CASE

UPON THE

STATUTE

FOR

DISTRIBUTION.

[By George Wythe.]

RICHMOND:

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CASE

Upon the ſtatute for diſtribution.

ONE, who had occaſion lately to conſider the queſtion, ariſing on a paragraph of the ſtatute, enacted by the general aſſembly of Virginia, in the year 1705, for diſtributing the goods of an inteſtate, * diſagreeing with engliſh judges in their expoſition of the ſame paragraph, in their ſtatute for that purpoſe, ſubmits to cenſure the following reſult of his diſquiſition, not without hopes of ſhewing, as he hath endeavoured to ſhew in other inſtances, that the judicial determinations in England do not deſerve the reſpect with which they are honored in this country.

By the 22 & 23 Car. 2. Cap. 10, it is enacted, 'that all ordinaries and eccleſiaſtical judges, upon 'granting adminiſtration of perſons dying inteſtate 'ſhall take bond of the adminiſtrator, with two, or 'more ſureties, with condition that the adminiſtra- 'tor ſhall make a true and perfect inventory of all 'the goods and chatels of the deceated, and ex- 'hibit it into the regiſtry of the ordinarys court 'by ſuch a day, and that the ſaid ordinaries, and 'judges reſpectively ſhall and may, and are enabled 'to proceed and call ſuch adminiſtrators to ac- 'count for and touching the goods of any perſon 'dying inteſtate, and upon hearing and due con- 'ſideration thereof, to order and make equal and 'juſt

* *This ſtatute is not now in force; but queſtions have ariſen, are now depending, and may ſtill ariſe upon it, in caſes where the inteſtate died before it was repealed.*

'juſt diſtribution of what remaineth clear (after 'all debts, funerals, and juſt expences of every ſort 'firſt allowed and deducted) amongſt the wife and 'children, or childrens children, if any ſuch be, 'or otherwiſe to the next of kindred, to the dead 'perſon, in equal degree, or legaly repreſenting 'their ſtocks, *pro suo cuique jure*, according to 'the laws in ſuch caſes, and the rules and limi-'tation hereafter ſet down; and the ſame diſtri-'butions to decree and ſettle, and to compel ſuch 'adminiſtrators to obſerve and pay the ſame, by 'the due courſe of his majeſty's eccleſiaſtical laws.

'Provided always that all ordinaries, and every 'other perſon, who by this act is enabled to make 'diſtribution of the ſurplus of the eſtate of any 'perſon dying inteſtate, ſhall diſtribute the ſur-'pluſage of ſuch eſtate, or eſtates, in manner and 'form following, that is to ſay, one third part 'of the ſaid ſurpluſage to the wife of the inteſt-'ate, and all the reſidue by equal portions to and 'amongſt the children of ſuch perſons dying in-'teſtate, and ſuch perſons as legaly repreſent ſuch 'children in caſe any of the ſaid children be then 'dead, other than ſuch child, or children (not 'being heir at law) who ſhall have any eſtate by 'the ſettlement of the inteſtate, or ſhall be advanc-'ed by the inteſtate in his life-time, by portion, 'or portions equal to the ſhare, which ſhall by 'ſuch diſtribution be allotted to the other children 'to whom ſuch diſtribution is to be made; and 'in caſe any child, other than the heir at law, 'who ſhall have any eſtate by ſettlement from the

'ſaid

'ſaid inteſtate, or ſhall be advanced by the ſaid 'inteſtate in his life-time, by portion not equal 'to the ſhare, which will be due to the other chil-'dren by ſuch diſtribution, as aforeſaid, then ſo 'much of the ſurpluſage of the eſtate of ſuch inteſ-'tate to be diſtributed to ſuch child, or children, 'as ſhall have any land by ſettlement from the 'inteſtate, or were advanced in the life-time of 'the inteſtate, as ſhall make the eſtate of all the ſaid 'children to be equal, as near as can be eſtimated; 'but the heir at law, notwithſtanding any land 'that he ſhall have by deſcent, or otherwiſe from 'the inteſtate, is to have an equal part in the 'diſtribution with the reſt of the children, with-'out any conſideration, of the value of the land 'which he hath by deſcent, or otherwiſe, from the inteſtate.

'And in caſe there be no children, nor any 'legal repreſentatives of them, then one moiety 'of the ſaid eſtate to be alloted to the wife of the 'ſaid inteſtate, the reſidue of the ſaid eſtate to be 'diſtributed equaly to every of the next of kindred 'of the inteſtate, who are in equal degree, and 'thoſe who legally repreſent them.

'Provided that there be no repreſentations ad-'mitted among collaterals after brothers and ſiſ-'ters children; and in caſe there be no wife, then 'all the ſaid eſtate to be diſtributed equally to, 'and amongſt, the children; and in caſe there 'be no child, then to the next of kindred in equal 'degree of or unto the inteſtate, and their legal 'repreſentatives, as aforeſaid, and in no other 'manner whatſoever. This

This ſtatute differs not materialy from the Virginia ſtatute, on the ſame ſubject, otherwiſe than that the latter appoints the next of kindred by the father, if no children be, to ſucceede with the wife.

On the words, 'provided that there be no repreſentations admitted among collaterals, after brothers and ſiſters children,' which are literaly tranſcribed into our ſtatute, engliſh courts have decided that the collateral kindred, whole repreſentatives ſuccede to the ſhares, to which their parents, if they had been living, would have ſucceeded, muſt have been brothers and ſiſters of the inteſtate:

So that although B, the ſurviving brother, and D, the child of C, a deceaſed brother, would ſuccede to the goods, of A, dying inteſtate, and childleſs, &c.

Yet B, the ſurviving uncle, ſhould ſuccede to all, excluding D, the child of C, a deceaſed uncle, from ſucceſſion to a part, of the goods, of A, in the ſame circumſtances.

So, if B, and C, had been nephews of A: or if B, had been the uncle and C, the nephew, who, by the caſe in 1 Atkyns rep. 454, are in equal degree of kindred to A.

The reaſons of theſe deciſions, explaned in a celebrated argument of chief juſtice North, with which T. Raymond hath crowned his book of

reports

reports, p. 496, more fully than any where elſe, ſhall be here examined.

His firſt reaſon is, 'all other relative terms 'generaly expreſſed through the whole act have 'the inteſtate for their correlative, ſo (wife) is 'meant wife of the inteſtate (children) are chil- 'dren of the inteſtate (heir at law) is of the inteſ- 'tate, ſo that, in the moſt plane and obvious 'ſenſe, the inteſtate ought here to be taken for the 'correlative to the words brothers and ſiſters.'

Obſervations: firſt, until the connection be- tween his propoſition, 'all other relative terms 'generaly expreſſed through the whole act have 'the inteſtate for their correlative,' and his infe- rence, 'ſo that in the moſt plane and obvious ſenſe 'of the words, 'that there be no repreſentations 'admitted among collaterals after brothers and 'ſiſters children,' the inteſtate ought here to be 'taken for the correlative to the words brothers 'and ſiſters,' which connection hath not been diſcerned, be proved, the inference is a *non sequitur*.

Second, this ratiocination is a miſtake of the queſtion, which is not of what tribe of collateral kindred, whether brothers, uncles, nephews, &c. the children ſhall repreſent their parents, but, to what degree the repreſentation of thoſe collateral kindred, who, if they were not dead, would have ſucceded, ſhall extend. if theſe reſtrictive words had not been inſerted, deſcendents of collateral

kindred

kindred, more remote than their children, would have legaly repreſented them. repreſentatives of neareſt kindred may be branched into children, grandchildren, great grandchildren, &c.

Third, the propoſition is not true. if he, who ſtated it, had completed, as fair argument required him to complete, the ſeries of inſtances in which the *ſuitas*, whence the inference was drawn, occurred, he would have found, in one place, after the words, 'children of ſuch perſons dying inteſtate,' the terms 'and ſuch perſons as legaly repre-'ſent ſuch children, in caſe any of the ſaid chil-'dren be then dead,' which are relative terms, and have for their correlative, 'children of ſuch 'perſons dying inteſtate;' in another place, after the word, 'children,' the terms, 'nor repreſenta-'tives of them,' which are relative terms, and have for their correlative, 'children;' in another place, after the words, 'next of kindred to the dead per-'ſon, in equal degree,' the terms 'repreſenting 'their ſtocks,' which are relative terms, and have for their correlative, 'next of kindred, in equal degree;' in another place, after the words, 'next 'of kindred of the inteſtate, who are in equal de-'gree,' the terms, 'and thoſe who legaly repre-'ſent them,' which are alſo relative terms, and have for their correlative, 'next of kindred of the inteſtate, who are in equal degree; and in another place, after the words, 'next of kindred, in equal 'degree, of or unto the inteſtate,' the terms 'and 'their legal repreſentatives,' which are likewiſe

relative

relative terms, and have for their correlative, ‘ next of kindred, in equal degree, of or unto ‘ the inteſtate.’ and the propoſition, to be true, ought to have been ſtated thus: of the relative terms, generaly expreſſed in the act, ſome have the inteſtate for their correlative, others have his children for their correlative, and others have the inteſtates next of kindred, that is, collateral kindred, for their correlative. is the deduction from it, ‘ ſo that in the moſt plane and obvious ſenſe, ‘ the inteſtate ought to be taken for the correlative ‘ to the words, brothers and ſiſters,’ ſound logic? yet it hath been ſo deemed in weſtminſter hall, for almoſt ſix ſcore years!

His ſecond reaſon is, ‘ becauſe the diſtribution ‘ is given by the act for their relation to the ‘ inteſtate, and not for their relation to the col- ‘ laterals; therefore the relation mentioned ought ‘ naturaly to refer to the inteſtate, and not to the ‘ collaterals. there may be caſes put wherein ‘ brothers and ſiſters children of collaterals may ‘ be no kin to the inteſtate, if they were by the ‘ half blood, and it cannot be pretended that ſuch ‘ ſhall have a ſhare in the diſtribution. now why ‘ ſhould the words be taken in the ſenſe that com- ‘ prehends thoſe, that have no title to diſtribu- ‘ tion?’

Obſervations: firſt, ‘ that diſtribution is giv- ‘ en, by the act, to next of kindred, for their re- ‘ lation to the inteſtate,’ is admitted: that the legiſlature, moved by the ſame conſideration, cal-

led the repreſentatives of colleteral kindred to ſucceſſion in place of him or her for whom they are ſubſtituted is admitted alſo; and moſt frequently ſuch repreſentatives are of kindred to the inteſtate; and when the caſe ſhall happen otherwiſe it is not ſo unreaſonable as at firſt it might ſeem; becauſe, he who is repreſented, if he had ſurvived the inteſtate, and received his ſhare, is preſumed to have deſigned to will it, when he ſhould die, to the ſame repreſentative, who may not be of kindred to the inteſtate. but the ſtatute having appointed repreſentatives of collateral kindred, in general terms, to ſuccede to the ſhares of their ſtocks, the argument, that repreſentatives, who are not of kindred to the inteſtate, may in ſome caſes ſuccede, if ſuch ſucceſſion be unreaſonable in thoſe caſes, doth not conclude againſt repreſentatives who are of kindred to the inteſtate. the concluſion then, which ought to have been particular, is univerſal, and the argument vitious.

Second, a poſition, here taken for granted, that the prepreſentatives of defunct collaterals, even ſo near as brothers, muſt be of kindred to the inteſtate, may be proved, by neceſſary conſequence from weſtmonaſterian authority, which may be a good *argumentum ad hominem*, to be untrue, thus:

The caſe between Smith and Tracey (2 Mod. rep. 204) was, A dies inteſtate, having three brothers B, C, and D, of the whole blood, and a brother, E, and a ſiſter F, of the half blood:

and

and, by judgment of the court of kings bench, 28 and 29, Car. 2. the brother and ſiſter of the half blood E, and F, ſucceeded to A's goods and credits, taking equal ſhares with his brothers of the whole blood, B, C, and D. ‡

Vary the caſe, by ſuppoſing E and F, to have died, leaving children, in the life time of A; theſe children, repreſenting their parents, would have ſucceded to their ſhares, being the children of a brother and ſiſter.

This will, as is believed, be granted.

Then vary the caſe again, by ſuppoſing the mother of E, and F, who appear by the opinion of the court not to have been uterine brother and ſiſter of A, B, C, and D, to have borne G, and H, children, by another huſband, and E, and F, to have left no children; G and H would have repreſented E, and F, as legaly as the children of E and F, and would have ſuccededto the ſame ſhares.

This is believed to be a conſectary from the judgment in the caſe between Smith and Tracy.

Yet G and H would have been, in Norths language, ' no kin to the inteſtate' A.

Third, the queſtion, at the end of this ſecond reaſon as it is called, ' why ſhould the words' (they were the words provided that there be no

repreſentations

‡ *The law here is ſuppoſed to be different. ſee the caſe of Bai ey and Teachle.*

repreſentations admitted among collaterals, after brothers and ſiſters children) ‘ be taken in the ‘ ſenſe that comprehends thoſe that have no title ‘ to diſtribution,’ is not a queſtion for which thoſe words taken in any ſenſe, of which they are capable, can miniſter occaſion. other parts of the ſtatute ‘ comprehended thoſe that have title to diſ- ‘ tribution,’ dividing collaterals, who ſhould ſuccede, into two claſſes. they were diſtinguiſhed by theſe characters, firſt, ‘ next of kindred,’ who muſt be in the ſame degree, or in equal degree; and, ſecond, ‘ their legal repreſentatives,’ that is, the repreſentatives of thoſe, who are next of kindred. the former were defined by the terms, ‘ next,’ and ‘ in equal degree,’ the latter were undefined, otherwiſe than that they muſt have been in exiſtence, at the death of the inteſtate. they might have been children, grand children, great grand children, or more remote, in ſome of which caſes the portions would be inconſiderable. to prevent this were the forecited words inſerted. they do not declare, becauſe unneceſſary would have been here a declaration comprehending thoſe collaterals, or kindred, whoſe repreſentatives ſhould be intitled to diſtribution. they do nothing more. as hath already been obſerved, than terminate the progreſs of repreſentation, in the immediate offspring from the collaterals, providing that repreſentation ſhall not be admitted, after brothers and ſiſters children, that is, ſhall not be admitted in any degree of kindred after, or more remote than, the children of brothers and ſiſters, and

(one, who feels the *argumentum ad judicium* more forcibly than the *argumentum ad verecundiam*, as I. Locke, in his eſſay on human underſtanding, b. iv. chap. xvii. §19—22, calls them, ventures to add) brothers and ſiſters of the collaterals. in the words, 'provided that there be no repreſen-'tations admitted, among collaterals, after bro-'thers and ſiſters children,' interpreted conſiſtently with the ſenſe of them, which is complete, and without interpolation, for which no cauſe appear-eth, the legiſlature contemplated a ſingle object, namely, the limit beyond which the right of re-preſentation ſhall not be aſſerted. but the author of this argument will have it, that the legiſlature contemplated, beſides that, another object, name-ly, the collaterals, the right of whoſe repreſen-tatives ſhall not be aſſerted. this is the ſecond inſtance, but is not the laſt, of a miſtake of the queſtion, for it occurs in two other parts of this compoſition by North.

His third reaſon is, 'becauſe as theſe words' provided that there be no repreſentations, &c. 'comprehend' (comprehend again) 'more than 'ought to have diſtribution in ſome inſtances, ſo 'they fall ſhort, and leave out many, that by 'parity of reaſon ought to have diſtribution, and 'therefore this ſenſe, they would put upon the 'words, is very improper.'

'As for inſtance:

'Suppoſe the next of kin are nephews, by 'ſeveral brothers, and ſome of them are dead,

'leaving

'leaving children, theſe children are not brothers 'children to the collaterals, and cannot, with-'in the words,' provided, &c. 'clame' (although, by the way, the children muſt clame, if they can clame at all, not by thoſe words, which give to no one) 'any ſhare; but if by chance any of them, 'had had uncles ſurviving, then they had been 'brothers children to the collaterals.'

'So, if the next of kin are couſin germans, and 'ſome of them are brothers to one another, others 'are not; the children of ſuch of them as had 'brothers that ſurvived the teſtator, (it ſhould be 'inteſtate) ſhall have a ſhare, but the children of 'ſuch who had no ſurviving brothers ſhall have 'no ſhare, which is moſt abſurd, for they ought 'to have a ſhare as they relate to the inteſtate and 'not as they relate to the collaterals.'

Obſervations: firſt, the queſtion, upon the words, 'provided that there be no repreſentations, 'admitted among collaterals, after brothers and 'ſiſters children,' is, as before, [illegible]t who are com-'prehended by the words brotners and ſiſters' but, beyond what degree of kindred, the repre-ſentatives of collaterals, whoſoever thoſe collate-rals be, ſhall or ſhall not ſucceede?

Second, in the firſt example, for illuſtration of the third reaſon, is taken for granted this poſi-tion: the brothers and ſiſters of collateral kindred, whoſe repreſentatives, not more remote than chil-dren, ſhall ſuccede muſt all, by the words of the

ſtatute

ſtatute, be συναδελφοι—brothers and ſiſters every one of every others—brothers and ſiſters by the ſame parents, or by one common parent; a poſition, if not admitted, neceſſary to be proved, becauſe, without it, a concatenation of the premiſes and the concluſion from them, ſtated in this third reaſon, is defective. the poſition is not admitted, but, on the contrary, its redargution, to be here eſſayed, by the medium of that example, varied for adapting the poſition to caſes equaly within its ſcope, is not despaired. for,

Suppoſe the neareſt kindred of A to have been B and C, ſons of a deceaſed brother, and D and E, daughters of a deceaſed ſiſter; B and D to have died in the life time of A, both leaving children, the former F and G and the latter H and I; and afterwards A to have died inteſtate, without alteration in his family. of F, G, H, and I, may be truly predicated, that they are brothers and ſiſters children; for by the hypotheſis the father of F and G is the brother of C, and the mother of H and I is the ſiſter of E; ſo that F and G are children of a brother and H and I are children of a ſiſter; and that which is true of each pair of children muſt be true of both. conſequently the poſition is falſe. But if F, G, H, and I, were children of different parents, ſo that neither of them had a brother or ſiſter, it would be nothing to the purpoſe, as will appear.

Third, an abſurdity, by the ſecond example, attributed to the expoſition, admitting repreſen-

tation

tation of collateral kindred, who were not brothers and ſiſters of the inteſtate, is a conſequence of two ſophiſms, already detected in the argument of North, one *ignoratio elenchi*, or a miſtake of the queſtion, the other a *petitio principii*, or a ſuppoſition of what is not granted. and if, ‘ that the children of ſuch couſins german, as had ‘ brothers, that ſurvived the inteſtate, ſhall have ‘ a ſhare, but the children of ſuch, who had no ‘ ſurviving brothers, ſhall have no ſhare, be moſt ‘ abſurd,’ as he ſays, which is not denied; this argument may partly ſhew the pravity of his interpretation.

Of the ſcholia appended to this third reaſon, that, which ſuppoſeth, for the words, ‘ provided that ‘ there be no repreſentations admitted among col- ‘ laterals after brothers and ſiſters children,’ if the legiſlature had not deſigned to exclude from ſucceſſion repreſentatives, more remote than brothers and ſiſters children of the inteſtate, would have been ſubſtituted the words, ‘ provided that ‘ there be no repreſentations admitted among col- ‘ laterals after their children,’ ſhall only be noted, becauſe no other is thought to deſerve notice. and this for the purpoſe of anſwering, that the former may be interpreted and ought to be interpreted, in the ſenſe of the latter, which anſwer is propoſed to be verified in the ſequal.

His fourth reaſon is, ‘ becauſe the excluding ‘ repreſentations in a remote degree agrees with ‘ the reaſons, upon which diſtribution is ground- ‘ ed.

ed. for 1, nephews and nieces to the inteſtate
' are of ſo near relation, the inteſtate having been
' as a parent to them, that they are of great regard,
' whereas remoter degrees have no regard but for
' their proximity (becauſe there are none nearer)
' and therefore no reaſon to admit repreſentations
' amongſt them, to bring in a more remote degree
' to ſhare with thoſe that are nearer of kin. 2.
' again, nephews and nieces cannot be many, ſo
' that the diviſion cannot come into very many
' parcels; but in a remote degree there may be very
' many of the ſame degree, and to admit a ſubdi-
' viſion to the children of any deceaſed would
' make the ſhares of ſuch children very inconſider-
' able, not worth demanding.'

Obſervations: firſt, the reaſon, upon which diſtribution is grounded, is an inteſtates affection for all his kindred, more or leſs warm, as the objects of it were related to him nearly or remotely; a thermometre, analogous with which the portions of the diſtributable ſubject are graduated; ſucceſſors neareſt, and in the ſame degree, taking equal portions, and ſucceſſors in a remoter degree taking the portions, not of themſelves, who are not, but of their ſtocks, who were, in the ſame degree. if ſo, the poſition, that, ' excluding repreſentations in a remote degree, ' agrees with the reaſons upon which diſtribution is grounded,' is ſo far from being true, that repreſentations, among lineal ſucceſſors, are admitted in remoteſt degrees, and among collaterals, would as extenſively have been admitted, (in every caſe where

they are designated by the appellation, 'next of 'kindred,' the words, 'and their representatives,' or words of the same import, immediately following) if the representations had not been abscinded, by other words, after the degree of brothers and sisters children. whose brothers and sisters will be a fitter subject of enquiry elsewhere.

Second, in the phrase, 'representations in a 'remote degree,' the term 'degree' may mean the degree of kindred, either between the representatives and their stocks, or between the intestate and his collateral kindred. in the former sense, the reason is not to the purpose; for no man denies that representations are not admitted among collateral kindred, whosoever they be, after or beyond the degree of brothers and sisters children; in the latter sense, the reason is not more pertinent, if the object, which the words of the statute, truly interpreted, shew the legislature to have contemplated, was to declare, not of what collateral kindred representation shall not be admitted but, after or beyond what degree of kindred between the collaterals surviving, and the representatives of those who were dead, representation shall not be admitted: and that this was the object hath been partly, as is believed, and will hereafter be perhaps fully proved. the notion stated in this reason, of 'the 'intestates having been as a parent to his ne-'phews and nieces,' seemeth altogether imaginary, §

and

§ *Horace had a different notion of the uncles parental affection towards his nephews and nieces, as may be collected from these words:* metuentes patruae linguae *XII. ode. II. lib. and* ne sis patruus mihi *sat. III. lib. II. v.* 88.

and the argument drawn from the remark, that when the multitude of ſucceſſors is numerous, the portions of repreſentatives, by means of ſubdiviſions, would be inconſiderable and worthleſs, which, however, would not happen ſo frequently as the contrary, is not an argument againſt the right of a repreſentative to his *modicum*, if the words of the ſtatute have intitled him to it. the argument, if it prove any thing, proves that the ſtatute ought not to have admitted, not that it did not admit, repreſentations, wherein thoſe ſubdiviſions would be neceſſary.

His fifth and laſt reaſon is, 'becauſe, by the 'opinion of the learned, the law and practice of 'the ſpiritual courts before this act did exclude 'all repreſentations of collaterals, after the inteſtates nephews and nieces.' to which he adds, 'the whole ſcope of the act was to make their 'juriſdiction as to diſtribution legal, which before was condemned by the kings courts, and 'the words of the act (legaly repreſenting) *(pro 'suo cuique jure)* and according to the laws in 'ſuch caſes) and the rules and limitation * ſet 'down) ſhew that there is a reference to their 'laws. now if there were an opinion this way before 'the act; there is great reaſon to believe, this 'clauſe, 'provided there be no repreſentations, "admitted among collaterals after brothers and "ſiſters children,' was founded upon that opinion.'

Obſervations: firſt, we might learn from North himſelf, for in the introduction to his opinion and reaſons

* The word 'hercafter,' occurs at this place in the ſtatute.

reaſons he admits, 'that all acts of parliament are 'to be expounded according to the true meaning 'to be collected from the words of them; and 'that muſt be a rule in this caſe,' to which rule however he doth not appear in a ſingle inſtance throughout his argument to have adverted. he flew the way at the ſtart, and never recovered it. to prove that this act of parliament, if it be expounded according to that rule, contradicts the law and practice, as they have been ſtated, of the ſpiritual courts, in this particular inſtance, will be attempted, and if the attempt be ſucceſsfull, there is no 'reaſon to believe the clauſe in queſ-'tion was founded upon the opinion of thoſe 'courts, and to expound it that way;' that is, to expound the clauſe, which, in the only ſenſe whereof it is capable, without interpolation, is reconcileable with other parts of the act, ſo as to contradict thoſe other parts of the ſtatute.

Second, the terms, 'legaly repreſenting,' and '*pro ſuo cuique jure*,' are intelligible ſurely without reference to the laws of eccleſiaſtical courts: the words, 'according to the laws in ſuch caſes,' if they refer to their laws at all, refer perhaps to thoſe only, by which degrees of conſanguinity are computed; and the words, 'rules and limita-'tions ſet down,' which are defectively quoted, and which in the ſtatute are, 'the rules and limi-'tation HEREAFTER ſet down,' ſhew that the reference is, NOT to THEIR LAWS but, to the STATUTE.

After

After his reaſons, the chief juſtice procedes to ſolve objections to his argument. of the ſolutions notice ſhall be taken of that only, which is in theſe words: 'i confeſs a law clearly penned ſhall have 'its force in caſes which it does reach, though it 'does not reach all caſes: but where a law is 'penned, ſo that it may be expounded one way or 'other, and there is a queſtion of the meaning of 'it, it is more natural to believe it was meant in 'that way that is clear, and reaches all caſes that 'are in parity of reaſon, than in that way which 'has abſurd conſequences, as this hath, both by 'including thoſe which were not intended, and 'leaving out thoſe which ſtand in the ſame degree, 'as i ſhewed before.'

Obſervations: firſt, the ſtatute is thought to be ſo 'clearly penned,' that the learned judges of Weſtminſter hall, and 'the learned doctors of 'Doctors commons,' who were adjutant miniſters to the chief juſtice on this occaſion, are challenged to diſcover, in the words of the act, if not ſophiſticated, that amphibolia, which is here attributed to it by the terms, 'it may be expounded 'one way or other.'

Second, the ſtatute, underſtood, 'in that way 'that is clear,' but different from the 'way' approved by the chief juſtice, will reach all caſes within the ſcope of the legiſlative providence, and will have no 'abſurd conſequences.'

His

His concluſion is, 'i conceive this act was intended for a plane rule, and i think it much better to interpret it in the moſt plane and obvious ſenſe which will eſtabliſh the ſucceſſion of perſonal eſtates, according to reaſon and ſymmetry than to ſtrain to find out another ſenſe for the ſake of remote kindred, that are of no regard, which will produce apparent abſurdities, and ſubject perſonal eſtates to fanciſull and intricate diſputes that will need another act to compoſe and ſettle.'

Obſervations: firſt, the act, 'in the moſt obvious ſenſe' of the words, that is, the ſenſe, in which the archdeacon of Huntington underſtood them, is a 'plane rule' they will not bear the ſenſe, in which they are otherwiſe underſtood by North, unleſs after the words, 'brothers and ſiſters children,' be ſupplied the words, 'of the inteſtate.' this ſupplement is called 'interpretation,' and perhaps may be ſo called by the weſtmonaſterian vocabularies.

Second, the reaſons for the interpretation have been examined.

Third, the interpretation, by words which meaſure degrees between ſtocks and their repreſentatives, would meaſure degrees between an inteſtate and his collateral kindred; and this interpretation matching things not relating to one another is called ſymmetry! ſymmetry not more daedalean than

Humano

Humano capiti cervicem pictor equinam.
Jungere si velit——————————

Fourth, 'another act which North ſuppoſed to 'be needful for compoſing and ſettling the fanci-'full and intricate diſputes' which he imagined would be raiſed on this, if his interpretation be rejected, is not the proper remedy for the evil apprehended by him. the remedy would be to give to judges what perhaps the legiſlature of Great britain have not more power to beſtow, than other legiſlatures. for, if ſo plane an act as this could be ſo miſtaken, as it hath been by him and his ſucceſſors, what would be the effect of another act?

HIS reaſons ſtated in the argument of the chief juſtice having been examined; the ſtatute itſelf ſhall now be conſidered, in order to diſcover the true meaning, from the words, thereof.

The ſtatute, after requiring ordinaries and eccleſiaſtical judges to take bond from him, to whom they grant adminiſtration of the goods and credits of a perſon dying inteſtate, with condition to make and exhibit an inventory of them, enables and requires thoſe ordinaries and judges to call the adminiſtrator to render account of his tranſactions, 'and to order and make juſt and equal diſtribu-'tion of what remaineth clear (after all debts fu-'nerals and juſt expences of every ſort, firſt al-'lowed and deducted) among the wife and chil-'dren, or childrens children, if any ſuch be, or, 'otherwiſe, to the next of kindred, to the dead

'perſon

'perſon in equal degree, or legaly repreſenting
'their ſtocks, *pro ſuo cuique jura*, according to the
'laws in ſuch caſes, and the rules and limitation
'hereafter ſet down; and the ſame diſtributions
'to decree and ſettle, and to compel ſuch admi-
'niſtrators to obſerve and pay the ſame, by the
'due courſe of his majeſty's eccleſiaſtical laws.'

THE phraſes, 'legal repreſentatives,' '*pro* '*ſuo cuique jure*,' 'according to the laws in ſuch 'caſes,' and 'the rules and limitation hereafter 'ſet down,' are thought by North to prove that the ſtatue had a reference to the eccleſiaſtical laws. but, 1. if it had ſuch a reference the reference by the firſt three phraſes was only to thoſe laws which determine who are the legal repreſentatives of an inteſtates next of kindred, which was not pertinent to the queſtion in the caſe diſcuſſed by him, namely, who of the inteſtates next of kindred ſhall be repreſented; as hath repeatedly been obſerved before. not more pertinent is the ſolution by him of the ſecond objection to his opinion T. Raym. p. 505. which ſolution is thought too trifling to deſerve a recital. 2. the fourth phraſe, correctly quoted, ſhews that the ſtatute refered to the rules and limitation ſet down in itſelf. this will lead to the true queſtion, namely, whether, by thoſe rules and limitation, repreſentation is admiſſible among collateral kindred, who are more remote than the inteſtates brothers and ſiſters?

The rules in the ſtatute, mingled with the limitations

mitations (for of theſe are two) ſo that their connection is interrupted, ſtated ſeparately for the ſake of perſpicuity, are,

'Provided that ordinaries and every other perſon, by this act enabled to make diſtribution of the ſurplus of the eſtate of any perſon dying inteſtate, ſhall diſtribute the ſurpluſage of ſuch eſtate in manner and form following, that is to ſay, one third part of the ſaid ſurpluſage to the wife of the inteſtate, and all the reſidue by equal portions to and amongſt the children of ſuch perſons dying inteſtate and ſuch perſons as legaly repreſent them, in caſe any of the ſaid children be then dead, and in caſe there be no children, nor any legal repreſentatives of them, then one moiety of the ſaid eſtate to be allotted to the wife of the ſaid inteſtate, the reſidue of the ſaid eſtate to be diſtributed equaly to every of the next of kindred of the inteſtate, who are in equal degree, and thoſe who legaly repreſent them. but in caſe there be no wife, then all the ſaid eſtate to be diſtributed to and amongſt the children, and in caſe there be no child, then to the next of kindred, in equal degree, of or unto the inteſtate, and their repreſentatives, as aforeſaid, and in no other manner whatſoever,'

Of the rules, thoſe which call children of the defunct, and repreſentatives of ſuch of them as may be dead, to the ſucceſſion, are without any limitation, otherwiſe than that, a child who had been advanced by ſettlement of the defunct, with a portion not equal to the filial portion, can clame

only the compliment, or ſo much as with the advancement added to it will be equal to the filial portion, out of the diſtributable ſubject. but ſuch foriſfamiliated child, if he were an heir at law, and advanced by ſettlement of land upon him, ſhall have a full portion of the ſurplus.

The rules, which, if no children or repreſentatives of them be, call the next of kindred to the ſucceſſion, comprehend,

Firſt, thoſe kindred who are in the aſcending line, that is, father and mother, &c. for the opinion in the ducheſs of Suffolk's caſe, 'that the 'mother is not of kin to her child,' although unanimouſly once approved by numbers of temporal, as well as eccleſiaſtical, judges ſufficient to entitle it to a place among what are called authorities, ſeemeth to have been ſince reprobated. the right of the mother indeed, if the father be living, is transfered to her huſband; but, if he were dead, ſhe took the whole before the eſtate of 1 James 2. ordained a communion with brothers and ſiſters and their repreſentatives: and, if no parents be, the rules comprehend,

Secondly, thoſe kindred who are in the collateral line, and who may be analyſed into brothers and ſiſters; if none ſuch be, uncles and aunts, and nephews and nieces; (for, according to the determination of a caſe before mentioned to be reported by T. Atkyns, 1 vol. p. 454 they are in the ſame degree of relation) if none ſuch be, couſins

ſins german &c. of the inteſtate. and thoſe rules, if not controuled, by the limitation, with the words, 'and their legal repreſentatives,' applied to every ramification of the ſyllabus, 'next of 'kindred,' may be read thus:

In caſe there be no children, nor any legal repreſentatives of them, the ſaid eſtate to be diſtributed equaly to the brothers and ſiſters of the inteſtate, and their legal repreſentatives; if none ſuch be, to be diſtributed equaly to the uncles and aunts and nephews and nieces of the inteſtate, and their legal repreſentatives; if none ſuch be, to be diſtributed equaly to the couſins germain of the inteſtate, and their legal repreſentatives; and ſo forth; the words, 'and their repreſentatives,' being added after every tribe of the inteſtates kindred, in equal degree.

Theſe evolutions of kindred and applications of repreſentatives are the ſenſe and meaning of the rules, without the limitation, in explicit terms; ſo that

The queſtion is reduced to this: whether that ſenſe and that meaning are altered by this limitation: 'provided that there be no repreſentations admitted among collaterals after brothers and ſiſters 'children, otherwiſe than that no repreſentatives 'ſhall be admitted among collaterals in any degree 'more remote from their ſtocks than children?'

That they are not altered otherwiſe will appear, as is conceived, without 'straining,' by inſerting the limitation

limitation after every one of the tribes of collateral kindred and their repreſentatives: when the rules, united with the limitations of them, will be read,

'In caſe there be no children, nor any legal repreſentatives of them, the ſaid eſtate to be diſtributed equaly to the brothers and ſiſters of the inteſtate, and their legal repreſentatives;' provided that there be no repreſentations admitted among [theſe] collaterals after brothers and ſiſters children; if no brothers and ſiſters be, to be diſtributed equaly to the uncles and aunts and nephews and nieces of the inteſtate, and their legal repreſentatives; provided that there be no repreſentations admitted among [theſe] collaterals after brothers and ſiſters children; if no uncles and aunts and nephews and nieces, or any ſuch, be, to be diſtributed equaly to the couſins german of the inteſtate, and their legal repreſentatives; provided that there be no repreſentations admitted among [theſe] collaterals, after brothers and ſiſters chil-children; and ſo forth.

According to this reading, liable to a ſingle objection which ſhall be removed, the children of thoſe next of kindred to the inteſtate in equal degree, however remote, are not excluded from ſucceſſion, to the portion to which their ſtock, if living, would have ſucceded.

Harmony by this reading is produced of all parts of the ſtatute one with another, not a ſingle word

word thereof being underſtood in a 'ſtrained' ſenſe, or in any other than the ordinary ſenſe; and the ſyſtem of *ſucceſſio in bona defunctorum* hath perfect ſymmetry; every rule being applied to one or other tribe of the inteſtates kindred, whoſe repreſentatives are appointed in the places of their ſtocks to ſuccede; and the limitation being commenſurate with the rules in every inſtance, except that the operation of one which would have included repreſentatives in all degrees, is reſtrained by the other, the office of which was, not to deſtroy any rule but, to limit the extent of it, excepting the repreſentatives of collaterals, of all denominations, after or beyond the degree of children of thoſe collaterals, who may have died before the inteſtate.

Not to allow the 'rules ſet down in the ſtatute,' to be applicable to repreſentatives of every tribe of collaterals, would, in the phraſe 'next of kin-'dred of, or unto, the inteſtate, in equal degree, 'and thoſe who legaly repreſent them,' deprive the words, 'thoſe who legaly repreſent them,' of more than half their meaning, and would deprive the words 'in equal degree,' if they have any, of all, meaning.

The words 'in equal degree,' applied to thoſe collaterals, who ſurvive and ſuccede in their own rights, repeat the ſubſtance of the words, 'next of 'kindred,' and therefore ſignify nothing; for collaterals, not in equal degree, that is, in a more remote degree, cannot be next, of kindred to the inteſtate.

inteſtate. but the words, 'in equal degree,' ſuppoſed to have been inſerted for ſome purpoſe, are ſignificant, applied to dead collaterals, who, if living, would have been in equal degree with the ſurvivors, and may be underſtood in the ſenſe which this paraphraſe of the rule and limitation expreſſes:

'The ſurpluſage to be diſtributed to the next 'of kindred to the inteſtate, and [if any of them] 'who are in equal degree [be dead to] their repre-'ſentatives, provided [although repreſentations 'are admitted among children of the inteſtate, 'how remote ſoever thoſe lineal repreſentatives be 'from their ſtocks, yet] that there be no repreſen-'tations admitted among collaterals after [if the 'repreſentatives be more remote in degree from 'their ſtocks, than] brothers and ſiſters children.' this will be congruous with the antitheſis, intended manifeſtly by the legiſlature, of childrens repreſentatives to collaterals repreſentatives; whereas North imagined the antitheſis to be of the repreſentatives of one tribe of collaterals, that is, brothers and ſiſters, to the repreſentatives of all other tribes of collaterals.

Here, indeed, the words 'in equal degree,' are taken out of their places, and transfered to other places. but the metatheſis is thought to be juſtified by this conſideration; immediately after the words, 'next of kindred of or unto the 'inteſtate, who are in equal degree,' the words, 'and thoſe who legaly repreſent them,' and after

the

the words, 'next of kindred, in equal degree, of 'or unto the inteſtate,' the words, 'and their le-'gal repreſentatives,' prove inconteſtably, that the legiſlature, who muſt have known, that the degree of an inteſtates kindred could not be the ſame in all caſes, contemplated repreſentations among the kindred in the different degrees, and meaned to admit repreſentations in all caſes, where the kindred to be repreſented and thoſe who ſucceded in their own rights were in equal degree of kindred to the inteſtate.

This meaning appeareth ſo manifeſt that, to make it more ſo is not the intention of the paraphraſt; he intended to ſhew that the meaning of the words, 'in equal degree,' removed from the place, where, if not mute, their voice is no more than uſeleſs tautology, conſpires with the ſuppoſed deſign of the legiſlature.

The proviſo therefore, that there be no repreſentations admitted among collaterals after brothers and ſiſters children, is an exception to each general rule.

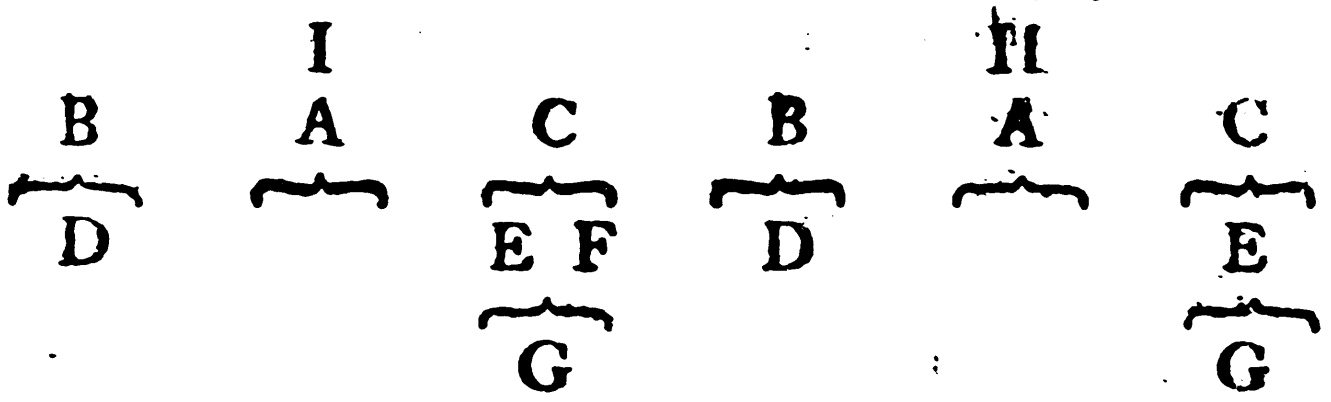
The objection to which the expplication, oppoſite to Norths interpretation, of the ſtatute, was mentioned to be liable, as it is ſtated in his language, is 'that, as it would comprehend more 'than ought to have diſtribution, in ſome in-'ſtances, ſo it falls ſhort, and leaves out many 'that, by parity of reaſon, ought to have diſtri-'bution.' theſe words occur, in his third rea-

ſon;

ſon; and the ſubſtance of them is repeated (T. Raym. 505) where he commends the interpretation 'in his way,' affirming that by it the ſtatute 'reaches all caſes, that are in parity of reaſon,' and prefers it to the explication in that 'way which,' according to him, 'hath abſurd 'conſequences, both by including thoſe which 'were not intended, and leaving out thoſe, 'which ſtand in the ſame degree.'

The objection ſuppoſeth the proviſo, containing the limitation or exception, to be the part of the ſtatute, by which repreſentatives of collaterals claime the ſhares of their ſtocks: but untruly; for they muſt clame, if they can clame at all, by thoſe parts of the ſtatute to which that exception is applicable. But let the objection be to the foregoing application of both, or either.

The objection and the anſwer to it will be underſtood beſt by references occaſionally to the caſes exemplified in the ſchemes ſubjoined.



In the firſt ſcheme D and F, ſurviving nephews, if they were next of kindred, to A, the inteſtate, would ſuccede, being comprehended in that part of the rule, which is contained in theſe words of the ſtatute, 'the ſurpluſage to be diſtri-

bution

buted to the next of kindred, ‘ of or unto the intestate.’ G, ‘the child of E, is as much comprehended in the remaining part of the rule contained in these words of the statute, ‘ and their representatives,’ for he is the representative of his father, a deceased nephew of the intestate, and one of his next of kindred, as D and F are comprehended in the former part of the rule. but North objects that G, in the first scheme, is inadmissible to the succession, and cannot represent his father, for two reasons, first, the case of G was not comprehended in the proviso, ‘ that ‘ there be no representations admitted among col- ‘ laterals after brothers and sisters children,’ for altho’ he was the child of a brother, his father was not a brother of the intestate; and secondly, because, if G in the first scheme should succede, by parity of reason, G, in the second scheme ought to succede too, but the latter is likewise inadmissible doubly, for the collateral, whom he represents was [illegible]—not a brother to the intestate, or to any other man.

Answer: the words, ‘ provided that there be ‘ no representations admitted among collaterals ‘ after brothers and sisters children,’ have been proved to be an exception to the general rule, ‘ that dis- ‘ tribution be to the next of kindred of or unto the ‘ intestate, in equal degree, and to their represen- ‘ tatives.’ if this be so, let be granted, that the case of G, in either scheme, is not included in the exception; the consequence unavoidable is the reverse of North's. G would not be inadmissible,

but would ſuccede. if the exception had not been inſerted, he would have ſucceded being comprehended in the rule, 'the ſurpluſage to be diſtributed 'to the next of kindred and THEIR repreſenta-'tives;' and if he be not included in the exception, his title remains the ſame as it would have been if the exception had not been inſerted. this conſequence is ſai' .o be unavoidable, and truly; unleſs the interpretation of North, as he calls it, can he maintained. but the interpretation, for the true ſhape of the limitation or exception, exhibits this metamorphoſis of it: 'provided, that 'there be no repreſentations admitted among [any 'other] collaterals [than thoſe collaterals who are 'brothers and ſiſters of the inteſtate, nor among 'them] after [the] brothers and ſiſters children;' which would convert unnaturaly the limitation of a rule or the exception to it, into a rule, and abrogate the ſtatute in more than two thirds of the caſes which it would comprehend if not mutilated by this monſter. to maintain it a pentad of reaſons have been pompouſly paraded; but they are all foreigners, none of them being furniſhed by the ſtatute, were chiefly preſſed into the ſervice from Doctors commons, and make no better figure at a review than the band of 'tattered prodi-'gals with which Falſtaff was aſhamed to march through Coventry,'*

The objector ſuppoſeth, that G, in the firſt ſcheme, and G, in the ſecond ſcheme, who are confeſſed to 'ſtand in the ſame degree,' and who therefore

* *Shakſp. He[illegible] IV.*

therefore, if either, ought each, to 'have a ſhare 'in the diſtribution,' are not in the ſame predicament, for one was the child of a brother, the other the child of him who never had a brother or ſiſter, or who had ſurvived his brothers and ſiſters.'

But, not to urge that this objection is perverſe, firſt, the word, AFTER, implieth intervals or degrees between the antecedent and conſequent terms in any ſeries of arithmetical progreſſion. of the ſeries, to which the proviſo containing the limitation or exception refers, the collateral E, is the antecedent or firſt term, his children is one of the conſequent terms, his grand children is the next conſequent term, and ſo on through the ſeries of repreſentatives. the proviſo is a canon meaſuring the intervals or degrees of kindred, not between the inteſtate and his collateral kindred but, between the collateral and HIS repreſentatives, admitting the ſecond term, and rejecting all the terms AFTER the ſecond, or children; ſo that the proviſo may be moſt properly read and underſtood in this ſenſe:

'Provided that there be no repreſentations admitted among collaterals AFTER [that is, if 'the degree of kindred between the collaterals and 'their repreſentatives be remoter than the degree 'of kindred between] brothers and ſiſters [and 'their] children'—moſt properly, becauſe, without a ſpurious interpolation, the proviſo cannot, as is conceived, be underſtood in any other ſenſe. nor can the objector retort that the words between

brackets

brackets in the paraphraſe are unjuſtifiable interpolations, becauſe, if they were expunged, the proviſo might undoubtedly be expounded in the ſame ſenſe without contradicting or altering the meaning of a ſingle word contained in the ſtatute. by this expoſition G would be in the ſame predicament in both ſchemes; the difficulties, which ſtaggered North, will be removed; and the phantom of abſurdities, which bewildered him, and perhaps miſguided his followers, will vaniſh.

If the preceding criticiſm and lection be not ſatisfactory,

2. The repreſentatives remoter than children of a collateral, who had no brother or ſiſter, may be included in the proviſo by the *argumentum a pari ratione*. ſtatutes in compendious and general terms, not animadverting upon ſubjects of a criminal nature, may juſtly comprehend caſes, not preciſely deſcribed in the text, but equaly within the reaſon and ſcope of the legiſlative providence. *in legibus et ſtatutis brevioris ſtyli, extensio facienda est liberius; at in illis, quae sunt enumerativa casuum particularium, cautius.* F. Bacon, de augment. ſcient. lib. VIII. cap. III. aphor 17. that this ſtatute, as to the part relating to the preſent queſtion, is *brevioris ſtyli* and not *enumerativum casuum particularium* muſt be agreed; and that the reaſon for including in the proviſo the repreſentatives of him who had, and of him who had not, a brother, is the ſame no man will doubt but he who aſcribes to the legiſlature, in matters of ſuch moment,

levity

levity more than puerile. 'if the next of kin are 'couſin germans, and ſome of them are brothers 'to one another, others are not, that the children 'of ſuch of them as had brothers that ſurvived the 'inteſtate, ſhall have a ſhare, but the children of 'ſuch who had no ſurviving brothers ſhall have 'no ſhare,' North admits would be 'moſt abſurd;' he might have added fantaſtical and futile. this would have been a good argument for including the children of thoſe couſins german, who had not brothers, in the ſame predicament with the children of thoſe who had ſurviving brothers, but ſurely not for excluding the latter from the ſhares which the act gave to them in terms unequivocal, and free from ambiguity.

If repreſentatives remoter than children of a collateral be not included in the proviſo, either *ex vi terminorum*, or *a pari ratione*,

3, The conſequence, as hath been obſerved, is that the caſe is a *casus omissus*, and that will not prevent operation of the ſtatute in caſes not omitted.

If the explication, here oppoſed to Norths interpretation, of the ſtatute be correct, the caſe of Carter *versus* Crawley, and other caſes, decided conformably with that interpretation, deſerve to be ranked with the caſe of Roſe *versus* Bartlett, Cro Car. 292. the caſe of Ratcliff *versus* Graves *et alios* 1 Vern. 196. and ſo many more that

Now

Nec mihi si linguæ centum sint, oraque centum,
Ferrea vox———————————
Omnia———percurrere nomina possim.

THESE animadverſions, not intended for thoſe learned judges, learned doctors, learned profeſſors, learned practitioners, of law, if any ſuch be, who reliſh all the crudities which have been diſgorged, and admit for true ſcience all the jargon which hath been babbled, and for ſage doctrine all the garrulities which have been prated, at times, in Weſtminſter hall, to men of taſtes leſs depraved, judgments more ſound, and ſpirits too liberal to be the ſlaves of authority, are inſcribed by

THE EDITOR.

ERRATA.

Page 10, line 12, for prepreſentatives, read *repreſentatives*.
15, 2, for others read *other*.
16, 28, for ſequal, read *ſequel*.
20, for anologous, read *analogous*.
23, 1 at the end leave out the *period*.
24, 12 for ſtatue, read *ſtatute*.
26, 1, for compliment, read *complement*.
26 20, for eſtate, read *ſtatute*.
28 21 take out the word *chil*
31 23, for expplication, read *explication*.
31 17, for applicatica, read *explication*.