or to the Residuary Legatee, whom must take out a Citation agt the Exors, to appear properly, if they do not, I have no doubt to prefer the Resid.ry Leg.

NB Collins on behalf of Mr Oswald one of the Attornies of the Exors prayd the Admon, but he living in Scotland, out of y.e Jurisdiction Goodwin prayd to be heard thereon; Exors were deceased agt the Attornies of the Attornies. NB. on the Caveat Day, Jan: 8. 1767. Mutter one of the Exors appeared & took Probate . . . . . .

Prerogative Bye Day

No 102

Jenner: Muccleston & Norman V Whylie ol: Muccleston — Altham

Dr Wynne. — Dr Calvert

Both Proctors are assigned to exhibit Inventories on the Oaths of their respective Clients, on the Admission of Althams Allegation . . .

Dr Calvert . . . Andrew Muccleston died intestate, leaving Elizabeth his Widow now Whylie; a Caveat was entered on the part of the Widow, & warned by Jenner on behalf of Jn Muccleston & Anne Norman, nephew & Niece, only next of kin to the Decd, & prayd the Admon to them, Altham prayd Admon to his Client; Jenner denied her Interest; we are now before you with an Allon propounding her Interest — the 1.st Art: pleads, the Decd lived Servants with Rd Bennet Esq — 2d pleads Affection & Agreement to marry — 3d pleads that Mr Bennet removed in 1739 from Malden Ash in Essex, to Babraham in Cambridgeshire, & that the Decd, Anne were married by Jn Champion a Popish Priest, (at Mr Hud Heslons at Sawston) in Oct.r 1739. according to the Ceremonies of the Church of Rome — 4th. pleads the Consummation at Mr Bennets at Babraham, & their being acknowledged & reputed to be Man & Wife — 5 Art. pleads Cohabitation at Easter 1739. their keeping a Shop, but on account of bad Circumstances, separated; that they afterwards took a Cheesemongers Shop, & lived together till the Death of Mr M. in 1766 — 7 Art: pleads Identity. ?

Dr Wynne . . . My Objections to the Admission of this Allon, are, that the Widow pleads a marriage in 1739. celebrated in such a manner, as will not entitle her to a personal Interest in the Admon; It is laid to have been celebrated by a Popish Priest, at a private House according to the Ceremonies of the Roman Catholic Church By 27 Eliz. c2. The Priest who performed y.e Ceremony incurs the penalties of High Treason

11 & 12 W3. The Priest is liable to perpetual Imprisonment for so doing.

23 Eliz. . . . The Parties are liable to 12 Months Imprisonment . . .

If this had happened since the Marriage Act, it wd have been clearly void, Jews & Quakers being excepted out of that Act, but not Papists — The Present Contest is not meant to establish the Marriage, but an Interest under it; if this Marriage had been solemnized abroad, or in an Ambassadors Chapel in England, according to y.e Ceremonies of the Popish Church, I admit it wd be good, because according to Law; 3 Jac. 1. c. 1 & 3. Every Popish Priest Convict shall forfeit 100£ to the King & be disabled &c.

They have not pleaded what Religion the Parties were of tho, their alledging themselves Protestants, wd not entitle them to an Interest under the present Circumstances; but supposing the fact true, it cd hardly be proved, as the Priest wd thereby incur the Penalty of Death, & the Ws being liable to great Penalties, wd hardly venture to be produced; The Cohabitation is rather imperfect, there being an Interval of 12 Years: tho. Cohabitation owning will induce a presumption, tis where they are not ousted, & upon a legal marriage; they cant cure the primary defect; the Question therefore is wh.r Persons married according to the Ceremonies of the Church of Rome, at a private House the Widow is entitled to y.e Admon or to any Interest in her Husbands Goods?

Qu: Can a Party plead a Marriage in England in a private chapel, by a Popish Priest? Is such Plea relevant?

Dr Calvert . . . I find our Allon is opposed on the general Principle, that the Marriage will not entitle the Widow to the Admon, or any Interest in her Husbands effects; I admit the Penalties on all the Parties, but they will not invalidate the Act when performed, Clandestine Protestant Marriages are liable to Penalties, yet wd not destroy, annul the Act in England, till the Marriage act took place; at last the Dr relied on the Impossibility of Proof, we have pleaded a particular Person present, the Proof rests on us; I have looked into the Statute 3 Jac. 1. c. 1. We do not fall within the Purview of that Statute, we claim nothing in Land, no Customary Share, but only what we have a right to by the Statute of distributions, wch dont affect us; Every Exception, establishes a Rule in other respects; we are not Papists Convict; I know not that being a Papist, is an indelible Character; a Marriage by a Popish Priest, is in itself a good Marriage . . .

Judge: ? . . . Dr Roy ? I have no doubt the marriage is good, if proved, tho, the Parties are liable to certain Penalties; it has been determind, that a Cohabitation, on an Interest is sufficient to entitle a Person to an Admon; The Law distinguishes, between Marriages, where a Restitution of Conjugal Rites is the Object in Question, & where there is only an Interest to be commenced on the Death of the Parties; I admit the whole Allon as laid . . . .

Caveat Day 1767 . . . Jan: 8. . . . . .

No 103 — Stuter Administratrix of Stratton. v Hamblin.

Holman — Dr Harris — Dr Calvert — Grene.

See Fol. 208

Qu: Wh.r the Widow is barred from her distributeable Share by the Settlement of a Leasehold on her? & wh.r they ought not to be brought into Distribution?

Dr Harris . . . I am Counsel for Mrs Stuter; admon having been granted to the Widow, she gave in an Inventory, to which we objected, & the Ct directed a fuller Inventory, the Value of the Estates settled on Mrs Hamblin, to be ascertained. Her Proctor having alledged there were 2 Leasehold Estates settled on Mrs H. we chose to have them inserted in the Inventory given in on Oath; One of them is now valued at 418£. the other at £82. 10. 0 . . . . . Grene did not comply with the Order, but exhibited a Special Proxy, confessing the Value of each as alledged, to which we agreed, in order to bring the Point to a speedy determination. The Qu: now before the Ct is, wh.r the Widow is barred from her distributeable Share, by the Settlement of the 2 Leasehold Estates, & wh.r they ought not to be brought into Distribution? . . .

Dr Calvert . . . after recapitulating the several Steps; said, there was another Prayer in Holmans Act; viz. that we would declare, whether we would take in Distribution, or under the Settlement, as we c.d not take under both: The 1.st Indenture bears Date June 23. 1728, & is for settling a Jointure, & Maintenance, on her, in case she shd outlive her Husband. The 2d dated June 24. 1728 is, in Consideration of an intended marriage & a certain Sum of Money to be received for a Portion, he settles on himself for life; then on his Wife for life, & then on his Children by the Marriage; 2 Leasehold Estates; one of which, lies in Hampstead Marshall, & held under Dr Crasen, upon a Lease for 3 Lives, determinable at the Expiration of 99 Years; the other Estate is called Bradley.

x These were 2 Settlements

Dr Harris . . . Your Determination that the value of the Leasehold Estates shd be inserted in the Inventory, in a great measure determines the Question; for to what purpose insert it, if Mrs Hamlin was not accountable? I do not remember this Case ever came before the Ct; I have seen Opinions thereon, which differ from one another The Statute of Uses has a particular Proviso, that a Woman having a Jointure, shall not have Dower Lands; if the Legislature thinks so in Cases where Real Estate is concerned, the Ecclesiastical Ct will act in a Similar Way with respect to personal Estate; the Statute of distributions regards Justice & Equality; as for Instance, in Hotchpot, which concerns all the Children but the Eldest Son & Heir, who indeed is excepted; I know nothing which can put the Widow upon a better footing than the Children; She is entitled by Statute to a moiety; but if she does not bring these 2 Estates into Distribution, she will take more than ½ which was not the Intention of the Legislature . . .

27 H8. c10. . . . . NB. See the 2d Statute wch is not applicable