Dr Calvert

Some of the Books say, that if a Statute can be proved never to have been put in use, it may be obsolete. tho standing on the Statute Book; this can't be said of the Act of Uniformity, wch has been generally observed, tho, not in every minute respect. The 2d Art: is merely argumentative & therefore improper to stand; Are the Witnesses to point out, when Service was not performed, they will only be Instances of neglect of Duty. As to the Marriage Act it is before the Ct, as all public Statutes are, the Observation is proper for the Council, but Witnesses cant be examined to it.

The 4th is destructive of itself; the Living is worth 100£ per An: the Livings in London dont much exceed that value, consider what Duty is done; this Living of St Bennets Pauls Wharf is no more; this wd destroy their Plea of small Livings, is 100£ of that Denomination? A man may have a Wife & 9 Children, yet not be poor, they may be an Advantage to him; He cd not preach any where without the Bps Licence; we only pray that he may be admonished to do his Duty for the future according to Law, what signifies wt he did it by the Bps Leave, tis now before you the Superior Ordinary. Canonically punished, are mere formal words, the future doing his Duty is 9 View of the Sentence; when he neglected his Flock & deserted them they were obliged to go to other Churches, it goes too far it is as much as to say, there is no occasion for any Duty at all, he might as well put the money at once into his Pocket; as to the Setting Dog, it is entring into little Pigues & Quarrels, it wd prove nothing; this wont excuse Driffield from his Duty, if true it cant be supposed to be the ground of every thing after. Both the ancient & modern Books of Practice agree that no contradictory Articles, can be received in the Ct of Appeal, any more than below; the only Dispute I have ever known, has been wh: the Art: is contradictory or not; tho: you will hear every body you will cut off all Delay.

Dr Wyrne

If no Allon can be given in the Ct of Appeal, that directly, or by Implication contradicts what has been pleaded agt you, it is useless to allow a Plea to be offered at all; I insist that, on the face of this Allon, there is nothing wch can have been collected from the Witnesses, or arisen out of their Depons but it is such an Allon, as he must have given on new sight, of the Allons brought agt him, if he had set up a Defence; this could not arise out of the Depons below, It is a general Defence agt a general Charge; there is then nothing to preclude us from giving this Plea now; if so, if will consider it as if in the Ct at Norwich, or before you originally, to be tried by the Rules of all Allons; the Charge is grounded on the Act of Uniformity; they admit Non User to be an Abrogation of a Statute, & that Custom will abrogate as well as make Law, Impracticability is the strongest argument agt a Law, there are Instances wherein it has been determined, the Act of Uniformity cant be executed in all Points; in all Places org. Cart. v Holland. where the Deft was dismiss with Costs; If in some cases the Statute cant be carried

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x ded. in the Consistory of London delt Decr 11. 1761. where the Deft was dismissed with Costs

into Execution, it brings on the discussion of the Fact, wh: it can in the present Case; the reason we give is, that the Living is so small; suppose Witnesses shd prove they lived in a Parish in the Country, where it had been insisted the Minister shd do Duty twice every Sunday, & that the Living was so small, no body wd accept it on such Terms; we may rely on what Fact we please; this will not burthen the Cause. In the 4th Art: we give a fair account of the Value of this Living, it is for your Consideration how it will aid us; it is not their Case, it is our Business to make the best use we can of it; they may give an Allon to take off the force of this Article, if they please; the Bp knows, what preferment, the Clergy of his Diocese have; there is a reason for allowing this Man to take a Curacy, his Preferment is small, his Family large, the Bp may on that Account excuse him doing Duty twice every Sunday at Chelsworth: The 48th Canon, says, No Minister shall serve more than one Cure, unless that is insufficient; wch is the present Case: Dr Harris mentioned an Oponion who preached 4 Times & read Prayers 8 Times every Sunday; so much the more improper, that the Service shd be so irreverently hurried over. I dont know any Law, wch requires 2 Sermons every Sunday; if the Psh of Chelsworth did not grumble, no body else had a right to complain; no Notice was taken of this Defect, till the Squire & Driffield quarrelled about the Setting Dog. When a Man is endowd so as to be able to live on 9 Living he is obliged to do the Duty of the Living, as the Statute requires; we shew Mr Driffield was not; If it shd turn out to be the Promoters own stirring up, will you pay any regard to his Complaint founded on the Construction of the Statute, we insist not only that Driffield, but that Former Rector did not perform Service twice a Day, because the Living would not afford it.

Judge. Dr May

The Prosecution being of a Criminal nature it is my Duty to admit every thing, by way of Justification of the Deft. The Rule is that in the Ct of Appeal you may plead new matter, & what might have been brought in the Inferior Ct, the Cause being open, but you cant plead contrary matter to what has been in Issue, & on wch Publication has passed; it is not merely the Publication, but the knowledge of the Depons, it is common in the Ct below for a Proctor to say he has not seen the Depons, & then to offer his Plea, but when the Depons have been opened & the Cause heard, nothing contrary thereto can be received; I am clear the Act of Uniformity in general is binding, & that a Clergyman may be prosecuted for not complying with it; but he may shew his Inability to comply, & why the Service has not been performed twice a day; it would be a hardship on the Clergy to say they shd comply with every particular of the Act of Uniformity: in the 5th Art: they plead, that Driffield's Predecessors performed morning & Evening Service; if the Deft had pleaded the contrary in the Ct below, he wd have done right; my Duty in a Criminal Prosecution is to admit every thing in Justification of the Deft. The Sentence is not confined to admonition, but censures him for what is passed; the Sentence must be right on the Evidence before the Chancellor of Norwich. The 3 first Articles are extraordinary, they plead the Impossibility of complying with the Statute, because