will depose more or less strong; if any thing is immaterial or improper, let it be struck out; but that ought be no reason for rejecting the whole Plea, It affects the knowledge, consequently the credit of the Witness.

Dr Wynne... Upon the Interrogatory, the Wt was called upon to answer whether he did declare, he then might have told, how he declared; as because he was asked impertinently; but he answers positively, he never did make any such Declaration: Let Witnesses depose what they will, the Ct will not apply it to the facts, but compare it with the Evidence, the Witness has given before. - When Hallward swore the Deed never sat at table at his Fathers House, but went into a Corner to eat; it is material for us to shew he sat at meat with him: I will admit, that if we could examine 20 Wt to the fact, it wd not apply thereto, but it wd discredit Hallward.....

Dr Burrell.... The whole force & Intent of the Exceptive Plea, is to bring the Veracity of those Witnesses in question, as to particular Facts of Incapacity insisted on by them - The Deed sitting above Hallward, must have impressed that Particular on a Memory so attentive, as his appears, to trivial Circumstances - Mills mentions the Deeds inability to distinguish one sort of meat from another, & particularizes Mutton & Beef, so that he must & ought to be very accurate on that Point, as he lays so considerable a stress on it; now we insist on the falsehood of that Assertion, & say we can prove, he must knowingly have deposed untrue....

Judge Dr Hay... After Publication, an Exceptive Plea may be given, & the Exceptions taken out of the Depons of the Witnesses; if a Wt on an Interrog: swears to a fact you can contradict, you may shew he has sworn falsely; if in his Examination in chief, you may also plead, to shew he has contradicted himself - if from the Generality of the Plea, you could not be apprized of the Fact deposed to, you may plead it, examine to it - It is an established Rule, you cant contradict Facts already in issue, as it wd introduce Perjury & Subornation, & Justice wd thereby be defeated; if you cd plead to falsify what was in issue before, it wd be in vain to conclude the Cause; the only Question, is to see, whr the Facts now pleaded, could have been examined in Contreplea before Publication - The Facts of sitting at Table &c might have been particularly contradicted; for a Witness might have been brought to prove that the Deponent sat with him & the Deed at Table: What you bring by way of Exceptions, you could have contradicted below, therefore they are not pleadable now, but shd have been pleaded to contradict the general Allon of Incapacity in the Ct below - on that Account the 2d & 3d Articles are not admissible, nay they seem to be so very immaterial & minute, that they wd avail little, if admitted; the Question whr he knew one sort of meat from another, turns against them. the 1st Art. is different, the Wt answers contrary to his Declaration, this is a material Exception; for the Declaration of a Wt agt his Oath is always received here, & at common Law, to impeach his Credit; the Wt says expresly, he never did declare, here they undertake to prove he did declare so Mr Hill, he formed his Opinion on Report only - The other Articles are not so much Exceptions to the Witnesses as Contradictions to the Facts pleaded already, & cannot therefore be admitted. Therefore only admit the first.....

Appeal prosecuted for: only 1st Arti: of Jenner's Plea received....

Prerogative — Bye Day. July 16...

Jenner — No 132. — Whiting v Smith — Bishop

Dr Wynne & Burrell — Dr Marriot & Harris

Q. if the Facts laid are provable, will they validate the Paper propounded.
Q. If not, can the Plea be admitted?

Dr Marriot.... Owen Bird is the Deed; he made a Will, in wch my Client is a Legatee; It is neither signed, dated, executed, or attested; there is no Person named Executor, or Residuary Legatee, It contains these words "And all the Residue to my Executors" We plead that it was found locked up, amongst the Deeds & other Papers, with the Interlineations therein, & an old cancelled Will - We plead Declarations of his having made his Will, to wms..... about Septr or Octr 1766, that he intended to leave all he had with his Wife, to her Relations

Dr Wynne..... Owen Bird of Portsmouth died a Widower, leaving no nearer Relation, than Sarah Whiting Widow, his Cozen German, only next of kin; as such she applied for the Admon, but was prevented by a Caveat entred by Bishop. wch being warned he appeard 5 Sep. 2 S. for Ja: White, & alledged him to be a Legatee in a Testamentary Schedule of Deed; & both Proctors were assigned to exhibit Affidt of Scripts, Bishop to answer to Jenners Clients Interest.

3 Sep. Jenner brought in Commission with Scripts, exhibited a Proxy under the Hand & Seal of his Client.

Legacys..... 5 Sea Arm
Eliz. Wallace t.. 170
Mary Oxford.... 87.
Anne Do..... 87.
John Do..... 175..
Hannah Do..... 175..
Int: for Life
J B. Smith... 700.
1095

4 Sep. Bishop brought in Comt with Scripts, declared Ja: White wd not propound any, & prayd him to be dismissed, Jenner objected thereto - Then Bishop exhibited as Proctor for Anne 10. 10. Wife of John Benham Smith, alledged her to be a Couzin German once removed, & next of kin of Deed, & prayd Admon with the Schedule annexed..

Anne Smith.. 350...
Susan Satter.. 350...
Dan. Hobbs.. 350...
Sarah Whiting.. 700...
Mary Wife of Wm Stockman 700....
3885...

1 Sep. Jen. S. White was dismissed paying Jenner 6.8 Costs. then Bishop exhibited Proxy under the Hand & Seal of Anne Benham Smith, a Legatee in the afd Testamentary Schedule & denied Jenners Clients Interest.

2 Sep. Jenner confessed Ab. to be Cousin German once removed, but denied her to be next of kin to Deed; propounded his Clients Interest, & asserted he gave an Allon, on admission 4th Sep..

4 Sep. Bishop propounded the Testamentary Schedule & asserted he gave an Allon, on admission the Bye day

My Objection to the Allon, is, that on the face of it & the facts pleaded, you cant pronounce the Paper to be the last Will of the Deed. It is known Law, that an imperfect unexecuted Paper cant be pronounced for, unless it is clearly in Evidence, the Deed was prevented by Accidents, & intended it shd be his Will - There is the Date of the year 1766. There are many Interlineations, & alterations, not only in word, but others more material; there are many Directions to the Exors, & References also, yet no Exors are appointed; it is very clear too, the Deed intended a Benefit to the Exors, therefore it is very imperfect as to the Intention - They plead a Declaration in 1766, that he locked up this Paper, & said he had left some Legacies to his Poor Relations; Supposeing all this proved, the Paper cant be pronounced for; (the Deed lay ill 7 Days.) It will prove only, that when this Paper was wrote, the Deed intended to die Testate, & dispose of his Estate in this manner. There have been several determinations, that the Intention must be permanent, & the Person prevented from executing by sudden death. Treves & Treves 1761. 3 Sep. Trin. S. Josuah Treves in Feb: 1760 gave an Attorney Instructions for his Will him to draw his Will agreable thereto; he drew it, & that was also read all over to the Deed, who approved it, took the Draft home, & said he wd consider of it. Nothing more was Done till 2 Decr 1760.

Treves v Treves.