If the Dr thinks the Proviso material to his Client, let him plead it, & shew, he is not within the meaning & Intention of the Statute — Dr Ex. Objects to the 6th Art: the Incapability of Proof, as to the Residence in Scotland; it has been before noted that mrs B. can answer for himself, & Witnesses may be examined concerning the Residence of mrs C. The Dr wonders at our pleading mrs B's Visits to her Brothers, Mother, & cannot perceive their Relevancy. I answer, it is pleaded to account for the Time from her leaving Mr Dalbys to her setting out for Scotland; With respect to the Laws of that Country, we have not pleaded it, because we have nothing to do with it, our Charge is the Breach of an English Statute, & if the Dr thinks the Scottish Law will exculpate & bear him harmless, he is at liberty to plead it in his defence, upon the whole, I hope you will admit the Libel as it is laid —

Dr Hay... } Judge... }

The Question now before the Court, is the Admission of the Libel; & a most important Question it is; I own, I am not sorry it is brought; for I think it of the highest Importance to the Nation, that it should receive a judicial determination. The Admissibility of this Libel depends on the operation of the Law, with respect to the Validity of the Marriage in Scotland, by reason of 26 Geo. 2. — In the former Cause a Libel of Jactitation was given; the Def: offered a Justificatory Plea; Objection was taken to the Certificate, that it wd not be Evidence, as Jameson if living, must be examined; I thought it might be of Use, as it was attested, if Jameson died before Examination, or denied the Act, tho, in itself, it was no proof of the Marriage, the Man being living, & therefore I received it. If there was a Marriage de facto, clearly proved, how could the Court say, they were free from all matrimonial Contract whatsoever, & forbid him to jactitate? if there was doubt whether the marriage was valid, I shd not have given Sentence agt the Defendant. They have now brought a Cause of Nullity; the Parties not objecting, the Ct, I understand, is bound to receive the Libel — Dr Ex.
of Request; it was so determined in Butlers Case. The Facts laid in this Libel, are, that Mrs M.C. Compton, was baptized in 1740, married March 13. 1760, It states her to be under 21, her Father dead, & Testamentary Guardians appointed by him, who had not consented to the Marriage; that they went to Scotland, & were married at Ruddlestons House at Dumfries — Answers will be proof in all Cases, the Relations could speak to the Alibi, so the Residence is capable of Proof. But the Question is, wch taking the Fact in all its parts, on the Plea, it is void by the Statute? I am clear the Marriage is not void under the Act, 26 Geo. 2. wch was made to prevent secret & Clandestine Marriages, Fleet Marriages, wch it was impossible to prove, so that the Parties were left in the greatest Incertainty, & the Legitimacy of their Issue was frequently called in Question; to prevent this Abuse, the Legislature interposed, & a restraining Law was made, to regulate Marriage, & annull those wch were not solemnized in conformity to y directions there laid down; all Marriages were declared Clandestine wch were not had by Banns or Licence — A restraining Law shd not be carried beyond the Letter — The Law has made a Proviso, that it shall not extend to Scotland, or Foreign Countries. Suppose I said, that the Subjects of England going beyond Sea to evade the Law, are liable to the same penalties, as if the Marriage was solemnized here against the Law; Should I not exceed the Intention of the Legislature, as well as the Letter of the Law? Most certainly: Tho, it wd be an Evasion of

That is not the question now

of the Statute, it wd not be a Consequence, that the Act has nulle void. I will put a Case, as evasive, as any that can be stated; Suppose the Contracting parties go into any large parish, remote from their Parents, reside there 4 Weeks, procure the Banns to be published, the Marriage solemnized; this is a clear Evasion of the Law, which intends that all minors shd be abridged from matrimony, who have not their Parents Consent, or that of their Guardians; yet this Evasion dont infer the Consequence; the Law does not say it shall not extend to Persons resident in Scotland, but, Generally, to Scotland. You must bring the Case within the Law to shew it is not valid; I give my Opinion now, that this Case may come immediately before the Delegates; I reject the Allon, & dismiss Majors Client, without Costs. Appeald.

N.B. when y Judge began to enter on the Law, the Plts Council being then unprepared to argue, pray'd the Ct to name a day to hear y Law argued D Hay at first was inclined to grant it, but afterwards refused to appoint a day for that purpose, gave his Judgement without hearing the Council on either Side upon the Law, tho the Admission of the Libel was the only Point in Question at that time

Prerogative
Dec. 1. Geo. 3.

No III

Alexander — Pyefinch — V. — Palmore — Stevens

Dr Wynne — Dr Calvert

Dr Calvert... I am Council for ... Palmore Exr in the Will of Wm Pyefinch dcd, dated 13 August 1760. it was proved in the Ct of Hereford, & afterwards called in ad the Suit of Jn Pyefinch, the Brother, alledging himself sole Exor in a Will dated 8 July 1762. he has cited my Client to bring the Probate obtained by her, & to shew Cause why it shd not be revoked for want of Jurisdiction, & why Probate of a Paper purporting to be the Substance of the last Will of D. P. shd not be granted to him, till an authentic Copy thereof, or the original Will shd be brought in — Oct 2 Stevens appeard for Palmore under Protestation; alledging that Jn Pyefinch had accepted a legacy of 10£ under the Will proved at Hereford, & that She was cited by a wrong name, viz Palmorre instead of Palmer — Alexander denied there had been a Sentence; Stevens exhibited a Copy thereof (after Sentence for the Validity thereof) & the Order of Jn Pyefinch. 20 Octr 1763 to pay the Legacy under that Will — Alexander contests the Subscription of the Exhibits, & alledges the latter Will did not come to his Knowledge before the date of those Papers, otherwise he wd have propounded it at the Ct of Hereford; this he supports by an Affidt of John Pyefinch; the Substance whereof was, that his Order was dated 29 Octr 1763, & that he was informed of the latter Will by Mr Jones an Attorney about June 1764

Dr Calvert... There is no doubt, but that if Probate be obtained from a Ct not having Jurisdiction, it wd be revoked, let the Effect of the Jurisdiction be what it will — But a Party may preclude himself by appearing absolutely to the Jurisdiction — This a common Rule to appear to save the Contumacy of the Party cited, but then such Appearance is under Protest; here Mr Pyefinch is the Actor, he has acted under the Will, & shall not harass the Defr after she has undergone the Trouble of a Suit; in Rosenberg & Meyer, it was said that having appeard before the Ct, he had submitted to the Jurisdiction, & cd not after object, because he was a Foreigner; therefore it is not to be called in question for a defect in the Jurisdiction; he next prays Probate of a Paper, upon the face of which he is not entitled, it not being even a Copy; can he call ones before he has established his own Will; then indeed he might pray our Probate to be revoked on account of a posterior Will — There must likewise be Certainty in the Person calling, & called — in the formal Courts of Law, the Addition is necessary — See the Case of Rees & Rowlands fol. 7 of this Book, & there cited the Cases of Clarke & Burwood 1719. Kenrick & Lyus 1732. Johnson & Richardson 1733. The Dr will answer, that it is immaterial, if the Party is identified; But I cd not take out a Sitation agt a Minister, as Rector of St Brides, in a Cause of Legacy, without

2. Shall Defr be obliged to appear absolutely on acct of y misnomer —
2. Can Plt bring his Suite agt y Defr had he received a Legacy under it? — —
2 Must he not first refund y Legacy so received? — —