without calling for the Will, or even knowing its Existence; we have now called for it, to see on what grounds, we oppose; it is not introducing new Evidence, but calling for some, where there was none; the Judge has committed more than one Oversight, he deliberated out of 2 Ways, chose the wrong; he had a notion, as the Legacy was devised without any Trust, that Mrs Duncan had the absolute Property thereof, an Inventory is of common right; it is Law, that whenever there is an apparent ostensible Interest, the Party has a right to call on the Exec: It is not in Contemplation with the Sp: & what is the foundation of the Claim, it is sufficient if it appears on the Face of the Will

Dr Wynne. It never was the Business of a Judge to call for Evidence, 'tis that of the Party to instruct the Cause; if there is any neglect in producing Evidence, the Judge is not to blame; We appear under Protest, the Proctor alledges, that an absolute Property is vested, the other Party denies this; the Affirmation stands good, till it is disproved; the Opponents Proctor shd have referred to the Will, it was not incumbent on . . . . . to take any notice of the Will being in Existence; I did not object to reading the Will & Admon, because it was regularly before you, but I do object to it, as it affects the Judgement below; I submit that the Merits of the Appeal depend on this Question, wh: the Judge did right or not, in his Decision on the Acts before him

Judge—} Dr Hay—} On the return of the Citation the Exec: appears under Protest admitting the Facts laid, but denying the Interest of the Pl: The next of kin have a right to call for an Inventory & Acct: one thing in the Transaction fair by which they may possibly be Sufferers; upon the Citation & the Acts, I am clear the Judge did wrong; Mrs Duncan says, she is not obliged to answer, that the Effects are her sole Property, because, the Bequest is given to her for life, & not the Use thereof only, this was indeed the old Law, but the Modern Determinations are very different. I pronounce for the Appeal, give 23l Costs, to be taxed by the Registrar. . . .

Prerogative 45 Eps. . . . .

No 100

Gough. v. Fletcher & Duncan

Bishop Farrant Collins

The Question was whether Bishop was obliged to answer to Farrants Clients Interest, before he propounded the Will, & if he was bound to say wh: he was next of kin or not, or that a general Admission of his Relationship, would be sufficient? . . . .
N.B. The Cause stood, in the Book, on the Petition of all Proctors, but, neither Farrant nor Collins, had wrote to s. The Act — The Registrar, Mr Stevens, said they shd have wrote to the Act, as well as Bishop; otherwise, it will be taken down, at the Petition of all Proctors, when Js & C. have no Petition; on this Account, it was adjourned to the next Ct, Js C. ordered to write to the Act; but Dr Hay took notice of the Point in question, about Bishops Answer to Js Clients Interest—

Dr Hay . . . . In respect to the Question wh: an Exor propounding a Will, is not bound to answer to the Interest of his Opponent, before he propounds such Will; the Delegates determined, the Party alledging his Interest, had a right to an Answer; but to what purpose wd this Answer be, if he is not entitled to distribution, it wd only multiply Suits? In the case of Grace agt Calemberg, Louth Proctor for Mrs Grace the Exec: thinking the Will good, would not deny Calemberg's Interest, but allowed him to be a contradictor; the next of kin did not insist on an Answer; I think by Law & Practice J. is entitled to an Answer but Bishop need not say whether sufficient is next of kin; it is sufficient if he owns & denyes his Relationship . . .

Prerogative Bye Day. . .

No 101

Collins Mutter and Petrie v. White Goodwin

Dr Collyer, Calvert Dr Harris & Wynne

Dr Collyer. . . . Ja: White died abroad, having made his Will & thereof appointed Mutter & Gilbert Petrie Exors, (who are both abroad) & Jn White, Resid: Leg: who obtained Admon till the Will shd arrive; & being now arrived Mr White has pursuant to Citation brought in the Admon; the Exors have appointed Messrs Oswald & Mill their Attornies, who having left Business have substituted their Successors, Messrs Ross & Ja: Mill, to act in this Business; the 2u: therefore is wh: a Substitute of Attorney, or the Resid: Legatee, shall be decreed Admon with ye Will annexed.

Dr Harris. . . . James White, late Chief of Fort James in Africa died a Bachelor in July 1764. leaving John White & Susan Hog, ol: White, his natural & full Brother & Sister, his only next of kin; the Decd made a Will, Codicil & thereof appointed, Wm Mutter, (now at Granada) & Gilbert Petrie (now resident in Africa) his Exors, & said Jn White his Brother Resid: Legatee, & therein bequeathed to Susan Hog, by the name of Susan White his Sister 300l also 400l to Wm White a Minor, an illegitimate Son of the Decd, who hath since October 1764. & now continues under the Care of Jn White; Decd in such Will directed his Exors to remit his Effects, as they collected & received in the same, to Richd Oswald & Co. of London Merchants, to be by them paid to his Heirs — in October 1764, Jn White received intelligence of his Brothers death & soon after a true Copy of Decds Will & Codicil, he therefore applyd for Admon with said Copy of the Will & Cod: annexed, wch was granted 23 Jan. 1765, & delivered to Jn White under Seal 4 Febr: following, limited till the original last Will, or an authentic Copy thereof, shd be brought in, the Exors being first duly cited, & not appearing . . . . .
Jn White waited on Messrs Oswald & Co. who confessed having considerable Effects of the Testator in their Hands; Mr White solicited them for 11 months to come to an amicable Agreement, Settlement of the affairs, wch they refused, notwithstanding they have paid the 300l Legacy to Susan Hog, without any Color of legal Authority.
12 Jan: 1766. Jn White in his own name, & in the name of Wm White the Minor, as his next Friend filed their Bill in Chancery, agt Messrs Oswald & Mill for a discovery of the Decds Estate, & account of all the Money & Effects of Decd, wch had come to their hands, that they might be decreed to pay 400l thereof into the Bank to be laid out for the Minors benefit, & to pay the Residue to John White the Admor — 17 April 1766, Oswald & Mill suggested in their Answers to sd Bill, that they had retired from Business, & previous thereto had recommended Gilbert Ross & Ja: Mill to Mutter & Petrie the Exors, in consequence of which, they believed several Remittances had been made to Ross & Mill to whom on retiring from Business, they on 1 Jan: 1764. paid the Balance of Decds Estate; White by Order of the Ct. amended his Bill, & made Ross & Mill Defts who 11 Augt 1766. confessed 2000l & more than sufficient to pay Debts & Legacies — 17 April 1766. brought in the Original last Will, Testament, & Codicil of Decd 5 July 1766. Collins extracted a Decree agt Jn White to bring in the Admon agd, & shew cause why it shd not be revoked as surreptitiously obtained, & as expired by reason the Original last Will & Codicil was brought in — 30 July 1766 Goodwin brought in the Admon, wch the Judge decreed to be expired, & last Will, Codicil being brought in, then Collins brought in a Letter of Attorney from Mutter & Petrie to Oswald & Mill, & also a Substitution of Oswald, to Ross & Mill; then he exhibited a special Proxy from Ross & Mill, & prayd Letters of Admon, with the Will & Codicil annexed, to be granted to them for the Use of Mutter & Petrie the Exors; Goodwin prayd the Admon to John White the Brother & Resid: Legatee . . . . . .

On Collins's Petition

2u: Whether the Substitute of the Attorney of the Exors of a Will, or the Resid: Leg: shall have the Admon with ye Will annexed; there being more Effects than will pay Debts & Legacys