In this Case it is very remarkable. the Misnomer is on the part of the Plt. whose Proctor appears to be ignorant of his Clients name tho: he had before taken out a Licence of marriage, & signd his name to a Bond for the due performance of the same - That the Plt shd not be accurately acquainted with a Defts name is not surprizing but that he shd be ignorant of his own, is scarce to be credited - Having spoke to the Misnomer I proceed now to the Discontinuance of the Certificate, & as that stands on the same foundation, with the Certificate & Citation itself, it is necessary, something shd be said touching both as to the necessity of a Citation. I believe Dr Collyer will not controvert it, because it is one of the first principles of Justice, without wch the Accused wd be cut off from an Opportunity of defending themselves - for want of this essential, the case of St Johns College went off. It is thus reported 4 Mod 253. Comberback. 279. 4. & 5 Wm. & Mary Rex & Regina against the Master, Fellows & Scholars of St Johns Coll: in Cambridge About 20 Fellows refusing to take the Oaths at the Revolution, pursuant to Act of Parlt a Mandate was directed to the Master, from the Attg Genl requiring him to declare their Fellowships void, & the Case had: a long time depended, the Attn Genl: at last demanded Sentence, (Stoke Eyers being then on the Bench) but he was answerd, that his Omission on not having cites the Fellows themselves was a fatal Error -

Discontinuance of Certificate

Citation

Certificate

A Citation is necessary for the safety of the Def: so is the Certificate of that Citation being duly serd for the satisfaction of the Ct, that it may be satisfied with respect to the fairness & legality of y Citation Every Writer on practice considers it in the same light, as essential to the promotion of Justice.

1 Oughton. Tit: 28. Mandatarius tenetur personaliter interesse coram Judice, ad certificandum, & fidem faciendum, per Juramentum corporale; de executione Citationis & forma eiusdem -

Gail. Lib. 2. Obsvn: 48. nº 2. In praxi diligenter ab Advocatis partium animadvertendum, an Citatis aliquo vitio laboret, sta ut citatum ad comparendum non obligat. Citatio enim invalida, nullum producit effectum, nec constituit aliquem in mora; adeo ut, si super tali citatione procedatur, Processus & Sententia nulla sint.

Conformable to this Doctrine, the Case of Mees & Gratewood was determind in the Arches on Appeal from the Consistory of Wells.

Mees v. Gratewood 2 May 1749

On wch day Sutton returnd a Monition for payment of Costs then, Gratewood, being three called, & not appearing, the Judge at Suttons petition, (who alledgd, the Monition had been duly executed upwards of 15 Days, & that the Costs were not paid him or his Client) pronounced Gratewood contumacious, but reserved his pain, to Saturday next to the Adjournment.

6 May. 1749. On wch Day Gratewood being three called, & not appearing, the Judge at Suttons petition (alledging the Costs taxd were not paid him, or his Client & accusing &c) pronounced him contumacious & on pain of his Contumacy, decreed him to be excommunicated -

5 Decr: 1749.. Gratewood is decreed to be excommunicated, on wch day Sutton produced a Schedule of Excommunication, & the Judge at his Petition, read the same, & decreed Excommunication to be published in the face of the Church -

From this Decree Gratewood appeals, on account of a Certificate not being given before the Decree of Excommunication passd -

Fountain & Mees

Fountain appeard for Mees & gave a negative Issue to the Libel

2 Sep. Trin: T. 1751 ... Fountain exhibited a special Proxy, under the hand & Seal of his Client, by virtue whereof, he retracted the Negative Issue, & gave an Affirmative Issue to the Libel; & the Judge thereupon pronounced for the Appeal & condemnd Fountains Client in Costs -

Continuation of the Certificate

The Continuation of the Certificate appears to be founded on the same reasons & equally important & requisite: The Proctors & Doctors Commons have constantly & universally adopted it, & I cant suppose them so injudicious, as to continue any particular part of Practice, without they were convinced of its Utility.. I do not find, after the strictest Search any Case wherein this Point has been called in Question, & what is very surprizing the Writers on Practice are silent in this respect, the only one I can find who speaks to it, is Conset. who Part 3. Ch: 1. Sec: 6. §§ 1. 5. 6. 7. says The Proctor who obtains Sentence, must procure a Monition, for payment of the Charges; wch must also contain, the Excommunication, & be duly executed on the party condemnd: But if the Pty obtaining such Decree does not execute in due Time, or dont certify the Execution, so that the Certificate, upon such Execution, is discontinued, the Proctor must acquaint the Judge, that the Decree is perisht without any Success.

In matrimonial Causes, where the Def: is excommunicated, for not appearing to a Citation, viis & modis, & is afterwards, called by public Edict, to see Proceedings (with Intimation that the Judge in pain of this Contempt proceeds to a definitive Sentence) the Plts Proctor must take care, that nothing be done, but in pain of the Def: to contempt, that this may be lawfully done, the Certificate of the Ing: Citatory Decree, shd be continued, from one Ct day to another; for that Certificate being at a Period, or discontinued, the 2d Citatory Decree, is at a period also, & nothing can be decreed, so as that the Act may avail, in contempt of the Def:

If A cites B to an Inventory & Account, & B puts A. to the proof of his Juriness, A's Proctor must take care, to get the Certificate of the Citation continued from one Ct day to another, until A's Interest be proved, wch being proved, the Def: may be excommunicated if he dont satisfy the Contents of the Mandate - If the Certificate of the Citation, be discontinued, the Def: cant be excommunicate, tho, he do not satisfy the Contents of the Mandate -

The Certificate being discontinued, there is no Cause before the Ct -

We never appeard except under protest; Holyoake shd have prayd our Protest to be extended, & that we shd be assigned to appear absolutely

Judgment

The Question before me, is wh: the Decree of the Surrogate in the Ct below, on the 8th of Novr 1764, (dismissing Rowland with Costs) was right: this depends on the Proceedings in the Cause: It is admitted, the Protest to the Jurisdiction was overruled & not appeald from: then Hand appears again under Protest, objects to the misnomer: What effect that wd have as to the Citation, I apprehend is not before me: In the Cases cited, all were dismissed for misnomers on the part of the Def: this Obj: arises on the part of the Plt, on wch point I am not at Liberty now to determine, because that Obj: has been overruled without appeal. The present Appeal being from a Grievance, I must judge ex iisdem actis; You must shew the Fact to be true, or are not justified in your Objection: I cant take notice of the Surrogates Certificate on the transmission of the Omissa, (that he dismissed the Cause on acct of the discontinuance of the Certificate) I am not to judge from his reasons but from what appeard in the Cause - In my opinion the Doctrine of continuing Certificates, shd hold only where no Appearance is given, when the Plts Proctor shd proceed agt the Def: for Contumacy, & continue the Certificate of the Citation, or he will not be entitld to the Excommunication - It is true, the Pty here appeard under protest; I look on an appearance under Protest, to be an Appearance before the Ct with respect to the Citation, saving the particular point of the Protest, wch is brought in Issue thereby - There is no Appeal from the Misnomer, if there had, I shd have given my opinion thereon - Holyoak shd have prayd Hand to be assigned, to extend his Protest, & appear absolutely, before he prayd him to be excommunicated -

When the Pty has appeard, the Certificate is only continued for greater caution, but is not necessary - I cant suppose the Surrogate dismissd the Cause for the reason assigned, as it dont appear in the Acts transmitted, I must therefore pronounce for the Appeal by Interlocutory, without Costs, & retain the Cause

Mr Tyndal the Kings Proctor being asked his Opinion, by the Judge, said he apprehended the Continuance of the Certificate, after Appearance given, to be unnecessary. Mr Altham Proctor was of the same Sentiments, & added even tho, the Appearance was under Protest.

Greene Proctor said, Sir Geo, Lee determind in the Case of Mr Raymond v the Baron Von Watteville, that it was unnecessary to continue y Certificate of a Decree for Answers, wch of all Points, is the most necessary -

Prerogative Ct 4 Session. P. T. ... Nuncupative Will

No. Drs Collyer & Wynn - Pugolas v Pugolas. Drs Harris & Bever ... Major ... Fountain

Lis is y Rogatum omnium Testium nec Sacrif.

Henry Pugolas of St Mary le Bone, Esq, a Widower, died without Children or Parents, leaving John Pugolas, his Brother, & Sarah Pugolas his Sister (now the Wife of Ch: Wm Molloy) his only next of kin, entitld to distribution, in case of an Intestacy

23 May 1764 The Decd being at his dwelling house at St Mary le Bone, (& sick of the Illness whereof he died about 8 o'clock the same Day) did between 5, & 6 o'clock on the same day nuncupate his last Will & Testament, as follows, "I believe I shall dye; if I do, I give "every thing I have to my Sister" meaning the aft Sarah Pugolas, wch he so nuncupated