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 shd 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 p.ann: wd be lost; he prays C may be taken with G. exclusively of B. if C is rejected, he is doubtfull 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 Deed 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 shd not think C. so imperfect not to supersede B. if that Paper stood by itself. the Principle of Dr Calverts 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 base 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 this Will I am of Opinion that the Papers B, G. shd be confirmed, decree the Costs to be paid out of the Estate . . .

Prerogative — July 5.

Jenner — Stevens v Senhouse — Bishop — No 92

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, &c 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 Jenner 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 wch 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 placed on the Royal Exchange.

Dr Marriott . . I am Council for P.S. the Father, & Attorney of the surviving Exor who is properly impowerd 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 8. 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. Jun.r may possibly be dead, & pray a Citation to ascertain that fact; he is a mere Exor, it might be very different if 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 8 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; Decree 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 whether he is lawfull Attorney? A decree viis & modis ought to issue; if P.S. Sen.r is the lawfull Attorney of P.S. the Coexecutor, & if Stevens don't shew the Coexor to be dead, or that P.S. is not his lawfull Attorney, the Preference in the Grant of the Debonis, will be due to P.S. as the Attorney; I dont see any reason for me 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 Case. Exor . . . the Citation must Issue agt the next of Kin . . .