favor, it was then a proper time to say so, yet he is silent & suffers the Capt: to detain the Buttons. None of the Ships company except a few of the Mariners, (who probably learnd it from Hines) knew any thing of a Will being made; they endeavor to prove W.G. a mariner, because Capt. said I will consider you as Mariners, it is admitted he said so, if at all, out of charity, it is also admitted the Legacy of £500 left WG by his father, was publickly known, before he left Bencoolen; is it then probable the Capt: Sh: rate him as a Mariner? He appears to have been employd during the voyage in attending on Passengers - By the Book no Wages are specified, if then he was no mariner, the Will must be set aside for want of 3 credible Wn wch are required by the Statute of Frauds, Hines being an incredible Wn on acct of his bad Character; besides, the Ch will be very jealous on account of the Substance of the Will, which gives away every thing to Strangers in preference of the nearest Relations . . . . . .

Dr Wynne — It is in proof that the Sister of the half Blood, was scarce born, when the Testator went abroad; it was natural for him to look out for somebody, with whom he himself had a Connection, for he could have no Affection for this half Sister. Seven Witnesses prove that Chrishly & the Deed did all mutual good Offices to each other & like Brothers attended each other in Sickness: Freeman speaks to the Deeds frequent Declarations, friendly Expressions of Chrishley, who worked as a Taylor, often assisted the Deed with money, and noursed him - The Deed being taken ill at Sea, kept his Hammock, at which time this Transaction is dated; the fullt account of which is given by Hines, that the Deed called for some water, which he was unwilling to give him & asked if he did not prefer Grogg, wch he declineing, Hines brought him the water; that he had fetched Chrishley at Deeds request & then his other Messmates, in whose presence Deed sent him for some valuables out of his Chest, & wch being brought Deed told Chrishley, he gave them to him, & desired his other Mismates to bear witness when they came to England, that he gave Chrishley every thing he had in the world; the Witnesses all agree in substance & vary only only in such trifles as might be expected at so considerable a distance of time: there is a strong Declaration in recenti facto of Smith in Confirmation of the Testamentary Witnesses - One of the ordinary Symptoms of the Scurvy is to be struck with Death at whiles, when the Sick Person attempts to exert himself particularly - In their Allegation, they attempt to establish 2 Propositions .. Incapacity & that the Will in question was not made by the Deed:

Hubback proves only a weakness in the Deed; he was called after the Nuncupation; the Deed fell out of his Hammock; about 5 or 10 minutes after the Will was made. by which in common parlance is signified only an indefinite Time; if Hubback sh: swear precisely to a minute, yet he is a single Witness, & stands contradicted by the others. Chrishley told the Captain, the Deed gave him the Buttons, but the Capt: refused to let him have them; & said he must take care of them for the Deeds Expes. Ch: did not ask them as part of Deeds Cloaths wch the Capt: gave him without hezitation, it being usual to give the Clothes of Persons Deed to those who took care of them, but you are told Ch. said not a word of the £500 - It is plain he had the Buttons in his possession, now if the Capt: would not admit the Gift of the Buttons, it was much less probable he would allow that of the £500, therefore Chrishley said nothing of it, the Captain might speak roughly to him; what could occasion the doubt in Chrishley that he wd not get them, but that the Captain had said, the Gift was not good; this might make an Impression on him: Fraud has been suggested, but by whom non constat; it is said to be unfavorable, that a Sailor sh: make a nuncupative Will; but it is plain the Legislature thought otherwise, by excepting Sailors out of the Statute

Dr Burrell — The single Question before you, Sir, is, whether the Nuncupative Will, was the Act of the Deed; the Gentleman who opend the Case on the other Side, seemed to insinuate, that it was not, but at the same time shewd, he did not mean to rely on that Insinuation, by immediately after possessing himself of another Ground of Objection; viz, that if it sh: contrary to his Expectation, turn out, to have proceeded from the Deed, yet that it was invalid, for want of the Testimony of 3 legal Witnesses, present at the Nuncupation; i.e. omni Exceptione majores, according to the Requisites of the Statute of Frauds; he insisted, that Hines Character was proved so bad, that no Credit whatever ought to be given him, & if that was admitted, then there remained only 2 Witnesses, to the Nuncupation, which was insufficient to give force & Validity to the Act, unless the Deed was a Sailor; in actual Service at the time, which the Dr insisted he was not, but merely indulged, out of Charity, to come home on board the Grosvenor: unfortunately, every Position laid down by Dr Collier is confuted beyond a doubt: the Situation of the Deed, was that of a man, whose father tho, so affluent as to retire from Business (soon after the Deed left England,) suffered an only Son to enter as a common Soldier in the E.I.C.s Service, & when he had quitted his native Country, the father married his Housekeeper,

By whom he had a Daur, born subsequent to the Son's departure as appears clearly by Mr Jones's Letter dated 10 Dec: 1764. there can not therefore be the least colour to presume any affection or Regard between the Deed, & his mother & Sister in Law, & so no great Stress is due to that part of Dr Colliers Argument, relative to the unfavorableness of the Will itself, in bequeathing the Estate away from the nearest Relation to an utter Stranger; I think I am warranted in asserting that the Deed never knew he had such Relations in the world, till the Receipt of Jones' Letter, which at the same time that it informed him of this new Connexion, acquainted him that his father had made his will a little before he died, & given his mother & Sister his whole Estate (amounting to several Thousand Pounds) to the Prejudice of the Deed, to whom he had left only 500£ It is not unreasonable to presume, a Circumstance of this sort, would induce the Deed to form rather unfavorable Ideas of these new Relations, & nothing is more natural than that a Person so circumstanced, should be inclined to prefer a Friend, from whom he had received singular favors, to Relations who had occasioned his being disinherited:
It is in Evidence, that Chrishley was a Messmate with the Deed at Bencoolen; that they contracted a great friendship for each other; that Ch: nursed him in his Illness at Bencoolen & even assisted him with a Portion of the Money he earned, as a Taylor; that Deed often expressd his regard for & the Obligations he owed him: Hines & Hamilton often heard Deed, after he had received an acct of his fathers death & legacy, tell Chrishley, if it pleasd God to take him out of the World, he wd give him all he was worth. Freeman never heard Deed say he wd give Ch: y 500 left by his father, but frequently heard it talkd of amongst the Crew, that he had made a declaration to that Effect, & gave as a Reason, that Ch. had nursed him in his Sickness - Bell remembers particularly abt 4 Days before Deeds death, Morgan the Armourer, in Dep[t]s presence, askd Deed to make a Will to him, who replied, he would not, but if he died, every thing he had in the world, J. C. sh[d] be the better for - The account given of the Nuncupation, stands uncontradicted, except by Hubbach, whose variation from the other Witnesses, is so particular, that either he, or they, must be perjured; & tho, the Testamentary Wds differ in some trifling Particulars, yet they concurr in Substantiating the fact itself of Nuncupation, in which they are strongly supported by Smith who on y[e] day of W[ms] death, says, as he was going forwards on Business, he saw Hines, Braulin, Hamilton, standing round Deed, then lying on his Chest, & they put down their Heads, as if they were listening to something he was saying; that when Dep[t] came back, he askd some of the Persons, what they had been listening to, who said, Deed was so very bad, he cd not make a written Will, therefore had by word of mouth declared, he had given all he had to Chrishley - much Stress was laid on there being no

Conversation about this Nuncupation, after the Deeds death, & that Chrishley never took notice of it; the truth is, the Capt[s] Major Frith, & other Persons of Superior Rank did not hear of it, but the Sailors, who were the Deeds, Chrishleys Equals, often conversed on the Subject, as Freeman, Bell, Hoffman, & Smith say: & heard Chrishley declare what W. G. had done for him, Hines depones, Ch. said in his presence, "That please God to spare his life, he sh[d] do very well, for that by "what poor Gardner has left me, I shall have enough to live like "a Gentleman all my life time;" Freeman, about a Week or fortnight after Deeds death, said to C. I hear G. has left you his Will, 500£ "wch is coming from his father, to wch he replyd, he had left him "his Will, given him 500, but he was not certain he sh[d] get it, when "he came to England, but that he had also left him every thing "he had on board the Ship -
The Gentlemen have labourd, to destroy, the Credibility of Hines' Evidence; & in order to do that, have examined Major Frith, & Mr Hubbach; the former seems to think him a Man of loose Principles, says he served under him, & was then addicted to Gaming, quarelling, & bad behavior; the latter, attacks his Character during the Voyage, & says he was so infamous, he believes he wd swear any thing for Gain; but in this Hubback is contradicted by every Wd & supported by none, 5 Wds speak to his good behavior during the Voyage, & only say he was addicted to liquor, So that upon the whole, his Credibility is not destroyd; but if it was, Still the Will must stand as the act of a Sailor upon Service, for however great the Industry of the Opponents, has been, to shew the Deed was not a Mariner, yet the contrary is demonstrated, by Capt. Sanders, who declares he entord Gardner, Chrishley, Hines & Curry, as Seamen belonging to the Grosvenor at 1. 2. 6 each p[r] Mo & ent[d] Bell at St Helena at the same Wages out of Charity & with a view to assist them - Burges Paym[r] of Seamen at the E. I. House produced a Copy of the Grosvenors Ledger, wch authenticates the Entry of Gardner as a Seaman - Bell - Hoffman - Smith, prove their doing Duty as Seamen upon the whole I hope you will think there is sufficient Evidence to induce you to pronounce in favor of this nuncupative Will -

D[r] Collier - There are many Suspicious Circumstances accompanying this Will, which ought to be cleard up & removed, before you give your Sentence to confirm it - There does not appear to be any Disagreement between the Deed & his mother in Law; these Soldiers would assist each other, but no Affection can be laid between Soldiers, to the Detriment of the next of Kin - Second hand Evidence, after Examinations in chief are insufficient to prop a bad found action.
The Deed was not entord at any certain wages, but only waited on the Passengers; If it is not clear to you whether he was a Mariner, or not, then it rests on the Statute of Frauds, & if Hynes depon is set aside there are not 3 Witnesses, as the Statute requires, & so

The Testament is inofficious - a nuncupative Will must be in extremis. There are 3 Objections to thies Transaction,
1 Incapacity at the Time the Will was made.
2. The Person said tobe benefited, never took notice of it, to the Man, towho he ought tohave mentioned it.
3 The Want of Credibility in thines one of the Witnesses said to habe been present at the Nuncupation...
as this Transaction is liable to Fraud, there should be strong & clear authenticabion of it - Fraud may be encountered by shewing Inconsistency, Improbability, & Contradiction in the Witnesses; the variation in the Day, pitched upon for the Date of the Will is remarkable; thines says three times, the Will was executed on the 8th of October, if you consider his Character & his Depon together, they are not worth a groat; 2 of the Witnesses are Marksmen & yet are very exact as to the Nuncupation - Hamilton says he & Brawlin went down to the Deed together - Brawlin declares he found Hamilton with the Deed: this is one Variation - all the Witnesses say, Deed died in 5 minutes after he made his Will - Stubback was with him 10 minutes before his death, & found him insensible: why sh: not C. acquaint the Captain with the affair Nothing was known about it, except amongst the Common Sailors; It is very likely tobe the Contrivance of the 3 Soldiers who were coming home; if they had acquainted Capt. Sanders, Major Frith, & Mr. Cowherd with they would have probably made enquiries, & so discovered the whole Transaction; the Entry is insufficient to entitle him tosue for the Wages - You must compare the Evidence together, & form your Judgement from thence, after having maturely weighd it I hope you will think upon the whole, that this Will Sh: be set aside - - - - - - - - - - - - - - - - - -

D: Calvert — If the Deed was a Seaman within the Letter, yet you would consider the Principle of the Statute, & the facility with which such Persons may be imposed on: the Variations when taken together, are very considerable, the Will is nuncupative, made in extremis, the Ev: will therefore require strict Proof. The Statute enacts, that after 6 Months no Testimony shall be received, unless the Will was committed towriting within 6 Days, in the present Case, the Nuncupation was in August the Will was not committed towriting till the 5th of Nov: Chrishly not noting the Will to the Capt: & claiming the Buttons no otherwise than as part of the Cloaths, shews he did not know of any Will made by the Deed; it is not clear the Will was talked of, on board, more probable it was not, if it had, it would have been publickly known; extraordinary Chrishley Sh: not mention the Legacy tosowherd, when he sent for him tomake his Will - Hofman thinks G. did not intend tobenefit Ch: in so large a Sum as 500£, though he might intend toreserve him by giving him the other things: if the Deed was able tomake such a nuncupation, what hindered him making a written Will

It is a Transaction in Articulo mortis, & therefore should be received with the utmost Caution by the Court.

Judge & D: Hay — The Date depends on the Calculation of Time, whether that used at Sea, or at Land, the Witnesses differ as to the exact time of G's Death; I take the Date to be as stated, on the 8th of August, the Will was made in extremis; it is impossible for Witnesses tospeak tothe minute of Deeds death, precisely, at this distance of Time: In all Cases of nuncupative Wills the Court expects full, clear, & indisputable Proof of the Words spoken, whether the Deed be privileged or not - as to the fact, it appears the Deed is tobe considerd as a Seaman, for the Witnesses swear, he did Duty as such, & therefore he will be privileged, wh: he was an able Seaman, or not; according to Capt. Sanders Evidence he was entered at £1.2.6. pr mo which is, about half the Wages of an able Seaman - What a Sailor has, is usually so inconsiderable, that tho, many Nuncupative Wills are made, they are seldom brought in; but here the Deed appears tohave received Information, he was entitled to 500£, which was known to the Captain & the Crew, a Letter was received by the Deed informing of the Legacy, that Letter is not exhibited; but Bell says the Deed shewd it him, the Truth then is clear, that G. had 500£ which he might dispose of as he thought proper; Bell says Morgan desired the Deed tomake a Will tohim, but he refused, & said If I make one Chrishley shall be the better for me; the Witnesses differ in their account, wh: Hines or Chrishley was sent for the Buttons, but allow they were sent for - They all agree he made as regular a Will, as the Statute of Frauds required; I own this Circumstance made it suspicious, the Solemnities were fabricated at home, by some Lawyer, but if that was the Case, I sh: not be justified, in saying, nothing passed, because something had, by ill advice been superadded to the Truth; the Deed calling out, "Bear witness", as if he was a Lawyer, is in itself rather incredible, is made more so, by Chrishley not laying in any Claim as Exor, when the Chest was fastend up, nor when opend; It was well observed, that Chrishley had the Buttons in his posession, & when he delivered them to the Captain demanded them back, as a Gift made him by the Deed, but did not say he was entitled to all under the Will, as he naturally, would, if he thought he had any right tothem, I have no doubt that the Capt: Frith & Cowherd speak Truth, that no demand was made at that time; the Question then is, whether the three Witnesses are not tobe credited, because no Claim was made, when the Chest was brought on Deck; that is going toofar; the Man might doubt, wh: the Will was good, but I think something of a Testamentary nature must have passed between the Deed & Chrishley; nothing is heard of this affair till about 18 days after G's death, then Freemantle, who is a Witness above all Exception, says to Chrishley, I hear G. has left you 500, Ch: answers, yes, but I dont know, if I shall get it; this is a proof, the Legatee did not think of this Will, as if it was transacted by Lawyers who would know the Extent, though he might have the other Trifles. I look on this as an affirmance of a Claim - now if nothing passed that Ch: could make a demand on Deeds Effects, how could he ask for a Copy of the Letter abovementioned? this is another Circumstance to support the Testamentary Wt: who are corroborated by Smith a Wt accidentally passing by, at the time of making the Will; If the Deeds affection for Ch: & the Services he had experienced from him are taken into the Account, the Testamentary Witnesses are well

Supported, in their general Account, that Ch. had a right to the Sool. The Difficulty arises on the non-claim when the Captain gave the Clothes – If I give full Credit to Stubback, I must suppose all the Witnesses perjured, but Stubback may mistake in point of Time – I am of Opinion this is a privileged Will, therefore two Witnesses are good, & no particular Time of writing is necessary & there is no occasion to enquire into Stiles Character – The writing down the Nuncupation, is giving Evidence by an Affidavit. I think the Difficulty arises from Management at Home, not from the . . . . of the Will – I pronounce for the Nuncupation & that Christley & his Sons are entitled to the Admon &c. . . . . .

Prerogative
Bye Day. H.J.

Altham No 189. Stevenson & others v. Harwood Cumberlege

Dr. Harris & Wynne Drs Calvert & Burrell

Dr Calvert .... In Lacy Leg cited 22 June 1769. the Will propounded bears date 16 April 1748. by which he leaves all his real & personal Estate to his dear Friend Mrs Fr: Harwood, except a few Legacies, & appoints her Exec: this Will is wrote & signed by the Decd, & attested by 3 Witnesses Mrs Searwood took Probate the very day the Decd died.

Trin: T. 1767 Mrs Harwood was cited by Bennet Stevenson, Anne Goodchild Eliz Stevenson, Eliz. Wife of Wm Rolfe, the Nephew, Nieces, & next of kin of the Decd, to bring in the Probate & shew cause why it sh: not be revoked. the Interests of Altham's Clients are confessd. &

2 S M.T. Cumberlege propounded, Altham opposed the Will

3 S. C. brought in an Allon of 7 Articles which was admitted, & 5 Witnesses have been examined thereon

Trin. T. 3 Sep: Altham gave an Allon of 9 Articles, wch was admitted & 2 Witnesses examined thereon

The Allon given by C. pleaded the Will, & that 2 of the Subscribing Witnesses were dead; the Surviving Witness gives the following Account, that the Decds Servant came & desired him to come to his House, which he did, & was carried into the Parlour, where he was ordered to come to the Table, &c. the Decd execute his Will, which he did; the Handwriting & Death of the other two subscribing Witnesses, are likewise ascertained – The Purport of Althams Allon is, that the Decd was a Barrister of considerable Practice, from wch he retired in 1752 – That in 1754 or 1755. he went to Mr Blounts at Uxbridge, & executed his Will in the presence of Mr, Mrs Blount & a neighbour of Mr B – That Mr B. is dead, but Mrs B. is examined. The Question is, Wh: You can pronounce for an Intestacy, on account of the Execution of a subsequent Will, which is not produced, & the Contents whereof are unknown? As it is notorious Mrs Harwood lived in great Intimacy with the Decd, the Opponents have endeavoured to shew improper Custody on her Part

The Case being admitted to be fairly stated, Dr Calvert proceeds

Dr Calvert — It is agreed on both Sides, Mr Lacy was a Person of great Eminence in the Law, & his Capacity is not disputed; he appears to have made his Will at his own House, with his Neighbors about him, in favor of a Person, with whom he lived in the greatest Intimacy, & closest Connection, & therefore may be fairly supposed to have a considerable Affection for her: the first

& Was a Subseq: Will made? if there wh: it's contents not appearing, if first duly executed Will is revoked thereby

Presumption of Law, is, that a Testators Affection is fixed on his Relations, but that Presumption may be ousted, & turn the other way; I do not dispute the Principle, of a subsequent Will, destroying a former, if there is full Evidence of the Contents being different, tho, the Will itself sh: not be produced, as wds determined in the Case of Helyar v Helyar. the Distinction taken there, related to the Introduction of Parole Evidence, to establish the Existence of a subsequent Will; in wch nothing but the strongest Case can support it, for Courts will be always cautious of that Principle, as it might occasion an Intestacy wch the Testator never intended. Here are 2 Points necessary to be established 1. That another Will was actually made. 2. That the Contents of the latter differd from the former. How does the fact turn out in the present Case? they say Mr Blount one of the Subscribing Witnesses, to the latter Will was dead, & endeavour to prove his Declarations, which must be more strongly supported, because one Step further removed, & weaker than what the Party himself saw; this Evidence is calculated, not to establish, but to destroy a Will which is propounded; It is principally deposed to by Lloyd, but however numerous the Ws may be they relate only to the Evidence of one W: liable to these objections – Rebecca Blount is living; one might expect a full Account from her; She does not say, Mr Lacy returnd on the Day appointed with Mr Blount for the Execution of y Will. She dont recollect the Execution of the Will, because she used often to attest Papers for her Husband, who was an Attorney, I allow She dont contradict, but as She does not support the fact of Execution, it is the same as if no W: had been examined to that Point: She might have recollected sending for a Neighbour to be a 3d Witness; How does it follow that the Papers on the Table related to Lacy's Will; they might refer to other Peoples Affairs. B. being an Att: & L. a Barrister: to support the Fact, they set up a Report, & then examine Witnesses to prove it: they rely on Stephenson who had lived with Decd, who remembered the Decd told him about 12 or 13 years ago, he was go to Town & settle his Affairs, that he went to the Devil Tavern, sent for Agent who lived in Elm Court who came, staid with the Decd alone, who came home in the Evening, told Stevenson he had settled all his affairs, but St: knows not wh: he had then made another Will – Morgan & Hooke support the Subsequent Will made in Town, whereas the other Ws say it was made in the Country

as to the 2d Point – In Helyar & Helyar there was one positive Witness, as to the Contents, that Helyar was Ex: & Resid: Leg: which She was not in the prior Will, & this made a very material Difference; Sir G. Lee depended also on Circumstances: viz, that Helyar had been married, at wch

the Decd had expressd his dislike, & made a strong Declaration, that he had given him formerly 40000£ but now would not give him a farthing - There had been a kind of Agreement, that the Parties shd make cross Wills, wch was destroyd by the Brother having a Son: It must be inquired whether the Wills differ, if not, they may both stand, all the contents are not necessary to be set forth; the Account of the subsequent Will being very long, is vague; It would appear much longer than it really was, by being engrossed; It is a little extraordinary, that Mr Blount shd say there were several Limitations in it, when he had not read it - Is it probable Mrs Harwood shd send a message to Hooke at the Alehouse, when she saw him every day; or that she should betray Mr Laeys Secret of having made another Will - the Decd might alludes to the Will propounded, when he declared Hooke was in his Will, he might mistake, knowing a Servant was mentioned therein; what use can the Plea of Custody be, to our Opponents, in the present Case? it might have been usefull, if we had set up the 2d Will; But say they, She posessd herself of all the Decds papers, & wd thence insinuate she had destroyd the 2d Will: I answer, as Exec: she had a right to possess herself of them, & to take Care of the Decds Effects: The 2d Paper sealed up wch Decd put into her Hands & afterwards took away again, might be the subsequt Will.

Dr Burnell. It is not contended, but that the Decd had a very great Regard & affection for my Client, who appears the Exec: in the Will of April 1748. She lived with him as his Mistress, & had the sole Care & Management of all his Domestic affairs for many Years preceding, & to the time of his death: the Will propounded is admitted to be the Handwriting of the Decd, & to bear every Mark of Authenticity & fairness; the Testator, was a Person, who had attained a considerable Degree of Eminence in his Profession, of the Law, & therefore cannot be presumed liable to Imposition; he retired from Business to Iver 6 or 10 Years before his Death, & for 7 or 8 Years previous to that Period, lost the Use of his Limbs; this Will is duly attested by 3 Wn: two of whom are dead, but their Characters & Hand writing are proved & supported, by 3 Credible Wn: Rutter the only surviving Wn has fully proved the Execution &c, as far therefore, as relates to the fact & Execution of the Will of 1748, no doubt can possibly remain; but it is Suggested, the Decd made a subsequt Will, by which the former is necessarily annihilated, & set aside; & in order to support this Hypothesis many Wn are examined to shew the Notoriety of such a Transaction, at Iver & the Neighbourhood: the Will itself does not appear; no Contents are deposed to, no Time specified when it was made; the Witnesses who endeavour to ascertain the time, speak only to hearsay; Mr Blount who is supposed to have been principally concernd, as a Subscribing Witness, is dead; Mr Lloyd gives an account, of a Conversation, he had with Mr Blount, on the Subject, which is by no means decisive, or satisfactory; Mr B. cant precisely state the Time of

Execution, he never read the Will, but said, Decd brought a Parchment, ready engrossed, to his House, which was very long, & contains many Limitations; from hence it is plain Mr B. could not know the Contents of the Parchment he attested, & I cannot comprehend, how he should be able to discover the numerous Limitations, without having perused it: the Circumstance of Engrossment wd naturally account for its appearing very long: there are other Inaccuracies in the Acct given by B. thro. the Medium of Lloyd wch shew no Stress can be laid on it; B. cant recollect who was the 3d Witness, nor on what the Will was certainly wrote, nor even whether it was a Will which he attested. he has made no Entry in his Book of the Transaction, which shews he had no Concern in it as a Lawyer, but merely as a Witness: His Widow who was another Wn never saw Decd, but twice, at her Husbands House; who told her he had Transactions with him in the Law; She thinks abt 13 or 14 years ago. She was Witness to a Writing executed by Decd but is not certain, by reason She was frequently a Wn to the Execution of Papers at her Husbands House; whom she hears, a short time before his Death, tell Mr Lloyd, he was a Wn to a Will of the Decd Mr Laey - Several Witnesses say, it was the common received notion of the Neighbourhood that Laey had made another will, but none of them attempt to shew what were the Contents of it, or when it was made; in order to prejudice the Ist Dgt the Will propounded, they pleaded Custody on the Part of my Client, in order I suppose to insinuate, (for there is not the least Shadow of Proof) that She being possessd of the Decds Papers, destroyd the Latter Will; unfortunately no Custody is proved, the Witnesses say She had the power of hiring & discharging the Servants, we admit she had, being the Decds Housekeeper, & conducting his Domestic affairs: you are told the Decd hated Swine, that She kept several & allowd them to go up & down Stairs, not a word of this is in Proof, but mere Suggestion; another Charge is, her possessing herself of Mr Laeys Papers immediately upon his decease, & coming that Morning to Drs Commons; as Exec: She had a right to possess herself of every thing belong to her Testator, & I know of no time which is stated for a Person to take out a Probate, the Law has left it to the Discretion of the Exor, & if she thought, the Decds might possibly create Trouble & Delay by entering a Caveat, she acted prudently & wisely, in taking the earliest Opportunity of obtaining a Probate: I hope you will think, as the Precise time of the Execution of the Second Will, nor its Contents are ascertained, & as the Will propounded is admitted to be the Act of the Decd, that there is sufficient foundation to decree the Probate to be delivered out of Court to my Client.

See fol 530, after the Index, & Cormier, Maugin v Bowden

Folio	Names of Plts & Defts	Nature of y^e Suite	Proctors for Plts.	Proctors for Defts	Name of y^e Court	Term	Session	year	Judgement
1	Delahay. v Price	Ch: Wms accounts	Stevens	Fountain	Arches	E.T.	2 Sess	1765	Allon admitted
1 to 3	Walton v Jacobson	Grant of Admon	D^o Jun^r	Collins	Prerogative		D^o		Ly^d Wifes next of Kin
4 to 5	Mascoll. v Scaife	Seizure	Fuller	Crespigny	Admiralty		3 Sess		Appeal not deserted
5	Whiting. v Willford	Grant of Admon			Prerogative		D^o		Admon to y^e Man
5 to 6	Terrill v. Cecil	Sequestrator's acc^t	altham	Major	Consistory		D^o		Sequestrator must pay th into Ct
6 to 9	Rees v Rowlands	Subtract^n of legacy	Crickett	Bishop	Arches		3 Sess		for y^e Appellant
9 to 10	Pujolas v Pujolas	Muncupative Will	Major	Fountain	Prerogative		D^o		for the Will
10 to 11	Heale. v Noble & Piper	farther Security	Cumberlege	Grene	Ibid		D^o		Adm^r in Contempt
11	Stott v Stott	Adultery	altham	Stevens	Consistory		D^o		for y^e Divorce
11 to 14	Griffin v Griffin	Validity of a Will	Collins	Fuller	Prerogative	Trin. T.	3 Sess		for the Will
14 to 15	Woodward. v Sanders	D^o	altham	Bishop	D^o		D^o		2 Wit^s sufficient
16 to 18	Schaw Guardian of Schaw v Schaw ats Page	marriage	Stevens	Collins	Consistory		D^o		Def^t to appear absolutely
18 to 19	Anne Ctss of Anglesey v. Juliand Ctss of Anglesea	Grant of Admon	Bishop		Delegates	Feb. 19		1765	Assigned to S^t Inn
19 to 21	Foster v Wright	Validity of a Will	Bishop	Major	Prerogative	Trin. T.	2 Sess		Except^ve Allen^on rec^d
21 to 23	Bate v Taylor	Correction	D^o	Alexander	Arches		4 Sess		Plea admitted exc^pt y^e Articles
24	Woodward & Sanders	See Vol. 14. 15. 112					D^o		
25 to 28	Jones, Scroop. v Craven	Correction	Tyndal	Stevens	Delegates		D^o		Plea rejected
28	Jones v Day	Correction	Fountain	Bishop	Com^rs of Surry	July.			Dary Suspended
29 to 31	Markam v Beadon, Kirk	Dilapidations	altham	Gostling	Arches	July	2^o		Libel admitted
32 to 33	Johnson v Champion, Wright & Johnson	Right of an Exor	Goodwin	D^o	D^o	D^o	D^o		Johnson entitled
34 to 37	Gunner, Hazeler v Pays	Rate	Gostling	Stevens	D^o	D^o	D^o		Gett condemned in Costs
37 to 39	Whittington v Frances	Legacy	altham	Fuller	Prerogative	D^o	4		Executory decreed
39 to 40	Talbot v Ryan	Validity of a Will	Bargrave	Holman	D^o	D^o	4		for the Will
40 to 41	Neal v Neal & Piper	farther Security	Cumberlege	Grene	D^o	D^o	4		not excommunicated
41 to 42	Merry v Jamison & C^o	Bottomry Bond	Gostlin		Delegates	D^o	5		Assigned for S^t Jan
43 to 44	Hewet v Kidgell	Correction for non Attend	Stevens	Fountain	Surry	D^o	5		
45 to 46	Orby v Rowland	Admon	Collins	Grene	Prerogative	D^o	30		Adm^r Next of Kin
46 to 47	Winchester Langdale & Wood v Gough & Strode	2 Wills	Bogg	Major	D^o	D^o	D^o		
47	Dowding Goods of A. Bax	Testam^y Schedules	Clarke		D^o	D^o	D^o		Probate unnecessary
47 to 48	Holmes v Fleet	Admon	Gostling	Holman	D^o	Mich. T.	3 Sess	Nov. 23	Adm^on to Mr^s Fleet
48 to 51	Hewet v Kidgell	Correction	Stevens	Fountain	Surry	Mich. T.	3 Sess	D^o 26	Sequestrator may not intervene Stopped Articles
51 to 53	Lovegrove v Lycett	Validity of a Will	altham	Jenner	Prerogative	Mich. T.	4 Sess		Allon rejected
53 to 55	Pepper, Markam v Markam	Admon	Fuller	Altham	D^o	D^o	D^o		Adm^on to y^e Widow
55 to 56	Element ol: Hedge v Hedge	Inventory & Acc^t	Alexander	Adderley	D^o	Bye'd	Dec. 11		may be a Bar
56	Molyneux v Mayo	Inventory	Gosling	Bishop	D^o	D^o			Inventory decreed
56 to 59	Foster v Wright	Validity of a Will	Bishop	Major	D^o				Conclusion rescinded Monton 23^d Jan^y Hobart in the Instructions
59 to 61	Markam v Beadon, Kirk	Dilapidation	altham	Gostling	Arches	Bye'd	Dec: 9		Commission refused
61	Ward v Hennell	Ch: Wms Election	Jenner	Syndal	Consistory	D^o	Dec: 12		Hennell dismissed
62 to 64	Price v D^r Burnell, Harrison	Admon de Bonis			Prerogative	Mich. T.		1766	Adm^on to Harrison
65 to 67	Office of y^e Judge & Greenway	Correction	Fountain	Holman	Arches	Mich. T.	3 Sess		Articles admitted
67	Cole by Gn v Surman	Legacy Sum^y Acc^t	Bishop	Alexander	D^o				Cause remitted
68 to 71	Otway Gn of Otway ats Savory v Otway	Grant of Admon	H Stevens jun^r	Adderley	Prerogative	D^o	D^o		Both Parties to name Persons for y^e to determine
71 to 72	Balderston v. Balderston	Adultery	Fuller	Bargrave	Consistory	D^o	D^o		Allon admitted
72 to 73	Lovegrove v Lycett	Validity of a Will	altham	Jenner	Prerogative	D^o	4 Sess	Feb. 13	Allon admitted
73	Thos^n, Robinson v Middleton	Revoc^n of Admon	Fuller	D^o	D^o	D^o	D^o		D^o
73 to 76	Carpenter & Dewell v The Vicar &c of S^t Leonard Shoreditch	Grant of a Faculty	Cumberlege	D^o	Consistory	D^o	D^o	Feb. 21	W^m Prokes Executrix Ch condemned in Costs
76 to 77	Archer, Wakelin v Whytall, al^s	2 Wills & Sanity			Delegates		Dec. 9	1765	Plea admitted
77 to 86	Jones, Scroop v Craven	Correction	Tyndall	Stevens	D^o	Feb. 10	& 22	1766	Agt Craven
86 to 87	Knipe ol: Spier v Spier	Subtraction of Legacy	Grene	Bogg	Consistory	Mich. T.	4 Sess	Feb. 21	Legacy forfeited
87	Earle v Earle	Adultery			D^o	D^o	D^o		Fuller Answers decreed
87 to 88	Griffen v Rice	Admon de Bonis	Adderley	Bishop	Arches	Bye'd	Feb. 22		Appeal pronounced Agt
88 to 89	Forrest v Wilson	Admon	Bishop	Bogg	Prerogative	D^o	Feb. 25		Allon admitted
89	Morris v West	Admon	Longden	Jenner	D^o	D^o	D^o		not rescinded
89 to 90	Senior v Senior	Admon	Grene	H Stevens jun^r	D^o	D^o	D^o		Joint Admon granted
91 to 92	Pippon v Turner	Defamation	Goodwin	Grene	Consistory	D^o	Feb. 26		Def^t dismissed & Costs
92	Balderston v Balderston	Adultery	Fuller	Bargrave	D^o	D^o	D^o		Allon admitted
92 to 108	Foster v Wright	Will. Sanity	Bishop	Major	Prerogative		March 5		Will Codicils pronounced for
108 to 111	Markham v Beadon & Kirk	Dilapidation	altham	Gosling	Arches	Mich. T.	2 Sess	D^o 22	Old Deanery Dilapid^n as part of y^e Deanery
112	Woodward. v Sanders	Will	Bishop	altham	Prerogative	D^o	D^o		Allon admitted 12 Art: being reformed

The Questions to be argued.

1 Q. Wh^r the Allon shd be admitted to verify an Allon not appealed from?
2 Q. Is y^e Representative of y^e Husband or next of Kin of y^e Wife, entitled to Admon of y^e Goods left unadminist^d by the Husband?
3 Q. Is the Appeal deserted by the Discontinuance of the Certificate?
4 Q. Wh: Admon shall be granted, Vs M^rs B. or M^rs Wh: a spinster?
5 Q. Wh: Money paid to the Registrar, out of Ct. is a legal Pay^t & discharge, y^e Registrar dyeing insolvent?
6 Q. wh: the Sequestrator must make good such Deficiency?
7 Q. Is the Discontinuance of the Certificate fatal?
8 Q. Is the Adm^r in Contempt, for not ~~performing~~ giving farther Security pursuant to y^e Order of y^e Ct. See fo. 40
9 Q. Is the Delivery of y^e Wife, on y^e Husband being absent in America a year preceding y^e Birth of the Child sufficient grounds to pronounce for a Divorce for Adultery?
10 Q. wh^r an unexecuted Paper shall be established? See Book B. fo. 160
11 Q. must y^e Pty propounding a Will produce all the Subscribing Witnesses? fo 112. See fo. 24
12 Q. Shall M^rs Schaw appear absolutely? Q. Is y^e Suite brought by a proper Person? Q. Is it brought on proper Grounds? Q. shd it not be a Suite of Nullity, not of Jactitation? Book B. fo 154
13 Q. Did the Judge right in rejecting the Allon, with nothing annexed, except the Copy of the Deed pleaded? Book B. fo 128
14 Q. wh^r a Witness shall be allowed to contradict his own Act?
15 Q. Wh: the Patty agent hav^g suffered Def^t to examine his Witnesses on his Allon, Publication to pass in the Inferior Ct, may give a contradictory Plea in a^t of Appeal? fo. 184
16 Q. wh: the Plea is relevant? fo. 24. 112
17 No Qu^s fo. 77
18 Q. wh: the Articles are relevant, & wh^r the Estimates are properly taken? fo. 89. 103
19 Q. Wh: A. assigning over all his Effects to his Creditors in 1762. & B. entitled to a Legacy on the Decease of B, such Legacy passes by the Assignment?
20 Q. wh: Church Wardens can make a Rate contrary to the Order of Vestry?
21 Q. There being 2 Persons of the same name & one of them Exor, a small Legacy being given in the Will to G. & y^e Residue not disposed of, wh^m such legacy to go to the Exor?
22 Q. Is the Will valid?
23 Q. Shall the Adm^r be decreed excommunicate for not giving further Security? being unable to find any Persons who will be bound for her?
24 Q. Wh: Captain took y^e necessary Steps to entitle him to hypothecate the Ship? See fo. 10
25 Q. wh: farther time shall be allowed A. to exhibit a Proxy? fo 189.
26 Q. Is a next of Kin, who has made over all her Interest, deprived of her right to the Admon? Book B. fo. 162 See fo. 48
27 Q. are the Exhibits offered in Time? Q. If so, are they material to invalidate the Cause? Book B. fo 140 fo. 136
28 Q. Are certain Testamentary Papers to be considered as part of the Will of B. ax?
29 Q. Is Dead restrained to y^e disposal of particular Effects by y^e Articles. Q. Is H. entitled to y^e Admon of his Wifes Effects, had no Int: therein? Book B. fo 61. 76. Book B. fo. 65
30 Q. May the Sequestrator intervene? Q. is Fountain entitled to Articles?
31 Q. Shall this Plea be admitted, 2 Pleas had been given before? Q. Is it offered in Time? Book B. fo 127. See fo 43. 45
32 Q. Can a Wit^s exam^d on an Allon be read to an executed Will, as to Handwriting? Q. Is there legal Evidence to continue the Admon? fo. 72.
33 Q. Is a Plea of Release a sufficient Bar to an Inventory & Account?
34 Q. Is an Administratrix & a creditor entitled to an Inventory?
35 Q. Had Dead an Understanding adequate to this Will? Q. wh: Letters & Books of Account generally pleaded, the one W^s supported by Circumstances, wh^r that is sufficient to identify them? Q. Shall a Monition issue, & to bring in y^e Instructions, said to be given by Dead? Q. Shall y^e Conclusion be rescinded? fo. 14. 92.
36 Q. Shall a new Commission of Inspection of y^e Deanery House of R. be granted to Clergyman?
37 Q. Is an Officer of the Excise exempt from the Services of Parish Offices? fo. 29. 138
38 Q. To wh: Guardian shall Admon de Bonis be granted? Book B. fo 162
39 Q. Is the Jurisdiction rightly founded? Q. Are the Articles admissible?
40 Q. Did the Judge below right in admitting the Allon?
41 Q. Who shall have the Admon during the minority of the Bastard Infant? fo. 175
42 Q. Are the Facts pleaded, relevant to prevent^t the Suite? Q. can a Woman after having eloped, institute a Suite of Divorce by reason of Adultery? Q. Is the Allon admissible?
43 Q. Is the Plea in Time? Q. are the Facts relevant? fo. 92
44 Q. Is the Plea admissible?
45 Q. Is Wilsons Protest founded? Q. Is the Intimation right? Q. can new matter, or Exhibits be now brought in? Q. Is the Ministers Consent necessary? fo 81.
46 Q. Is the Allon in time? Q. Is it relevant?
47 Q. Have the Judges recused a right to give any Sentence? Q. Is that Sentence just? Q. can the Proctor exercise their Authority in private Colleges? Q. has y^e Recusation taken away the Jurisdiction? Q. Is this Practice allowed & admitted? Q. ought the Mode & Form alledged by the Proctors to be received? fo. 28.
48 Q. Has Def^t complied with the Conditions of the Will? Q. y^e Tender well made & has he incurred y^e Penalty?
49 Q. are M^rs Earles Answers full?
50 Q. has the Minor appeared properly before the Ct by his Gn? Q. shd the Proceedings be quashed for Irregularity? Q. fo
51 Q. Shall the Admon granted to W. be revoked? Q. Is E. the Sister, or not?
52 Q. Shall the Cause be rescinded to introduce certain Papers, wrote by M^rs D. to Dead Bro^r, sent by him to his Proctor Faulkner, to draw an Allon from, & wch he contrary to Orders omitted so to do?
53 Q. Shall a single Admon be granted to the whole, or a Joint Admon to y^e half Blood & a majority of Intrests?
54 Q. Are the Words, you are with Child: defamatory? Q. if so were they spoken with an Intention so to be? fo. 112
55 Q. Are the Letters relevant being spoken, or that they were uttered with a Defamatory Intention?
56 Q. Had Deed a Capacity equal to the Will in Question? Q. Are the Instructions proved? Q. was Deed under Owens Custody & Controul & Liable to have a Will imposed on him?
57 Q. Ought not a Distinction to be taken, between the Old & New Deanery? Q. Is not the Distinction too early? Q. Is the Old Deanery to be deemed a Dilapidation as such, or as a Farm leased out? fo. 71 fo. 1a. 56 fo. 29. 54
58 Q. Shd not the Letter wrote to Land be exhibited, or a reason assigned why this not? fo. 24. 14.

Page	No											
112	59	Morris	v West	Admon	Jenner	Longden	Prerogative	23 Sep			1766	Admon confirmed to Deft: appeals
115	60	Maplestoft & others	v the Vicar Ch: Wms &c of Cherbsey	Faculty for erecting a gallery	Grene	Collins	Surry	Do				Conclusion rescinded
120	61	Ware	v Ware	Uncest	Bishop	Do	Arches	Do 31	Apr. 29			dissolved as executors
123	62	Griffin v Boswell Kindley		Validity of a Codicil	H Stevens jun	Grene	Prerogative	Do				Codicil established
133	63	Hopwood	v Luckis	Bona notabilia	Collins	Major	Do	Do				
133	64	Grainger	v Stedman	Proof by Witnesses	Do	Cricket	Surry	Do				Proof by Wits decd
134	65	Browne	v Browne	Inventory	Jenner	Alexander	Prerogative	Do 4 Sep				Inventory denied &c
135	66	Cockerline	v Cockerline	Intervention	Fuller	Grene	Do	Fr 5 Sep	May 28			Intervention allowed
136	67	Wenchester Langdale & Wood	v Strode	Sanity Imposition	Bagg	Major	Do	8 & 5				Will established
155	68	Clouds	v Davis Robinson	Validity of a Will	Bishop	Fountain	Do	Fr 5 & 5				Allon admitted & said
159	69	Kirkman Kidgell	v Hewit	Correction	Fountain	Stevens	Arches	Do 3	June 10			
164	70	Gardiner	v Hazzold als Harrold	Testamentary	Goodwin	Fuller	Prerogative	Do	Do 12			Deft condemned in full Costs
164	71	Maddox als Madox	v Giles	Legacy	Collins		Arches	Do	Do 10			Legacy Costs no Interest
165	72	Cornshaw	v Partridge	Defamation	Bargrave	Goodwin	Consistory	Do	Do 14			Deft dismissed wth Costs
165	73	Bate	v Taylor	Correction	Bishop	Alexander	Arches	Do 4	Do 17			The Opening
169	74	Lovegrove	v Lycett	2 Wills. Custody	Jenner	Altham	Prerogative	Do	Do 19			
171	75	Stevens	v Herringham	Distribution	Bargrave	Adderley	Do	Do	Do			Counsel to search Precedents 23 July 5
172	76	Earle	v Earle	Adultery	Grene	Do	Consistory	Do	Do 21		appeld	Divorce pronounced for
175	77	Office of y Judge promoted by Dr Bever	v Greenway	Correction	Fountain	Holman	Arches	Bye D	Do 23		appeld	Deft condemned in full Costs
178	78	Brown	v Hems worth & Arnold als Arnott	Legacy	Longden	Goodwin	Do	Do	Do			Pltf Peton rejected
								Do	Do			Allon admitted except by Certificate
179	79	Compton	v Beareroft	Marriage	Bogg	Major	Do	Do	Do 25		appeld	Last Will affirmed
180	80	Lovegrove	v Lycett	2 Wills	Altham	Jenner	Prerogative	Do	Do			Do no Costs
183	81	Noble	v Snook	Do	Jenner	Bogg	Do	Do	Do 27			Deft condemned in Costs
186	82	Bate	v Taylor	Correction	Bishop	Alexander	Arches		Do 27			Allon admitted
192	83	Hull	v Pipe	A Wills	H Stevens jun	Fountain	Prerogative	July 5				Do special articles subscribed
								Do	Do			
195	84	Woodward	v Sanders	Validity of a Will	Bishop	Altham	Do	Do	Do			Will established
196	85	Smith	v Maddox	Do	Gostling	Do	Do	Do	Do			Allon admitted
196	86	Norris	v Barnaby	Point of Practice	Cumberlege	Londen	Do	Do	Do			Will established
196	87	Jackson admin of Collins	v Jones	a will	Grene	Cheslyn	Do	Do	Do			Admon to Whaley
197	88	Best Attt of Marcha	v Whaley	Admon de Bonis	Bargrave	Grene	Do	Do	Do			Deferred 15th Q
198	89	Stevens	v Herringham	Distribution	Do	Adderley	Do	Do	Do 5			Admon to Harvey
199	90	Sturt	v Beckford & Harvey	Admon de Bonis	Bp Altham	Do	Do	Do	Do			Pq established
200	91	Gosling Pyle	v Walsh Abel	Testam Schedules	H Stevens Dr	Collins	Do	Do	Do			Vis. Medis decreed
205	92	Stevens	v Senhouse	Admon de Bonis	Jenner	Bishop	Do	Do				Allon admitted
206	93	Ly Ss Mayo	v Brown	Admiss of Bs Allon	Major	Bargrave	Do	M T	2 Sep			Dr Peton rejected
206	94	Gibolet	v Launnoston & Connor	Validity of a Will	Fountain	Gostling	Do		3 Do			
												Visp Medis decreed
207	95	Stevens	v Senhouse	Admon de Bonis	Jenner	Bishop	Do					fuller Inventory
208	96	Shiter	v Hamblin	Inventory	Holman	Grene	Do					Sentence for Deft
209	97	Wright	v Wright	Adultery	Cricket	Clarke	Consistory					
												Grene petition received
210	98	Maplestoft & others agt the Rector, Ch. Wms &c of Cherbsey in spec; all others in general		Seal	Grene	Collins	Surry					
								Do	Stevens	Arches	4 Sep	Appeal received
211	99	Hoblyn	v Duncan	Inventory Acc	Do	Farrant & Collins	Prerogative					Bp to answer
212	100	Gough	v Fletcher Duncan	Will	Bishop	Collins	Do	Bye	Day			Costs agt Pltf
213	101	Mutter Petrie	v White	Admon	Collins	Goodwin	Do					Allon admitted
214	102	Mucclestone & Norman	v Whylie, ol. Mucclestone	Admon Grant of	Jenner	Altham	Do					Judgement deferred
217	103	Shiter Admin of Stratton	v Hamblin	Inventory	Holman	Grene	Do	Caveat	Jan: 8		1767	The Widow to have her distributive Share, as Monk brings her self within Holdford Statute affirmed
								H T		Sep		
219	104	Healy	v Mathews	Validity of a Will	Bargrave	Goodwin	Do			1 Sep		Reexamination rejected
221	105	Ames	v Ward	Do	H Stevens jr	Lumberlege	Do			2 Sep		Divorce decreed
222	106	Balderston	v Balderston	Adultery	Fuller	Bargrave	Consistory					Admon not recorded
							Prerogative			2 Sep		
227	107	Forrest	v Wilson	Interest			Do			3 S		Instructions called
227	108	Bridges	v Rhodes	Instructions	Bog	Holman	Do					3/4 decreed to Widow
227	109	Lewis	v Lewis	Inventory Account Freemans Widow's Chamber	Alexander	H Stevens	Do					Her Chamber
228										4 S		Marriage established
					Bogg	Major	Arches					Deft to appear absolutely but to have costs of Petition
							Prerogative					Petition dismissed
229	110	Compton	v Beareroft	Marriage	Alexander	Stevens	Do			Bye D		Exor to appear
233	111	Pyefinch	v Palmore	Validity of a Will	Collins	Altham	Do					Copies referred to to be brought in
234	112	Cauwood al.	v Cauwood & Peters	Dismission of a Suit Exor to become a Witness	Stevens		Do					
236	113	Ld M Herbert	v Ld Gage	Scripts & Rolls	Goodwin	Grene	Surry			8 S	2 Sep	Exor cant appear
		Maplestoft & others agt the Rector Ch Wms &c of Cherbsey		Faculty for a Gallery	Grene	Collins	Surry					
237	114											

59 Q. Wh: one of the Parties being alive the marriage shall be pronounced for unless there is a Legal Proof of it? Q. Is there Proof sufficient to induce a Sentence in favor of the Marriage? Q. is Cohabitation sufficient?
60 Q. Are the Petitioners entitled in preference to the rest of the Parish? Q. are the Allons of the Petition true? Q. Ought not the Sentence to be conformable to the Petition & Citation?
61 Q. Is the marriage of a Woman with her Bastard Brother incestuous?
62 Q. Is the Codicil valid?
63 Q. Did Decd leave Bona Notabilia? Q. if he did Has the Plt any Interest?
64 Q. Wh: a Legatee has received the Writings of a Cottage bequeathed by B. can afterwards call on the Exec: to prove the Will by Witnesses?
65 Q. Is it necessary to give in an Inventory? Q. Has the Party praying an Inventory, any Interest?
66 Q. May a Party intervene after the Cause is heard, but before Judgement is given? Q. Shall Probate be delivered out of Ct? Q. Is there any Cause before the Ct?
67 Q. Was Decd under undue Influence when the 2d Will was made?
68 Q. Is not the Allon calculated for Delay? Q. Ought not B. be assigned a precise Time to plead? Q. Is the Allon proper to be admitted to proof? See fol 166 Following
69 Q. Is not this a Criminal Cause? Q. did not y Judge right in ordering S. to give Articles? Q. did he not wrong in rejecting Ks Allon, declaring he had no right to appear?
70 Shall a Party who puts a next of Kin on Proof of Interest, & then confesses it, be liable to Costs?
71 Q. Shall a small Legacy bear Interest?
72 Q. Will an Alteration in y Plts name in y Citation, at y time of Service, vitiate the Process? See Vol. 21 - 186
73 Q. See the Queries at Folio 186 See Book B fol 157 See Vol: 72 180 181
74 Q. See the Queries at Folio 180
75 Q. Shall 2 next of Kin, whose deaths are not proved, be presumed dead, after 20 years Absence? Q. Shall their Distributive Shares be delivered to Js only apparent surviving next of Kin?
76 Q. Is the Adultery proved? Q. is Def: entitled to Alimony pendente lite? Q. applied for it till the Hearing of the Cause?
77 Q. Wh: G. Registrar of Berks, ought not to deliver y Seal, when demanded by y Officiating Surrogate? Q. ought he not to be punished for neglecting to perform his Duty, tho frequently requested so to do? Q. Is there sufficient Proof of Dr Bevers Appointment? See the Subseq. Abstracts of the Delegates to Appointment
78 Q. Is the Proceeding in a Legacy Cause, on a Libel regular? Q. Shd y Exor give a Plea to shew why he is not liable? Q. Can the Consent of Parties alter the Mode of Proceeding?
79 Q. Shall y Certificate of y Clergyman, in supply of Proof of y Marriage, be received? Q. Is the Plea admissible?
80 Q. Is the 2d Will valid? Q. was there any Custody, or undue Influence to procure it? Q. was Decd capable? See fol. 81. 172 74
81 Q. Is the 2d Will inofficious? Q. was it imposed on Decd? Q. was Decd capable? Q. Is it signed or executed?
82 Q. Is not this a Criminal Cause? y Plt held to strict Proof? Q. are St Oswalds Chapel & y Tything of Whitstones in y Parish of Claines? if they are Q. had Def: a right to do, what he did, as Curate of St Oswalds Hospital? See Vol. 21. 73.
83 Q. is Js Affidavit of Scripts full? Q. Will y Paper propounded entitle him to proceed? Q. is the Plea admissible?
84 Q. is the Plea relevant? See fol: 14 24 112
85 Q. is there sufficient Evidence of the Execution of the Will?
86 Q. Shall Def: be dismissed, Plt being assigned to give his Allon a Week before y Ct had given it only 3 days?
87 Q. Was Decd capable?
88 Q. Is y Attorney of a Bond Creditor, or a Book Creditor himself entitled to y Admon de Bonis, y Widow, next of Kin renouncing?
89 Q. See the Queries. fol. 176
90 Q. Shall a joint Admon be granted to Harvey Beckford, or a single Admon to either, if y latter, to wch of them?
91 Q. Which of the Papers did Decd intend to operate? Q. Which can legally operate?
92 Q. Shall a Citation viz. to Js is sd to be executor to accept or refuse? Q. can the Attorney of y executor claim y Right of his Principal, without proving him alive, in preference of y Admor of y other Exor who acted when living?
93 Q. Shall Mrs Deed be taken as part of the Will? Q. shd y original be brought in? Q. is the Affidt full?
94 Q. Did Peter Senhouse the Younger, survive the Deed? See fol. 205
95 Q. Is Mrs Hamblin's Inventory full? Q. must she now make her Election whether she will abide by her Jointure, or put the Estate into a Course of Distribution?
96 Q. Is Mrs Hamblin's Inventory full? Q. must she now make her Election whether she will abide by her Jointure, or put the Estate into a Course of Distribution?
97 Q. Wh: a Proctor being assigned to prove, when y Libel had not been admitted, but many Acts were done subsequent to such Assignation, by both Proctors; Objection can be taken to the Nullity of the Proceeding on the hearing of the Merits? Q. is the Adultery proved?
98 Q. Shall y Judge name Commissrs to survey & report to y Ct one of the Parties objecting thereto? Vide 114
99 Q. Did the Judge right in refusing an Inventory & Account, at y Suit of y next of Kin?
100 Q. Wh: a Pty proponding a Will must first answer to the Opponents Interest? Q. must he admit or deny him to be next of Kin, or will y Admission of a Relationship generally, be sufficient? Q. is Farrant entitled to such answer before he has wrote to Bishops Act?
101 Q. Wh: the Substitute of the Attorney, of the Exors of a Will, or the Resid: Leg: shall have y Admon with the Will annexed, there being a Consent of more Effects than will pay y Debts & Legacies?
102 Q. Is the Plea relevant, of a Marriage in a private Chapel in England, by a Popish Priest?
103 Q. Is the Widow barred from her distributable Share by the Settlement of 2 Leasehold Estates? Q. Must they not be brought into Hotchpot? See Vol. 21 - 73
104 Q. Is the last Will sufficiently proved? Q. must all y Subscribing Witnesses be examined?
105 Q. Shall a Party examine the Witnesses to a 2d Set of Interrogatories, some time after their Examin?
106 Q. Are the Facts proved? Q. is y Identity ascertained? Q. the Wife deserting may she sue for such committed subsequent to her Desertion? Q. Was there not a Reconciliation, so a Condonatio Criminis? Vide fol 92
107 Q. Shall the Instructions operate?
108 Q. Is y Inventory, Account full? Q. Is y Widow entitled to y Furniture of her Chamber, or what in lieu thereof?
109 Q. Shall the Libel be admitted as laid?
110 Q. Must Def: appear absolutely, on account of the Misnomer? Q. can Plt impeach y Will under wch he has received a Legacy? Q. must he not first refund the Legacy received?
111 Q. Must Def: appear absolutely, on account of the Misnomer? Q. can Plt impeach y Will under wch he has received a Legacy? Q. must he not first refund the Legacy received?
112 Q. Wh: a undue Exor having given an Inventory, may be dismissed, to become a Witness?
113 Q. Shall a Copy of a Will (deposited in y Ct of the Chatelet at Paris) received from abroad, but alledged to be inaccurate; an Authentic Copy brought into Ct at the Hearing) be brought as a Script or Scrole, the Party being assigned to bring in all Scripts or Scrolls?
114 Q. Is Grenes Appearance for the Exor of one of the Partys, proper? Vide 60 - 90.

Page	no	Names of Plt & Defts	Nature of Suits	Proctors Plt	Dr Defts	Court where brt	Term	Sess	Year	Sentence
238	115	Peers. v Vicar & c of Croydon	Seat	Jenner	Adderley	Peculiars	ST	3S	1767	Allon admitted exc: 2 & 3 Art
241	116	Hull v Jupe	A Wills	H Stevens Jr	Fountain	Prerog:				Exceptive Dr admitted.
242	117	Woodward v Sanders	Will	Altham	Bishop					Will set aside
255	118	James. v Harden	Defamation	Adderley	Grene	Consistory				Defam: pronounced for
255	119	Orbs. v Tasell	Admon de Bonis	Dr	H Stevens Jr	Prerog:		4S		Admon decreed
259	120	Mapletoft &c. v Rector Ch. Wans &c of Chertsey	Seat	Grene	Collins	Surrey				Widow may intervene
260	121	Allen. v Chapman &c	Codicil	Longden	Stevens	Prerog:	Tr. T.	2S		The Plea admitted
263	122	Hewson v Keeling & Dr	Incapacity	Fabrant	Cricket	Dr				Dr
264	123	Peachy. v Dr by her Gn	Admon	Addesly	Trenley	Dr				admon to the Plt.
266	124	Sawyer & Darnbrook v Silver Side & others	Incumbation	Grene	Fuller	Dr		3S		Plea rejected
268	125	Pyefinch. v. Palmore	Revocn of a Probate	Alexander	Stevens	Dr				Plea admitted
269	126	Ryley. ol. Proser v Ryley	Legacy	Jenner	Bishop	Dr				Dr
271	127	Ames. V. Ward	Validity of a Will	Stevens	Cheslyn	Dr				Will established
283	128	Don. v Campbell	Dr	Cricket	Goodwin	Dr				Dr
283	129	Brede. v Thompson & others	Dr	Longden	Fuller	Dr				Dr & 4 Codicils &c
284	130	Balch. v Burton	rescind: Conclusion	Goodwin	Falkner	Arches	Dr	Bye	Day	Conclusion rescinded
285	131	Cave v Socket	Sanity	Grene	Stevens	Dr				Appeal pronounced for
289	132	Whiting v Smith	Validity of a Will	Jenner	Bishop	Prerog:		Bye	Day	Plea admitted
292	133	Gilbert v Garland & Ux	Construct: of a Bond	Barograve	Major	Dr				Codicil established
296	134	Powel. v Appes	Dr of a Release	Cumberlege	Cricket	Dr				Fuller Inventory decreed
297	135	Blanchard. v. Ducornet	Prolongation of y Term Probatory	Bogg	Falkner	Dr				Term probatory
299	136	Browne, French v Cranston	Validity of a Will	Collins	Grene	Dr	M T	1S		prolonged Allon deformed
299	137	Driffield v Pockinton	Correction	Stevens	Altham	Arches		2S		Allon reforme
305	138	Nye v Piercy & Gregory	Bona Notabilia	Lushinton	Fuller	Prerog:		2S		Allon admitted
308	139	Mapletoft &c. v the Vicar Ch. Wns &c. of Barnes	Erection of a Gallery	Grene	Collins	Surrey	M T	3S 1S 6d		Faculty decreed in part The matter not sufficiently
313	140	Castles. V Vaughan	Validity of a Will	Dr	Goodwin	Prerog:		Bye		proved. No Costs
320	141	Thomas Maddox v. Williams	Subtraction of Rate	Stevens	Fountain	Arches		Dr		Appeal pronounced for Allon reformed
329	142	Chartier v Darcy	Jactitation	Dr	Holman	Dr		Dr		Allon reformed
326	143	Soule v Connor	Admon	Stevens	Longden	Prerog:		Dr		a Simple admon granted to y next of Kin of the Dec:
327	144	Proue v Proue	Dr	Bogg	Adderley	Dr		Dr		
328	145	Senhouse v Stevens	Dr	Bishop	Jenner	Dr	H T	3S	1768	Admon revoked
329	146	Nye. v Piercy & Gregory	Bona Notabilia	Lushinton	Fuller	Dr		4S		Plt condemned in St. 110 & principal Point not determ:
331	147	Mole v Askin Fletcher	Validity of a Testamentary Schedule	Gostling	Bargrave	Dr		2S		Schedule rejected
333	148	Hull v Jupe	Revocn of a Will	H Stevens	Altham	Dr		4S		Will of 18th revived
338	149	Whiting v Smith	Testam: Schedule	Jenner	Bishop	Dr		4S		Schedule rejected
345	150	L'Bolingbroke. v. Uxorem	Adultery	Holman	Stevens	Consistory		4S		Divorce decreed
349	151	Ashby. v Hay & Thrale	Right of contesting a Will	Adderley	H Stevens	Prerogative	L T	1S		Legacy ord: to be brought in
350	152	Jones. v. Chapman	Intervention	Bargrave	Major		H T	Bye		No proper Authority
357	153	Coxon v Jordan and Hills	Inventory & Acct	Jenner	Bishop		L T	2S		Inventory decreed
35A	154	Cowper v Turner	Bona Notabilia	Cumberlege	H Stevens			3S		Bona Notabilia decreed with 5L nom: Expensarum
359	155	Ly My Herbert & Pritchard v Ld Gage	Grant of a Probate	Goodwin	Grene			4S		Answers directed to be full
363	156	Baffier, Hall, Delarive & al Robinson	Sanity	Fountain	Longden		Trin T	1S		Sentence defend. q vid no 159
367	157	Dr Newcome v Dr Markam	Lapidations	Gostling	Altham	Arches		2S		Deft to 4S.
370	158	Office of y Judge promoted by Goddard. V. Ward & Miles	Stopping a Door & altering seats with out a Faculty	Grene	Cheslyn	Dr		2S		Plea loco responsionis
375	159	Battier & others v Robinson	Sanity	Fountain	Longden	Prerog:		2S		Wits not allowed to be repeated
380	160	Ryley ol. Proser v Ryley	Right of Lyonship	Jenner	Bishop			2S		Sentence for y Wife de facto
381	161	Mervey v Coghlan	Jactitation			Consistory		3S		Plea admitted
382	162	Stevenson & Nunes & al Muilman	Church Rate	Gostling	Jenner	Dr				Dr
384	163	Atkinson ol. Church v. Worger & others	Construction of a Legacy	Longden	Holman	Arches		Bye		The Words, decreed to comprehend every thing in y Testatrixes house, at her death.

Qs... The Material Point to be debated in each Suit...

117... Was Deed of sound & disposing mind? Q Was the Will obtained by undue Influence & Imposition on the part of Woodward? V. fo. 14: 112. 193. Sentence confirmed with Costs. 200l.

118 Q Wh: saying a married Woman (who is separated from her Husband) is with Child, a Whore, & gone into the Country to lye in is Defamation? NB. only 1 W. to y Word Whore

119... Q Is y Adm: of H. Tasell, as such a Creditrix & W. N.? If yes, is she entitled to pray y Securities to justify?

120... Q May y Widow of a Party (who prays a faculty for a Seat in conjunction with others) intervene, or does the Suit abate?

121... Q Is the Allon proper to be received to Proof?

122... Q Can a Party who has propounded a Will, afterwards plead Incapacity in the Testator?

123... Q Did the Office right in disobeying the Decree of the Ct? Q Shall the Decree be overruled?

124... Q Are the Solemnities of the Statute of Distributions complied with? Q Is there a proper Regatio Testium? Q Shd the Plea be received to proof?

125... Q Is the Plea admissible?

126... Q Shall a pretended Wife be admitted to offer Evidence, to prove herself y Husband intended to be benefited by the Husbands Will, as y Lawfull Wife?

127... Q Can a Minor not quite 14 make a Will to dispose of personal Estate? Q Was this Will obtained by Imposition or undue Influence?

128... Q Is the Identity of the Deed sufficiently proved?

129... Q Was the Deed sane when he made the Will, when he made the 4 Codicils?

130... Q Shall the Conclusion be rescinded, the Proctor having erroneously suffered the Cause to be concluded, when he was ordered to plead?

131... Q Did the Judge below right to reject the Exceptive Plea, shd he not rather have ordered it to be reformed?

132... Q If the Facts Pld are proved, will they validate y Paper propounded? Q If not can y Plea be admitted?

133... Q Can y Bond be construed to be Testamentary? Q Ought the Codicil to be pronounced for?

134... Q Is Mrs Powel debarred of her distributive Share of her Sisters fortune by the Release given of all y demands, she cd have under her Fathers Will, by y Custom of y City of London, or otherwise, however? Q Is not she entitled to an Inventory of the Sister Effects? Q Is y Inventory given by y Widow full?

135 Q Is Falkner entitled to a Compulsory after y Term Probatory is out? Q Should the Term Probatory be prolonged?

136 Q Shall the Allon be received to Proof as laid?

137 Q. Dr

138 Q. Dr Ex Nr 146

139... Q. Will any Detriment ensue to the Church from the Alterations proposed?

140... Q. Is the Will forged?

141... Q Did the Judge below right in rejecting the Allegation?

142 Q Is the Allon given in Terms? Q If this, Is it relevant? Nr

143. Q Shall Admon be granted to the Representative of the Husband, or to the next of Kin of the Wife?

144 Q To which of 2 Brothers Admon shall be decreed?

145... Q Shall an Admon be revoked, (wch was granted on the Contumacy of the surviving Exor) & a Probate granted to the surviving Exor, or a new Admon to his Attorney?

146 Q Shall a Bond found in y possession of y Dcd, at his death in y Diocese of Chichester, be proved in that Diocese, y Debtor residing in y Diocese of Winchester, or shall it be esteemed Bona Notabilia, & Admon to be taken in y Prerogative Ct. of Canterbury? Wilkes

147... Q Shall the Allon be received?

148... Q Was y Will of Sept: 18th revoked? Q Was it not revived by cancelling y Will of Sept: 41?

149... Q Is Schedule A. an unexecuted Paper, did y Testator mean it shd operate as his Will?

150... Q Is the Adultery proved by the Birth of the Child, with the other Circumstances?

151... Q Can a Person who has received a Legacy under a Will, afterwards contest that Will, if he can, must he not first bring in his Legacy into Court, or pay it back to the Exors?

152... Q Is there an Authority to pray an Intervention from the Crown Q If yes, has the Crown a right to intervene under the special Circumstances of this Case?

153... Q Is the Son Legatee of the Decd entitled to an Inventory & Acct having released his Interest? Q Is the Release executed? Q can the Ct enquire into y Validity of it?

154... Q Are Pawns Bona Notabilia? Q Can y Ct take Cognizance of a Sale of?

155... Q Has Wallace answd fully to the Interrogs if not are they pertinent Q is Dr Gage entitled to object before he has given in his Libellous Answers? V Nr 113

156. Q Wh: after Publication & y Cause being called on for Sentence on the first Assignation, the Party who called it on, is entitled to correct any Omissions of his Proctor? making Affidavit y he has not seen or been informed of the Contents of y Depositions?

157... Q Is the Libel admissible?

158... Q may Deft give an Allon, loco responsi, in a criminal Suit, justifying the Fact?

159... Q Shall a Witness be allowed to release his Interest, (after examon & Publication) & then be repeated to his Depon, or re-examined?

160. Q by the words "my dear Wife Mary," is the Wife de Jure meant, or y Wife de facto?

161... Q Will the Evidence, if proved, induce the Ct to pronounce for the Marriage?

162... Q Is a Rate to raise an additional Sum, to defray the Expence of compleating Allhallows Church &c. legal, the Inhabts having expended the Sums they were authorized to raise by 2 Acts of Parlt Q If legal, were the extra Expences necessary

163... Q as to the Construction of a Legacy, what is meant by the words "all that is in the House" does it comprehend, money, Furniture, & all other things in the Testators House at her death?

Page	No	Names	Suite	Plts Proctor	Deft Proctor	Term	Sess	Year	Judge's Decree	
386.	164.	Office of y^e Judge promoted by Bebrr. agt Pearsal.	Non Residence.	Fuller.	Addeley.	Trin.	Bye	1768	Arches.	Artes admitted
387.	165.	Charter v Darey.	Jactitation.	Stevens.	Holman.					Marriage established
393.	166.	Cloudd v Davis & Robinson.	Sanity. Drunkenness. Imposition.	Bishop.	Fountain.				Prerogative	Will established.
405.	167.	Pakey v Skerry.	Misnomer.	Major.	Gostling.					Do.
407.	168.	Ly M^r Herbert, Pritchard agt Ld Gage.	Exors giving Security.	Goodwin	Grene.					Security not required
413.	169.	Frideriek. v. Horton.	Dilapidations.	Cheslin.	Major.	Aug:	1		Surry.	Deft to appear absolutely.
415.	170.	Compton. v Beareroft.	Nullity of Marriage.	Bogg.	Do.	Nov:	4		Serj^ts Inn.	adjourned.
424.		Do.				Dec:	1			Do to 28 Jan:
455.	171.	Thomas & Maddox agt Williams.	Rate.	Stevens.	Fountain.	Mich. T.	35.		Arches.	Rate affirmd
457.	172.	Pryce. v Long Holland & Bird.	Repairs of the Chancel	Grene.	Stevens.					Proceedings set aside.
458.	173.	Allen. v Chapman & others.	Codicil.	Bellas.	Do.				Prerogative	Plea admitted
459.	174.	Wood. v Mole & Atkin.	Validity of a Will.	Collins.	Gosling.					Judgement for Collins Client
459.	175.	Mole v Atkins & Fletcher.	Appraisement.	Gosling.						too early.
460.	176.	Duke v D^so of Grafton.	Adultery.	Do.	Stevens.		45.		Consistory	Plea admitted
471.	177.	Butler v White.	Jew^y Papers.	Stevens.	Grene.		Bye.		Prerog^v.	Do.
472.	178.	Ibbetson v Burchal.	Brawling.						Consistory.	Deft dismiss'd
473.	179.	Hervey v Coghlan.	Validity of Marriage.						Prerog^v.	Plea reformd
476.	180.	Tomkins v Biggs.	Admon.	Fuller.	Stevens.					Joint Admon decreed
477.	181.	Betts & others. agt Duhamel.	on giving Security for y^e proper Application of a Legacy.	Falkner.	Grene.	H T.	2 S.	1769	Arches.	Legacy decreed to be paid without Security.
479.	182.	Driffield v Pocklington.	Correction.	Stevens.	Altham.					adj^d to 2 S. E. T. for Inform^n in Law.
481.	183.	Betts &c. v Duhamel.	vid N^o 181.						Consistory	Fuller Answers directed
482.	184.	Morris v Morris.	marriage.	Stevens.	Collins.		45.			Citn held good.
483	185.	Macalpin. agt Alderney.	Improper Citation.	Jenner.	Bargrave.					
483	186.	Compton agt Beareroft.	Validity of Marriage	Bogg.	Major.		Jan.	28.	Delegates.	adj^d to Feb. A. then y^e marriage declard valid.
		Childleigh agt Aug^s Hervey.	Jactitation.	Bishop.	Holman.	H T.	35.		Consistory.	Deft enjoind Silence
511.	187.								Prerogative	Will established.
518	188.	Cave & Borgh. agt Gardiner.	Nuncupative Will.	Cheslyn.	Bishop.		45.			
526	189.	Stevenson & others agt Harwood.	Validity of a Will & d^o being made.	Altham.	Cumberlege.		Bye.			Do.
530	190.	Cormier, Mauger agt Bowden.	marriage. Contract.	Longden.	Fountain.	March	28	1765	Surry.	Contract rel^d aside.
542.	191.	Austen by her G^d agt Chancellor.	Defamation.	Jenner.	Cheslyn.	H T.	Bye.	1769	Consistory	Defamation pronounced for

164 Q. Are the Articles admissible, as laid?
165 Q Has Def^t proved her marriage? Q has she complyd with the Requisites prescribed by y^e Laws of Ireland, relative to her renouncing Popery, & conforming to the Protestant Religion?
166 Q Was this Will obtained by fraud or Imposition, & was y^e Testator of sound mind?
167. Q Wh^t Nuce Sherry of W. Carpenter, is meant by Lewis Story of W^m Carpenter?
168. Q Shall the C^t oblige the Exors to give Security before the Probate is delivered to them?
169. Q Can Sir J. S. institute a Suit of Dilapidations, as Patron, agt Horton, S^r J. S. Elder Bro^r & had granted the next Avoidance to S. in Trust to present. C. only?
170. Q Is a Marriage contracted between 2 Persons, who are natives & domiciled in England, but who go into Scotland merely to solemnize such marriage, & immediately return to England, a good Marriage within the 26 of Geo. 2. c33. one of the Parties being a minor, & none of the Requisites prescribed by that Act being complied with?
171 Q Is the Rate formal & Legal?
172 Q Wh^r Witnesses examind viva voce without taking down their depons will found the Sp^l C^t in a Sentence?
173 Q Shall the Allon be admitted?
174 Q Does a personal presence in Court bind one who is no Party to the Suit?
175 Q Was not y^e Commiss^n of Appraisement obtaind for Delay, & have not y^e Com^rs been guilty of Delay?
176. Q No Opposition! - The Divorce afterwards pronounced for.
177 Q Is the Allon admissible?
178 Q Has Def^t brawld in the Church, by giving notice of a Poor Rate?
179 Q Is the Allon admissible, as laid?
180 Q Shall the Adon be granted separately to the Brother, or Sister of the Died or shall they have a Joint Admon?
181. Q Are the Ch: Wdns bound to give Security for the proper application of W^ms Legacy, & can the Exec^rs of his Exec^r refuse to pay it, without such Security being first given?
182. Q May Exors, resume & prosecute a Cause of Correction instituted by their Testator agt a Clergyman for neglect of Duty?
183 Vide N^o 181.
184. Q Are the Answers full?
185 Q. Wh: a Party cited to appear, in y^e Dining Room of D^rs Com^s instead of the Common Hall, must be cited again, for a criminal & personal Offence?
186. Vide N^o. 170.
187 Q Has Def^t proved his Marriage to the Plt?
188 Q. Wh: Deed made y^e Nuncupative Will? Q Wh: Hynes is a credible W^n? Q. if not wh: the Will is good under the Statute? Q. Wh: Deed was a Mariner in actual Service at y^e time of the Nuncupation?
189. Q. Wh: any Subsequent Will was made? Q if there was, wh^r the Date thereof not being precisely ascertained, nor the Contents appearing, the first Will duly executed was revoked thereby?
190. Q. Shall the Contract of Marriage at Guernsey per verba de futuro, be Enforced?
191 Q Is the Defamation proved?

On Appeal from the Sub Deans of Guernsey to the Bp of Winchester: heard by Dr Harris Commissary of Surry, as Ap[pe]ctor to the Bp

Dr Calvert

No 190 Cormier & Mauger v Bowden

Longden — Dr Wynne — Dr Calvert — Fountaine

March 28 1765.

As to enforcing a Contract of Marriage made per Verba de futuro

This is a case of Contract of Marriage on an Appeal from the Sub Deans of Guernsey to the Bp of Winchester, as Superior Ordinary of that Island. I am Counsel for Mr James Bowden the Respondent, who addressd Miss Mauger with her Mothers Consent & Mrs Anne Mary Cormier, Widow of Jos: Mauger, & Curatrix of this Anne Mauger, & proposed Marriage to her, to wch the Mother agreed, but insisted on a Contract being entred into. Accordingly on March 2d. 1762. they reciprocally covenanted to marry, as soon as might be; this Contract was signed by the Parties, their Mother, & 2 Witnesses. In Consequence of it, she received his Visits, as is usual between Persons betrothed. The Mother afterwards quarrelling with Mr Bowden, resolved her Daughter shd not marry him, but leave the Island: to prevent her going away, he, at Miss Maugers request delivered her the Contract, but on giving it up, stipulated, & She verbally engaged, that she wd not plight her Faith to another, or leave the Island, without his Consent, & that the Contract shd be delivered, on the Day of Marriage wch shd be a Fortnight after the stated Time elapsed. Mr Bowden delivered her the Contract Feb: 3d. 1763, but he had the Caution to have previously a Copy, attested by the same Persons, as attested the Original. Feb. 20. 1763 She declared her Intention to fulfill her Promise. But on her Refusal & Treaty going off, he constituted a Jude before the Revd Mr Elias Crespin Subdean of Guernsey, before whom, (with the Revd Mr Dufresne & Mr de Marchant for his Assessors) the 1st Hearing was March 1st 1763 & Final Hearing April 28th 1763. The Council for Miss Mauger read the Contract, it was argued by Advocates. Mr Bowden waved all Proceedings, & rested his Cause upon Affidavits; The Judge'd passed Sentence for them to marry in 2 Months, under £500 penalty, & condemned the now Appellt in Costs. The Parties had agreed to hear the Cause on Affidavits; but the Deft Advocates objected to Miss Maugers Examn on acct of her being a Minor

Dr Wynne — I am Counsel for Mrs Mary Anne Cormier, & Miss Mauger in an Appeal, from a Sentence of the Revd Mr Elias Crespin B. Subdean of Guernsey, in a Suit upon a Contract of Marriage, commenced agt the Curatrix & the Daughter. Jan: 22. 1762. Citation, Inhibition, & Monition were prayd. Libel was assigned by Feb. 8th 1762. 2 Affidts by the Appellants are before you; upon them & the original proceedings the Cause is to be heard. The Contract is in French, & stipulates, that the parties Mr Bowden & Miss Mauger agree to marry as soon as they shall find convenient. It contains several Settlements, & the Parties have engaged to fulfill it, on pain of Forfeiture of ½ their Fortune, & that all their Estate, present & to come, were bound for the Performance: there is also an affidt of the Respondent, & there are others, wch are thus described; Viz: Depons of sevl Persons relating to the Truth of the Respondts Affidt. How can such be annexed, as it is, to the Bps Commission? for it is unheard of to annex it to the Grounds; they might as well annex a Depon of a Party, & examine Witnesses both, as to a Plea. The Cause is to be heard on the Contract of Marriage itself, & upon the Affidavits.

Affidavit of James Bowden

That he was a Widower Feb[y] 9th 1762, & had conceived a great Affection for Miss Mauger, he applied to the Widow Mother for leave to address her, she consented but insisted that the Marriage shd be under Conditions in writing: agreable to this a Contract was drawn March 2d 1762 between him & Miss Mauger, that the Parties shd marry each

on pain of forfeiting ½ their Fortune. That £1000 of the Daughters in the Funds, shd be transferred & secured; that the intended Husb[d] shd receive the Interest; & in case of death, to vest absolutely in her & that she shd then have a Share of his Fortune & Dower. This was done in the presence of the Mothers of the Parties, who both agreed not to dispose of the Moveables, to the prejudice of the contracting Parties; It was mentioned as a Request, but not in the Contract, that the Marriage shd not be of 2 Years, but that he was to be at Liberty in the mean while to consider her as his betrothed Wife. That it was the Custom in Guernsey to enter into Contract some time before they intend to marry. That the Mother & She often quarrelled, but that he continued to visit the Daughter; That in Jan[y] 63 Mrs Cormier told him, he shd not have her Daughter, & hearing that she said, she shd soon leave Guernsey, he declared that if the Contract gave him power, he wd prevent it. That on being asked, he refused to deliver up the Contract, till they gave an Agreement under their hands; but that Miss Mauger said, if he had any Love for, or put any Trust in her, he wd not scruple delivering it to her, without, in order to satisfy her Mother; however he made her give him a verbal promise; viz[t] plight her Faith to him, & engage that she shd plight it to no other. That since her Mother did not consent to their marrying till after 2 Years, no more than 15 days shd elapse, after their Expiration, before she wd marry him. That she shd not leave Guernsey without his Consent. That the Contract shd be returned on the Day of Marriage, & the presents he gave her; shd be delivered back to him. It was conditioned that he shd be obliged to see Miss Mauger every Morning & Evening; he answered that he might not perhaps be able, thro' Illness, or his affairs calling him out of the Island; she said, if he was ill she wd go & see him, & of the 2d of Feb[y] 63. he said to her, See the Confidence, I have repos'd in you, & I hope you will not change your mind; she repeated her promises. But however for the greater precaution, he desired 2 Witnesses before he gave her the Contract, to take an exact Copy wch is annexed. Feb 3d 63 Miss Mauger repeated her Promise, to fulfill the Engagement, & he on that Condition delivered the Contract to her: he trusted her with it merely to prevent her going out of Guernsey: She went out of the Room & left it upon the Table; & upon her return, took it up, & said, before we go farther, you must promise that you have no Subterfuge or Evasion whatever, this deposes that he did not deliver it up, as annulling it, but to prevent the Daughter being forced by the Mother to leave Guernsey & she did not take the Counterpart, but left it in the hands of the Witnesses: that he was well received by the Mother so late as Feb[y] 21. 1763. But the next time when he visited the Daughter who was with her Mother, Mrs Cormier then pretended, that the Daughter had not promised on her faith, only on her Conscience & visit her bitt he was forbid by the Mother, who she believes made her Daughter keep out of the Way. Feb 28th. finding they were determined to quit Guernsey, he resolved to have them arrested, accordingly March 5. 1763, he procured them to be arrested by Warrant from the Chief Magistrate, to shew Cause why they shd not fulfill the Contract. Bail was given to answer the purpose of the Arrest; at the time of which in the presence of the Provost & others, the Mother said he might take her Daughter; but she wd give him nothing, he said, no doubt, he wd take her as she was. Before the Suit was advanced, he was sent for, she proposed to vest the Money & pay the Interest to her. March 30 an Overture was made to him of paying him the Interest of ½ her Fortune, if she married any other, but he refused to close with the Proposal, as being entitled under the

Contract to ye the Fortune if she married any other: they were then ready to return the Contract, but refused an Assurance in writing to carry it into Execution, whereupon the Treaty for stopping the Suite broke off - The Advocate for Mr Bowden rested his Cause on the Examination upon Oath of the Mother & Daughter - Mrs Cormier offered to be sworn & examined, but their Advocate objected to the Daughters Examination as under Age - Hereupon they were ordered to withdraw, & the Judge gave Sentence, that Miss Mauger shd compleat the Marriage, by Solemnization in the Church, within 2 Months, under a Penalty of £500, & condemned the Defts in Costs; from this Decree they appealed, & 2 Securities were given to prosecute the Appeal - We believe that since prosecuting the Appeal, they are withdrawn from Guernsey, & have sold part of their Estates - March 2d 1762 the Parties entred into Contract, without the performance whereof, the Marriage shall not take effect - All goods presented to come were bound for the Execution of the Contract -

Depons of several Persons to the Truth of the Affid: sworn & subscribed by Bowden annexed to the Bishops Commission - It is a very extraord in any Proceeding throughout: the Parties agree to be heard on Affid: & Mr Bowdens Affid: is annexed to the Commission: it must have been read over to the Witnesses, before they cd be examined; I observe indeed, that it is said, examined to the Interrogatories; but if any were administred, they shd have been returned - The Rule in Affidavits is, that the Witnesses are to be kept separate to prevent any Collusion from their knowing what each depose. on the contrary, here the Affidavit of the Party is the ground of these Affidavits, thus described, thus obtained, it looks like prompting the Witnesses, such a Practice ought not to be suffered

Dr Wynne

Dr Calvert

Upon reading the Requisition only. Sir, you will perceive that the Objection is at an end - Mr Bowdens Affid: is very full, it is in the nature of a Plea, & I do not see that this method is more leading, than if they had been examined upon a Plea, & besides, the Proceedings are different in Guernsey - The Revd Mr Elias Dufresne, one of the Assessors & Witness by Copy, & Mr Richd Reserson jointly & severally depose to the Truth of the Copy - Mr Philip Mauger only shews he was cited, refused to depose

Elias Dufresne deposes That about Feb: 1762, he was desired by Mr Bowden to speak to Mrs Cormier & Miss Mauger about Mr Bowdens Marriage with Miss Mauger - That a Contract was drawn & signed, that they visited frequently, as is usual between Parties betrothed, & he heard both the Mother & Daughter say, he was always welcome: Upon a Quarrel between Mr Bowden & Mrs Cormier, he doubted wh: there was not an Intention to send the Daughter away from Guernsey: that she alledged drunkenness in Mr Bowden, who was never reputed a drunkard: he heard Cormier or somebody say, that he shd never have her Daughter, having broke his promise, not to get drunk, & twice at her morning & night: that they asked with great Calmness at the Parsonage, wh: the Parties to a Contract, were at Liberty to marry any other; that the Judge thought Miss Mauger refused to be examined, for fear of perjuring herself, & the Deponent thought so too, as she had asked him wh: when 2 Persons had contracted together they cd not disengage themselves -

The other Witness nearly to the same purpose, & that on delivering up the Contract, she made some verbal promises to perform the purport of the Contract; that she wd have avoided it, & said that was Childs Play - Mr Bowden offered to abide by the Examion on Oath, viva voce, of Mrs Cormier & Miss Mauger; that Mrs Cormier did not swear, as he apprehended, for fear of forswearing herself, thro Passion, Prejudice &c. that he was asked by Mrs Cormier, wh: the Contract being delivered up, did not leave her Daughter at Liberty - Several refused to depose -

deposed, that Miss said, if ever Mr Bowden was drunk, he never shd marry her; she owned to the Deponent, that she had promised to marry him, tho, she had desired him to deliver up the Contract, because it did oblige her Mother, on whom she had great dependance: that when the Suite was just commenced she was advised to make it up with Bowden by giving him a Sum of money: she said she wd sooner forswear Marriage than give him any thing - The Kings Proctor in Guernsey deposes to the Warrant, the Arrest, & giving Security not to quit the Island - The Promise is reciprocal, that if one shd break it, the other shd be free - Deposition to his being seen drunk, but not at the Time when Miss Mauger embarked - Deposition That there are no Canons in Guernsey, but that there are in Jersey, which are often admitted to determine the Causes in Guernsey

Dr Wynne

Extracts from the Registers of the Proceedings in the Ecclesiastical Courts of Guernsey &c

Affid: of Miss Mauger That the Contract was delivered up about 3 Weeks before, by Mr Bowden, because the Engagement of marriage was entirely at an end, voluntarily & freely without any Reservation, & of his own Accord, & that she delivered to him some Silver Plate, wch he had made her a Present of - Affidavit of Mrs Cormier That Mr Bowden came to her House after the Contract was delivered up: she said she was glad it was broke off: he answerd, it was only to prevent Law Suites & Troubles, but wanted to tell her something about an Engagement by Words; whereupon she said to him, as he was now disengaged she wd not enter into any further Engagement with him & he must not expect Leave to see her Daughter as before: Miss Mauger was present - she said to her, you may now marry me or let it alone, as you will, having the power in your own Hands -

Dr Calvert

I apprehend the principal Consideration will be, whence the Appeal comes: as in Guernsey they proceed by their own Customs: In an Action at Law Coke C.J. said a Commission must issue out of Chancery, to determine according to the Laws & Customs of Guernsey - The Suggestion for the Appeal is, That the Judge pronounced upon the Oath of the Parties; an Oath ex Officio, wd not be allowed here, I know, but it may in Guernsey: it is not long ago that it was so here: in the time of Charles the 2d, it was allowed in Matrimonial Causes, & the reason must have been chiefly on account of the Secrecy, wch prevails in them: In the first Instance, the Judge wd not permit the Oath of one, because Mr Bowden had put it upon the Oath of both: he proceeded in pœnam contumaciæ; the Daughter cd have only objected from the Consciousness of the Promise, as she cd else have speedily decided the Cause by her own Oath: Another Objection to be made is, that the Penalty annext to the Sentence is very extraordinary: but tho, it wd be so here, yet there may be something civil as well as Ecclesiastical

on the Ct of Guernsey; they were bound by ye Security to solemnize the marriage: Jam supplied with Precedents of the Proceedings there, wch shew that is the usual practice. Jan 27th 1705/6 Suit was brought by Querpole agt in a Cause of marriage, wherein the Judge relyed on the oath of ye Pty, condemned the Deft in Costs. Wolling agt Solemnization was decreed with a penalty of 100 Livres on non performance. June 8th 1733 Anne Sherlet complained agt Solemnization under a penalty was decreed upon her Oath. Besides ye Oath in this Cause, the Judge had more before him, he had ye personal knowledge of the Assessors: it do not indeed be allowed here, but the Practice is different at Guernsey; & there they divested themselves as much as possible of the Character of Judges - they spoke only secundum Allegata & probata - another Plea is, that ye Contract was given up; but its being so is fully accounted for by our Affidavits; the Reason is established by the other Circumstances in the other Affidt by the belief of the Neighbourhood, the continuance of the Visits; for how does this agree with ye Contract being annulled? it was not given up with an Intent to cancel the Obligation, but upon a promise of fulfilling it; & for other reasons our Depons stand uncontradicted except by Mrs Cormiers, Mis Mauger, unsupported by others. It may be urged, that this is the Contract of a minor Swinburn says from 7 years to 14 Minors may contract per verba de futuro, & after that age, they may enter into any sort of Marriage Contract; for any who may marry may contract - It is proved that the parties were acting under & by Consent of their Mothers & Guardian. The Marriage Act 26 Geo 2. disables here, without Consent, but they may with, tho under Age; & in Guernsey the Practice is established - It may be said that a Contract per verba de futuro, may be binding in Conscience, but that the Ecclesiastical Judge will not take care of performance, & will only order Penances; tho, this might be ye practice regularly in our own Eccles: Cts, that is no Rule for the Ct from whence this Cause comes, & there is no reason to say, a Contract of this kind may not be carried into Execution in Guernsey, where it is very common to enter into such Contracts, as the Depons, Precedents I have quoted, prove, I hope therefore you will be of opinion to pronounce for ye Sentence of the Judge below, as being conformable to the Custom & Practice of Guernsey -

Dr Wynne — The Dr has premised that the principal matter is, whence the Cause came, & that you are to suppose yourself sitting in Guernsey, & that it is to be determined there - I must differ with the Dr on that point; it wd be so in case of a Real Action, there is something permanent; but you will please to observe this is a marriage Cause; the Ct then will enquire where the Party is commorant: she is now resident here, & has been so for these 2 years, perhaps may never return; I do conceive then the Ct wd be shy of compelling a marriage on the Contract; I submit it upon the Sentence of the Judge & what appears here: - It has been said, it may be supported by the Precedents, however contrary they may be to our practice, but I insist, the only Evidence & Information to be attended to, is, the Process returned: the Depons of Persons may aid the merits, but cannot the Sentence of the Judge, wch must depend merely on what appears from the Acts of Ct - It only appears that Mr Borden complained on his Complaint Sentence was given without Witnesses being examined or a Plea given in, or its being known wh? Miss Mauger wd or wd not comply: such a Proceeding is contrary to reason: the Judge makes himself the Instrument of the party: The Oath ex Officio ought to have been upon the petition of the Proctor & taken down so, even if ye practice of an

MS E181

Oath ex Officio to be supported; whereas it does not appear in ye Act of Ct, nor yet from Mr Dutresne, what was the foundation of the Sentence - The Advocate for Mrs Cormier, Miss Mauger & the head part of the Contract, & Mr Bowdens Council waived all other proofs & rested upon Affidavits, but was the Judge therefore to proceed in that manner? May did the Judge direct the Oath? was it offered, possibly not; & it might be improper that she shd take the Oath as a Minor - In the present Case, one wd take ye Oath the Other did not; therefore it is different from the Precedents: Besides, these Precedents stand upon a different footing, from Precedents quoted from Notes taken in these Cts; they are known to all, if mistaken can be contradicted; but those from abroad shd be authenticated under Seal, or some public Authority: It is to be considered what sort of a Place Guernsey is, where these Precedents are said to be laws: the People live very retired; it is different from a Country with a well established known Law but here every thing passes sub Silentio - From those Sentences there was no Appeal interposed; the Sum of 100 Livres was so small a penalty that it may have been complyed with, for that reason; tho' on an Appeal the Sentence did not have been justified; but you will enquire Sir into the Decency & Propriety of compelling the performance of this Contract - It is a marriage Cause, It is an Engagement to live together as Man & Wife, for wch reason the Sp: Ct will not compell a Marriage - The Penalty annexed to the non performance creates an Alternative; this is a Commutation of Marriage, a prophanation of a most sacred rite, (tho, not a Sacrament in our Church) unheard of in any Ct. The whole has been a Chaos of Ignorance, Error, & Absurdity - One of ye Assessors says there are no Laws in Guernsey; that on occasion, when wanted they are borrowed from Jersey - Were the governed in this Decree by any Canon prevailing in Jersey, if they were, why was it not pleaded? The Books mention 2 Sorts of Contracts: the first, when the Engagement is per Verba de presenti; the other, when the Stipulation is per verba de futuro - They all say the former is verum matrimonium, from wch description this Suit is improperly called a Contract, for it has ye Effect of an absolute Marriage, & accordingly it is laid down that a subsequent marriage is void, upon proof of a prior Contract per Verba de presenti & the Sp: Ct does not interpose to make a marriage where there was none, but only for decency sake enjoins a Solemnization, by a Priest in the face of the Church - But as to a Contract de futuro, tho, it be ever so solemn, tho, upon Oath, yet by mutual Consent, the Parties may be as free as if they were never under any Engagement, tho, it may be true, that if ye Parties do not agree to be disengaged, they are bound, as they wd be by any other Contract - The Eccles: Ct never went farther than to admonish, & it implies a Contradiction to compel Parties, because Marriage cant be contracted except by consent, & if then the Parties were either of them to be compelled, the very essential wd be wanting - Agreable to this is the Canon Law laid down in Decretalium Lib. 4. Tit 1. Cap: 17. de Sponsalibus Requisivit a nobis . . . . . quâ censurâ mulier compelli debeat quæ Jurisjurandi religione neglecta nubere renuit, cui Juramento interposito se nupturam firmavit - ad quæ respondi[t] quod cum libera esse debeant matrimonia monenda est potius quam cogenda cum coactiones, difficiles solent exitus frequenter habere. and this appears to have been ye practice in England accordg to Swinburn of Espousals Chap. 17. & for the reason given in

the Canon Law - How ed the Party be absolved from Excommuni-
=cation? the Party swears de parendo Ecclesiæ - Was an Admonition
ever enforced by Excommunication? how ed y^e Party be absolved?
There has been no Precedent of a Suit on a marriage Contract, in
y^e Course of my short Practice, as there can be no recent precedent
26 Geo. 2. because of the late Act of Parl^t. There is in a Common Law Report
a case upon a marriage Contract, that of Holt v Ward wherein
the Plt (a Minor at the time of the Contract) brought her Action
at Common Law, for damages, agt the Deft who being a Major at
the time of Contracting, it was urged in his favor, that it was
nudum Pactum, because only one Party was bound. But y^e
Ct enclined for the Plt. because tho, the Deft ed not have had
the same Remedy, agt her, by Action for damages yet they
thought he might have some Remedy, viz, by Suit in y^e Sp: Ct
to compel a Performance, the Plt being of y^e Age of Consent
& that wd be a sufficient Consideration: they apt pointed an
Argument by Civilians, upon wch no Instance ed be given
wherein they had compelled the performance of a Minors
Contract: And y^e Council for the Deft said, that in y^e case of a
Contract per Verba de futuro, there is no remedy even agt
one of full age in the Sp: Ct, but only an Admonition, and
the only reason why they hold Pleas of Contracts per verba de
præsenti, is, because that is looked upon amongst them
to be ipsum matrimonium, & they only decree y^e formality
of a Solemnization. In 1733. upon a Contract per verba de
futuro in the Arches, the case of Villa Real v Dacosta
where the Engagement was to marry a year after y^e Date of
the Contract, was much stronger, yet y^e Judge refused even
to give an Admonition to solemnize; it was laid down as
established Law, that being a Contract per verba de futuro
the Ct ed not compel a performance - It does not appear
from y^e Process in this Cause, of what Age miss Mauger was
she is only said to be under Age. In this Contract there are
many Conditions, it is more like a marriage Settlement
than a marriage Contract - The words de futuro, are expressly
in the closest manner; the performance of y^e Contract is
made to depend, not only on a future Day, but on y^e Will
of the Party at that time; it depends upon y^e opinion of
the Convenience; suppose the Party shd never think it
convenient, every penalty in whatever Bond it be, leaves
an Option - My Client has a right to refuse a Performance
he prays y^e Celebration, wch we deny because there is an
alternative; the Minor might chuse wh^t she will or will not abide
by the Contract, for the penalty he must apply elsewhere - Now
let us examine how the Case stands upon y^e Subsequent Promise pre-
=tended to have been made; he had delivered it up; the presumption
in Law is that he had departed from the right, as much as if
the Contract had been cancelled - They say there was a formal
Promise, but that is in y^e Affidv^t of the Person himself only, wch
is not sufficient Evidence, that there ever was such a formal
Promise - There are indeed some who depose to the Truth of
his Depon^t, but these sort of Causes depend on many
minutiæ, upon sifting the Evidence, of wch there has been no
Opportunity afforded in the present case; besides Mrs Cormier, miss
Mauger's Oath is as good as Mr Bowdens, nay they are 2 to 1 &
Mrs Cormier is more than a formal Party, as Curatrix to a
Minor; the Witnesses say they sometimes quarrelled, & that she

sometimes called him a Drunkard, (wh^ch he was so or not,
it shews her Opinion of him, & makes it less likely, she shd make
him a verbal promise, after she was disengaged from the
Contract - There seems to have been a Courtship, there may have
been once a Treaty of marriage, but it was broken off: Mr Bowdens
views will appear from his own account: he himself says the Daughter
offered to marry him, on some Alterations in the Settlement
wch he refused - She conceived a settled Aversion for him, (no
wonder that she shd entertain one, to so arbitrary, so harsh a
man; if he treated thus before marriage, what sort of treatment
ed she expect afterwards: Her Dislike to him is confirmed by the
Offer she made him, of giving up to him the Interest of half her
Fortune; he wd not be content with this considerable Offer
but wd insist upon y^e her Fortune: Surely Sir it must raise
some degree of Indignation, that a Man shd himself avow
that it was a mere Bite, that he had drawn in so fast
that she ed not be loosed accord^g to his Apprehension. Tho
I hope he will prove mistaken in y^e ungenerous Advantages
he wants to take - No Cause ed ever appear in a more unfavor
-able light to the Ct - Clauses of Penalty are foreign to a Contract
of Marriage; the whole has been irregular & extraordinary
in the Proceeding; there has been strange Conduct towards &
cruel Treatment of my Client, & moreover, she is now resident
in England & to be determined by the Laws in force here, not
by the Customs of Guernsey, I hope therefore &c.

Dr Calvert. I hope the Plt will not look upon this to be so much as
money Matter, as the Dr does; the Proposal of money came from
them & the Ill Usage from them - I will detain you very
little in following the Dr thro, y^r Argument - The Q^n is not
now, what the Law here, elsewhere is, but what is Law in
Guernsey - Notwithstanding y^e Objection that this is a
matrimonial Cause & is different from a real Action, the Ct
will take it at Large; How can Parties tell how to demean
themselves, if they are to be determined at Guernsey under one
Law, & on Appeal hither to be governed by another - The
Proceedings in the Ct below, are in a summary way, there were
only 2 Hearings; the Cause did not proceed gradatim, as it
wd have done here; it was rather like a reference, & y^e Judge-
=ment not censureable because they proceeded differently
from ours - The Island is of Consequence enough to form
Precedents for itself surely; if they had written Law, that
wd determine, as they have not, there is the more reason
for relying on Precedents - I see no reason why one refuse^s
to pay the penalty, Excommunication or attachment (if
the Ct has a mixture of the Civil Power with it) the other method
of enforcing the Sentence in Guernsey, might not be proceeded
to; I waive discussing the Point, as to what the Law is here
as to such a Contract, as I cannot consider the present Case to
fall under it's Cognizance - The Ct of Chancery will award
a specific performance of a Bond, notwithstanding the penalty -
A Contract there, to marry when their Parents shall please,
has been awarded to be carried into Execution immediately; it is
not more uncertain than the other - It is not determined
how far Minors may be bound by Contracts, it is not settled
they cannot bind themselves, nay, in many cases they certainly
can - Not long ago, there was a notable Case on that of

N.B. Before it came on my 2d day of Hearing Sd Sackville Glam Lady Drury Shore & Desd Ts married Read ye Point, but took the opinion of ye House upon the standing——

Lady Drury — wherein the point was, whr a minor on entering into an Agreement for a marriage Settlement Ed bar herself of Dower? the Judges differed in Opinion; it was fully debated at last went up to the House of Lords who decreed that she was barred. We must have ye best Evidence we can get; Mr Bowdens Affidt is very full; it has been said that it is uncertain what ye Parole agreement was; it is not so very uncertain, for it was reduced to writing afterwards: However, Sir, if you think ye Sentence was according to the Rules observed in Guernsey you will not Judge it, I hope, by a harder law than we were subject to there.

Judge March Harris 28: 1765

I have heard the Informations, but can give no Sentence it being reserved till the whole has been reported to the Bp, by me, as his Assessor.

Report April 3d 1765

To the Right Revd Father in God, John by divine Permission Lord Bishop of Winchester, Superior Ordinary of the Island of Guernsey, & its Dependencies, in your own proper Person—

May it please your Lordship

In Obedience to your Lps Directions to me, to hear the Cause of Appeal brought by Mary Anne Cormier, Widow of Jos Mauger & Curatrix of Anne Mauger their Daughter, & by ye Sd Anne Mauger, the Parties Appellant & complainant on ye One part, & Ja: Bowden, the Party Appellate & complained of on ye other part (with in the first Instance) was a Cause, or Business of Complaint, of the said Ja: Bowden agt ye Sd Mr Anne Cormier Widow of Jos Mauger & Curatrix of the Sd Anne Mauger their Daughter, agt ye Sd Daughter, to shew Cause, why ye Sd Anne Mauger refused to fulfill the Promises, wch ye Sd Pt & ye Sd Anne Mauger, had reciprocally made in presence of & with ye Consent of ye Sd Curatrix, to marry with one another, & also to hear at the same time, said & adjudged, that ye Sd A. M. shall be bound & obliged, to fulfill the same within the Time & under ye Penalty with ye Ct shall please to order, & to pay him his Expences, & wch was lately depending in Judgement before ye Revd Elias Crespin B. A. SubDean of ye Island of Guernsey & its Dependencies, howsoever constituted, who did by his Definitive Sentence or final Decree, made & interposed on ye 28th of April 1763 adjudge ye Sd A. M. to marry with ye Sd J. B. within 2 Months, in discharge of ye Sd Complaint, on the penalty of £500 Sterling & condemned her in Expences & to reporting Opinion as to the Merits thereof; I do humbly report to your Lp "That on Thursday March 28. 1765 "having heard ye Evidences, wch was by Affidt at ye Request of ye "the Parties, & Council, as well on behalf of ye Appellant as ye "Respondent, It appeared that the Ct of Guernsey hath proceeded very irregularly — By determining ye Merits of ye Cause, without written Evidence, or even any Evidence upon Oath; no Species of Evidence by Confession of Parties, or otherwise, having been transmitted with the Process. By decreeing a Marriage to be celebrated between J. B. & A. M. in consequence of a Contract per Verba de futuro only wch if it had been regularly proved by Confession, or on the Oaths of Witnesses, wd not have afforded sufficient foundation for such a Sentence, it not being in the power of the Parties

Ct to enforce ye Celebration of a marriage by a Priest, unless when a marriage Contract is proved to have been made, per Verba de præsenti, such a Contract being regarded in Law, as actual & present, such a Contract being regarded in Law, as actual & present, such a Contract being followed by decreeing the payment of lawfull matrimony — And also by decreeing the payment of £500, as a Penalty in case A. M. shd refuse to marry with ye Sd J. B. within 2 months: for by so doing the Ct of Guernsey hath greatly exceeded ye Authority of an Eccles Ct, wch cannot impose a Fine or enforce its Decrees in any other way than by Excommunication or Eccles Censures; It is therefore apprehended, that ye Appellt hath a just Cause of Appeal—

And it farther appearing from the Affidt exhibited in ye Ct of Appeal, that the written Contract transmitted from Guernsey entred into on March 2d. 1762 had been delivered up by J. B. the Party Appellate to A. M. who was a minor some Weeks before the Commencement of the Suit in ye Ct below; the not being that full, clear & unexceptionable Proof, wch such a case requires, of subsequent & mutual Promises by word of mouth, or otherwise, sufficient of themselves to make a new Contract, or to revive the former; it is humbly submitted to your Lp, that it wd not be expedient, under all the Circumstances of the present Case, to admonish ye Sd J. B. & A. M. to intermarry; but that it wd be rather advisable to dismiss the Parties from any other Observance of this Suit without Costs on either Side

Doctors Commons April 3d. 1765. George Harris

Thos Adderley Actuary Assumed —

Dr Harris ——— We have averted that a subsequent Will was made in 1748 or 1755, subscribed by the Decd, & attested by 3 Wn: if we make this out, tho. the Will is not produced, an Intestacy must ensue, as the former is revoked by the 2d being made; It was thus determined in the Cases of Helyar & Helyar - Jennings & Whitehead, where there was very slight Evidence of Contents - By the Statute of Car. 2. there must be 3 Wn to make, & 3 Wn to revoke a Will; no Will by word of mouth shall revoke a Written Will; Suppose a 2d Will made, & lost, & the Witnesses dead, if any Person can swear he saw that Will, with 3 Wn subscribed, the former will be revoked, & because it is Evidence of a fact only, the Statute directs certain forms If the Contents can be remembered, & that the Will was properly executed, that wch was prior will be revoked; a case happened wherein an Exor burnt a Will by Accident, & recollecting y Contents, the Ct pronounced for it. Two Points have been insisted on: This said we must establish a Contrariety if we prove the Fact: It would be as hard for us, as them, to suffer by the death of Witnesses: Mr Blount is dead, we have his declaration, which is all we can have; on the Death of a Wn his Declaration, being exposed to by another Person will be received: You have an Acct from Stevenson, that the Decd wd alter & settle his Affairs: I dont know it appears Lacy & Blount did Business together he did not then, he was retired from it — You are deprived of another Wn by Death: Harwood admits Decd took away all the Wills from her, most probably this Will likewise. When she found him declining, She brought Hogs into the House, he was angry & made another Will; the Presumption is, this was a different Will, it is said to be a long Will on Parchment with many Limitations; there is a positive Declaration of Decd that Hookes name was in the Will, it must therefore be a subsequt Will; It is immaterial wh: strict Custody is proved; if we have proved the factum, the prior Will is undoubtedly revoked

Dr Wynne ——— The Legacys in the Will propounded, amount in the whole to about 150£; whatever the Decds Sentiments might once be it is clear he formed a better & more favorable Idea of his own Relations, & a more just notion of Mrs Harwoods behavior in consequence of wch he made another Will; the Relations have given an Allon, containing some Particulars, to induce you to pronounce agt the Will of 1748 - The General Report at Jves was, that Decd had made a subsequent Will; a Just notion cannot be formed of the Report, without considering the Person, whose Will was the Object, the Persons about him, his mode of Living, & his declining State of Health; the Alehouse was not so improper a Place, for enquiring into this Gentlemans Circumstances, as it was frequented by those who were most conversant in his affairs; they have examined Stevenson on the Will of 1748, his ex: 11 May 1768, says that 11 or 12 Years ago. i.e. 1756 or 1757 he wanted to settle his Affairs, there are all the reason in the world to suppose, Decd gave the Orders

for the subsequent Will, at the Devil Tavern, that it was engrossed, & that Decd carried it to, & executed at Uxbridge. Blount attested it only as a friend - Mrs Harwoods Affidavit is very equivocal, when compared with the Evidence -

Carthews Rep: The Ct determined in Killigrews Case that Parole Evidence might be received - The Maxim of the Roman Law is, Testamentum prius perfectum, posteriore perfecto, rumpitur - Blount as a man of Business, might easily, as he was attesting, catch the Limitations - the Decds Declarations to Hooke are material .....

Judges Dr Hay } If I thought the Evidence founded the Question of Law determined by Sir Geo Lee, I should have taken time to consider, before I gave Judgement Helyars Case. a will was made & only executed by Mr Helyar 12 Feb. 1742. a subsequent will was said to have been made in Dec: 1748. the Will itself was not produced, & it was suggested to have been destroyed, not by the Testator, but by somebody else, but who did not appear, 2 Wn. Darley & Pearce, they were present when the Testator executed it, & the 2d Wn Eliz. Cornish was dead - Darley swore by best of his Remem brance, Anne Helyar was Ext: & Resid: Leg: Darleys Testimony was supported by a circumstance, that on Wm Helyars marriage, Decd declared his dislike to it, said he had formerly left him 4000£ now wd not leave him a farthing, hence Sr G. he concluded y 2d will was not consistent with y first: another circumstance was Mr Helyar has a Son born in Nber 1748. wch entirely put y Decd out of any Expectation of Benefit from his Wife. Sr Geo. pronounced y first will to be revoked by a Will of a different Tenor, & that there had not been sufficient Acts done, or Declarations made by the Testator, by wch y former Will was revived & consequently he pronounced agt the Validity of the Will propounded - Ld Northington thought the Decree very alarming, so the cause was appealed, but the Appeal was not prosecuted therefore I shall pay it all due deference -

vid. Opinion in Book. fol. 62 &c.

* That was y Case in Jennings, Whitehead &c.

There must, in cases of this kind, be the clearest Evidence of a subsequent Will, contradictory to the former -

The Contents must be proved different beyond a doubt, otherwise it might be introductive of Perjury -

Lloyds account of Mr Blounts declaration is very loose & uncertain; no account whatsoever is given of the Contents If Blount was alive, he wd be only a single Witness, wch would not bring it up to Helyars Case -

Lloyds account is a Parole of a Parole, & not on Oath -

In Helyars Case Darley was present at the Execution of the subsequent Will, & could give an Acct on Oath -

I would not allow the Declarations if there were 2 Witnesses

Stevensons is the most uncertain Acct in the world; he answers to an Interrog: he dont know it was a Will, but believes so -

Here is nothing but Probability, Supposition, Declarations supported by vague Reports in Juer - If you can shew another Will different from this propounded, it may be material. There is nothing to affect this Will, to cause an Inestacy - there is no Evidence, on which I can say, it ought not to subsist, & therefore I must pronounce in favor of the Will propounded, & decree the Probate out of Court -

The Will propounded, pronounced for -

Consistory — Jenner — Austen by her Gd v. Chancellor — Cheslyn

Hil. T. Bye Day — Drs Marriott & Calvert — Drs Wynne & Burrell.

Dr Marriott ... This is a Cause of Defamation promoted by Anna Maria Austen of the Pish of St Margarets Westmr Spinster, a Minor, acting by Robt Austen her natural Father & Guardian lawfully assigned agt Eliz. Chancellor of St James Pish Westr Widow.
a Libel has been admitted & 3 Wts Sarah Creed, Thos Morgan & Patric Coyle exam: thereon, by whose Depons it appears that A.M.A. had been Apprentice to Mrs C. a Lace merchant; that a Difference arising, the Indentures were discharged & Mst went home to her Father; that in may last R.A. sent Sarah Creed to Mrs C. for Mrs Cloaths: that S.C. took Morgan & Coyle 2 Chairmen up Stairs with her, to bring down y Bureau; that on going into the Chamber where the Things were, words arose between Chancellor, Creed who with Morgan, swear, Ch: speaking then of Mst, said She was a Thief, a Drunkard, & a Whore; This is the Substance of their Depons, wch, when read, we hope, will be deemed sufficient to found your Sentence in our favor, that the Deft may be condemned in Costs & enjoined Penance.

Dr Wynne ..... Agreed with Dr Marriots State of the Case as far as it went & added; that Coyle said Ch: appeard in a great Passion, expressd great Resentment agt the Person to whom the Drawers belongd but did not hear Ch. call Mst, Whore or any other opprobrious name:
an exceptive Allon was given by us, (of 3 Articles) to the Credit of Creed & Morgan; on this we examined, Thos: Brook Son in Law to the Deft: Sarah Cook the Servant Maid, & Mary Webb an Apprentice of Deft: who all swear they were present in the Chamber the whole time, that it was a small Bed-chamber, & that they never heard the Words libellate spoke, Brooke adds he is certain no such Words ever were spoke at that time, as he must have heard them if they had. The Characters of these 3 Wts are unexceptionable, & one of them Cook, would not come to Depose without a Compulsory; The Account given by Mr Brook is that the Latter End of 1766. R.A put his daur Mst Apprentice to E.C. but some Difference arising between them, the Indres were agreed to be cancelled, on y Afternoon of 18th of may if day they were cancelld & exchanged, Dep: called at E.Cs House, & soon after a young man, (Creed) came with a Footman & 2 Chairmen to E.Cs to take away Mrs Bureau, Cloaths, &. E.C. said, she expected to see the Contents, before it was removd that he went up Stairs with E.C. Cook. Webb. Creed & y two Chairmen; whilst the Things were taking out E.C. called them a Pack of Raggs, & said they looked, as if they came from Rag Fair, whereupon Altercation arose, between E.C. & Creed, But y whole of E.Cs conversation turned on the raggedness of the Cloaths & a Pint Bottle, Cornelian found on y said Bureau, wch E.C. said She supposed was a Dram Bottle; But Dep: is very certain & positive, E.C did

not at that time say A. was a Thief, a Drunkard, or a Whore, by reason he was present during the whole Transaction, & must have heard the said Words, if any such had been spoken, as he distinctly heard, every word, wch was uttered by E.C. & did not hear any such words —
he says the Indres were dated 18 Nov. 1766 & y Apprentice fee to have been paid was 40 Guineas, but Rot, saying he c: not pay it in less than 2 years & desiring E.C to take his Bond for the Money, payable in that time by half yearly payments of 10 Guineas each, She did so. & 18 may foll: 10 G being due on said Bond, & 18 Nov: 10 G more, & neither being paid, she directed Brook to proceed agt R.A for Recovery thereof — Brook wrote Rot word unless he paid y 20 G due, a Bill w: be filed agt him for recovery thereof — R.A. prevd Brook by Letters for further Time & ab: Hil. T. 1768. executed a Warrant of Att: to confess Judgement for 20 G on Brookes consenting to stay Execution, — 2 March. 1768. R.As Wife paid y 20 G & took up the Warrant of Att: That on Differences arisen before & after this Affair, R.A desired Brook to prevail on E.C. to part with Mst to wch She consented on Condition of keeping the 20 G received. Rot insisted she sh: return the whole, or at least 10 G: wch E.C. refusing R.A summoned her before Sir Jn Fielding, & on 18 May (the Day the 3d Pay t became due) R.A. Mrs & Brooke on behalf of E.C. attended Fielding & another Justice, who thought it better for the Mistress & Apprentice to part, & that E.C retaining y 20 G was a reasonable Compensation for Mrs Board & Instruction, & recommended things to be so settled — Brooke & R.A went to the Blakeneys Head in Bow Street Cov: Garden, & after some Altercation cancelled & exchanged the Indentures & Brooke delivered up to R.A his Bond.
Brooke believes R.A prosecutes this Cause thro, Revenge & Malice, because R.A, in his Presence swore by his Maker, he w: be revenged on E.C. some way or other —
Brooke went with two Hampton boy & Unicorn at Share in Jermyn Street, to Morgan & Coyle, to know if they had been applied to, & by whom, to swear any thing, & what agt E.C. relative to what passed at her House on y 18th of May; & they both acknowledged two Austin had sent for them, & produced & read a Paper to them, wch they had signed, & that otherwise they sh: not have recollected any thing about it; that Coyle declared he did not hear E.C. say the word Whore, & Morgan said he did not know, whether it was

whore or Rogue, & on Brooke saying a woman could not properly be called a Rogue, Morgan said, then it must be a whore —

No Exceptions were taken to the Characters of Creed & Morgan, except what arose from their depons in the present Cause

A. S. Mr. Jenner gave an Allon of 1 Article, in contradiction to the 1st of our exceptive plea, on wch he has examined 13 Wt. 10 whereof speak to the good Character of Creed, & 3 Wt to that of Morgan —

Upon the whole, 2 Wt fully depose to the words being spoke, & 3 Wt positively swear the Contrary — The Cause itself is unfavorable; & being of a Criminal nature, Justice requires, where there is a doubt that Judgement shd be given for the Party accused.

Dr Betteworth Judge — S. The whole depends on this Question whether entire Credit should be given to Morgan & Creed? Strict Proof is necessary in Criminal Cases, & to be sure they speak fully to the Point, & their Evidence is corroborated by Coyle; to invalidate their Testimony, Brooke Cooke & Webbe, swear they were present the whole time, & did not hear the words libellate; to take off the force of their Evidence, a Quarrell is said to have happend between Robt Austin & the Defr & Brooke is supported by Webber, in asserting, R.A. vowd Revenge — It would be going too far, to say, the Witneses falsify, & if their Credit is not affected R.As Declaration is unimportant. Mr A. went too far in reading over the Evidence of Creed to Mr. & L. it looks like leading the Evidence, but I must observe, he desired them to swear only the Truth — The Witneses appear rather biasd in favor of R.A. by refuseing to tell B. any thing, when he Examined them; for C. by attacking the Credit of the Witneses, has furnishd me with proof of the Goodness of their Evidence, for no Characters were ever better established by the Witneses called in support of it; I am better justified, in crediting 2 Wt swearing to a positive fact, than Jnd: be in pronouncing them perjured, on the Testimony of 3 Wt deposeing to a negative; I am therefore bound to pronounce that the Pll has proved the Defamation charged, & condemn the Defr in 50£ Costs, & to do Pennance in St James Church, & to certify as usual

Sentence for the Pll

Appeald. ..... N.B. The Bill 70£.

Mutatis mutandis vide No 7.
Anglesea Case No 13.
Ecd Case No 15
All Souls Oxford No 17. & 48.
St Saviours Southwk 18
Leith versus Edinburgh No 52.

No 106

English Chapels at Dumfries No 79
Poste disputes p. 167
Separating Divorce Case 209

"The death's part", — custom of London p. 296

Citations set aside for slight errors of proper names Rees v. Rutland No 6