Dismissed, you wd have said that having obeyd p come to reside, he never was a Party before the Ct – They have said this is a plenary Cause, but if what I have urged is true, it is no Cause at all – There are only 3 Ways of instituting a Cause of Correction, By Inquisition, Accusation, Denuncia-
Oughton Tit. 138. tion; this, is none of them; here the Parishioners apply to the Bp, he issues a Monition; it is the tendrest Way of proceeding, & the most summary; the Parishioners pray no Correction for the past; only that it may not be so for the future – The Dr has said it is of the Newest Impression, but he will find an ancient Precedent in Gibson's Appendix Tol. 1522. from whence this Process has been taken; Intervention in a Cause of Correction, wch the Dr is pleased to call it, was never heard of; it is the greatest Absurdity imagineable, but there are so many throughout, that I dont know how to follow them; if Articles were to be given at this time, there wd be a clear nullity, wanting the previous Steps; the Precedent shews the Proceedings to be according to antient Practice, he has as good an Opportunity to defend himself, therefore, I hope you will be of opinion, the Commissary did wrong in ordering Articles, & right in rejecting his Allegation –

Dr Collier. The Dr has quoted a Precedent from Gibson, wch, he says, is similar to this, & yet it is not similar, for it dont appear to have proceeded on Presentment: Articles are the more necessary, because this is to avoid a Judgement of the Kings Bench; Articles shd be exhibited to satisfy the B.R. what Grounds we proceed on: We may argue agt their Admission, they wd be rejected, the reason we desire them. Is, we suppose they must be according to the Presentment, & wd you then admit them, wd you let them say, he has not personally resided, must not they have expresly said, that the Duty has been neglected; the use of Articles is, We cd controvert in limine; We shd be apprized, the Ct shd be apprized, what is to be contested, in a regular manner, not by a flimsey Presentment, but precisely & definitely, we shd certainly oppose their Admission, & might plead in Bar; the Dr Town, has turned it in every shape very ingeniously, like Counts in a Declaration at Common Law; I apprehend the Ct will be well satisfied of the Facts; Does the Statute absolutely bind; are there no Exceptions? must he reside, able, or not sick or well, dispensed with, or not; there cd be no Collusion in this Case, It was ordred by the B.R. It is the Sequestrator's Business to find the Person to officiate: the King has no Interest; the B.R. has none; the Bp has none; Mr Kidgell has none; says the Dr Kidgell may die, so the Creditors Interest may be defeated, but that is the Act of God, so cd not be prevented; the B.R. however wd prevent by Prohibition, any indirect practice, to defeat its Sentence; the Bp wd refuse a fraudulent Resignation: was it ever known says the Dr that a Mortgagees Claim on an Estate cd stay the Eviction of the Possessor of the Fee; Perhaps this Case may not have happened; if it did, the Ct wd find means, that the Mortgagee shd not be ousted: We dont claim as a Creditor, but under a Judgement: We have taken care to secure the Debt; the B.R. has taken care & given us a Remedy; We are a Sequestrator with an Interest, not a mere rude Sequestrator; As to the Cases out of Bunbury, what sort of Sequestrator do they refer to; was it to a rude Sequestrator, I allow it, it was such, & neither Case says no Sequestrator can have an Interest, they mean such an one; We have propounded an Interest, we have clearly deduced it, & the Grievance we complain of, is that it is notwithstanding overruled. . . . . .

Judge. } This is an Appeal from a Grievance in rejecting the Allegation of the
Dr Hay. } Sequestrator, an Adhesion of the Proctor on the other Side, so far as respects the Promoters being ordred to give Articles, who has instituted a Suit, I must think, agt K. for Non-residence; therefore the Appeal consists of 2 parts; K. himself does not appeal, his Proctor only appears, on his behalf alledges it to be a Plenary Cause, & prays Articles: There are 2 Presentments; on those Mrs Hewit obtains a Monition to reside, or shew Cause, why he does not, or why he shd not be deprived? This Monition is divided into 3 Terms of 2 months each; the last Term is peremptory, if he dont appear in 6 Days – The Cause is instituted, I think, in a strange Way, & then to say it is no Cause! It is one of the highest of the most criminal nature; it is to proceed to Deprivation itself, the Punishment reserved for the most criminal Offences: It is in its own nature a Cause of Correction, however instituted; the Monition is agreeable to an Instrument in Gibsons Appendix; there is however a

Difference between that, & the present Case; for that does not appear to have been founded on a Presentment: It is not for me so much to enquire, what was the Old Proceeding, as what it ought to be: the Bishops formerly perhaps took a great deal more upon them in many respects, than cd be justified; they took Advantages in those Days of Ignorance, wch in more enlightened times wd not be suffered: All Canonical Purgations &c have been abolished, the present Rule must be that of natural Justice, that in all Processes the accused, should have the Liberty of defending himself, & the Accuser be bound to prove: I am surprized Kidgell was not advised to object to the Process, & say, I am not bound to answer to such Monition, wch implies a Censure, I having done something wrong; upon what Grounds? upon a Presentment, wch is itself a Charge, not a Proof: & a Censure upon a Charge is not allowable: Would a Jury, upon an Indictment, without Evidence find a Person guilty? a Presentment is in the nature of an Indictment: the Judge therefore ought not to have issued the Monition without citing Kidgell in the usual manner to shew Cause, why a Monition shd not issue? Upon the return of such Citation he might have shewn sufficient Cause, perhaps to prevent the Monition issuing but Mr Mangey took out a Citation, agt his licenced Curate, to shew Cause why he shd not be deprived, for not having read the Act of Conformity? Dr Andrews gave Costs agt Dr Mangey; he said it was a mons trous way of proceeding; that the Rule of Law, was, Actori incumbit Probatio, & that the Parish cd prove a Negative – And in the Arches Hil: T. 1733/4 in the Case of Orme & Flemming before Dr Betteswort, Monition issued out of the Ct of Winchester agt Owen for Nonresidence, he had appeared & alledged himself Chaplain to Lord Brook the Bp had reserved to himself the power of determining how far the Excuse was to be admitted, & this, I think, was the Proper time of the Appeal, but there were many Points in the Cause: on solemn Argument, the Ct was of Opinion that Citation shd issue, & that Articles shd be given, issue joined, & reasonable time assigned, & not to proceed immediately. If Kidgell had objected on the Return of the Monition, that he was not bound, I must have determined the Point, but the Qu now is, on the Appeal interposed by Kirkman, there is no Objection on the part of Kidgell, against the Monition, he prays Articles, Qury then, wh he is entitled now to object to the Monition, had appeared absolutely, upon it; I think it will be necessary to consider it a little presently, he may else, perhaps be apt hereafter to object his not being bound, however I will consider Kirkman's Case first, wh he has a right to intervene? the living was sequestred before the first Presentment; this Right depends on the nature of the Cause; a Party certainly may intervene pro interesse suo, in a Civil Cause, but then it must be a direct, not a contingent Interest: as for instance, a Creditor of a Legatee, cannot intervene in a Legacy Cause, much less can a third Person intervene in a criminal Cause; else all the Consequences wd follow that have been pointed out by Dr Wynne: the Sequestrators Interest is, as such, contingent, the Sequestration may be relaxed, he has no Right what ever to appear in this Cause, for then the Contracting a Debt wd be a Security agt any Correction whatever – As Kidgell appears & prays Articles without having appealed, he is to be held, there being no Objection to the legal Informality; What sort of Proceeding, to say, there is no Cause; the very nature of the Proceeding itself shews, that the Non-residence is not such an Offence, as, ec nomine incurrs a Deprivation; the Statute itself makes Exceptions, wch shews, the Minister ought to be cited on a Presentment; but taking it for a Crime, they presuppose Deprivation to follow; they present, & then say he shall shew cause, what? agt himself? Actori incumbit Probatio, the Prosecutor is first to prove a Fact: In all the Methods of Inquisition, Denunciation, & Recusation, Citation must issue, Proof must be made: the Party might be heard on y Admission of the Articles: I am of Opinion Articles shd be given; Kidgell had appeared & not objected to the Irregularity of the Proceeding, Citation need not issue, the Purpose is answered: As to Kirkman, I am of Opinion, he has no right to intervene, but I give no Costs agt him, pronouncing agt the Appeal & Adhesion; I remit the Cause to the Judge a Quo, who did right in both these Points.

N.B. when Stevens prayd an Issue to the Adhesion, it was a Qu wh he was entitled to one – Clerk is Silent on this head – Gostlin said there was none in Bowman & Sharpe Case, Altham said there was none given in Bowman & Sharpe at the Delegates . . . . .