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 shd 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.n is wh.r the Intimation is erroneous, not wh.r the alterations are necessary? I am of Opinion to overrule Mr Wilsons Protest as frivolous, & condemn him in 1. G.S. Costs.

Delegates. Serj.ts Inn. Dec.r 9. 1765.

No 47

Archer & Wakelin agt Whytall & others.

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

On a admission of the Allon. of one of the next of Kin

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 Sollicitor 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 his 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 Ldps receive a Paper so 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.r 18. 1765.

Mr Perrin ....

Seriatim. This 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 the 26th of June 1764 Mr Hood put in his Answer, wherein he confessd he had Minutes Barker one of the Co Clerks has no power to collate, see delayed

Sollicitor Gen.l ... Mr De Grey ...

It is the misfortune of Mr Thos. Johnson Mrs Eliz: Marshals Exor, to be solate, 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 Ldps memory - The Decd died in 1759 leaving 2 Wills, both benefitting Strangers; they were propounded in the Eccles: Ct - Fraud, undue Influence, & Mal practice was alternately charged, one Side must be guilty - Eliz.th Marshal was cited but died before the Examn of Witnesses; Publication passed in 1761, they proceeded to Sentence 1762 as if she was living, & pronounced her Contumacious for not appear: 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, allege what they might in the Ct below; if the next of Kin can make out the Mal practice 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 Allons 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 Examn of Mr Whytall - that may prove some Articles, the Decd 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 things; 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.L.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? Will it be presumed they did dispute Fraud in 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 cant 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 Article of the Decd's 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, the 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 Willes 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 48

Sollicitor Gen.l — Jones & Scroop agt Crawen — Dr Blackstone

Tyndal. — Dr Calvert, Harris — Dr Wynne Mr Popham 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 Crawen 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.r 1763. The Drs Butler, Harrison, Vivian, Bever & Bourn reversd the Decree of the Congregation

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

Dr Harris ....

The Qu: is, wh.r the Judges recused, have a right to give any Sentence; & then wh.r that Sentence is a just one (here he recited 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.r Sentence - The Proctor for the Appellant recused Dr.s 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 Crawen; the other Six declared they wd not judge of the Recusation of the 3 Dr.s aforesd. The recused Dr.s said fairly they wd nominate Arbiters for themselves, & required Mes.rs Jones & Scroop to appoint Arbiters on their part, meet again the 2d of Nov.r There is a difference between Arbiters & Arbitrators - Scroops Proctor named Nody Smallwall

NB The Protestor begins in the Delegates..