Prerogative June 12....

No 71

Gardiner v Hazzold als Harrold

Goodwin — Cumberlege Dr Calvert — Dr Wynne. Fuller

2: Shall the Party who puts ye next of Kin on proof of her Int: & then confesses it be liable to Costs?

Dr Calvert... I am Council for Mr 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:n 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's
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 Person so denying puts the other to unnecessary Expence; but it shd
seem the Rule will not hold, if the Party whose Interest is denied runs himself
into unnecessary Expence; 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 more, 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, giving 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, Rob: 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, Cumberlege's 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 man 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 Proxy 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 Monon for Payment agt Cumberlege's Client,
Goodwins being insolvent; the Judge said he shd have it agt which he pleased..

Arches June 10.

No 72 **Maddox als 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 con-
:sidered, 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:x without specifying ye time of payment
Before her Death she had advanced £2.10.0. to purchase the Legatees Freedom, shd
that Sum be taken to be paid in part of the Legacy or not? the Ct held it was to be ac-
:counted as part of Payment, & that the Exec:x did not give it in Advancement of
the Party; that it was not to be reckoned, as if intended for the Interest, for de

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 14.

Misnomer of Plt.

No 73 **Ernshaw v Patridge**

Bargrave — Dr Wynne — Dr Harris — Goodwin

Qu: will an alteration in a Citation under Seal vitiate the Process?

Dr Harris.... I am Council for the Deft who hav: been cited in a Cause of Defamation by Sarah Anne
Ernshaw, appears under Protest, alledgeing that the Name Urshaw 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 ye 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; & tho, 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 allowd 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 inten-
:ded; the reason as to the Plts, is, that from the Certainty of such Plt. the Deft may
consider wh: he shall defend himself, or submit, it is not pretended that Deft dont
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 afresh,
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 Law, & 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 ye Whole I hope you will not think the Process vitiated by
this Mistake..

Judge... Dr Bettesworth } 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..

No 74 **Bate .... v ..... Taylor.**

Bishop. Drs Marriott. Clarke, Calvert — Drs Collyer. Wynne.. Burrell. — Alexander.

Correction for Doing Duty in Bs Parish

Dr Collyer... This is an Appeal from Worcester brought by the Revd: Henry Bate, perpetual Curate of
Clains, agt ye Revd: Edw: Taylor Minr: 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 ye 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 ye 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
Parishrs: of C. that on May 17th. 1758, he went to the House of Sam: Lucas, &