Counsel for Lunacy Pltff!

Co. Lit. 25. 252; *Ricketts* and *Baker*, contra *Co. Lit.* 149; *Ferne*, 39. and 60; and *Gilbert on Uſes*, 21. and 24; arguing, that admitting *Mary Paterſon* had forfeited, the title comes nevertheleſs into the preſent plaintiffs; and ſo the Court held, therefore

The objection was over-ruled.

DOE, and Lord MACLEOD.

A Motion was made for a foreign commiſſion, in order to examine witneſſes generally, without naming them, but by the Court it was denied.

KELLY and HARRIS.

IN an ejectment, a motion was made for a commiſſion *de bene eſſe*, to take the evidence of three witneſſes without ſhowing *age* or *infirmity*, or that they are *going off the iſland*, but it was denied.

Another motion was made in the ſame cauſe, for a commiſſion to examine witneſſes named in *Ireland*, after the cauſe had been ready for trial two Courts; but as it was in delay of the plaintiff, who applied, it was granted.

POOL *verſus* RAE et al. *March* 13.

A Motion was made to quaſh judgment, becauſe in the *coſts of increaſe*, commiſſion is included, for part of the debt *paid before* the judgment, which was only for the balance. This, though an abuſe of indulgence to the defendants, the Court was bound to grant.

REX *verſus* WILLIAMS in Eſcheat, *March* 6.

THIS was a cauſe of great importance, and many obſtructions had been thrown in the way of the trial, but it came on this day on *demurrer*.

The

The writ was brought for *Moreland* eſtate, together with 239 ſlaves, alſo the mules, horſes, cattle, and plantation, implements and utenſils, of which *George Williams* died ſeiſed and poſſeſſed *without heirs inheritable*, being a *baſtard*. The *inquiſition* was found accordingly, except that there were 31 ſlaves fewer than ſet out in the writ *of eſcheat*.

The *traverſe* ſet out a will by *Williams*, dated 24th January 1774, in which he deviſed his eſtate in truſt to *John Myrie*, *George Robert Goodin*, *John Parkinſon* and *Thomas Parkinſon*, after payment of debts and legacies, for the uſe of his ~~own~~ ſeven mulatto baſtard children, the ſurvivors and the ſurvivor of them. On the 13th of April following, he made farther deviſes and legacies to ſeveral natural mulatto daughters; and empowered and directed the truſtees, to ſell the greater part of his real eſtate, and to lodge the money for the uſe of his ſeven ſons in the Bank of England.

The Attorney General replied, ſtating the act of the iſland in 1761, for preventing exorbitant grants and deviſes to negroes and their iſſue; and alſo ſetting forth the baſtardy of *Williams*. 2 Geo. iii. c. 8

Mr Frazer for the defendants argued, That the *truſtees* became the *tenants*, and therefore that the *eſcheat* did not lie: That the deviſe being ſubject to payment of debts, the capital to ariſe from the ſale was ſtill open in the hands of the Bank, paying intereſt only to the ſons of *Williams*: That truſts and mortgages are not eſcheatable, *Hardreſs*, 465. He alſo contended, That there was a *departure* in the pleadings, in as much as *baſtardy* was ſet out in the replication, though not ſtated in the declaration: But he chiefly relied on the 27 *Eliz.*; 4 *Bac.* 133.

Mr Baker, on the ſame ſide, made ſix points, but did not ſupport and diſcuſs them regularly. He cited *Dalrym. Feud. Cha.* 1. 2. and 3. *p.* 18. *et infra*; and inſiſted, that ſince 27 H. VIII. where there is a *legal tenant*, an eſtate cannot eſcheat, and that the *truſtees* are ſuch, *Hard.* 488; 2 *Vez.* 300; that the act of 1761 does not give *eſcheat* to the King, only a *forfeiture* of the ſurpluſage beyond L. 2000 to the heir. That the inquiſition is bad, as it goes to the *whole*, and *part is* perſonalty; that the return is uncertain in mentioning 31 ſlaves deficient without naming them; and laſtly, that *Williams's* debts being conſiderable, and ſome of the legacies payable 11, 12, and even 20 years hence, there is no aſcertaining that the deviſe to the mulattoes will exceed what is *legal*; beſides, that land deviſed *to be ſold* for money is perſonal eſtate, and that the *reſiduum* thereof goes to the executors, 2 *Bac.* 423.

Mr Ricketts,—ſame ſide.

He took what is certainly the ſtrongeſt ground in this caſe, contending that the writ is not *technical* in comprehending *perſonal* property, for that all *remedial* writs ought regularly to follow the nature of the tenures, 4 *Bac.* 131; 2 *Black. Com.* 63. 72. 73; Lord *Bacon's Uſe of the Law*, 131; *Fitzheb. N. Brev.* 337. *Baſtardy* not having been ſet out in the *writ*, he ſuppoſes it is brought merely on the acts of the

the iſland, *Co. Lit.* 13. *act* 18. *ſect.* 3. directs the *true* value of the *reality* to be returned, which is not done in this inqueſt, for all is blended. By that act, the Governor cannot paſs a grant of *eſcheat*, till after proclamation three terms; conſequently, the eſtate does not immediately veſt on the return of the writ. Perſonal property veſts in the ordinary, and letters-patent would give it to an adminiſtrator, *Salk.* 37; but the *hæres factus* in the preſent caſe, renders this unneceſſary. Wherever a truſtee is compellable to do any executory act, it muſt be in *equity*, and till that is done, he cannot be *diveſted* by the King. The act in 1761 does not mention the King, and was calculated to favour *heirs*, and to prevent their diſheriſon. By 2 *Vern.* 106. a deviſe to an executor for *ſale* of lands to pay debts, is not *legal aſſets* till after ſale; therefore before ſale, ſuch deviſe is *equitable aſſets* cognizable in Chancery only, 2 *Atkins*, 43. 50. The ſurpluſage, after payment of debts, legacies, and L. 2000 to each mulatto, ought to go to the executors, as there is none to take according to the ſtatute of diſtributions. And *if* there were, *this Court* cannot compel diſtribution: 2 *Pere Will.* 338; 2 *Vez.* 303. 304. He cloſed by urging, that a deviſe to *executors to ſell* for payment of debts, being a deviſe in FEE, the *legal* eſtate is conſequently in the preſent executors.

Mr JACKSON *contra*, *March* 9.

He opened by ſaying, that the caſe of eſcheat for negroes had been formerly determined, without ſtating in what inſtances: He then combated Mr FRAZER's argument as to a *departure* in the pleadings, 4 *Bac.* 133; 5 *Comyn's Digeſt.* 580; *Stat. of Jeo faile temp. Anne; Co. Lit. fo.* 13. He cited *Sullivan's Lectures*, 159. to ſhow that perſonal and real property were equally liable to the forfeiture of the *Crown* and *Bro. ab. Placito*, 12. 30. and 38; he obſerved, that no *fiduciary truſt* is raiſed in the *codicil* for payment of *debts*; and that he conceives the *codicil* revokes the *will*: That the truſt is good in the *whole*, or not at all; but that in equity the mulattoes may be creditors for L. 2000 each. He aſſerted, that the eſtate veſted in the Crown by the *return* of the writ; and dwelt on the *baſtardy* of *Williams*, *Co. Lit. ſect.* 188; *F. N. B.* 337; 27 H. VIII; *Sup. Com. Dig.* 312; *Sullivan*, 416; and 2 *Monteſquiu*, 110.

Mr BROWNE,—ſame ſide.

After ſome preliminary remarks, tending to ſhow that the *form* of the preſent writ is ſuch, as has been heretofore uſed in this country; and that it ought to be termed a writ *quaſi*, *or in the nature of an eſcheat*, inſtancing proceedings under act of *William* and *Mary*, relative to Papiſts, and that of *Anne*, on the ſame ſubject; likewiſe clearing up the variance between the writ and return; explaining that the defendants are by the traverſe precluded from

 queſtioning

queſtioning the inquiſition; that there was no neceſſity for ſetting out *particulars* in the *replication;* and that by the prerogative, the King may have a *traverſe* of a traverſe;—he branched his argument into heads.

Firſt, That were *Williams's* will out of the caſe, and he had died inteſtate, that his property, real and perſonal, would go to the *King* as *vacant rights* real and perſonal, 9 *Coke*, p. 38. *Henloe's* caſe; 1 *Madox's Exch.* 185. 346; 1 *Salk.* 37; 2 *Black. Com.* 505. 506; 2 *Jenk.* 710. confirmed in Parliament. He added, that till lately *negroes* were deemed *perſonalty;* but an act paſſed in 1774 requires three witneſſes to a ~~demiſe~~ *deviſe* of negroes, *King* and *Dybens*, and *King* and *Galliard* in this Court.

Secondly, Where a forfeiture is given, and no perſon named, the *King* is the taker, as *bona vacantia*, 3 *Lev.* 290; 2 *Vent.* 267; *Siderf.* 86. 148; *Swinburne* 40. & 41. Forfeiture being here ſuperinduced, the *beneficial intereſt* is in the Crown, and only *fiduciary* in the executors. By his conſtruction of the act 1761, (the will being void), the mulatto ſons cannot take even the L. 2000 each.

Thirdly, That on the pleadings as they now ſtand, theſe ſeveral rights muſt be eſtabliſhed in the Crown; for where poſſeſſion in law *is caſt on the King*, he may *ſeize even without office*, *Stanford prerog. Reg.* 54; 4 *Coke* 58; *Saville* 8. 9. 10. 19. 61. 64. & 70. Had *Williams* died without a will, the *King* would have immediately had a right to enter; and it is the ſame here, the will being void, *F. N. B.* 7. & 32; *Skin.* 114; 2 *Lilly Ab.* 326; *Dyer* 238; 4 *Inſt.* 116; 2 *Cro.* 481; *Stanf. prer. Reg.* 65; *Vaugh.* 62. 63. 64; *Bro. Ab. tit. prerog.* Though he admits the great authority of the *Regiſter*, he inſiſts, that no *writ* of *eſcheat* can ever be brought in *this iſland* according to *that form* on account of negro property. He finiſhed by obſerving, that the codicil does not eſtabliſh a *truſt* for the creditors; but that by the act of *Geo.* II. real eſtates are made liable to debts; and by the 2 and 3 of *Edw.* VI. c. 8. all eſtates in the hands of the *King* are ſubject to debts, &c.

Here the cauſe broke off for this term; and the *Chief Juſtice* WELCH being obliged to leave the iſland by ſickneſs, the cauſe came on in *May Court*. Mr BAKER and Mr FRASER had ſpoken before I ſat; and on *May* 31. Mr RICKETTS ſpoke in it the ſecond time.

On the head of *baſtardy* he cited 4 *Bac.* 122. contending that it is not found by the inquiſition, *Herne* 138. 139. *After verdict*, a judgment was reverſed for an error in the teſte of a writ, *Cro. Eliz.* 325.

The premiſes not *bona vacantia*, *Jacob's Dict.*; 2 *Bac. Ab.* 392. 418.

Some of the truſts of this will are *good*, as in the caſe of *Papiſts* and *Proteſtants*, though it would be bad as to *Papiſts only*, 1 *Vez.* 187; 1 *Chan. Ca.* 196.

The *King* ought to ſue in *Chancery*, and may by 1 *Eq.* c. 71; but he cannot be ſeized of an *uſe*, 4 *Bac.* 190; *Gilb. Deviſes* 21.

Surpluſage goes to *executors*, *Perkins*, ſec. 525; 2 *Bac.* 423. 5.—No legacies are given to *Myrie* and *Goodwin*, therefore they are not precluded from taking ſurpluſage.

Mr PINNOCK, ſame ſide, quoted the following caſes, *Hob.* 280; 2 *Bac.* 244. 245; 13 *Edw.* I. c. 19; *Sir Tho. Raym.* 198; 2 *Hard.* 466; 2 *Burn Eccleſiaſt.* 636. and *Stra.* 839. He confined himſelf to the pleadings, inſiſting that the *Attorney-General* has taken a *traverſe* on a *traverſe*, which in matter of *law* he has no right to do. He alſo contended, that there being *hæredes facti* in this caſe, there can be no eſcheat.

Mr BROWNE, *contra*,

Again accounted for the *variance* of the *return* from the *writ* as to the number of ſlaves. He ſaid, that as *iſſues* had been tendered by the replication, it was the plaintiff's own fault to forego trial by jury; and that *on demurrer facts were admitted*, 4 *Bac.* 132; 2 *Black. Com.* 86. 89. He went over his former grounds as to the act of *Geo.* II. ſubjecting real eſtates in the colonies to payment of debts: Fiduciary truſt *only* in executors.—As to the *forfeiture*, he contends that by the ſecond proviſo of the act, a deviſe within the limitation, *i. e.* leſs than L. 2000 is not ſaved. As to precedents *here*, beſides thoſe mentioned in his firſt argument, he now produced that of the *King* verſus *Burbeck* in 1762, which involves *cattle*, (*qu.* if oppoſed?) and as to *creditors*, they have recourſe on the eſtate in the *King's* hands by 2 and 3 *Edw.* VI. Beſides this reiteration of his firſt argument, he attacked the authority of 3 *Peere Will.* 383. ſhowing it quæried by the reporter himſelf, *Parker* 144. In a catalogue of *private* acts, there is one to *enable* the *King* to grant lands to a deviſee, which he ſays was owing to the deviſee's being an *alien;* and as *ſuch*, the *King* could not of *himſelf* grant to her, 2 *Stra.* 839; *Vaugh.* 62. *et infra.* Traverſe, though proved, ſhall not avail without proof of *title* too againſt the *King*. He inſiſted that there is no *departure*, and if there were, that the *King* has a right to *depart*.

JUNE 1.

The *Attorney-General* (Mr HARRISON) opened with an explication of *hæres* as underſtood among the *Romans*, whoſe rule was alike as to real and perſonal eſtates, *data ſingula ſingulis*. The opinion of *Cicero* and ancient writers on juriſprudence, as to *bona vacantia*. Writ of *eſcheat* takes in every thing *perſonal* as well as *real*, in virtue of the *King's* repreſenting the community, *Godbolt* 260. The *King* has a right to ſeize *cadentia* without office; if ſo, ſhall inquiſition

quiſition *ex abundante* prejudice the Crown? A ſuit in *this Court* is more likely to be free from bias than in *Chancery*, where the Governor is the Judge. Eſcheats were in uſe before the time of the *Normans*, *Wright* 116. 117. from *Bracton*. The *Engliſh* writ of *eſcheat* not practicable, ~~not~~ uſed here. Though the writ be not the ſame as in the *regiſter*, yet that ſhall not vitiate, if *equivalent*, or if there is a *precedent*, *Hob.* 59. 94. Where, in an eſcheat, *erronice emanavit* goods are taken, it does not vitiate, *Bro. office eſcheator*, title *Biens;* in the *King* and *Burbeck*, cattle were included. *King* and *Dykens*, where negroes were in queſtion; and in that caſe, BROWNE, without ſucceſs, moved to quaſh the writ; yet the *regiſter* furniſhes no precedent in that inſtance. He cited *Lee's Reports* to ſhow the regular proceedings in offices. The plea tendered, is, that they are *ſeiſed* of the realty, and *poſſeſſed* of the perſonalty, with a *proteſtando only* as to the inſufficiency of the writ, on which an *iſſue* does *not* lie; and having pleaded as *truſtees*, objections to the writ are now too late.

The *traverſer* muſt, in all caſes, make out his own title, *Viner*, note, tit. *Traverſe*; *Bro.* 246. The *King* may *traverſe* on the *title*, and abandon the *office*, even if the office itſelf be traverſed, *Placita Co.* tit. *Prerog.*; *Plac.* 45; *Hutton* 96. where *office* is found as to *goods*. *Chattels* may *veſt without office*, *Viner*, tit. *Off.*; *Inqueſt* 80. 83. 85; *Vaughan* he thinks concluſive on this point, 1 *Mod.* 276; *Kielway* 192; *Freeman* 7. He maintained that there is no *departure*, and that the plea is properly their *terminus a quo;* that *baſtardy* was *replied*, to avoid the objection of a *negative pregnant;* that the *proteſtando* admits every thing in the Crown, which concludes the traverſer, and admits the *baſtardy;* and alſo, that the bequeſts are more than are allowable by law. What is bad in part, is bad in the whole, *et e converſo*, *Plowd.* 68. *Seiſing without office*, as the Crown might have done, would be more odious. An inqueſt of office as to *goods*, *Lee* 38. 78. Debts and incumbrances may be recovered in Chancery, where, he ſays, a bill in this caſe is filed.

He obſerved that the *reſiduum* is only deviſed by the *will*, but the *whole eſtate* by the *codicil*. Truſts of this nature being void by the act, Courts ought not to infer debts; for a rent-charge of L. 10, might raiſe a perpetuity in all caſes to defeat eſcheat.

The *plea* does not mention that they take as *executors*, but as *truſtees*, *Parker* 144. Nothing given to the executors by *implication;* on the contrary, it is expreſsly given for the uſe of the mulatto children.

He concluded by ſaying, that bonds, and every debt to which the eſtate was ſubject at the *teſtator's* death, are recoverable, whether the property be in the *King's* hands, or in poſſeſſion of others.

Mr

Mr PINNOCK, in reply.

He alleged generally, that Mr *Attorney-General's* caſes are all older than the ſtatute of *Edw.* VI. and 12 *Car.* II.; that all the caſes cited by the other ſide, were thoſe of *quare impedit;* that in the *King* and *Burbeck,* the inquiſition found realty and perſonalty ſeparately; that eſcheat was not in contemplation in the act 1761.

Cur. adviſare vult.

And on *Wedneſday* the 9th of *June,* the Court requeſted the opinion of Mr BARNES, Mr HUGH LEWIS and Mr REDWOOD, as *amici curiæ* on the queſtion of the expediency of a *repleader.* The two former thought it grantable; the latter cited 4 *Bac.* 129. and 3 *Levinz.* 20. adding, that juſtice is the whole queſtion.

The Judges delivered their opinions *ſeriatim;* by TROWER, JACKSON and GRANT *, LEWIS *diſſentiente.*

The demurrer was over-ruled.

* MY OPINION.

IN theſe proceedings the propoſition aſſumed for the King is, that the will of *Williams* being in evaſion of the act of 1765, is void; and that *Williams* himſelf, *as a baſtard,* having neither heirs nor next of kin, to take agreeably to the act, the King is conſequently entitled by *eſcheat.*

If the firſt part of the propoſition is eſtabliſhed, the inference I think unavoidable.

The moſt material objection taken for the traverſers, goes to the regularity of the writ; not, however, becauſe, as Mr *Fraſer* ſaid, it is contrary to the precedents in the *regiſter;* but for reaſons which I will give by and by. One is almoſt bewildered in the profuſion of caſes cited. I have peruſed almoſt all of them, perhaps with needleſs anxiety, if the *principle* on which my opinion turns ſhall be found right.

Many of the authorities adduced are from *Chancery caſes,* which are to be received *here* under great reſtrictions. I conceive, however, that none of them avails the traverſers in the main queſtion. For though by 2 *Vez.* 304; *Hard.* 496. it be undetermined, whether a *truſt* is eſcheatable; or even admitting it is not, yet it can be underſtood only of truſts made for allowable and lawful purpoſes, whereas this before us, is made in manifeſt evaſion of a very plain and very neceſſary law. Every ſtream muſt be contaminated, that flows from an impure ſource. Mr BAKER puts the caſe very ſtrongly by aſking, whether, if a man deviſing a large eſtate to his legitimate offspring, or unexceptionable kindred, would work a *forfeiture,* if he ſhould incautiouſly bequeath a trifle beyond the limitation of L. 2000 to a mulatto. Such an inſtance is not likely to happen: beſide, the King's right would be out of the queſtion, in caſe of either heirs or kindred, who are within the purview of the act, and thereby the private hardſhip in a great degree, and the political miſchief altogether prevented.

Mr RICKETTS has very ingeniouſly argued from *Vez.* 187. that a truſt may be partly *void,* yet in ſome reſpects good; as in the inſtance of Papiſts and Proteſtants; but this reaſoning too, muſt be confined to fair, well-intended truſts: The evident deſign of *Williams* to elude the law vitiates *all.* And the ſame principle does away, I conceive, every thing ſaid about *hæredes factí.*

The greateſt weight that has been laid on my mind throughout this long buſineſs, ſprung from a doubt, whether on the authority of 2 *Vez.* 116. ſome *creditors* would

May Grand Court, 1779.

GALLEY *verſus* LAMOND, in Replevin.

THE *collecting conſtable* for the pariſh of *Kingſton*, had made a levy on the property of Mr Galley, one of the attornies of this Court, on account of taxes on trade, for the ſupport of *church* and

not be ſhut out from recovering againſt the eſtate in the King's hands. For it is there ſaid that the King, or his grantee of a forfeiture, takes ſubject to all *charges* binding the party though voluntary, if there is no fraud; but *not* ſubject to *debts* at large, as there is no ſuch law in England, though the Chancellor ſays there is in Scotland.

But a little reflection has enabled me to get over this difficulty; for though in England real eſtates are not chargeable for open accounts, or book-debts, in the colonies they are, by the 5th *Geo.* II. Now the principle laid down by *Lord Hardwicke*, being that eſtates in the hands of the Crown are *chargeable* with every debt binding the party *forfeiting*, it neceſſarily follows, that as debts of every *denomination are in this country a* charge on the *realty*, the CROWN muſt take *here*, ſubject to the payment of *all Williams's* juſt debts.

Let us now conſider, whether the Crown ought to ſucceed on the proceedings before us. The *regiſter*, however venerable and authoritative, does not contain precedents of every writ uſed at this day, even in England: much leſs, will it be found to furniſh precedents of the writs in uſe *here*: This is ſo well known to every one that hears me, that it is needleſs to dwell upon it. But the law in the proſecution of rights, has drawn ſtrong lines between *real* and *perſonal* property; and it is indiſpenſable for the King, like every other plaintiff, to ſue in ſuch a mode, as if not ſanctioned by *ancient forms*, ſhall at leaſt hold out a certainty to the defendant.

Mr BROWNE calls this a *quaſi writ of eſcheat*, or a "writ in the nature of an eſcheat;" but the queſtion is, can a writ, ſuch as this, under whatever appellation or modification, legally involve *perſonal* as well as *real* rights?

The *Attorney-General* has conſidered it in two other views; 1*ſt*, As *equivalent* to a regular writ, according to *Hob.* 51. 94; 2*dly*, As founded on precedents in this country, *viz. Rex* and *Dykens*; *Rex* and *Galliard*; and *Rex* and *Barbeck*. The two firſt went *only to negroes*; the latter, indeed, was an *eſcheat*, which included *perſonal* property; but it is ſaid, that the judgment in that caſe was, if oppoſed at all, not determined on ſolemn argument. *Hobart's* doctrine will ſcarcely hold here; for I cannot conceive a writ to be *equivalent* to a writ of eſcheat, that includes *perſonal* property, which is not the ſubject of eſcheat.

It is urged, that the King is entitled to the *perſonalty*, as *bona vacantia*, for defect of kindred, as in this inſtance; and it muſt be allowed, that the preſent proceedings are leſs odious, than if the King were to ſeize on the perſonalty *without office*, as laid down in the books; and for *obvious* reaſons, it is to be wiſhed that the matter may be tried here, rather than in *Chancery*.

To determine that perſonal property is ſubject to eſcheat; that one may be *ſeized in fee* of a horſe, or houſehold-furniture, will, to be ſure, ſound ſtrangely in an *Engliſh* Court. I have therefore wiſhed for a *repleader*; but apprehending it cannot be regular-

and *poor*. The queſtion was, Whether an *attorney at law*, as an inhabitant of *Kingſton*, is liable for this tax? *Colman Johnſon* proved, that it is the practice in that pariſh, to tax the inhabitants *generally* for the *church* and *poor*, after levying 9 d. 1 s. or 1 s. 6 d. in the pound on the houſe-rent: That the rule is taken from the viſible abilities, according to the trade, profeſſion, or buſineſs of the parties: That, in 1773, the plaintiff was aſſeſſed 50 s. for rent, and L. 3 on the tax now complained of, which he paid. But that attornies are not taxed on their buſineſs, *as ſuch*; for the merchants pay the tax on *trade*, *ſtrictly ſo called*; and *this likewiſe* for *church* and *poor*, in aid of the poundage on houſe-rent.

The plaintiff called Mr Matthews, who proved, that in *Spaniſh Town*, *lawyers* are excepted from the tax for *church* and *poor*, which is laid only on traders and huckſters. He could not ſay how the practice is at *Port-Royal*.

Some unneceſſary learning was waſted in this caſe, tending to ſhow that *attornies* are not thus taxable in *England*. The warrant of the Magiſtrates was not ſtrictly regular. Were the Court to entertain objections ſo very technical, the collection of taxes would fail altogether. The caſe was left to the jury, with a few obſervations to this effect, and they returned a

Verdict, *Not guilty*.

May Grand Court, 1780.

REX *verſus* SMELLIE, et. al. Surveyors.

ON a motion for leave to bring an *information*, under the *ſurveyors act*, for the penalty of L. 100, *Mr Browne* conſidered it as a ground of public miſdemeanor. The ſurveyors had been employed

ly awarded, I am conſtrained to give my opinion on the whole matter as it *now* ſtands before the Court: therefore, conſidering that the merits are with the Crown; that had the *Attorney-General* proceeded on the act by *information*, he might have comprehended the *perſonalty* with the *realty*; that as the King can ſeize perſonalty *without* office, it is at moſt, *ex abundante*, in the preſent writ, and ſuperfluity does not vitiate; that there is ſome weight in Mr *Browne's* diſtinction of a *quaſi* writ, the *baſtardy* having made a writ of eſcheat neceſſary as to the land; that this being a *general* demurrer, *forms* are not to weigh againſt *ſubſtance*; and that in regularity the exception ſhould have been made to the *inquiſition* in order to quaſh it, but it is now too late; therefore, upon the whole, I am for over-ruling the demurrer.

N. B. Judgment affirmed in error; alſo on appeal, in *England*.