specifying the Name; Suppose the Party did not appear, & was to be excommunicated, wch would be criminous, could that be done by a wrong name? the Paper mentioned, has very little Resemblance of a Will; the Favor of the Ct, as far as Law & Practice will authorize, must be with us; Is it reasonable he shd possess himself of the money, & then fight us with it you will not surely allow him to contest this Will, till he has refunded the Legacy he received under it....

Dr Wynne... all that the Party desires, is to have an Opportunity of laying the Paper before the Ct; there are Instances of Papers revoking a Will, the Contents of the Original being ascertained; the Ct will not trouble itself about the Legacy, we only desire the Probate to be brought in, not to be revoked, till our Will is proved; then he must refund; with respect to the misnomer. 2 of the Cases cited were criminal Cases, Clerk says it down, that if a Party is excommunicated

the original Liber may proceed in the Testamentary Suite at the same time, the Ct does not give leave to stop on account of Minutiæ

Dr Hay } Judge. } I find Probate has been taken in Hereford; the Citation is to shew Cause why it shd not be revoked for want of Jurisdiction — The Election would not give Jurisdiction — in all Cases where Probate has been granted, any Person may call it in, as void in itself because there were Bona notabilia; he might have done that if he had gone no further; but he prays Probate of another Paper — as to the Jurisdiction; if there had not been Bona notabilia, the Citation to revoke, shd have been in the Court of Hereford — I dont think the Proctor ought not to hold; I shd be tender in calling on Parties by a wrong name — the same Precision is not necessary in the Prerogative, as in other Courts for Civil Causes, ubi constat de persona, Error in nomine non valet — What should I do if the Party was to be excommunicated Dr Wynne says, Clarke says it down, that the Ct shall go on; I dont see how that could be; wherever you have received any thing, it is clear, you must bring it in, before you can controvert the Will; Pyefinch must suffer for the Trouble he has given the Widow; I decree Costs to Stevens Client on account of the misnomer, he must appear absolutely on Haveat Day 18th March —

Vid. Sir G. Lee's opinion in Case of Amy or Lemma Powel. 1758.

Prerogative
Byed Day

No 112

Stevens — Cauwood & others v Cauwood & Peters — Altham
Collins

Dr Collier — Dr Wynne — Dr Harris

2: Wh. a nude Extor who has given in Inventory, may be dismissed & become a Witness?

Dr Collier... John Cauwood is the Decd; he made his Will 27 August 1766, thereof appointed Jane Cauwood, & Thos Badger Extors; the other Parties are Sarah Cauwood & ..... Peters Daughters of the Decd; Stevens exhibits a Proxy from Badger, alledges he has renounced the Execution, & prays he may be dismissed; Altham alledges that Badger may afterwards retract his Renunciation, & that if he is not held, no Sentence given in this Cause, will bind him, & he may again propound the Will now contested, & put his Client to fresh Expence — Collins alledges, Badger will be a material Witness, therefore prays him to be dismissed, adding that Badger has not only declared he renounced, but also that he wd not propound, & therefore the Ct will not allow him hereafter to propound the same Beaumont & Sharp. It was agreed, that the Rule of Once a Party, & always a Party, was absurd — Winchester & Gough. Sir Ed: Simpson, said he wd dismiss the Party, but there no Inventory

which I take, has been given in the present Case; there is no doubt, that a common renouncing Extor may retract, but whether an Extor judicially renouncing may retract, is another Question; there is a considerable distinction between a party renouncing in common form & in this manner; besides if Extor atHam the Ct can set aside the Will, you wd grant admon, & then the Extor wd be precluded from propounding the Will, it is irrevocable, unless the Ct is satisfied the admon is unduly obtained; in this Will, Badger is a nude Extor; the Residue is given away, Brown v Heath K. Pocklington 1719/20 Dutton the Writer was Extor, he renounced, & offered himself as a Witness in the Cause, 6 April 1720 the Judge admitted him to be a Witness; this shews, an Extor, who is not interested may be a Witness; according to the Practice then in use, he was not dismissed from being a Party, but allowed to be a Witness

Dr Harris... Mr Badgers Petition consists of 3 parts; that he may renounce, be dismissed, & examined as a Witness; the 3 Extors have all joined in a Proxy, authorizing Collins to propound the Will; the Extor has done such an Act, as will tye him down to take Probate of the Will, if it is pronounced for, & having once administred, cannot refuse, his Authority being derived from the Will; Whatever an Extor does with respect to the Effects of the Decd, points out his Intention, as by saying, I will propound the Will, he points out to the Creditors, to whom they shd apply; you wont suffer him to go backward & forward; But suppose the Renunciation cd be pronounced for, he may prove to be interested; before Probate passes, he may retract his Renunciation, & take Probate jointly with the other Extors; even a nude Extor has a Bias, tho, it is not so strong; you will suffer none to be Witnesses, who can have any possible Bias; I am afraid you cant prevent his Retractation, the Man dont say he renounces for ever; if he may act as Extor, he is an interested Witness; I dont know whether the Ct can say he shall not propound; but if it did, the Affair might go by Appeal to the Delegates, & be examined over again; is there any Instance of dismissing a Plt. or Extor? there are many Instances in Chancery of dismissing Defts because they are involuntary Parties; In the Case of Beaumont & Sharp, the Party dismissed, was in strictly a Deft. No reason is assigned to shew him a necessary Witness, we have only their bare Suggestion of his being material; is he a subscribing Witness? have they not two others? When Partys are desired to be dismissed the Ct ought to have full Satisfaction of the necessity of their Evidence; I know Cases where Extors applying to be dismissed, have been refused; In the Case of Tabl & Newby 1740. Sir Geo Lee cited the Cases of South v Yardley — Yardley v Wise — Hudson v Short — where Extors were denied their dismission — In Beaumont & Sharp there was a particular allegation, stating the necessity of the Witness, there being no other; here there are two Witnesses.

Dr Wynne — The first Objection taken by Dr Harris, is to the Extor having done such an Act, by executing a Proxy, as to disable him from renouncing, says the Dr — a slight Act will bind an Extor; I agree a slight Act will bind the Extor, but that Act must respect the Effects of the Decd; the Law means to prevent an Extor getting the Effects into his Hands, so as to embezzle them; the Execution of the Proxy is a mere formality — It is as much in Altham's power to bind the party after Signing a Proxy & releasing by desire, as if he had said originally, he would not act in it; what sort of Plaintiff can a nude Extor be? Dr H. calls it a dangerous Precedent, a wanton Application; how can we satisfy the Ct of the Importance of the Depons, till they are published; I see no reason why a Plt shd not be released as well as a Deft;