Prerogative
H. T. 3 Jes. Feb. 6

Dr Wynne
stateing the Case

No 42.

Otway Guardian of Otway als Savory, agt Otway

H Stevens Junr. Dr Wynn & Bever Dr Harris & Calvert - Adderley

A Petition on Grant of Admon with Will annexed 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 hath by sd Will, in Case of her Daughters death, given & bequeathd her Fortune, 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 ye small Pox at Hendon

June 22. Miss Caroline Otway & Mr 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 affixed 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 Original 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 & prosecuting 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. 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 Affid: of Jas Coulthard, & Assignation was continued to 1 Sess. Hil. T. & if any further Affids were given Copies were to be delivered a Week before.

1 Sess. Hil. T. Adderley brt in a further Affid: 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 Causes 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: Eattons Will her Gr: father, & Mrs O. her mother greatly clash, as clearly appears from Mr Coulthard the Solicitors 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 Deft now is who shall be Guardian? for the Admon follows. This being a natural Child, has no Relation, it is discretionary in you, & 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 it 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 Mrs D 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 Admon 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 Admon - 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 D. 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 refuses; It is not unlikely the Testator sid think, that by granting the Residue to a Person she gave the Exorship. Qu: wh: Mrs O. is not the properest Person, Mrs D. the most improper? The Deed may have mistaken the Deed, wch a right Substitution or not, but you may by granting it agt Mrs O. you in a manner anticipate the Judgment of the Ct of Chancery; Mrs 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 Story is the same - Ld Coke says, no Person sid 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. Will the Money bequeathd by the Paper to F.O. to be divided, pass? A. 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 sid think