together in France, the other being a Person of no Fortune, & 140000 £ depending on their honesty, will I hope plead strongly in favor of this Application, & induce you to insist upon Security, before the Probate passes the Seal (i.e. a Bond, with Sufficient Sureties, in such Penalties, as to the Ct shall seem meet)

Dr Harris ... Ld Gage would not be aided, by the Incertain description of this Legacy, which, being to the Poor of Great Britain indefinitely, would be disposed of by the King in his Court of Chancery; the Deed declares the Exors know his mind, they had probably verbal Orders from him; but he allows them to dispose of in Charity at their pleasure; The Quantum of the Residue, is by no means ascertained. The Canon of Bp Stratford, has been unfortunately quoted; It dont oblige the Exor, at first coming, to give Security, but if he could not execute or cede, his Substitute was obliged to give Security, this dont apply to the first Exor; the Canons by ye Civil law gave no Security

Lindwood. Lib. Tit. 13. fo. 177. Note. v. Papist ... Si Executor impotentia Juris vel facti impeditus sit, quominus exequatur, Potestas agendi, vel distribuendi transfertur in Episcopum.

The Case of the King, agt Sr Rd Raines makes against them, Dr Waller could produce no Precedent, no Canon Law, therefore the Ct ordered the Mandamus to go. C.J. Holt knew a great deal of Canon Law

The Custom was originally taken up at York, & did not spring out of the Constitution. They allege, Security should be given before Probate, & to support their Assertion, produce the Canon Law, wch shews it sh: be after Probate.

What Reason is there to found the Supposition of Inability or Roguery in the Exors? they have offered no Evidence in support of this Hypothesis, which is merely imaginary: They have not satisfied the Ct, that there is any Residuum; they have produced no Law, nor any Case to apply to the Law, if they had produced any.

Dr Wynne ... where a Bequest is made to a Charitible Purpose, there is no void Devise, the Law always finding out some method, of rectifying a mistake, to give such Devise Effect. attorn. Genl v. Guise 1 Vern. 225 Vern. 26 ... v. Sidenfin. Snell had given a Legacy to found an Anabaptist Lecturer in a Market Town; the Ct of determined it shd go to found a Lecturership of the Church of England; The Testator in the present Case dont confine the Exors by any Directions, but leaves the Residuum to be disposed of in Charity at their Discretion, wch is a clear Bar to the next of Kin. If the Canon of Bp Stratford is in force, the Judge & every Officer of this Court will have incurred the greater Excommunication; for if a Feme Covert comes to your Office, if her Husband, being Alive, does not consent, you will not grant her Probate. It is contrary to the Law of the Land for this Ct to prescribe a Condition, which the Testator has not; the Prerogative Ct of Canterbury will not recurr to that of York, to enquire & learn, what is Law; the Ct of York went upon a right Ground, either always to take Security, or never; but I apprehend they act illegally & cant be justified by Custom; but even supposing there was any weight in what has been urged by the

Gentlemen who are Council for Ld Gage, you would not go into the particular Circumstances of the Case without Evidence to support it.

Judge Dr Harris ... The Application is new & extraordinary, & from all that has been said, appears to me, to be ill founded; Ld Gage cannot claim the Residue, unless he is next of kin; if that is not clear his Pretensions are too early; It is by no means clear to me, that Ld Gage is next of kin; It is very doubtfull, wh: the Legacy (thus worded) is void? I rather incline to think it is not; The Constitution of Bp Stratford has been urged in Support of the present Application wh: the Meaning of that Constitution, is, as Dr Harris has explained it, or wh: the Ct has a Discretionary power to demand Bond in particular Cases, or whatever is meant, It clearly does not mean what is done at York, & if it did, it is clearly not Law. The Words Si oporteat, refers to Circumstances, the Court of York could not, therefore, be founded on that Constitution, but on immemorial Usage, seeing it always takes Security; no Attempt of this Nature, has been made since the time of Sir Rd Raynes, the Law having been well settled. v. Hilly Mill Shower on this subject

Bp Stratfords Constitution, means, only, that Security shall be taken on a Case made out; It dont warrant Application to this Court. An Exor can do several Acts before Probate, to wch he is entitled simply, & without Condition. The Court of Chancery, on particular Cases stated, will order Security, but not unless the Party has misbehaved. that Court has Jurisdiction in Cases of Trusts; the Note in Carthew is, that the Exor was compelled to give Security; I can go no farther, than to consider the Validity of the Will; It wd open a great field, for Disputes, if Probates were delayed on Questions of Sufficiency, or Insufficiency; as to what has said of Dr Waller, I must observe, he was one of the ablest Men of his Time; he did not look upon this Constitution to be Law. I think, there is no foundation for me to direct the Exors to give Security. . . . . Exors not bound to give Security

Costs being asked the Judge, said he believed it was not usual to give Costs, on an Act, but only something nomine Expensarum; & therefore he gave no Costs. . . . . .

Commissary of Surry August 1 1768 — No 169. Cheslyn — Sr Thos Frederick v Horton — Major

Dr Calvert Burnell — Dr Wynne

Q. can a Patron institute a Suit of Dilap: for an Incumb: if no Avoidance has been made, over the Incumbent

Dr Wynne ... This is a Cause of Dilapidation instituted by Sir Thos Frederick Bart: by leing himself, the true & undoubted Patron, in full Right, of the Rectory & Parish Church of Hascomb in Surry. agt the Revd Thos Horton Rector thereof; the Citation was personally served & returned.

1 S. Trin. T. 1768 Major appeard under Protest for the Party cited. & says, that Sir Thos F. has not such an Interest as to entitle him to institute this Suite, Sir Jn F. his elder Brother having granted the next Avoidance to Jno Serocold in trust to present the Revd Dan: Chandler, & no other Person to the said Rectory. of the truth of this Position Mr Serocold has made an Affidavit, wch has been read: the Question is not, wh: a Patron, as such, can cite a Rector in a Cause of Dilapidations, (tho, it might admit of a doubt wh: he cd: institute such a Suite in the Ecclesiastical Ct, his Right