

I am of the same Opinion with the above Reporter.

Geo: Plater

I am of the same

Philip Clarke

I subscribe to the same Opinion

Rob<sup>t</sup> Carvile

In obedience to your Ex<sup>co</sup>l<sup>ies</sup> Commands, to Certifye my Opinion, in the Case of Edward Randolph Esq<sup>r</sup>, who as well for our Sovereign Lord the King as for himself prosecuted against John Blackmore and the ship Ann etc<sup>a</sup> I have considered

1: That in the case of a Subject only and where the King is not concern'd in the Suit; if a Writ of Error be brought in a Superiour Court vpon a Judgm<sup>t</sup> given in an inferiour Court, and the Judgm<sup>t</sup> be therevpon Reversed for Error in the Judgm<sup>t</sup> given in the inferiour Court; then the Superiour Court ought to give the same Judgm<sup>t</sup> as the inferiour ought to have done in case they had not Erred, Rolls 1<sup>st</sup> part, tit Error Fol 774, Delamore and Hoskins Case, Lim 10 Car Rot 900 adjudged Hoskins and Cheles Case, Mich: 14 Caroli in B R adjudged, and Omuleourie and Aires case adjudged in a Writ of Error vpon a Judgm<sup>t</sup> in Ireland, Mich, 13 Car in Banco Regis Rot 332.

2: In the principall Case the information was brought ag<sup>t</sup> the ship vpon the Statute supposing that she had not observed the form of the Statute, but had taken on Board Tobacco before any Bond was given according to the form of the Statute, and was thereby become forfeited to the King and to the Informer Vpon this the Master of the ship appeared and pleaded not guilty and puts himself vpon the Countrey, and the Informer Joynes issue.

The point in issue to be tryed was whether the ship tooke in Tobacco before Bond given or not; and if the Def<sup>t</sup> had given the Bond in Evidence to the Jury at the Barr to Maintain and support the Matter in issue, if the Bond was not a good Bond according to the form of the Statute, the Kings Councill or they that were of Councill with the Informer ought to have demurred in Law to such Bond given in Evidence, and then vpon Demurrer joyned the Judges would have given Judgm<sup>t</sup> whether the bond was according to the form of the Statute or not, and whether twas good Evidence or not to the jury; for the Jurye cannot Trye whether the Bond be a good Bond or not, but this must be tryed by the Judges, being a matter of Law, and it cannot come before them but by Demurrer, and the Jury are sworn to Trye the Fact only, Viz<sup>t</sup> whether the ship tooke in Tobacco before bond given or not; And if the Informer will not Demurr to the Bond when 'tis given in Evidence to the Jury then it shall be taken to be a good Bond, and if the Jury find against him, he cannot vpon a Writ of Error in a Superiour Court Assign for Error that the bond was not a good bond, because he did not take advantage thereof in the first Action, Vide Rolls tit Error Fol 781. 20 Ass: 3M: 40: 41 Eliz: B: R: Smith and Odyhams case adjudged p: 16. Jacobi. B: R: Markham and S<sup>r</sup> Fra: Fortescues Case adjudged P. 9. Caroli. Lord