the Discretion or Judgement of the Exors; I know that under such a description, a Court of Equity, has directed, such a Bequest, to be paid, to the Poor of that Parish, where the Testator resided; & the Grounds of the Order, were, the great Probability of the Testators preferring the Poor of his own Parish, to any other in the Kingdom; but that Idea cant be formed in the Present Case; because the Testator died in France, where he had resided, many Years, before his death, & could not have any preference, for the Poor of any particular Parish, in Great Brittain; under these Circumstances, who can be called the Objects of the Testators Bounty? Has he expressed himself in such a manner, that his Exors can ascertain, what Poor he intended to Benefit? if he has not, where is the Residue to vest? not in the Exors, for it is evident, the Testator never designed them so considerable a Benefit, by his giving them a Specific Sum for their executing the Trust reposed in them; In this State of Doubt & Uncertainty, what can be more equitable, than that those Persons, whom the Ties of Blood, & the Laws of the Land, have pointed out, as Representatives of the Dec^d, should be entitled to that, wch the Testator, has not disposed of; if I am right in this Principle, the Interest of my Client must be a necessary Consequence, as he is admitted to be the nephew & one of the next of Kin, of the Dec^d; I shall now proceed to examine, the Other Position, how far this Ct has a discretionary Power, to demand Security, from an Exor; It will scarce be denied, that the Constitutions made in the Provincial Synods of this Kingdom, in former Times, were binding upon the Clergy, & that the Laity were likewise comprehended, where those Canons were confirmed by Act of Parl^t or antient Usage; In the time of Edw: 2^d a Constitution was enacted by Bp Stratford, "empowering the Ordinary after a Will was proved, to refuse committing the Execution of it to any, who were unable, to fulfill the Duty of their Administration, & authorizing such Ordinary, if it was necessary, to take Sufficient Security of the Partys for the due performance of the Trust reposed in them, & their faithfull account before the Ordinary, when legally required so to do.

Lindwood. Lib. 3 Tit. 13. fol. 177...

I am aware, the Gentlemen, will deny, the Authority of this Constitution, & tell me, this Doctrine was exploded in the Case of the King v Sr Rich: Raynes. But if I can shew, that Determination, to have proceeded upon improper Grounds, & that the force of this Constitⁿ has been weakend by no subsequent Law, I shd hope, the Ct will lay no Stress on that Determination; The Reasons assigned for the Judgement in the K. v Raynes, were, because Dr Walter had quoted, no Canon Law to shew the Ordinary ought to take Caution; & no Precedent of the Existence of such Usage, in the Province of Canterbury; now It is to be observed, that Dr Walter cited his Law, as the Dicta of Lindwood, & not as the Constitution of Stratford, then a part of the Law of the Land; & the Defect of Precedents in the Province of Cant^y is utterly inconclusive for it is notorious that the Custom of taking Caution, has existed from time immemorial, in the Province of York to this Day

1 2

1. Dep^y Reg^r of the Prerog: of ye Ct of York
2. a Public Notary & Proctor of ye said Ct....

as now appears by the Affidavits, of Robt Jubb. & R^d Mackay. And it would be absurd to suppose the same Doctrine sh^d be confirmd Law in one part of the Kingdom, & exploded in another: If this Constitution was ever admitted to have prevailed, I w^d ask, when, & by what Law it has been abolished? that it once existed, nay that it now exists, in the Province of York, is demonstrated by Affidavits,

" The Statute 25 H 8. c 19. empowers the King to nominate 32 Persons, (16 of
" the Clergy, & 16 of the Temporalty of the upper (neither House of Parl^t) to
" examine the Canons, Constitutions, & Ordinances provincial & Synodal
" heretofore made, & such of them, as the King & the 32, or the major part
" of them, shall deem, & adjudge worthy to be continued, kept, & obeyd, shall
" be from thenceforth, kept, obeyd, & executed, within this Realm, so that
" the Kings Royal Assent under his Great Seal be first had to the same: &
" the rest of the Canons &c, wch ye Kingque shall not approve, or deem worthy
" to be abolish, abrogate, made frustrate, shall from thenceforth be void &
" of none effect, & never be put in execution within this Realm. . . . .
" 17. Provided that such Canons, Constitutions, Ordinances, Synodals
" Provincial being already made, wch be not contrariant, or repug-
" nant to the Laws, Statutes, & Customs of this Realm, nor to ye Hurt
" of the Kings Prerogative Royal, shall now still be used, & executed, as they
" were afore the making this Act, till such time, as they be viewd, searched
" or otherwise ordered, & determined: by the said 32 Persons, or the more
" part of them, accord^g to ye form, Tenor, & Effect of this present Act . . .

Nothing was done, in consequence of this Statute, till 1603 when Certain Constitutions & Canons made in that Year, were confirmd by King James in Council pursuant to 25 Hen. 8. & ratified by Letters Patent under the Great Seal. as follows. Viz^t.

" We by these Presents do give our royal Assent, accord^g to the
" form of the Statute (25 Hen. 8) a^d, to all & every of the said Canons
" Orders, Ordinances, & Constitutions. & to all & every thing in them
" contained — "We enjoin & command by our said Authority & by
" these our Letters Patent, the same to be diligently observed, exe-
" cuted, & equally kept by all our loving Subjects of this our
" Kingdom, both within the Province of Canterbury & York, in
" all points, wherein they do, or may concern every or any of
" them, according to this our Will & Pleasure, hereby signified
" & expressed. . .

If then all Constitutions, which were not repugnant to the Statutes, & Customs of the Realm, or the Kings Prerogative, & wch were made prior to 25 H 8. c 19. S 7. were authorized to be used, subsequent to that Statute, till the King, & the Majority of the 32 Com^rs a^d determined otherwise; & if King James & his Com^rs made no alteration with respect to this Constitution, as I must insist, they did not, the Consequence is evident, that the Ordinary has still a discretionary Power to demand Security from the Exor, as is the daily Practice in the Prerogative Ct of York. But it seems, the Non User of this Power, in the Province of Canterbury, has operated so forcibly, as to destroy the Right, reserved to the Ordinary, by 25 Hen: 8. I own I am at some loss to account for so extraordinary a Position; the Power lodged in the Ordinary, is discretionary, & not coercive, as to this Point; he may require security, or not, according to the Circumstances of the Case before him, & tho' no Case sh^d have arisen in a course of years, where this Power was deemed necessary to be exercised, it cannot be fairly inferred, that the Law itself is become obsolete, or annulled; the Circumstances of the present Case demand the Execution of this Constitution, one of the Exors resideing all-