the has not on the face of our Plea, complied with the Terms of the Intre, wch requires the Will to be 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 Ct. 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 Bever..... 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 more 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 Negatoryness & 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 Hay Judge... The Qu: is on the Admission of the Allon: There are 3 Parties in Judgement; the Representatives of the Husband allege, 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 Intre, 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 the Judge right in suspecting Kirchmans Allon, & ordering the Promoter to give Articles?

Arches. June. 10. 3 Sess. Trin. 5.

No 70 Kirchman & Kidgell .... v Stewit.

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 to 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 related to obligeing him, to give Articles, & in that the Judge had not decreed him the Effect of his Monition. The Adhesion was exhibited; the Proctor for K. 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, & every 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 this, 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 here, 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 tye his hands, & 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 Patron, 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: 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 negatory 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. nat 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. ordred 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